Interpreting the contours of self-defence within the boundaries of the rule of law, the common law and human rights

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J. Crim. L. 330 **Abstract**
The Crime and Courts Act 2013 has amended s. 76 of the Criminal Justice and Immigration Act 2008 on the amount of force a person can use in self-defence. The amended provision poses a dilemma for the courts: it states that only reasonable force can be used by a householder against a trespasser, but adds that force is unreasonable if it is grossly disproportionate. Until now, the courts have treated reasonable force and proportionate force as synonyms. This article suggests that the amended s. 76 should be interpreted to comply with the rule of law, incorporating the idea of equality before the law and legality. The courts should respect the traditional common law concept of reasonableness which is an impartial, objective concept that plays an important role across the whole of the criminal legal system. In addition, the article points out that the Act must be interpreted, where possible, in accordance with the European Convention on Human Rights to avoid the problems that arose with the defence of lawful chastisement.

Keywords
Self-defence, force, reasonable, burglar, proportionate, Criminal Justice and Immigration Act 2008, Crime and Courts Act 2013

Introduction
The rights of householders to use force to defend their property against burglars is an emotive issue which has been the subject of considerable public and political debate. The Crime and Courts Act 2013 [1] has amended s. 76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008) on the amount of force a person can use in self-defence. The amended provision poses a dilemma for the courts: it states ***J. Crim. L. 331*** that only reasonable force can be used by a householder against a trespasser, but adds that force is unreasonable if it is grossly disproportionate. [2] The concept of reasonableness is traditionally a tool for achieving justice in the common law, by establishing a consistent, objective standard of behaviour that applies equally to everyone. Until now, the courts have treated reasonable force and proportionate force as synonyms. Thus, Hughes LJ in *R* v *Keane and McGrath* [3] commented that in looking at the defence of self-defence the jury had to decide:

> was his response reasonable, or proportionate (which means the same thing)? Was it reasonable (or proportionate) in all the circumstances? [4]

It was up to the jury to decide this question using their common sense. The legislation potentially contains a fundamental contradiction for the courts because under the common law the courts had viewed disproportionate force as unreasonable force and consequently unjust force. Judges are therefore faced with a difficult problem of statutory interpretation and this article will seek to assist them in approaching this problem. If a literal interpretation is given to the legislation then disproportionate force would be interpreted as reasonable and therefore lawful. This article suggests that such a literal interpretation risks causing injustice and in *R* v *Clinton, Parker and Evans* [5] the Court of Appeal emphasised that the courts could move away from a literal interpretation of criminal justice legislation in order to achieve justice. That case was concerned with interpreting the defence of loss of control in the Coroners and Justice Act 2009. The Court of Appeal noted:

> We have proceeded on the assumption that legislation is not enacted with the intent or purpose that the criminal justice system should operate so as to create injustice. We are fortified in this view by the fact that, although the material did not assist in the construction of section 55(6)(c), our conclusion is consistent not only with the views expressed in Parliament by those who

were opposed in principle to the enactment of section 55(6)(c) but also with the observations of ministers who supported this limb of the legislation. [6]

To interpret this piece of legislation the courts need to take account of the rule of law, the importance of reasonableness for setting standards within the common law and the implications of the European Convention on Human Rights.

The Rule of Law

With regard to the scope of the defence of self-defence, the amended s. 76 of the CJIA 2008 states:

In a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances. [7]

This provision amends the Criminal Justice and Immigration Act 2008, s. 76. When reflecting on how the amended s. 76 should be interpreted, we need to go back to basic principles: the fundamental role of a legal system is to achieve justice. While the concept of "justice' is potentially a vague, philosophical concept, a key way that the courts have tried to give it substance in practice is to develop the doctrine of the rule of law. The rule of law seeks to ensure that the legal system complies with certain fundamental principles so that it is both just and seen to be just. It is the criminal law's foundations in the rule of law which give it legitimacy and a proper claim on a citizen's respect and obedience. The Constitutional ***J. Crim. L. 332*** Reform Act 2005 makes express mention of the "existing constitutional principle of the rule of law'. [8] While Parliament is sovereign, it must work within this constitutional principle. This is a principle that underpins the whole legal system, of which the criminal legal system is one aspect. In *R* v *Hussain and Hussain*, [9] which involved an attack by a homeowner on a burglar, the trial judge expressly stated that the legitimisation of such conduct would undermine the rule of law:

[I]f persons were permitted to … inflict their own instant and violent punishment on an apprehended offender rather than letting justice take its course, then the *rule of law* and our system of criminal justice, which are the hallmarks of a civilised society, would collapse. [10]

The conviction of the two defendants in the case was upheld by the Court of Appeal.

