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The Agreement and devolved social security: a missed opportunity for socio-economic rights in Northern Ireland?

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Abstract

The UK government made three key human rights-related commitments in the Good Friday Agreement, the basis for the restoration of devolution and transition from conflict to peace in Northern Ireland: to incorporate the European Convention on Human Rights into Northern Ireland law; to consider proposals for a regional Bill of Rights; and to ensure compliance with the state's international obligations in the region. While ECHR compliance is required of devolved institutions by the constitutional legislation, the prospects of a Bill of Rights being enacted appears limited and oversight of compliance with other international obligations is unsatisfactorily placed in political, rather than judicial, hands. Consequently, protection of socio-economic rights beyond those covered by the ECHR is weak. This paper argues that judicial protection of socio-economic rights – whether in the form of a Bill of Rights or the incorporation of additional human rights agreements into Northern Ireland law – is required for full implementation of the Agreement. It then considers the implications of such a step for social security in the region. The concluding section highlights political and fiscal implications that would have to be considered.

Introduction and context

The Good Friday Agreement[1] was signed by most major political groupings in Northern Ireland and two national governments, then endorsed by the electorate in simultaneous referenda in Northern Ireland and the Republic of Ireland in 1998.[2] The Agreement was struck in pursuit of two main objectives. First, to restore devolved government to Northern Ireland – the world's first 'perfect example of devolution'[3] but without stable regional

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1 Northern Ireland Office, *Agreement Reached in the Multi-party Negotiations* (Cmnd 3883, NIO 1998).

2 Strictly speaking, the referendum in the Republic of Ireland, although generally portrayed as an endorsement of the Agreement, approved only the amendment of that state's constitution as proposed by the Agreement: see N Whyte, 'The 1998 Referendums' (ARK 14 January 2001/17 February 2002) <www.ark.ac.uk/elections/fref98.htm> accessed 26 August 2014.

3 'An American professor' cited by J I Cook, 'Financial Relations between the Exchequers of the United Kingdom and Northern Ireland' in F H Newark, J I Cook, D A E Harkness, L G P Preer and D G Neill, *Devolution of Government: The Experiment in Northern Ireland* (George Allen & Unwin 1953) 18.

representative institutions since 1972.[4] Second, to finally resolve the 'Irish question' in UK politics by putting in place a wider peace settlement.[5]

The concepts of human rights and equality are central to the Agreement, reflecting the widely recognised role of inequality, human rights abuses and discrimination as features and drivers of conflict in Northern Ireland.[6] However, their prominence is also consistent with a wider concern with human rights and equality of opportunity that found repeated legislative expression throughout 13 years of New Labour government in the UK.[7] Three Agreement provisions are of most interest to this paper. The first, incorporation of the European Convention on Human Rights (ECHR) into Northern Ireland law, has been delivered.[8] The second, the appointment of a commission to identify supplementary rights that require judicial protection on the basis of 'the particular circumstances of Northern Ireland'[9] has resulted in the publication of recommendations,[10] but not their implementation. Finally, the stipulation that Parliament should 'legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland' has received comparatively little attention to date, but will be crucial to the present discussion.[11]

The context for this article is a long-standing impasse in the region's five-party Northern Ireland Executive (the Executive) regarding a proposed Welfare Reform Bill.[12] The Bill as originally presented to the Northern Ireland Assembly would have continued the long-established practice of operating parallel but in most respects identical systems of social security for Great Britain and for Northern Ireland[13] by replicating reforms approved by the UK Parliament for Great Britain.[14] The Bill was introduced to the Assembly in October 2012, completing committee stage in February of the following year. After a two-year hiatus, the legislative process resumed in February 2015, but following the withdrawal of support by Sinn Féin – one of the two main political parties in the regional Executive – the

4 For an overview of key episodes, both violent and political, in the Northern Ireland 'troubles', see CAIN Web Service, 'Key Events of the Northern Ireland Conflict' <http://cain.ulst.ac.uk/events/> accessed 28 August 2013.

5 For an overview, see D G Byrne, *The Irish Question and British Politics, 1866–1996* (Macmillan 1996); P Adelman and R Pearce, *Great Britain and the Irish Question 1798–1921* (Hodder Education 2005); on the search for a settlement, see B Hadfield, 'The Belfast Agreement, Sovereignty and the State of the Union' (1998) Public Law 599; M McWilliams, 'Reflections of a Participant' in *Mapping the Rollback? Human Rights Provisions of the Belfast/Good Friday Agreement 15 Years On*, Report of a conference at Queen's University Belfast (26 April 2013).

6 P Hillyard, B Rolston and M Tomlinson, *Poverty and Conflict in Ireland: An International Perspective* (Institute of Public Administration/Combat Poverty Agency 2005); B Dickson, 'Counter-insurgency and Human Rights in Northern Ireland' (2009) 32(3) Journal of Strategic Studies 475; C Harvey and D Russell, 'A New Beginning for Human Rights Protection in Northern Ireland?' (2009) 6 European Human Rights Law Review 748.

7 Human Rights Act 1998, c 42; Race Relations (Amendment) Act 2000, c 34; Disability Discrimination Act 2005, c 13; Equality Act 2006, c 3; Equality Act 2010, c 15.

8 The Agreement (n 1) c 6, para 2; Northern Ireland Act 1998, c 47, s 6(2).

9 The Agreement (n 1) c 6, para 4.

10 NIHRC, 'A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland' (NIHRC 2008).

11 The Agreement (n 1) c 3, para 33(b).

12 Welfare Reform Bill (NIA Bill 13/11–15).

13 A partial legislative basis for this approach can be found in the Northern Ireland Act 1998, c 47, s 87; for discussion, see M Simpson, 'Social Security Parity in Northern Ireland: Developing Constitutional Principles through Firefighting?' (2015) 22(1) Journal of Social Security Law 31.

14 Welfare Reform Act 2012, c 5.

Bill failed to pass final stage in May of that year.[15] The main cause of the delay appears to have been the inability of the Executive parties to reconcile the view that the reforms included in the Bill represent an unjustifiable assault on the living standards of benefit claimants with fear that anything other than continued adherence to the Westminster model would represent an unsustainable financial burden for the region[16] and the appeal to political unionism of the principle 'that an individual here in Northern Ireland should receive the same level of benefit, subject to the same conditions, as an individual elsewhere in the UK'.[17]

Discontent with the UK government agenda has been expressed by ministers in all three devolved regions.[18] However, the Northern Ireland Assembly is in the unique position of having devolved competence for social security[19] and is therefore currently the only regional legislature with the option of taking a different approach.[20] This paper examines the potential impact of the Agreement's human rights provisions on the outcome of the debate as to the desirability of emulating reform in Great Britain. It argues that current obligations in respect of the ECHR rights should give regional legislators cause to reconsider one central aspect of the reform proposals, namely the sanctions that may be imposed on claimants who fail to meet conditions attached to receipt of benefit. However, equivalent judicial protection to socio-economic rights also protected by international law, but not incorporated into UK law, could have a further-reaching impact on the practice of maintaining parity. Given the opposition of unionist political parties and the UK government to the implementation in their current form of proposals for a Northern Ireland Bill of Rights, it is argued that the Agreement provision on compliance with international law in the region represents an alternative, and potentially more persuasive, vehicle for the protection of socio-economic rights.

The article begins with consideration of the nature of human rights and whether, as has previously been claimed, a qualitative difference exists between civil and political rights and social and economic rights that justifies or requires differential treatment in law. This proposition having been rejected, section 2 provides an overview of the human rights provisions of the Agreement, which are subsequently examined in turn. Following discussion of the limited (though real) potential for use of the ECHR in defence of socio-economic rights and stalled progress towards a Northern Ireland Bill of Rights, the

15 See Northern Ireland Assembly, 'Welfare Reform Bill' (Northern Ireland Assembly 2015) <www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/welfare-reform-bill> accessed 24 March 2015. Sinn Fein's position is outlined in Sinn Fein, 'Welfare: The Facts' (Sinn Fein 2015) < www.sinnfein.ie/files/2015/Welfare-The-Facts.pdf> accessed 24 March 2015.

16 D Birrell and A M Gray, 'A View from Northern Ireland' in N Yeates, T Haux, R Jawad and M Kilkey (eds), *In Defence of Welfare: The Impacts of the Spending Review* (Social Policy Association 2011) 49; P Robinson, NIA Deb 9 October 2012, p 18; S Hamilton, NIA Deb 21 January 2014, vol 91, no 2, 3–4, 8–10; A Maskey, 'Hamilton Acting as Tory Cheerleader on Cuts – Alex Maskey' (Sinn Fein 16 March 2014) <www.sinnfein.ie/contents/29353> accessed 17 March 2014.

17 N McCausland in Committee for Social Development, *Welfare Reform Bill: Ministerial Briefing* (Official Report, Northern Ireland Assembly 31 January 2013) 2.

18 N Sturgeon, Scot Parl Deb 22 December 2011, session 4, cols 4941, 4943; Hamilton (n 16) 10; J Cuthbert and V Gething, 'Written Statement – Tackling Poverty Action Plan 2013' (Welsh Government 2013) <wales.gov.uk/about/cabinet/cabinetstatements/2013/tacklingpoverty/?lang=en> accessed 14 April 2014; N Sturgeon, 'Foreword from the Deputy First Minister' in Scottish Government, *Child Poverty Strategy for Scotland: Our Approach 2014–2017* (Scottish Government 2014).

19 Social security features in the Scottish list of reserved powers and is absent from the Welsh list of delegated powers – see Scotland Act 1998, c 46, sch 5; Government of Wales Act 2006, c 32, sch 5.

20 The Scottish Parliament's likely future competences in the field of social security are set out in Scotland Office, *Scotland in the United Kingdom: An Enduring Settlement* (Cm 8990, Scotland Office 2015).

prospects of the Agreement provision on the UK's international law obligations underpinning more rigorous protection of socio-economic rights are then considered. Finally, section 4 examines the likely practical implications for policymaking of a judicially enforceable obligation to comply with international law in the context of the current welfare reform controversy. It is concluded that, if the ECHR rights construct a persuasive argument against one aspect of envisaged reform, a general requirement to comply with the socio-economic rights instruments could raise wider questions about the appropriateness to Northern Ireland of the new approach in Great Britain. Although the principle of non-retrogression in socio-economic rights might prove difficult to argue before the courts, clearer statements on income security can be found across the various international instruments.

1 Civil and political rights versus socio-economic rights: a false dichotomy?

A theme central to this paper is the differential position in UK law of the ECHR, primarily associated with the protection of civil and political rights, and other international agreements more explicitly concerned with social and economic rights. At face value, this appears to mirror the oft-repeated contention that socio-economic rights differ qualitatively from civil and political rights and are consequently less suited to judicial enforcement. This section briefly examines the grounds for this contention, which are considered to be limited, before outlining the basis for justiciability or non-justiciability of a right in the UK specifically.

Claims of the non-justiciability of socio-economic rights[21] tend to emphasise that they are positive rights, requiring deliberate state intervention and thus a political decision to allocate resources,[22] not negative rights requiring only non-interference with liberty, as civil and political rights are often portrayed.[23] This argument sits uneasily alongside the fact that institutions for the exercise of political rights (representative bodies) and for upholding civil rights (courts) are not without cost. If no government has questioned whether the resources allocated should be maintained (a questionable assertion given criticism of the cost of local government and the courts),[24] this is 'a matter of political culture and contingency', not the innate nature of such rights.[25] So-called negative rights may themselves imply positive obligations such as a remedy for infringement,[26] not mere non-

21 For discussion, see G McKeever and F Ni Aolain, 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland' (2004) 2 European Human Rights Law Review 158; C Gearty, 'Against Judicial Enforcement' in C Gearty and V Mantouvalou, *Debating Social Rights* (Hart 2011); J King, *Judging Social Rights* (CUP 2012).

22 For discussion of where the line between law and politics should be drawn, see King (n 21) 123.

23 R Plant, 'Citizenship, Rights and Welfare' in A Coote (ed), *The Welfare of Citizens: Developing New Social Rights* (Institute for Public Policy Research 1992) 18; S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 3; see also A O'Hear, 'Hayek and Popper: The Road to Serfdom and the Open Society' in E Feser (ed), *The Cambridge Companion to Hayek* (CUP 2006) 134; D King and F Ross, 'Critics and Beyond' in F G Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford Handbook of the Welfare State* (OUP 2010) 46.

24 A M Rees, 'The Promise of Social Citizenship' (1995) 23(4) Policy and Politics 313, 316; L Welsh, 'Neoliberalism and Access to Justice: Some Preliminary Findings' (Socio-Legal Studies Association Annual Conference, University of York March 2013); M Jacobs and T Wright, 'Tax and Spending (Again)' (2013) 84(2) Political Quarterly 177.

25 Rees (n 24) 316.

26 Articles 1 and 13 ECHR.

interference,[27] or only be realisable through removal of constraints on individuals' freedom to live as they see fit, such as lack of economic opportunity, education or health.[28]

The contention that the courts should not and cannot intervene in the social sphere has become increasingly indefensible.[29] Civil, political, social, economic and cultural rights stand together in various documents[30] and the European Court of Human Rights (ECtHR) recognises no 'water-tight division' between kinds of rights.[31] Van Bueren argues that litigation on South Africa's constitutional duties in relation to housing[32] 'hammered the final nail into the coffin of non-justiciability' to the extent that judges who accept their own lack of responsibility for upholding socio-economic rights are as much engaged in a 'political exercise' (here to determine the extent of their own remit) as those who adopt a more interventionist approach.[33] However, the constitutional entrenchment of justiciable social rights in South Africa and a number of other states remains the exception rather than the rule.[34]

Claims of qualitative difference between types of rights are particularly difficult to sustain in the UK. With no one set of rights privileged with entrenched constitutional protection,[35] rights in any sphere can potentially be created, enhanced, diminished or abolished by a government with a parliamentary majority.[36] Here, the key distinction is between rights that form part of domestic law and those contained in international agreements that, although ratified by the state, have not been incorporated into domestic

27 For discussion, see B Dickson (guest ed), Special Issue: Positive Obligations and the European Court of Human Rights (2010) 61(3) Northern Ireland Legal Quarterly; in particular, B Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61(3) Northern Ireland Legal Quarterly 203, 203, argues that 'a duty to not do something can always (or virtually always) be re-phrased as a duty to do something' and that 'the idea that human rights can be adequately protected if states content themselves with merely standing by and doing nothing has become patently absurd'.

28 Fredman (n 23) 11.

29 For discussion, see I Byrne, 'A Legal Right to Wellbeing' (2005) 53 European Lawyer 54; E Palmer, *Judicial Review, Socio-economic Rights and the Human Rights Act* (Hart 2007).

30 Universal Declaration of Human Rights, adopted by General Assembly resolution 217A(III) of 10 December 1948; Charter of Fundamental Rights of the European Union (2007/C 303/01).

31 *Airey v Ireland*, App no 6289/73 [1979] 2 EHRR 305, para 26; S*tec and Others v UK* [2006] ECHR 65731/01, 65900/01 para 52 (2006) 8(1) European Journal of Social Security 77; 93; see also E Myjer, 'The European Court of Human Rights and Social Justice' in I Lintel, A Buyse and B McGonigle Leyh (eds), *Defending Human Rights: Tools for Social Justice* (Intersentia 2012).

32 *Government of the Republic of South Africa, the Premier of the Province of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality v Irene Grootboom and Others*, judgment of the Constitutional Court, 4 October 2000.

33 G van Bueren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' (2002) Public Law 456; see also King (n 21) 3; for further discussion of the 'political' nature of judicial views of the remit of the courts, see C Gearty, 'On Fantasy Island: British Politics, English Judges and the European Convention on Human Rights' (2015) 1 European Human Rights Law Review 1.

34 M Fordham, 'Social Rights' (2013) 18(4) Judicial Review 379, 380.

35 This is in contrast to the USA – see M T McCluskey, 'Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State' (2003) 78(2) Indiana Law Journal 783, 791.

36 See, for example, Criminal Justice and Public Order Act 1994, c 33, alleged to curb citizens' rights to freedom of movement, assembly and political expression; see also Rees (n 24); that Parliament's freedom to legislate thus may not be completely unrestrained is suggested in *Jackson v Attorney General* [2005] UKHL 56, para 102 (Lord Steyn), albeit that in many cases the constraints applicable to parliamentary power are self-imposed – ibid, para 105 (Lady Hale).

law through legislation.[37] The ECHR *does* occupy a privileged position in UK law, but this is not because the rights conferred are civil and political rather than socio-economic – numerous applicants have sought to use the ECHR in defence of socio-economic rights[38] – but because of its incorporation through the Human Rights Act 1998 and constitutional legislation for the devolved regions.[39] The obligation on public authorities in Article 3(1) UN Convention on the Rights of the Child (UNCRC) to consider the best interests of the child when taking decisions affecting him or her also forms part of domestic law in 'spirit, if not the precise language' and, as shall be discussed in section 4, may have implications for socio-economic rights in cases involving children.[40] Otherwise, a range of instruments concerned with socio-economic rights have been ratified by the UK but do *not* form part of domestic law.[41] According to international law, such instruments are legally binding on state parties,[42] a position accepted to some extent by the UK in its statement that it does not 'ratify treaties unless confident that domestic law and practice is consistent with them'[43] and in the requirement that ministers act in accordance with international obligations.[44] However, in the dualist system there is *no* mechanism that requires compatibility of domestic legislation with international law: 'the sovereign power of the Queen in Parliament extends to breaking treaties'.[45] Nor can any action be brought in the UK courts on the basis of infringement of a right conferred by a non-incorporated agreement, although

37 *Cook and Another v Sir James Gordon Sprigg* [1899] AC 572, 577 (Lord Halsbury); *Rayner (Mincing Lane) Ltd v Department of Trade and Industry and Others; Maclaine Watson & Co Ltd v Department of Trade and Industry; Maclaine Watson & Co Ltd v International Tin Council* [1990] 2 AC 418, 500 (Lord Oliver); J H Jackson, 'Status of Treaties in Domestic Legal Systems: A Policy Analysis' (1992) 86(2) American Journal of International Law 310; A W Bradley and K D Ewing, *Constitutional and Administrative Law* (Pearson Education 2003) 310–12.

38 For discussion, see A Gómez Heredero, *Social Security as a Human Right: The Protection Afforded by the European Convention on Human Rights* (Human Rights Files no 23, Council of Europe Publishing 2007); M Cousins, *The European Convention on Human Rights and Social Security Law* (Intersentia 2008); B Toebes, M Hartlev, A Hendriks and J Rothmar Herrmann, *Health and Human Rights in Europe* (Intersentia 2012); Myjer (n 31).

39 Human Rights Act 1998, c 42; Scotland Act 1998, c 46, s 29(2); Northern Ireland Act 1998, c 47, s 6(2); Government of Wales Act 2006, c 32, s 81.

40 *R on the Application of SG and Others (Previously JS and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16, para 82 (Lord Reed); UNCRC, adopted by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, UN Treaty Series, vol 1577, 3; Children (Northern Ireland) Order 1995, no 755 (NI 2); Children Act 2004, c 31, s 11; Rights of Children and Young Persons (Wales) Measure 2010, nawm 2, s 1.

41 Examples of relevance to the present discussion include ILO C102 – Social Security (Minimum Standards) Convention (Geneva, 28 June 1952, entry into force 27 April 1955); ESC (Turin, 18 October 1961, entry into force 26 February 1965, ETS035); ICESCR, adopted by General Assembly resolution 2200A (XXI), 16 December 1966, entry into force 3 January 1976, UN Treaty Series, vol 993, 3; the remaining UNCRC provisions.

42 Vienna Convention on the Law of Treaties, adopted 22 May 1969, entry into force 27 January 1980, UN Treaty Series, vol 1155, 331, Article 26.

43 United Kingdom of Great Britain and Northern Ireland, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Fifth Periodic Report submitted by States Parties under Articles 16 and 17 of the Covenant* (E/C12/GBR/5, United Nations Economic and Social Council 2008) para 50.

44 HM Government, *Ministerial Code* (Cabinet Office 2010) para 1.2.

45 *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116, 143 (Diplock LJ); see also *In the Matter of an Application by Caoimhin Mac Giolla Cathain for Judicial Review* [2009] NIQB 66, in which it was held that the UK's ratification of the European Charter for Regional and Minority Languages could not in itself override the Justice (Language) Act (Ireland) 1737 requirement that court proceedings and documents be in English.

interpretation of the ECHR rights and UK legislation can be shaped by those set out in such documents.[46]

This paper is not concerned with the principle of the sovereignty of the Queen in Parliament.[47] The devolved legislatures are *not* sovereign and can only act within the competences delegated.[48] If Parliament has been careful to reserve the right to legislate contrary to the ECHR, albeit against a strong presumption that it should not do so, no such flexibility is afforded to the devolved regions. These institutions therefore *could* be compelled to act in accordance with other international law. Although the Agreement suggests that this ought to be the case, at least in respect of Northern Ireland, current arrangements do not appear sufficiently robust to achieve the objective.

2 Human rights in the Agreement

Human rights feature prominently in the Agreement, most notably in the chapter on 'Rights, safeguards and equality of opportunity'. This commences with a declaration that the signatory parties 'affirm their commitment' to eight almost exclusively civil and political rights, the exception being the right to 'equal opportunity in all social and economic activity'.[49] More substantively, the chapter includes a commitment to establish a Northern Ireland Human Rights Commission (NIHRC) and, on the part of the UK government, to legislate for the incorporation of the ECHR into Northern Ireland law so as to render non-compliant legislation invalid. The remit of the NIHRC is to include the identification of rights 'supplementary' to those in the ECHR that require similar protection on the basis of the 'particular circumstances of Northern Ireland', which, collectively with the ECHR rights, are to form a regional Bill of Rights.[50] The further requirement that Parliament 'legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland' is also of relevance given that those obligations include the rights protected by a range of additional agreements ratified by the state.[51] The extent of progress on each of these commitments varies.

Incorporation of the ECHR into the law of Northern Ireland has been delivered: the Northern Ireland Act 1998 stipulates that any Act of the Assembly, piece of subordinate legislation or act of a minister in the devolved Executive that is 'incompatible with any of the Convention Rights' (as defined by the Human Rights Act 1998) is outside the competence of the Assembly and therefore invalid.[52] Similar provisions are found in the

46 *Demir v Turkey* [2009] App no 34503/97 48 EHRR 54, para 85; see also *Sidabras v Lithuania* [2006] App no 55480/00, 59330/00 42 EHRR 6, in which the court draws on Article 1(2) ESC when considering a complaint based on Articles 8 and 14 ECHR; for discussion of the use of the ECHR by the courts as an aid to statutory interpretation prior to its incorporation, see M Hunt, *Using Human Rights Law in English Courts* (Hart 1997) 131.

47 Other authors have questioned or identified exceptions to the general rule that Parliament can legislate exactly as it deems fit – see Bradley and Ewing (n 37) 60; D Sharp, 'Parliamentary Sovereignty: A Scottish Perspective' (2010) 6(1) Cambridge Student Law Review 135.

48 Scotland Act 1998, c 46, s 29; Northern Ireland Act 1998, c 47, s 6; Government of Wales Act 2006, c 32, ss 80–2, 94.

49 The Agreement (n 1) c 6, para 1.

50 Ibid c 6, paras 2, 4.

51 Ibid c 3, para 33.

52 Northern Ireland Act 1998, c 47, s 6(2), s 24; Human Rights Act 1998, c 42, s 6.

constitutional legislation for both Scotland and Wales.[53] The ECHR rights are afforded stronger protection in the devolved regions than in UK law generally. The Human Rights Act 1998, whose own future may be in doubt after the 2015 general election delivered a Conservative majority,[54] allows the courts to declare an Act of Parliament or piece of subordinate legislation to be wholly or partially incompatible with the ECHR. However, the court may not invalidate primary legislation, or subordinate legislation where 'the primary legislation concerned prevents removal of the incompatibility'; nor does a declaration impose any legal requirement on ministers to remedy the incompatibility.[55] In contrast, Acts of the devolved legislatures can be, and have been, declared invalid; in *Salvesen*, the court disapplied one provision of a Scottish Act with immediate effect and allowed a second to continue to have effect for a maximum of one year to allow the incompatibility to be remedied.[56] In Northern Ireland, it appears that litigation could be commenced with the sole purpose of proving incompatibility;[57] the High Court has held that the NIHRC could bring proceedings without itself being a victim of the incompatibility as long as the existence of a victim or potential victim could be demonstrated.[58] Further, a Bill or proposed Measure that has completed its passage through a devolved legislature may be referred to the UK Supreme Court prior to royal assent if the Lord Advocate, Advocate General, Counsel General or Attorney General (depending on the region) considers it may fall outside the legislative competence of the region.[59]

While the devolved legislatures are each prevented from legislating contrary to the ECHR, the Agreement's proposal for a regional Bill of Rights is unique to Northern Ireland. Progress on this front has been more limited. The NIHRC completed its designated task with the presentation of its recommendations to the Secretary of State in 2008.[60] However, this has not resulted in the publication by the UK government of proposals for a Bill of Rights, which, according to the Agreement, should be binding on the Northern Ireland Assembly in the legislative process in the same way as the ECHR.[61] The principal reason for this lack of progress appears to be NIHRC's recommendation that a Bill of Rights should protect a range of socio-economic rights and dispute as to whether

53 Scotland Act 1998, c 46, ss 29(2), 54; Government of Wales Act 2006, c 32, ss 81, 94, 108; although Stewart has questioned whether Parliament really intended to put in place 'two competing human rights . . . jurisdictions' for the devolved regions, the effect of the legislation seems clear – see A Stewart, 'Devolution Issues and Human Rights' (2000) 30 Scots Law Times 239; I Jamieson, 'Relationship between the Scotland Act and the Human Rights Act' (2001) 5 Scots Law Times 43.

54 O Bowcott, 'Cameron's Pledge to Scrap Human Rights Act Angers Civil Rights Groups' *The Guardian* (London 1 October 2014) <www.theguardian.com/politics/2014/oct/01/cameron-pledge-scrap-human-rights-act-civil-rights-groups > accessed 9 October 2014.

55 Human Rights Act 1998, c 42, s 4; N Bamford, 'Parliamentary Sovereignty and the Human Rights Act 1998' (1998) Public Law 572; Lord Irvine of Lairg, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' (2003) Public Law 308.

56 *Salvesen v Riddell* [2013] HRLR 23; the offending provisions were Agricultural Holdings (Scotland) Act 2003, asp 11, s 72(6) and (10).

57 Normally, and previously in Northern Ireland, a case under the Human Rights Act 1998 or ECHR may only be brought by a victim of a rights violation – see Human Rights Act 1998, c 42, s 7; Article 34 ECHR; *Klass v Germany* [1978] 2 EHRR 214; *Re Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2009] NI 235.

58 *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2012] Eq LR 1135, para 41 (per Treacy J); this judgment is on the basis of Northern Ireland Act 1998, c 47, s 71(2B).

59 Scotland Act 1998, c 46, s 33; Northern Ireland Act 1998, c 47, s 11; Government of Wales Act 2006, c 32, s 99.

60 NIHRC (n 10).

61 The Agreement (n 1) c 3, para 26(a).

the protection of such rights represents an appropriate response to the 'particular circumstances of Northern Ireland'. 'Constitutional borrowing' and 'internationalisation' are frequently central to the drafting of Bills of Rights,[62] as is arguably reflected in the Agreement's statement that a Bill might draw 'as appropriate on international instruments and experience'.[63] Proponents of the entrenched protection of socio-economic rights further argue that many of the 'particular circumstances of Northern Ireland' are social, economic and cultural in nature, highlighting the link between socio-economic disadvantage and civil unrest and the potential for such rights to catalyse political engagement on a basis other than community affiliation.[64] On the other hand, critics argue that the inclusion of socio-economic rights derived from international agreements – and therefore applicable to a wide range of societies – does not result in a proposal sufficiently tailored to the 'particular circumstances of Northern Ireland'.[65]

Such debates aside, current political realities appear to offer limited prospect of a Bill of Rights including socio-economic rights being enacted in the foreseeable future. In Northern Ireland, unionist political parties have strongly opposed the NIHRC's recommendations in their current form.[66] At UK level, the Prime Minister has also expressed scepticism about the NIHRC proposals[67] and the Northern Ireland Office has argued that socio-economic rights 'are equally as relevant to the people of England, Scotland and Wales as they are to the people of Northern Ireland and, therefore, fall to be considered in a UK-wide context' rather than at regional level.[68] Given the recommendations of the UK Commission on a Bill of Rights[69] and the 'antipathy' of politicians and media to 'the expansion of a "human rights agenda"',[70] the prospects of socio-economic rights thus gaining enhanced protection seem equally scant. In Northern Ireland, desire to see the enactment of *a* Bill of Rights – *any* Bill of Rights – raises the possibility of a document being produced with a sole focus

62 A Smith, 'Internationalisation and Constitutional Borrowing in Drafting Bills of Rights' (2011) 60(4) International and Comparative Law Quarterly 867.

63 The Agreement (n 1) c 6, para 4.

64 B Dickson, 'New Human Rights Protections in Northern Ireland' (1999) 24 supp (human rights survey) European Law Review 3, 8; F McCausland, 'Why Northern Ireland (Still) Needs a Bill of Rights' (Groundhog Day: Five Years on from the Bill of Rights Advice, Belfast December 2013); P Kelly, 'Why Northern Ireland (Still) Needs a Bill of Rights' (Groundhog Day: Five Years on from the Bill of Rights Advice, Belfast December 2013); A Smith, M McWilliams and P Yarnell, 'Political Capacity Building: Advancing a Bill of Rights for Northern Ireland' (Transitional Justice Institute 2014); see also Hillyard et al (n 6).

65 Harvey and Russell (n 6); Northern Ireland Affairs Committee, 'A Bill of Rights for Northern Ireland: An Interim Statement' (HC236, incorporating HC360 i and ii, The Stationery Office 2010) ev 14–19; T Hadden, 'How the Bill Was Lost' (2010) (September) Fortnight, <www.nuzhound.com/articles/Fortnight/arts2010/sep10_how_Bill_was_lost__THadden.php> accessed 10 January 2014; T Hadden, 'A Constitutional Bill of Rights for Communities and Individuals in Northern Ireland (Not a Bill of International Human Rights)' (Groundhog Day: Five Years on from the Bill of Rights Advice, Belfast December 2013).

66 J Donaldson, HC Deb 8 July 2009, vol 495, col 956; Democratic Unionist Party, 'Manifesto 2009: 1 Dodds' (Democratic Unionist Party 2009) 26; Ulster Unionist Party, 'Ulster Unionist Party Position on a Bill of Rights' (Ulster Unionist Party, year unknown).

67 'Tories Will Not Take McWilliams' Path – Cameron' *News Letter* (Belfast 27 May 2009) <www.newsletter.co.uk/news/regional/tories-will-not-take-mcwilliams-path-cameron-1-1885137> accessed 7 January 2014.

68 Northern Ireland Office, 'A Bill of Rights for Northern Ireland: Next Steps' (Consultation paper, NIO 2009) 17.

69 Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice before Us: Volume 1' (Commission on a Bill of Rights 2012) 34.

70 B Dickson, *Human Rights and the United Kingdom Supreme Court* (OUP 2013) 36.

on a limited range of civil, political and cultural rights around which consensus can be reached, with social and economic rights sidelined.[71]

The third Agreement provision of relevance to the protection of human rights, that Parliament should legislate to ensure fulfilment of the UK's international obligations in Northern Ireland, has thus far attracted less attention from academic authors and campaigners; the commitment has largely slipped from the agenda. This oversight appears surprising for a number of reasons. First, as a party to the Agreement, the UK government makes an explicit commitment to ensure its international obligations are met in respect of Northern Ireland, whereas its only firm commitment in respect of a Bill of Rights is to take account of the NIHRC's advice 'on the scope for defining, in Westminster legislation, rights supplementary to those in [the ECHR]'.[72] Second, section 3 will suggest that the means by which Parliament has chosen to fulfil this commitment in the Northern Ireland Act 1998 may be portrayed as flawed. Third, insertion of a provision requiring that devolved legislation comply with, for example, the European Social Charter (ESC) or the International Covenant on Economic, Social and Cultural Rights (ICESCR) into s 6 and s 24 of the 1998 Act would immediately put the rights set out in those documents on equal footing with those in the ECHR without the convoluted process of negotiating and drafting a Bill of Rights[73] that the NIHRC envisages would be strongly influenced by them.[74] If amendment of the 1998 Act might seem a mundane means of protecting rights compared to achievement of the enactment of a Bill of Rights that has been assigned totemic status,[75] it should be remembered that, in the UK, an Act of Parliament called a Bill of Rights is legally no different from any other Act of Parliament: it would be no more binding on the Northern Ireland Assembly and no better protected from repeal should Parliament change its mind.

That the ECHR has some relevance to the protection of socio-economic rights has been noted in section 1 and will be of interest in section 4. Little more need be said about proposals for a Bill of Rights as the political climate is such that the delivery in the near future of a Bill including enhanced protection for social and economic rights appears fanciful. Further consideration of how the UK government might deliver on its commitment to ensure international obligations are met in Northern Ireland *is* required and forms the focus of section 3.

3 Ensuring compliance with international law in the devolution settlement

The UK government's commitment to ensure that the state's obligations under international law are realised in Northern Ireland is clearly stated in the Agreement. One means of doing so is provided for in the constitutional legislation for all three devolved regions. However, it is argued here that this approach, based on political rather than judicial enforcement, is too dependent on voluntary action by the UK government of the day to offer effective protection of human rights. An alternative model, also used in all devolved regions but applicable only to the ECHR and EU law, not to other international law, has potential to underpin a more robust, judicial guarantee of the rights the state has committed to uphold on behalf of its citizens.

71 Discussion at 'Political Capacity Building: Advancing a Bill of Rights for Northern Ireland' (report launch, Stormont October 2014).

72 The Agreement (n 1) c 6, para 4.

73 For discussion of the process, see Harvey and Russell (n 6).

74 See NIHRC (n 10) 45–51.

75 For details of the ongoing campaign in favour of a Bill of Rights, see <www.billofrightsni.org>.

The devolution legislation empowers the Secretary of State to ensure devolved ministers comply with the UK's international obligations by directing them to take, or not to take, certain actions as necessary.[76] Such actions may include the making of secondary legislation and the introduction of a Bill to the devolved legislature.[77] Primary legislation may not be revoked by order, but the Secretary of State could presumably direct that a minister in a devolved administration introduce a Bill to amend or repeal a previous Act or Measure. It is therefore possible for the devolved institutions to be bound by unincorporated international law in a way that Parliament is not. However, this is dependent on the exercise of political discretion by the UK government, not on enforcement by an independent judiciary: the Secretary of State is not *obliged* to direct that a particular action be taken or not taken even if it appears that international obligations are likely to be breached.

