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A comparative analysis of English and French defences to demonstrate the limitations of the concept of loss of control

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Introduction

The most important change to the partial defences to murder by the Coroners and Justice Act 2009 was the introduction of fear of serious violence as a possible trigger for the defence.² Up until this reform, the emphasis of the defence of provocation had been on anger leading a person to lose their control because of things said or done. Now, the emotion of fear as well as anger can be the basis for the new defence of loss of control. A key reason for introducing this reform was to achieve justice for battered women who killed their abusive partners. This reformed version of the defence has similarities with self-defence³ and the statutory public defence⁴ (together referred to in this article as self-defence). Historically, self-defence has rarely succeeded in removing criminal liability for women who have killed their abusive partners. This article will compare the fear of serious violence branch of the loss of control excuse and self-defence to see where the former will succeed when the latter will not. It is only where loss of control extends beyond the scope of self-defence that the new branch of the law will have any impact, since where there is an option to rely on either defence, an accused would logically favour the complete defence of self-defence over the partial one of loss of control. This comparison will show that not only does the new defence share similar constraints to the old one of self-defence, but it also contains an additional constraint that the accused must have lost their control. The significant overlap of these defences combined with the additional constraint of loss of control renders the new extension relating to a fear of serious violence close to redundant.

The English defences will then be compared with the approach taken in French criminal law. Through this comparison it will be argued that the Government was misguided in clinging onto the concept of loss of control as the basis of a defence for battered women who kill. Instead, a three pronged approach needs to be taken to make sure that justice is done in such cases. Firstly, the law on self-defence should be developed so that it ceases to be a sexist defence that is more likely to succeed for male defendants than female defendants. This could be done by changing the burden of proof where the defendant had been subjected to physical or mental abuse by the victim. Secondly, a new partial defence of self-preservation could be created which would be available where a court concluded that excessive force had been used in an attempt at self-preservation, reducing the defendant's liability from murder to manslaughter. Finally, the sentencing arrangements could be revisited to make sure that the sentence matches the gravity of the attack in the context of a fatal attack on a victim of domestic abuse.

Comparing self-defence and loss of control

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² Coroners and Justice Act 2009, s 55(3).

³ See, for example, *Palmer v R* [1971] AC 814.

⁴ Criminal Law Act 1967, s 3.

The old defences of self-defence and the public defence are available where the defendant feared serious violence, as with the loss of control defence. A comparison between self-defence and the fear of serious violence branch of the loss of control defence, will demonstrate that the reasons why self-defence has not succeeded for battered women who kill will also create problems for the application of the new defence. In addition, a battered woman relying on the partial defence will have to prove that she had lost control of herself. This was a logical requirement when the defence of provocation was built on the notion of defendants losing their temper, but illogical when the defence is based on a rational fear of serious violence.

There are three key elements of these defences which need to be examined in order to determine how far the defences differ: the timing of the defendant's response to the fear of serious violence, the proportionate response to the threat; and the requirement of loss of control. Each of these three issues will be considered in turn.

The timing of the defendant's response to the fear of serious violence

For self-defence to succeed it must have been necessary for the defendants to have taken defensive action and their response must have been proportionate. In determining whether it was necessary to take defensive action, there must have existed an imminent threat. This does not mean that defendants have to wait until they are hit, for example, before hitting back, but it does mean there must be some immediacy about the threat posed.⁵

Thus, on first impressions a factual situation where the defence of loss of control may be available and self-defence not, is where the threat of serious violence was not imminent. But while the threat of violence need not be imminent for the defence of loss of control, timing is not irrelevant to the defence. Under the new defence, there is no longer any requirement that the defendant's response must be sudden,⁶ but the explanatory notes to the Act state that delay could be evidence as to whether defendants had actually lost their self-control.⁷ Where there is a delay then there is a greater possibility that the defendant acted out of calculated revenge and s. 54(4) expressly states that the defence is not available if the defendant 'acted in a considered desire for revenge.' Thus the potential for defendants who were not viewed as having reacted to an imminent threat to argue that they still came within the defence of loss of control will be quite limited.

A proportionate response

Self-defence is only allowed if the defendant has used a reasonable amount of force. This has proved to be the most controversial issue in practice. Section 76(6) of the Criminal Justice and Immigration Act 2008 provides:

“S. 76(6) 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 disproportionate in those circumstances.”

⁵ *Attorney-General's Reference (No. 2 of 1983)* [1984] AC 456; *Malnik v DPP* [1989] Crim LR 451.

⁶ Coroners and Justice Act 2009, s 54(2).

⁷ Coroners and Justice Act 2009 Explanatory Notes, para 337.

