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Foreword

The University of Liverpool Law Review was launched in 2015. This collaboration between the Law School and our students aims to celebrate the high level of engagement of our students with legal scholarship and current issues.

The Law School has entrusted the student body with the running of the Law Review. We very much hope that our students' work on the editorial board of the Review will provide them with a stimulating and rewarding experience. Whilst being student-led, the Review will reflect the work which the Law School is most proud of. We look forward to sharing our work with colleagues from academia and the professions in Liverpool and beyond, hoping to get anybody involved who shares our own interest in the way that law shapes our lives.

At the Liverpool Law School we not only encourage our students to learn the law and to apply it but also to critique and change it. Our students are engaged in schemes that promote pro-bono work and provide direct advice to those in need of help though our award-winning Law Clinic. They reach out to local communities through our Street Law project and they volunteer their services to local Citizens Advice Bureaux. It is my hope that the University of Liverpool Law Review will highlight the academic discipline that empowers our students to engage so enthusiastically in all these activities.

Our launch represents a very special milestone for the Law School. It acknowledges the School's confidence in our students as partners in both the study and the application of law, as well as in the life of the Law School itself. I wish the University of Liverpool Law Review every success.

Prof Amandine Garde
Head of Law, University of Liverpool

Preface

It was an ordinary Wednesday afternoon in February at a coffee shop down Hardman Street near the University. The nine of us, all undergraduate law students, met for the first time after lectures to discuss how our student-led law review could be run. *Haec otia studia fecit* – it was this very moment of leisure that drew the nine would-be friends to a common objective: to foster learning by promoting academic excellence through a student law review.

Our aim was grand but simple: publish and showcase our students' extraordinary academic works outside the boundaries of our curriculum. We charged ourselves with maintaining a unifying forum for students to publish their thoughts on contemporary legal issues and render their views to the wider world.

This Law Review would not have its aims materialised beyond mere ideals were it not for the continued support we have received. Since our inception, the Academic Advisory Board from our School of Law and Social Justice have extended their unreserved and unwavering support. We are also indebted to the dissertation contributors who join us in our debut. Without their enthusiasm and faith in our stewardship over their prized work, this issue would not have been possible. On behalf of the Editorial Board, I would like to express our many thanks to every person who has seen us through till publication.

Last but certainly not least, I would like to take this opportunity to praise and thank everyone on the Editorial Board. Though we had no predecessors to follow, we shared the same goal – we moved in strides and helped each other put the pieces of this inaugural issue together.

It is with great pride and joy that as the Editor-in-Chief, I present our Law Review's very first issue and the Editorial Board members who have worked diligently and thoroughly.

Vito Pun
Editor-in-Chief

How Effective are the Legal Responses to Football "Hooliganism"

Nicole Hartley *

Abstract

Exploring the nature of football hooliganism, it is argued hooliganism is largely a collective discourse; individual punishment is redundant and counter-intuitive. However, current legal responses to hooliganism focus on individual punishment instead of targeting groups which facilitate hooligan behaviour. The current legislative framework therefore arguably created excessive and disproportionate penalties. This fails to properly address the mischief to the point of being counter-productive. As an alternative, this article argues that the first step to an effective set of legislative responses to hooliganism is having a better understanding of the nature of hooliganism rather than relying on any pre-conceived notions.

I. Introduction

In the words of one hooligan: 'being involved in football violence is the most incredibly exciting and enjoyable thing. To anyone who has not been a part of it, that will probably be an astonishing statement but nevertheless, it is the truth'.[1] This encapsulates the collective sense of hooliganism.[2] In this dissertation, I will analyse the challenges associated with tackling (legally or otherwise) those individuals who are motivated to participate in hooliganism, whilst illustrating how difficult it can be to detect and target. The above quote

* Nicole Hartley is a third year Law student at the University of Liverpool.

[1] Dougie Brimson, *Barmy Army: The Changing Face of Football Violence* (Headline Book Publishing, 2000) 56.

[2] Participation, often as part of a group, in football-related disorder.

also suggests that there is a lack of understanding of football hooliganism and I will, therefore, analyse the problematic nature of defining the individual hooligan and develop an understanding of the characteristics which they hold.[3] In order to illustrate my arguments I will make reference to the Hillsborough disaster of 1989 and the consequential development regarding the policing and stewarding of football games.

II. Background Information

A. Defining and understanding the 'hooligan' in hooliganism

Before exploring the effectiveness of the current legal provisions attempting to deal with football hooliganism, it is imperative to explore and develop a greater understanding of what is meant by the term 'hooliganism'. An appreciation of the term's context will provide the foundation on which a deeper analysis of these legal responses can be carried out.

The term 'hooligan' dates back to 19th-century England.[4] Originally, a 'hooligan' was a person who engaged in any kind of rowdy, possibly criminal, behaviour.[5] In the mid-1960s, the contemporary concept of a "football hooligan" was established: a person intent upon rowdy, possibly criminal, football-related behaviour, most notably, fighting.[6]

However, it is of significant importance that one understands why such conflict occurs around the sport of football. A connection can clearly be drawn between the game and local

[3] The scope of this dissertation extends to England and Wales only.

[4] The word may have originated from an Irish immigrant family named Hoolihan or Hooligan that terrorized the 'East End' of London in the 19th century (Steve Cowens, *Blades Business Crew: The Shocking Diary of a Soccer Hooligan Top Boy* (Milo Books, 2003); Clifford Stott and Geoff Pearson, *'Football Hooliganism': Policing and the War on the English Disease* (Pennant Books, 2007) 13; John Williams and Stephen Wagg, *British Football and Social Change: Getting into Europe* (Leicester University Press, 1991)).

[5] Peter T Leeson, Daniel J Smith, Nicholas A Snow, 'Hooligans' (2012) Revue d'economie politique 213.

[6] Hooligans are overwhelmingly 20-something year old men. Many, though not all, of them are unskilled or semiskilled labourers (Eugene Trivizas, 'Offences and Offenders in Football Crowd Disorders' (1980) British Journal of Criminology 276, 285).

cultural and gendered norms[7]; for example, meeting up in a group in order to consume alcohol and chant in identification with their club is becoming an ever-appealing activity to young hooligans.[8] These characteristics are imperative to understanding the hooligan, both as an individual and as collective forming a group identity. Most football hooligans are in their 20s and come from working-class backgrounds.[9] According to a sample of more than 500 persons arrested for various football-related 'hooligan crimes' in the mid-1970s, the average hooligan was 19 years old.[10] More than 80 percent of hooligans were manual labourers or unemployed,[11] with 36 percent of them having a history of previous convictions.[12] In the 1980s, the hooligan population increased in age and became more socio-economically diverse.[13] General social perceptions have, however, remained steady: the typical hooligan is still thought to be a young, working-class man.[14] There is a cultural acceptance that certain sports, such as football, 'turn a boy into a man' and, as a result, such sports have been used as an agent to socially construct masculinities and to define manhood.[15]

In the modern day, the label 'football hooliganism' has been applied to anyone whose intoxicated, criminal and/or anti-social behaviour can be associated with football;[16] the case of *R. v Curtis (Lewis Cash)*[17] exemplifies this. Here, the perpetrator was chanting and jumping as part of an 'out of control' crowd outside a football ground after a local derby. Although he was not known as a trouble-maker at football games, he was labelled as a

[7] Agnes Elling and Annelies Knoppers, *Sport, Gender and Ethnicity: Practises of Symbolic Inclusion/ Exclusion* (Kluwer Academic Publishers, 2005).

[8] Rowan Bridge, 'Increase in young football hooligans, say police' (BBC News, 8 October 2010) <http://www.bbc.co.uk/news/uk-11473191> accessed 5 January 2015.

[9] Trivizas (n 6).

[10] ibid.

[11] ibid 280-281.

[12] ibid 283.

[13] ibid.

[14] ibid.

[15] Jay Coakley, *Sports in Society: Issues and Controversies* (8th edn, McGraw-Hill, 2004).

[16] Gary Armstrong and Richard Giulianotti, *Entering the Field: New Perspectives on World Football* (OUP, 1997).

[17] [2009] EWCA Crim 1225, [2010] 1 Cr App R (S) 31.

'football hooligan' and a banning order was imposed.[18] This is, arguably, for a very specific reason: 'the need to eliminate the phenomenon of fan violence, so that the game's appeal to corporate or bourgeois finance may continue'[19]; it is evident that football is a multi-million pound business and football hooliganism may be detrimental to football clubs when looking for club sponsors. Following several reports of criminal offences being committed in connection with a club, it is likely that sponsors would be less forthcoming.

B. The hooligan as a collective enterprise: gendered discourse

There are six universal features fundamental to the construction of hooligan identities: excitement and pleasurable emotional arousal, hard masculinity, territorial identifications, individual and collective management of reputation, a sense of solidarity and belonging, and representations of sovereignty and autonomy.[20] Most of these features seem to represent a desired adrenaline rush when participating in football related disorder, and also the longing of identity, such as being a part of a "firm".[21]

In football hooliganism's earliest days, hooligans organized in small, informal groups around kinship, friendship, and neighbourhood ties.[22] Subsequent football hooligans organized in more formal, rival groups called "firms" associated with football teams.[23] Football games and the activities that surround them, such as patronising pubs and travelling to and from games, provide convenient locations for the particular behaviours that those involved in hooliganism might adopt.[24] Team rivalries supply ready and willing opponents: hooligan

[18] Football banning orders are a preventative measure designed to stop potential troublemakers from travelling to football matches - both at home and abroad.

[19] Armstrong and Giulianotti (n 16).

[20] Ramón Spaaij, 'Men Like Us, Boys Like Them: Violence, Masculinity and Collective Identity in Football Hooliganism' (2008) Journal of Sport and Social Issues 369.

[21] A collection of individuals who are all motivated towards the same goal, i.e. fighting.

[22] Some were associated with other youth subculture groups such as 'Teddy Boys' and, by the late 1960s, 'Skinheads'. Although it's common to associate hooligans with racist 'Skinheads', Brimson and Brimson note that this association has been greatly exaggerated (Dougie Brimson and Eddy Brimson, *Everywhere We Go: Behind the Matchday Madness* (Headline Book Publishing, 1996) 54).