The concept of the rule of law is an important part of the common law system, though its precise meaning has been the subject of much debate. [11] A "thin', [12] formal definition of the rule of law incorporates the idea of legality, but to provide an effective tool to evaluate a piece of legislation a "thick' substantive definition is more valuable. [13] Dicey [14] is a recognised authority on the subject and he included within the scope of the rule of law the principle that no one can be punished except for a breach of law proved in an ordinary court (sometimes known as the principle of legality) and that everyone is equal before the law. [15] The courts need to interpret the amended s. 76 to make sure it complies with these principles. By doing so, the rule of law will prove itself to be an "unqualified human good' [16] in laying down boundaries for the exercise of power, in this context the power of the landowner. Failing to do so will provide ammunition for those Marxist scholars who have argued that the rule of law is simply a tool of oppression used to enforce and control the unequal distribution of wealth in a capitalist society and an instrument of class power. [17]

The two principles identified by Dicey as central to the rule of law will now be considered in turn.

The Principle of Legality

Dicey included within the rule of law that no one can be punished except for a breach of law proved in an ordinary court. Crimes, such as burglary, are public wrongs in that they are wrongs that the community is responsible for punishing. [18] With burglary we should be focusing therefore on the wrong caused to the public as a whole by this crime, not the private individual's experience of this crime. The community is the appropriate body to bring proceedings and impose punishment.

Vigilantism is a potential challenge to the rule of law because such conduct can involve the punishment of individuals by private individuals outside the court system. The amended s. 76 must not be interpreted as allowing extrajudicial punishment as this

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would be in breach of the principle of legality. ***J. Crim. L. 333*** The courts have always distinguished between self-defence and vigilantism. In *R* v *Jones*; *Ayliffe* v *DPP*; *Swain* v *DPP,* [19] Lord Hoffmann observed:

… it may be legitimate, even praiseworthy, for the citizen to use force of his own initiative, but when law enforcement officers, if called upon, would be in a position to do whatever is necessary, the citizen must leave the use of force to them; if the law enforcement authorities will not assist (as for operational reasons), a citizen whose person or property is under threat may take reasonable steps to protect himself; but the right of the citizen to use force is more closely circumscribed when he is not defending his own interests, but simply wishes to see the law enforced in the interests of the community at large; the law will not tolerate vigilantes. [20]

Any disproportionate violence which is carried out for revenge would be in breach of the principle of legality. Under common law the courts have treated such violence as outside the perimeters of self-defence because the violence was not necessary. This solution remains unchanged by the 2013 Act: a court can conclude that violence which is disproportionate (without being grossly disproportionate) was not necessary defensive action and did not therefore fall within the defence of self-defence. The fact that the amount of force used can remove a case from the defence altogether was clearly stated by the Court of Appeal in *R* v *Hussain and Hussain*: [21]

The combination of events which culminated in the serious injuries sustained by Walid Salem is highly unusual. By the time he was lying defenceless on the ground, none of his assailants was acting in self-defence or in Munir Hussain's case in defence of his wife, of his children, of himself, or of his home. This is not, and should not be seen as a case about the level of violence which a householder may lawfully and justifiably use on a burglar. [22]

In *Palmer* v *R* [23] Lord Morris observed:

If the attack is over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. [24]

The right to protect our home has become a very political and emotive issue. Sangero [25] has argued that the home has special significance as a sanctuary, from which the attacked person should never be required to flee. However, Bagaric and McConvill [26] have carried out some interesting research applying evidence about happiness to the context of criminal law. They have concluded:

People are extremely resilient and adaptable. It follows that most criminal offences are unlikely to have a lasting significant negative impact on well-being. This suggests that so far as the principle of proportionality is concerned, it is inappropriate to impose sanctions that have long-term effects. [27]