In contrast, under the ECHR model, which is outlined in section 2 above, it is not for the Secretary of State but for the *courts* to decide whether devolved legislation or acts of devolved ministers comply with the ECHR and, if appropriate, to declare legislation invalid or (as in *Salvesen*)[78] to order amendment. This means that a decision as to whether to challenge the validity of legislation lies with a victim whose rights have allegedly been infringed or (in Northern Ireland) with the NIHRC, or (prior to royal assent) the Advocate General, Lord Advocate, Counsel General or Attorney General;[79] the ultimate decision on compliance rests with the courts, not with a politician who may or may not wish to investigate or act upon possible non-compliance in a given case. Invalidity because of lack of devolved competence is not limited to non-compliance with the ECHR. An Act of the Northern Ireland Assembly would also be invalid if contrary to EU law, purporting to apply outside Northern Ireland, dealing with an excepted matter, discriminatory on the basis of religious belief or political opinion[80] or, perhaps, violating 'constitutional common law principles'.[81] Some similar grounds for invalidity exist in Scotland and Wales.[82]

A hierarchy of means of ensuring compliance with international law therefore emerges. Although international treaties in principle place a legal obligation on state parties to fulfil the obligations entered into,[83] to which the UK at least pays lip-service,[84] in practice there is often no means of enforcing these obligations. Accountability mechanisms are often political rather than legal, such as the reports on compliance produced by the European Committee of Social Rights (ECSR) and Committee on Economic, Social and Cultural Rights (CESCR); even where a judicial body exists, the UK may not agree to its jurisdiction, as with the procedures instituted by the optional protocol to the ICESCR and the additional

76 Scotland Act 1998, c 46, s 58; Northern Ireland Act 1998, c 47, s 26; Government of Wales Act 2006, c 32, s 82.

77 For discussion of whether Acts of the Scottish Parliament represent primary or subordinate legislation, see A McHarg, 'What is Delegated Legislation?' (2006) Public Law 539.

78 *Salvesen v Riddell* [2013] HRLR 23.

79 Such a challenge has occurred, although not on human rights grounds – see *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney General for England and Wales* [2013] 1 AC 792.

80 Northern Ireland Act 1998, c 47, s 6(2); the 1998 Act stipulates some grounds for invalidity other than those listed above.

81 *Re CM's Application for Judicial Review* [2013] NIQB 145, para 4, 13 (Treacy J).

82 Scotland Act 1998, c 46, s 29; Government of Wales Act 2006, c 32, ss 80, 94, 108; *Axa General Insurance v Lord Advocate* [2012] 1 AC 686, para 51 (Lord Hope), para 143 (Lord Reid).

83 Vienna Convention on the Law of Treaties (n 42).

84 United Kingdom of Great Britain and Northern Ireland (n 43) para 50; HM Government (n 44) para 1.2.

protocol to the ESC, neither of which has been signed by the state.[85] No legislature or state institution could be compelled to abide by the terms of such instruments in the absence of specific domestic law to that effect. The current model in the devolution legislation provides one means of compelling a devolved legislature to do so. This approach has the advantage of not requiring a complaint from an individual who claims his or her rights have been infringed, but is weakened by reliance on political rather than judicial enforcement. If, as shall be discussed in section 4, the UK government may be accused of non-compliance with its international obligations in a given field, it could hardly be expected to hold a regional administration to account for the same failings. The ECHR model, as it applies at devolved level, is much more robust, providing for the invalidation of non-compliant legislation by the courts on the basis of non-compliance alone, independent of political calculation. The need for an individual who has suffered an alleged rights violation to initiate proceedings might in some cases prevent non-compliant legislation being exposed to judicial scrutiny due to the absence of a willing applicant, but in Northern Ireland at least the ability of the NIHRC to litigate in its own name in the absence of a named victim addresses this risk. A similar model for other human rights instruments would not only greatly strengthen their judicial weight, but would require their closer consideration in the political process.

A revised s 6 of the Northern Ireland Act 1998, amended with this objective in mind, might then read:

> **6. Legislative competence**
>
> (1) A provision of an Act is not law if it is outside the competence of the Assembly.
>
> (2) A provision is outside that competence if any of the following paragraphs apply—
>
> . . .
>
> (c) It is incompatible with any of the rights set out in the relevant Agreements.
>
> . . .
>
> (2A) In s 6(2)(c), the relevant Agreements are:
>
> (a) The European Convention on Human Rights
>
> (b) Those articles of the European Social Charter accepted by the United Kingdom
>
> (c) The United Nations Convention on the Rights of the Child

Subsection 2A could be then amended over time to incorporate such international instruments as the UK government deemed ought to be binding on the devolved institutions.

85 Additional Protocol to the European Social Charter providing for a system of collective complaints (Strasbourg, 9 November 1995, entry into force 1 July 1998, CETS158); Optional Protocol to the ICESCR adopted by General Assembly resolution 63/117 (LXIII), 5 March 2009, GAOR 63rs, sess, supp 49; see also Council of Europe Treaty Office, 'Additional Protocol to the European Social Charter Providing for a System of Collective Complaints CETS no 158: status as of 27/8/2014' (Council of Europe 2014) <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=158&CM=&DF=&CL=ENG> accessed 27 August 2014; Office of the High Commissioner for Human Rights, 'Ratification Status for ICESCR-OP – Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (UN 2014). <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en> accessed 27 August 2014.

The key question for this section is whether the UK government has lived up to its commitment in the Agreement to ensure fulfilment of its international obligations in respect of Northern Ireland. Certainly, through s 26 of the Northern Ireland Act 1998, Parliament confers upon the Secretary of State the power necessary to ensure that the Assembly and Executive do not act contrary to the state's international obligations. This in turn must create a significant incentive for those institutions to ensure their actions *are* compliant with international law. Indeed, there is evidence of this obligation being taken seriously at regional level, in the form of Assembly committee investigations in Northern Ireland[86] and legislation in Wales.[87] However, should a regional legislature act contrary to human rights obligations, the Secretary of State is under no obligation to intervene. When, as in section 4, the source of the alleged rights infringement is UK legislation whose provisions are essentially being duplicated in the devolved region, such an intervention must be particularly unlikely. In such circumstances, the only truly effective protection of human rights may be through the judiciary.

4 Enter the Welfare Reform Bill: the potential impact of judicially protected socio-economic rights

The Welfare Reform Act 2012[88] may be fairly described as the flagship legislative achievement of the Conservative–Liberal Democrat Coalition government of 2010 to 2015. The main stated objectives of the Act may be described as (1) simplification of the social security system, (2) encouragement of transition from benefits to employment and (3) 'fairness' to those in employment.[89] The means employed in pursuit of these objectives have generated considerable hostility from civil society campaign groups[90] and from devolved governments. If the most vocal opposition has arguably come from Scotland's governing Scottish National Party,[91] of the devolved regions only Northern Ireland is currently in a position to translate its concerns about UK government policy into a distinctive regional approach.[92] However, given the long-established convention that the region's social security system mirror that in Great Britain, underpinned by its weak fiscal position and the statutory requirement to consult the UK government on the desirability of maintaining common provision,[93] a compelling case would have to be made for any significant policy divergence. The extent to which such a case can be made may depend in large measure on the implementation of the human rights provisions of the Agreement.

86 Ad-hoc Committee, *Report on Whether the Provisions of the Welfare Reform Bill are in Conformity with the Requirements for Equality and Observance of Human Rights* (NIA 92/11–15, Northern Ireland Assembly 2013).

87 Rights of Children and Young Persons (Wales) Measure 2011, nawm 2, which is designed to enhance the status of UNCRC in that region.

88 Welfare Reform Act 2012, c 5.

89 See I Duncan Smith, HC deb 9 March 2011, vol 524, col 919; Department for Work and Pensions (DWP), 'Simplifying the Welfare System and Making Sure Work Pays' (DWP 2014) <www.gov.uk/government/policies/simplifying-the-welfare-system-and-making-sure-work-pays> accessed 27 August 2014.

90 See, for example, P Walker, 'UK Uncut Joins Fight against Welfare Reform Bill' *The Guardian* (London 25 January 2012) <www.theguardian.com/uk/2012/jan/25/uk-uncut-welfare-tax-disability> accessed 27 August 2014.

91 See Sturgeon (n 18) col 4943; Scottish National Party, Press Release 'UK's Catastrophic Welfare Changes Set to Bite' (1 April 2013) <www.snp.org/media-centre/news/2013/apr/uks-catastrophic-welfare-changes-set-bite> accessed 17 February 2014; N Sturgeon (n 18).

92 The revision of Scotland's devolution settlement following the 2014 referendum on independence will include devolved competence for some aspects of social security – see Scotland Office (n 20).

93 Northern Ireland Act 1998, c 47, s 87.

Northern Ireland has since 1920 been the only UK region with devolved competence for social security.[94] However, since 1926 the UK Exchequer has financially underwritten the maintenance of a parallel but in almost all respects similar system for the region compared to that in Great Britain, an approach that would at most points in Northern Ireland's history otherwise have represented a heavy, if not unaffordable, fiscal burden.[95] The UK government currently subsidises contributory benefits in Northern Ireland[96] and funds non-contributory benefits in their entirety, at a cost of £334m and £2.9bn respectively in 2012–2013.[97] This arrangement, which could once readily be portrayed as the 'most important item' of policy for the 'removal of want' in Northern Ireland,[98] has been increasingly questioned since the 1980s.[99] The long delay in the progress – and ultimate failure – of the current Welfare Reform Bill[100] is the result of a clash between the two main parties in the consociational Executive.[101] The Democratic Unionist Party has stressed the fiscal risks associated with abandonment of parity and (to a lesser extent) the convention that all UK citizens should enjoy the same social entitlements on the same terms,[102] while Sinn Fein expresses opposition to 'Tory cuts' to public services without providing clear information on how it would fund an alternative approach.[103]

Public discourses on the desirability or otherwise of implementing reforms to mirror those in Great Britain have tended to be political and economic, rather than legal, in nature. However, the scrutiny process undergone by the Bill does indicate that the Assembly has been alive to the possibility of provisions contravening human rights obligations, an ad hoc committee having been appointed to consider this issue.[104] The committee concluded by majority vote that no specific breaches could be identified. However, concerns about compliance with specific human rights provisions – particularly Article 8 ECHR and

94 The powers of the Parliament of Northern Ireland are set out in the Government of Ireland Act 1920, c 67, ss 4 and 9, and generally mirror those envisaged for an Irish 'home rule' Parliament in the Government of Ireland Act 1914, c 91, ss 2 and 14.

95 Relevant legislation includes Unemployment Insurance (Northern Ireland Agreement) Act 1926, c 4; Social Services (Northern Ireland Agreement Act) 1949, c 23; Social Security Administration (Northern Ireland) Act 1992, c 8, s 153; for further details, see J Bradshaw, *Social Security Parity in Northern Ireland* (Policy Research Institute 1989); L Lundy, 'Parity, Parrotry or Plagiarism? Legislating for the Unemployed Poor in Northern Ireland 1838–1995' in N Dawson, D Greer and P Ingram (eds), *One Hundred and Fifty Years of Irish Law* (SLS Legal Publications 1996); Simpson (n 13).

96 Funds are transferred from the National Insurance Fund for Great Britain to that for Northern Ireland so as to maintain the balance in the Northern Ireland fund at 2.84% of the combined total; in 2012–2013, this arrangement resulted in a transfer of £334m, but payments from the fund still exceeded receipts by £255m – see HM Revenue and Customs, *Northern Ireland National Insurance Fund Account for the Year Ended 31 March 2013* (HC 894, The Stationery Office 2013) 2, 11.

97 Department for Social Development (DSD), *Resource Accounts for the Year Ended 31 March 2013* (DSD 2013).

98 B Brooke, HC (NI) Deb 2 March 1949, vol 33, col 37.

99 N Raynsford in HSS Committee, *Report on Proposal for a Draft Housing Benefits (NI) Order* (NIA 51, 11 May 1983) appendix 2 calls for the abandonment of parity in favour of using Northern Ireland as a testing ground for new approaches to social security; HSS Committee, *Report: Social Security Parity* (NIA 141-I, 26 June 1984) 5.3 advocates a special supplementary unemployment benefit and fuel benefit for Northern Ireland; E Evason, 'Poverty in Northern Ireland' (1986) 75(300) Irish Quarterly Review 503 argues that higher energy costs mean levels of cash benefits that are adequate for Great Britain are not for Northern Ireland.

100 See Northern Ireland Assembly, 'Welfare Reform Bill' (Northern Ireland Assembly 2015) <www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/welfare-reform-bill> accessed 25 March 2015; Sinn Fein (n 15); Simpson (n 13).

101 Birrell and Gray (n 16) 49.

102 Robinson (n 16); Hamilton (n 16) 10.

103 A Maskey, 'Sinn Féin Calls for Deferral of the Welfare Reform Bill' (Sinn Féin 4 October 2012) <www.sinnfein.ie/contents/24642> accessed 17 March 2014; Maskey (n 16).

104 Ad-hoc Committee (n 86).

Article 3(1) UNCRC – were raised in written submissions and Sinn Fein members argued that the Bill as drafted *was* likely to result in human rights infringements.[105] Simpson argues that there is a strong possibility of the sanctions regime for claimants who breach conditions associated with receipt of a benefit – that they be available for paid employment, actively seeking paid employment and/or undertaking activities intended to improve their prospects of securing employment – breaching ECHR obligations.[106] In particular, it is argued that by denying access to the financial resources necessary for the satisfaction of essential needs,[107] sanctions applied to households including dependent children may violate the child's right to family life under Article 8 ECHR.[108] There is also a risk of non-compliance with Protocol 1 Article 1 ECHR due to concerns about proportionality, effectiveness and arbitrariness of sanctions that mean the public interest test for interference with an proprietary right may not be passed.[109]

Given that the Northern Ireland Assembly lacks competence to legislate contrary to the ECHR, it would be well advised to take these issues into account; indeed, a ministerial amendment tabled at consideration stage would have limited the maximum duration of a sanction in Northern Ireland to 18 months, compared to 36 in Great Britain,[110] although the extent of support available through hardship payments would have been a matter for secondary legislation. Changes to the sanctions regime, though, would not address every potential human rights concern relating to the reformed social security system. Other particularly controversial features of the reformed social security system include provision for compulsory, unpaid work placements,[111] reduction of the maximum available housing benefit including an under-occupancy penalty for social tenants (commonly referred to as

105 See, for example, the NIHRC submission at 324, Northern Ireland Welfare Reform Group submission at 344 and the Save the Children submission at 351.

106 M Simpson, '"Designed to Reduce People . . . to Complete Destitution": Human Dignity in the Active Welfare State' (2015) 1 European Human Rights Law Review 66; failure to comply with these conditions can result in loss of Jobseeker's Allowance (JSA) or the standard allowance element of universal credit for a maximum of 156 weeks – see Jobseekers Act 1995, c 18, part i; Jobseeker's Allowance (Mandatory Work Activity) Regulations 2011, no 688; Welfare Reform Act 2012, c 5, pt 1, c 2, pt 2, cc 1–2; Universal Credit Regulations 2013, no 376, reg 110; Jobseeker's Allowance Regulations 2013, no 378, pt 3.

107 The judgment in *R on the Application of Refugee Action v Secretary of State for the Home Department* [2014] ACD 99 calls into question the ability of hardship payments to enable claimants subject to sanctions to meet essential needs and demonstrates clearly that an individual *without* access to a hardship payment would have insufficient income to do so.

108 For the principle that Article 8 may create a positive obligation to provide financial support when the welfare of children is at stake, see *Ala Anufrijeva v London Borough of Southwark; R on the Application of N v Secretary of State for the Home Department; R on the Application of M v Secretary of State for the Home Department* [2004] 2 WLR 603, para 43 (Lord Woolf); *R on the Application of Jamil Sanneh v Secretary of State for Work and Pensions, Commissioners for HMRC v Birmingham City Council* [2013]ACD 99, paras 44–6 (Hickinbottom J).

109 *Hentrich v France*, App no 13616/88) [1994] 18 EHRR 440, para 2; *R on the Application of SRM Global Master Fund LP v Commissioners of HM Treasury* [2009] UKHRR 1219, para 81 (Stanley Burton LJ and Silber J); P T Orebech, 'From Diplomatic to Human Rights protection: The Possessions under the 1950 European Human Rights Convention, First Additional Protocol Article 1' (2009) 43(1) Journal of World Trade 59; D Webster, 'Independent Review of Jobseeker's Allowance (JSA) Sanctions for Claimants Failing to Take Part in Back to Work Schemes: Evidence Submitted by Dr David Webster' (Child Poverty Action Group 2014) <www.cpag.org.uk/sites/default/files/uploads/CPAG-David-Webster-submission-Oakley-review-Jan-14_0.pdf> accessed 19 May 2014.

110 Northern Ireland Assembly, 'Welfare Reform Bill Marshalled List of Amendments (Annotated)' (Northern Ireland Assembly 2015) < www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/welfare-reform-bill/marshalled-list-of-amendments-consideration-stage-tuesday-10-february-2015> accessed 23 February 2015.

111 Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013, no 276.

the 'bedroom tax')[112] and the capping of households' maximum overall benefit income.[113] There is no need to discuss in detail the issue of compulsory work placements, the Supreme Court having held in *Reilly* that such schemes do not constitute forced labour contrary to Article 6 ECHR,[114] and therefore do not violate the right to free choice of occupation in other human rights instruments.[115] The provisions potentially resulting in reduced benefit income *do* raise issues regarding compliance with human rights instruments other than the ECHR, which might mean lack of competence to legislate contrary to them would have a profound influence on Northern Ireland's response to the reforms in Great Britain.

Social security benefits in the UK largely play the role occupied by social assistance[116] in continental welfare states of relieving or alleviating poverty and ensuring a minimum standard of living for some of the most disadvantaged members of society. Any measure that results in lower incomes for claimants must therefore raise questions of compliance with the presumption of non-retrogression in social rights.[117] This requires that there should be no diminution of citizens' social rights 'except under specific circumstances'.[118] However, specific retrogressive measures may be acceptable if the state can demonstrate that it considered all alternatives and that retrogression in this field enables better use of available resources in pursuit of the realisation of the suite of social rights as a whole.[119] While it may be claimed that reform of out-of-work and disability benefits represents an unjustified retrogressive step given the reduction of income that will result for some claimants,[120] it is equally arguable that there is 'no magic figure [of public expenditure] that's going to guarantee or undermine human rights' and that decisions as to priorities must always be made.[121] If, as the UK government claims, overall reduction of public spending proves beneficial to the economy, realisation of the full suite of socio-economic rights

112 Housing Benefit Regulations 2006, no 213, reg B13, inserted by Housing Benefit (Amendment) Regulations 2012, no 3040, reg 5; Rent Officers (Universal Credit Functions) Order 2013, no 382, s 3, sch 1.

113 Housing Benefit Regulations 2006, no 213, pt 8A, inserted by Benefit Cap (Housing Benefit) Regulations 2012, no 2994, reg 2; Universal Credit Regulations 2013, no 376, pt 7.

114 *R (on the Application of Reilly and Another) v Secretary of State for Work and Pensions* [2014] AC 453, paras 80 and 83 (Lord Neuberger and Lord Toulson); see also *X v Netherlands* [1976] 7 DR 161.

115 ESC Article 1(2), ICESCR Article 6; see also *European Roma Rights Centre v Bulgaria*, complaint 48/2008 [2009] 49 EHRR SE12; *Schuitemaker v Netherlands*, App no 15906/08 [2010] (unreported) 4 May 2010; CESCR, *General Comment No 18: The Right to Work* (E/C12/GC/18, UN 2006) 4; European Committee of Social Rights, *European Social Charter: Addendum to Conclusions XV-1* (Council of Europe 2001).

116 A normally non-contributory cash benefit of last resort – see S Jones, 'Achieving an Adequate Minimum Income in Europe' (Social Consequences of the Crisis, Brussels, 22 February 2013).

117 Article 2(1) ICESCR; Article 4 UNCRC.

118 M Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 319; see also CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health* (E/C12/2000/4, UN 2000) 9.

119 CESCR, *General Comment no 19: The Right to Social Security* (Article 9) (E/C12/GC/19, UN 2008) 13.

120 A Donald, 'Austerity Opposition Needs a Coherent Narrative. Human Rights Provides One' *The Guardian* (London 25 January 2011) <www.theguardian.com/commentisfree/libertycentral/2011/jan/25/human-rights-fairness-austerity-cuts> accessed 20 January 2014; A Nolan, 'Is the Government's Austerity Programme Breaking Human Rights Law?' (Open Democracy 1 March 2011) <www.opendemocracy.net/ourkingdom/aoife-nolan/is-governments-austerity-programme-breaking-human-rights-law> accessed 20 January 2014; P O'Connell, 'Let Them Eat Cake: Socio-economic Rights in an Age of Austerity' in A Nolan, R O'Connell and C Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social rights* (Hart 2013).

121 Lord McNally and K Clarke in 'Joint Committee on Human Rights, The Government's Human Rights Policy (HC 609i 2010–2011) (uncorrected transcript of oral evidence) <www.publications.parliament.uk/pa/jt201011/jtselect/jtrights/uc609-i/uc60901.htm> accessed 20 January 2014.

might be *advanced* if this were to lead to increased employment at adequate wages.[122] The Court of Appeal has already recognised the maintenance or strengthening of work incentives by reducing benefit payments to be a 'fundamental legitimate objective' capable of justifying some negative impact on some claimants.[123] Therefore, even if the relevant international agreements could be relied on in court, the vagueness of the non-retrogression principle means its judicial enforcement would be difficult.

General provisions in the international agreements on what constitutes an acceptable or adequate living standard also suffer from lack of precise definition and may therefore be difficult to translate into a minimum acceptable income,[124] other than with reference to existing UK case law,[125] and may in some cases apply specifically to workers rather than all citizens.[126] It might be arguable that the right of the child to 'a standard of living adequate for . . . physical, mental, spiritual, moral and social development'[127] ought to be interpreted in accordance with the income and material deprivation standards established by the Child Poverty Act 2010,[128] but this would have to be tested by the courts.

Specific provisions on social security and social assistance are clearer as to the income levels required for compliance. The pre-2012 level of social security benefits in the UK was already 'manifestly inadequate' to comply with the Article 12 ESC provision on social security,[129] being below 40 per cent of equivalised median income for most claimant groups. This might form the basis for a legal challenge to the level of contributory benefits if the ESC were justiciable in the UK. Likewise, unemployment benefits have never matched the level required by Article 66 International Labour Organization Convention 102 (ILO C102), 45 per cent of an unskilled worker's wage.[130] However, the state pension aside, most so-called social security benefits in the UK are more akin to the ESC definition of

122 G Osborne, 'New Year Economy Speech by the Chancellor of the Exchequer' (HM Treasury 2014) <www.gov.uk/government/speeches/new-year-economy-speech-by-the-chancellor-of-the-exchequer> accessed 20 January 2014.

123 *R on the Application of SG and Others (previously JS and others) v Secretary of State for Work and Pensions v Child Poverty Action Group, Shelter Children's Legal Service* [2014] HRLR 10, paras 46–50, 56 (Lord Dyson); this judgment was upheld by the Supreme Court in *R on the Application of SG and Others (previously JS and Others) v Secretary of State for Work and Pensions* (n 40) see also *Hoogendijk v Netherlands* [2005] 40 EHRR SE22.

124 Article 11 ICESCR requires income sufficient to acquire basic necessities, plus (possibly) 'a further amount . . . reflecting the cost of participating in the everyday life of society' – see World Bank, *World Development Report 1990: World Development Indicators* (OUP 1990)

125 For example, *R on the Application of Refugee Action v Secretary of State for the Home Department* [2014] ACD 99.

126 Article 7(a) ICESCR; Article 4(1) ESC.

127 Article 27 UNCRC.

128 C 9, ss 2–6 – the Act sets targets for the near-eradication of child poverty, defined as living in a household with income below 60% of equivalised median in current year, below 60% of equivalised median in 2010–2011 adjusted for inflation, below 70% of equivalised median *and* unable to afford specified items deemed necessities or below 60% of equivalised median in three of the last four years.

129 Note that the UK accepts only Article 12(1) and not the subsequent paragraphs – see European Committee of Social Rights, *European Social Charter: Conclusions XX-2 (2013) (Great Britain)* (Council of Europe 2014).

130 Committee of Experts on the Application of Conventions and Recommendations, Direct Request, adopted 2007, published 97th ILC session (2008): Social Security (Minimum Standards) Convention, 1952 (No 102) UK.

social *assistance*.[131] Their appropriateness is therefore better judged against Article 13. In the past, the UK has been found to comply with this article, which requires that combined income from all benefits received should not be 'manifestly below' 50 per cent of equivalised median income.[132] This finding can be questioned – other research suggests childless households on means tested benefits could typically expect an income of no more than 30 per cent of equivalised median[133] – and the capping of benefit income[134] has potential to increase the number of claimant households with children whose income falls significantly below the 50 per cent threshold.[135] Local housing allowance reform is likely to have a similar effect if, as housing advisors have reported, landlords are disinclined to reduce rents in response to resulting reductions in housing benefit, forcing claimants to redirect a portion of non-housing benefit income to make up the shortfall.[136] The courts have recognised that the benefit cap discriminates against lone parents, and by extension against women, but nonetheless held that it did not contravene the ECHR rights as these negative effects could be justified by the 'fundamental legitimate objective' the policy was introduced to achieve.[137] Future ECSR reports will provide further insight into whether judicially enforceable ESC rights in Northern Ireland might have the potential to result in a different judgment.

Further potential consequences for social security claimants of the reforms discussed in the previous paragraph include loss of housing due to inability to pay rent or inability to acquire housing in some areas as landlords become reluctant to let to claimants.[138] In the main, it appears that the socio-economic rights instruments offer such individuals no additional protection compared to the ECHR, both Article 8 ECHR and the housing-related provisions of ICESCR having been mainly interpreted as primarily protecting from arbitrary eviction rather than conferring an absolute right to a home.[139] The best prospect for an action on the basis of homelessness so caused would appear to be Article 8 ECHR

131 In 2012–2013, payments of contributory JSA and Employment and Support Allowance (ESA) in Great Britain totalled £4.2bn, compared to £16.7bn spent on means-tested JSA, ESA and Income Support and a further £57.2bn on means-tested housing benefit, council tax benefit and tax credits – see Department for Work and Pensions (DWP), *Budget 2013 Expenditure Tables* (HM Government, 2013); DWP, *Department for Work and Pensions Annual Report and Accounts 2012–2013* (HC 20, DWP 2013); DWP, *Outturn and Forecast Budget 2014: Summary Tables* (DWP 2014); for definitions of social security and social assistance, see Committee of Independent Experts, *Conclusions XIII-4* (Council of Europe 1996) 34.

132 European Committee of Social Rights (n 129) 22.

133 The Poverty Site, 'Poverty Indicators: State Benefit Levels' <www.poverty.org.uk/12/index.shtml> accessed 16 August 2013.

134 Welfare Reform Act 2012, c 5, ss 96–7; Benefit Cap (Housing Benefit) Regulations 2012, no 2994.

135 50% of households in Great Britain affected by the benefit cap, and 63% of those in Northern Ireland, are projected to be lone-parent families – see DWP, 'Benefit Cap (Housing Benefit) Regulations 2012: Impact Assessment for the Benefit Cap' (DWP 2012); DSD, 'Northern Ireland Benefit Cap Information Booklet' (DSD 2013).

136 B Reeve-Lewis, 'Tenants Driven from Private Rented Sector in Anticipation of Benefit Cap' *The Guardian* (London 10 June 2013) < www.theguardian.com/housing-network/2013/jun/10/tenants-private-rented-sector-benefit-cap> accessed 28 March 2014.

137 *R on the Application of SG and Others* (n 123) paras 46–50, 56 (Lord Dyson).

138 Reeve-Lewis (n 136); A Gentleman, 'The Families priced out of their London Homes by Benefit Cap' *The Guardian* (London 5 March 2014) <www.theguardian.com/society/2014/mar/05/families-priced-out-london-homes-benefit-cap> accessed 28 March 2014.

139 *Chapman v UK* [2001] 33 EHRR 18, para 99; *St Brice and Another v London Borough of Southwark* [2002] 1 WLR 1537, para 21 (Kennedy LJ); R *on the Application of HC v Secretary of State for Work and Pensions, Secretary of State for Local Government and Communities, HM Revenue and Customs v Oldham Metropolitan Borough Council* [2013] EWHC 3874 (Admin), para 71 (Supperstone J); CESCR, 'General Comment No 7: The Right to Adequate Housing (Article 1 Paragraph 1 of the Covenant)' in Economic and Social Council, *Official Records, 1998: Supplement No 2* (E/1998/22, UN 1998).

for households including children or Article 3 ECHR for rare adult applicants whose circumstances are such as to constitute inhuman or degrading treatment.

The compliance of one aspect of recent social security reform in Great Britain, the stiffened sanctions regime, with the UK's ECHR obligations may be questioned. A judicial challenge on the basis of Article 8 or Protocol 1 Article 1 would provide welcome clarification. Further potential issues emerge when the proposed reforms are compared to the state's obligations under other international human rights instruments. The non-retrogression principle may be seen to be sufficiently flexible to allow some retrogression in some areas, possibly including reduction of the level of cash benefits, and is thus likely to provide a poor basis for a legal challenge to an individual policy decision. Nonetheless, benefits must be above a certain minimum level to comply with provisions on social security and social assistance, including Article 66 ILO C102 and Articles 12 and 13 ESC. As has been demonstrated, the UK's compliance with at least two of these three articles can be questioned.

The practical consequences at devolved level of non-compliance varies depending on the region and the instrument concerned. Wales and, until now, Scotland lack competence for social security and therefore the opportunity to develop an alternative approach. In Northern Ireland, a finding of incompatibility of the sanctions regime with the ECHR rights would render the Assembly incapable of following its usual policy of emulating social security policy in Great Britain as it lacks competence to legislate contrary to ECHR. The position in relation to the other instruments is less clear-cut. Both the Agreement and the Northern Ireland Act 1998 suggest that devolved legislation *ought* to comply with the UK's international obligations generally. However, with enforcement currently in the hands of the Secretary of State, it would be extremely surprising if the UK government were on human rights grounds to prevent Northern Ireland following a course central government had itself set. As with ECHR at present, judicial oversight would form a more effective means of protecting human rights. If the devolved institutions were similarly debarred from acting contrary to international law generally, adherence to the Great Britain model, already under political pressure, could become legally problematic even outside the narrow field of sanctions.

Discussion and conclusion

The UK government has given a 'solemn commitment to support, and where appropriate implement' the provisions of the Good Friday Agreement.[140] The extent to which it has done so in respect of the document's human rights provisions is mixed. Incorporation of the ECHR into the law of Northern Ireland has been achieved, and in a manner that binds the devolved legislature to a much greater extent than its incorporation into UK law binds Parliament. The commitment to consider recommendations from the NIHRC on the desirable content of a Bill of Rights for Northern Ireland might be argued to have been delivered upon, although it currently seems unlikely that any Bill of Rights will be enacted by Parliament as a result, and almost certain that any such Bill would not enhance the protection of socio-economic rights beyond that afforded by the ECHR. Finally, the requirement to legislate to ensure the state's international obligations are fulfilled in Northern Ireland finds expression in political oversight of the actions of devolved institutions, but has no judicial element and confers no binding obligation on the Secretary of State to take action.

140 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (Belfast, 10 April 1998, TS50 (2000) Cm 4705) (British–Irish Agreement) Article 2.

As a result, protection of social and economic rights in Northern Ireland is weaker than would have been the case had these been included in a Bill of Rights or had other human rights instruments been afforded equal status to the ECHR in the constitutional legislation. An approach reflecting the ECHR model would have important implications for current and future social security reforms considered by the devolved legislature. It is already possible to question whether the Northern Ireland Assembly has competence to introduce a sanctions regime equivalent to that now in force in Great Britain, due to possible incompatibility with the protection of human dignity underpinned by Articles 3, 8 and Protocol 1 Article 1 ECHR. If the ESC, the ILO C102 or the UNCRC were equally binding on the Assembly, such doubts might extend to the level of benefits. The long-established practice of parity in social security between Great Britain and Northern Ireland, already under strain to the political controversy that surrounds the UK government reform agenda, might also become legally difficult to sustain.

Such a development would raise serious economic and fiscal issues which fall beyond the scope of this paper. Given the extent of central subsidy to Northern Ireland's formally separate social security system, the affordability of more generous provision there would inevitably be questioned, in keeping with the familiar debate over the definition of 'maximum available resources' in socio-economic rights instruments.[141] Previous literature has argued that contributory benefits and those benefits that form the core of the UK's 'social union' are ill suited to regional control or payment at different rates in different regions.[142] Whether the risk of fiscal difficulties – which could be exacerbated if claimants from other regions migrated to Northern Ireland in order to take advantage of a higher level of support[143] – could outweigh the requirements of the international agreements and whether the UK government should underwrite higher benefit levels if these were necessitated by obligations imposed by Parliament would be hotly contested politically. Any perception from Scotland or Wales that provision for citizens' welfare in Northern Ireland had improved in comparison to Great Britain could also be expected to have implications for demand for full devolved competence in those regions.[144]

The present paper does not pretend to offer a solution to these complex considerations that would accompany a strict requirement to comply with socio-economic rights

141 For discussion, see R E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights' (1994) 16 Human Rights Quarterly 693; van Bueren (n 33); R Balakrishnan, D Elson, J Heintz and N Lusiani, *Maximum Available Resources and Human Rights: Analytical Report* (Center for Women's Global Leadership 2011); D Elson, R Balakrishnan and J Heintz, 'Public Finance, Maximum Available Resources and Human Rights' in Nolan et al (n 120).

142 K C Wheare, *Federal Government* (Greenwood Press 1963) 156; P Sutherland, 'Social Security Law and Administration from an Australian Perspective' (Ulster Law Clinic seminar, Belfast 13 June 2013); G Lodge and A Trench, *Devo More and Welfare: Devolving Benefits and Policy for a Stronger Union* (Institute for Public Policy Research 2014).