What constitutes reasonable force is a matter for the jury to decide, balancing the amount of force used against the harm the accused sought to prevent – so that, for example, force considered reasonable for protecting a person might be considered excessive if used to prevent a crime against property. Defendants are not expected to perform precise calculations in the heat of the moment as to the minimum amount of force required in the circumstances.⁸ The law recognises that in the kind of situation where the defence is used, there is rarely much time to consider what should be done. As Lord Morris put it in *Palmer*:

“A person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.”⁹

The law imposes an objective test, so it does not matter if the defendant thought they were using a reasonable amount of force, what matters is whether objectively they actually have used a reasonable amount of force. The Criminal Justice and Immigration Act 2008 restates the requirement of reasonable force in this context,¹⁰ confirming the case law on the point.¹¹

The objective test was confirmed in the high-profile case of *R v Anthony Martin*,¹² though it was watered down slightly because the Court of Appeal left open the possibility of sometimes taking into account specific characteristics of the accused when applying this test. The defence barrister submitted that in deciding the issue of reasonable force the courts ought to take the same approach as the House of Lords laid down in *Smith (Morgan)*¹³ for the objective test in provocation. This would have enabled the defendant’s characteristics to be considered when determining whether his or her reaction had been reasonable, which in this case would include the fact that Martin suffered from a paranoid personality disorder. The Court of Appeal accepted that the jury could take into account the physical characteristics of the defendant. They also stated that, in exceptional circumstances that rendered the evidence especially probative, judges could take into account the fact that the defendant was suffering from a psychiatric condition. But this was not such an exceptional case, and the court found on the facts that reasonable force had not been used.

Thus, self-defence is only available to women who kill their abusive partners if the force used by the women is reasonable and necessary to protect them from an imminent attack. It is, therefore, not available to an abused woman who fears violence in the future and kills her abuser when, for example, he is asleep or has his back to her. Aileen McColgan has argued that the law discriminates against women in this context:

“The relative scarcity of female killers has resulted in a paradigmatically male ideal model and this, together with the incompatibility of aggressive force with

⁸ *Attorney-General for Northern Ireland’s Reference (No. 1 of 1975)*[1977]AC 105.

⁹ *Palmer v R* [1971] AC 814, 817.

¹⁰ S. 76(3), (7) and (8).

¹¹ *Williams (Gladstone)* [1987] 3 All ER 411.

¹² [2001] EWCA Crim 2245.

¹³ [2001] 1 AC 146.

stereotypical femininity, means that the apparently gender-neutral concept of reasonableness is actually weighted against the female defendant.”¹⁴

In addition, Edwards has pointed to research which shows significant differences between the way men and women kill. Men who kill their female partners tend to use bodily force whilst women who kill their male partners use knives in 83 per cent of cases. Where weapons such as knives are used a conviction for murder is more likely.¹⁵ Edwards has argued that self-defence has been:

“skewed to the detriment of women since a defendant's action is only considered ‘reasonable’ when the killing is a proportionate response to an immediate threat of deadly force.”¹⁶

The new loss of control defence does not specify that the defendant must not use excessive force, but it specifies that the defence is only available if a person of the defendant’s sex and age with an ordinary level of tolerance and self-restraint and in the circumstances of the defendant might have acted in the same or similar way to the defendant.¹⁷ The reference to the defendant’s ‘circumstances’ includes all circumstances except those that are only relevant to the defendant’s general level of tolerance and self-restraint.¹⁸ The explanatory notes to the Act provide that a defendant’s history of abuse at the hands of the victim could be taken into account when considering whether an ordinary person might have behaved as he or she did, whereas the defendant’s short temper cannot.¹⁹ Under the former defence of provocation the case law referred to the defendant’s characteristics rather than their circumstances. It is not yet clear whether this change of terminology will make any real difference, though it may allow a wider range of factors to be considered than had been allowed under *Attorney-General for Jersey v Holley*.²⁰ Amanda Clough has suggested:

“‘Circumstances’ suggests being able to consider prior abuse as an external element rather than having to try and deem it as a characteristic by internalising it as some kind of syndrome or character flaw.”²¹

Both the defence of loss of control and the defence of self-defence are therefore restricted by the application of an objective test. These objective tests have slightly different nuances but following the shift away from *Smith (Morgan)*²² the reasonable person

¹⁴ Aileen McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 OJLS 508, 515.

¹⁵ Susan Edwards, 'Injustice that Puts a Low Price on a Woman's Life', *The Times* (2 September 2003) Law Supplement, 5.

¹⁶ Susan Edwards, 'Abolishing provocation and reframing self defence - the Law Commission's options for reform' [2004] Crim LR 181, 188. See also Aileen McColgan, 'In Defence of Battered Women who Kill' (1993) 13 OJLS 508. An illustration of the law in practice is *Rossiter* (1992) 95 Cr App R 326.

¹⁷ Coroners and Justice Act 2009, s 54(1)(c).

¹⁸ Coroners and Justice Act 2009, s 54(3).

¹⁹ Coroners and Justice Act 2009 Explanatory Notes, para. 338.

²⁰ [2005] 2 AC 58.

²¹ Amanda Clough 'Loss of self-control as a defence: the key to replacing provocation' (2010) 74(2) JCL 118, 125.