[23] Trivizas (n 6).

[24] This can include minor offences against the person but also criminal damage, breach of the peace and drunk and disorderly.

fans of the opposing team – this is, arguably, the main challenge associated with hooliganism. I argue that football games themselves and the activities (public or otherwise) surrounding the game support and almost encourage the opportunity for this form of behaviour to occur.

In addition, large excited crowds make such clashes less risky for hooligans as they are less likely to be detected and arrested for creating a disturbance.[25]

Hooliganism is not about one perpetrator committing one crime. In the words of a hooligan: 'We don't—we don't go—well, we do go with the intention of fighting, you know what I mean . . . (W)e look forward to it . . . it's great'.[26] This suggests that the focus of the legal responses should be centred on collective behaviour as opposed to individual offending. Hooliganism is inextricably linked with the changing dynamics of the game's activities and the social acceptance of certain types of behaviour. This leads on to how hooliganism is tackled criminally and by game policies. For hooligans, fights surrounding football rivalries are a central part of the sport, or even a sport in itself.[27]

III. Tackling the Problem

A. Policing and Stewarding

It is imperative to note that policing is not the only form of control used before, during and following a game, so it must be located within a wider framework of preventative measures used at football games. Policing is underpinned by a set of repressive legal provisions. This includes restrictions on the sale and consumption of alcohol,[28] specific football-related

[25] Gerry Finn, 'Football Hooliganism: A Societal Psychological Perspective' in Richard Giulianotti, Norman Bonney and Mike Hepworth (eds), *Football Violence and Social Identity* (Routledge, 1994) 95; Patrick Murphy, John Williams and Eric Dunning, *Football on Trial: Spectator Violence and Development in the Football World* (Routledge, 1990) 11; Emma Poulton, 'Tears, Tantrums and Tattoos: Framing the Hooligan' in Mark Perryman (ed), *Hooligan Wars: Causes and Effects of Football Violence* (Mainstream Publishing Company 2001) 129.

[26] Murphy and others (n 25) 87.

[27] Eric Dunning, Patrick Murphy and John Williams, *The Roots of Football Hooliganism: An Historical and Sociological Study* (Routledge, 1988) 16.

[28] SECAA.

offences[29] and some quite draconian legislation which provides for the imposition of banning orders and travel restrictions upon convicted and, uniquely in English criminal law, upon unconvicted persons whom the police believe may engage in hooligan behaviour.[30]

I will now consider why these offences have been brought into force. 15 April 1989 remains a poignant date for the world of football it is on this day that ninety-six Liverpool Football Club fans died after a crush in the Leppings Lane end of the Hillsborough Stadium, Sheffield. In response to the 1989 disaster, the Taylor report[31] was commissioned to identify its causes and make safety recommendations for future sporting events. The report criticised the football industry's treatment of spectators in addition to its policing and medical response. Lord Chief Justice Taylor stressed that the cause of the Hillsborough disaster was overcrowding and that the main reason for the disaster was the failure of police control.[32] Seventy-six recommendations were made which included all seated stadia, fences around the pitch to be removed, and a more family friendly atmosphere was to be created.[33] Taylor revolutionised the game at a time when its future was questionable by forcing the Conservative Government to change their attitude towards football. It is unlikely that football would have evolved like it has without the Taylor report highlighting the changes that so drastically needed to be made.

In England and Wales, the Hillsborough disaster is a high profile case and a depressing example of how fans have been treated in recent decades. A further example comes from The Times newspaper which, in the early 1980s, had described football as a 'slum sport played in slum stadiums watched by slum people'.[34] It can be argued that football fans are treated differently to those of other sports and I propose that differences in the legislation

[29] Football (Offences) Act 1991.

[30] Football Spectators Act 1989; The Football (Offences and Disorder) Act 1999.

[31] Home Office, *The Hillsborough Stadium Disaster*, (Cm 765, 1989).

[32] ibid.

[33] Home Office, *The Hillsborough Stadium Disaster*, (Cm 962, 1990).

[34] Anthony Clavane, 'The squad to beat football's racists' (The Sunday Times, 2 December 2012) <http://www.thesundaytimes.co.uk/sto/comment/regulars/guestcolumn/article1169948.ece> accessed 19 April 2015.

suggest that this is the case.[35] As a consequence of 'media and political attention',[36] fencing was introduced at most clubs in the mid-1970s; segregation fences were introduced to prevent the hostile environment of home and away supporters watching the game standing side by side.[37]

Hooliganism in the 1980s brought football into the political scene and the Heysel disaster[38] led to a decision by the Government that football could not govern itself. The Government's motive for all seated stadia was seen as a prevention of hooligan behaviour, rather than a safety measure for spectators.[39]

Furthermore, the courts have defined 'hooligan' rather broadly and there are many examples of longer sentences being imposed upon those who commit hooligan acts compared to those imposed for similar criminal behaviour which has not occurred at or near a football game.[40] In *R v Bruce*,[41] Park J spoke of the need to impose exemplary sentences on 'those who commit violence on the occasion of football games'.[42] Stringent sentences have been imposed on individuals for behaviour that would have passed unnoticed in any other social setting. For example, a Bristol City fan who shouted 'wanker' at a group of rival segregated fans received a 14 hour attendance centre order, despite this behaviour happening regularly in other social settings.[43] Police and stewards are faced with a grave challenge when it comes to identifying an individual who attends games with the intention

[35] See SECAA, s 2. Football fans can drink beer inside the stadium, but not in view of the playing surface whereas rugby fans can drink alcohol whilst watching their sport.

[36] A young supporter was stabbed to death at a Second Division match in 1974.

[37] Chris Whalley, 'Stadium Safety Management in England' (The Football Association) <http://www.thefa.com/football-rules-governance/more/stadium-safety> accessed 7th November 2014.

[38] On 29 May 1985, escaping fans were pressed against a wall in the Heysel Stadium of Brussels, resulting in the death of thirty-nine people—mostly Juventus fans— and the injury of six hundred others.

[39] Martin Johnes, 'Heads in the Sand: Football, Politics and Crowd Disasters' in Paul Darby, Martin Johnes and Gavin Mellor (eds), *'Soccer and Disaster: International Perspectives'* (Routledge, 2005).

[40] Trivizas (n 6); Eugene Trivizas, 'Sentencing the "football hooliganism"' (1981) Brit J Criminol 342; Eugene Trivizas, 'Disturbances associated with football matches: types of incidents and selection of charges' (1984) Brit J Criminol 361.

[41] *R v Bruce (Michael)* (1977) 65 Cr App R 148 (CA).

[42] ibid 150.

[43] Michael Salter, 'Judicial Responses to Football Hooliganism' (1986) NILQ 280, 290.

of becoming involved in disorder and those who merely want to be involved in a 'carnival of fandom', usually entailing alcohol consumption, humour and song.[44]

Sports fans are subject to the general body of criminal law; they can be dealt with in the normal way for offences against the person, against property and against the state. However it can be argued that, although they can be dealt with in the normal way, the degree of regulation and control is different: 'Football supporters going to see their teams play can experience a degree of regulation and control that few others encounter, outside of an airport.' [45] What is unusual is that there is a wide range of criminal legislation which is solely football related - these are the Acts that I will be analysing.[46]

B. The Legislative Responses

There are four main legislative responses to football hooliganism: the Sporting Events (Control of Alcohol, etc) Act 1985; Football Spectators Act 1989; Football (Offences) Act 1991 and Football (Offences and Disorder) Act 1999. In this section, I will discuss the offences that these Acts criminalise and whether or not they have met their aim in deterring and dealing with football-related crimes. Although not solely football related, the Violent Crime Reduction Act 2006 is relevant as this Act empowered police to move people on if alcohol-related offences might occur, and removed time limitations on football banning orders (these orders will be discussed later on under their parent act).[47]

[44] Geoff Pearson, *An ethnography of English Football Fans: Cans, cops and carnivals* (Manchester University Press, 2012).
[45] Duleep Allirajah, 'Criminalising Football Fans' (Institute of Ideas, London, October 2014).
[46] Home Office, *Justice for All*, (Cm 5563, 2002).
[47] Football Spectators Act 1989.

i. The Sporting Events (Control of Alcohol, etc) Act 1985 (SECAA)

SECAA was based on the premise that much disorder at football is related to alcohol intake.[48]. This Act was implemented despite a report published in 1984 by a Working Group on football spectator violence in England stating that legislation preventing the consumption of alcohol at football grounds or on 'football specials' was not necessary. This was partly because the police had reported to them that alcohol was *not* a major factor for football-related violence in England and Wales. It is vital to note that there is no evidence to suggest that a pre-game alcoholic drink increases the likelihood of hooliganism or other football related violence.[49] This is important as the SECAA is solely related to alcohol intake.

The 1985 Act was introduced simply because 'something had to be done' after several distressing incidents of hooliganism and football related violence during the 1984/85 season,[50] such as the Heysel Tragedy. The provisions of this Act were based on the presumption that football related violence or hooliganism could be prevented, or at least reduced, if the availability of alcohol to spectators before, during and after a football game was limited.[51]

Difficulty lies in the practical enforcement of the provisions of this Act. Section 1 of the Act prohibits the carrying of alcohol on so called 'football specials'.[52] The Act does not cover private vehicles used as transport to games, although cars full of drunken fans are presumably as undesirable as coaches full of drunken fans. Pearson found that alcohol was allowed on many independent or supporters' club coaches, with both organisers and consumers willing to risk the minimal chance of being stopped and searched by the police.[53]

[48] *R v Doncaster Justices, ex p Langfield* (1984) 149 JP 26.
[49] David McArdle, *From Boot Money to Bosman: Football, Society and the Law* (London, 2000).
[50] The football league season begins in August and ends in May the following year.
[51] McArdle (n 49).
[52] Arranged travel by the football club for fans to get to the game directly.
[53] Geoff Pearson, 'Legitimate targets? The civil liberties of football fans' (1999) J Civ Lib 28.