In English law there is the established maxim that "an Englishman's house is his castle'. This phrase can be found, for example, in *Semayne's Case* [28] back in 1604. But there were always ***J. Crim. L. 334*** limitations on what a person could do to protect their home. Back in the Middle Ages in *Compton's Case* [29] the court stated:

in many other cases a man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them if he cannot take them. [30]

Thus homicide was only a legitimate option if the burglar could not be arrested. The common law has always recognised that the use of lethal force should only be as a last resort. In *Cook's Case* [31] the court of King's Bench held the defendant guilty of manslaughter when he shot and killed a bailiff who wrongly forced his way into the defendant's dwelling to execute a warrant. It was recognised that the defendant had a right to defend his house but was liable in the case because "he might have resisted without killing him'. [32]

So under the principle of legality as encapsulated in the rule of law, self-defence must not legalise vigilantism, even in the context of an individual's private home. As a result, the common law has ruled that certain levels of violence take the defendant's conduct outside the scope of self-defence altogether because the level of violence reflected a desire to punish rather than a necessary defence. Section 76 of the CJIA 2008 does not state that only grossly disproportionate force will be unreasonable.

Judges are, therefore, entitled to conclude that while grossly disproportionate force is clearly unreasonable, disproportionate force which is not grossly disproportionate force can also be unreasonable.

Equality before the Law

Within the principle of the rule of law as identified by Dicey is the principle of equality: that everybody should be equal under the law and the law should apply equally to everyone. A few years ago the government considered reforming the law on self-defence to develop more lenient rules for soldiers and the police. One of the justifications for this was that such individuals were more likely to be armed with guns and find themselves in the position that they needed to use force. Andrew Ashworth, [33] however, argued very persuasively at the time that the law needed to apply equally to everyone and that such distinctions based on a person's status as a soldier or police officer in the law on self-defence would undermine this principle. The government did not pursue this reform proposal further.

The amended s. 76 could potentially breach this principle of equality by drawing irrational distinctions between different members of society. Why should householders in a dwelling have the right to use more force against their attackers than those who are not householders? Why should homeless people sleeping rough in cardboard boxes have fewer rights to protect themselves than the homeowner? Should the trespasser in a home be at risk of more violence than a trespasser in a garden? If a person accidentally enters the wrong flat thinking there is a party in that building, why should they be at risk of being subjected to more violence than a person who is a party guest but is mistaken by a householder as a trespasser? A householder could potentially be entitled to use disproportionate force against a trespasser but a victim of domestic abuse would not be entitled to use disproportionate force against her abusive partner.

Much of the debate surrounding the passing of the CCA 2013 referred to burglars, though the legislation itself refers to trespassers. Acts of trespass are often not criminal, but a householder would still be entitled to use disproportionate force against them. We should also remember that the vast majority of burglars are unarmed, young and likely to run off, as Anthony Martin's [34] victims did, when challenged.

 The irrationality of the distinctions being drawn between different members of the public is apparent from the government's own circular explaining that the provisions of the 2013 Act will apply to trespassers in shops where family members live in the shop building, but not to trespassers in other shops, or to customers or acquaintances who were not residents of the adjoining accommodation. [35]

It is important that the courts interpret the amended s. 76 of the CJIA 2008 in a way that avoids irrational distinctions being drawn between different members of the public. To achieve this, the concept of reasonable force needs to be given the same meaning regardless of whether a person is a householder or a trespasser.

Reasonable Force

It was mentioned above that the aim of any legal system should be to achieve justice. As well as developing the doctrine of the rule of law, the common law has tried to give substance to the idea of justice through the concept of reasonableness. In *R* v *Keane and McGrath* [36] the Court of Appeal observed that "underlying the law of self-defence is the common sense morality that what is not unlawful is force which is reasonably necessary.' In essence, people are expected to behave like reasonable people, and if their behaviour falls below this general standard of reasonableness and they have *mens rea,* then they can expect to face a criminal sanction. The courts have developed this superficially simple idea of reasonableness because it is accessible to the people who will often have to apply the law: lay magistrates and the jury. But within its simplicity it should be remembered that reasonableness is the articulation of the fundamental value of justice. In the civil law context, Lord Radcliffe has observed:

The spokesman of the fair and reasonable man, who represents after all no more than the anthromorphic conception of justice, is and must be the court itself. [37]