143 For a previous warning of this risk, see J Craig, HC (NI) Deb 22 September 1931, vol 13, col 1945; residence tests for some benefits were previously more onerous in Northern Ireland than in Great Britain because of the perceived risk of migration from the Irish Free State and later Republic of Ireland – see T Fahey and E McLaughlin, 'Family and State' in A F Heath, R Breen and C T Whelan (eds), *Ireland North and South: Perspectives from Social Science* (Proceedings of the British Academy 1998/OUP 1999) 128; N Yeates, E McLaughlin and G Kelly, 'Social Security in Ireland, North and South' in N Yeates and G Kelly, *Poverty and Social Security: Comparing Ireland, North and South* (report on seminar hosted by Statistics and Research Branch, DSD and Social Security Research Group, Dundalk, November 2001) 2.2.

144 Northern Ireland's Finance Minister claimed in 2014 that his counterparts in Scotland and Wales were 'incredibly jealous' of the region's devolved competence for social security, even as he cautioned against any expectation that more than minor departures from the approach in Great Britain would be feasible – see Hamilton (n 16) 4.

agreements applied to a devolved region but not to the national legislature. It does highlight an apparent gap between the commitments entered into in 1998 by the UK government in respect of human rights in Northern Ireland and subsequent legislation (or, in the case of the Bill of Rights, lack of). Delivery in full on these commitments would call into question the policy of every government of Northern Ireland since 1920, whether devolved or direct rule, that social security in the region should almost without exception mirror that in Great Britain, a policy whose future under the current Executive already appears less certain than at almost any point in the history of Northern Ireland.

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When 'reform' meets 'judicial restraint': Protocol 15 amending the European Convention on Human Rights

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Introduction

The European Court of Human Rights (the ECtHR, Court/Strasbourg Court) is presently facing a number of challenges. The perennial problem of its increasing workload has led the Court to implement a number of reforms. Ensuring compliance with its decisions is another strategic goal for the Court, especially with regard to highly non-compliant states. In addition, a number of commentators and governments have recently engaged in a debate concerning the limits of the ECtHR's jurisdiction: is the Court going too far and – therefore – producing judgments that lack legitimacy?

In this challenging era for the Court, Protocol 15 amending the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR) was adopted in June 2013. One of the main features or novelties of this important Protocol is the inclusion of a specific reference to the *subsidiarity principle* and the *margin of appreciation* the contracting parties enjoy when applying the Convention. Indeed, Article 1 of the Protocol provides:

> At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows:
>
> 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

The two terms should be briefly explained. First, the margin of appreciation is an 'interpretational tool' developed by the Strasbourg Court 'to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in traditions and culture'.[1] Put differently, the doctrine implies that 'the state is allowed a certain measure of

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1 Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 Human Rights Law Journal 1.

discretion, subject to European supervision, when it takes legislative, administrative, or judicial action in the area of a Convention right'.[2] Second, in international law, the principle of subsidiarity 'regulates how to allocate or use authority within a political or legal order, typically in those orders that disperse authority between a centre and various member units', and suggests that 'the burden of argument lies with attempts to centralize authority'.[3] The most well-known application of the principle in the Strasbourg machinery is the exhaustion of domestic remedies rule.[4]

Protocol 15 will enter into force once ratified by all member states (Article 7); the experience with Protocol 14 has shown that this might not be a smooth and straightforward process.[5] The Protocol contains further provisions in addition to Article 1, most notably, Article 2, which extends the age limit of sitting judges to 74,[6] and Article 4, which reduces the limitation period to submit an application to the Court from six to four months. The focus of this paper is, however, on Article 1 of the Protocol, due to its controversial or ambiguous nature: critics of the Strasbourg Court expect that the insertion of the Protocol into the Convention's corpus will bring about a restraint in the so-called 'activist' interpretative activity of the Court.[7]

This article is the first contribution aimed at explaining the rationale behind the adoption of Protocol 15, as well as assessing the impact of the Protocol on the Court's jurisdiction. Once ratified, the Protocol will be at the core of legal debate as regards the margin of appreciation conferred upon states and the operation of the subsidiarity principle within the Convention machinery. To that end, this paper advances two claims in relation to Protocol 15. The first point concerns the background to its adoption. It is argued that the Preamble is the product of a *compromise* between two competing tendencies: on the one hand, the Strasbourg institutions, led by the Court, stressed the reform agenda and placed the Protocol in the context of the reduction in the ECtHR's workload; on the other, certain governments, led by the UK, saw in the new Protocol an opportunity for judicial restraint or an answer to their anxieties concerning an increasingly activist Court, in accordance with the ongoing debate on the Court's legitimacy. It will be argued that this is all the more important since the divergent driving forces behind the adoption of the Protocol will play their own distinctive role once the issue of the interpretation of the new Preamble arises

2 David Harris et al, *Law of the European Convention on Human Rights* (OUP 2009) 11. The *Handyside* case (concerning Article 10(2) ECHR) is considered the decisive case for the development of the doctrine: 'The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights . . . Consequently, Article [10(2) ECHR] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'; *Handyside v UK*, App no 5493/72, 7 December 1976, para 48.

3 Andreas Follesdal, 'The Principle of Subsidiarity as a Constitutional Principle in International Law' (2013) 2 Global Constitutionalism 37, 37–8.

4 Article 35(1) ECHR.

5 See Christina G Hioureas, 'Behind the Scenes of Protocol No 14: Politics in Reforming the European Court of Human Rights' (2006) 24 Berkeley Journal of International Law 718; for more on Protocol 14 see also the 'Subsidiarity' section below. As to the current status of signatures and ratifications of Protocol 15, see <www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=&CL=ENG> accessed 24 June 2015.

6 This Article states that 'Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22', and amounts essentially to an amendment of present Article 23(2) ECHR, providing that: 'The terms of office of judges shall expire when they reach the age of 70.' In addition, Article 23(1) ECHR states that the non-renewable term of judges should amount to a period of nine years.

7 See, for example, <www.theguardian.com/law/2013/jun/03/european-human-rights-protocol-15> accessed 30 March 2015.

before the ECtHR. In this respect, the importance the Court has attached to the Preamble of the Convention should also be underlined.[8]

Second, and assessing the text of the new preambulary paragraph, it is emphasised that the formulation of the text, subordinating the margin of appreciation doctrine to the Court's supervisory jurisdiction, does not support any expressed ambition, on the part of some contracting parties, to actually encourage the ECtHR's so-called judicial restraint. This is pivotal because it marks a departure from the status quo, whereby the ECtHR confines the margin of appreciation doctrine to its overall supervision through its *jurisprudence*; once Protocol 15 is in force, the new Preamble will imply that this confinement stems *directly* from the *Convention*. Thus, it will be argued that the new preambulary paragraph eventually fails to impose limitations on the ECtHR's existing interpretative practices. In fact – but strictly *legally* – this very text could potentially provide grounds for the Court to employ the paragraph as a vehicle to strengthen its constitutional position. Nonetheless, it is submitted that this is *politically* quite improbable, given that the discussion on the Court's legitimacy occupies a prominent place in academic discourse and beyond. The Court is aware of this discussion and therefore the probability of such a move is – for the foreseeable future – remote.

This contribution is structured as follows. Its first part offers an analysis of the background to the adoption of Protocol 15. Competing interests are identified, including the position of the Strasbourg institutions and the UK government. The second part assesses the main features introduced by Protocol 15 to the Preamble. Three additions can be identified: the reference to the margin of appreciation; the reference to the subsidiarity principle; and the subordination of the margin of appreciation doctrine to the supervisory jurisdiction of the Court. The article concludes by suggesting that the new Preamble, while being the product of a compromise between the two aforementioned competing tendencies, eventually fails to restrain the ECtHR's existing interpretative approach as to the Convention.

1 Background and rationale: divergent ambitions

The position of the Strasbourg institutions

As a preliminary remark, it is noted that the reform of the Court was the subject of three successive high-level conferences at Interlaken, Izmir and Brighton; these conferences took place between 2010 and 2012.[9] Moreover, following the Brighton Declaration,[10] the Committee of experts on the reform of the ECtHR published an open call for

8 Speech by Dean Spielmann at the Max Planck Institute for Comparative Public Law and International Law, 'Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2013) <http://echr.coe.int/Documents/Speech_20140113_Heidelberg_ENG.pdf> 8 accessed 30 March 2015; see also the relevant discussion below.

9 See Council of Europe, 'Reforming the European Convention on Human Rights: Interlaken, Izmir, Brighton and Beyond – A Compilation of Instruments and Texts Relating to the Ongoing Reform of the ECHR' (2014) <www.coe.int/t/dghl/standardsetting/cddh/reformechr/Publications/Compilation%20Reform ECHR2014_en.pdf> accessed 30 March 2015.

10 High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration (2012) <http://echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 30 March 2015 (the Brighton Declaration). The Brighton Conference was organised under the UK's chairmanship of the Committee of Ministers.

contributions on the long-term future of the Convention and the Strasbourg Court.[11] The preparation of the draft text of Protocol 15 was assigned by the Committee of Ministers to the Steering Committee for Human Rights (CDDH). The latter had, of course, to take into account the views expressed by the Strasbourg machinery and, most notably, the Court, the states' positions and the submissions by other relevant actors working in the field of human rights; equally important, the CDDH had to consider 'the questions dealt with in [specific] paragraphs' of the Brighton Declaration.[12]

Shortly before the Brighton Conference, the Court submitted a preliminary opinion.[13] The opinion clearly emphasised the waves of reform that had taken place during the past 15 years and saw the Brighton Conference as an opportunity to build on the success and shortcomings of Protocol 14, the pilot judgment procedure, and so on and so forth.[14] The preliminary opinion identified the member states as crucial allies in the implementation of the Convention; dialogue with national courts was enthusiastically encouraged and steps were proposed in order to deal with inadmissible, repetitive or non-priority cases.[15] The aim of the Brighton Conference, according to the Court, had to be to secure a 'manageable' case load subject to two conditions: the preservation of the right to individual petition; and the promotion of effective remedies/mechanisms at the national and international level for cases the Court is not able to deal with.[16] In brief, the priority for the ECtHR was the reduction of its workload, with a view to safeguarding its efficiency and ultimately its legitimacy vis-à-vis citizens/petitioners.

In a somewhat different vein, the Brighton Declaration departed from the 'reform' discourse, underlining the centrality of the subsidiarity principle and the sovereignty of the parties to the Convention:

> The States Parties and the Court share responsibility for realising the effective implementation of the Convention, underpinned by the fundamental principle of subsidiarity. The Convention was concluded on the basis, *inter alia*, of the sovereign equality of States. States Parties must respect the rights and freedoms guaranteed by the Convention, and must effectively resolve violations at the national level. The Court acts as a safeguard for violations that have not been remedied at the national level. Where the Court finds a violation, States Parties must abide by the final judgment of the Court.[17]

The responsibility of states to comply with the judgments of the Court was still duly stressed. However, it is at point 12 of the Declaration that one finds a clear invitation to the Court to refer to the subsidiarity principle and to the margin of appreciation doctrine, and to amend the Convention's Preamble accordingly:

11 See the call and the contributions at <www.coe.int/t/dghl/standardsetting/cddh/reformechr/Consultation_en.asp> accessed 30 March 2015.

12 See Committee of Ministers, 'Securing the Long-term Effectiveness of the Supervisory Mechanism of the European Convention on Human Rights' (2012) paras 3, 4, and 6 <https://wcd.coe.int/ViewDoc.jsp?id=1943985&Site=CM> accessed 30 March 2015.

13 Preliminary Opinion of the Court in preparation for the Brighton Conference (2012) <www.coe.int/t/dgi/brighton-conference/documents/Court-Preliminary-opinion_en.pdf> accessed 30 March 2015 (Preliminary Opinion).

14 Ibid. The pilot judgment procedure was first adopted in *Broniowski v Poland*, App no 31443/96, 22 June 2004, as a means of responding to the 'proliferation of structural and systemic violations capable of generating large numbers of applications from different countries'; see Preliminary Opinion (n 13), point 7.

15 Ibid.

16 Ibid point 25.

17 Brighton Declaration (n 10) point 3.

> The Conference therefore:
>
> a) Welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments;
>
> b) Concludes that, for reasons of transparency and accessibility, a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the Preamble to the Convention . . .

The above was confirmed by the Explanatory Report to Protocol 15,[18] which, apart from the abovementioned points 3 and 12 of the Brighton Declaration, explicitly referred (in fact reproduced, at point 9) to point 11 of the Declaration as well:

> The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

Thus, the above paragraph underlined that the Court should have 'due regard' to the margin of appreciation; in addition, the reference to the link between subsidiarity and the margin of appreciation is evident.

The Explanatory Report also referred to the 'transparency and accessibility' of the principle of subsidiarity and the margin of appreciation, 'these characteristics of the Convention system';[19] this was also inspired by the Brighton Declaration and the proposals contained therein, suggesting that the visibility of remedies at the national level should be increased.[20] Another message stemming from these terms is that the reformulation of the Preamble will incite applicants to exhaust national remedies before turning to Strasbourg,[21] and thus the overall amount of inadmissible applications solely on the grounds of lack of compliance with the exhaustion rule will be reduced. Importantly, the Explanatory Report pointed out that the new Recital aims at incorporating the margin of appreciation doctrine '*as developed by the Court in its case law*'.[22]

As to the views of the Parliamentary Assembly, the Committee on Legal Affairs and Human Rights noted that 'the proposed changes to the text are principally of a technical and uncontroversial nature', and states were therefore urged to proceed with all the

18 Protocol 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report (CETS No 213) (2013) <www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 30 March 2015 (Explanatory Report).

19 Ibid point 7.

20 Brighton Declaration (n 10) point 9 (referring, inter alia, to the establishment of independent national human rights institutions, the introduction of new domestic legal remedies and the appropriate translation of the ECtHR's judgments or other documents).

21 As required by Article 35(1) ECHR.

22 Explanatory Report (n 18) point 7 (emphasis added).

appropriate steps so as to speed up the process of ratification.[23] In its Report, the Committee reacted to member states' preoccupation with criticism of the Court by stating that the implementation 'of Convention standards in States Parties' is equally important, in that '[s]tressing the need to reform – and criticising – the [ECtHR] tends to mislead the public by suggesting that reform of the Court alone is needed'.[24]

Taking into consideration the aforementioned *official* positions of the Strasbourg organs and especially of the ECtHR, one concludes that the Protocol essentially attempts to distinguish responsibilities and reaffirm member states' crucial role in the prevention of human rights violations or their elimination at the national level. In fact, the Court's view, expressed via its preliminary opinion, almost endorses this approach as a means of reducing the perennial problem of its increasing workload. It is therefore evident that, generally, the Strasbourg institutions viewed Protocol 15 as part of a broader reform agenda, whereby the amendments contained in the Preamble would be of a primarily technical nature. It is in the Brighton Declaration that we find the firmest references to states' sovereignty, and it is worth examining this matter in detail.

A RESPONSE TO *HIRST (NO 2)*?

This section examines whether the first Article of Protocol 15 could also be attributed to British anxieties concerning an increasingly activist Court. One rather influential line of argumentation in the UK has it that, although human rights are universal in their conception, their application and implementation should best be left to the 'hands' of national authorities and courts.[25] This is not a recent development. It should be remembered that, in his well-known dissenting opinion in *Golder*, Fitzmaurice concluded in 1975 as follows: '[i]f the right [of access to courts] does not find a place in Article 6.1, it clearly does not find a place anywhere in the Convention. This is no doubt a serious deficiency that ought to be put right. But it is a task for the contracting states to accomplish, and for the Court to refer to them, not seek to carry out itself.'[26]

A number of interesting deductions stem from the preparatory work of the CDDH and its Committee of Experts, demonstrating that the reality behind the adoption of Protocol 15 is somewhat more complicated when compared to the approach taken by the Court and the Parliamentary Assembly post-Brighton, but before the adoption of the final text. First, during its meeting in June 2012, the CDDH acknowledged that only Article 1 of the forthcoming Protocol would be a 'challenging' amendment; the remaining amendments were viewed as 'relatively straightforward'.[27] It was also added that the new text 'should stay within the consensus of the Brighton Declaration, respect the balance of the existing preamble and be comprehensible to the general public'.[28] Second, the Report produced by the Committee of Experts in October 2012 clearly referred to 'potentially conflicting

23 Committee on Legal Affairs and Human Rights, 'Draft Protocol No 15 to the European Convention on Human Rights' (2013) <www.assembly.coe.int/Communication/ajdoc11_2013.pdf> accessed 30 March 2015.

24 Ibid point 3.

25 Lord Hoffmann, 'The Universality of Human Rights' (2009) Law Quarterly Review 416, critically assessed by Christos Rozakis, 'Is the Case-law of the European Court of Human Rights a Procrustean Bed? Or is it a Contribution to the Creation of a European Public Order? A Modest Reply to Lord Hoffmann's Criticisms' (2009) 2 UCL Human Rights Review 51.

26 *Golder v UK*, App no 4451/70, 21 February 1975, Separate Opinion of Judge Sir Gerald Fitzmaurice, para 48. For more on Fitzmaurice's (different) understanding of the Convention, see Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2013) 359–65.

27 See CDDH's Report of 1 July 2012, CDDH(2012)R75, p 6.

28 Ibid.

positions' concerning the first Article, and concluded that the final text sought to serve a number of interconnected aims: to refrain from defining relevant terms, possibly with a view to leaving this task to the Court; and, by doing so, to avoid presenting the Court as the '*originator* of the doctrine of the margin of appreciation' and to avoid 'refer[ring] to *the role of the Court* in relation to the margin of appreciation'.[29] Equally important, the Committee did not accept proposals to include the phrases 'subsidiarity in the *interpretation of the Convention*' and 'a margin of appreciation in *executing* Court judgments'.[30] In addition, the ECtHR's opinion of 6 February 2013 on Article 1 of the Protocol (that is, after the final text was agreed – reference to this opinion is also made below) not only underlined a preference, on the part of the Court, to refer to the margin of appreciation 'as developed by the Court in its case law', but it also confirmed that the text was the product of a 'compromise' in order to facilitate an agreement.[31]

The submissions by pertinent civil society actors on Protocol 15 ECHR should also be taken into consideration. A significant number of NGOs published a joint statement in June 2013, underlining that this Protocol 'must not be allowed to result in a weakening of the Convention system and human rights protection in Europe'.[32] Moreover, the NGOs favoured a more balanced drafting of the Preamble, notably one that would explicitly refer to other interpretative principles developed by the Court, such as the proportionality principle, the interpretation of the Convention as a 'living instrument' or the 'principle that rights must be practical and effective rather than theoretical and illusory'.[33] These views were also endorsed by the European Group of National Human Rights Institutions.[34]

The UK signed the Protocol on the day it was opened for signature and informed the CDDH that 'it attaches great importance to Protocol 15' and hopes that 'all States Parties will sign and ratify it as soon as possible so that the measures agreed in the Brighton Declaration may be rapidly implemented'.[35] Simultaneously, a press release issued by the UK Ministry of Justice emphasised that the Court's reform decided during the Brighton Conference and the subsequent adoption of the Protocol 'was one of the key priorities for the UK's chairmanship of the Council of Europe' and, furthermore, that the new package entails that '[t]he court will not normally intervene where national courts have clearly applied the Convention properly'; lastly, it was mentioned that 'the Court should not routinely overturn the decisions made by national authorities'.[36] The press release was, of

29 Committee of Experts on the Reform of the Court (DH-GDR), 2nd meeting of 29–31 October 2012, DH-GDR(2012)R2, 3 (emphasis added).

30 Ibid (emphasis added).

31 CDDH, 'Opinion of the Court and of the Parliamentary Assembly on Draft Protocol No 15 to the European Convention on Human Rights' 7 June 2013, CDDH(2013)015, 2–3. The Parliamentary Assembly in its opinion of 26 April 2013 emphasised as well that the reference to the doctrine of margin of appreciation should be understood 'as developed by the Court's case law'; ibid 5.

32 Joint NGO Statement, 'Protocol 15 to the European Convention on Human Rights Must not Result in a Weakening of Human Rights Protection' (2013) <www.amnesty.org/en/library/info/IOR61/007/2013/en> accessed 30 March 2015 (Joint Statement).

33 Ibid 2. The 'living instrument' method has enabled the Court to adopt a dynamic interpretation, taking into consideration the 'present-day conditions', embedding a 'higher standard of protection' and accommodating 'new technologies or . . . social change'. See Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 European Constitutional Law Review 173, 177–8.

34 CDDH/DH-GDR, 'Compilation of Written Comments on Draft Protocol No 15' 26 October 2012, DH-GDR(2012)012, 2.

35 CDDH, 'Review of the Council of Europe Conventions' 2 April 2014, CDDH(2014)005, 14. It should also be noted that the UK ratified Protocol 15 on 10 April 2015.

36 See Press Release, 'UK Delivers European Court Reform' <www.gov.uk/government/news/uk-delivers-european-court-reform> accessed 30 March 2015.

course, a political document directed mainly at the national audience or part thereof. Still, the statement by the UK Ministry of Justice aligns with a significant number of warning signs delivered by the current UK government and even by members of the judiciary, questioning the ambit of the ECtHR's authority.[37] These signs have recently been characterised by the incumbent President of the Court, Dean Spielmann, as disappointing, given that the UK was one of the founding states of the Council of Europe.[38]

The current state of human rights affairs in the UK is primarily characterised by the balance the Human Rights Act 1998 strikes between the doctrine of parliamentary sovereignty[39] and the Convention. This is reflected in ss 2–4 of the Act. The Act essentially injected 'fundamental values . . . intrinsic to representative democracy' in a deeply 'procedural' UK constitution, 'based on a commitment to a particular form of representative majoritarian democracy and responsible government'.[40] Section 2(1) imposes an obligation upon UK courts and tribunals to 'take into account' any judgment or opinion of the ECtHR. Section 3(1) states that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. If this is not possible and regarding primary legislation only, s 4(2), read in conjunction with s 4(1), empowers certain high-ranking courts to issue a declaration of incompatibility. The exact ambit of these sections or the Act itself is a question open to debate. With respect to the fairly contentious s 2(1), for example, Clayton reads that section as leaving it to the courts to decide 'the weight to be given to the Strasbourg jurisprudence', not least since 'it was not the government's intention to require the domestic courts to be bound by Strasbourg decisions'.[41] For Sales, the so-called 'mirror principle' implies that UK courts should generally – but not always – follow judgments of the Strasbourg Court, unless there are convincing reasons for them to do otherwise; this means that, although the discretion as to the weight ultimately remains with the courts, Parliament's intention was that 'the weight to be given to [Strasbourg jurisprudence] should be great'.[42]

The law is, of course, evolving through the UK courts' jurisprudence, which cannot be discussed here extensively.[43] Suffice it to briefly refer to the well-known views of Lord Bingham in *Ullah*: '[t]he duty of national courts is to keep pace with the Strasbourg

37 See 'European Court is not Superior to UK Supreme Court, says Lord Judge' *The Guardian* (London 2013) <www.theguardian.com/law/2013/dec/04/european-court-uk-supreme-lord-judge> accessed 30 March 2015.

38 BBC, *Hardtalk – Dean Spielmann* <www.bbc.co.uk/programmes/n3cstljm> accessed 24 June 2015. Along similar lines, former President Bratza found 'deeply regrettable' the proposals within the UK to withdraw from the ECHR; Nicolas Bratza, 'The Relationship between the UK Courts and Strasbourg' [2011] European Human Rights Law Review 505, 506.

39 It is needless to point out that the Diceyan 'orthodoxy' is facing increasing challenges, including from the Human Rights Act 1998; see, for example, John McGarry, 'The Principle of Parliamentary Sovereignty' (2012) 32 Legal Studies 577; Anthony Bradley, 'The Sovereignty of Parliament – Form or Substance?' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (OUP 2011) 35; *R (Jackson) v Attorney General* [2005] UKHL 56; or the very recent case *R (Evans) v Attorney General* [2015] UKSC 21 (the 'black spider memos'), which will no doubt prompt further reflections on the relevancy of the traditional understanding of parliamentary sovereignty. For a more reconciliatory approach compare, however, Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

40 David Feldman, 'The Human Rights Act and Constitutional Principles' (1999) 19 Legal Studies 165, 166.

41 Richard Clayton, 'Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law' [2012] Public Law 639, 640–1.

42 Philip Sales, 'Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine' [2012] Public Law 253, 255–8.

43 See, in this respect, Sales (n 42); Clayton (n 41); Bratza (n 38); Colm O'Cinneide, 'Human Rights Law in the UK – Is There a Need for Fundamental Reform?' [2012] European Human Rights Law Review 595; Francesca Klug, 'The Long Road to Human Rights Compliance' (2006) 57 Northern Ireland Legal Quarterly 186.

jurisprudence as it evolves over time: no more, but certainly no less';[44] or to the statement (with 'considerable regret') by Lord Hoffmann that 'the United Kingdom is bound by the Convention, as a matter of international law, to accept the decisions of the ECtHR on its interpretation';[45] or to the more balanced position in *Manchester City Council v Pinnock* that the UK Supreme Court is not 'bound to follow every decision of the [ECtHR]', but

> [w]here, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [UK] law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for [the UK Supreme Court] not to follow that line.[46]

This meticulously drafted balance is presently experiencing an unmatched degree of scrutiny[47] due to – among other cases – one (controversial, for some) decision of the ECtHR. In the well-known *Hirst (No 2)* case, the Strasbourg Court held that the blanket ban on voting rights imposed upon all prisoners was disproportionate and inconsistent with the right to vote, as guaranteed by Article 3 of Protocol 1 ECHR.[48] Putting aside the discussion of the case in the media, *Hirst (No 2)* was met with varying reactions from the UK courts and the UK Parliament, the latter being split into three groups: the first group stressed the importance of complying with international law and effectively respecting the rule of law; the second group favoured the sovereignty of Parliament and eyed Strasbourg as a threat; and yet another favoured extensive deliberation on this issue as a means of influencing the European Court.[49] But it was only after *Hirst (No 2)* that a major debate on the relationship between the Convention and the domestic legal order took place in Westminster, which, according to Bates, cannot but suggest that the progressively expanding jurisdiction of the Court before that case was duly accepted on the basis of a 'political calculation' by successive UK governments, although the consequences of this 'commitment' were occasionally viewed as 'unwelcome'.[50]

One line of argument on why the ECtHR overstepped its authority was that Article 3 of Protocol 1 ECHR does not grant universal suffrage, but is destined at guaranteeing a specific democratic procedure.[51] This is flawed, not least since it is in clear contrast to the Court's expressly adopted view since 1987.[52] However, criticism has been levelled against

44 *R (on the Application of Ullah) v Special Adjudicator* [2004] UKHL 26, para 20.

45 *Secretary of State for the Home Department v AF* [2009] UKHL 28, para 70; regret was expressed because the relevant decision of the ECtHR was, in Lord Hoffmann's view, 'wrong'.

46 *Manchester City Council v Pinnock* [2010] UKSC 45, para 48. Compare also the brief discussion of *R v Horncastle* in the concluding section below.

47 As Judge Bratza put it (referring to *Hirst No 2* (n 48)): '[t]he vitriolic – and I am afraid to say, xenophobic – fury directed against the judges of my Court is unprecedented in my experience'. See Bratza (n 38) 505.

48 *Hirst v UK (No 2)*, App no 74025/01, 6 October 2005, paras 76–85. See also s 3 of the Representation of the People Act 1983. Importantly, however, the Court left it to the UK to decide how, under its wide margin of appreciation, it will implement this judgment and comply with Article P1–3; see paras 83–4.

49 Sophie Briant, 'Dialogue, Diplomacy and Defiance: Prisoners' Voting Rights at Home and in Strasbourg' [2011] European Human Rights Law Review 243, 250.

50 Ed Bates, 'British Sovereignty and the European Court of Human Rights' (2012) Law Quarterly Review 382, 406–7.

51 David Davis, 'Britain Must Defy the European Court of Human Rights on Prisoner Voting as Strasbourg is Exceeding its Authority' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Edward Elgar 2013) 67–8.

52 See *Mathieu-Mohin and Clerfayt v Belgium*, App no 9267/81, 2 March 1987. For some discussion on the *travaux préparatoires* behind Article P1–3, see Nikos Vogiatzis, 'Mapping the Jurisdiction of the European Court of Human Rights further to the "Reasonable Intervals" Clause of the Right to Free Elections' [2013] European Human Rights Law Review 401.

the Court from outside the UK as well. Zwart considers, for instance, that the case was an instance where the ECtHR pursued a strategy to target a highly compliant state so as to increase the overall boundaries of protection, especially because prisoners lack the right to vote in other contracting states as well.[53] In any case, the fact remains that, in light of strong domestic opposition, the UK government has yet to implement the ECtHR's decision.[54]

Another – interconnected with Brighton – manifestation of the British anxieties vis-à-vis the Strasbourg Court is the UK government's persistence in drafting its own Bill of Rights, an idea that would, in all probability, amount to the repeal of the Human Rights Act 1998.[55] The independent Commission on a Bill of Rights, appointed to examine this possibility, submitted its final report in December 2012; the majority of members found that 'there is a strong argument in favour of a UK Bill of Rights', but two members opined otherwise as they were not convinced that there are flaws in the way the Human Rights Act 1998 currently operates and is applied by the domestic courts.[56] Individual members openly denounced the ECtHR on the grounds of *Hirst (No 2)* and the 'judicially activist approach' taken by Strasbourg 'in the last 30 years', which undermines – according to the authors – 'the democratically expressed will of Parliament'.[57] Many have criticised the necessity or the motives behind such a move: Elliott argues, for example, that, regardless of the content of the list of rights contained in a possible new Act, the adoption of a mechanism which would '[make] more difficult the vindication of extant legal rights by requiring litigants more frequently to traverse the road to Strasbourg' is perfectly imaginable.[58] For Harvey, the process is primarily informed by an 'inward looking' agenda, which does not pay sufficient attention to the complexities of the UK's constitutional design.[59]

A COMPROMISE, LEAVING OPEN QUESTIONS OF INTERPRETATION

The above analysis reveals that the Brighton Declaration and the subsequent Protocol 15 should be viewed as a story of competing interests leading to a compromise. The 'reform' discourse advanced by the Court and the Parliamentary Assembly had to be reconciled with British concerns about an increasingly 'activist' Court.[60] This is not unfamiliar territory for

53 Tom Zwart, 'More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights Is in Need of Repair and How It Can Be Done' in Flogaitis et al (n 51) 71, 80.

54 For the legal developments after *Hirst (No 2)* (n 48), see Colin Murray, 'We Need to Talk: "Democratic Dialogue" and the Ongoing Saga of Prisoner Disenfranchisement' (2012) 62 Northern Ireland Legal Quarterly 57.

55 Mark Elliott, 'After Brighton: Between a Rock and a Hard Place' [2012] Public Law 619; O'Cinneide (n 43). The debate did not commence in light of Brighton, but constitutes part of a broader discussion on the functionality of the Human Rights Act – see, in this respect, Colin Harvey, 'Taking the Next Step? Achieving Another Bill of Rights' [2011] European Human Rights Law Review 24; Merris Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 Modern Law Review 883.

56 Commission on a Bill of Rights, 'A UK Bill of Rights? The Choice Before Us' (2012) vol 1, 175–7.

57 Lord Faulks QC and Jonathan Fisher QC, 'Unfinished Business', in Commission on A Bill of Rights (n 56) 182.

58 Elliott (n 55) 627.

59 Harvey (n 55) 41.

60 This is confirmed by Judge Costa, who observed that, during the Izmir and Brighton conferences, 'the attitude has been less favourable to the Court', sending the following message: 'governments (or some of them) wish to compel the Court to exercise increased self-restraint in its scrutiny', particularly in relation to sensitive issues, the prisoners' right to vote being the evident example. See Jean-Paul Costa, 'The Relationship between the European Court of Human Rights and the National Courts' [2013] European Human Rights Law Review 264, 265.

the Convention.[61] What remains to be assessed, though, is whether and to what extent the final text reflects such a compromise, or whether the actual solution might be more promising for the Court than its critics imagined.

2 Three elements of Article 1 of Protocol 15 in context

The margin of appreciation

The new Preamble will state that the contracting parties 'enjoy a margin of appreciation'. It is therefore appropriate to provide some clarification as to the meaning and scope of this term. The margin of appreciation doctrine generally places the Court in a position to ask a number of questions, including the following: when exactly are restrictions to a right necessary in a democratic society? When does the legislation under examination go below the common standards in most European countries? When may these restrictions not be justified with reference to the constitutional and historical background of the respondent state?[62] The doctrine takes other 'manifestations' as well, including 'the Court's respect for the facts as established by the domestic courts or their interpretation of domestic law'.[63] The doctrine is irrelevant for specific Convention rights, a point which is returned to below. For Arai-Takahashi, the proportionality principle and the doctrine possibly interact: '[t]he more intense the standard of proportionality becomes, the narrower the margin allowed to national authorities'.[64]

Some commentators consider that the Strasbourg Court could provide further guidance as to the use and application of this doctrine. Letsas invited the Court to distinguish between the 'substantive' and 'procedural' use of the margin of appreciation, namely between cases where 'the applicant did not, as a matter of human rights, have the right he or she claimed', and cases where the ECtHR 'will not substantively review the decision of national authorities as to whether there has been a violation'.[65] For the ECtHR's President, the application of the doctrine is indeed 'predictable only to a certain degree', but this is inevitable as the facts and the legal framework of the case are of utmost importance: the margin 'is not a fixed unit of legal measurement[,] [n]or is it applied at the Court's own pleasure'.[66]

In an effort to apply the proportionality principle consistently, the ECtHR will often seek for – what is termed as – the European consensus, the identification of pan-European legal agreement on a – frequently – sensitive or controversial matter. The interpretative instrument of European consensus could also benefit from a precise definition, on the part of the Court, in order to unravel its true legitimising factor and to bring about 'clarity and foreseeability to case law in relation to almost all Convention rights'.[67]

61 See Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] Public Law 152; Bates (n 50) 382.

62 Anthony Bradley, 'Introduction: The Need for Both International and National Protection of Human Rights – The European challenge' in Flogaitis et al (n 51) 5–6.

63 Dean Spielmann, 'Whither the Margin of Appreciation?' (2014) 67 Current Legal Problems 49, in particular 55 (and case law cited therein).

64 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 14.