Therefore it can be argued that this Act is ineffective in its attempts at a preventative measure.

Section 2(2) of the SECAA makes it an offence to attempt to enter a football ground whilst 'drunk', a phrase which the Act fails to define, meaning stewards and/or the police are required to make a 'spur of the moment' value judgement, suggesting that each case would be decided differently according to a subjective view of what constitutes 'drunk', severely reducing the Act's effectiveness. One fan could be charged with the offence whilst another would not be depending upon which steward they are judged by, causing clear issues in terms of consistency.

Pearson also notes an understandable reluctance on the part of turnstile stewards to prevent the entry of those who may be 'drunk'.[54] This may be due in part to a pragmatic and perfectly understandable unwillingness on the part of stewards to risk getting involved in an altercation with a drunken fan and his friends.[55]

SECAA also aims to prevent the consumption of alcohol within football grounds by Section 2(1)(a) which prohibits the consumption of alcohol within the sight of the pitch and Section 2(1)(b) that makes it an offence to attempt to take alcohol into a football ground. These provisions lead to fans becoming intoxicated before the game. Consuming alcohol in pubs before kick-off is an ideal opportunity for fans of both teams to meet before the game in an atmosphere charged with alcohol. Not only does this defeat the immediate purpose of the Act, in reducing alcohol consumption, but it also makes incidents between rival fans drinking in the same establishment likely, with potential weaponry – glasses and bottles – to hand and a greater risk to the uninvolved public. For example, a local newspaper in Bristol reported in 2012 that innocent members of the public were forced to flee after a gang of football hooligans clashed with Asian youths in Bradford city centre. Witnesses said both

[54] ibid.
[55] McArdle (n 49).

sides threw glasses and used abusive and racist language.[56] This shows that these sections of the Act are unhelpful in reducing football related disorder and could actually increase hooliganism.

In the more 'civilized', consumer-driven environment of the 1990s, many clubs had been granted licences to serve alcohol and the 1985 Act does not prevent them from doing so, provided that the beverage is sold and consumed out of sight of the pitch. The Taylor report[57] suggested the removal of the ban on the sale of alcohol at grounds. If more bars inside the ground were open, it was suggested that more fans would be likely to arrive earlier and therefore avoid trouble in pubs with rival fans. These comments seem well-founded as the Act's restriction on alcohol at grounds is serving little purpose as regards to social control, and could well be having a detrimental effect in the fight against crowd disorder. However, drinking inside the ground could allow those who have been to the pub pre match to continue their consumption of alcohol thus increasing the likelihood of becoming involved in hooliganism.

ii. The Football Spectators Act 1989

Some fundamental elements of the Football Spectators Act 1989 were not implemented because Taylor LJ was so critical of them in his Final Report on the Hillsborough Disaster.[58] The controversial football membership scheme was shelved for this reason. Therefore we must look at Part II of this Act that relates to restriction orders, now known as International Football Banning Orders (IFBO). The Government established the Football Banning Orders Authority to maintain a register of all banned persons[59] and to liaise with police forces to ensure that banned persons are required to report to a police station when the team they

[56] Editorial, 'Violent street fight forced passers-by to flee and hide in city centre pub' (The Telegraph & Argus, 4 September 2012) <http://www.thetelegraphandargus.co.uk/news/9908163.Football_hooligans_clashed_with_Asian_men/> accessed 3 December 2014.

[57] Home Office (n 31).

[58] Home Office (n 33).

[59] As of 30 January 2012, there were 3,058 persons on the register.

support plays. This is very powerful legislation and has proved to be the main cornerstone in the drive to reduce the risk of violence occurring in football.[60]

Although in theory Part II of this Act appears valuable in preventing known hooligans from travelling abroad to cause trouble, in practice, the Act has failed to achieve its objectives. More recently, questions have been asked as to the effectiveness of the 1989 Act in dealing with those convicted of offences which are considered 'football-related' by the government and the media but which do not actually fall within the definition of 'football-related' provided by the Act.

The 1989 Act follows a strict statutory definition of 'football related'. As a result, offences which are carried out more than two hours before the start of the match (but not on the journey to the game) were not classified as 'football related' and therefore could not lead to the imposition of a restriction order. This undermined the effectiveness of the Act because hooligan activity quite often occurs before one pm on a game day. Such a narrow definition severely restricted the effectiveness of the Act. Since then, the Football (Offences and Disorder) Act 1999 has extended the definition of 'football related' for the purpose of the 1989 Act to include offences committed up to twenty four hours before and after the match; but it remains to be seen whether the closing of this loop-hole will enable the 1989 finally to achieve its aims.

iii. The Football (Offences) Act 1991

This can be seen to be the most notorious anti-hooligan measure. Alongside tougher sentencing policies in respect of football hooligans and the development of the Football Intelligence Unit (FIU), the 1991 Act was supposed to finally resolve hooliganism. The Act creates three new offences: Section 2 of the 1991 Act makes it an offence to throw any object within a football stadium; while Section 3 criminalises racist or indecent chanting within a

[60] The Football Association, 'Summary of measures taken to prevent football violence', (2012) <http://www.thefa.com/football-rules-governance/more/stadium-safety> accessed 7 November 2014.

designated football stadium; and Section 4 makes encroaching onto the pitch or the surrounding area an offence.

The practicalities of enforcing this Act are highly problematic. The offences covered by the statute are often considered so minor that they rarely lead to police action. So many offences occur during a football game that infringe one or more of the sections of this Act that, despite increased police powers, arrests are made only in exceptional circumstances.[61] Usually arrests are made only when such actions are likely to break the general 'peace' with the possible result of more serious offences.

Section 3 prohibits 'indecent chanting' and although the term 'indecent' as used in this Act has never been defined. The upshot is that 'what the fucking hell was that' or 'you're so shit, it's unbelievable' have become potentially 'indecent' when uttered by those attending a football game.[62] Yet, the same chant uttered by fans watching the same game in a pub – where most 'real hooliganism' occurs would provoke no response. In relation to 'racist chanting' in the case of *DPP v Stoke on Trent Magistrates Court*[63] a Port Vale football supporter who had chanted the words 'you're just a town full of Pakis' at fans from Oldham, had been guilty of the offence of racialist chanting under Section 3(1) of the Football (Offences) Act 1991. R's admitted behaviour fell squarely within the definition given in Section 3(2)(b) and within the mischief which the Act aimed to tackle.

Despite the threat of police action and the occasional arrest, the deterrent value of the Act is fairly negligible with the number of arrests exceptionally low. As regards to racist or indecent chanting, the number of arrests since the Act's coming into force has been as low as ten a season – despite research revealing there are typically dozens of 'indecent' chants at the average league game.[64] It is not surprising that the police's ambivalent attitude towards these

[61] Steven Greenfield and Guy Osborn, *Law and Sport in Contemporary Society* (London, 2000).
[62] McArdle (n 49).
[63] *DPP v Stoke on Trent Magistrates' Court* [2003] EWHC 1593 (Admin), [2003] 3 All ER 1086.
[64] Sir Norman Chester Centre for Football Research, *Football and Football Hooliganism* (University of Leicester, 2001).

offences is reflected in the behaviour of the fans. It can be further argued that although the legislation in itself is quite draconian, the widespread failure to implement its provisions has severely weakened its impact.

iv. The Football (Offences and Disorder) Act 1999 (FODA)

This Act was a Private Member's Bill but was drafted by the Home Office and received the all-Party support required to pass through the House. Tony Banks, the then Sports Minister, celebrated the Bill as being 'the toughest anti-hooligan legislation of almost any country in the world'.[65] It was obviously far easier to tighten up the flawed 1989 and 1991 Acts than it was to contemplate the possibility that those laws has missed the target.

It proposed that the Football Spectators Act 1989 should be widened and that respectively the laws on indecent or racist chanting should be strengthened. Roy Keane has written: 'Some of the things you hear from terraces are really sickening. Racist taunts, chants about players' personal lives, filth that makes you wonder about the people who come to football matches'.[66] This quote from 2002, shows that although this Act proposed that the laws on racist chanting should be strengthened, sickening chants are still being heard from the terraces. This undermines the effectiveness of the Football Spectators Act 1989.

Section 1 replaces the phrase 'restriction orders' in Section 15 of the 1989 Act with 'international football banning orders'. Section 2 of the Football Spectators Act 1989 amends Schedule 1 to the Football Spectators Act 1989 in order to increase the range of offences in respect of which an 'international football banning order' may be made, a move which recognises that football hooliganism does not merely occur at football grounds.

[65] McArdle (n 49) 83.

[66] Independent Online, 'Keane throws the book at FA Cup, Irish coach' <Independent Online, 18 August 2002) <http://www.iol.co.za/sport/keane-throws-the-book-at-fa-cup-irish-coach-1.516167?ot=inmsa.ArticlePrintPageLayout.ot> accessed 19 April 2015.

Section 9 amends Section 3 of the 1991 Act so that now an individual who engages in a racist or indecent chant on his own is now guilty of the offence. Before this Act was passed, the police were reluctant to make arrests, even when a large crowd indulged in a 'racialist or indecent' chant. The impossibility of arresting all those involved militated against the use of Section 3.

These restrictions have been combined with deterrent sentencing and the work of the FIU. The FIU has the power to photograph and file the details of fans suspected of involvement in 'football related' crime and these details have been used to prevent fans from leaving the country or to deport them back to the UK if they are suspected of involvement in football hooliganism but have never been convicted or even charged of a football related offence.

Under the new Act, the convicting court must impose an IFBO if it is satisfied that there are reasonable grounds for believing that the Order would prevent violence or disorder at future designated football games.[67] The court must give reasons where an Order is not imposed. The evidence upon which the court will base its reasonable grounds will be supplied by the police's FIU. The majority of the Unit's information is gathered by police spotters[68]. These police spotters collect evidence, often including photographs, of suspected hooligans. The data collected on these suspects is then kept on file and used to rank them in terms of the seriousness of the threat they pose. Suspected hooligans are classed in either Category A, B or C where the latter are the ringleaders and most dangerous according to the police.[69] This information is then often distributed to foreign agencies, such as police forces and immigration authorities, who can then use it to deny entry to their country to British citizens.[70]

[67] FODA, s 47.