²² [2001] 1 AC 146.

should be quite a consistent individual (though taking into account differences between juries). One view is that the objective test for loss of control will be less stringent than the objective test for self-defence. Thus, Withey has observed:

“When comparing the normal person against the defendant's conduct in losing self-control, the jury have to ask whether the normal person *might* have had the same or *similar* reaction. The new test could therefore make the defence available to those who fail with public and private defence because of an excessive use of force.”²³

On this logic, where excessive force has been used self-defence will not be available but the partial defence may be available because the excess amount of force might be explained by the loss of self-control. In practice, however, the amount of force that might be used for self-defence may not differ significantly from the amount of force that would be permissible for the new defence of loss of control. There are circumstances where a person will be entitled to kill in self-defence and these are circumstances where a normal person in those circumstances would have reacted in this way. A normal person will rarely use a disproportionate amount of force, whatever their circumstances, thus, this limitation which has caused controversy in the context of the defence of self-defence may well prove problematic in the context of the loss of control defence.

Loss of control

The new defence is only available where the defendant has lost control. The Law Commission had recommended that the requirement of loss of self-control should be dropped altogether because it is the wrongful words or conduct which provide the justification for the defence, there was no need for a loss of control to justify providing a defence.²⁴ Alan Norrie has noted:

“Indeed to be out of control might take the moral edge off what has been done in righteous, but sanctionable, anger [or fear].”²⁵

He has also pointed out that the requirement of loss of control seems to ‘work against the core logic of the new defence’.²⁶ The defence will often only work in practice if the meaning of loss of control is strained to include situations which on the surface might not really fit. Thus, has a woman who has suffered years of abuse and eventually kills her abusive partner really suffered from a loss of self-control at the time of the killing? The Government chose to keep the concept of loss of control because it thought the concept was needed to exclude people who killed in cold blood, particularly as the requirement that the killing be sudden was being removed. However the provision in the legislation that the killing could not be committed for revenge would probably have been sufficient.

²³ Carol Withey ‘Loss of control’ (2010) 174 JPN 197, 200.

²⁴ Law Commission ‘Murder, Manslaughter and Infanticide’ (Law Com No 304, 2006) [5.17].

²⁵ Alan Norrie ‘The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control’ [2010] Crim LR 275, 278.

²⁶ Alan Norrie ‘The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control’ [2010] Crim LR 275, 288.

The requirement of loss of control is an additional restriction on the availability of the new defence which is not required for self-defence. In the past it was difficult for defendants to argue both that they behaved rationally in self-defence and alternatively that they lost their self-control due to provocation, as the defences seemed to contradict each other. With this alternative form of the new loss of control defence it might be easier to argue self-defence in the alternative, though there remains the complication that the Government kept the requirement for a loss of control which the Law Commission would have dropped.

Crimes of passion in France and England

The comparison drawn between self-defence and loss of control has shown that it is far from certain whether the new defence of loss of control will make any significant impact with regard to its extension to include a fear of serious violence because it will rarely be available where the complete defence of self-defence is not available. At this point it is helpful to draw a comparison between the direction that English law has taken in this context with the approach to these defences in French criminal law. The first thing to note is that today there is no equivalent defence to provocation or loss of control in French law. Historically there had been a defence available to crimes of passion,²⁷ which would have included where a man found his wife in the act of being unfaithful with her lover.²⁸ In the 1800s, approximately fifty per cent of trials for a crime of passion would result in an acquittal.²⁹ The old Criminal Code was changed in 1832 so that a finding that there had been a crime of passion was no longer a complete defence, but rather a mitigating factor which could reduce the defendant's sentence. Thus the old Napoleonic criminal code provided:

“Art. 324. Murder committed by a husband on his wife, or by the latter on her husband, is not excusable, if the life of the husband or the wife who committed the murder has not been put in danger at the very moment when the murder took place.

Nevertheless, in the case of adultery, provided for by article 336, murder committed by the husband on his wife, as well as on the accomplice, at the moment when he surprised them in *flagrante delicto* in the conjugal home, is excusable.”³⁰

²⁷ Marc Ancel, ‘Le crime passionnel’, (1957) 73 *The Law Quarterly Review* 36.

²⁸ Maurice Garçon, *Histoire de la justice sous la III^e République*, (A. Fayard, 1957), Volume 3, 105.

²⁹ Annik Houel, Patricia Mercader and Helga Sobota (2003). *Crime passionnel, crime ordinaire*. (PUF, 2003) 48; Eliza Earle Ferguson, ‘Judicial Authority and Popular Justice: Crimes of Passion in Fin-de-Siècle Paris’ (2006) *Journal of Social History* Vol 40 293. For an international perspective see Melissa Spatz ‘A Comparative Study of Legal Defenses for Men who Kill their Wives’, (1991) 24 *Columbia Journal of Law and Social Problems* 597.

³⁰ “Art. 324. Le meurtre commis par l'époux sur l'épouse, ou par celle-ci sur son époux, n'est pas excusable, si la vie de l'époux ou de l'épouse qui a commis le meurtre n'a pas été mise en péril dans le moment même où le meurtre a eu lieu.

Néanmoins, dans le cas d'adultère, prévu par l'article 336, le meurtre commis par l'époux sur son épouse, ainsi que sur le complice, à l'instant où il les surprend en flagrant délit dans la maison conjugale, est excusable.”