65 George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 81.

66 Spielmann (n 63) 56.

67 Kanstantsin Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' [2011] Public Law 534.

To the possible surprise of many contemporary critics of the Court, the ECtHR had to deal with certain rather severe allegations during the 1990s, including from UK politicians, all centring on the tenet that it was relying too much on the margin of appreciation the contracting parties enjoy.[68] Thus, the Court was accused inter alia of 'denial of justice', 'resignation', 'opportunism' and avoiding adjudication in sensitive cases.[69]

If one now considers the amended text of the Preamble, the first thing to be noted is that the new formulation departs from the initial intention to refer to the term '*considerable* margin of appreciation'.[70] In addition, as discussed above, the Explanatory Report highlighted that the margin of appreciation is dependent on the facts of the case and the rights in question.[71] Equally important, according to the explanatory text, the notion of margin of appreciation should be understood *in line with the Strasbourg case law*.[72] This qualification does not feature in the text of the new preambulary paragraph. The ECtHR was quick to note that, although the text is incomplete, and 'could give rise to uncertainty as to its intended meaning', the fact that 'the drafters' intentions have been clarified' was not without legal consequences.[73] The Court added, in particular, that the Explanatory Report, as well as the documents prepared under the CDDH, '[form] part of the *travaux préparatoires* of the Protocol and thus [are] relevant to its interpretation'.[74] The Joint NGO Statement also observed that the subordination of the doctrine to the ECtHR's interpretative practices entails a confirmation of specific principles: 'the Court has always accepted that the doctrine of the margin of appreciation does not apply at all in respect of some rights, such as freedom from torture and other ill-treatment'.[75] The Strasbourg Court arguably believed that the inclusion of the phrase 'as developed by the Court's case law' would recognise the '*provenance* of the margin of appreciation',[76] but the CDDH refrained from developing the text further.

The removal of the term 'considerable' is noteworthy because the Court itself on a number of occasions has recognised that the extent of the states' discretion is significant. To take the example of the abovementioned prisoners' right to vote, in *Mathieu-Mohin* the ECtHR accepted that the contracting parties 'have a *wide* margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with'.[77] Still, the omission of the term 'considerable' may not be overstressed; the doctrine interacts[78] with the subsidiarity

68 See Mahoney (n 1) 1; the author also refers to an opinion expressed at the time by Lord Lester of Herne Hill, who argued that the margin of appreciation '[had] become as slippery and elusive as an eel' and could 'become the source of a pernicious "variable geometry" of human rights'. See also Timothy Jones, 'The Devaluation of Human Rights under the European Convention' [1995] Public Law 430.

69 Mahoney (n 1) 1.

70 See Elliott (n 55) 623, commenting on the Brighton Declaration (n 10) and comparing the final text of the Declaration with a leaked, preparatory version of February 2012, drafted in the context of the UK's chairmanship of the Council of Europe's Committee of Ministers, which indeed referred (at point 17) to the 'considerable margin of appreciation' the states need – according to the drafters of this document – to enjoy.

71 Explanatory Report (n 18).

72 Ibid point 7.

73 Opinion of the Court (n 31) point 4.

74 Ibid.

75 Joint Statement (n 32) 3.

76 Spielmann (n 63) 58 (emphasis added).

77 *Mathieu-Mohin and Clerfayt v Belgium* (n 52) para 52 (emphasis added). The Court has consistently followed this approach on P1–3. See, recently, *Söyler v Turkey*, App no 29411/07, 17 September 2013, para 33.

78 Explanatory Report (n 18).

principle, enabling the Court to essentially entrust the protection of a specific right (or the justification of its restriction) to the domestic order and, in particular, the domestic courts.

Subsidiarity

It would not be hyperbole to suggest that the ECtHR more often than not 'treasures' the notion of subsidiarity. Subsidiarity has various meanings.[79] The principle indeed penetrates in a number of ways the Convention, the Court's function and the implementation of its decisions. The classic understanding of subsidiarity in the Convention machinery is the exhaustion of domestic remedies rule; otherwise, the application is considered inadmissible.[80] Moreover, although the extent of the margin of appreciation is primarily defined by the matter/case at hand and the right in question,[81] subsidiarity may also be viewed as granting contracting parties greater discretion: this was duly acknowledged by the Explanatory Report to Protocol 15 and the Brighton Declaration.[82] Further, subsidiarity is pivotal for the enforcement of the ECtHR's judgments;[83] this entails not only that states parties have a number of options as to 'how to fulfil their obligations under the Convention',[84] but also that they are encouraged to 'develop domestic capacities and mechanisms to ensure the rapid execution of the Court's judgments'.[85] In addition, subsidiarity presupposes *prevention* at the domestic level, including the establishment of appropriate legal remedies.[86] The new Preamble aptly reflects this tenet, since the '*primary* responsibility to secure the rights and freedoms' rests with states.[87] In a formulation echoing s 2 of the Human Rights Act 1998, the Brighton Declaration invited national courts and tribunals to 'take into account the Convention and the case law of the Court'.[88]

Pragmatically, the subsidiarity principle has been employed to justify a number of reforms seeking to reduce the enormous workload of the Strasbourg Court. The Court may have managed to significantly reduce pending cases below the threshold of 100,000,[89] but the problem remains unresolved.

In 2005, Lord Woolf sent a clear warning sign with his report on the working methods of the Court, in which he identified possible reforms that would not require amendments to the Convention.[90] Among others, it was proposed that national extra-judicial institutions could play a catalyst role in the reduction of the Court's workload,[91] while the possibility of

79 For a convincing definition of the principle in international law see Follesdal (n 3) 37–8.

80 Article 35(1) ECHR.

81 Mahoney (n 1) 1.

82 Explanatory Report (n 18).

83 Article 46(1) ECHR states that: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

84 Brighton Declaration (n 10) point 29(b).

85 Ibid point 29(a)i.

86 Ibid points 7 and 9(c)iii.

87 Article 1 Protocol 15 (emphasis added).

88 Brighton Declaration (n 10) point 7.

89 Press Release, 'President Spielmann Highlights the Court's Very Good Results in 2013' (2014) <http://hudoc.echr.coe.int/webservices/content/pdf/003-4653899-5638176> accessed 31 March 2015. It should also be noted that, according to the Provisional Annual Report 2014, the number of pending cases was further reduced by the end of 2014 to 70,000.

90 Lord Woolf, 'Review of the Working Methods of the European Court of Human Rights' (2005) <www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf> accessed 30 March 2015.

91 In this respect, the Brighton Declaration (n 10) refers to the establishment of 'an independent National Human Rights Institution' (point 9(c)i).

establishing Satellite Offices of the Registry, especially in countries producing a high number of inadmissible complaints, was duly underlined.[92] In 2006, another report was produced by a group of experts, containing additional recommendations.[93] Amendments to the Convention were not subsequently avoided, and Protocol 14 entered into force despite the initial Russian opposition.[94] According to the President of the Court, this Protocol is mainly responsible for the massive reduction in the number of pending cases.[95]

It is the severe problem of the increasing workload[96] that has prompted commentary on the overall constitutional position of the ECtHR. Has the time come for the Court to focus on its 'constitutionalist' function, that is, 'clarifying standards, holding states to account' or developing rights and standards 'beyond their literal . . . conceptions', instead of its 'adjudicatory' one, possibly with the implication of restraining the right of individual petition?[97] In their review of 'the "official" and the "academic/judicial" debates' on the ECtHR's constitutionalisation, Greer and Wildhaber 'advocate "constitutional pluralism" as the best analytical paradigm for the Convention system and also the best framework for the identification and pursuit of procedural and other reforms'.[98] Other more cautious approaches favour a more efficient division of labour between the Grand Chamber and the Chambers, in order for the right of individual petition to be maintained, a right that admittedly preserves the Court's own legitimacy.[99]

The Court is well aware of this debate. In accordance with the 'reform' discourse discussed above, in its opinion before Brighton it realistically acknowledged that there is 'a mismatch between the Court's workload and its capacity', and that the Convention system may only be efficient by adopting the principle of shared responsibility, since '[t]he Court should not in principle, and cannot in practice, bear the full burden of work generated by implementation of the Convention'.[100] These considerations demonstrate that the reference to the subsidiarity principle under Protocol 15 is arguably viewed by the Court as a positive development.[101]

92 Lord Woolf (n 90) 5.

93 Report of the Group of Wise Persons to the Committee of Ministers (2006) CM(2006)203 <https://wcd.coe.int/ViewDoc.jsp?id=1063779&Site=CM> accessed 30 March 2015.

94 The Protocol brought about (among others) a number of procedural amendments to the Convention, notably: the single-judge formation (Articles 26 and 27 ECHR); the competence of committees to decide cases further to well-established case law (Article 28(1)b ECHR); the 'significant disadvantage' criterion for admissibility (Article 35(3)b ECHR). For a discussion see, for example, Lucius Caflisch, 'The Reform of the European Court of Human Rights: Protocol No 14 and Beyond' (2006) 6 Human Rights Law Review 403; Michael O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' [2008] European Human Rights Law Review 1.

95 Press Release (n 89).

96 As noted above (n 89), the results in 2014 were encouraging: the number of pending cases fell below 70,000.

97 Fiona de Londras, 'Dual Functionality and the Persistent Frailty of the European Court of Human Rights' [2013] European Human Rights Law Review 38. For an overview of the academic debate, see, for example, Steven Greer and Luzius Wildhaber, 'Revisiting the Debate about "constitutionalising" the European Court of Human Rights' (2012) 12 Human Rights Law Review 655; Robert Harmsen, 'The European Court of Human Rights as a "Constitutional Court": Definitional Debates and the Dynamics of Reform', in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (OUP 2007) 33.

98 Greer and Wildhaber (n 97) 659, 684. They explain that the 'official debate is dominated mostly by Strasbourg officials, diplomats and NGOs'.

99 Kanstantsin Dzehtsiarou and Alan Greene, 'Restructuring the European Court of Human Rights: Preserving the Right of Individual Petition and Promoting Constitutionalism' [2013] Public Law 710.

100 Preliminary Opinion (n 13) points 4, 5.

101 CDDH (n 31) point 5.

However, this does not mean that the precise *ambit* of the term enjoys universal acceptance. For the Court's President (citing *Handyside*),[102] the question 'Subsidiarity to what?' necessitates the following answer: '[t]o "the national systems safeguarding human rights", and not, as some seem to think, to the political will or policy of the national authorities'.[103] For de Londras, the effectiveness of the Convention requires 'a level of political subsidiarity between the Council of Europe's political processes and the Court', in the sense that a more robust political supervision of systemic violations would provide the Court with sufficient breathing space to deal with its constitutional function.[104]

On the inclusion of both terms in the Preamble

Elliott observed that the references to the subsidiarity principle and the margin of appreciation feature in the Preamble and not in the main corpus of the Convention.[105] Indeed, the draft version of the Declaration, presented in February 2012, stated that the 'transparency and accessibility of the principles . . . should be enhanced by their express inclusion in the Convention'.[106]

If the above version of the Declaration was adopted, the two terms could have been included in specific Articles of the Convention or possibly Article 1 ECHR,[107] which can be seen as an expression of the subsidiarity principle.[108] Two questions stem from this point. First, would it have been preferable if the references had featured in specific Articles, for instance, Articles 8–11 of the Convention, where the Court has employed the margin of appreciation doctrine to identify whether interference with these rights may be justified under public interest grounds?[109] Second, would it have been possible to envisage the insertion of the clause into the existing Article 1 ECHR?

It is initially essential to remind ourselves of the importance the Court has attached to the Preamble of the Convention. As is well known, the Court follows a contextual interpretation, suggesting that the Convention should be interpreted as a whole; this is linked to its approach that the 'object and purpose' of the Convention need to be duly considered.[110] According to the Vienna Convention, which informs the work of the Court, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes' – the Preamble forms part of the context of a Treaty.[111] Thus, the Preamble 'articulates

102 *Handyside* (n 2) paras 48–50.

103 Spielmann (n 8) 2. However, as previously mentioned (above n 2), the margin of appreciation is 'given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force'; see *Handyside* (n 2) para 48.

104 De Londras (n 97) 44.

105 Elliott (n 55) 623, referring to the Brighton Declaration, but with consequent implications for Protocol 15 as well.

106 Ibid. See also point 19(b) of the draft version <www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft> accessed 30 March 2015.

107 Article 1 ECHR provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

108 See Mahoney (n 1) 2; compare also the discussion below.

109 See, for example, Harris et al. (n 2) 12.

110 See, for example, Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights* (OUP 2014) 73ff.

111 Vienna Convention on the Law of Treaties, Articles 31(1) and 31(2). Aust argues that there is no hierarchy of norms in Article 31, but a 'logical progression': '[o]ne naturally begins with the text, followed by the context, and then other matters, in particular, subsequent material'. Anthony Aust, *Modern Treaty Law and Practice* (CUP 2013) 208.

certain fundamental precepts that the Court has drawn upon when interpreting the substantive provisions of the Convention'.[112] Judge Rozakis expressed the view that the current Preamble not only reflects the fact that 'all the contracting states express their expectations [therein] and describe their goals to be achieved through the implementation of the [Convention's] provisions', but also that some terms featuring therein, and notably 'the achievement of greater *unity*' and 'the maintenance and *further realisation* of Human Rights', clearly, 'and without stretching the meaning of the words to eccentric results', suggest that the drafters had in mind a 'more ambitious future' for the Convention.[113] Now, if one is willing to interpret the Preamble in this vein, one is simultaneously willing to accept that the 'post-Protocol 15' Preamble, featuring the principles of the margin of appreciation and subsidiarity, could perhaps imply a *less* ambitious future.

Regardless of the fact that since in its jurisprudence to date the Court has not subjected Article 1 ECHR to the margin of appreciation, it is certainly preferable that the doctrine features in the Preamble, instead of as part of Article 1. Indeed, the laconic Article 1 declares the states' obligation to embed the rights granted by the Convention and it has been employed by the Court to underline the significance or to delineate the ambit of other rights and, more specifically, in order to stress the contracting parties' *positive obligations*.[114] An insertion of the doctrine in Article 1 would be in contradiction to the unquestionable fact that the margin of appreciation is inapplicable vis-à-vis certain rights or aspects of rights. Such an insertion could incite respondent states to press for its recognition throughout the corpus of – and the rights guaranteed by – the Convention; this would be a highly unfortunate consequence. Even in that case, the final word on the interpretation of an amended Article 1 ECHR would, of course, remain with the Court.

In this regard, it has been noted that Article 1 ECHR is a 'clear' expression of the subsidiarity principle, granting 'the primary responsibility' to member states.[115] Indeed, the Court has confirmed that Article 1, combined with Article 13 ECHR, verifies that '[t]he machinery of complaint to the Court is . . . subsidiary to national systems safeguarding human rights'.[116] Further, Article 1 has been used to stress the states' primary responsibility in the *implementation of judgments* and the practical impossibility of the ECtHR undertaking this task.[117] While the meaning of the subsidiarity principle is precisely this, one may consider whether the broad formulation of Article 1 is a reflection of the subsidiarity principle *only*,[118] especially since subsidiarity and the margin of appreciation doctrine go hand in hand, and the latter is inapplicable vis-à-vis certain Convention rights. Besides, Article 1 has been frequently used by the Court to define the *territorial scope* of its *own*

112 Spielmann (n 8) 8. He refers to *Golder v UK*, App no 4451/70, 21 February 1975 (the rule of law and access to courts); *United Communist Party v Turkey*, App no 19392/92, 30 January 1998 (effective political democracy); *Matthews v UK*, App no 24833/94, 18 February 1999 (effective political democracy); *Ireland v UK*, App no 5310/71, 18 January 1978 (collective enforcement); *Mamatkulov and Askarov v Turkey*, App nos 46827/99 and 46951/99, 4 February 2005 (collective enforcement).

113 Rozakis (n 25) 57 (emphasis in original).

114 See, for example, *McCann and Others v UK*, App no 18984/91, 27 September 1995, para 161; *Kontrová v Slovakia*, App no 7510/04, 31 May 2007, para 51.

115 Mahoney (n 1) 2.

116 *Kudła v Poland*, App no 30210/96, 26 October 2000, para 152.

117 *Papamichalopoulos and Others v Greece*, App no 14556/89, 31 October 1995, para 34, discussed by Lucja Miara and Victoria Prais, 'The Role of Civil Society in the Execution of Judgments of the European Court of Human Rights' [2012] European Human Rights Law Review 528, 529.

118 By this it is not implied that Mahoney (n 1) viewed Article 1 as an expression of the subsidiarity principle *only* or that a reference to subsidiarity cannot be inferred from the aforementioned Article. Instead, the purpose of this paragraph is to explore to what extent this reference is so *clear* or whether this article serves other (and perhaps equally, if not more, important) purposes as well.

jurisdiction, including possible extra-territorial obligations of contracting parties.[119] Moreover, one could equally place Article 1 alongside Article 19 ECHR, which establishes the ECtHR with a mission to 'ensure the observance of the engagements undertaken by the High Contracting Parties', in other words with a mission to essentially ensure compliance with the content of Article 1. Thus, although the primary responsibility remains with the states, the ECtHR's pivotal supervisory role is duly stressed under Article 19 of the Convention. Lastly, as previously stated, Article 1 has been used by the Court to further develop or interpret positive obligations. It may therefore be argued that Article 1 serves multiple purposes, the subsidiarity principle being just one of them. For these reasons, an insertion in Article 1 of the above two terms would be unfortunate.

What remains to be assessed is whether the new Preamble is, from the perspective of the protection of human rights, a preferable option when compared to the insertion of the terms in specific Articles where the Court has conferred upon contracting parties a margin of appreciation. A tentative answer may be endeavoured. If a possible insertion in specific Articles (for example, Articles 8–11 or 2 ECHR) would be viewed[120] as imposing an *obligation* upon the Court to essentially reconsider its current interpretative approach vis-à-vis the aforementioned Articles possibly with a view to conferring upon states a *wider* discretion, then the post-Protocol 15 preambulary paragraph may be seen as expanding the discretion of the Court to refer to the principle of subsidiarity and the margin of appreciation. Still, since certain Strasbourg judges have attached great importance to the existing Preamble, notably in order to justify a more dynamic interpretation of Convention rights,[121] is a more cautious reliance on the Preamble's updated text to be expected by the Court, once the ratification of Protocol 15 takes place? This remains to be seen.

Two further points stemming from the preparatory work to Protocol 15 should also be discussed. First, it is understood that at least the majority of judges at the ECtHR would prefer a Convention (including its Preamble) which did not contain *any* reference to the margin of appreciation.[122] Clearly, this was politically not feasible, a point the Court was fully aware of. It is sufficient to consider, in this respect, the Brighton opening address of the UK Lord Chancellor and Secretary of State for Justice: 'we hope to get an agreement that makes clear that the protection of human rights goes hand-in-hand with democracy and the role of democratically-elected national parliaments'.[123] The inclusion in the Preamble should therefore be viewed as (yet another) compromise between two positions: the inclusion in the main body of the Convention and the overall omission of such a reference.

Second, concerning subsidiarity, the work of the CDDH demonstrates that the Strasbourg Court secured a number of (legally) important things: the avoidance of phrasing such as 'subsidiarity in the interpretation of the Convention', and the lack of a definition (in the Convention) of the term subsidiarity.[124] The discretion granted to the Court, in this respect, is considerable. As the President of the Parliamentary Assembly put it during the

119 See *Soering v UK*, App no 14038/88, 7 July 1989; *Banković and Others v Belgium*, App no 52207/99, 12 December 2001; *Al-Skeini and Others v UK*, App no 55721/07, 7 July 2011.

120 By commentators, or respondent states. Again, it should be emphasised that even if it was decided that the term would feature in specific Articles of the Convention, the authoritative interpretation of these Articles could be provided by the ECtHR only.

121 Rozakis (n 113).

122 See Council of Europe (n 9) 80–3 (Speech by Judge Bratza before the Brighton Conference); 77–80 (Speech by Jean-Claude Mignon before Brighton); Faulks and Fisher (n 57) 188; Spielmann (n 63) 57–9.

123 Council of Europe (n 9) 74.

124 See the relevant discussion at n 30 above.

Brighton Conference, the limit to subsidiarity is the effectiveness of the available machinery at the national level and, in any event, the last word remains with the Court.[125] Accordingly, for Judge Bratza, subsidiarity 'can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.'[126]

In order to assess the overall position of the Strasbourg Court post-Protocol 15, it is now appropriate to examine the last phrase of the new preambulary paragraph.

The supervisory jurisdiction of the ECtHR

The provision in the Convention's new Preamble that the margin of appreciation is 'subject to the supervisory jurisdiction of the European Court of Human Rights' deserves to be stressed. That is so because it will be the first time that the *Convention itself* will explicitly reflect the Strasbourg jurisprudential principle that the margin of appreciation doctrine is *subject to the Court's scrutiny*.

It should be remembered that the Explanatory Report states that the doctrine 'goes hand in hand with supervision' and '[i]n this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation'.[127] The Brighton Declaration pushed for a somewhat different formulation as it 'welcome[d] the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourage[d] the Court to give *great prominence* and *apply consistently* these principles in its judgments'.[128] This is not surprising, in light of the aforementioned dual rationale behind the initiatives leading to the adoption of the Protocol. However, the terms 'great prominence' and 'apply consistently' are not found in the Explanatory Report or, of course, in the new Preamble.

It is not difficult to imagine that respondent states will attempt to rely on the new Preamble as a means of solidifying their argumentation and justifying proportionate, in their view, restrictions to rights guaranteed by the Convention. In that case, the ECtHR might be convinced to respond to a consistent academic call and provide a more elaborate definition of the margin of appreciation doctrine. This is an additional angle to the reference to 'transparency' advanced by the Brighton Declaration.[129]

Regardless of this, the last phrase of the new Preamble serves essentially as a safeguard for the Court: no matter how elaborate a definition it provides, the Court is expected to hold firmly the status quo, namely its maintenance of the final word on states' discretion.

The precise formulation of the phrase prompts further consideration. It can be argued that, had the sovereign states not wished to allow the Court a 'supervisory jurisdiction' on the margin of appreciation, this particular phrase could have been omitted from the new paragraph. Put differently, while proponents of the Court might have wished for an inclusion, next to the margin of appreciation doctrine, of the phrase 'as developed by the Court's case law', and for good reasons,[130] one wonders whether the new text actually provides the Court with a lot more than this, given that it now has explicitly *under the Convention* the final say on this very matter. And, as highlighted above, it is arguably one thing if the Court itself confines the margin of appreciation doctrine to its overall supervision *through its jurisprudence*, and quite another if this confinement stems *directly* from

125 Mignon (n 122) 78.

126 Bratza (n 122) 82.

127 Explanatory Report (n 18).

128 Brighton Declaration (n 10) point 12(a) (emphasis added).

129 Ibid point 12(b).

130 Joint Statement (n 32) 2.

the *Convention* . The time that will elapse until the ratification of Protocol 15 will enable the Strasbourg Court to realise that a more 'developed text'[131] concerning the margin of appreciation would not necessarily be preferable to the existing explicit reference in the Preamble that the doctrine is *subject to its supervision*. The above analysis demonstrates that the Court is possibly concerned with a number of issues, including the following: that the provenance of the doctrine is unclear under Protocol 15; and that the States might heavily invoke the margin of appreciation, questioning its context-dependent nature and its inapplicability vis-à-vis specific Convention rights. The first point to be considered, in this respect, is that it is the ECtHR that will interpret the new Preamble, including the terms mentioned therein. The lack of a definition in the Convention of the doctrine and the presence of the phrase 'as developed by the Court in its case-law' in the Explanatory Report could easily enable the Court to deal with these concerns. Second, and equally important, a more 'developed text' in the Preamble under the aforementioned terms[132] could be viewed as limiting the Court's discretion: in that case, the ECtHR would need to follow its established case law on the margin of appreciation, however fragmented or uncertain it has been characterised as. Under the existing formulation, the Court has an additional strategic option at its disposal: to further limit the states' discretion (that is, to review its case law on the margin of appreciation) because the doctrine operates in the Convention *subject to its jurisdiction*. As is well known, while the Court takes into due consideration previous case law, it is not formally bound by precedent.

The ECtHR is fully aware, of course, of the discussions on its legitimacy[133] and may not be expected to embark on such a risky and expansive approach any time soon. Thus, it could be claimed that the above reflections are mainly legalistic in their nature, adhere too much to the final text, and do not pay sufficient attention to its background. However, it is important to underline that the new Preamble may be employed by the Court to defend its own legitimacy, while maintaining the same balanced[134] approach to its interpretation. Put simply, the Court could merely reiterate *pacta sunt servanda*, in other words, that it was 'the will of democratic states' to sign the treaty[135] and grant the Court the supervisory role and, therefore, the development and application of the margin of appreciation.

In any event, it is not possible to predict with absolute certainty the actual stance of the Court when it will be called upon to interpret the Preamble. The President of the Court, discussing possible developments on the margin of appreciation doctrine after Protocol 15, has given some early signs, observing that:

> [w]ithout prejudging – or even predicting – how exactly the Court will interpret the new provision when the time finally comes, the signs so far are that it will not be regarded as modifying the basis of the Court's review, laid down in the case-law of many years.[136]

This issue is returned to in the following section.

131 See above n 31. A more 'developed text', according to the Court, would refer to the margin of appreciation 'as developed by the Court in its case law'.

132 See above nn 31, 131.

133 It is not coincidental that former Presidents of the Court have written on the latter's legitimacy; see Costa (n 33); Bratza (n 38) – it is noteworthy that Judge Bratza highlights (at 506) that Strasbourg judges *are* actually elected (by the Parliamentary Assembly).

134 Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 Human Rights Law Review 57; he concludes (at 79): 'the Court has generally struck a fair balance between judicial innovation and respect for the ultimate policy-making role of member States in determining the spectrum of rights guaranteed by the Convention'.

135 Costa (n 33) 174.

136 Spielmann (n 8) 8.

In addition, the last phrase of the new Preamble places the Court in the strategic position to make use of the subsidiarity principle and the margin of appreciation doctrine to overcome perennial shortcomings of the machinery. For instance, the Court may refer to the subsidiarity principle so as to press for the enforcement of its judgments at the national level. Such an attitude would complement approaches favouring an increased diplomatic involvement from the Committee of Ministers.[137] The institutional reality remains that the Strasbourg Court, no matter how creatively it may use the Preamble, can only achieve so much in the field of implementation without the support of the Committee and, perhaps more importantly, of the national authorities. It is well-known that the enforcement regime is not always effective, especially with regard to persistently non-compliant states and the prevention of consistent breaches.[138] Recent research, however, presents a more optimistic picture as the influential Secretariat of the Council of Europe uses 'interpretive and monitoring tasks . . . to ensure the even-handed and impartial implementation of Court judgments'.[139]

3 Three (not necessarily divergent) directions for Protocol 15

Although one has to be fully aware of the limitations involved in assessing the direction of a Protocol not yet ratified by all the contracting parties, the above analysis enables us to formulate a number of possible (but not necessarily divergent) directions that may be taken. These are based on three initial remarks: (i) a Protocol containing such sensitive and controversial terms, adopted further to laborious negotiations by states and institutions with different priorities, cannot evade legal developments; (ii) the final word on the interpretation of the Protocol, including the new preambulary paragraph, cannot but remain with the ECtHR; but the latter (iii) is well aware of the discussions concerning its legitimacy, including the fact that the Protocol was essentially the product of the Brighton Declaration.

To begin with the most unlikely scenario, the new Protocol might be used by the Court to expand its supervisory jurisdiction with a view to reducing the states' margin of appreciation as applied so far. Although the text could legally support such an approach, this should be considered as improbable, for reasons explained in more detail below and relating to its legitimacy. Second, the new Preamble may be used by states to expand their margin of appreciation. The final text does not guarantee any success in such efforts, since it clearly refers to the supervisory jurisdiction of the Court and since the margin of appreciation doctrine does not feature, for example, in Article 1 ECHR. However, the positive consequence of a possible eagerness of certain respondent states to cite the new Preamble might be the much awaited clarification by the Court of the precise ambit of the margin of appreciation doctrine. Third, the new Preamble may be cited by the Court to point out the states' primary responsibility in the implementation of its judgments or their responsibility to establish or improve domestic remedies for the protection of Convention rights. The Court was not hostile to the inclusion of the term 'subsidiarity' in the Preamble, while also viewing Brighton as part of the reform agenda. This scenario is therefore probable.

137 De Londras (n 97) 44.

138 Philip Leach, 'The Effectiveness of the Committee of Ministers in Supervising the Enforcement of Judgments of the European Court of Human Rights' [2006] Public Law 443. Enforcement occupied a considerable part of the discussions in Brighton – see Council of Europe (n 9).

139 Başak Çali and Anne Koch, 'Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe' (2014) 14 Human Rights Law Review 301, 314. With the term 'Secretariat', the authors (at 304) refer to the 'Department for the Execution of Judgments of the European Court of Human Rights'.

Lastly, given that the amended Preamble is the outcome of two competing tendencies (on the one hand, the position of the Strasbourg institutions, and especially the ECtHR, and, on the other, the aspirations of certain states, and notably the UK), one thing is certain: the two tendencies will play their own roles once the issue of its interpretation surfaces.

Concluding remarks

This article explored the background to the adoption of Protocol 15 ECHR and assessed its main features. The focus was on Article 1 of the Protocol, which includes an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It was shown that the Preamble is the product of a compromise between two competing tendencies: on the one hand, the Strasbourg institutions, led by the ECtHR, stressed the reform agenda and placed the Protocol in the context of the reduction in the ECtHR's workload; on the other, certain governments, led by the UK, saw in the new Protocol an opportunity for judicial restraint or an answer to their anxieties concerning an increasingly activist Court, in accordance with the ongoing debate on the Court's legitimacy.

The remainder of this article considered the text of the new preambulary paragraph. It was observed that the new Preamble will by no means impose any duty upon the ECtHR to modify its interpretative methods, notably by lowering the standards of human rights protection it has developed over time (which only serve as the minimum standard of protection). It ultimately rests upon the Court to decide when and how it may resort to the new Preamble to essentially confirm that the margin of appreciation doctrine and the subsidiarity principle operate subject to the Court's supervisory jurisdiction. Put differently, the new preambulary paragraph fails to impose limitations on the ECtHR's existing interpretative practices. More specifically, whereas currently the ECtHR confines the margin of appreciation doctrine to its overall supervision *through its jurisprudence*, once Protocol 15 is in force, the new Preamble will imply that this confinement stems *directly* from *the Convention*. This means that a more adventurous avenue to be taken by the Court would be to further substantiate its supervisory realm via Protocol 15, in a sufficiently opportune political setting. If the leading role of the UK government in the drafting of preparatory documents behind the adoption of the Protocol is taken into consideration, one can expect the existing momentum to clearly point in a different direction.

Inversely, it cannot be excluded that the contracting parties or at least some of them will see in the new Preamble an opportunity to question any further or even existing limitations to their margin of appreciation, in which case the Court might be forced to clarify more precisely the ambit of the doctrine. This would be a positive development serving legal certainty. Lastly, the Court could also see in the Preamble an opportunity to stress subsidiarity in the execution of judgments, much in line with its own discourse before and after the Brighton Declaration which, as explained in this article, focused on the reform of the Convention machinery.

Protocol 15 may not be instantly viewed as a substantial revision of the Convention, but it is far from certain that its nature is simply 'technical and uncontroversial', as no doubt strategically the Parliamentary Assembly suggested. Once in force, it may prompt analogous discussions to the ones currently taking place concerning, for example, s 2 of the Human Rights Act 1998, namely debates concerning the ambit of human rights protection and the role of courts – national, supranational or international – in such a protection. In this perennial constitutional question, arguments regarding the ECtHR's legitimacy – a fairly recent academic debate – will come into play yet again.

The judges of the ECtHR have certainly engaged in the aforementioned legitimacy debate, and rightly so, but one thing should be stressed: the ECtHR needs to underline with

sufficient clarity that the question of its legitimacy may not be employed à la carte, in other words, whenever Strasbourg is not producing a desirable outcome for the respondent.[140] To return to an aforementioned example, could it really be ignored that the interpretation of Article 3 of Protocol 1 as a provision granting an *individual right to vote* took place in 1987,[141] and not in 2005, when *Hirst (No 2)* was decided? If so, why was the legitimacy question raised after that specific case?[142] One has to be clear: the ECtHR promotes an understanding of democracy (or democratic values) whereby the rule of law is an essential, if not inherent, feature, and 'pluralism, tolerance and broadmindedness' are prerequisites, to the extent that the majority may not always prevail.[143] And the debate is, in fact, similar to the debates taking place within the confines of a national legal order: the Convention in 'certain domains' 'disables democratic discretion' (understood as majority rule) to ensure the respect for fundamental rights and freedoms, and in some other areas it leaves a 'permissible spectrum' to national authorities.[144] The idea that democracy as majority rule could go as far as undermining fundamental or minority rights is not only outdated, but also contrary to equality,[145] an essential precondition for contemporary democratic states which are not or should not be concerned solely with the proper functioning of majority rule within the political system.[146] It is in the late twentieth century that we find approaches stressing the non-antagonistic, but '*mutually reinforcing* nature of rights and democracy'.[147] That said, it is unavoidable that the European or national judge might sometimes fail to strike the right balance, as it is unavoidable that the legislature might at some point produce bad laws; but it is only through this constructive interaction, whereby democracy and the rule of law are mutually dependent, that citizens can benefit the most.

To be sure, the Court is not expected to disregard the surrounding 'legitimacy' discourse and attempt a 'dynamic' interpretation of the new Preamble in the foreseeable future, although strictly *legally* it may be possible for it to do so. The ECtHR is certainly aware that the main issue to be resolved is its workload. It is to this area that efforts should be geared, and this perhaps explains why the Strasbourg actors and notably the Court, pre and post-

140 It has been argued that the UK's reactions against supranational judgments take place on an ad hoc basis, and that a long-term strategy based on dialogue and mutual understanding should be advanced; see Rt Hon Lady Justice Arden, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29 Yearbook of European Law 3.

141 *Mathieu-Mohin and Clerfayt v Belgium* (n 52).