[68] Police spotters provide a football policing operation with live and relevant information and intelligence on supporter groups and also act as a link between the police and a club's supporter community.

[69] Siobhan Leonard, 'Football (Offences & Disorder) Act 1999: Football Fans Cry Foul?' in Tracy Taylor (ed), *How You Play The Game: Papers from The First International Conference on Sports and Human Rights* (University of Technology, Sydney, Faculty of Business, 2000).

[70] ibid.

The undercover police photographing football spectators in this way can be seen to be a breach of Article 8(1) ECHR as it is an interference with a person's right to respect for their private life. Furthermore the way in which this Act enables an international football banning order to be imposed on a person with no previous convictions or who has not committed an offence at that time is a clear removal of the presumption of innocence on sentencing and previous good character. Kevin Miles, of the Football Supporters Association said:

> 'We cannot see why football fans should be the only people for whom criminal standards of evidence should not be required before a sanction is taken against them. We also feel that the way the law has been framed, allowing police to use old convictions, is imposing a second punishment on fans a long time after the original offence.'[71]

It can be argued that this was, in human rights terms, an imperfect piece of legislation. However, any breaches of the UK's treaty obligations were considered to be necessary in the fight against football hooliganism. The FODA is panic law - rushed through Parliament to score political points with the electorate - and to assist the failed Football Association's bid for the 2006 World Cup.[72] The result is a piece of legislation that not only breaches the UK's international obligations, but which may even provoke the very disorder that it is trying to prevent when its full effects are felt by the football viewing public.

Considering the challenges analysed above, the discussion will now be focussing on suggesting possible reforms that could increase the effectiveness of the legislative provisions targeting hooliganism.

[71] David Millward, 'Travel ban on hooligans upheld' (London, 14 July 2001) <http://www.telegraph.co.uk/news/uknews/1333917/Travel-ban-on-hooligans-upheld.html?mobile=basic> accessed 12 December 2014.
[72] Leonard (n 69).

IV. Moving forward: reforms and effectively managing the 'hooligan'

A number of academics have discussed how they feel we should move forward in effectively managing the hooligan. Brick notes that there was already 'ample provision in the existing criminal and common law to punish the specific acts criminalized under the Act'[73] This suggests that a difference response to solving football hooliganism is needed, as he clearly thinks the legal responses in place at the moment are useless as football spectators are subject to the general body of criminal law anyway. The tension between the provisions themselves and their implementation in practice is a major, recurring theme and, as Greenfield and Osborn have argued, the problem is "essentially with the application of the law rather than the lack of it."[74] So it could be argued that the problem that is hooliganism cannot ever be effectively targeted.

However, I argue that remedial policies would strengthen the state powers of police control on football fans. This could be carried out through the extension of Section 3 of the Football Offences Act[75] or Section 15 of the Football Spectators Act,[76] or through enforcing a "unit limit" on alcohol intake of football fans by breathalysing spectators as they go through the turnstiles. Arguably this is unfeasible and dangerous as vast numbers would be entering the ground at around the same time. However it could be done on a spot check, by randomly selecting a fan when appropriate. This would decrease the chances of fans coming into a match heavily intoxicated, thus decreasing the chances of participating in hooliganism.

Two decades after the introduction of the Football (Offences) Act 1991, it appears that legislative attempts to control football crowd disorder have not had their desired effect. Much of the legislation enacted was introduced to combat specific problems in and around football grounds and cannot solely bear the responsibility for any perceived 'return' of football-related disorder. Much of the hooliganism is occurring further away from the

[73] Steven Greenfield and Guy Osborn, *The Legal Regulation of Football and Cricket: England's Dreaming* (Meyer & Meyer, 1998).
[74] Steven Greenfield and Guy Osborn, 'Poor Laws', *When Saturday Comes* (February 1999) 14.
[75] Section 3 criminalises racist or indecent chanting within a designated football stadium.
[76] Section 15 sets out restriction orders.

grounds, e.g. on public transport as seen in the case of *R. v Goodridge (Dominic)*[77]. This renders hooliganism more difficult both to predict and to police and means that much of the 'football specific' legislation enacted against the hooligan is ineffective. However, the complexity involved in policing those who wish to adopt particular behaviours is extremely challenging and perhaps it can be argued that the legislation has done all that is legally possible to do.

In order to ensure an effective criminal response to football related disorder we need to be more dispassionate when looking at how the law should respond to hooliganism. Does football crowd violence really 'threaten civilized life'? It is so different from other forms of public disorder, such as outside pubs at closing times?[78]

V. Conclusion

To conclude it is clear to see that the legal responses to football hooliganism are ineffective: 'Many served only to worsen the problem, create an increasingly confrontational attitude between fans and police, and drive the violence away from the immediate environment of the football ground.'[79] Even the most basic of attempts of the Football Offences Act 1991 and the SECAA to prohibit specific actions within football stadiums have been thwarted by both over-ambitious drafting and the non-enforcement of their provisions by police and match-day stewards. In addition, the extent of the failure of these Acts is so manifest that their deterrent function is minimal.

However, to suggest that such ongoing disturbances necessarily demonstrate the social-control failures of the legislation would, of course, be both hasty and naive. Much of the legislation enacted was introduced to combat specific problems in and around football

[77] *R v Goodridge (Dominic)* [2008] EWCA Crim 2259, [2009] 1 Cr App R (S) 101.

[78] McArdle (n 49).

[79] Ian Taylor, 'Soccer Consciousness and Soccer Hooliganism' in Stanley Cohen (ed), *Images of Deviance* (Penguin, 1971); Ian Taylor, 'Football Mad – A Speculative Sociology of Soccer Hooliganism' in Eric Dunning (ed), *The Sociology of Sport: A Selection of Readings* (Cass, 1971).

grounds and cannot solely bear the responsibility for any perceived 'return' of football-related disorder. This would deny the possibility that factors 'external' to the law may themselves be responsible for the problems still being faced.

Many measures used to fight football hooliganism do infringe the civil liberties of innocent fans.[80] For example, preventing a fan leaving the country when England play as they have an IFBO is infringing the principles of due process and the presumption of innocence as there is insufficient evidence to charge. However, in the case of *Miller v Leeds Magistrates Court*[81], Banning orders under the Football Spectators Act 1989 at Sections 14(a) and 14(b) - as amended by the Football (Disorder) Act 2000 - were not "penalties" for the purposes of Article 7 of Schedule 1 to the Human Rights Act 1998 and it was stated that the banning regime did not constitute a violation of EC law standards of procedural fairness.

Despite the criticisms raised above in relation to breaches of human rights, it can be argued that the Football Offences Act 1991 has been completely unable to achieve its own specific crowd-control objectives, and the Football Spectators Act 1989 has continually failed to prevent convicted hooligans from travelling abroad, supporting the England international team. Furthermore, once these failures are combined with the possible role of the SECAA in creating the opportunity for more violence outside football grounds, we can see that the legislation enacted against the hooligan has, at the very least, failed to prevent the current reported resurgence. In the worst case scenario the legislation may well have actually contributed to the recorded growth in serious violent disorder.

If our government seriously wanted to deal with football hooliganism then a sensible first move would have been to take steps to actually understand the nature of hooliganism, rather than relying on self-opinionated views. The State is able to infringe upon the civil liabilities of fans with impunity precisely because football hooliganism has been defined so broadly

[80] Greenfield and Osborn (n 61).
[81] [2002] EWCA Civ 351, [2002] QB 1213.

and without criticism for so long. Armstrong and Young state that the behaviour which is being defined as 'football hooliganism' has been 'largely misunderstood, misinterpreted and misrepresented, and this has led inexorably to vilification and a profound over-reaction'.[82] Whilst our law claims to adhere to general liberal principles such as certainty, equality and justice, we need to recognise the inappropriateness of a legal response to football-related disorder based upon such an ambiguous understanding of the phenomenon.

[82] Gary Armstrong and Malcolm Young, 'Legislators and Interpreters: the Law and "Football Hooligans"', in Armstrong and Giulianotti (n 16).

An Analysis of the Prisoner Voting Saga: Mixed Messages from Strasbourg, Euro-scepticism in the UK and the Continuing Legitimacy of the Convention System in Europe

Lydia Jane Hazlehurst [*‡]

Abstract

The European Court of Human Rights (ECtHR) ruling in Hirst v United Kingdom (No.2) has generated much debate in the UK. Hirst and other relevant judgments suggest UK's blanket ban on prisoners' right to vote is incompatible with the European Convention of Human Rights (ECHR). However, the blanket ban still remains. In questioning how and why the blanket ban remains in place, this article examines the wider Euro-scepticism. The author has also employed the British doctrine of parliamentary sovereignty to lay an ultimate challenge against the legitimacy of the whole Convention System in Europe.

I. Introduction

In this analysis I examine the ruling in *Hirst v United Kingdom (No2)*[1] *(Hirst)*. The UK has an obligation under Article 46 of the European Convention on Human Rights (ECHR or 'the

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[1] *Hirst v United Kingdom* (No 2) [2005] ECHR 681.

Convention') to abide by the final judgments of the European Court of Human Rights (ECtHR or 'the Court') and can boast an impressive record of compliance with previous judgments,[2] yet the Representation of the People Act 1983 (RPA) remains untouched in UK statute books

The key points focused on in this enquiry include: is Strasbourg sending mixed signals to the UK as to what will satisfy the principles set out by the Court in *Hirst*? Is it possible that the debate on prisoner voting has become a focal point for what is in fact a much broader controversy? Has Strasbourg over-stepped its mark in *Hirst* and subsequent judgments or has a fundamental misinterpretation of the Grand Chamber's decision created a political maelstrom causing the argument to move away from prisoner voting and towards the question of whether 'legislative decisions of this nature are a matter for democratically-elected law makers'.[3] Finally, what are the wider reaching implications of the judgment and the UK's reluctance to abide by it?