Article 326 of the old Criminal Code explained that the sentence imposed could be significantly reduced in such cases:

“Art. 326. When the fact of an excuse is proven,
If it is a question of a serious crime carrying the death penalty, or forced labour for perpetuity or deportation, the punishment will be reduced to imprisonment for one to five years.
If it is a question of any other crime, it will be reduced to imprisonment from six months to two years.”³¹

In the past, French juries showed misplaced compassion for defendants in such cases and were prepared to acquit defendants despite the fact that the legislation aimed to simply reduce liability not excuse defendants altogether. People who committed a crime of passion might be treated as if they were suffering from a brief period of mental ill-health and have a defence on this basis. Paragraph 2 of article 324 was only repealed in 1975.³²

Similarities in the development of the English law regarding crimes of passion and the defence of provocation can be noted. During the medieval period in England, a man finding his wife in the act of adultery was entitled to kill her and be acquitted of murder.³³ Blackstone wrote that such circumstances:

'[Are] of the lowest degree of (manslaughter); and therefore ... the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation'.³⁴

The defence of provocation was traditionally available when a husband discovered his wife committing adultery.³⁵ By the 20th century, with effective divorce laws, the courts regarded this leniency as an anachronism and were not prepared to extend the defence to engaged or cohabiting couples.³⁶ However, following the passing of the Homicide Act 1957, any infidelity could potentially amount to provocation. While by 1975 French legislators considered there was no role in a civilised society for a defence or mitigation based on loss of control and loss of temper for crimes of passion, in England just before the passing of the 2009 Act, a jury found a defendant liable for manslaughter rather than murder when he killed his wife and her lover who he claimed were about to engage in sexual intercourse.³⁷

³¹ “*Lorsque le fait d’excuse sera prouvé,*

S’il s’agit d’un crime emportant la peine de mort, ou celle des travaux forcés à perpétuité ou celle de la déportation, la peine sera réduite à un emprisonnement d’un an à cinq ans.

S’il s’agit de tout autre crime, elle sera réduite à un emprisonnement de six mois à deux ans.”

³² Loi du 11 juillet 1975 n° 75-617 portant réforme du divorce, JO p. 7171.

³³ Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992).

³⁴ Manning 16761 T. Raym 212. quoted by Susan Edwards. ‘Anger and fear as justifiable precludes for loss of self-control’ (2010) 74 JCL 223, 231.

³⁵ *R v Mawgridge* (1707) Kel J 119 at 137; 84 ER 1107 at 1115. See further Susan Edwards ‘Abolishing provocation and reframing self defence - the Law Commission's options for reform’ [2004] Crim LR 181, 186.

³⁶ *R v Palmer* [1913] 2 KB 29 at 31, *R v Greening* [1913] 3 KB 846 at 849, *Holmes v DPP* [1946] AC 588 at 598, *per* Viscount Simon.

³⁷ Susan Edwards ‘Anger and fear as justifiable precludes for loss of self-control’ (2010) 74 JCL 223, 231.

The law has moved on in France and, in an effort to tackle the social problem of domestic violence, an attack on a spouse, whatever the circumstances, is, since 2006, viewed as an aggravating factor rather than a mitigating factor.³⁸ The amended article 132-80 of the new Criminal Code states:

“In the cases laid down by the law, the punishments incurred for a serious crime or a major crime are aggravated when the offence is committed by the spouse, the lover or the partner linked to the victim by a civil pact.

The aggravating circumstance laid down in the first paragraph is equally applicable when the facts are committed by a former spouse, a former lover or the former partner linked to the victim by a civil pact.”³⁹

Where this provision applies, and the offence committed is murder, the maximum sentence is increased from 30 years to life imprisonment. The problem with this provision is that it does not draw any distinction between abusive partners who kill and partners who are themselves the victim of domestic abuse who kill their abusers. While it seems appropriate to treat the former situation as an aggravating factor, it would seem more appropriate to treat the latter situation as a mitigating circumstance.

In England, sexual infidelity has now been expressly removed as a basis for the defence of loss of control,⁴⁰ which in some respects responds to concerns about the sexist values underpinning lenient approaches to crimes of passion. While this exclusion has been described as ‘gesture politics’,⁴¹ and was subject to considerable criticism during its progress through parliament,⁴² when looked at from the context of historical attitudes in France and England to crimes of passion, its exclusion seems completely logical in a modern society. Where the issue of sexual infidelity was raised in the past, a trial risked focusing on the deceased's behaviour rather than the defendant's. Inevitably, the deceased was not able to answer these accusations and the whole process could be extremely distressing to the deceased's family and friends. An acquittal of murder on grounds of provocation could, and often did, appear to relatives of the victim to be a travesty of justice. It appeared to imply a judgment by the court that the defendant's responsibility for killing the deceased was seriously lessened by the behaviour of the victim. Thus, in a case where a defendant had killed through sexual jealousy because the victim had formed an association with someone else, a verdict of manslaughter by reason of provocation often understandably appeared to the victim's relatives to be an insult added to injury.

³⁸ Loi n° 2006-399 du 4 avril 2006 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs, JO n°81 du 5 avril 2006.

³⁹ “*Dans les cas prévus par la loi, les peines encourues pour un crime ou un délit sont aggravées lorsque l’infraction est commise par le conjoint, le concubin ou le partenaire lié à la victime par un pacte civil de solidarité.*”

La circonstance aggravante prévue au premier alinéa est également constituée lorsque les faits sont commis par l’ancien conjoint, l’ancien concubin ou l’ancien partenaire lié à la victime par un pacte civil de solidarité.”