Under common law, reasonableness has marked the boundary between lawful self-defence and unlawful violence. [38] Reasonableness is the established standard for innocent conduct. It is a key tool used by the courts to ensure they are applying a just system of law. If that central notion of reasonable conduct is undermined then you remove the very foundations of

the criminal law in justice and thereby take away the legitimacy of the system. The important role of "reasonableness' in the common law is encapsulated by the statement of Paul Mendelle QC, the former chair of the Criminal Bar Association, who has commented:

The law should always encourage people to be reasonable, not unreasonable; to be proportionate, not disproportionate. [39]

Sometimes the courts talk impersonally about "reasonable force', sometimes they try to personify the concept by referring to the "reasonable person'. The concepts of reasonableness and the reasonable person are a long-established part of the common law. Gillespie has traced back the concept of the reasonable person [40] to around the year 1200.

J. Crim. L. 336 The reasonable person is an ordinary, average person, he/she is not expected to be perfect, [41] but embodies society's rules about how a person is expected to behave.

To support the rule of law and the principle of equality before the law, the courts have been anxious to keep reasonable force in the context of self-defence as an objective test. This approach was confirmed by the Court of Appeal decision in *R* v *Owino,* [42] and by the Divisional Court in *DPP* v *Armstrong Braun.* [43] The objectivity of the hypothetical reasonable person involves conceptualising a person that possesses universal characteristics, rather than characteristics personal and peculiar to the defendant. [44] It is assumed that people are mentally sound, rational and prudent. In *R* v *Martin* [45] the Court of Appeal suggested that, in exceptional circumstances which made the evidence especially probative, a court could take into account the fact that the defendant was suffering from a psychiatric condition. [46] However, in subsequent cases where defendants have been suffering from severe mental health problems the courts have not considered these conditions to be "exceptional circumstances' within the meaning of *Martin.* Thus in most, if not all, cases a purely objective test is applied and the dicta in *Martin* has not been applied. In *R* v *Canns* [47] the defendant was suffering from paranoid schizophrenia. The Court of Appeal commented:

It is not for a defendant in his own mind to set the standard of reasonableness, it is for the jury, considering all the circumstances but not the psychiatric condition, to set the standards of reasonableness in considering the individual case.

In *R* v *Press and Thompson* [48] the Court of Appeal did not think the defendant's post-traumatic stress disorder would be relevant to the objective test. The defendant in *R* v *Oye* [49] had gone into a staff room at a cafe in the Westfield Shopping Centre in London. The manager found him twitching and talking to himself, so the manager locked him in the room and called the police. When the police arrived he had hidden in a cavity in the ceiling and refused to come down, saying he would not come down because he was selfish and reading a book. When he was eventually persuaded to come down he was arrested and taken to the police station. He tried to escape from the open door of a police cell, punching two police officers in the face because he thought they were evil spirits. In his defence to a charge of causing grievous bodily harm, he claimed to have acted in self-defence. The trial judge refused to take into account his mental illness when considering the objective test of whether his force used had been reasonable. An appeal was lodged and the Court of Appeal stated the psychiatric characteristics of an accused cannot be taken into account on the issue of whether the degree of force used was reasonable in the circumstances. His defence of self-defence was rejected and a defence of insanity allowed instead.

The objective test for reasonableness does not mean that the same level of force will always fall on one side or the other of reasonableness. While the criteria of reasonableness and the reasonable person should be objective and consistent, the context in which the violence is being used can change and this will have an impact on whether or not the force used was unreasonable. Thus, an elderly lady might be entitled to defend herself with a kitchen knife, while this might be considered unreasonable of a strong young man. As society evolves, the context in which reasonableness is interpreted changes. For example, ***J. Crim. L. 337*** the defence of lawful chastisement had to evolve to reflect the greater emphasis on human rights after the passing of the Human Rights Act 1998. But while the context in which reasonableness functions may evolve with time, the core meaning of proportionality has remained unchanged.

The idea of reasonable force has its roots in the principle of the sanctity of life which the common law traditionally supports. Natural lawyers tied the common law to the Judeo-Christian doctrine which holds as its sixth Commandment "thou shalt not kill'. [50] This is a key reason why the defence of duress is never available to a charge of murder. The concept of the sanctity of life was expressly referred to in *Re A (Children)* [51] when discussing whether doctors should have a defence to a charge of murder if they knowingly caused the death of a conjoined twin during surgery to separate the twins.