142 Judge Caflisch clearly explained in his concurrent Opinion in *Hirst (No 2)* (n 48) the role of the Court within the Convention machinery. The Latvian Government as third-party intervener argued that the 'Court was not entitled to replace the views of a democratic country by its own view as to what was in the best interests of democracy'. Judge Caflisch responded: 'This assertion calls for two comments. Firstly, the question to be answered here is one of law, not of "best interests". Secondly, and more importantly, the Latvian thesis, if accepted, would suggest that all this Court may do is to follow in the footsteps of the national authorities. This is a suggestion I cannot and do not accept. Contracting States' margin of appreciation in matters relating to Article 3 [P 1] may indeed, as has been contended, be relatively wide; but the determination of its limits cannot be virtually abandoned to the State concerned and must be subject to "European control",' (para 3 of his Opinion)

143 Rainey et al (n 110) 79, discussing *Gorzelik and Others v Poland*, App no 44158/98, 17 February 2004.

144 Mahoney (n 1) 3.

145 For some arguments on why and how the ECtHR could realise political equality with an occasional reduction in the margin of appreciation see, notably, Rory O'Connell, 'Realising Political Equality: The European Court of Human Rights and Positive Obligations in a Democracy' (2010) 61 Northern Ireland Legal Quarterly 263, and, in particular, 266–7.

146 This is not the place to discuss the interplay between democracy and constitutionalism but see, in this respect, Richard Bellamy (ed), *Constitutionalism and Democracy* (Ashgate 2006).

147 Rory O'Connell, 'Towards a Stronger Concept of Democracy in the Strasbourg Convention' [2006] European Human Rights Law Review 281, 282.

Brighton, have used the 'reform' line of argumentation to justify the insertion of the subsidiarity principle.

In this vein, Protocol 15 may also be expected to feature in forthcoming discussions on a mutually constructive dialogue between the Strasbourg judges and the highest domestic judges and courts,[148] including in the UK, where common law still maintains its distinctive characteristics.[149] This dialogue necessarily presupposes that the ECtHR will duly consider the domestic input as well; the *R v Horncastle*[150] and *Al-Khawaja*[151] cases constitute an indicative example of such a stance.[152]

To conclude, one could accept that the Brighton Conference – at least insofar as the approach taken by the UK government is concerned – was another 'manifestation of a specific, and influential, strand within politico-legal discourse in the United Kingdom . . . characterised by a deep antipathy towards legal control of political . . . authority in general, and external –"European" – legal control in particular', in other words, a manifestation of 'a deep-seated commitment to the notion of the political constitution'.[153] This contribution argues that the final, adopted text of Protocol 15 does not reduce the intensity of this 'external' control. The position of the Strasbourg Court within the Convention is to secure minimum standards of protection of human rights, while granting states an – oftentimes wide – margin of discretion. Even if Protocol 15 might have been presented to the UK audience as a supposed reduction in the ECtHR's jurisdictional realm, a closer look at the new preambulary paragraph does not support such an approach. As the title of this contribution suggests, Protocol 15 might have been a constructive 'meeting' between Strasbourg voices pressing for reform and efficiency and certain states' voices dissatisfied with the ECtHR's allegedly activist approach. Nonetheless, there is no reason preventing the Strasbourg Court from being satisfied with the 'outcome' of this 'meeting'.

148 Compare in this respect an analysis of Protocol 16 ECHR, providing for an extension of the advisory jurisdiction of the ECtHR; Kanstantsin Dzehtsiarou and Noreen O'Meara, 'Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-control?' (2014) 34 Legal Studies 444.

149 For a case study on Article 6 ECHR, see Gordon Anthony, 'Article 6 ECHR, Civil Rights, and the Enduring Role of the Common Law' (2013) 19 European Public Law 75.

150 *R v Horncastle and Others* [2009] UKSC 14.

151 *Al-Khawaja and Tahery v UK*, App nos 26766/05 and 22228/06, 15 December 2011.

152 Duly stressed by the UK Supreme Court, see <supremecourt.uk/about/the-supreme-court-and-europe.html> accessed 30 March 2015.

153 Elliott (n 55) 626–7. For a discussion of the political constitution, see Special Issue: Political Constitutions (2013) 14 German Law Journal 2103.

NILQ 66(2): 151–77

'His home is his castle. And mine is a cage':[1] a new partial defence for primary victims who kill

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She said 'I'm savin' up my money and when I get the nerve I'll run
But Jim don't give up easily so I intend to buy a gun
He will never see the way he treats me is a crime
Somebody oughta lock him up but I'm the one 'Who's done the time'[3]

Abstract

This article provides an in-depth analysis of the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 which had the effect of repealing the Australian state of Victoria's only general 'partial defence' of defensive homicide, and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test. The abolition of defensive homicide means there is now no general 'partial defence' to accommodate cases falling short of self-defence. The change is likely to mean that some primary victims will find themselves bereft of a defence. This is the experience in New Zealand where the Family Violence Death Review Committee recently recommended the reintroduction of a partial defence, post-abolition of provocation in 2009. Primary victims in New Zealand are being convicted of murder and sentences are double those issued pre-2009. Both jurisdictions require that a new partial defence be introduced, and accordingly, an entirely new defence predicated on a fear of serious violence and several threshold filter mechanisms designed to accommodate the circumstances of primary victims is advanced herein. The proposed framework draws upon earlier recommendations of the Law Commission for England and Wales, and a comprehensive review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009, but the novel framework rejects the paradoxical loss of self-control requirement and sexed normative standard operating within that jurisdiction. The recommendations are complemented by social framework evidence and mandatory jury directions, modelled on the law in Victoria. A novel interlocutory appeal procedure designed to prevent unnecessary appellate court litigation is also outlined. This bespoke model provides an appropriate via media *and optimal solution to the problems faced by primary victims in Victoria and New Zealand.*

1 Ariel Caten, 'A Man's Home Is His Castle' (lyrics) on Faith Hill's album, *It Matters To Me* (1995).

2 I am incredibly grateful to Professor Warren Brookbanks (University of Auckland, New Zealand), Associate Professor Thomas Crofts (University of Sydney, Australia), Ben Livings (Senior Lecturer, University of New England, Australia), Associate Professor Arlie Loughnan (University of Sydney, Australia) and Professor Alan Reed (Associate Dean for Research and Innovation, Northumbria University) for their very helpful comments on earlier drafts of this article. Elements of this paper were presented to the Sydney Law School, Institute of Criminology (Nicola Wake, 'Extreme Provocation and Loss of Control: Comparative Perspectives' 18 March 2015). I thank members of the institute for their thoughtful contributions on that presentation. Any errors or omissions remain my own.

3 Caten (n 1).

Introduction

The Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (the 2014 Act) abolished the Australian state of Victoria's only general 'partial defence'[4] of defensive homicide and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test.[5] In the absence of a partial defence, self-defence becomes an all-or-nothing claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged. The 2014 Act also expanded the admissibility of social framework evidence (which includes, inter alia, the history of the relationship, cumulative impact of family violence, and social, economic and cultural factors that may impact on a family member) from homicide to all self-defence cases.[6] These amendments were complemented by the introduction of new juror directions in cases involving family violence.[7] Despite the aims of the Victorian Department of Justice (VDoJ), this 'one-size-fits-all' approach to self-defence may have unintended consequences in practice, with significant ramifications in intimate partner homicide cases.[8]

This article commends the amendments to self-defence, but the impact of these reforms 'should not be overstated'.[9] The existence of a partial defence is necessary to capture cases that fall outside the scope of self-defence, but do not warrant the murder label.[10] The evaluation undertaken by jurors in determining whether a partial defence applies can serve an important role in assessing societal opinion of the killing, thereby assisting the sentencing judge in imposing sentence.[11] It also has the effect of involving

4 The conviction was actually for defensive homicide, rather than a reduction from murder to manslaughter (although the effect was to substitute a murder conviction with the lesser offence); the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 3(4).

5 Ss 322N and 322K of the 2014 Act abolished common law (s 322N) and statutory versions of self-defence (Crimes (Homicide) Act 1958, ss 9AC (self-defence in murder cases) and 9AE (self-defence in manslaughter cases)).

6 Crimes Act 1958, s 322J, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014. For a detailed exposition of the relational nature of domestic violence, see Thom Brooks, *Punishment* (Routledge, 2012) ch 10.

7 Jury Directions Act 2013, ss 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4.

8 This article takes as its main focus cases of female on male intimate partner homicide, addressing the potential impact of the absence of an applicable partial defence. It should be noted, however, that the impact is relevant to both male and female defendants, both of whom may suffer from domestic abuse. The feminine pronoun will also be used throughout this article when referring to the primary victim, but this should not be interpreted as implying that only women may be considered the primary victim, nor should it be read as implying that the partial defence(s) are gender-specific. For a definition of the term 'primary victim', see page 153 below. For an excellent analysis of defensive homicide cases involving male defendants see, Kellie Toole, 'Self-defence and the Reasonable Woman: Equality before the New Victorian Law' [2012] 36 Monash University Law Review 250.

9 Hansard, Legislative Council, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 7 August 2014, Ms Pennicuik (Southern Metropolitan) 2419 citing Debbie Kirkwood, Mandy McKenzie, Libby Eltringham, Danielle Tyson, Bronwyn Naylor, Chris Atmore and Sarah Capper, 'Submission on the Department of Justice's Defensive Homicide: Proposals for Legislative Reform-Consultation Paper' (2013).

10 For a detailed analysis of potential partial defences, see Thomas Crofts and Danielle Tyson, 'Homicide Law Reform in Australia: Improving Access to Defences for Women who Kill their Abusers' (2013) 39 Monash University Law Review 864.

11 See, generally, Family Violence Death Review Committee (FVDRC), *Fourth Annual Report* (2014).

jurors in an important 'dialogue with the legislature and prosecutors'.[12] A comparative analysis with the position in New Zealand demonstrates that primary victims are being convicted of murder and sentenced more harshly than if a partial defence was available. The Family Violence Death Review Committee (FVDRC) defines the primary victim as an individual experiencing 'ongoing coercive and controlling behaviour from their intimate partner'. The predominant aggressor is the principal aggressor in the relationship who 'has a pattern of using violence to exercise coercive control'.[13] These terms will be used throughout this article. New Zealand has a restrictive sentencing regime and tighter self-defence provision than Victoria, but these differences do not detract from the unfairness in labelling the primary victim a murderer.[14] As Quick and Wells point out, evading the stigmatic murder label is often as important to primary victims as the sentence imposed.[15]

It is essential that Victoria and New Zealand adopt a more nuanced approach to reforming homicide defences. The introduction of a bespoke partial defence or offence predicated on a fear of serious violence provides a novel *via media* and optimal solution to the problems faced by primary victims within Victoria and New Zealand. These innovative proposals draw upon earlier recommendations of the Law Commission for England and Wales, in addition to an in-depth review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009 (the 2009 Act), as enacted.[16] The entirely new partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.[17] The defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These clauses include a 'normal person' test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[18] In cases where sufficient evidence is raised that the partial defence might apply, it is then for the prosecution to disprove the defence to the usual criminal standard. The defence is complemented by bespoke provisions on social framework evidence and *mandatory* juror directions where family violence is in issue. A new interlocutory appeal procedure that would serve to prevent unnecessary appellate court litigation is also advanced. The following analysis demonstrates not only the need for such a partial defence within Victoria and New Zealand, but also the extent to which this newly proposed model provides an advantageous framework for reform.

12 Mike Redmayne, 'Theorising Jury Reform' in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial* vol II (Hart 2006) 102, cited in Thomas Crofts, 'Two Degrees of Murder: Homicide Law Reform in England and Western Australia' (2008) 8(2) Oxford University Commonwealth Law Journal 187–210, 198.

13 FVDRC (n 11) 6. These terms are useful in that they are gender-neutral but, as Hamer identifies, they could not be used in a forensic context. My thanks to Associate Professor David Hamer (University of Sydney) for making this point. See also n 8 above on use of the feminine pronoun in this article.

14 For detailed discussion on the abolition of provocation and the restrictive sentencing regime operating in New Zealand, see Warren Brookbanks, 'Partial Defences to Murder in New Zealand' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) 271–90.

15 Oliver Quick and Celia Wells, 'Getting Tough with Defences' [2006] Criminal Law Review 514. See also Crofts and Tyson (n 10).

16 Law Commission, *Partial Defences to Murder* (Law Com No 290 2004); Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304 2006).

17 Coroners and Justice Act 2009, s 54(3).

18 Ibid s 54(5)–(6).

The decision to abolish partial defences in Victoria

In 2005, defensive homicide replaced provocation in a move intended to send a clear message that killings borne of male possessiveness, envy and rage were unacceptable.[19] The Victorian Law Reform Commission (VLRC) recommended abolition at a time when the Court of Appeal was considering the case of *Ramage*.[20] Ramage claimed he had lost control and killed his estranged wife, Julie, when she asserted that sex with him 'repulsed her', and said she was happy with another man.[21] In a 'dramatic' display of 'victim blaming' the trial became 'an examination, and ultimately crucifixion' of Julie, where her new relationship, marital unhappiness and comments regarding her life without Ramage were closely scrutinised.[22] Julie was unhappy as a result of Ramage's controlling and oppressive behaviour and the violence he inflicted on her, but a significant amount of abuse evidence was excluded on grounds that it was temporally too remote and/or 'potentially highly prejudicial'.[23] Morgan's observation that 'dead women tell no tales, tales are told about them' is a remarkably apt epithet of the case.[24] Convicted of manslaughter, Ramage was sentenced to 11 years' imprisonment, but released after a minimum non-parole period of 8 years. Following sentence, Julie's sister expressed her disappointment, noting that a murder conviction would have resulted in a higher sentence.[25] The recommendations of the VLRC, coupled with public outrage regarding the decision reached in *Ramage*, influenced the abolition of the partial defence.[26]

In the absence of provocation, the VLRC considered a new partial defence of excessive self-defence necessary to accommodate killings in response to domestic abuse, should self-defence fail.[27] The government responded by introducing defensive homicide. Designed to apply to 'understandable over-reaction' scenarios, murder could be reduced to defensive homicide where the defendant killed believing it necessary to defend herself/another, but reasonable grounds for that belief were absent.[28] The test asked jurors to assess whether the defendant believed her conduct was necessary to defend herself/another from death or really serious injury. If jurors concluded the defendant held that belief, or the prosecution failed to disprove that beyond reasonable doubt, the defendant would be acquitted of murder, and jurors were required to determine her liability for defensive homicide. The defendant would be guilty where the prosecution proved beyond reasonable doubt the defendant had no reasonable grounds for the belief.[29]

The repeated use of defensive homicide in cases involving one-off violent confrontations between men of comparable strength meant that defensive homicide might

19 VLRC, *Defences to Homicide: Final Report* (2004) (comments on provocation). Note, the VLRC recommended the introduction of excessive self-defence, not defensive homicide.

20 Ibid; *Ramage* [2004] VSC 508 [22] (Osborn J).

21 *Ramage* (n 20) [40] (Osborn J).

22 Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' [2006] 18(1) Current Issues in Criminal Justice 51, 54. See also, Phil Cleary, *Getting Away with Murder: The True Story of Julie Ramage's Death* (Allen & Unwin 2005) 136.

23 *Ramage* [2004] VSC 391 [46] (Osborn J).

24 Jenny Morgan, 'Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) Melbourne University Law Review 237.

25 AAP, 'Provoked Wife Killer Gets 11 Years' *Sydney Morning Herald* (Sydney 2004).

26 Ibid.

27 VLRC (n 19) 102.

28 Ibid para 3.101, citing Supplementary Submission 27 (Criminal Bar Association).

29 Ibid 12–13.

be perceived to have failed to produce the results intended.[30] The offence was criticised as inherently complex, difficult to apply, and lacking common sense.[31] It had the effect of diverting attention away from the (in)adequacy of self-defence. Popular opinion was heavily influenced by evocative media reports, lamenting deals that could 'get potential murderers off the hook', and advocating 'a stronger voice for crime victims'.[32] Men who 'escaped' potential murder convictions include: Dambitis,[33] who killed his victim with lumps of wood and his fists two days after being released from prison; Giammona,[34] who stabbed another prison inmate 16 times; a schizophrenic man who killed two men believing he was the clone of Hitler or Hitler's grandson;[35] Smith,[36] who, in a drug-induced psychosis, stabbed his victim 50 to 60 times because he allegedly called him gay and threatened him; and a drug addict, with 91 previous convictions, who killed his victim during the course of a drug-related robbery.[37]

Between 2005 and 2014, there were 33 convictions for defensive homicide in Victoria: 28 out of 33 were of men; 32 out of the 33 victims were men; and 27 out of the 28 men killed another man; meaning that only five women were convicted of the offence.[38] It was the case of *Middendorp*,[39] together with a comprehensive review produced by the VDoJ, which operated as a catalyst for abolition. Middendorp was convicted of defensive homicide after he brutally stabbed his estranged partner, Jade, to death because she attempted to bring a male friend into their home. According to Middendorp, Jade threatened him with a knife and, because of earlier violence, he believed he needed to defend himself from death or serious injury. The relationship was plagued by alcohol and physical abuse. Earlier reports by Jade indicated that Middendorp was responsible for the violence, but Middendorp blamed Jade, and her reliability was questioned at trial, where she was obviously unable to defend herself.[40] Like Julie Ramage, it was Jade who was put on trial when she was described as 'a troubled young woman' who deserved the 'prospect of growing out of her [drug and alcohol] addiction'.[41] At the time of the killing, Middendorp was subject to bail conditions and a family violence intervention order as a result of several alleged offences against Jade.[42] Middendorp was described as over 6 feet tall and 90kg,

30 VDoJ, *Defensive Homicide: Review of the Offence of Defensive Homicide* (VDoJ Discussion Paper 2010) 36.

31 VDoJ, *Defensive Homicide: Proposals for Legislative Reform* (VDoJ Consultation Paper 2013). See also, Adrian Lowe, 'New Calls for State to Overhaul Homicide Laws' (2010) The Age 6; and, Geoff Wilkinson and Courtney Crane, 'A Law Meant to Protect Women Is Being Abused by Brutal Men' *Herald Sun* (Melbourne 2012) citing Kate Fitz-Gibbon and Sharon Pickering.

32 Michael, 'Deals Could Get Potential Murderers off the Hook in Victoria' *Herald Sun* (Melbourne 2012); Robert Clark, 'Giving a Stronger Voice to Crime Victims' *Herald Sun* Law Blog (Melbourne 2012).

33 [2013] VSCA 329.

34 [2008] VSC 376.

35 *Ball* [2014] VSC 669.

36 [2008] VSC 617 [9].

37 *Taiba* [2008] VSC 589. See, generally, Matt Johnson, 'Killer Blow: Defensive Homicide Laws Hijacked by Thugs Will Be Scrapped' *Herald Sun* (Melbourne 2014).

38 Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014, Mr McCurdy, Murray Valley, 3144. For a contextual analysis of these figures see, DVRCV, *Justice or Judgement? The Impact of Victorian Homicide Law Reforms on Responses to Women Who Kill Intimate Partners* (DVRCV Discussion Paper No 9 2013).

39 [2010] VSC 202.

40 Ibid [7].

41 Ibid [17].

42 Ibid [4].

compared to Jade who was smaller and weighed approximately 50kg.[43] Middendorp wrestled the knife from Jade and stabbed her four times in the shoulder before she managed to stagger from the house. Witnesses observed Middendorp follow her, shouting, 'she got what she deserved', and calling her 'a filthy slut'.[44]

The facts in *Middendorp* bore the hallmarks of a brutal killing borne out of anger, sexual jealousy and male possessiveness. Middendorp was sentenced to 12 years' imprisonment with a minimum non-parole period of 8 years. The verdict was vituperatively criticised as 'laughable', 'too lenient', 'unsatisfactory' and 'all about provocation'.[45] There was widespread concern that the precedent might result in similar verdicts in other femicide cases. The case coincided with the VDoJ's review which concluded that the offence had been inappropriately used as a vehicle to drive provocation-type arguments; the (unclear) benefit to having defensive homicide for primary victims was substantially outweighed by the expense of inappropriately excusing men who kill; and the shift in emphasis from self-defence to defensive homicide implied that the primary victim's response was irrational rather than reasonable in the circumstances.[46] Shortly thereafter, the offence was abolished by the 2014 Act.

The decision to abolish defensive homicide was not unanimously supported. Indeed, a number of eminent scholars have advocated that reform should have focused upon plea-bargaining practice in Victoria, rather than the relatively embryonic operation of defensive homicide.[47] *Middendorp* is one of a limited number of defensive homicide convictions reached by jury verdict. In this respect, it is apparent that any partial defence needs to be framed in order to ensure that it is left to the jury in appropriate cases. The vast majority of defensive homicide convictions were achieved via plea bargains, mandating that the Crown withdraw related homicide charges.[48] Although plea-bargaining is an expeditious and financially beneficial way of obtaining a conviction, the lack of transparency associated with this prosecutorial discretion circumvents juror – and therefore social – evaluation as to whether an individual should be convicted of murder or manslaughter. It also prevents effective analysis of the reasons for accepting such pleas.[49] This lack of transparency fuelled 'public perceptions of clandestine outcomes, inequality and a lack of accountability' in relation to the application of defensive homicide.[50]

43 *Middendorp* [10].

44 Ibid [9].

45 Adrian Howe, 'Another Name for Murder' (2010) The Age; Kate Fitz-Gibbon, 'Defensive Homicide Law Akin to Getting Away with Murder' *The Australian* (Sydney 2012). Middendorp's subsequent appeal against conviction and sentence was unanimously dismissed; *Middendorp* [2012] VSCA 47.

46 VDoJ (n 31) viii–ix, and 27–8.

47 Kirkwood et al (n 9).

48 Hansard, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, 3 September 2014, Mr Pakula (Lyndhurst), 3135.

49 Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-Law Reform' (2011) 35 Melbourne University Law Review 905. See also, Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan 2014).

50 Flynn and Fitz-Gibbon (n 49) 907. Flynn and Fitz-Gibbon suggest that best practice guidelines modelled on the Attorney General's 'Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise' framework operating in England and Wales would assist in improving transparency, thereby ensuring that pleas are accepted only in appropriate cases. See also, Kirkwood et al (n 9) 8, and Debbie Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge 2013).

Amendments to self-defence: attempting to compensate for the lack of a partial defence?

The prospect of having no partial defence for primary victims highlighted the need to improve the law on self-defence and evidence admissibility. The 2014 Act replaced the existing statutory self-defence provisions relating to murder/manslaughter[51] and the general common law self-defence rules with a single test.[52] Self-defence represents an 'all-or-nothing' claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged. This effectively mirrors the law of England and Wales.[53] The test requires that the defendant believed force was necessary in self-defence and the conduct was reasonable in the circumstances as perceived by the defendant.[54] The introduction of s 322M of the 2014 Act implies that self-defence may be more accessible to primary victims in Victoria than it currently is in England and Wales. Section 322M specifies that, in cases involving family violence, self-defence may apply even where the threat is not imminent, or the force used is excessive.[55] The assumption is that reformulated self-defence will capture deserving cases, while other cases where self-defence is unsuccessfully raised will be considered during sentencing.[56] In murder cases, s 322K(3) requires that the defendant believed the conduct was necessary in order to defend herself/another from death or really serious injury. Section 322L further precludes the availability of the defence where the victim's conduct is lawful, and the defendant knows that the conduct is lawful at the time.[57]

The emphasis on family violence under s 322M challenges the stereotypical notion of self-defence as a one-off confrontation between two individuals of equal strength. It reflects contemporary recognition that a more nuanced approach must be adopted in cases where the primary victim wards off a physically stronger aggressor in a non-traditional self-defence situation. Ramsey heralded the Victorian provisions on self-defence as a radical and trendsetting example of feminist-inspired reform.[58] The cases of *SB*, in which a *nolle prosequi* was entered, and *Dimotrovski*, which resulted in a magistrates' discharge, have been 'cautiously' cited as evidence that earlier amendments to self-defence are working in practice.[59] Yet, the assumption that these cases demonstrate success of the new provisions 'may be premature'.[60] SB shot her stepfather after he demanded oral sex from her at gunpoint. Dimostrovski stabbed her husband after he hit her in the face, pushed her to the

51 See n 5.

52 Ibid.

53 Criminal Justice and Immigration Act 2008, s 76.

54 Crimes Act 1958 (Vic), s 322K, as amended by the Crimes (Abolition of Defensive Homicide) Act 2014.

55 This effectively re-enacts and expands the scope of s 9AH of the Crimes (Homicide) Act 2005 (the 2005 Act) beyond homicide cases. It should be noted that a lack of imminence will not necessarily bar a successful self-defence claim in England and Wales; *Attorney General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL). Nor does the defendant have to 'weigh to a nicety the exact measure of his defensive action'; *Palmer* [1971] AC 814; Criminal Justice and Immigration Act 2008, s 76(7).

56 See Crofts and Tyson (n 10) 865.

57 This effectively replicates s 9AF of the 2005 Act (now repealed).

58 Carolyn Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100(1) Journal of Criminal Law and Criminology 32–108 (commenting on earlier amendments to self-defence under the 2005 Act).

59 See, Crofts and Tyson (n 10) 884.

60 Toole (n 8) 270.

ground and attacked their daughter.[61] These cases did not proceed to trial because it was recognised that both defendants were acting in self-defence; their actions complied with 'traditional notions of self-defence'.[62] The problems presented by judicially invented constructs of imminence and proportionality were not at issue.[63]

Even with bespoke provisions dedicated to the unique circumstances of family violence, some primary victims may find themselves bereft of a defence in homicide cases. Abolition of both provocation and defensive homicide renders self-defence 'an all or nothing roll of the dice for women in these circumstances, and if they are unable to convince the court that self-defence has been made out, then what these women will face is conviction for murder'.[64] Despite the problems associated with defensive homicide, a number of legal practitioners, academics and key stakeholders identified that abolition would be a 'retrograde step'.[65] 'Introduced for sound reasons', defensive homicide provided 'a very important and compelling safety net for women who experience, and respond to family violence';[66] removal of that safety net on grounds that men have been inappropriately using it, in male-on-male combat, unfairly disadvantages primary victims.[67]

Five women were convicted of defensive homicide, all of whom might have faced a murder conviction had the offence been abolished.[68] One of the most recent female-on-male defensive homicide convictions did not involve family violence or a relationship between the defendant and victim. Copeland,[69] a 24-year-old heroin addict and prostitute, stabbed her 68-year-old client in the back and left, taking $420 from his wallet. According to Copeland, she feared that she would be raped or killed when he threatened her with a knife during an argument regarding payment. It was 'quite impossible' to tell exactly what happened, but had the evidence supported Copeland's version of events, self-defence would have been available.[70] The media labelled Copeland a 'drug addled prostitute',[71] and the sentencing judge was unsympathetic towards the mental illness from which she suffered. Maxwell J noted that there was 'no particular feature of Copeland's drug dependency which made it peculiarly or unusually intractable'.[72]

Copeland is clearly very different from the other female defensive homicide convictions that have involved significant history of abuse in intimate partner relationships. Consideration of a defendant's recognised medical condition would require the

61 See, Kim Stevens, 'Breakthrough Case – Dismissed Murder Charge Defence Successful under New Laws' *Shepparton News* (Shepparton 8 May 2009) 3, cited in VDoJ (n 30) 31–2, paras 108–9.

62 Danielle Tyson, Sarah Capper and Debbie Kirkwood, 'Submission to Victorian Department of Justice, Review of the Offence of Defensive Homicide' (2010) 8.

63 Toole (n 8) 270.

64 Ramsey (n 58). See also, Caroline Forell, 'Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia' (2006) 14(1) Journal of Gender, Social Policy and the Law 27–71. Hansard (n 38) Mr Pakula (Lyndhurst) 3137.

65 Hansard (n 38) Ms Graley (Narre Warren South) 3146, citing Mary Crooks and Sarah Capper of the Victorian Women's Trust.

66 Kirkwood et al (n 9) 1.

67 Ibid 8. See also, VDoJ (n 30) viii, ix and 29.

68 DVRCV, *Defensive Homicide an Essential Safety Net for Victims* (DVRCV 2014). See, *Williams* [2014] VSC 304; *Copeland* [2014] VSC 39 (11 February 2014); *Edwards* [2012] VSC 138; *Creamer* [2011] VSC 196; and *Black* [2011] VSC 152.

69 *Copeland* (n 68).

70 Ibid.

71 Mark Russell, 'Drug-addled Prostitute Jailed for Kitchen Knife Killing' (2014) The Age.

72 *Copeland* (n 68) [65].

introduction of a new partial defence equivalent to s 2 of the Homicide Act 1957, as amended, and not one predicated on a fear of serious violence.[73] It might be appropriate to consider a defendant's recognised medical condition as part of the circumstances of the individual case where he/she fears serious violence, considered further below.[74] The remaining defensive homicide convictions of primary victims illustrate the need for a partial defence based upon a fear of serious violence.

It has been suggested that the availability of defensive homicide, or an alternative partial defence, may result in defendants pleading guilty to a lesser offence rather than risk a murder conviction in claiming self-defence. It is also possible that a halfway house potentially encourages compromise manslaughter verdicts based upon an ostensible disproportionate use of force, for example, where a primary victim uses a weapon to kill an aggressor.[75] The case of *Edwards*[76] reflects circumstances in which the availability of defensive homicide may have prevented a successful self-defence claim. According to Edwards, the predominant aggressor threatened her life and repeatedly punched and kicked her in the days preceding the fatal attack. Edwards said:

> I went to sleep for while, and I was hoping that it all would be over when I woke up. And when I woke up, he was still drunk . . . and then . . . he said that he was going to cut my eyes out and cut my ears off. And disfigure me. And then he said he was going to get some petrol from out the back and he was going to set me on fire and ruin my pretty face so that no one would look at me ever again. And I panicked.[77]

'Wild and angry', the predominant aggressor approached Edwards brandishing a knife. During the struggle that ensued, he lost his balance and fell. Edwards then grabbed the knife and stabbed him. It was accepted that Edwards believed it was necessary to defend herself, but her plea meant she accepted there were 'no reasonable grounds' to believe she was in 'danger of death or serious injury'. The wounds inflicted were 'a disproportionate response to the threat'.[78] The reforms might assist primary victims like Edwards to claim self-defence, but there is 'little evidence to suggest that self-defence would become more accessible'.[79] The prosecution case, in stark contrast to Edwards' version of events, was that she stabbed her sleeping husband. In this respect, there was (and remains) a risk that jurors might reject self-defence. In the absence of a partial defence, defendants like Edwards might be convicted of murder. There is no guarantee that the absence of a partial defence will prevent primary victims from pleading 'guilty to murder in order to receive a discounted sentence' in such cases. Of course, the bargaining power of defence counsel will be substantially reduced in the absence of a partial defence.[80]

73 The VLRC (n 19) 243 opposed the introduction of diminished responsibility, preferring that mental conditions that do not meet the requirements of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic), ss 20–5, are considered as part of mitigation during sentencing. For an analysis of the challenges in applying a defence in the context of co-morbidity see, Arlie Loughnan and Nicola Wake, 'Of Blurred Boundaries and Prior Fault: Insanity, Automatism and Intoxication' in Alan Reed and Michael Bohlander with Nicola Wake and Emma Smith (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Ashgate 2014) ch 8.

74 See generally *Asmelash* [2013] AII ER (D) 268.

75 VLRC (n 19) para 3.92. See also, Crofts and Tyson (n 10) 887.

76 *Edwards* (n 68).

77 Ibid [28].

78 Ibid [49].

79 Kirkwood et al (n 9) 5.

80 Ibid 5.

Designed to accommodate the circumstances of primary victims, s 322M specifies that, where family violence is in issue, a person may believe that conduct is necessary, and the response may be reasonable in the circumstances as perceived by them, even if the person is responding to harm that is not immediate, or the response involves the use of force in excess of the threatened or inflicted harm. Priest has criticised the provision as a 'breathtaking extension' of self-defence:

> Taken to their logical (or, perhaps, their illogical) conclusion, these new provisions suggest that a number of 'trivial' acts of 'harassment' (whatever the term might embrace) by a family member, which do not involve actual or threatened abuse, might permit a person to use disproportionate force to kill that family member even where 'harm' is not 'immediate'.[81]

As Priest identifies, s 322M appears to imply a different approach in family violence cases. This might have unintended consequences for defendants who find themselves in a potentially analogous situation to vulnerable family members, but for failing to fall within that category. For example, in the context of terrorist/hostage, human trafficking, or other situations where 'the threat is not immediate, but . . . more remote in time' or, arguably, ongoing.[82] In such situations 'there may not be a need to prevent immediate harm but rather an immediate need to act to prevent inevitable harm'.[83] The Judicial College of Victoria, however, has suggested that the common law approach regarding immediacy and the reasonableness of the force used will continue to apply.[84] In practice, the provision reiterates the common law principle that when acting in the 'agony of the moment' the defendant does not need to 'weigh to a nicety the exact measure of his necessary defensive action'.[85] A similar clause recommended by the VLRC would have been of general application.[86] The VLRC proposal extended necessity in self-defence to cases where the defendant 'fears inevitable, rather than immediate harm'. The provision was intended to clarify the common law position that the significance of the defendant's 'perception of danger is not its imminence. It is that it renders the defendant's use of force really necessary.'[87] In this respect, whether the defendant/victim is a family member and/or family violence is in issue would be more appropriately categorised as a matter of evidence rather than a principle of law.[88] The effect would be to extend s 322M to all self-defence cases.

81 P Priest, 'Defences to Homicide' (2005) 8 cited in Australian Law Reform Commission, *Family Violence: A National Legal Response* (Australian Law Reform Commission No 114 2010).

82 VLRC (n 19) para 3.61.

83 Ibid para 3.54.

84 Judicial College of Victoria, *Bench Notes: Statutory Self-Defence* (Judicial College of Victoria 2014).

85 *Keane* [2010] EWCA Crim 2514 [3].

86 For example, 'where a young man, who kills defending himself against someone who is physically much stronger and in genuine fear for his life, uses a level of force which may at first appear to be excessive'; VLRC (n 19) 84.

87 'If the captor tells [the defendant] that he will kill her in three days' time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until the third day? I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by [the deceased] that night except by killing him first was reasonable.'; *Lavellee* [1990] 1 SCR 852, 899 (Wilson J). See, generally, VLRC (n 19) 81.

88 See, *Zecevic* (Vic) (1987) 162 CLR 645, 622 (commenting upon the dangers of elevating matters of evidence to substantive legal principles).