⁴⁰ Coroners and Justice Act 2009, s 55(6)(c).

⁴¹ Jo Miles, ‘The Coroners and Justice Act 2009: a “dog’s breakfast” of homicide reform’ (2009) *Archbold News*, Legislative Comment, 6, at p 7.

⁴² See for example, Lord Henley and Lord Thomas’ comments on November 11, 2009, HL Deb col 840-841 and the comments of Claire Ward and Mr Grieve QC on November 9 2009, HC Deb col 80-90.

At the same time, the exclusion of sexual infidelity highlights the inappropriateness of basing a defence on loss of control and then excluding the one factual situation where a person might have traditionally argued that he or she had lost control. As Susan Edwards has observed:

“Of all 'triggers', sexual infidelity, both done and when spoken about, has been at the very epicentre of reasons for loss of self-control accepted and validated by law.”⁴³

By then seeking to extend the defence to a person who has both lost control and feared serious violence highlights that the two concepts do not really fit together. The emphasis should have been on the fear of serious violence and the necessity for self-preservation and the concept of a loss of control is simply a historical distraction.

A comparison with the French defences

While the law as it stands in France has no separate defence based on a loss of control, there is a defence of legitimate defence which is very similar in remit to that of self-defence and public defence. Article 122-5 of the Criminal Code lays down the parameters of the legitimate defence. This states:

“A person who, faced with an unjustified attack against themselves or another, carries out at that time an act required by the necessity of the legitimate defence of themselves or another is not criminally liable, except if there is a disproportion between the means of defence used and the gravity of the attack.

A person who, in order to prevent the commission of a serious or major offence against property, carries out an act of defence, other than voluntary homicide, when this act is strictly necessary for the goal sought is not criminally liable when the means used are proportionate to the gravity of the offence.”⁴⁴

As with the English law, in order for the legitimate defence to apply there must be an actual or imminent attack. For example, if a person is threatened, but the aggressor is held back by others on the scene, the person threatened cannot lash out violently at their aggressor and then rely on their legitimate defence, as the attack was no longer actual or imminent.⁴⁵ Where the threat is not actual or imminent the defence is not available because the individual should have sought the protection of the authorities, rather than

⁴³ Susan Edwards ‘Anger and fear as justifiable precludes for loss of self-control’ (2010) 74 JCL 223, 230.

⁴⁴ “N’est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit dans le même temps, un acte commandé par la nécessité de la légitime défense d’elle-même ou d’autrui, sauf s’il y a disproportion entre les moyens de défense employés et la gravité de l’atteinte.

N’est pas pénalement responsable la personne qui, pour interrompre l’exécution d’un crime ou d’un délit contre un bien, accomplit un acte de défense, autre qu’un homicide volontaire, lorsque cet acte est strictement nécessaire au but poursuivi dès lors que les moyens sont proportionnés à la gravité de l’infraction.”

⁴⁵ Crim. 28 mai 1937, G.P. 1937.2.336.

take the law into their own hands. If there is a time gap between the attack and the response, the latter amounts to a revenge attack and the defence is not available.⁴⁶

As with the English law, the defendant is only allowed to use a proportionate amount of force against his or her aggressor. In one case, some people had just climbed over a boundary wall and the homeowner had sought to frighten them away by shooting into the darkness. One of the intruders was hit and injured. The defence was not available to the homeowner since he had carelessly used excessive force.⁴⁷ Where the accused mistakenly thinks they are about to be attacked they are entitled to rely on the defence if that mistake was reasonable.⁴⁸

The legitimate defence is available to protect property, but tighter limitations on the defence are placed in this context.⁴⁹ This is expressly provided for in the second paragraph of article 122-5 of the new Criminal Code. Thus it is sometimes permissible to use force against a thief. Article 122-5 lays down that the violent response must have been 'strictly' necessary to prevent the attack, an adverb which is not used in the context of preventing an offence against the person. As a result, the defendant should normally give the victim a warning before using violence when a property crime is involved. On the issue of proportionality, a voluntary homicide cannot be committed simply to protect property.

As well as the legitimate defence, there is also a general defence of necessity which was introduced by the New French Criminal Code in 1994.⁵⁰ The old Criminal Code did not contain a general defence of necessity, but there were certain offences which could not be committed where the person acted through necessity, such as obstructing the highway⁵¹ or having an abortion.⁵² During the 19th century, the courts were reluctant to recognise openly a general defence of necessity, preferring to treat these cases as falling under the defence of constraint⁵³ (which is similar to the English defence of duress). Alternatively the courts would find defendants not liable on the basis that they lacked the requisite intention to commit the offence.⁵⁴ But both these approaches were artificial, since the defence of constraint implies that the defendant was unable to make a free choice, but actually when a defendant is acting under necessity he has made a positive choice. For the same reason, such individuals do actually have mens rea, and to suggest otherwise is to confuse mens rea with motive. Eventually, in the 1950s a court of first instance recognised the defence of necessity. A defendant charged with building without a permit was acquitted because he was trying to provide decent living conditions for his family who had been living in slum accommodation.⁵⁵ Soon afterwards the *Cour*

⁴⁶ Crim. 4 juill. 1907, *B.*, 243; Crim. 28 mai 1937, *G.P.* 1937.2.336; Crim 16 oct. 1979, *D.*, 1980, *I.R.*, 522.