II. Background: The Prisoner Voting Saga

At present, all convicted prisoners in the UK are prohibited from voting in parliamentary, local or European elections for the duration of their detention.[4] In 2005 John Hirst, having previously served a life sentence for manslaughter, sought to challenge the legality of the UK's existing blanket ban and successfully took his claim against the United Kingdom to the ECtHR. The Court handed down its judgment in *Hirst*[5] by a majority of twelve to five; concluding that Section 3 of the RPA 1983 was incompatible with article 3 protocol 1 of the ECHR, which requires "[Member States] to hold free elections".

[2] Georgia Byran, 'Lions under the throne: the constitutional implications of the debate on prisoner enfranchisement' (2013) 2(2) CJICL 274, 275.

[3] David Davis MP, HC Deb 10 Feb 2011, vol 523, col 494

[4] Joint Committee, *Draft Voting Eligibility (Prisoners) Bill* (HC 2013, 924), 3

[5] [2005] ECHR 681.

The UK blanket ban on prisoner enfranchisement was deemed to be 'general, automatic and indiscriminate'[6] and therefore 'disproportionate in that the ban [applied] automatically to prisoners, irrespective of the nature or gravity of their offence and their individual circumstances.'[7] However, the court's judgment did not amount to a total condemnation of the UK's basis for restricting prisoner enfranchisement;[8]rather it provided the UK an opportunity to reform the RPA.

The ECtHR, bearing in mind the lack of any recent or substantive debate by members of the legislature on the continued justification for maintaining a restriction on prisoners voting rights,[9] requested that any restrictions imposed following consideration by parliament have to be proportionate to the crimes in question.[10]

Although successive UK governments acknowledged that they ought to consider legislative reform; they sought to delay this process by insisting that a political consensus exists in the UK which favours retaining the blanket ban on prisoner voting[11] and have spent years locked in an impasse regarding the enfranchisement of prisoners. It was not until the ECtHR reiterated the incompatibility of the RPA 1983 in *Greens and MT v UK*[12], that any substantial debate was held in the House of Commons. The backbench debate held on the 10 February2011 saw MPs vote 234 to 22 to defend the 'long-standing' ban on prisoner enfranchisement.[13]

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[6] [2005] ECHR 681 [82].

[7] ibid.

[8] CRG Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after *Hirst v United Kingdom*' (2011) 22 KLJ 309, 523.

[9] [2005] ECHR 681 [79].

[10] CRG Murray, 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66 PA 511.

[11] Joint Committee (n 5) 32.

[12] *Greens and MT v UK* [2010] ECHR 1826.

[13] CRG Murray (n 10), 525.

The ECtHR offered the UK a final six months[14] from the ruling in *Scoppola v Italy (No. 3)*[15] to reform the law in compliance with *Hirst* and in November 2012, the government eventually responded with the Voting Eligibility (Prisoners) Draft Bill. The draft-bill sets out three legislative options in respect of prisoner voting, which include replacing the current ban with legislation that enfranchises prisoners serving sentences less than 4 years The Bill also contains an additional option, which would allow MP's to vote in order to confirm the current blanket ban. This suggests that British MP's could positively reject the ruling in *Hirst*, not by ignoring the complaints of the ECtHR but by legislating in conscious defiance of it.[16]

III. The Evolution of the Prisoner Voting Saga: Mixed Messages from Strasbourg

The Grand Chamber's judgment in *Hirst* was the first of many controversial and inconsistent approaches that Strasbourg would go on to take towards Article 3 Protocol 1 of the ECHR (the right to vote and the enfranchisement of prisoners). Although the current blanket ban on prisoner voting is framed in primary legislation, the ECtHR in *Hirst* felt confident in declaring current UK law to be a 'blunt instrument'[17] that strips significant persons of their Convention right to vote.

The court's basis for this judgment is murky at best, with a number of the five dissenting judges expressing unease regarding the standard of review applied by the court as well as the narrow application of the margin of appreciation doctrine. Strasbourg's subsequent rulings in *Frodl v Austria,*[18] *Scoppola (No 3) v Italy*[19] and *Greens and MT v UK*[20] seem to send mixed

[14] Isobel White and Alexander Home, 'Prisoners' voting rights' SN/PC/01764 (Last Updated: August 2014).
[15] *Scoppola v Italy* (No. 3) [2012] ECHR 868.
[16] Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14(3) HRLR 503, 504.
[17] [2005] ECHR 681 [82].
[18] *Frodl v Austria* [2010] ECHR 508.
[19] [2012] ECHR 868.
[20] [2010] ECHR 1826.

messages to the UK as to the standard by which compliance with the initial judgment in *Hirst* can be reached.

The UK position, largely endorsed by the minority of the court, proposed that British laws could be seen as proportionate when taking into account the fact that they only applied to those convicted of crimes 'sufficiently serious to warrant an immediate custodial sentence'[21] and-therefore could not constitute a complete blanket ban. If this is the case, then the current law could still be said to fall within the margin of appreciation offered to the UK, which entitles each member state to certain latitude in balancing individual rights and national interests.[22]

The UK sought to further argue that a lack of European consensus on the topic, namely that the UK was not alone in depriving all convicted prisoners of their right to vote (in 2005 up to 13 contracting states also boasted a blanket ban), fundamentally undermined the judge's conclusion in *Hirst*. Despite the UK's arguments, the 12 majority ECtHR judges focused on the lack of substantive debate by members of the legislature[23] to establish that the margin of appreciation awarded to the UK in *Hirst* could not accommodate a complete blanket ban on the prisoner franchise.

In other words, the focus was not on the mere basis for excluding prisoners from the franchise but on the UK's procedural inadequacies for the protection of human rights, particularly with legislation that predates the Human Rights Act 1998.

[21] [2005] ECHR 681 [52].

[22] Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Pubic Morality Cases' (2007) 8(7) German Law Journal 712.

[23] [2005] ECHR 681 [79].

Rather than attacking the rationale for restricting the franchise, the ECtHR seemed more concerned that there was no evidence that parliament had ever sought to weigh the competing interests or assess the proportionality of a blanket ban by substantive debate.[24]

To an extent, this allowed the UK extensive opportunity for reform in that Strasbourg 'left the door ajar'[25] for the UK to maintain some restrictions on prisoner voting whilst maintaining that the government gave viable reasons and allowed substantial debate to occur in order to assess the proportionality of any measures aimed at reform. However, this approach strays perilously close to the idea that Strasbourg is intruding improperly into the legislative process of the UK.[26] By focusing on the inadequacy of Parliament's decision-making process, the court appears to have crossed the constitutional boundary into the forbidden territory of procedural enquiry. It is this constitutionally uncertain basis upon which the court found the UK to be in violation of its obligations to the ECHR in *Hirst* that created the uncertainty and hostility surrounding its judgment, and this viewpoint is discussed extensively in Part IV of this analysis.

There is also ambiguity surrounding the nature of reform that would best satisfy the principles set out in *Hirst.* On one hand, it can be suggested that the Grand Chamber awarded the UK a wide margin of appreciation within which to reform the RPA.[27] The court offered that it is 'primarily for the state concerned to choose, (subject to supervision by the Committee of Ministers) the means used in its domestic legal order to discharge its obligation under Article 46 of the Convention'.[28]

On the other hand, the court stated that 'the principle of proportionality requires a discernible link between the sanction, conduct and circumstances of the individual

[24] Tom Lewis, 'Difficult and slippery terrain: Hansard, human rights and *Hirst v UK'* [2006] PL Sum 209.
[25] ibid 216.
[26] ibid 215.
[27] CRG Murray (n 10) 511-599, 534.
[28] [2005] ECHR 681 [83].

concerned'.[29] Therein lies the suggestion that the UK can only be in compliance with the principles in *Hirst* where a judge assesses the proportionality of disenfranchising an individual on a case-by-case basis.

In subsequent rulings, Strasbourg has done nothing more to clarify its position; rather the jurisprudence seems to be in a constant state of flux. This lends to the suggestion that Strasbourg is sending mixed messages to UK courts through their differing interpretations thus rendering unclear what degree of reform will satisfy the principles set out in the *Hirst* judgment.[30]

The court in *Frodl v Austria*[31] (*Frodl*) seems to have taken a strict approach to the principles laid out in *Hirst.* The court applies the '*Hirst* test', which suggests that the decision on disenfranchisement should be taken by a judge who takes into account the particular circumstances of the case.[32] Contrastingly*, Greens and MT v UK*[33] (*Greens*) saw the court adopt a 'minimalist[34] approach to the 2005 judgment. Nowhere in the judgment does the court cite the need for a scheme of individualised assessment; instead the court suggested that the principles arising from *Frodl* could be confined to its facts.[35]

The final case of *Scoppola v Italy* (No 3)[36] goes some way towards a final clarification of Strasbourg's expectations of the UK. The case states that nothing has occurred or changed at the European or Convention level since *Hirst* (No 2) that might lend support to the

[29] ibid 71.
[30] Sophie Briant, 'The Requirements of Prisoner Voting Rights: Mixed Messages From Strasbourg' (2011) 70(2) CLJ 279.
[31] [2010] ECHR 508.
[32] ibid [34].
[33] [2010] ECHR 1826.
[34] Ed Bates (n 16) 503-509.
[35] ibid 510.
[36] [2012] ECHR 868.

suggestion that the principles established should be re-examined.[37] However, the judges went on to reject the controversial *Frodl* approach[38] and opted for a minimalist *Greens*[39] approach that does not place emphasis on the 'need for [any restriction of the franchise] to be ordered by a court'.[40]

To an extent, this opens the door for wider measures of reform that appear to comply with *Hirst*; the court arguably retreated from the main arguments put forward in 2005, in favour of a more flexible approach to the requirements necessary for domestic legislation to be brought in line with the Convention.

IV. Prisoner Voting, Politics, the Press and the Path to Euro-scepticism

One of the most notable remarks on the prisoner voting saga is that Prime Minister, David Cameron, claims contemplating the idea of extending the franchise to include criminals makes him feel "physically ill".[41]

This staunch defence of the UK's existing blanket ban is echoed by many back-bench MP's and the majority of British media outlets. Is it likely that this defence reaches far beyond the mere arguments for and against restricting the voting rights of prisoners, into the much wider realm of Euro-scepticism in general?