Before the 2013 Act, the defence of self-defence was not available if a person used a disproportionate amount of force, as this was automatically an unreasonable violation of the sanctity of life. The amended s. 76 continues to limit the defence of self-defence to where reasonable force has been used but it adds that the amount of force used would be unreasonable if it was grossly disproportionate. On the surface, the Act might be viewed as trying to change the very meaning of reasonableness to something different than proportionate. Such a distortion of the established meaning of this core concept is particularly dangerous given the fundamental role of reasonableness in the common law system.

Thus, in interpreting s. 76 the courts need to keep in mind the significance of the concept of reasonableness in common law. The courts should continue to respect the common law tradition of the reasonable person: the standard of reasonableness should remain consistent and the reasonable person should remain the same whether or not defendants are standing in or outside their home. It could create considerable confusion for the jury faced with two defendants in the same incident, one of whom attacked the burglar in the house and the other one attacked him in the garden. It would be very unsatisfactory if the jury were to be directed that the same term "reasonable' had a different meaning for the two defendants. The reasonable person is the personification of justice and the meaning of justice remains constant and has an existence which is separate from the legislation. Parliament cannot unilaterally change the meaning of reasonableness, because it is a reference to the standards of ordinary people, not the standard of parliamentarians. If reasonable people would not have used disproportionate force before 2013, they would continue not to use disproportionate force after 2013.

The importance of respecting the concept of reasonableness and the reasonable person goes beyond the criminal law, as this is a concept that is central to achieving justice in the common law more generally. In *Healthcare at Home Limited* v *The Common Services Agency* [52] the Supreme Court observed:

The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years. [53]

If we tinker with the concept of reasonableness and the reasonable man in the context of criminal law, then we open the gates to undermining this concept in other areas of the law.

Some legal philosophers have argued in favour of breaking the link between proportionality and the exercise of self-defence. For example, Schopp has written:

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J. Crim. L. 338 the liberal theorist must allow the exercise of defensive force against an aggressor, even if the injury to that aggressor exceeds the setback to concrete interests the victim would have absorbed had she refrained from exercising force in self-defence. [54]

He therefore rejects the notion of proportionality as limiting the available defensive force in cases of culpable attacks. He has argued that a defender may use whatever defensive force is objectively necessary, and any risk of mistake and unnecessary injury must be borne by the culpable attacker. The only limit on the amount of force that could be used would be the concept of necessity and the exclusion of gratuitous injuries.

The criminal law academic, Fletcher, [55] has analysed self-defence as a justificatory defence. By categorising self-defence as a justification, Fletcher has in the past argued that there is no need for a principle of proportionality to be incorporated into the defence. He supported this stance on the basis that maintaining the social order justifies any force necessary to defend a legally protected right or interest. Self-defence would only be excluded where there was a gross disproportion between the harm threatened and the defensive force used. But he has also noted that there was a "growing consensus that the doctrine of abuse of rights limits the exercise of necessary defence'. [56] He has observed in German law a move towards socio-ethical limits on self-defence stemming from a growing scepticism towards individual self-help and that Germany's law on self-defence had been too harsh in the past. Fletcher in his most recent book says:

Proportionality in self-defence requires a balancing of competing interests, the interests of the defender and those of the aggressor. [57]

Without a principle of proportionality the law risks being unjust. The common law has integrated this core requirement of proportionality in self-defence through the idea of reasonableness. To avoid injustice where excessive force has been used, Parliament has expanded the English defence of loss of control to include acting in fear of serious violence. Thus where excessive and fatal force has been used, there will now often be a partial defence to achieve a fair balance between the interests of the defendant and the interests of the victim. This would seem to be an appropriate safety net for homeowners who use disproportionate force on burglars and removes any need to interpret the amended s. 76 to provide additional leniency.

Human Rights

Inevitably, the European Convention on Human Rights will also need to be considered when interpreting the provisions of the CCA 2013. Under s. 2 of the Human Rights Act 1998, when interpreting the 2013 Act the courts are required to "take into account' any relevant pronouncements made by the European Court of Human Rights (ECtHR). Section 3 states that where possible the 2013 Act "must be read and given effect in a way which is compatible with the Convention rights.' Our human rights also arguably form part of the rule of law, but at the least sit alongside it.