⁴⁷ T. Corr. Mayenne, 6 mars 1957, *D.*, 1957.458, note Pageaud.

⁴⁸ Crim. 21 fév. 1996, *B.*, 84, obs. Boulloc, *R.S.C.*, 1996, p. 849; Paris, 9 oct. 1979, *J.C.P.*, 1979.II.19232, note Bouzat.

⁴⁹ Art. 122-5.

⁵⁰ Art. 122-7.

⁵¹ Art. R. 38, old Criminal Code.

⁵² Act of 17 January 1975.

⁵³ Crim. 15 nov. 1856, *B.*, no. 358; 14 août 1863, *D.P.*, 64.I.399.

⁵⁴ Amiens, 22 avr. 1898, *S.*, 1899.2.1, note Roux; Crim. 27 janv. 1933, *G.P.*, 1933.I.489.

⁵⁵ Trib. Corr., Colmar, 27 avril 1956, *D.*, 1956.500.

de cassation formally recognised the general defence of necessity.⁵⁶ The defence is now expressly laid down in article 122-7 of the new Criminal Code which states:

“A person is not criminally liable who, faced with an existing or imminent danger which threatens themselves, another or property, carries out a necessary act to safeguard the person or property, except if there is disproportion between the means used and the gravity of the threat.”⁵⁷

This defence is available to all types of offences, but three conditions must be satisfied in order for it to be applied: there must be an existing or imminent danger, this danger must have necessitated the commission of the offence, and the offence must have been proportionate to the danger. These conditions are very similar to those for the legitimate defence because the latter is really just a special form of the former, always requiring that the danger to which the defendant was responding be a criminal offence.

European Convention on Human Rights

There have been suggestions that the availability of self-defence and public defence where the defendant has made an honest, but unreasonable, mistake as to the necessity to take defensive action may breach the European Convention of Human Rights. Fiona Leverick⁵⁸ has argued that the law on this issue may violate the right to life, protected by Art. 2 of the Convention. She considers that Art. 2 requires a criminal sanction to be applied where a person kills on the basis of an erroneous and unreasonable belief. The European Court of Human Rights has consistently stated that exceptions to Art. 2 based on a mistaken belief, must be held for good reasons. A counter-argument was put forward by the late Professor J.C. Smith⁵⁹ who considered that the English law on this issue did not breach the Convention. He pointed to the case of *Re A (Children)*⁶⁰ where the Court of Appeal interpreted Art. 2 as only concerned with intentional killings and noted that intention is given a narrower meaning under the Convention than under English law. Under the Convention it is restricted to direct intention, where the killing was the defendant's purpose. Thus, Professor Smith interpreted *Re A (Children)* as deciding that Art. 2 did not apply to someone who killed when they acted honestly in self-defence. His argument is not totally convincing, since the European Court of Human Rights has ruled that Art. 2 does not only apply to intentional killing, but also places an obligation on the state to protect the individual from any unjust deprivation of life, intention or not: *LCB v UK*.⁶¹

Both Professor Smith and Fiona Leverick agree that for this type of case, the most appropriate label might be manslaughter rather than murder. The defence of self-defence

⁵⁶ Crim. 25 juin 1958, Lesage, *J.C.P.*, 1959.II.10941, note J. Larguier, *D.*, 1958.693, note M.R.M.P.

⁵⁷ “*N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.*”

⁵⁸ Fiona Leverick, ‘Is English self-defence law incompatible with article 2 of the ECHR?’ [2002] Crim LR 347.

⁵⁹ Professor John Smith, ‘The use of force in public or private defence and Article 2’ [2002] Crim LR 958.

⁶⁰ [2001] Fam 149, [2001] 2 WLR 480.

⁶¹ (1999) 27 EHRR 212. See Fiona Leverick, ‘The use of force in public and private defence and Article 2: A reply to Professor Sir John Smith’ [2002] Crim LR 963.

could be removed where an unreasonable mistake has been made. Instead, a partial defence of self-preservation could be developed which would avoid a potential breach of the European Convention because liability for manslaughter would be imposed.

Burden of proof

With self-defence the ordinary rules regarding the burden of proof apply with the defendant having to put forward some evidence to support the defence. Once this evidence has been provided, the prosecution have to prove that the defence is not available. Before the Homicide Act 1957 judges could withdraw provocation from the jury's consideration if they thought a reasonable person would not have acted as the defendant did. Under the 1957 Act, if there was evidence that a person was provoked to lose his or her self-control, the judge was required to leave the partial defence to the jury even where no reasonable jury could conclude that a reasonable person would have reacted as the defendant did.