To fully understand the extent to which the debate on prisoner voting has become the 'standard bearer' for the expression of discontent with European influence, it is key to look

[37] *Scoppola v Italy (No. 3)* [2012] ECHR 868 [95].
[38] Ed Bates (n 16) 516.
[39] [2010] ECHR 1826.
[40] [2012] ECHR 868 [101].
[41] Andrew Hough, 'Prisoner Vote: what MPs said in heated debate' *The Telegraph* (London, 11 Feb 2011).

towards the reaction of the public, press and parliamentarians to Strasbourg's continued insistence that the UK must reform its legislation to comply with the ECHR.

A recent YouGov poll of 1,812 British adults saw 63% of respondents agree that 'no prisoners should be allowed to vote at elections' in comparison to an 8% minority that answered 'all prisoners should be allowed to vote'.[42] Although it is just one poll; if this is taken as representative in any way of the attitude of the British public then it becomes obvious why successive governments have been hesitant to introduce any reform in compliance with the *Hirst* judgment.

The British Press has played a vital part in the shaping of the prisoner-voting saga. Euro-scepticism is prominent in the press, with the balance of coverage in the media being heavily skewed towards opponents of prisoner voting.[43] With opposition to prisoner's rights being rife amongst the British media, pressure from newspapers and various (predominantly right wing) media outlets may have played a role in persuading ministers to abandon any proposals for reform in compliance with the ruling in *Hirst*.

McNulty, in his evaluation of the role of the media in shaping public debate, suggests that very little of the media debate on prisoner's rights to vote was about human rights;[44] rather the primary focus seemed to surround the nature of parliamentary sovereignty and judicial interference from Europe. This is not to say that concerns over the threat to parliamentary sovereignty are not legitimate or important. On the contrary the influence that European institutions, such as the ECtHR, have on domestic policies remains a notable and relevant issue. This is particularly significant as the UK's continuing relationship with the Convention is under (constant) scrutiny in the run up to the 2015 general elections.[45]

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[42] YouGov/Sunday Times Survey Results (November 2012) http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/lmlmhdqllh/YG-Archives-Pol-ST-results%20-%2023-251112.pdf.

[43] Howard McNulty, 'Human rights and prisoners' rights: the British Press and the shaping of public debate' (2014) 53(4) Journal of Criminal Justice 360.

[44] ibid.

[45] 'European Human Rights rulings 'to be curbed' by Tories' *BBC News* (London, 3 October 2014) <http://www.bbc.co.uk/news/uk-politics-29466113> accessed 10 January 2015.

However, vast majority of the media seem to have lost sight of the fundamental argument put forward by the Grand Chamber in *Hirst* that denying the vote to all prisoners is disproportionate and therefore contravenes the human rights of detainees. Media coverage on the other hand, focuses on the idea of Britain 'regaining control of its own laws and halting the remorseless undermining of [the UK] Parliament and judicial system'.[46]

Arguably, the debate on human rights in the UK has become so polarised that the considerable benefits which have flowed from being party to the Convention have been lost or obscured in the media clamour against the Strasbourg court – a clamour which is the result of a small number of unpopular decisions amongst the thousands that have passed unnoticed[47] in media coverage.

It is evident that the ruling in *Hirst* has provoked more fury among politicians and the tabloid press in the UK than almost any other case decided in Strasbourg.[48] Perhaps more importantly, however, is why this has been the case?

It seems unlikely that a mere moral dissatisfaction with the idea that criminals should be enfranchised created the political frenzy that now surrounds the debate. Furthermore, parliamentarians have expressed little concern regarding other prominent cases where Strasbourg identified legislative provisions that infringe ECHR rights[49] such as the incompatibility of the Terrorism Act 2000 with the right to liberty under Article 5 of the ECHR.[50]

[46] Daily Mail Comment, 'MPs today have an historic opportunity to start taking back control of Britain's laws and destiny. They must seize it.' *The Daily Mail* (London, 18 Feb 2011).

[47] Nicolas Bratza, 'Living Instrument or dead letter – the future of the European Convention on Human Rights' (2014) 2 EHRLR 116, 127.

[48] ibid 124.

[49] CRG Murray (n 8).

[50] *Gillian and Quinton v UK* (2010) 50 EHRR 45.

I argue that several other factors played a fundamental and more significant role in shaping the way Parliament dealt with the ruling in *Hirst.*

At the heart of the prisoner voting debate is the threat that a judicial activist Strasbourg poses to the UK as a sovereign state. The UK Parliament is generally held to enjoy complete legislative supremacy, with A V Dicey's description proving as relevant today as it was in 1885; that 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[51] This principle that 'there is no law which parliament cannot change'[52] is hard to reconcile against the UK's obligations as signatories to the ECHR.

It is likely that the resulting backlash from the judgment in *Hirst* stems largely from fear that the court and other supra-national institutions such as those of the European Union, pose a threat to Westminster's law-making competence.[53]

For some, the relative merits of *Hirst* are less significant than the judgment being one of European descent. The media often label various European judgements as 'foreign' and 'alien',[54] whilst notably failing to make a distinction between judgements deriving from the ECJ and the ECtHR.

[51] A V Dicey, Introduction to the Study of the Law of the Constitution (1885).
[52] ibid.
[53] CRG Murray (n 10) 513.
[54] ibid 530.

The idea of an 'alien imposition upon the UK's electoral and penal arrangements'[55] only furthers the cause of anti-European scare mongers who would seek to use the prisoner voting debate as a rally cry.

This being said, it is possible that the emphasis placed on the prisoner voting debate has merely surfaced at a time when euro-scepticism is rife in Britain. Nick Gibb MP is quoted as saying 'the debate goes beyond the matter of prisoner voting, we have to stand firm *now* to prevent future incursions into the sovereignty of our democracy'.[56]

This essentially draws a 'line in the sand'[57] on the issue of European influence; suggesting that the debate on prisoner voting has become the bench mark for Parliament standing up to Europe. It would seem impossible now for the government to legislate in compliance with *Hirst* without having lost considerable ground to Europe.

However, the ECtHR has arguably over-stepped the mark, reaching above the limits of what is regarded as legitimate treaty interpretation and thus stretching Convention rights beyond what the language of the instrument can support.[58]

The dicta of some of the dissenting voices in *Hirst;* notably the Court's then President (Wildhaber), stress the politically sensitive nature of the prisoner voting issue. For these voices, the Grand Chamber was verging on activism in a field that should be reserved for the UK, considering that the Court is not a legislator and should therefore be careful not to assume legislative functions.[59]

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[55] ibid.

[56] Nick Gibb MP, 'With respect, I disagree with my Committee. Prisoners should not have the vote' (December, 2013) <www.conservativehome.com> accessed 27 April 2015.

[57] Tim Montgomerie, 'Is it time to give this disloyal, pro-Europe old bruiser the boot?' *The Daily Mail* (London, 12 Feb 2011) <http://www.dailymail.co.uk/debate/article-1356214/Kenneth-Clarke-Time-disloyal-pro-Europe-old-bruiser-boot.html> accessed 27 April 2015.

[58] Nicolas Bratza (n 47) 123.

[59] [2005] ECHR 681 [6].

Critics of the ruling in *Hirst* also noted that nowhere in Article 3 Protocol 1 of the ECHR does it state that every adult citizen of member states has a right to vote.[60] In fact, the UK representatives involved in the drafting of the Human Rights Act 1998 have successfully argued against the inclusion of universal suffrage in Article 3.[61]

On this basis, has the Strasbourg court 'gone beyond [its] contract'?[62] This view is far from exclusive to the debate on prisoner voting. In fact, disapproval of Strasbourg's move towards judicial activism is present in cases as far back as the 1979 decision in *Tyrer v United Kingdom.*[63] Although few would now question the result of the case which involved the corporal punishment of a juvenile; the one dissenting Judge, Sir Gerald Fitzmaurice concluded that the court was essentially using the ECHR as a vehicle of indirect penal reform for which it was not intended.[64]

Another view is that successive governments hesitated to reform the law in accordance with *Hirst* to further their own political agendas. Both Labour and Conservative–led coalition governments have demonstrated strong opposition to introducing remedial legislation.[65]

Several commentators, including Colin Murray, assert that Parliament have defended the long-standing blanket ban on prisoner enfranchisement in order to bolster their 'tough image on penal policy'.[66] Murray goes on to suggest that the Labour party repeatedly sacrificed opportunities provided by the Grand Chamber to reform restrictions on the prison

[60] Michael Pinto-Duschinsky, 'Bringing Rights Back Home: Making human rights compatible with Parliamentary Democracy in the UK' [2011] PE 37.
[61] Joint Committee (n 4) 311.
[62] David Davis MP, HC Deb 10 Feb 2011, vol 523, col 497.
[63] (1979) 2 EHRR 1.
[64] ibid, Dissenting Opinion Sir Gerald Fitzmaurice 14.
[65] Janet Hiebert, 'The Human Rights Act: Ambiguity about Parliamentary Sovereignty' 14 (12) GLJ 2254, 2257.
[66] CRG Murray (n 10) 534.

franchise in order to maintain its claims of pursuing a tougher stance on penal policy in the 2010 general election campaign.[67]

The Labour party went as far as issuing election materials stating assertions such as 'Do you want convicted murderers, rapists and paedophiles to be given the vote?',[68] in order to front the party's move towards 'rawer anti-crime politics'.[69] However this shows the effects of a collision between the law and politics. The UK's failure to implement reform compliant with *Hirst* serves as a potent reminder that legal decisions are often complied with simply due to political impetus.[70]

It is of course right to say that the UK is a signatory of the Convention and is therefore bound by its constraints. But it can also be argued that the court has overreached itself in judgments such as *Hirst* and its methods of interpreting the Convention have transgressed into the realm of policy-making. In this respect, Strasbourg has arguably gone further than simply declaring Section 3 of the RPA to be incompatible with the Convention and have transgressed into the realm of domestic politics. Lewis comments that 'scrutinising the decision-making process of domestic authorities' reaches into 'difficult and slippery terrain.'[71]

By placing the basis of the decision in *Hirst* on whether Parliament sufficiently debated the issue, the ECtHR essentially 'required [Parliament] to undertake an adequacy assessment of the reasoning behind its enactments' and are therefore 'prescribing the way in which national legislatures carry out their legislative functions'.[72] This transgression into Parliament's decision-making process does not appear to have gained the measure of criticism it deserves and therein is an example of Strasbourg suggesting that a measure may

[67] ibid.
[68] 'Labour's 'votes for paedophiles' leaflet sparks row' *BBC News* (London, 19 April 2010) <http://news.bbc.co.uk/1/hi/uk_politics/election_2010/8630001.stm> accessed 27 April 2015.
[69] M Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Willian Publishing 2004) 64.
[70] Georgia Byran, (n 2) 278.
[71] Lewis T, 'Difficult and Slippery Terrain: Hansard, Human Rights and *Hirst v UK*' [2006] PL Sum 209, 213.
[72] ibid.

be disproportionate where the adequacy of Parliament's reasoning falls short of Strasbourg's expectations; an approach which appears to have no legitimate basis.