Before being elected to office, the Prime Minister, David Cameron, suggested that "burglars leave their human rights outside the moment they invade someone else's property.' [58] The legal academic, ***J. Crim. L. 339*** Schopp, has argued that the burglar loses their rights because they have entered the private sphere of the homeowner where the homeowner is sovereign in a liberal society. But our culture has long accepted that the remit of the law does not stop at the front door but enters into people's private homes. That is why the criminal law can sanction incest and domestic violence. [59] Self-defence is an important tool for enforcing personal and individual autonomy, but this must be balanced against the victim's own legitimate rights.

David Cameron's statement fits within the "rights forfeiture' analysis favoured by some legal philosphers. [60] Leverick, [61] for example, has argued that by threatening another's life a person effectively loses their right to life. Uniacke [62] reaches a similar conclusion but on the basis that a person's right to life is conditional on their own conduct, so that the aggressive burglar does not lose their right to life, because their conduct prevents them having a right to life in the first place. But even if one accepts this idea of forfeiture, it must include within it an issue of proportionality. A mere threat by a man to stamp on a woman's foot should not mean that the man has completely lost his right to life and that the woman now has the right to kill him. Whereas, if the man has already stabbed the woman in the chest, then it is less problematic to view the man as having forfeited his right to life. On this logic, it becomes an issue of proportionality between the burglar and the householder: the burglar should not be viewed as forfeiting all their rights on entering the home, rather some of their rights may have been reduced in proportion to the threat the burglar poses. The common law has taken the view that the point at which the burglar's right to life could be lost is where it would be reasonable for the householder to respond by killing.

While the philosophical work on self-defence and forfeiture is undoubtedly of interest, Parliament has passed the Human Rights Act 1998 tying the national courts to the European Convention on Human Rights. Under the European Convention the burglar undoubtedly does have rights, and these have not all been forfeited simply by being a burglar. It is logical that property owners will dislike burglars, but that unpopularity makes them vulnerable. Politicians in a democratic society need votes, so they need popularity. There will always be a temptation to pick on a vulnerable, unpopular minority to win votes. Unfortunately, sometimes the public seems more interested in voting for an X-factor competitor than they are for a politician. In order to motivate the public to vote for them, politicians have to get the public interested in what they are doing. Zygmunt Bauman has observed:

Fighting crime, like crime itself, and particularly the crime targeted on bodies and private property, makes an excellent, exciting, eminently watchable show. [63]

The mass media is happy to report on this show and the politicians are happy to latch onto this show to win votes. The courts need to be the counterbalance to this popular culture. They need to protect the rights of burglars, not of course their right to burgle, but their right to life, their right not to suffer inhuman or degrading treatment and their right to be punished only through the criminal system.

Article 2 of the European Convention on Human Rights protects the right to life. [64] It states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

J. Crim. L. 340 a. in defence of any person from unlawful violence;

b. in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Other articles of particular interest in this context are Article 3 prohibiting torture, inhuman or degrading treatment or punishment; Article 5 laying down the right to liberty and security; Article 7 stating that a person cannot be punished for a crime outside the criminal legal system; Article 8 on the right to respect for family and private life and Article 13 establishing the right to an effective remedy for breach of the Convention. For example, if a burglar is killed by a homeowner this raises the question of whether there has been a violation of the burglar's right to life under Article 2; if the burglar survives, the attack may still amount to inhuman or degrading treatment under Article 3 or a violation of the burglar's right to liberty and security under Article 5.

The right to life in Article 2 is not absolute; in particular it can be limited by the exercise of the right to self-defence, provided the force used was not more than was "absolutely necessary'.[65] The ECtHR has stated that this provision must be strictly construed and narrowly interpreted,[66] with any deprivation of life being subjected to "the most careful scrutiny.'[67] The term "absolutely necessary' has been interpreted as establishing a test of "strict proportionality'.[68] Fiona Leverick has already raised the question of whether Article 2 is breached where a person makes a mistake over the necessity for defensive action.[69] It is very likely that the new reasonable/not grossly disproportionate test added by the CCA 2013 will breach this Article unless it is given a restrictive interpretation by the courts.