For the new defence of loss of control, if sufficient evidence of the partial defence is raised, the burden of disproving the defence of loss of control beyond reasonable doubt rests with the prosecution.⁶² The evidence will be sufficient where a reasonable jury, properly directed, could conclude that the partial defence might apply. It will be a matter of law, and therefore for a judge to decide, whether sufficient evidence has been raised to leave the partial defence to the jury.⁶³ Where there is sufficient evidence for the issue to be considered by the jury, the burden will be on the prosecution to disprove it. This is the same burden of proof as most other defences including self-defence, but amounts to a significant departure from the previous law, as it gives the judge a control over whether there is a case fit to go to the jury. As Norrie notes:

Under the new law, the idea of a justifiable sense of being seriously wronged directs the jury to consider what is morally or politically acceptable, and, further, the judge has the power to remove cases from the jury's consideration. Interestingly it should be noted that, with regard to the power of removal, the matter is taken from the 'actual' jury's consideration in the name of an 'ideal' jury.⁶⁴

Amanda Clough has observed that the 2009 Act is moving the law backwards in the direction it had been before 1957, in other words one could wonder whether the legislation in this respect is regressive rather than progressive.⁶⁵

An interesting aspect of the French law of legitimate defence is the approach taken to the burden of proof. Normally the defendant has to prove that the conditions of the defence have been satisfied. On the issue of proportionality, where the threat was to the person the burden of proof is on the prosecution to show that the response was disproportionate, while with threats to property it is on the defendant. More significantly, the legislator has sought to strengthen the protection of individuals in particularly dangerous situations by reversing this burden of proof. Article 122-6 of the Criminal Code lays down two categories of presumption of legitimate defence:

⁶² Coroners and Justice Act 2009, s 54(5).

⁶³ Coroners and Justice Act 2009, s 54(6).

⁶⁴ Alan Norrie 'The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control' [2010] Crim LR 275, 280.

⁶⁵ Amanda Clough, 'Loss of self-control as a defence: the key to replacing provocation' 74 JCL 118.

“Art. 122-6. A person is presumed to have acted in a state of legitimate defence when they carry out the act:

1. To repel, at night, an entrance by force, violence or fraud into inhabited premises;
2. To defend himself against the authors of theft or looting carried out with violence.”⁶⁶

In such circumstances it would be up to the prosecution to prove that the individual was not acting in a state of legitimate defence. For a long time this presumption was thought to be irrebuttable. Thus, on several occasions an individual had entered a house for an amorous rendezvous with a woman inside. Her husband was aware of his intentions and, having armed himself for his arrival, killed or injured him with a gun. In such cases, the conditions of legitimate defence were not satisfied, but the prosecution could not rebut the presumption that the defence applied.⁶⁷ In 1959 the *Cour de cassation* reversed its position on the matter, ruling that the presumption was rebuttable.⁶⁸ This is the approach adopted by the new French Criminal Code of 1994.⁶⁹

Self-preservation

Even after the Coroners and Justice Act 2009, if a woman in an abusive relationship kills her partner to protect herself from further violence in the future, she may have no defence to murder—under loss of control, diminished responsibility or self-defence. She will therefore face the mandatory sentence of life imprisonment and this sentence might be disproportionate to her personal guilt. The Government ignored the Law Commission’s recommendation to remove the requirement of loss of control from the definition of the reformed defence in the 2009 Act and instead put this requirement at centre stage. By doing so, the defence is clinging to its rather dubious social and moral roots which in France had long ago caused the equivalent defence to be dropped altogether. By extending the defence to include fear of serious violence, but still requiring the defendant to have lost their control, there is a real tension in the current law. In addition, by sticking to the framework of the old defence of provocation, the objective test and timing factors are still determinant of whether the defence is available. The problems with the defence of provocation/ loss of control are so fundamental that a mere redefinition has still left an unsatisfactory defence. It is regrettable that with the Coroners and Justice Act 2009 the Government did not take the more radical option of moving away from a defence based on loss of control altogether.

There is today a risk that battered women who kill their abusive partners will fall outside the new partial defence. The key goal of trying to provide justice for women who had suffered years of abuse at the hands of their abusive partners who subsequently reacted by killing their abuser, might be achieved more effectively by abandoning a

⁶⁶ “*Est présumé avoir agi en état de légitime défense celui qui accomplit l’acte:*

1. *Pour repousser, de nuit, l’entrée par effraction, violence or ruse dans un lieu habité;*
2. *Pour se défendre contre les auteurs de vols ou de pillages exécutés avec violence.”*

⁶⁷ Crim. 11 juil. 1844, S. 1844, I, 777.

⁶⁸ Crim. 19 fév. 1959, D., 1959.161, note M.R.M.P., J.C.P., 1959.II.11112, note Bouzat.

⁶⁹ Crim., 21 fév. 1996, bull., no. 84.

defence based on loss of control altogether. As there has been a historical reluctance to recognise a general defence of necessity in English law,⁷⁰ unlike in France, the way forward would be to create a narrow focused form of a necessity defence: a defence of self-preservation. This new partial defence of self-preservation would not be limited to battered women who killed;⁷¹ it could, for example, be used by victims of racial abuse or bullying who react by killing their tormentors. The new defence could move the focus onto what ought to be the central issue of the defence: the terrible and dangerous abuse suffered by the victim. Undoubtedly, the woman's reaction to this abuse—killing—was wrong, and as a result this defence would only offer a partial defence.