V. The Impact of *Hirst* and the Continued Legitimacy of the Convention

It is unquestionably a problematic time for human rights in the UK.[73] Although not wholly, this period of uncertainty can be largely accredited to controversial judgments stemming from Strasbourg, such as the activist nature of the decision in *Hirst*, and the UK's reluctance to 'back-down' to Europe in the face of the growing anti-European sentiment which finds itself sweeping across Britain.

These two conflicting standpoints – the Convention system as a 'living instrument' by which the ECtHR establishes principles that limit governmental powers within member states versus the fundamental principle of parliamentary sovereignty – created a 'stand-off' that resulted in far reaching consequences than could ever have been predicted at the time the Court gave its initial judgment in *Hirst*.

Perhaps one of the most concerning consequences of this impasse is the suggestion that human rights are becoming trivialised[74] within the UK. Some critics of the Strasbourg court's ruling distinguish *Hirst* from other human rights cases through claims that the right to vote is not a 'proper'[75] human right.

David Davis MP, who is closely associated with campaigns to protect human rights, argues that the UK entered into the ECHR to protect against 'very serious and fundamental

[73] Nicolas Bratza (n 47) 117.
[74] CRG Murray (n 10) 511-539, 531.
[75] Jack Straw MP, HC Deb 10 Feb 2011, vol 523, col 504.

issues'.[76] As such, Davis claims that prisoner voting rights are a 'triviality' in comparison to the fundamental human rights the ECHR was designed to protect.[77]

Many parliamentarians at the forefront of the opposition attempted to use the idea of prisoner rights being mere 'privileges' or 'civic rights' rather than the rights identified by Strasbourg as human rights in order to stall any process of reform. This viewpoint best reflects the UK's historic position on prisoner's rights, which focuses on the concept of 'civic death'[78] upon detention. Colin Murray warns against this line of approach; to him this worryingly suggests that UK legislators have not fully accepted the breadth of rights protected by the Convention.[79]

The government seems closer in unleashing proposals that would see a British Bill of Rights replace the existing legislation. There seems to be a gathering momentum of support for a reconfiguration of the relationship that the UK has with Strasbourg, with key political players like Theresa May asking questions like 'to what end are we signatories to the Convention?'[80]

To some however, a withdrawal of support for the Convention system by one of its key players would be simply incalculable.[81] The UK's departure from the ECHR would have a massive effect on the protection and enforcement of human rights, not just in Britain but throughout the whole of Europe, especially considering the role that a legitimate Convention system plays in member states where the hold on democracy and establishment of human rights is both recent and fragile.

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[76] Susan Easton, 'Opposition to prisoner voting rights stems from hostility towards inmates' *The Guardian* (London, 10 Feb 2011).
[77] Jack Straw MP (n 75) cited by CRG Murray (n 10) 532.
[78] [2005] ECHR 681 [53].
[79] ibid.
[80] Anon, 'Theresa May: Tories to consider leaving European Convention on Human Rights' *BBC News* (London, 9 March 2013).
[81] Nicolas Bratza (n 47) 128.

In other words, will the UK's continuing defiance of Strasbourg on the topic of prisoner voting and the growing euro-scepticism surrounding the debate, have a corrosive effect on the standards of human rights and the legitimacy of the Convention in both the UK and in other European signatories?

Sir Nicolas Bratza, the former President of the ECtHR, expresses concern that not only would withdrawal from the Convention system harm the international standing of the UK, but it could also cause serious damage to the Convention system as a whole and affect the protection of human rights in newer democracies within Europe.[82]

Although the UK claims to be a leading nation in the protection of human rights; it is not itself without criticism, having been the subject of 27 declarations of incompatibility between the years 1988 and 2011.[83]

Despite this, the UK remains part of the Convention system and 'incurs obligations that cannot be the subject of cherry picking.'[84] By 'picking and choosing'[85] the judgments based purely on public or media populism, the status and authority of Strasbourg's decisions may be undermined. As Lord Lester comments, "the fact that there is mere populism about the issue no more justifies [the UK] than if it was in the Duma in Russia or another part of Europe where they do not obey the rule of law".[86]

[82] ibid 127.

[83] Ministry of Justice Report to the Joint Committee on Human Rights on the Government's response to human rights judgements 2010-2011.

[84] Joint Committee (n 4) 33.

[85] Alan Travis, 'Defying Strasbourg ruling on prisoner voting risks anarchy, MPs told' *The Guardian* (London, 6 November 2013) <http://www.theguardian.com/law/2013/nov/06/defying-strasbourg-ruling-prisoner-voting-anarchy> accessed 28 April 2015.

[86] Andrew Sparrow, 'Chris Grayling's Prisoner Voting Statement: Politics Live Blog' *The Guardian* (London, 22 November 2012) <http://www.theguardian.com/politics/blog/2012/nov/22/prisoner-voting-echr-grayling-live-blog> accessed 28 April 2015.

Arguably the 'bad example'[87] set by the UK in the prisoner voting saga may encourage others to do the same, ultimately setting in motion the weakening of the Convention and…a dissolution of the whole system'.[88] Whether there is any evidence to suggest that non-compliance by the UK with regards to the human rights of prisoners will have any effect on the Convention is questionable.

However, abuses of Human rights are undeniably widespread in many Council of Europe member states, with the 'governments of such states frequently [dragging] their feet – sometimes for many years – in complying with judgments of the ECtHR against them'.[89]

However, the UK's reaction to *Hirst*, i.e. implementing a Draft Bill containing the possibility of re-enacting a law consistently found to be in breach of the ECHR, presents a course of action without precedent.[90] Therefore, any impact on the Convention would have to presume a difference between simply stalling reform and choosing actively to legislate to the detriment of the Convention.

VI. Conclusion: A British Victory?

It remains to be seen whether criminals serving sentences in the UK will ever be incorporated into the franchise. It became obvious when conducting research that the prisoner voting saga no longer surrounds the sheer basis upon which prisoners should be awarded human rights under the Convention. The bad-tempered debate has instead become intertwined with broader constitutional issues that face the UK.

[87] Joint Committee (n 4).
[88] ibid.
[89] ibid 31.
[90] ibid.

The dispute now seems to rest on whether the UK government is prepared to potentially undermine the legitimacy of the Convention system by continuing to consciously defy Strasbourg in favour of the voice of what appears to be the majority of the British electorate.

Recent developments in the prisoner-voting saga suggest that the government has gained some ground in its insistence that prisoners 'damn well shouldn't be given the right to vote'.[91]

While the court reiterated that a blanket ban on the prison franchise remains in violation of the Convention, the ECtHR in *Firth and Others v United Kingdom*[92] ruled that prisoners who have been denied the vote should not be awarded legal costs nor paid compensation. Perhaps this is because David Cameron's threat to 'clip the wings'[93] of Strasbourg had some effect.

This does appear to be an attempt at appeasement – 'despite a violation of almost ten years, the court has now been willing to show patience and respect for parliamentary sovereignty, even declining to award damages or costs'.[94] However, to what extent does this render the decision in *Hirst* obsolete? If there is no longer a financial repercussion for continuing to defy Strasbourg's rulings then what prevents the UK from continuing to skirt around ECtHR's judgments?

Considering the amount of political and press scepticism surrounding the debate, it is doubtful that the threat to the UK's standing amongst other member states in the field of

[91] Steven Swinford, 'David Cameron: I will clip European Court's wings over prisoner voting' *The Telegraph* (London, 13 December 2013).
[92] *Firth and Others v United Kingdom* [2014] ECHR 874.
[93] Steven Swinford, 'David Cameron: I will clip European Court's wings over prisoner voting' *The Telegraph* (London, 13 December 2013).
[94] Mark Tran, 'UK prisoners denied the vote should not be paid compensation, ECHR rules' *The Guardian* (London, 12 August 2014).

human rights will be enough to convince the government that it is worth reforming the law. Particularly when the UK cannot be entirely sure that continuing to deny Strasbourg will have an impact on the legitimacy of the Convention at all.

In my honest opinion, this ruling is proof that the UK's hostile stance towards the *Hirst* ruling has ultimately awarded them a victory and if this is the case, it will be interesting to see what message this sends to other member states regarding the credibility of the Convention system. Ultimately, it is likely that as a result of this 'back-peddle' an expansion of the frequency of ECtHR's judgments will be contravened in the future.

Animals and Public Benefit

Jennifer Noonan *

Abstract

Trusts set up for closed animal sanctuaries face significant challenges in gaining status as a charity. Specifically, the public benefit requirement becomes problematic because certain trusts face more difficulties in presenting evidence for benefit to the common man. This article challenges the current regulations on charities and argues that a more inclusive test – a presumption of charitable status – should be set for two reasons. First, humans and animals can be philosophically regarded as possessing the same moral capabilities and rights. Second, the current legislative framework should re-evaluate benefits in light of changing societal views concerning animals.