The Convention does not only impose a legal obligation on representatives of the state, it has been interpreted as also imposing a positive obligation on the state to ensure that citizens are protected against violations of rights by private individuals as well as state representatives.[70] The positive obligations on the state are strictest where fundamental rights, such as the right to life or the prohibition of torture, are at stake.[71]

Positive obligations can require states to take positive measures to prevent Convention rights being breached. A passive approach of doing nothing (for example, not prosecuting a person who kills a burglar in revenge) will be a breach of the Convention.[72] The doctrine of positive obligations includes a duty on the state to put in place a legal framework which provides effective protection for Convention rights.[73] The state has an obligation to create an environment in which the right to life is protected from killings by private persons. There must be an effective domestic remedy for human rights violations. This means that the law in a country must criminalise unjustified killings.[74] Where a private person kills, a state may be responsible for breach of the right to life if it can be shown that it failed to protect the *J. Crim. L. 341* right to life.[75] The duty to investigate a death under Article 2 is closely linked with the right to an effective remedy under Article 13. An inquiry that follows a suspicious death must be designed to lead to criminal proceedings where appropriate.[76] If a defence such as self-defence is defined in such a way that a conviction and punishment are impossible, after a person has been killed unnecessarily, this will be a breach of the positive obligation under Article 2.

In *Aydin* v *Turkey*[77] the applicant alleged that she had been raped and assaulted. The ECtHR held that Article 3 (taken in conjunction with Article 13) imposed a positive obligation on the state to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for alleged violations. An inadequate response by the prosecuting authorities amounted to a violation. In *MC* v *Bulgaria*[78] the ECtHR held that states have a positive obligation under Articles 3 and 8 to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution. On the facts of that case, to adopt a policy of only prosecuting rape where there was evidence of resistance on the part of the alleged victim violated this duty. In the same way, the amended s. 76 must not be interpreted as allowing to go unpunished serious offences against the person which have been committed against burglars in revenge rather than genuine self-defence.

The government itself has acknowledged that the 2013 Act must be interpreted restrictively to make sure it complies with the European Convention. In its supplementary memorandum on the Bill it observed:

The amendment to section 76 of the 2008 Act would not prevent disproportionate force from being found unlawful where this would be contrary to Article 2. [79]

In looking at an equivalent legislative provision, [80] the Joint Committee on Human Rights has commented that:

Given the obligation to interpret legislation in accordance with ECHR rights, under section 3 of the Human Rights Act 1998, the courts would be required to interpret the defence that force used was not "grossly disproportionate' in light of the State's positive obligations under Articles 2, 3 and 8. In our view, this would require a wider interpretation of the conduct considered to be grossly disproportionate in light of the absolute prohibition on inhuman and degrading treatment, and the terms of Article 2 which prohibit lethal force which is more than "absolutely necessary' in self defence or in defence of others … This would effectively involve the court deleting the word "grossly' from the Act. [81]

To allow burglars to be killed without sanction when disproportionate force has been used would be a violation of their right to life. In *McCann* v *United Kingdom* [82] the ECtHR concluded that soldiers had not breached the right to life because they had used reasonable force. The court was reluctant to question the judgement of the individual officers who had to make a quick decision in difficult circumstances. But those facts are very different to this situation, where it is Parliament legislating to potentially broaden ***J. Crim. L. 342*** the meaning of "reasonable force'. Because reasonable force is the essential threshold between unlawful and lawful violence, the European Court might well decide that by passing the legislation the UK government is breaching its positive obligation to respect the right to life.

In *Bubbins* v *United Kingdom* [83] the ECtHR held that there had been no violation of Article 2 when police had shot dead the applicant's brother, mistakenly believing he was a burglar. But in deciding that case the court emphasised that law enforcement operations were regulated by domestic law and had a system of safeguards to prevent the arbitrary use of unlawful force. Unfortunately, these safeguards are not present in the context of homeowners attacking potential burglars. The amended s. 76 would be effectively withdrawing the regulation of this type of conduct unless it is narrowly interpreted.

Under Article 7 of the European Convention, the criminal law must be certain, predictable and clear. [84] There is a risk that the changes introduced by the 2013 Act will introduce uncertainty into the existing law as the distinction between "disproportionate' and "grossly disproportionate' force will be unclear.