The defence of self-preservation could be defined to offer a defence where the offender, or another person with whom he or she is closely associated, has been repeatedly subjected to serious violence or tormenting behaviour.⁷² The defence could be available where force has been used not just to protect oneself, but also to protect another. For example, a son might kill his mother's violent boyfriend to protect her from further violence.⁷³ The violence or torments would have had to be directed against a person, it would not be sufficient if they were directed against property. This behaviour must have caused the offender to be in a state of severe emotional disturbance⁷⁴ (a concept which incorporates both emotions of fear and anger) at the moment of the fatal attack. The accused must have honestly believed that killing was the sole way to prevent grave future violence or torment to him or herself or another.⁷⁵ That belief need not have been reasonable.⁷⁶ Nor should there be any requirement that the amount of force used was reasonable. A possible definition of the new defence is:

A person will have a defence to murder so as to reduce their liability to manslaughter if he/she (or another person to whom he/she was closely associated) had:

- (a) before the killing, been subjected by the victim to repeated, serious violence or tormenting behaviour; and
- (b) reacted in a state of severe emotional disturbance in the honest belief that this was the only way to protect him or herself (or the other person) from further serious violence or torments.⁷⁷

As the defence is only a partial defence there would be no need for an imminent threat to have existed. As regards the burden of proof, where the defendant had themselves been

⁷⁰ *R v Dudley and Stephens* (1884) 14 QBD 273.

⁷¹ The Criminal Law Revision Committee recommended the introduction into English law of a new partial defence to murder where excessive force was used in self-defence: Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*, Cmnd 7844 (1980) para 288.

⁷² *Ibid.* at para. 12.88.

⁷³ *Ibid.* at para. 10.105.

⁷⁴ See the Model Penal Code, The American Law Institute, s.210.(3)(1)(b), discussed in Ronnie Mackay and Barry Mitchell 'Provoking diminished responsibility: Two pleas merging into one?' [2003] *Criminal Law Review* 745, 758.

⁷⁵ Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person*, Cmnd 7844 (1980), para. 10.101.

⁷⁶ *Ibid.* at para. 10.102.

⁷⁷ See Catherine Elliott 'What future for voluntary manslaughter?' (2004) 68 JCL 253, 263.

the victim of domestic abuse there would be a presumption that the defence was available.

If the victim is a spouse, lover or civil partner of the defendant who was abused by the defendant before the final attack, then consideration could be given by the Sentencing Council as to whether this should be treated as an aggravating factor, as in France, when determining the sentencing tariff.

Self-defence and the burden of proof

Politicians have been looking at reform options for the defence of self-defence. The Conservative Party's election manifesto promised greater protection for householders against intruders.⁷⁸ Conservative politicians suggested that the right of self-defence should be lost only where the householder used 'grossly disproportionate force' on the intruder.⁷⁹ But this is not a satisfactory solution for self-defence because the law of self-defence operates in a wider variety of social contexts. It is not just available to homeowners confronted by a burglar, but also to someone involved in a fight in a local pub, or to a woman suffering domestic violence or to the police who shoot a suspect. At the moment a single test of reasonable force applies in all these different contexts and a 'grossly disproportionate' standard would not be appropriate.

Instead of trying to change the boundaries of self-defence, a more effective reform would be to change the burden of proof in appropriate cases. Historically, the defence of self-defence has not succeeded for battered women who kill their abusive partners.⁸⁰ We could consider building on the example of the French law in this field and applying a rebuttable presumption that the defence is available in the context of battered women who kill.

Conclusion

In attempting to move away from its indulgent approach to crimes of passion, the French criminal law has left no defence based on the concept of a loss of control. Instead the focus is on whether the defendant had a legitimate defence or acted out of necessity. The French Parliament has used the rules on the burden of proof to try to make sure that justice is done in appropriate cases and adapted the rules on sentencing to treat domestic violence as an aggravating factor. The retention of the concept of loss of control is an irrational distraction in English law and by retaining the conceptual framework of the old defence of provocation, unnecessary obstacles are being put in the way of defendants who deserve at least a partial defence. In order to make sure that our law complies with the European Convention on Human Rights we need to reconsider the boundaries of the partial defences to murder. Justice could be achieved by developing a defence of self-preservation, changing the burden of proof for the defence of self-defence in certain specific contexts and taking into account in sentencing the existence of domestic abuse. While it is disappointing to be recommending legislative reform of the defences to homicide so soon after the passing of a parliamentary Act on the subject, the 2009 Act does not provide an adequate solution to the problems identified in the earlier defence of provocation. The proposed

⁷⁸ *Invitation to join the Government of Britain: The Conservative Manifesto* (Pureprint Group, 2010), 56.

⁷⁹ Nigel Morris 'No need for new laws over confronting burglars', *The Independent* 28 December 2009.

⁸⁰ Aileen McColgan 'In defence of battered women who kill' OJLS [1993] 508, 521.

reforms will allow battered women who kill their abusive partners a partial defence (self-preservation), and in limited circumstances a complete defence (self-defence) in order that justice can prevail for both men and women.