It is important to note that s 322M does not apply only to abused women, but extends to other family members. The 2014 Act defines 'family member' and 'family violence' in wide terms in order that 'a fairly broad cohort of persons and circumstances' may be brought within the new test.[89] The term family member covers current and former marital relationships; intimate personal relationships; parental relationships (step or biological); guardians; a child in residence; and a person who is or has been a member of the household. The definition of family violence includes, inter alia, physical, psychological and sexual abuse, which may manifest as a single act, or several acts amounting to a pattern of behaviour.[90] It is apparent that the broad ambit of this element of the defence may have unintended consequences in practice.

However, the extent to which s 322M will change the substantive approach is questionable. A provision similar to s 322M was introduced in England and Wales in relation to the use of force by householders.[91] Where a defendant is protecting herself/another against a trespasser, force will only be regarded as unreasonable if it is 'grossly disproportionate'. Herring points out that s 43 makes 'little change to the law because the jury would, even under the standard approach, take into account the emergency of the moment when considering whether a householder was acting reasonably and would be likely to only find a grossly disproportionate amount of force to be unreasonable'.[92] The clause has been heavily criticised as a 'triumph of rhetoric over reason' and it highlights the dangers associated with enacting legislation specific to discrete categories of offender that may do little to change the substantive approach.[93] The primary victim might face similar problems. As Hollingworth J identified in *Williams*:[94]

> what happens in such cases is that the victim of family violence finally reaches a point of explosive violence, in response to yet another episode of being attacked. In such a case, it is not uncommon for the accused to inflict violence that is completely disproportionate to the immediate harm or threatened harm from the deceased.[95]

A woman is more likely to use a weapon, and it is not uncommon for substantially more strikes to be inflicted than may have objectively been reasonable to incapacitate a man.[96] Hollingworth J acknowledged that viewing the infliction of 16 blows with an axe in response to a minor or trivial threat as being a very serious example of an offence might not be the right conclusion where the defendant has suffered a history of abuse.[97] This implies that greater weight will be attached to the impact of family violence during sentencing, but such a defendant might still be convicted of murder. In cases involving excess force, an appropriate partial defence is an essential safety net for primary victims.

89 Hansard (n 38) Mr Morris (Mornington) 3135.

90 Crimes Act 1958, s 322J(2) and (3), as amended by the Crimes Amendment (Defensive Homicide) Act 2014 (Vic).

91 Criminal Justice and Immigration Act 2008, s 76(5A), as amended by the Crime and Courts Act 2013, s 43.

92 Jonathan Herring, *Criminal Law: Texts, Cases and Materials* (OUP 2014) 646.

93 Vivien Cochrane, 'Allowing Disproportionate Force in Self-defence – A Triumph of Rhetoric over Reason' (Kingsley Napley Criminal Law Blog 9 May 2013). See also, Claire De Than and Jesse Elvin, 'Mistaken Private Defence: The Case for Reform' in Reed et al (n 73) 139.

94 *Williams* (n 68).

95 Ibid [35]–[36].

96 Ibid [34].

97 Ibid [33]–[36].

The amendments to self-defence are complemented by new jury directions designed to assist jurors to understand the impact of abuse, and how this can evoke 'possibly the worst behaviour from everybody in an unbelievably hot-tempered, violent home where domestic family violence is prevalent'.[98] By requiring the trial judge to provide a direction on family violence where it is requested by counsel, unless there are good reasons not to, these amendments are targeted towards proactively tackling misconceptions regarding family violence. The trial judge will explain, inter alia, that family violence may be relevant to assessment of whether the primary victim was acting in self-defence; and that family violence may include sexual and psychological as well as physical abuse.[99] Importantly, the trial judge may inform jurors that there is no typical, proper or normal response to family violence. Jurors are to be advised that it is not uncommon for a primary victim of family violence to remain with an abusive partner, or to leave and return to that partner; and/or not to report or seek assistance to stop such conduct.[100] Social framework evidence is no longer limited to homicide cases and may extend to all self-defence claims. Amendments to the Evidence Act 2008 mean that the court can refuse to hear evidence where it unnecessarily demeans the victim.[101] This change does not limit the use of evidence providing an important contextual narrative or where there are good forensic reasons for its admission.[102] The effect is to address 'the despicable practice of gratuitous blame directed at victims during homicide trials', while simultaneously allowing evidence relating to family violence to be admitted.[103]

A partial defence is still necessary

These provisions undoubtedly serve an important educative function in assessing the impact of family violence on the primary victim, but the extent to which they will affect the outcome of self-defence cases remains unclear. In this respect, the impact of these changes 'should not be overstated'.[104] The case law demonstrates that there continues to be only limited understanding of the relationship between social framework evidence and defences. Section 322M must be considered in light of the other elements of self-defence; namely, that in murder cases the defendant must fear death or really serious injury.[105] In a detailed study of intimate partner homicide between 2005 and 2013, it was revealed that 'there continues to be a focus on physical forms of violence and a lack of understanding of the serious impact of non-physical

98 Hansard (n 38) 3138 and 3146.

99 Jury Directions Act 2013, ss 31 and 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4. See also, Legislative Assembly, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, second reading, Hansard, 20 August 2014, Mr Clark Attorney General.

100 Jury Directions Act 2013, s 32, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 4.

101 See generally Jeremy Gans and Andrew Palmer, *Uniform Evidence* (OUP 2014).

102 Evidence Act 2008, s 135, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 3(9).

103 Hansard (n 38) 3138.

104 Hansard (n 9) Ms Pennicuik (Southern Metropolitan) 2419 citing Kirkwood et al (n 9).

105 'Although it has not been determined, it seems likely that it can include psychological injuries as well as physical injuries. It will be for the jury to decide whether what the accused was threatened with was an "injury" as well as whether that threatened injury was "really serious".'; Judicial College of Victoria (n 84) para 8.9.2.1, line 21. The case of *Creamer* indicates that being forced into group sex also amounts to serious injury; (n 68) 24–9. See also, DVRCV (n 38) 20.

forms of intimate partner violence, such as psychological coercion and intimidation, and sexual forms of violence'.[106] Black[107] was convicted and sentenced to 9 years' imprisonment after pleading guilty to the defensive homicide of her de facto husband. Black stabbed him after he cornered her in the kitchen, repeatedly jabbing her with his finger. In evidence, Black said:

> He was coming closer and closer to me . . . and I was thinking because he was so drunk he would probably want to force himself on me sexually . . . and I was just thinking what else could he do.[108]

The sentencing judge noted that the aggressor was unarmed and that stabbing him twice might be viewed as disproportionate.[109] The threat was described as 'being limited to intimidation, harassment, jabbing and prodding'.[110] Black's appeal against sentence was dismissed, the Court of Appeal concluding that the sentencing judge was 'justified in making the observation that the violence which confronted the appellant was not as serious as many of the other cases'.[111] The cumulative impact of family violence and how it contributed to Black's perception of the danger she faced was clearly misunderstood.[112] Where domestic violence has become the norm, the primary victim will have an acute awareness of the danger that she is in at the time of the act, but may subsequently understate the impact of that abuse. Black downplayed the violence she had suffered saying, '[h]e was never physically violent towards me, but he'd poke me with his fingers and point at me and jab me in the chest and forehead. He would sometimes force himself on me sexually.'[113] In the absence of a partial defence, there is a real risk that the primary victim will be convicted of murder, particularly where the impact of family violence is misunderstood by the legal profession.

These concerns are compounded by the fact that a move to make juror directions mandatory where family violence is at issue was rejected by the Victorian Parliament in favour of judicial flexibility.[114] There is a mandate requiring the trial judge to give directions where necessary to avoid substantial miscarriage of justice, but failure to make the family violence directions mandatory is arguably a missed opportunity. As Kirkwood et al point out, mandatory directions would have 'an educative value for the judiciary and legal practitioners', as well as assisting 'judges to better direct juries when family violence is led, when the implications of the evidence are not spelled out by the defence, or when the evidence is used to argue for reduced culpability rather than an acquittal'.[115] The onus rests on defence counsel to raise the issue, and, in practice, they will need to be, 'sufficiently aware of family violence and to raise it at an early stage to avoid damage being done without it'.[116] There is a risk that the new jury directions will be inconsistently applied, with potentially significant consequences in terms of juror decision-making.

106 DVRCV (n 38) 20.

107 *Black* (n 68).

108 Ibid [18].

109 Ibid [22].

110 Ibid.

111 *Black* [2012] VSCA 75 [29].

112 DVRCV (n 38) 39.

113 *Black* (n 68) [12].

114 Hansard (n 9) Mr Tee (Eastern Metropolitan) 2423.

115 Kirkwood et al (n 9) 22.

116 Hansard (n 9) Ms Pennicuik (Southern Metropolitan) 2419 citing the DVRCV, the Victorian Women's Trust and Dr Danielle Tyson.

Jurors serve a vital role in such cases, but it is essential that appropriate guidance is available in order to help them in that role.

This lack of understanding at both a legislative and a practical level suggests that separating genuine from fabricated facts in order to prevent victim blaming might be difficult to achieve in practice.[117] There was significant debate during the trial of Creamer as to whether she was a victim of domestic violence.[118] The relationship between Creamer and the aggressor was described as 'largely, if not entirely, dysfunctional'.[119] Each engaged in extra-marital affairs, encouraged by the aggressor.[120] The aggressor frequently requested that Creamer engage in group sex, which she 'resented strongly'.[121] On the weekend of the killing, Creamer believed that the aggressor had arranged for her to engage in group sex. According to her evidence, the aggressor had hit her in the genitals with a knobkerrie while she was sleeping, accused her of having sex with his brother, and insisted that she smell his semen-stained sheets before placing them over her head.[122] Immediately before the fatal act, the aggressor repeatedly smacked Creamer in the face and threatened to 'finish her off', before attempting to push his penis in her mouth and urinating on her.[123] Creamer managed to hit the aggressor in the genitals before grabbing a knife and stabbing him to death. The prosecution asserted that, rather than being a victim of domestic abuse, Creamer had initially denied her involvement in the killing because she had no excuse. She was portrayed as being jealous of the aggressor's extramarital affairs and annoyed at his decision to leave her for his former wife.[124] The forensic evidence did not fully accord with Creamer's account, and the sentencing judge rejected a significant proportion of her evidence, describing her as an 'unsophisticated witness'.[125] In particular, Coghlan J suggested that the jury had rejected Creamer's allegation that she had been raped previously by the aggressor because Creamer chose to stay with him and had not disclosed such evidence prior to trial.[126]

Toole notes that the availability of defensive homicide worked to Creamer's advantage. Rather than 'being obsessive, jealous and controlling . . . her husband encouraged and facilitated [Creamer's] affairs'.[127] In this respect, Toole argues that defensive homicide had the 'potential to both protect and criminalise lethal conduct by women in inappropriate and unintended ways'.[128] In contrast, the Domestic Violence Resource Centre Victoria (DVRSV) contends that this assessment demonstrates a 'lack of understanding about how psychological manipulation, sexual degradation and coercive control are forms of family violence'.[129] The primary victim may feel unable to disclose

117 See, for example, *Creamer* (n 68) and *Sherna* [2011] VSCA 242; [2009] VSC 526. See generally Evidence Act 2008, s 135, as amended by the Crimes Amendment (Abolition of Defensive Homicide) Act 2014, pt 3(9).

118 DVRCV (n 38) 27.

119 *Creamer* (n 68) [6].

120 Ibid [7].

121 Ibid [7] and [14].

122 ibid [17] and [19]. A knobkerrie is a South-African weapon in the form of a stick with a knob on the end of it [20].

123 Ibid [21]–[22].

124 ibid [10]–[12].

125 Ibid [16].

126 Ibid [32].

127 Toole (n 8) 283.

128 Ibid 286.

129 DVRCV (n 38) 28. See also, Evan Stark, 'Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 Albany Law Review 973.

details of abuse because 'of a deep sense of shame and self-blame'.[130] It is worrying that such abuse continues to be viewed at the 'lowest end of the spectrum'.[131] The amendments to prevent victim blaming and fact fabrication are welcome, but it may be difficult in practice to reliably distinguish genuine from disingenuous facts, particularly given the hidden nature of domestic abuse.

Irrespective of the changes to self-defence, it remains clear that some defendants will fall outside the scope of self-defence simply because the force used was excessive. In such cases, a reduction from murder to manslaughter may be apposite in terms of appropriate standardisation of the defendant's culpability level.[132] The suggestion that lower culpability may be reflected in sentencing mitigation where self-defence fails ignores the injustice associated with labelling the primary victim a murderer where she genuinely believed force was necessary, but was mistaken regarding the level of force. The murder label unfairly stigmatises those who kill their abusers and it 'obscures the family violence to which s/he has been subjected'.[133] The Victorian Sentencing Council acknowledged that the removal of provocation would result in significantly higher sentences for provoked killers, given the increased maximum penalty and stigma attached to murder.[134] The same can be said of the abolition of defensive homicide. Experience in New Zealand is that primary victims are being convicted of murder and sentenced more harshly than if a partial defence was available.[135]

The impact of abolishing the partial defence in New Zealand

The New Zealand criminal justice system has been described as 'out of step internationally in the way it responds when the victims of family violence kill their abusers'.[136] Last year, the FVDRC noted that there needs to be a radical change in the way New Zealand deals with 'dangerous and chronic cases of family violence'.[137] In particular, the FVDRC advocated reintroducing a partial defence to New Zealand, post-abolition of the provocation defence in 2009.[138] The New Zealand Law Commission (NZLC) had previously recommended abolition, complemented by developments to the law on self-defence. The NZLC advocated that priority should be given to drafting a new sentencing guideline to ensure that 'full and fair account' may be taken of provocative conduct and other mitigating factors during sentencing.[139] Provocation was abolished, but the remaining recommendations were not taken forward. The result is that self-defence laws in New Zealand remain demonstrably unsuited to primary victims who kill a predominant aggressor and, despite appellate court guidance on the impact of provocation in sentencing, primary

130 DVRCV (n 38) 27.

131 *Creamer* [2012] VSCA 182 [41].

132 See, for example, *Monks* [2011] VSC 626. Unlike other defensive homicide cases, Monks received little media attention and has been described as vindicating 'the VLRC position that the offence could appropriately apply in family situations other than where a woman killed an abusive male partner'; Toole (n 8) 484.

133 Kirkwood et al (n 9) 6.

134 Sentencing Advisory Council (Vic), *Provocation in Sentencing: Research Report* (2009). The maximum sentence for manslaughter in Victoria is 20 years' imprisonment. In contrast, the maximum sentence for murder is life imprisonment; Crimes Act 1958, ss 5 and 3, respectively.

135 See, for example, *Ribia* [2012] NZHC 6720; *Wihongi* [2012] 1 NZLR 755.

136 FVDRC (n 11) 6.

137 Ibid.

138 Ibid.

139 NZLC, *The Partial Defence of Provocation* (NZLC No 98 2007) paras 2.04 and 2.08.

victims are in a significantly worse position than if a partial defence was available.[140] As Brookbanks stated:

> By abolishing the provocation defence, the legislature has drawn a line in the sand. Those who cross it, whatever their motive or disposition, can no longer expect a sentencing court to look at their situation with such compassion or understanding, as might have previously marked the court's response as a concession to their 'human frailty'.[141]

The self-defence provision operating in New Zealand appears to reflect the approach adopted in Victoria and England and Wales, but the manner in which it has been interpreted renders it difficult for primary victims to successfully claim the defence.[142] Section 48 of the Crimes Act 1961 provides that: '[e]veryone is justified in using, in the defence of himself or another, such force, as in the circumstances as he believes them to be, it is reasonable to use'.[143] The relaxation of the imminence requirement in Victoria and England and Wales has not occurred in New Zealand, where 'immediacy of life-threatening violence' is required in order to justify killing in self-defence.[144] In cases where the defendant had a viable, non-violent option, the threat is not considered sufficiently imminent to satisfy self-defence. This approach fails to recognise that when a primary victim kills an intimate partner it will rarely be in the face of an imminent attack, since by then 'any attempt at self-protection may be too late'.[145] The apparently viable escape option is similarly not possible for the primary victim who fears that she will be in even more danger should she attempt to do so.[146] The FVDRC noted that by focusing on the imminence of the threat, the primary victim's circumstances are limited to a short time-frame. This results in vastly different rulings in factually similar cases where self-defence is precluded in the absence of an imminent threat.[147] The problem with this arbitrary approach to culpability is that it results in some primary victims being labelled murderers, while others receive an outright acquittal. The availability of a partial defence would assist in ameliorating this inherently unjust bifurcatory divide between justified killings in response to an imminent threat and *ostensibly* unjustified killings undertaken when a predominant aggressor is off-guard. The circumstances of the primary victim have been acknowledged to a limited extent in that expert evidence is admissible to explain how she might be more aware of covertly threatening behaviour which may not appear objectively apparent. It remains clear, however, that self-defence in its current form does not adequately accommodate the circumstances of primary victims.[148] Like the VLRC, the NZLC recommended replacing the 'imminence'

140 NZLC (n 139) para 1.84. Horder and Fitz-Gibbon have suggested that the sentences imposed post-2009 might also be higher than those issued pre-2009 in the context of domestic abuse; Jeremy Horder and Kate Fitz-Gibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' Cambridge Law Journal <doi: 10.1017/S0008197315000318>.

141 Warren Brookbanks, 'Provocation and Sentencing' (2013) (April) New Zealand Law Journal 120–4, 124.

142 Elisabeth McDonald, 'Criminal Defences for Women' in *Women in the Criminal Justice System* (New Zealand Law Society 1997) 46–9.

143 'Everyone authorized to use force is criminally liable for any excess according to the nature and quality of the act that constitutes that excess'; Crimes Act 1961, s 62.

144 *Wang* (1989) 4 CRNZ 674, 683.

145 NZLC, *Battered Defendants Victims of Domestic Violence Who Offend* (NZLC PP41 2000) para 38.

146 Ruth Busch, 'Don't Throw Bouquets at Me . . . (Judges) Will Say We're In Love: An Analysis of New Zealand Judges' Attitudes towards Domestic Violence' in Julie Stubbs (ed), *Women, Male Violence and the Law* (Institute of Criminology and Sydney University Law School 1994) 104.

147 FVDRC (n 11) 122.

148 *Lavellee* (n 87) cited in *Oakes* [1995] 2 NZLR 673, 676 (CA).

requirement with the need for an 'inevitable attack', but these recommendations were not acted upon.[149]

The absence of a partial defence means that mitigating factors are considered solely during sentencing in determining whether a life sentence would be 'manifestly unjust' and in setting a minimum non-parole period. The restrictive sentencing regime operating in New Zealand mandates that a murder conviction automatically attracts a life sentence, unless the nature of the offence and the circumstances of the defendant would render such a sentence 'manifestly unjust'.[150] The minimum non-parole period on a life sentence for murder may not be less than 10 years or 17 years in the 'most serious cases'.[151] It is only in 'limited circumstances when a finite sentence may be imposed'.[152] There is no legislative guidance on the impact of the predominant aggressor's conduct and/or provocation in relation to the assessment of whether to impose a life sentence, but the Court of Appeal in *Hamidzadeh*[153] and *Taulekí*[154] confirmed that both are potentially relevant mitigating factors.[155] In all cases, only 'exceptional' circumstances will result in the presumption of life imprisonment being overturned.

The type of case in which the presumption has been rebutted include, inter alia, mercy-killing cases[156] and those involving serious domestic abuse.[157] Sentences of 10 years' and 12 years' imprisonment were issued in the cases of *Rihia*[158] and *Wihongi*,[159] respectively, which to date represent those cases in which a primary victim has been convicted of the murder of a predominant aggressor post-abolition of the provocation defence.[160] The low number is attributable to the rare cases in which a primary victim responds with lethal force rather than signifying that this particular category of defendant is being afforded an alternative defence.[161] The horrific abuse and mental impairments suffered by Rihia and Wihongi meant that their cases were 'exceptional'.

149 NZLC, *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC Report 73 2001) 9–12.

150 Sentencing Act 2002, s 102 (1). '"Unjust" can only mean that in the context of a particular murder and particular offender, the normal sentence of life imprisonment runs counter to both a Judge's perception of a lawfully just result and also offends against the community's innate sense of justice.'; *O'Brien* (2003) CRNZ 572 [19].

151 *Hamidzadeh* [2013] NZSC 33 [5]. Sentencing Act 2002, ss 103 and 104. See, generally, Geoff Hall, *Sentencing: 2007 Reforms in Context* (LexisNexis 2007) 487.

152 *Hamidzadeh* (n 151) [4]. A life sentence is 'almost invariably' imposed; *Hessell* [2009] NZCA 450 [63].

153 *Hamidzadeh* (n 151). For a helpful analysis of the *Hamidzadeh* case see, Brookbanks (n 141) 120–4.

154 [2005] 3 NZLRC 372.

155 See, generally, Sentencing Act 2002, s 9(1) and 9(2).

156 In *Law* (2002) 19 CRNZ 500, the mercy killing of an elderly woman suffering from Alzheimer's disease by her husband attracted an 18-month term of imprisonment. See also, *Reid* HC Auckland CRI-2008–090–2203, 4 February 2011 (confessing to a crime that might not have otherwise been discovered and attempting suicide after the offence indicated significant remorse – the defendant suffered from major depression and psychotic delusions); *Cunnard* [2012] NZHC 815 (peripheral role as a secondary party, previous good character, evident remorse, restorative justice conference held with the victim); *Nelson* [2012] NZHC 3570 (deficiency in decision-making faculties, youth, inability to process information, tumultuous family situation); see, generally, Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd, *The Sentencing Act 2012: Monitoring the First Year* (Ministry of Justice 2004).

157 See *Rihia* and *Wihongi* (n 135).

158 *Rihia* (n 135).

159 For an in-depth analysis of the case of *Wihongi* (n 135), see Nicola Wake, 'Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing 2015) 391–9.

160 FVDRC (n 11) 6.

161 Ibid 102.

This resulted in the notorious presumption of life imprisonment being overturned in each case.[162]

A comparison between *Rihia* and the earlier manslaughter conviction of *Sualape* demonstrates the stark reality that primary victims are not only being convicted of murder, but sentences are double the length of those imposed pre-2009 in factually similar cases. Rihia was convicted and sentenced to 10 years' imprisonment after she pleaded guilty to the murder of her estranged husband. Their relationship was plagued by violence and alcohol abuse.[163] They had been drinking heavily throughout the day, during the course of which their seven-year-old daughter was removed by Child, Youth and Family Service staff over concerns regarding the alcohol consumption and the predominant aggressor's presence at the property. Fearing a retaliatory beating, and angry at the predominant aggressor's involvement in the removal of their daughter, Rihia stabbed him in the chest during the course of an argument.[164]

Psychologists described Rihia as suffering from 'complex post-traumatic stress disorder' and 'borderline personality disorder' characterised by 'alcohol abuse, emotional dysregulation, outbursts of anger, and feelings of abandonment' induced by familial violence.[165] Rihia's parents were alcoholics and she had been removed from their care as a consequence of abuse. Rihia was abused by her first husband, with the result that her seven children were taken into care.[166] The 'extreme reaction' to Rihia's despair at losing her daughter was described by the sentencing judge 'as being rooted firmly in the abuse' she had suffered from the predominant aggressor and others.[167] There were 36 reported incidents of violence between Rihia and the predominant aggressor. Police confirmed that in 33 out of the 36 cases the predominant aggressor was responsible, and the court said it was 'reasonable to infer that there were more than only three or four incidents a year'.[168] The trial judge was satisfied that Rihia would not have killed 'had it not been for the significant impairment' she suffered through years of alcohol and physical abuse.[169]

Sualape, in contrast, received a sentence reduction of 7.5 years to 5 years on grounds that the initial sentence did not reflect the cumulative impact of the abuse and degradation she suffered, in addition to her vulnerability by reason of ethnic and cultural background.[170] Sualape successfully argued that she was provoked to kill her abusive partner of over two decades after he said he was leaving her for another woman. The initial sentencing judge described the killing as 'brutal'. Sualape had questioned the predominant aggressor over his decision to leave her before repeatedly hitting him over the head with an axe in what Randerson J dubbed a 'frenzied attack' with a 'strong element of deliberation about it'.[171] It was not accepted that Sualape suffered from battered-woman syndrome and the degree of physical and emotional abuse was deemed

162 *Hamidzadeh* (n 151) 33. See also, *Rapira* [2003] 3 NZLRC 794 (CA) [121]. The assessment as to whether the presumption is displaced must be undertaken in light of ss 7–9 of the Sentencing Act 2002

163 *Rihia* (n 135) [2].

164 Ibid [10]–[12].

165 Ibid [20].

166 Ibid [28].

167 Ibid [30].

168 Ibid [16].

169 Ibid [28].

170 *Sualape* [2002] NZCA 6.

171 Ibid citing original ruling [6]–[8].

to be exaggerated.[172] According to Randerson J, it was the sexual infidelity which proved to be the main trigger for a killing on the borderline between murder and manslaughter. The jury's verdict was termed 'merciful' in the circumstances.[173] That 'merciful' decision resulted in a sentence 2.5 years shorter than that imposed in *Rihia*, despite Randerson J's obvious misgivings regarding the verdict.

Upon appeal, Baragwanath J concluded that Randerson J had not attached sufficient weight to the family abuse suffered by Sualape. The appellant's role in what was described as a 'chronically dysfunctional marriage' was governed by 'traditional Samoan norms'.[174] The appellant was responsible for the care of her four children from a previous marriage, five children with the predominant aggressor, his disabled mother, and eight of his brother's children whose wife had died.[175] The relationship involved physical and emotional violence, including bashings, cutting with a machete, and the infliction of a venereal disease, consequent upon repeated infidelities.[176] The aggressor was a world-renowned tattoo artist, popular for *p'ea* tattoos which are designed to display cultural identity, and commonly used as part of a 'right [sic] of passage' ritual into manhood.[177] On one occasion, he organised a tattooist convention which was of cultural significance to the local Samoan community, in which the appellant's family were prominent, and attended with a lover with whom he 'cohabited openly'.[178] It was said that this brought great shame to Sualape's family.

Baragwanath J held that essential considerations ought to have included: the exemplary past behaviour of the primary victim; the cumulative impact of the sustained pattern of abusive and insulting conduct of the predominant aggressor; the gross humiliation of the appellant and her family by the aggressor's conduct in Samoa; and the appellant's perception, from what appeared to be a position of subordination in both her relationship and culture, of a lack of realistic options available effectively to relieve herself of what was progressively becoming an intolerable burden.[179] Sualape's actions were 'more than a jealous response by a jealous wife, but the consequence of the victim's treatment of her over two decades, and of her limited perception of means by which it might be resisted'.[180]

Randerson J's view reflected a narrow interpretation of Sualape's circumstances, which focused principally on the fatal attack and the exchange between the primary victim and predominant aggressor immediately preceding it. By labelling sexual infidelity as the triggering event, Randerson J implied that Sualape's conduct was undertaken in response to the predominant aggressor's attempt to exercise personal autonomy in leaving a relationship to commence a new one. In reality, his sexual infidelity constituted the final straw in the living nightmare he had inflicted on her, and it was this combination that eventually tipped her over the edge. In this respect, it is essential that sexual infidelity is considered as part of the narrative leading to the fatal act. More recently, the Court of Appeal in *Hamidzadeh*[181] recognised that the 'circumstances in which sexual infidelity may be treated as reducing culpability is a difficult issue'.[182] Their Lordships noted Lord Judge CJ's comments, in

172 *Sualape* (n 170) citing original ruling [15] and [22].

173 Ibid citing original ruling [27].

174 Ibid [3] and [7].

175 *Sualape* (n 170) [4].

176 Ibid [5].

177 Karen Hudson, 'Tattooist Murdered' (1999) about.com.

178 *Sualape* (n 170) [6].

179 Ibid [8].

180 Ibid [23].

181 *Hamidzadeh* (n 151).

182 Ibid [64].

Clinton, on the sexual infidelity exclusion in the loss of control defence.[183] Lord Judge acknowledged that:

> Sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response. This may have nothing to do with any notional 'rights' that the one may believe she or he has over the other, and often stems from a sense of betrayal and heartbreak, and of crushed dreams.[184]

The Court of Appeal, in *Hamidzadeh* concluded, however, that 'while an angry and emotional response to the end of a relationship may be understandable, the ordinary expectation of the community is that this ought not to justify the use of violence, especially where there are fatal consequences'.[185] The problem is that in cases like *Sualape* the sexual infidelity and revelation that the relationship is at an end constitutes 'an important and relevant component of the cocktail of events' that combined to make the defendant lose control.[186] The sexual infidelity served to humiliate and degrade the victim in circumstances which she was powerless to prevent. In this respect, the sexual infidelity formed part of the domestic abuse, in a similar way that taunts designed to belittle or denigrate the victim do. As the Court of Appeal identified in *Clinton*, to 'compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole . . . is unrealistic and carries with it the potential for injustice'.[187]

The ruling in *Sualape* also highlights the problems associated with focusing on a narrow time-frame in domestic abuse cases. Despite Randerson J's misgivings regarding the mitigatory force of the abuse Sualape suffered and the respective (lack of) weight attached to sexual infidelity, the sentence imposed was significantly shorter than that imposed in the similar case of *Rihia*. The problem with considering mitigation solely at the sentencing stage is that it circumvents important juror and therefore societal evaluation as to whether a manslaughter verdict and a corresponding lower sentence ought to apply. The role of the jury in such cases represents an important 'bulwark against overzealous prosecutors and cynical judges'.[188] The jury verdict confers 'a societal stamp of approval that must be given weight'. It tends to result 'in both a finite sentence, and a sentence that is likely to be somewhat shorter than the lowest available minimum term for murder'.[189] In all cases, however, it is essential that the defence is appropriately framed and sufficient guidance is provided to jurors in order for them to perform their role effectively.

The *via media*: a new partial defence

It is essential that New Zealand and Victoria adopt a more 'nuanced and less black and white approach to reforming of the criminal defences to homicide'.[190] An optimal solution would be to introduce a new partial defence predicated on a fear of serious violence.[191] This entirely new defence draws upon earlier recommendations of the Law Commission for

183 *Clinton* [2012] EWCA Crim 2; [2012] 3 WLR 515 [16], cited in *Hamidzadeh* (n 151) [65].

184 *Clinton* (n 183) [16].

185 *Hamidzadeh* (n 151) [68].

186 Hansard, Parliamentary Debates, HC Deb 9 November 2009, col 88 (Mr Grieve).

187 *Clinton* (n 183); see also Horder and Fitz-Gibbon (n 140) 18 and 20.

188 Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York University Press 2003) 247.

189 NZLC (n 139) para 1.89. Although compare the contrasting sentences in comparable provocation cases; *Ali* (3 years) and *Edwards* (9 years); ibid, para 1.90.

190 FVDRC (n 11) 103.

191 Coroners and Justice Act 2009, s 55(3). See also, Law Commission No 304 (n 16) para 5.55.

England and Wales, in addition to an in-depth review of the operation of ss 54 and 55 of the Coroners and Justice Act 2009, as enacted.[192] The partial defence would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual.[193] The defence is qualified by appropriate threshold filter mechanisms designed to preclude the availability of the defence in unmeritorious cases. These clauses include a normal person test and provisions stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in a considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[194] In cases where sufficient evidence is raised that the partial defence might apply, it is then for the prosecution to disprove the defence to the usual criminal standard. The defence should be complemented by bespoke provisions on social framework evidence and *mandatory* juror directions where family violence is in issue. An interlocutory appeal procedure designed to prevent unnecessary appellate court litigation is also outlined. The following analysis illustrates that this novel model provides an appropriate *via media* for the introduction of a new partial defence to Victoria and New Zealand, with the added benefit of developments based upon the experience of the operation of the loss of control defence in England and Wales.

The proposed defence requires that the defendant feared serious violence from the victim against the defendant or another identified individual. This mirrors the 'fear trigger' operating under the loss of control defence.[195] It is also similar to defensive homicide, which required the defendant to fear death or really serious injury. The proposed defence is designed to be available where the defendant kills in response to an anticipated (albeit not imminent attack); and where the defendant over-reacts to what she perceived to be an imminent threat.[196] Whether the defendant feared serious violence engages an entirely subjective enquiry.[197] The fear must be genuine but it need not be reasonable. Arguably, it would be difficult to prove that the fear was genuine if it were not based on reasonable grounds. There is no need to extend the defence to circumstances falling short of serious violence, but social framework evidence should be utilised to explain why an ostensibly trivial incident might cause the primary victim to fear such violence.[198] The term violence should be broadly construed as including psychological[199] and sexual harm, in addition to physical violence.[200] It should also include coercive or controlling behaviour as identified under the Serious Crimes Act 2015, which introduced a new offence based on such conduct.[201] The offence provides overdue recognition of the impact of coercive and

192 Law Commission No 290 and Law Commission No 304 (n 16).

193 Coroners and Justice Act 2009, s 54(3).

194 Ibid s 54 (5)–(6).

195 Ibid s 55(3).

196 Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (Consultation Paper 19/08, 2008) para 28.

197 '[T]he reasonableness requirement is out of place when we are thinking of people who are acting out of fear or anger and are therefore likely to be in a somewhat emotional state'; Law Commission No 290 (n 16) para 3.154.

198 Law Commission No 304 (n 16) para 5.55.

199 Psychological abuse need not 'involve actual or threatened physical or sexual abuse' and may include (i) intimidation; (ii) harassment; (iii) damage to property; (iv) threats of physical abuse, sexual abuse or psychological abuse; Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 322J.

200 See, Rudi Fortson QC, 'Homicide Reforms under the CAJA 2009' (Criminal Bar Association 2010) para 90.

201 Serious Crimes Act 2015, s 76.

controlling practices, and it is appropriate that the definition of serious violence under the new defence incorporates this form of conduct.[202]

A fundamental difference between defensive homicide and the newly proposed defence is that defensive homicide remained unqualified by appropriate threshold filter mechanisms. The proposed defence is qualified by the normal person test which mandates that a person of the defendant's age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant might have reacted in the same or a similar way.[203] The VLRC was critical of the normal person test because it involves 'speculation about how a person *might have* reacted in the circumstances'.[204] This approach is necessary because it is impossible to say how a person *would have* reacted in the circumstances, particularly where there is evidence of domestic abuse.[205] The proposed test is similar to the normal person test operating in relation to the loss of control defence, with the exception that the term 'sex' is omitted. Use of the term 'sex' overstates the 'role of sex and gender in explaining D's reaction'.[206] In this respect, sex and gender are better considered by the judge and jury as part of the broader circumstances of the case.[207] Akin to the loss of control defence, 'circumstances' in this context is a reference to all of the defendant's circumstances other than those whose only relevance to the defendant's conduct is that they bear on her general capacity for tolerance and self-restraint.[208] In cases where the defendant has a recognised medical condition relevant to her fear of serious violence then that might, like sex and gender, form part of the circumstances for consideration.[209] A normal degree of tolerance means that, in evaluating the defendant's conduct, the jury cannot take into account irrational prejudices, such as racism and homophobia.[210] A normal degree of self-restraint excludes characteristics such as bad temper, jealousy, irritability and intoxication. Unlike the loss of control plea, the proposed defence specifically excludes self-induced intoxication from the assessment of the defendant's capacity for tolerance and self-restraint.[211] This statutory exclusion is designed to prevent unnecessary litigation in cases where the defendant is voluntarily intoxicated.