懲罰將不是適度和合理的"[i]如果是為了滿足激情或憤怒而實施的，或者如果它在性質或程度上是不適度和過度的，或者如果它被拖延到超出兒童的忍耐力，或者使用不適合目的的工具，並被計算為對生命或肢體造成危險；在所有此類情況下，懲罰都是過度的。"

Lawful Chastisement 合法的懲罰

In considering how to interpret the amended s. 76 of the CJIA 2008 in accordance with the European Convention, the courts will find it useful to look at the European Court's decisions on the defence of lawful chastisement, which have grappled with a similar issue: how much force can lawfully be used against a vulnerable member of society. At common law, a parent or any other person acting in *loco parentis* may administer reasonable corporal punishment to control the behaviour of children in their care. In *R* v *Hopley* [85] a child had died after being beaten with a thick stick by a schoolmaster. The trial judge, Chief Justice Cockburn, stated that a parent "may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable'. [86] Punishment would not be moderate and reasonable "[i]f it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive.' [87]

As human rights have become more entrenched in our society, the ECtHR have forced Parliament to intervene to restrict the amount of force that can be reasonably used against children. Caning, for example, was condemned by Strasbourg as "inhuman and degrading treatment' [88] and is now unlawful. In *Tyrer* v *United Kingdom* [89] three strokes of the birch were imposed as a sentence on a 15-year-old boy convicted of assault occasioning actual bodily harm. This was found to breach Article 3.

In 1998 the UK government was criticised by the ECtHR over the reasonable chastisement defence in *A* v *UK*. [90] The original trial judge in that case had directed the jury:

It is a perfectly good defence that the alleged assault was merely the correcting of a child by its parent, in this case the stepfather, provided that the correction be moderate in the manner, the instrument and the quantity of it. Or, put another way, reasonable. It is not for the defendant to prove it was lawful correction. It is for the prosecution to prove it was not. This case is not about whether you should punish a very difficult boy. It is about whether what was done here was reasonable or not. [91]

J. Crim. L. 343 The stepfather was found not guilty of causing actual bodily harm on a majority verdict. The case was subsequently referred to the ECtHR where it was found that the defence of reasonable chastisement was incompatible with the UK government's responsibility to protect children. The ECHR ruled that the law did not protect the boy from inhuman or degrading treatment or punishment and thus breached Article 3 of the Convention. The factors identified as being indicative of an unacceptable level of punishment reflected previous jurisprudence: the age, health and size of the child, the nature and duration of the punishment, and the lasting physical or psychological effect. The European Court held that the defence of lawful correction afforded insufficient protection to the rights of the child victim.

The common law defence was subsequently refined in *R* v *H* [92] in order to bring it into line with the requirements of Article 3. *R* v *H* was a Crown appeal occasioned by judicial reluctance to direct a jury to apply the defence of reasonable chastisement incorporating the *A* v *UK* criteria. The trial judge was uncertain over the extent to which the HRA 1998 and *A* v *UK* had modified the scope and definition of the defence and the propriety of directing the jury towards a modified version of the old common law defence, in accordance therewith. The Court of Appeal upheld the appeal, noting that common law is evolutionary and that directing a jury in accordance with the aforementioned criteria is "an appropriate and accurate reflection of the current state of the common law in the light of the Strasbourg jurisprudence to which the English courts, by virtue of the HRA 1998, must now have regard'. [93]

In response to the Strasbourg case law, Parliament also legislated in the Children Act 2004, s. 58. This clarifies that the defence of lawful chastisement is not available if physical punishment causes actual bodily harm (which includes bruising) or an offence under s. 1 of the Children and Young Persons Act 1933 concerned with the mistreatment and neglect of children.

Conclusion

The Crime and Courts Act 2013 poses a difficult challenge of statutory interpretation for the courts. This article has sought to assist the courts with this process by pointing to the important principles of the rule of law, incorporating the idea of equality before the law and legality. It has also emphasised that the common law has for many years developed the concept of reasonableness in demarcating the type of behaviour that can potentially give rise to criminal liability and the courts have equated this idea of reasonableness with the concept of proportionality. Finally, the Act must be interpreted, where possible, in accordance with the European Convention on Human Rights to avoid the problems that arose with the defence of lawful chastisement.

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Footnotes

1 At s. 43.
2 Ibid., inserting s. 76(5A) into the Criminal Justice and Immigration Act 2008.
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4 Ibid. at [5].
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6 Ibid. at [40].
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