In terms of determining whether the proposed defence applies, the defendant's fear of serious violence is to be disregarded in cases where the defendant intentionally incited serious violence. The intentional incitement clause is different from s 55(6)(a)–(b) of the 2009 Act which stipulates that the defence will be unavailable where the defendant incited something to be said or done for the *purpose* of using it as an excuse to use violence. In *Dawes, Hatter and Bowyer*, the Court of Appeal held that the mere fact that the defendant was, 'behaving badly and looking for and provoking trouble' does not mean the defence is

202 In Victoria, violence also includes causing or putting a child at risk of witnessing physical, sexual or psychological abuse of a person by a family member, and this could form part of a new Victorian provision; Crimes Amendment (Abolition of Defensive Homicide) Act 2014, s 322J.

203 Coroners and Justice Act 2009, s 54(1)(c) and (3).

204 VLRC (n 19) para 3.84 (emphasis in original).

205 Fortson (n 200) para 148. Although cf Jo Miles, 'A Dog's Breakfast of Homicide Reform' (2009) 6 Archbold News 8.

206 Neil Cobb and Anna Gausden, 'Feminism, "Typical" Women, and Losing Control' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) ch 7.

207 Ibid.

208 Coroners and Justice Act 2009, s 54(3).

209 *Asmelash* (n 74).

210 Coroners and Justice Act 2009, s 54(1)(c).

211 Ibid.

unavailable.[212] This is because self-induced triggers are viewed in a narrow sense only for the purposes of the loss of control defence.[213] The exclusion will arguably only apply where the defendant has 'formed a premeditated intent to kill or cause grievous bodily harm to the victim, and incites provocation by the victim so as to provide an opportunity for attacking him or her'.[214] This approach was applied in *Duncan*,[215] where a defendant successfully claimed the partial defence after stabbing a love rival to death. Duncan was shopping with his two children when he saw the victim. As a result of seeing him, Duncan purchased a small-bladed paring knife, removed the packaging and concealed it within a carrier bag. His explanation was that some days before the victim had confronted him in a similar location and threatened him with a knife. According to witnesses, Duncan then proceeded towards the victim shouting at him. A fight ensued, during the course of which, the victim slashed Duncan across the face and body with a knife. It was at that point, Duncan claimed to have momentarily lost self-control and stabbed the victim to death. Duncan's loss of control plea was accepted by the Crown, Lord Thomas advocating that the case should be seen:

> As an acceptance of a basis of plea in a one-off case in circumstances which we have not gone in to. It should not be regarded as any precedent that where two people arm themselves and a wound is caused in the course of an intended knife fight, that that would ordinarily give rise to a loss of self-control.[216]

Despite the warning of Lord Thomas, the case illustrates that the circumstances in which a defendant's conduct might be construed as having been done for the *purpose* of using it as an excuse to use violence are likely to be limited. The Law Commission of England and Wales opined that to exclude the defence 'in the broader sense of self-induced provocation would be to go too far'.[217] Such an approach might exclude deserving claims where the incitement was induced by 'morally laudable' conduct, for example, 'standing up for a victim of racism in a racially hostile environment'.[218] The Law Commission did identify that 'there is much to be said . . . in denying a defence to criminals whose unlawful activities expose them to the risk of provocation by others'.[219] The recommended intentional incitement clause provides a *via media* between these ostensibly polarised approaches to self-induced provocation.

The provision would operate where the defendant *intentionally incited serious violence*. The defendant's conduct must be done for the *purpose* of inciting serious violence. In this respect, the 'mere fact that the defendant caused a reaction in others' would not result in the defence being excluded.[220] The approach in *Dawes, Hatter and Bowyer*, that provocative behaviour does not negate the defence, is equally applicable to the new proposal. This ensures that confrontational circumstances do not automatically preclude the partial defence, but, where the defendant intends to incite serious violence, the defence is

212 *Dawes, Hatter and Bowyer* [2014] 1 WLR 947 [58].

213 Law Commission No 304 (n 16) para 3.139.

214 Ibid.

215 *Duncan* [2014] EWCA Crim 2747.

216 Ibid [11].

217 Law Commission No 304 (n 16) para 3.139.

218 Ibid.

219 Ibid.

220 *Johnson* [1989] EWCA Crim 289 (CA) Watkins LJ. Note that the Court of Appeal in *Dawes, Hatter and Bowyer* (n 212) noted that 'the impact of *R v Johnson* is now diminished, but not wholly extinguished by the new statutory provisions'; [58]. See also, *Richard Anthony Daniel v The State* [2014] UKPC 3 [17]–[33].

precluded.[221] This is important as the primary victim may feel responsible for inciting the aggressor's response because she is aware that doing X makes him angry, but it cannot be said that it was her *intention* to have that effect. Contrary to the Law Commission's observation, judges and jurors would be in a position to 'differentiate satisfactorily between forms of self-induced provocation in the broader sense which should, and which should not, preclude a defence'.[222] It is true that this would be a challenging task, given the potential variables, but at present the exclusionary clause serves little purpose when viewed in the narrow sense, since arguably cases of premeditated killing would be excluded via s 54(4) of the 2009 Act in any event.

Section 54(4), which provides that the loss of control defence is not available where the defendant acted in 'a considered desire for revenge', forms part of the proposed framework.[223] The clause operates to prevent the use of the defence in premeditated, cold-blooded killings, but it does not preclude the defence simply because the defendant was angry at the victim for conduct which engendered a fear of serious violence.[224] The Royal College of Psychiatrists noted that:

> Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate psychologically both anger and fear . . . [T]he abused woman who waits until the man is 'helpless' is likely, not merely to be angry but also fearful that he will eventually kill her, and/or her children and that there is no way of preventing it other than by the death of the man.[225]

The word '"considered" denotes something over and above simple revenge'[226] and, as such, the primary victim who claims 'He deserved it!' remains eligible to claim the defence because jurors are in a position to distinguish genuine cases involving an element of retaliation from disingenuous claims.[227] Nevertheless, it may be difficult 'to determine whether the killing was one motivated by a considered desire for revenge or from other emotions' and, for this reason, social framework evidence should be used to explain why the primary victim may experience a complex array of emotions at the time of the fatal act.[228]

The proposed legislative framework does not include the loss of control requirement which is integral to ss 54 and 55 of the 2009 Act in England and Wales. By avoiding this controversial requirement, the proposed partial defence is closely aligned with self-defence. In cases where self-defence fails, the new partial defence might apply. At present, in England and Wales, a defendant claiming self-defence on grounds of a fear of serious violence may revert to a loss of control claim where the initial plea fails.[229] The problem is that the defendant will have to revert from alleging that she was acting reasonably in the

221 This is in line with the Law Commission's recommendation that the defence 'must not have been engineered by him or her through inciting the very provocation that led to it'; Law Commission No 304 (n 16) para 5.20. See also, Ministry of Justice (n 196) para 27. See generally Law Commission No 304 (n 16) para 3.139.

222 Law Commission No 304 (n 16) para 3.139.

223 Coroners and Justice Act, s 54(4).

224 Law Commission No 304 (n 16) paras 3.137 and 5.11.

225 Law Commission, *Partial Defences to Murder* (Law Com Consultation Paper No 173 2003) para 3.99.

226 *Evans* [2012] EWCA Crim 2 (Christopher Clee QC).

227 Law Commission No 304 (n 16) para 1.137.

228 David Ormerod, *Smith and Hogan's Criminal Law* (OUP 2011) 511.

229 Nicola Wake, 'Battered Women, Startled Householders and Psychological Self-defence' (2013) 77(5) Journal of Criminal Law 433, 434.

circumstances to asserting that she lost self-control. This is apt to cause juror confusion.[230] Rejection of the loss of control requirement also avoids the inherent contradiction in requiring the primary victim to simultaneously fear serious violence and lose self-control. For these reasons, loss of self-control does not form part of the proposed defence herein.

The loss of self-control requirement was introduced by the government of England and Wales in order to prevent the defence from being used inappropriately in cases of cold-blooded, gang-related or honour killings.[231] A review of jurisprudential authority suggests, however, that a significant number of loss of control claims are being filtered out *unnecessarily* by the loss of self-control element. It is right that these claims are being rejected, but the loss of self-control requirement is unnecessary because these claims could be filtered out by the alternative threshold filter mechanisms within the partial defence. As previously stated, loss of control and the newly proposed defence are unavailable where the defendant 'acted in a considered desire for revenge'.[232] Lord Judge CJ, in *Evans*, advocated that there 'was no need to rewrite . . . the language of the statute'.[233] In all cases, 'the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self-control'.[234] The 'considered desire for revenge' exclusion is a more appropriate instrument for filtering out unmeritorious claims because, unlike the loss of self-control mandate, the 'words "considered", "desire" and "revenge" are not words of legal technicality. They are words of ordinary use.'[235]

The trial judge, in *Jewell*,[236] refused to leave the partial defence to the jury where the defendant prepared firearms and a survival kit 12 hours before he drove to the victim's home, armed with a shotgun and home-made pistol, and shot him without warning.[237] Jewell's explanation was that he feared serious violence from the victim who had allegedly threatened to kill him the evening before. The killing 'bore every hallmark of a pre-planned, cold-blooded execution'.[238] There was a 12-hour 'cooling period' between the alleged threat and the actual killing in which Jewell could have sought an alternative course of action, but failed to do so. The defence, however, was negated not by virtue of s 54(4), but by the loss of self-control requirement. The trial judge considered the remaining elements of the defence 'out of an abundance of caution' but that assessment was 'unnecessary as a dispositive conclusion'.[239]

The extent to which the loss of self-control requirement impacts upon the utility of the alternative threshold filter mechanisms within the defence was similarly highlighted in the

230 Wake (n 229) 438. In *Kojo-Smith and Caton* [2015] EWCA Crim178; [2015] 1 Cr App R 31 [88], counsel identified that the suggestion that the defendant might have reacted in anger would not assist in considering self-defence, but might imply a loss of self-control. Cf *R v Ward* [2012] EWCA Crim [2 1] and [11 10], where a loss of control plea was accepted following the rejection of affirmative self-defence.

231 Ministry of Justice (n 196) para 36. The term 'gang' is defined in the Policing and Crime Act 2009, pt IV, s 34(5), as amended by the Serious Crime Act 2015.

232 Coroners and Justice Act 2009, s 54(4).

233 *Evans* (n 226) [131].

234 Ibid [10].

235 Ibid (Andrew Edis QC and Simon Waley).

236 *Jewell* [2014] EWCA Crim 414.

237 Ibid [43].

238 Ibid [43].

239 Ibid [47].

case of *Barnsdale-Quean*.[240] The defendant had purchased a rolling pin and chain two weeks prior to the killing. On the day of the killing, he collected the chain from a flat in which he had stored it and the rolling pin from the kitchen. He tied two elasticated bands in a loop at the end of the chain, and carefully placed it over his wife's head while she was subdued due to antidepressant medication. He used the rolling pin as a tourniquet to strangle his wife to death before stabbing himself in an attempt to make it appear that she had committed suicide after attacking him. Barnsdale-Quean claimed that he could not remember what had occurred following his wife's alleged attack. The trial judge ruled that there was no loss of self-control on the facts or the defendant's account. In the event that the defendant had lost self-control, the defence would be negated by virtue of s 54(4). The Court of Appeal advocated that it was unnecessary to reach a conclusion in respect of s 54(4) because there was no evidence of loss of self-control. These rulings demonstrate that s 54(4) is capable of filtering out unmeritorious cases in the absence of the loss of self-control requirement.

In all cases, should the outlined threshold filter mechanisms of the proposed defence be bypassed, the trial judge has the authority to reject a claim on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[241] The grounds for the plea would be considered at a pre-trial hearing under case-management procedures. The implementation of an interlocutory appeal route would mean that the trial judge's decision could be challenged (only) before trial, thereby preventing unnecessary appellate court litigation.[242] In cases where family violence is in issue, the trial judge will be charged to provide juror directions equivalent to those operating in relation to self-defence in Victoria, considered above; the difference being that these directions ought to be mandatory. This will ensure that appropriate directions are consistently provided in all cases, rather than relying on ad hoc requests made by counsel.

Conclusion

The amendments to self-defence, social framework evidence and juror directions in Victoria challenge the traditional male-oriented perception of self-defence involving violent confrontations between parties of comparable strength. This view is incompatible with killings in response to familial abuse and, as such, the changes in the law serve an educative function, highlighting the need for greater understanding of the circumstances of the primary victim in order to ensure that self-defence captures deserving cases outwith traditional gender-biased notions of self-defence. Nevertheless, there will continue to be cases involving family violence that fall outside the scope of revised self-defence. In the absence of an applicable partial defence, the primary victim may face a murder conviction and longer sentence. This is the experience in New Zealand, post-abolition of the provocation defence in 2009. The injustice associated with labelling the primary victim a

240 *Barnsdale-Quean* [2014] EWCA Crim 1418. It is true that killings involving gang-related violence may be filtered out by the loss of self-control requirement, but such a claim would more efficaciously be filtered out by the fear of serious violence trigger on the basis that 'fear of serious violence' ought to be distinguished from 'fear before engagement in a fight'. Further, a person of the defendant's age with a normal degree of tolerance and self-restraint is unlikely to react in the same or a similar way to a gang member; *R v Gurpinar* [2015] EWCA Crim 178; [2015] 1 Cr App R 31 [55]. See also, *Kojo-Smith and Caton* (n 230) [94].

241 Coroners and Justice Act 2009, s 54(5)–(6). '[I]n many mixed motive cases the judge might take the view that, even if there is no "considered desire for revenge", it is nonetheless a case where no reasonable jury would find that the defence applies. We regard it as significant that of the provocation cases studied . . . in the two involving honour killing both the accused were convicted of murder. We are confident that that result would be no different under our recommendations.'; Law Commission No 304 (n 16) para 5.27. See also, paras 5.11(5), 5.25–32, and 5.60. Lord Judge identified that the fear trigger implies a higher threshold test than the common law had; *Thornley* [2011] EWCA Crim 153 [15] cited in *R v Lodge* [2014] EWCA Crim 446.

242 Law Commission No 304 (n 16) para 5.16.

murderer and the longer sentences imposed have resulted in calls for the reintroduction of a partial defence within that jurisdiction. The risk that primary victims may be convicted of murder is unacceptable, irrespective of the sentencing regime operating in these jurisdictions.

The introduction of a new partial defence, predicated on a fear of serious violence, provides an appropriate *via media* and optimal solution within both jurisdictions. The newly proposed framework would sit cogently alongside developments to self-defence in Victoria, providing a more comprehensive package of defences covering the potential various circumstances in which a primary victim may respond with lethal force. For New Zealand, the proposed defence is far removed from provocation and earlier concerns regarding the operation of that defence. It ensures that a partial defence is available to the primary victim who kills fearing serious violence from a predominant aggressor. The novel defence is restricted by the threshold filter mechanism of the normal person test, and alternative clauses stipulating that the defence is not available where the defendant intentionally incited serious violence, acted in considered desire for revenge, or on the basis that no jury, properly directed, could reasonably conclude that the defence might apply.[243] These proposals should be complemented by social framework evidence and mandatory juror directions, similar to those operating in Victoria. This would ensure that the partial defence is available only in deserving cases. A new interlocutory appeal procedure would provide defendants with an opportunity to challenge the judge's refusal to admit the defence prior to trial, thereby preventing unnecessary appellate court litigation. The abolition of all general partial defences in Victoria and New Zealand ought to be reconsidered, and this new proposal provides an optimal framework on which to base a new defence.

243 Coroners and Justice Act 2009, s 54(5)–(6).

NILQ 66(2): 179–97

Is the creation of a discrete offence of coercive control necessary to combat domestic violence?[1]

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There is currently significant political interest in strengthening the criminal justice response to domestic violence and/or abuse. To this end the Serious Crime Act 2015, s 76, includes a new offence of controlling or coercive behaviour in an intimate or family relationship.[2] The motivation for this offence partially derives from Her Majesty's Inspectorate of Constabulary (HMIC), *Everyone's Business: Improving the Police Response to Domestic Abuse*, which highlighted that, although there were pockets of good police practice in this area, too many forces were responding in an overtly inadequate manner. The report found a lack of understanding of what domestic violence and/or abuse entailed.[3] Evidence suggests that the police are not unusual in this, with many people associating domestic violence and/or abuse with physical forms of violence.[4] That the report has been the impetus to reflect on how domestic violence and/or abuse is criminalised in England and Wales is further confirmed by the Law Commission's acknowledgment of 'the continuing concern about the policing of domestic violence'.[5] Historically, such prosecutions for crimes occurring within the context of domestic violence and/or abuse have been

1 The difficulty in defining this term is discussed within the article itself.

2 Also see Serious Crime HC Bill (2014–2015) [160], cl 73. Originally the proposed offences included the offence of coercive control in a domestic setting and domestic violence in Serious Crime Bill 2014–2015, Notices of Amendment 7 January 2015. Following Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (December 2014); Home Office, *Strengthening the Law on Domestic Abuse – A Consultation* (August 2014); In addition, reflection on reforming domestic violence and/or abuse are included in the Law Commission, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Law Commission Consultation Paper No 217, November 2014).

3 HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse* (HMIC 2014); A Musgrove and N Groves, 'The Domestic Violence, Crime and Victims Act 2004: Relevant or "Removed" Legislation?' (2008) 29 (3–4) Journal of Social Welfare Law 233, 240, found that 'police responses have, in some cases, moved well beyond the stereotyped image of their past indifference'.

4 S Walby and J Allen, *Home Office Research Study 276 Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office Research, Development and Statistics Directorate March 2004). Walby and Allen found that victims of domestic violence and/or abuse were more likely to seek help where the violence was physical or if they were severely injured and those who named incidents as domestic violence were more likely to seek help than those who did not.

5 Law Commission (n 2) s 144.

hampered by several factors including police responses to these offences[6] and the high level of retraction by victims themselves.[7] There have been significant advances in prosecutorial practices and data collection has also been introduced.[8] There remains, however, an inability by the substantive criminal law to capture the distinctive nature of coercive control that is, arguably, a defining feature of many cases of domestic violence and/or abuse.[9] Empirical research in this area suggests that domestic violence and/or abuse is systemic within society and, where coercive conduct is used, it is programmatic in nature.[10] Due to the focus on single incidents of violence within the legal framework, there was a failure to take into account the actual harm experienced by many victims of domestic violence and/or abuse which occurs through coercive behaviours of the perpetrator.[11] The new offence centres on coercive and controlling behaviour, seeking to capture the parameters of an intimate relationship, and expressly includes non-physical forms of coercive behaviour.

This article seeks to assess the potential application of the new offence of controlling or coercive behaviour in an intimate or family relationship. In this endeavour a discussion of the evolving understandings of domestic violence and/or abuse will be undertaken to show the difficulty in defining offences in this area and the importance of doing so. This will provide the context for the argument that both physical and non-physical forms of coercive control in a domestic relationship should be criminalised. Judicial interpretation of related offences and a preoccupation with an incident-based approach has meant that the reality of domestic violence and/or abuse experienced by victims is, in practice, not criminalised. This stands in contradiction to the Home Office's non-statutory definition of domestic violence and/or abuse.[12] Criminalisation provides the opportunity to

6 For explanations on the unwillingness of domestic violence and/or abuse victims to cooperate with the criminal justice system, see A L Robinson and M S Stroshine, 'The Importance of Expectation Fulfilment on Domestic Violence Victims' Satisfaction with the Police in the UK' (2005) 28(2) Policing: An International Journal of Police Strategies and Management 301–20; C Humphreys and R Thiara, *Routes to Safety: Protection Issues Facing Abused Women and Children and the Role of Outreach Services* (Women's Aid Federation of England 2002).

7 A Cretney and G Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36(2) Howard Journal of Criminal Justice 146; L Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65(6) Modern Law Review 834; A Robinson and D Cook, 'Understanding Victim Retraction in Cases of Domestic Violence: Specialist Courts, Government Policy, and Victim-Centred Justice' (2006) 9(2) Contemporary Justice Review 189; Crown Prosecution Service, *Violence against Women and Girls: Crime Report* (2010–2011) <www.cps.gov.uk/publications/equality/vaw/index.html#a02> accessed 15 April 2015; V Bettinson, 'Restraining Orders Following an Acquittal in Domestic Violence Cases: Securing Greater Victim Safety?' (2012) 76(6) Journal of Criminal Law 512.

8 Crown Prosecution Service, *Violence against Women and Girls: Crime Reports 2013–2014 and 2008–2011* <www.cps.gov.uk/publications/equality/vaw/index.html#a02> accessed 14 April 2015.

9 V Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004–2005) 65 Louisiana Law Review 989; J B Kelly and M P Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46(3) Family Court Review 476 lists different categories of domestic violence and/or abuse.

10 Tadros (n 9); E Williamson (2010) 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' 106(2) Violence Against Women 1412; E Stark (2009) 'Rethinking Coercive Control' (2009) 15(12) Violence Against Women 1509; T L Kuennen, (2007) 'Analysing the Impact of Coercion on Domestic Violence Victims: How Much is Too Much?' 22 (1) Berkeley Journal of Gender Law and Justice 2.

11 E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007); Stark (n 10) where his theory describes coercive control as amounting to a deprivation of liberty (explored below).

12 The Home Office cross-government definition of domestic violence and abuse states that domestic violence and abuse involves: 'Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality.'; Home Office, *Guidance: Domestic Violence and Abuse* (March 2013).

promote a clearer understanding of the lived experience of domestic violence and/or abuse that many victims suffer. Legal clarity will aid victims of controlling and coercive behaviours by strengthening confidence to seek support either from the criminal justice system or alternative agencies.[13] However, the potential for the introduction of the new offence to provide clarity and to address misperceptions that real domestic violence and/or abuse involves only physical violence depends upon whether changes to legal doctrine can be translated into legal practice.[14] This article will explore challenges to the application of the proposed offence to consider whether they are necessarily able to combat domestic violence and/or abuse.

Why criminalise controlling and coercive behaviour as a form of domestic violence?

The role of the criminal law is significant in that it illustrates wrongful behaviour, carefully categorised to reflect the different degrees of harm that are not tolerated by society. Despite this, criminal law is limited in what it can achieve in terms of combatting domestic violence. As Hanna succinctly explains:

> Although the legal system alone cannot end violence against women, its role in providing remedies to victims and deterring abusers is central to the greater social struggle.[15]

In this the authors are agreed: a new discrete offence nonetheless could support change and clarify the behaviour and harm of domestic violence and/or abuse and, as Tadros emphasises, sends a 'symbolic' message, as well as providing practical means for change.[16] Supporting the criminalisation of domestic violence and/or abuse is in line with the criminalisation of other activities. As Ashworth indicates, the criminal law is not solely concerned with the interests of the wronged individual but also with behaviour that is 'against some fundamental social value or institution'.[17] Duff argues that within a domestic dispute the harm:

> should be condemned by the whole community as an unqualified wrong; and this is done by defining and prosecuting it as a crime.[18]

The importance of prosecuting domestic violence and/or abuse for the public interest, and not solely the individual victim, is further emphasised by Dempsey. Concerned with the philosophical arguments for the prosecution of domestic violence, she argues that it is insufficient to just criminalise the wrong for symbolic reasons. Any criminalisation that seeks to achieve condemnation of the wrong must be habituated within the system and consistently applied, rather than being merely a series of random condemnatory incidents. For this habituation to occur, a successful prosecution system must exist that 'promotes the freedom of future victims'.[19] The criminal justice system is unable to achieve this with a

13 Such agencies include charitable support groups for domestic abuse victims, families and perpetrators seeking to address their behaviours.

14 C Hanna, (2009) 'The Paradox of Progress: Translating E Stark's Coercive Control into Legal Doctrine for Abused Women' 15(12) Violence Against Women 1460.

15 Ibid 1458; Tadros (n 9) 1010.

16 Tadros (n 9) 1011.

17 A Ashworth, *Principles of Criminal Law* (OUP 2005) 1.

18 R A Duff, *Punishment, Communication and Community* (OUP 2001) 62.

19 M Madden Dempsey, 'Toward a Feminist State: What Does "Effective" Prosecution of Domestic Violence mean?' (2007) 70(6) Modern Law Review 908, 912. For a reflection on Dempsey's work see S Cowan, "Motivating Questions and Partial Answers: A Response to Prosecuting Domestic Violence by Michelle Madden Dempsey' (2014) 8(3) Criminal Law and Philosophy 543.

focus on physical harm rather than restraints on a person's capacity to exercise their freedom fully.

The premise that criminal law should be concerned with criminalising domestic violence and/or abuse has gained wide acceptance internationally and is certainly reflected through the UK's international obligations deriving from the Convention on the Elimination of all forms of Discrimination Against Women 1979 (CEDAW)[20] and recent jurisprudence from the European Court of Human Rights (ECtHR).[21] Despite this progress, there remains the challenge of clearly understanding and defining what domestic violence and/or abuse is. Physical forms of non-consensual violence are addressed by a number of non-fatal offences where context is irrelevant to the requirements of the offence. However, where physical and non-physical forms of violence and/or abuse occur within a relationship, context is crucial. Tuerkheimer emphasises the importance of context, arguing that the law needs to be capable of considering the relationship as a whole. This would enable courts to see that the coercive and controlling behaviour connects seemingly unrelated events.[22] Hanna endorses the reframing of domestic violence and/or abuse with coercive control as its focus 'from an evidentiary perspective, the complete narrative of the relationship becomes relevant' and 'recognises the ongoing loss of autonomy the victim suffers'.[23] Before considering the potential application of the new offence, it is important to reflect upon the changing understandings of domestic violence and/or abuse. Evolving definitions continue and can explain, to some extent, the criminal law's traditional failure to reflect the programmatic nature of some forms of domestic violence and/or abuse in the absence of legislative guidance.

Evolving definitions of domestic violence and/or domestic abuse

A Home Office Consultation and proposals under the Serious Crime Bill 2014–2015[24] reflect the difficulties that persist in defining domestic violence and whether it includes, or takes a different form to, domestic abuse. To be applied and enforceable, an offence needs to have a clear definition and substantive legal terms. As Groves and Thomas explain, before a term can be defined, its existence needs to be named. Otherwise 'it is impossible to speak about'[25] and, by extension, impossible to criminalise. The Home Office consultation paper preferred the phrase domestic abuse and in the summary of responses referred to the Home Secretary's announcement that she will 'include a new offence of domestic abuse as an amendment to the Serious Crime Bill'.[26] Section 76 retains domestic

20 In its General Recommendation 19, the CEDAW Committee interpreted CEDAW in such a manner as to encompass domestic violence. For an extensive overview of relevant international provisions, see B Meyersfeld, *Domestic Violence and International Law* (Hart 2010).

21 For example, *Opuz v Turkey* (2010) 50 EHRR 28; *Bevacqua and S v Bulgaria*, App no 71127/01 (ECtHR 12 June 2008); *Eremia and Others v the Republic of Moldova*, App no 3564/11 (ECtHR 28 May 2013); *Valiuliene v Lithuania*, App no 3334/07 (ECtHR 26 March 2013). In addition the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) 2011 entered into force 1 August 2014 for states who have ratified it. The UK is yet to ratify the treaty, although did sign it on 8 June 2012.

22 D Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 1019–20.

23 Hanna (n 14) 1462.

24 Home Office, *Strengthening the Law on Domestic Abuse – A Consultation* (n 2); Serious Crime Bill 2014–2015, Notices of Amendment, 7 January 2015.

25 N Groves and T Thomas, *Domestic Violence and Criminal Justice* (Routledge 2014) 1.

26 Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 11.

abuse as its heading, although the term is not reflected in the substantive requirements of the offence. In the initial proposed amendment introducing an offence of coercive control, the term domestic abuse was avoided.

This uncertainty concerning the term domestic abuse is unsurprising when the complexities of its origins are considered. An examination of the history of naming domestic violence and/or abuse illustrates that, as a society, our understanding of what these concepts are, and whether they are one and the same, is incomplete and evolving.[27] Given this, it is unsurprising that the criminal justice system has tended to focus on incident-based, physical forms of violence[28] which were already within its ambit. Even victims themselves usually associate the term domestic violence with physical violence as Walby and Allen's research showed.[29] Victims from their sample were more likely to describe what happened to them as domestic violence and self-identify as victims where they had experienced physical violence and injuries. And yet the impact of non-physical behaviours upon a victim's psychological well-being can be more damaging than a one-off incident of physical violence.[30]

Stark reconceptualised domestic violence and/or abuse as coercive control. He concluded that the law should redefine domestic violence and/or abuse as conduct intended to undermine another person's autonomy, freedom and integrity.[31] Similarly, Tadros has argued that two features 'distinguish domestic abuse from other types of violent conduct. It's setting in an intimate relationship and its "systematic" nature.'[32] These features serve to erode the distinctive kind of freedom a person has. Whereas many criminal offences protect individuals against 'the reduction of options', domestic abuse involves not only the options of the victim being reduced, but also the options that remain being subject to unwarranted and arbitrary control by another person.[33] Consequently, the victim's capacity to appreciate and see all the actual options available to them is controlled by another. Stark describes the dynamics of coercive control as 'the microregulation of everyday behaviours' with resistance to this microregulation leading to punishment.[34] Kuennen referred to coercive control as an 'ongoing strategy of intimidation, isolation, and control' and emphasised that the behaviour of the perpetrator impacts upon all aspects of the victim's life.[35] For this reason, Stark and Williamson refer to domestic violence and/or abuse in the form of coercive control as a 'liberty crime', best understood as a pattern or programme of behaviours.[36] Stark argues that the law should reframe the definition of domestic violence and/or abuse to encompass coercive control:

> as a course of conduct crime much like harassment, stalking, or kidnapping, rather than as a discrete act, and highlight its effects on liberty and autonomy.[37]

27 For a comprehensive account, see Groves and Thomas (n 25) ch 1.

28 As illustrated by analysis of relevant jurisprudence below.

29 Walby and Allen (n 4).

30 Stark (n 10); Tadros (n 9); Williamson (n 10).

31 Stark (n 11).

32 Tadros (n 9).

33 Ibid 998.

34 Stark (n 11) 5. Dutton and Goodman also provide a more expansive account of the dynamics of coercive control in an intimate relationship: see M A Dutton and L A Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52 Sex Roles 743.

35 Kuennen (n 10).

36 Williamson (n 10).

37 Stark (n 11) 382.

Dutton and Goodman reveal some difficulties with using the course of conduct model. A victim is particularly vulnerable to coercion and control, even when the immediate threat is relatively minor, if she has experienced violence from her partner already because the possibility remains that it will happen again.[38] As the rules become internalised and automatically performed by the victim, less and less physical violence and other punishing behaviour is needed to ensure compliance. In many abusive relationships the rules set by the perpetrator do not even need to be verbally expressed to create an atmosphere that is controlled by the abuser.[39] Signals and other covert messages will often have meaning only in the context of the relationship: 'a gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse'.[40] The implication being that whether these threats are coercive or not cannot be judged objectively; they depend upon the social context of the relationship and whether the victim has reason to believe the threats can and will be carried out.[41]

Unfortunately, such a concept of coercive control is difficult to criminalise while domestic violence and domestic abuse appear to be understood as representing different forms of behaviour. Domestic violence encompasses physical forms of violence either as single incidents or several separate incidents, while domestic abuse has become more commonly associated with non-physical forms of abuse, sometimes non-criminal behaviour, and typically seen as less serious. This separation of physical and non-physical forms of domestic violence and/or abuse does not reflect the context of the relationship between the two parties or the complex way that both physical and non-physical forms of behaviour often co-exist. Therefore it can often be inappropriate to consider domestic abuse as a less serious harm than single incidents of physical forms of domestic violence.[42] The Home Office definition states that domestic violence and abuse involves:

> Any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality.

Controlling behaviour is described as:

> a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is defined as 'an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim'.[43] This definition suggests that domestic violence and domestic abuse are distinct terms, presenting them without hierarchy and without distinguishing between the separate characteristics of

38 Dutton and Goodman (n 34) 748.

39 K Fischer, N Vidmar and R Ellis, 'The Culture of Battering and the Roles of Mediation in Domestic Violence Cases' (1992) 46 Southern Methodist University Law Review 2117 for examples of how control is maintained through the victim's reading of non-verbal messages from the abuser.

40 Ibid 2120.

41 Dutton and Goodman (n 34) 747–8.

42 S Cammiss, 'The Management of Domestic Violence Cases in the Mode of Trial Hearing: Prosecutorial Control and Marginalising Victims' (2006) 46(4) British Journal of Criminology 704 has observed that even single incidents of physical violence in a domestic setting have found to be minimised by prosecutorial practices within the Magistrates' Courts.

43 Home Office Circular 003/2013 <www.gov.uk/government/publications/new-government-domestic-violence-and-abuse-definition> accessed 9 June 2015.

the two.[44] The phrase domestic abuse is currently confusing and may promote the idea that abuse is less serious than domestic violence.[45] An offence named coercive control is preferable to domestic abuse because the control can take the form of physical and non-physical behaviours, or a combination of both. It is for this reason that the term domestic abuse, adopted in s 76, should not be seen as distinct from domestic violence. This would better convey the fact that coercive control is neither solely physical nor non-physical, but often a mixture of the two. The next section will look at the existing criminal law to highlight how it does not encompass coercive control within the non-fatal offences and the Protection from Harassment Act 1997.

The recognised legislative gap

Following consultation, the Home Office concluded that there is a gap in the existing legal framework as it fails to recognise non-physical coercive and controlling behaviour.[46] A consideration of the legal framework reveals that the non-fatal offences are focused on single isolated incidents, thus not capturing the ongoing nature of domestic violence and/or abuse. The non-fatal offences have been construed narrowly where the victim experiences non-physical harm within the context of an intimate or family relationship. The primary legislation used to prosecute perpetrators of domestic violence and/or abuse remains the Offences Against the Person Act 1861 and the common law offences of assault and battery.[47] Analysing the theoretical underpinnings and practical application of these offences reveals that the courts conceptualise and measure harm without reference to context or the presence of coercive control. These offences are thus premised upon physically violent acts which cause predominantly physical injury with their place on the spectrum of harm being determined according to an objective standard of outcome. In this way, the law creates a hierarchy of harm that does not always correspond to the injury experienced by the victim from a pattern of coercive or controlling behaviour which may or may not involve physically violent acts.[48]

There is an assumption that different forms of violent behaviour will have similar consequences if the objective harm is the same. This approach does not account for the impact that an abuse of trust characteristic of an intimate relationship has on victims in this context.[49] The dynamics of domestic violence and/or abuse reveal that physical violence neither accurately encapsulates the nature and the impact of the harm involved, nor the ways in which particular vulnerabilities can be created and exploited by the abuser.[50] Using a model derived from stranger violence and premised upon physical assaults causing physical harm ignores the ways in which the harm of coercive control in an intimate or

44 L Richards, S Letchford and S Stratton, *Policing Domestic Violence* (OUP 2008) 12 suggest that this inclusion reflects agencies' preference to use the term abuse which is better understood to refer to 'a pattern of behaviour which is both criminal and non-criminal in nature'.

45 Groves and Thomas (n 25) 5 emphasise that the term domestic abuse is less serious than physical violence according to health professionals whose priorities are based on matters of treatment rather than criminality leading to punishment.

46 Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 11; the Law Commission is currently seeking views on whether to adopt a dedicated offence or offences to tackle domestic violence in a scoping exercise to ascertain responses to proposed reform of the Act, see Law Commission (n 2).

47 Criminal Justice Act 1988, s 39; *R v Venna* [1976] QB 421; *Fagan v Commissioner of Police of the Metropolis* [1969] 1 QB 439.

48 E Stanko, *Violence* (Ashgate 2002) xiii.

49 Tadros (n 9).

50 Williamson (n 10); Stark (n 10); Kuennen (n 10).

family relationship is unique. This uniqueness is manifest precisely because the abuse is committed by an intimate in a context in which the perpetrator can exert coercion and exploit their knowledge of the particular vulnerabilities of the victim.[51] The incident-based approach taken towards non-fatal offences, alongside the focus on physical violence – except in limited circumstances[52] – results in the separation of individual incidents of violence from the context in which they occur. The construction of decontextualised acts of atomistic individuals to establish an offence means that the focus will necessarily be solely on the individual incident the defendant is being charged with. Norrie's critique of the criminal law process reveals that at the heart of modern criminal law exists a 'responsible individual' who is isolated from the real world and the social and moral contexts in which the crime occurs.[53] However, it is often only when the context of ongoing coercive control is taken into account that seemingly small and trivial incidents can be seen to have a detrimental effect on the victim. As a result of removing the individual from the context in which the crime occurs, the criminal justice system abstracts the criminal incident from the rest of the defendant's pattern of behaviour and actions.

The most recent conceptualisation of the types of harms for which redress may be provided under the 1861 Act is found in *R v Chan Fook*[54] and iterated more recently in *R v Dhaliwal*.[55] In *R v Chan Fook*, Hobhouse LJ stated that, while the phrase 'actual bodily harm' is capable of including psychiatric injury, 'it does not include mere emotions such as fear or distress nor panic' as to do so would be 'likely to create in the minds of the jury the impression that something which is not more than a strong emotion, such as extreme fear or panic, can amount to actual bodily harm'.[56] Hobhouse LJ's use of the phrases 'mere emotions' and 'not more than a strong emotion' trivialises responses such as these and, as noted by Munro and Shah, there is 'little recognition that emotional suffering, where it is severe in its effects and sustained in its duration, can have serious, harmful consequences'.[57] Following this judgment, non-physical harm is reduced to being 'either psychiatric or "merely" emotional, with only infliction of the former meriting criminalisation'.[58] This judgment reveals both the problematic nature of attempts to apply the existing offences against the person in the context of domestic violence and/or abuse, and perhaps judicial failure to comprehend the impact that an ongoing programme of abuse may have on a person unless it reaches a medically recognised threshold.

The requirement for bodily harm to the mind to amount to a recognisable psychiatric injury as opposed to psychological harm was reinforced by *R v Dhaliwal*.[59] In seeking to base a charge for constructive manslaughter on s 20[60] the prosecution argued that psychological harm as a result of a period of domestic violence and/or abuse (characterised by coercive control) amounted to bodily harm. On appeal it was questioned

51 L G Mills, *Insult to Injury: Rethinking our Responses to Intimate Abuse* (Princeton University Press 2003) 51; Williamson (n 10).

52 See discussion below of *R v Chan Fook* [1994] 1 WLR 689 (CA) and *R v Dhaliwal* [2006] EWCA Crim 1139; [2006] 2 Cr App R 24.

53 A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2nd edn CUP 2001) 29.

54 *R v Chan Fook* (n 52).

55 *R v Dhaliwal* (n 52).

56 *R v Chan Fook* (n 52).

57 V Munro and S Shah, '*R v Dhaliwal* Judgment' in R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010) 261–72, 263.

58 Ibid 264.

59 *R v Dhaliwal* (n 52).

60 Offences Against the Person Act 1861, s 20, wounding or inflicting grievous bodily harm maliciously.

whether the s 20 offence could be based on non-physical injury. In approving the previous case law[61] and reaffirming the requirement for a recognised psychiatric injury, the court in *R v Dhaliwal* effectively ruled out the impact abuse can have upon a victim when there has not been a formal diagnosis of battered woman's syndrome or post-traumatic stress disorder.[62] The psychiatric experts in this case did not find evidence of recognisable psychiatric injury and, despite finding some features of depression that would have impacted on the victim's psychological functioning, the prosecution failed. *R v Dhaliwal* provided the Court of Appeal with the opportunity to reconceptualise bodily harm in line with the lived experiences of domestic violence and/or abuse victims. Viewing the 1861 Act as a 'living instrument'[63] would have allowed the recognition that significant psychological symptoms might, in cases where a minimum level of severity is attained, amount to bodily harm despite the lack of a medical diagnosis.[64] The court declined to take this approach, thus 'privileging . . . medical knowledge over a large body of social science research relating to the effects of domestic abuse' despite the fact that medical opinion is also uncertain and experts do not always agree.[65] This demonstrates the reliance on medical research as opposed to social-psychological research and a continuing focus on the victim as opposed to the behaviour of the perpetrator.[66] At the heart of this analysis is the semantic complexity requiring the term 'bodily harm' to incorporate psychological injury – a legislative indication that non-physical harm manifested through a pattern of coercive and controlling behaviour ought to remove the need for such creative judicial interpretations.

It has been argued that the existing criminal law framework under the Protection from Harassment Act 1997 can apply to domestic violence and/or abuse which has taken place over a period of time and is not dependent upon physical violence.[67] However, judicial interpretation of provisions has restricted the legislative framework in successfully encompassing patterns of behaviour amounting to coercive and controlling behaviour. The basic offence of harassment,[68] the more serious offence of causing fear of violence[69] and the offence of stalking[70] offer some protection to victims of coercive and

61 *R v Chan Fook* (n 52); *R v Ireland; R v Burstow* [1998] AC 147 (HL).

62 M Burton, 'Commentary on *R v Dhaliwal*' in Hunter et al (n 57) 258; and Lord Steyn in *R v Dhaliwal* (n 52).

63 *R. v Ireland; R. v Burstow* (n 61).

64 Munro and Shah (n 57) allow for this approach provided that the psychological harm reaches the threshold level of 'really serious harm' under *DPP v Smith* [1961] 3 WLR 546.

65 Burton (n 62) 258.

66 The Law Commission (n 2) suggests that new offences relating to domestic violence could be accommodated in a new framework for non-fatal offences. Specialised forms of offences could refer to cases where the victim is living with the defendant as a member of the family. Sentencing powers would then need to be appropriate to reflect this specialised factor. However, a framework that is innately concerned with physical violence would struggle to accommodate the non-physical forms of behaviour concerned with controlling behaviour, as illustrated by the judicial approach in respect of non-fatal offences.

67 In Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 6 15% of respondents felt the current law was adequate; J Bindel, 'Criminalising Coercive Control Will Not Help Victims of Domestic Abuse' *The Guardian* (London 27 August 2014) <www.theguardian.com/commentisfree/2014/aug/27/coercive-control-crime-domestic-abuse-women> accessed 14 April 2015.

68 S 2.

69 S 4.

70 S 2A as amended by Protection of Freedoms Act 2012, s 111.

controlling behaviour.[71] For example, the offence of putting a person in fear that violence will be used against them[72] shows an appreciation of harm being inflicted without the use of physical violence and, instead, through the exertion of control over the victim by keeping them in a state of fear. Although, as Simester et al state, the term 'violence' still implies 'some kind of physical attack'.[73] Judicial interpretations have limited the applicability of these offences in cases involving coercive control within an intimate or family relationship. Firstly, these offences rely on establishing a course of conduct which amounts to two or more incidents, amounting to harassment[74] and having sufficient connection to each other.[75] Where the case reveals an ongoing relationship between the alleged victim and perpetrator, there is judicial reluctance to acknowledge the existence of a course of conduct with the required qualities. In *R v Hills*[76] the incidents relied upon to form the basis of the charge under s 4 were alleged to have occurred between April and October 1999. Allegations of ongoing violence between these dates were discounted for evidential reasons and it was further held that the incidents of physical assault were unrelated. The fact that the victim continued to live with the appellant throughout the period in which she claimed that he put her in fear of violence appears to have influenced the judicial disbelief of the alleged behaviour between the two incidents.[77] This disbelief appears in *R v Curtis* where the use or threats of violence over a nine-month period by the defendant towards the victim did not amount to a course of conduct given that the incidents were interspersed with affection between the two.[78] The case of *R v Widdows*[79] confirms this approach and indicates two assumptions. Firstly, that victims freely remain in a relationship characterised by coercive control and, secondly, that the abuse is less serious if it is in the context of a 'long and predominantly affectionate relationship in which both parties persisted and wanted to continue'.[80] This reasoning misunderstands the context and consequences of coercive control in intimate relationships. The perception of victims as autonomous individuals who remain in or return to the relationship because they freely choose to do so means that judges find it difficult to understand a victim who reports the behaviour of her partner but remains in the relationship. To interpret the legislation from this perspective ignores the dynamics and impacts of ongoing coercive control. It also undermines the potential utility of the offences contained in the 1997 Act to provide victims of domestic violence and/or abuse with adequate protection when the relationship is ongoing.[81] In fact, Otton LJ expressly regarded the Act as unsuited to this purpose, stating that the legislation was introduced

71 A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law Theory and Doctrine* (5th edn Hart 2013) 451 note 'no one would deny that courses of conduct aimed at destabilising and diminishing the quality of the victim's life are properly regarded as species of violence, notwithstanding the lack of any blow or physical attack'.

72 S 4.

73 Simester et al (n 71).

74 Protection from Harassment Act 1997, s 7(3), as inserted by the Serious Organised Crime and Police Act 2005, s 125(7).

75 *Lau v DPP* [2000] Crim LR 580; *R v Hills* [2001] Crim LR 318; Official Transcript (2000) No 00/4898/W5 CA (Crim).

76 *R v Hills* (n 75).

77 To the court's credit it was suggested that the prosecution would have been more successful had it pursued two separate charges under s 47 of the 1861 Act.

78 *R v Curtis* [2010] EWCA Crim 123; [2010] 3 All ER 849.

79 *R v Widdows* [2011] EWCA Crim 1500; [2011] Crim LR 959.

80 Ibid para 29.

81 As well as a criminal conviction under either s 2 or s 4, s 5 of the Protection from Harassment Act 1997 also provides for a restraining order to be attached to the sentence for either of these offences.

in the context of stalking, which implies a stranger or estranged spouse as the intended defendant.[82] Such a limit is not contained within the legislation itself, although clearly such an interpretation leaves coercive and controlling behaviour in intimate or family relationships lawful until s 76 of the 2015 Act enters into force.

Secondly, despite the inclusion of 'a course of conduct' in the offences under the 1997 Act and the recognition in the Home Office's report on stalking[83] that 'each stalking case is unique and highly personalised, involving an idiosyncratic combination of . . . a wide range of other diverse types of behaviour', the judgments lapse back into examination of individual incidents of assault and battery and whether or not these, in combination, amount to a course of conduct. For example, in *Lau v DPP*,[84] where two incidents were proved,[85] the court took the view that the fewer the number of incidents and the longer the time span between them, the less likely it would be that a finding of a course of conduct amounting to harassment could reasonably be made.[86] There are clear difficulties with proving many of the incidents which could be used to demonstrate a course of conduct for the purposes of harassment when they take place in the context of an intimate relationship, typically with no witnesses.[87] Therefore the court needed to recognise that, in a case involving domestic violence and/or abuse, there are likely to be other non-disclosed incidents and that two proven ones should suffice for a conviction. As the court did not, the efficacy of this offence in domestic violence and/or abuse characterised by coercive control is marginal. Had the judiciary provided a broader interpretation of a course of conduct amounting to harassment in the context of intimate or family relationships, it would be harder for future courts to view two incidents or more of coercive or controlling behaviour occurring in an intimate relationship as isolated and unrelated.

Whether or not the 1997 Act was intended for use within the context of relationships involving violence and/or abuse, it could have been applied in this way. The use of credible threats and other methods to maintain control over the victim by keeping them in fear of violence or other unwanted events is central to domestic violence and/or abuse involving coercive and controlling behaviour. These aspects quite clearly fit with the requirements for a course of unwanted conduct that may not be sinister when taken out of context, for example, the delivering of flowers or repeated phone calls, but that can take on a more sinister persona in the context of an unwanted or coercive and controlling relationship. That the legislation has not been interpreted in this way displays a lack of judicial comprehension of the dynamics of domestic violence and/or abuse and has given rise to a legislative gap in this context.

Ormerod has argued that s 4 'represents a distinct offence focused not on harassment, but on the graver wrong of creating fear of violence'.[88] Had the legislation been interpreted in this way it could have provided the potential for a case to be brought against a perpetrator of coercive control in an intimate or family relationship who used

82 *R v Hills* (n 75) para 31.

83 E Finch, 'The Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997' (2002) Criminal Law Review 704; T Budd and J Mattinson, *The Extent and Nature of Stalking: Findings from the 1998 British Crime* (Survey Home Office Research Study 210, Home Office Research, Development and Statistics Directorate October 2000).

84 *Lau v DPP* [2000] 1 FLR 799.

85 Although numerous more were alleged.

86 *Lau v DPP* (n 84) para 15; similarly see *R v Hills* (n 75) discussed above. Cf *Pratt v DPP* [2001] EWHC 483 (Admin); (2001) 165 JP 800.

87 Burton (n 62).

88 D Ormerod, *Smith and Hogan's Criminal Law* (13th edn OUP 2011) 704.

surveillance, credible threats and intimidation to put the victim in fear of violence. Although this may have been restricted to fear of *physical* violence being used, it would at least have enabled a case to be brought when fear of violence based on past incidents of physical violence is being used by the abusive partner to maintain power and control.[89] However, the approach taken in *R v Curtis*[90] construes s 4 in the broader context of the Act, requiring proof that the course of conduct putting the victim in fear of violence also amounts to harassment. Ormerod asserts that this is only of practical significance 'if there are circumstances in which two or more incidents with a sufficient nexus caused a fear of violence without also being harassing', which he concludes would be unlikely.[91] However, in the context of the violence and/or abuse, conduct not deemed 'harassing' may still be capable of creating fear in the victim in the context of the relationship and therefore the s 4 offence is more relevant.[92] In addition the 'fear of violence' needed is too limited as the victim must be afraid that violence *will* be used. In *R v Henley*,[93] Pill LJ emphasised that a course of conduct which caused a generalised state of fearfulness or a fear for the safety of others would not suffice. There would need to be two specific incidents which directly caused the victim to fear violence. Hence, it is not enough that the victim is seriously frightened of what might happen or frightened that violence will be used against members of her family. Therefore, coercive and controlling behaviours used as techniques for domestic violence and/or abuse are excluded, unless the victim could prove she was afraid that violence would be used against her at that particular time, and not merely of the possibility that it might be used against her.

Finally, the defendant must either know or ought to know that his course of conduct will cause another to fear violence on each of the occasions. The defendant can be convicted if any 'reasonable person' in possession of the same information would have known that such conduct would put a person in fear of violence.[94] Findings by magistrates and juries that a reasonable person would have realised that someone would be put in fear of violence may be shaped by their existing preconceptions.

Clearly, the consultation's conclusion that a legislative gap exists in respect of coercive and controlling behaviour in an intimate or family relationship is a correct one.

Applying the new offence of controlling or coercive behaviour

The Serious Crime Act 2015 seeks to address this legislative gap. Section 76 states:

> (1) A person (A) commits an offence if—
>
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
>
> (b) At the time of the behaviour, A and B are personally connected,
>
> (c) The behaviour has a serious effect on B, and
>
> (d) A knows or ought to know that the behaviour will have a serious effect on B.

89 Kelly and Johnson (n 9).

90 *R v Curtis* (n 78).

91 Ormerod (n 88).

92 Williamson (n 10).

93 *R v Henley* [2000] Crim LR 582; Official Transcript (2000) No 99/0356/W3 CA (Crim).

94 S 4(2).

Repeated or continuous behaviour

The new offence has sought to create a new model that moves away from that presented in the harassment and stalking offences. The course of conduct terminology is avoided and in its place the defendant must have repeatedly or continuously engaged in the prohibited behaviour towards the victim. The course of conduct model was initially proposed as was the suggestion that a single act of coercive control would suffice.[95] The deletion of the single act adds credibility to the offence, by ensuring it 'specifically criminalise[s] patterns of coercive and controlling behaviour'.[96] Requiring repeated or continuous behaviour highlights that this offence is not concerned with criminalising ordinary everyday behaviour between partners.[97] Although acknowledging the difficulties associated with the course of conduct model identified above, Youngs persuasively suggests that the move away from the familiar model may hinder the 'transition to the new criminal regime'[98] as it does not replicate the non-statutory definition. Her preferred approach would be to retain 'a course of conduct' defined in the context of a domestic violence offence as 'a pattern of behaviour encompassing at least two manifestations of domestic violence'.[99] Given the examination of judicial interpretations of 'a course of conduct' in the context of harassment and stalking, it is foreseeable that Youngs' proposal would retain assessments of 'incidents' and the tendency to focus on physical incidents. The legislative decision to move entirely away from the problematic 'course of conduct' model provides the opportunity for fresh judicial understandings of domestic violence and/or abuse to emerge.

Youngs' suggestion would link the course of conduct to domestic violence as opposed to a course of conduct that manifests in at least two criminal incidents. The continued confusion over the term domestic violence and/or abuse, discussed above, would inhibit the effectiveness of her provisional proposal. While the dominant societal perspective continues to view domestic violence as physical acts and domestic abuse as non-violent and less serious, judicial interpretations will continue to reflect this. Section 76 avoids this by linking the behaviour to control and coercion. The requirement that the defendant engages in repeated or continuous behaviour that is controlling or coercive enables the court to consider the broader context of the relationship. For Hanna, the opportunity for the victim to narrate the experience of the whole relationship has evidential benefits, as well as creating a criminal justice system that is empathetic and understanding. The context of the relationship becomes relevant to prosecutorial cases when the focus is not on establishing separate incidents. The goal of the new offence is to respond to the legislative gap identified and provide further protection from the actual impact coercive and controlling forms of domestic violence and/or abuse has on those experiencing it. Enabling the whole story to be relevant to the case 'connects the personal to the political' and the hope that the law will be systemically reshaped is validated.[100]

95 Serious Crime Bill 2014–2015, Notices of Amendment 7 January 2015; House of Commons Public Bill Committee Serious Crime Bill 2014–2015 Written Evidence (22 January 2015) SC12.

96 Home Office, *Strengthening the Law on Domestic Abuse Consultation – Summary of Responses* (n 2) 11.

97 A fear that received some media attention, see, for example, J Griffiths, 'Husbands who Shout at their Wives or Hold Hands with their Partner could be Jailed under New Law' *Akashic Times* (31 December 2014) <http://akashictimes.co.uk/husbands-who-shout-at-their-wives-or-hold-hands-with-their-partner-could-be-jailed-under-new-law/> accessed 14 April 2015.

98 J Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79(1) Journal of Criminal Law 55, 67.

99 Ibid 69.

100 Hanna (n 14) 1462.

Coercive or controlling behaviour

An interesting anomaly in the content of the new offence is the lack of definition provided for the terms 'controlling' and 'coercive'. In addition the offending behaviour suggests that controlling behaviour does not also need to be coercive to satisfy the offence. A possible option available to the courts when interpreting the terms is the non-statutory definition which describes controlling behaviour as:

> a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Whereas, coercive behaviour is defined as:

> an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.[101]

Useful though these terms may be, the legislation itself does not confirm that the offence is to be interpreted in light of these definitions. Given that coercive behaviour is to be construed as repeated or continuous, it is hard to envisage that the behaviour concerned will not be both controlling and coercive.

A and B are personally connected

The offence relates only to situations where A and B are personally connected,[102] meaning within 'an intimate or family relationship'.[103] Section 76(2) states:

> A and B are 'personally connected' if—
>
> (a) A is in an intimate personal relationship with B, or
>
> (b) A and B live together and—
>
> (i) They are members of the same family, or
>
> (ii) They have previously been in an intimate personal relationship with each other

There is considerable difficulty in determining the relationship parameters of domestic violence and/or abuse and the inclusion of describing those personally connected as 'members of the same family' is particularly difficult. In HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse*, police officers felt that the term had become too inclusive due to its coverage of some family relationships, which meant in their opinion that a domestic violence response was not always appropriate in the circumstances and did not always represent the same risk of harm or control compared to intimate partners.[104] In another context, Reece reflected similar concerns in relation to the term 'associated persons'.[105] She argued that reasons for violence that takes place between heterosexual couples or former couples differ and require different responses than other forms of family violence.[106] Youngs extends Reece's argument to the context of criminal law, agreeing that, as violence is qualitatively different where it takes place in certain relationships compared to others, the same law should not apply.[107] Caution should be applied when determining who

101 Home Office (n 12).

102 S 76(1)(b).

103 S 76(2).

104 HMIC (n 3) 30.

105 Family Law Act 1996, s 62, as amended by Domestic Violence, Victims and Crime Act 2004, pt 1, s 4.

106 H Reece, 'The End of Domestic Violence' (2006) 69(5) Modern Law Review 770.

107 Youngs (n 98).

can experience domestic violence and/or abuse. Empirical research is finding that forms of coercive control can occur within same-sex relationships, although a lack of data keeps this issue relatively hidden.[108] The gender-neutral approach taken in s 76 appropriately includes all intimate personal relationships whether current or at an end.

That the behaviour should not overlap with child abuse offending was raised in the responses to the government definition and was the basis for limiting the application to individuals aged 16 or above. A concern was expressed that this excludes teenage personal relationships, a problem highlighted by Barter[109] and which seems to be overcome by s 76(3) which excludes from the offence personal connections where the defendant 'has responsibility for B under the Children and Young Person Act 1933, s. 17' and where B is under 16. This is a clear indication that the focus is not on parental relationships, while at the same time extending the offence to relationships where one or both parties are under the age of 16. The ability of this offence to extend to teenage relationships is strengthened by s 76(2)(a) which does not limit 'intimate personal relationships' to those living together and can therefore including dating relationships.[110]

All other forms of family relationships are not excluded by the offence. Members of the same family are further defined in s 76(6) with all but one of the categories listed referring to people who have or have had an intimate personal relationship (if the terms are understood in their traditional sense). Section 76(6)(c) stands out as it refers to relatives as defined by Family Law Act 1996, s 63(1), which clearly includes non-intimate relationships.[111] The inclusion of all relatives that live within the same household within this offence locates the offence within the domestic setting. However, different family relationships have a different nature and quality to those between intimates. Expected levels of trust involved between members of family relationships are varied and often not equally distributed, unlike the levels of trust that grow within an intimate personal relationship. Therefore, the inclusion of all family relationships may continue societal confusion over forms of domestic violence and/or abuse that are coercive and controlling.

Behaviour has a serious effect on B

The requirement that controlling or coercive behaviour has a serious effect on B is a problematic aspect of the *actus reus* of the offence.

Section 76(4) states:

> A's behaviour has a 'serious effect' on B if—
>
> (a) It causes B to fear, on at least two occasions, that violence will be used against B, or
>
> (b) It causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities.

108 C Donovan and M Hester, *Domestic Violence and Sexuality: What's Love Got to Do with It?* (Policy Press 2014); C Donovan and M Hester, 'I Hate the Word "Victim": An Exploration of Recognition of Domestic Violence in Same Sex Relationships' (2010) 9(02) Social Policy and Society 279–89.

109 C Barter, 'In the Name of Love: Partner Abuse and Violence in Teenage Relationships' (2009) 39(2) British Journal of Social Work 211; C Barter, M McCarry, D Berridge and K Evans, 'Partner Exploitation and Violence in Teenage Intimate Relationships' (NSPCC, 2009) <www.nspcc.org.uk/inform> accessed 14 April 2015.

110 Youngs (n 98) 69. Youngs' provisional proposal would not accommodate dating relationships.

111 Family Law Act 1996, s 63(1), defines relative, in relation to a person, as: a) the father, mother, stepfather, son, daughter, stepson, stepdaughter, grandmother, grandfather grandson or granddaughter; or b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or the half blood of by marriage or civil partnership).

What amounts to a serious effect on B will raise issues as to whether a subjective or objective approach should apply.[112] The wording suggests that a subjective approach will apply as the victim will have to actually experience 'fear' that violence will be used against them or 'serious alarm or distress'. A subjective approach will limit the application to those who are able to appreciate or verbalise the impact of the harm they are experiencing, having left their 'hostage-like' state.[113] As highlighted above, until non-violent forms of controlling and coercive behaviour and their harm are better understood by the public, victims and judiciary, assessing the impact the behaviour has had on the recipient will be difficult. The Mothers' Union suggested that the harm be described as 'having a serious effect on B or has the potential of having a serious effect on B', however, until the injury caused is more widely understood, the problem of subjectivity, or objectivity, would remain.[114] Evidential factors would involve medical assessments of the victim, placing the victim's mental capacity into the forefront of the case. Care should be taken to ensure that the restrictive approach to psychological harm adopted in the case law surrounding non-fatal offences is not continued in this context. A move away from such an approach can easily be achieved as s 76(4) specifically refers to states of mind, such as fear, alarm and distress, rather than physical injuries.

In determining whether the serious alarm or distress has a 'substantial adverse effect on the person's day-to-day activities',[115] an objective test ought to be avoided in order to assist in achieving Parliament's aim to address the unique harm involved. A concern with an objective test would be the task of conveying the impact that a series of coercive behaviours has had on the victim in question, particularly where these are the result of gestures, phrases and looks that have meaning only to those within the relationship as outlined by Williamson.[116] Youngs adopts Burke's proposal, describing the harm as 'restricting the victim's "freedom of action"'.[117] This is a useful and preferred approach that focuses less on the mental capacity of the victim and her reactions to the offending behaviour. It more adequately reflects the nature of coercive control as a liberty crime. It remains to be seen how courts will interpret the phrase 'serious effect on B' for this offence without resorting to victim-blaming and asking why the victim didn't leave if the effect of the behaviour was so bad. The knowledge that there is support available to victims of domestic violence may make it harder for others to comprehend the extent and impact of the defendant's controlling and coercive behaviours upon the victim. Hanna warns that new legal advances that seek to help are likely to create new challenges and dilemmas.[118]

Mens rea – knows or ought to know that the behaviour will have a serious effect on B

Section 76(1)(d) states the *mens rea* requirement for the offence is either knowledge that the prohibited behaviour will have a serious effect on B or that the defendant ought to have knowledge of it. Section 76(5) clarifies that for (1)(d) the defendant 'ought to know' that which a reasonable person in possession of the same information would know. As noted by

112 House of Commons Public Bill Committee (n 95) SC10.

113 Youngs (n 98)

114 House of Commons Public Bill Committee (n 95) SC10.

115 S 76(4).

116 Williamson (n 10); Dutton and Goodman (n 34); Fischer et al (n 39).

117 Youngs (n 98); A Burke, 'Domestic Violence as a Crime of Pattern and Intent' (2007) 75 George Washington Law Review 602.

118 Hanna (n 14).

Finch, this objective standard was deemed necessary under the 1997 Act, where for neither offence is it necessary to prove an intention to cause fear of violence or a sense of harassment in order to ensure comprehensive protection for all victims. For the victim, the behaviour is 'no less harmful because it is unintentional hence an objective *mens rea* requirement' is more appropriate.[119] Enshrining an objective approach, s 76 prevents A from escaping liability by claiming that they did not know their behaviour would have a serious effect on B.

However, this is not to say that difficulties with this objective standard do not exist. Subsections 76(4)(a) and (b) both require that the behaviour has a 'serious effect' on B and thus the focus is on the effect that the behaviour has on the victim, not the intention of A. This effectively ostracises the motive of the defendant – controlling the victim – from the *mens rea*. Under Youngs' proposed offence, a requirement of 'intent to establish or exercise power and control' would provide an 'ulterior intent that goes "beyond" the act done by the defendant'.[120] It would further prevent the focus of attention being on the victim, with assessments of their reaction being based upon misconceptions of the harm of coercive control and judgments concerning why they remained in the relationship. In continuing to focus on the effect upon the victim, the criminal law continues to focus on the actual injury inflicted upon the victim, not on the motivations of the offender, avoiding wider questions of why the perpetrator acted as they did and why they exert the coercive control integral to the harm.[121] However, the objective standard means that to escape liability the perpetrator cannot claim that he did not know what he was doing would have a serious effect on the victim, or that behaviours he thought were 'reasonable' in the context of a relationship where male control and dominance are seen as natural by society. It is also suggested that the evidential difficulties that will be unavoidable in some cases of coercive control would be amplified by a *mens rea* of intention. To prove that the defendant intended to carry out the *actus reus* of the offence would be difficult. The defendant could simply claim that they just wanted their partner to be at home for a particular reason or did not realise that preventing their partner from leaving the house on occasions would have that effect upon her, whereas, the harm to the victim is the same regardless of the intention of the perpetrator.

The objective *mens rea* could explain why the maximum penalty for the offence stands at 5 years;[122] if the *mens rea* was solely based on A having an intention to seriously affect B it would be a crime of specific intent and thus more serious in terms of culpability. It is suggested that the maximum sentence under s 76 does not reflect the severity of the harm of coercive control and leads to the creation of a hierarchy of harm when compared with the maximum sentences for physical harm available under the 1861 Act. However, given the difficulties outlined above, the objective standard is to be welcomed as providing the best possibility of securing a conviction given the present limitations to legal and societal understandings of coercive control.

'Best interests' defence

Under s 76(8) it is a defence for A to show that, in engaging in the behaviour in question, they believed they were acting in B's best interests, and that the behaviour was, in all the

119 Finch (n 83).

120 Youngs (n 98) 68.

121 Ibid 61.

122 Serious Crime Bill (2014–2015), Notices of Amendment 7 January 2015 (NC3) suggested a maximum imprisonment not exceeding 14 years.

circumstances, reasonable. Although the defence is not available in relation to behaviour that causes B to fear that violence will be used against them,[123] concerns have still been raised about this defence in relation to the ease with which it could be manipulated by the perpetrator. Women's Aid notes that:

> the very nature of much psychological abuse is designed to ensure the victim believes they are in the wrong and the perpetrator is protecting or helping them.[124]

Perpetrators commonly tell victims that they are carrying out certain abusive behaviours 'for their own good' and this is a key element of coercive control. As shown by Williamson's research findings, perpetrator and victim perceptions of what is 'real' are frequently distorted, with victims often internally redefining their version of reality to match the version presented by the perpetrator. They may come to believe the abuse is their fault and, in order to reconcile the experience of domestic violence and/or abuse, may internalise the anger and feel there is something wrong with them for causing or allowing the violence and/or abuse.[125] This belief could be manipulated by the defence, especially when the victim is being cross-examined in court. In addition, magistrate and judicial preconceptions concerning violent and/or abusive relationships may make them predisposed to view the behaviour as 'reasonable' because they cannot understand the context in which behaviours that can be part of normal everyday life take on a coercive and controlling nature within the context of a specific abusive relationship.

The defence also appears to re-produce the hierarchy of harm, discussed above, which is common in legal understandings of domestic violence and/or abuse because it is only available for an offence under s 76 (4)(b) and not when A causes B to fear that violence will be used against them.[126] This implies that it is never reasonable or in someone's best interests to use violence against them, but it can be reasonable to cause someone serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.

Conclusion

The above analysis indicates that the creation of an offence of controlling or coercive behaviour in an intimate or family relationship is necessary in order for the criminal law to better reflect the reality of the central harm of domestic violence. In examining the protection available under the criminal law, it was shown that a legislative gap exists which leaves many victims of domestic violence and/or abuse without adequate legal protection and that there is a failure of the state to condemn such behaviours. Much of the wording of the new offence is to be welcomed as reflecting an understanding of the dynamics and harm of domestic violence and/or abuse. It remains to be seen, however, whether this recognition will continue when the new offence is interpreted and applied by the criminal justice agencies. In addition, the authors are aware that a number of difficulties remain. First, there are questions over how the new offence will fit within the existing criminal law framework in terms of the non-fatal offences and charges of child abuse. Secondly, there is a potential concern that the new offence will add to the perception of a hierarchy of harm that already exists if it is seen as a lesser offence, with physical harm continuing to be seen as more serious and thus deserving of a higher sentence. The third difficulty that can be

123 S 76(9).

124 Women's Aid, 'Briefing on the Serious Crime Bill: Clause 73 – Controlling or Coercive Behaviour in an Intimate or Family Relationship' (Women's Aid 2015) <www.womensaid.org.uk/page.asp?section=00010001001000330002> accessed 14 April 2015.

125 Williamson (n 10).

126 S 76(4)(a).

foreseen relates to the need to avoid double-charging and indictments will have to be carefully worded to ensure that this is avoided. Considerations will arise where the existence of physical violence in the past would be needed in order to establish that the behaviour of the perpetrator had a 'serious effect' on the victim for the purposes of the new offence. In conclusion, the new offence is necessary, but with it will come new concerns about evidence and proof.