I. Introduction

The objective of this essay is to discuss the prejudice against animal organisations within charity law arising as a result of the heavier burden that is placed upon them by virtue of the public benefit requirement. It argues that trusts set up for animals should be recognised as charitable solely on the basis that they benefit animals, without being required to benefit mankind. As a key issue it will critically assess the legal problems faced by *closed* animal sanctuaries. Philosophical perspectives surrounding animal rights are employed, so as to explain how they could influence the law on charities.

In order to further justify why animals should be accepted as part of the public, the legal framework surrounding the public benefit requirement must be provided to highlight the problems it causes for animal organisations. The public benefit requirement is addressed

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under Section 4 of the Charities Act 2011 which states that '"the public benefit requirement" requires... that a purpose falling within Section 3(1) must be for the public benefit if it is to be a charitable purpose'. In fact, it is expressly stated in Section 1(1) of the Recreational Charities Act 1958 that the courts must not derogate from the public benefit requirement.

The court in *Wynn v Skegness UDC* [1] elaborates on the definition of public benefit: 'The only other aspects of public benefit... were that a sufficient section of the public at large should be benefited and that... the overall effects should not be harmful.'[2] This rather vague interpretation of the law on public benefit fails to outline the limits of this requirement. Therefore, the common law has taken the words in the statute and applied it to cases which seem to suggest that the benefit must be targeted at mankind, without extending to include animals, causing problems in the law of charity.

II. The Philosophical Dimension

Since animals are increasingly becoming recognised as beings rather than commodities, it can be said that they are equally beginning to be regarded as members of communities. Evidence of this is, in particular, the growing increase in vegetarianism and public outrage at cases of animal cruelty. The proposition that all trusts for animals should be charitable simply on the basis that they benefit the animals themselves could therefore be premised on the argument that animals are a part of the public in general, thus allowing such trusts to meet the public benefit requirement.

Allowing animals to satisfy this requirement would necessarily imply that animals can have moral rights recognisable in law. In his recent article, Nathan Nobis[3] is critical of the arguments against animal rights. Nobis starts by introducing Cohen as 'one of the most

[1] [1967] 1 WLR 52 (Ch).

[2] ibid 64.

[3] Nathan Nobis, 'Carl Cohen's "Kind" Argument for Animals Rights and Against Human Rights' [2004] J Applied Phil 43.

prominent philosophical advocates of the view that non-human sentient animals do not... have moral rights'[4] and questions what is meant by 'rights?'. As Cohen himself describes in his article, a right is 'a claim, or potential claim, that one party may exercise against another'.[5] It must then be asked whether animals have any claim in not being killed, mistreated, or in keeping their integrity; their 'most fundamental interests'[6] as Nobis explains. Even Cohen himself asks this question regarding whether they have the right 'not to be used like inanimate tools to advance human interests'[7] - this being directly relevant to charity law since the case law depicts animal organisations as a human interest.

In response to this question, Cohen concludes that they do not possess this right as they do not possess the 'capacity for free moral judgement'.[8] Other authors have critiqued this notion suggesting that if having rights requires being able to make moral claims, to grasp and apply moral laws, then many humans – the brain-damaged, the comatose, the senile – who plainly lack those capacities must be without rights.[9]

Yet it is widely accepted that these particular humans still possess rights, as such a philosophy has been described as absurd[10]. Cohen rebuts this by stating that the core of his argument is that animals 'are not beings of a kind capable of exercising or responding to moral claims' whereas humans are[11]. Nobis demonstrates that this is a major flaw in Cohen's theory on why animals should not have rights, when he questions why these humans have rights even though they lack capacity.

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[4] ibid 43.

[5] Carl Cohen, 'The Case for the Use of Animals in Biomedical Research' (1986) 315 New England Journal of Medicine 865.

[6] Nobis (n 3) 44.

[7] Carl Cohen and Tom Reagan, *The Animal Rights Debate* (Rowman and Littlefield 2001) 22.

[8] Cohen (n 5) 866.

[9] Bernard E. Rollin, *Animal Rights and Human Morality* (Prometheus Books 1981).

[10] ibid.

[11] Cohen (n 8).

Cohen's theory is broken down into a three steps; '(1) If an individual is of a kind that possesses the capacity for free moral judgement, then they have moral rights, (2) Each 'marginal'[12] human is of a kind that possesses that capacity, (3) therefore 'marginal' humans have moral rights'[13]. Yet again, Nobis critically analyses the use of the word 'kind' and finds that 'perhaps all individuals of a particular kind can respond to moral claims, but the kind itself does not'[14] and on this basis, these 'marginal' humans cannot be of a kind that possesses the capacity for free moral judgement.

The above articles reveal a strong argument in support of animals' rights, whereas Cohen's attempt at justifying his claims by comparing 'marginal' humans to animals and implying that one belongs to a certain kind of species whilst another does not is complicated, far-fetched and artificial. Proving Cohen unsuccessful, provides a strong basis for an argument that animals should have more standing in law especially with regards to the public benefit requirement.

In short, Cohen has attempted to categorise humans and animals into different 'kinds' and show how this affects their capacity for morality. In response, Nobis formulated an argument explaining why this is illogical and why animals are not merely human interests, but instead have moral rights and should be treated on a par with humans. He does this by comparing 'marginal' humans, as described above, with animals and concluding that mere fact that they belong to a certain kind does not automatically grant the capacity for moral judgement. Therefore, it is near impossible to prove that animals do not possess this capacity as well. If it is generally accepted that 'marginal' humans have rights, then why should we discriminate against animals if there is no deviation between their capacities?

[12] i.e. the brain-damaged, the comatose, the senile etc.
[13] Nobis (n 3) 46.
[14] ibid 47.

III. Linking Philosophy with the Law

The elements of the above philosophy surrounding the moral differences between humans and animals goes to the root of the problem with the public benefit requirement, and can be utilised to highlight the current issues and potential solutions within charity law.

Section 3 of the Charities Act 2006 states that demonstrating a charitable purpose under Section 2(2) is not enough on its own to establish a charitable status, and that there must be a public benefit resulting from that purpose. Section 3(3) also states that 'public benefit' is defined by previous law, yet abolishes the presumption that a particular purpose[15] automatically carries a public benefit. A 'public benefit' is explained by the Charity Commission[16] as comprising of two aspects; the charity must produce a benefit, and this benefit must be conferred on to the public.

Common law has created confusion and ambiguity over the public benefit requirement and seems to imply that a section of the community can range from one individual[17] to all members of the community[18]. There has been commentary, given by the courts, on the relationship between animals and the law of benefiting a section of the public. Yet, these pronouncements are largely narrow in their understanding because they always require a benefit to humans, whilst expressly excluding benefits conferred solely to animals from forming a section of the community.

This understanding seems to stem from the old case of *University of London v Yarrow*[19] which involved a bequest to a corporation for an institution to cure maladies of any

[15] Such as religious, educational or for the relief of poverty (*Income Tax Special Purposes Commissioners v Pemsel* (1891) AC 531 (HL)).

[16] Charity Commission, 'Charitable Purposes and Public Benefit' (16 September 2013) <https://www.gov.uk/government/collections/charitable-purposes-and-public-benefit/> accessed 24 April 2015.

[17] *Isaac v Defriez* (1754) Amb 595 (Ch); which was held to be charitable by benefitting the testator's next of kin.

[18] *IRC v Baddeley* [1955] AC 572 (HL); where a bridge was a sufficient benefit to the community.

[19] (1857) 1 De G & J 72 (Ch).

quadrupeds. The significance of public benefit was demonstrated by the claimant who argued: 'This is not a charity; for the primary object is to benefit, not the public, but the animals which are within the scope of the bequest.'[20]

This argument seems to suggest that a trust cannot be validly charitable if it only benefits animals and has no involvement of mankind. Although Lord Cranworth L.C. held the trust to be charitable, he based his conclusion around a similar understanding:

> 'I cannot entertain for a moment a doubt that the establishment of a hospital in which animals, which are useful to mankind, should be properly treated and cured, and the nature of their diseases investigated, with a view to public advantage, is a charity; nor, as I understand, did the Master of the Rolls.'[21]

Therefore, having regard to the argument advanced by the claimant, Lord Cranworth did not dispute that if the bequest had been beneficial only to animals, it would not have been charitable. The basis of Lord Cranworth's judgement was therefore that an animal organisation can only satisfy the public benefit requirement if they are in some way useful to humans – which, it is submitted, is an extremely archaic interpretation. In this case, the judges omitted the idea of morality and did not consider any possibility of equating animals with humans in terms of moral capacity, highlighting the narrow interpretation of the public benefit requirement. Yet this may be a reflection of the era in which this case was decided apparent by the Lord Chancellor's description of 'animals which are ordinarily kept for amusement'[22].

A similar decision was given in *Re Douglas*[23] where gifts to the Royal Society for the Prevention of Cruelty to Animals and the Home for Lost Dogs were deemed to be sufficiently charitable. Kay J had the leading judgement:

[20] ibid 78.
[21] ibid 79.
[22] ibid 80.
[23] (1887) 35 Ch D 472 (CA).

> '...attending a… sick animal, may not be itself within the meaning of charity… but when an institution is referred to which is for the benefit of domestic animals, that is so far a benefit to the human species who are served by the domestic animal, that the institution itself may well be treated as a charity.'[24]

Again, this implies that whilst the public benefit requirement is very narrow in relation to animals, the same is not applicable to humans. While it was said that attending one animal would not constitute a validly charitable trust, it was held in *Isaac v Defriez*[25] that a trust for the testator's next of kin would be validly charitable even though only one member of the public would benefit.

It could be argued that allowing a charity for one animal would not be practicable, but if we both belong to the 'sentient being' kind, this would mean that a charity for one person cannot be justified either. The area of public benefit is a grey one and there can be no clear line to the extent we should allow animals to benefit from charity, yet the same can be applied to humans. There are certain cases which seem to prove this point, such as *Re Haines*[26] in which the court held as validly charitable a trust for 2 cats, as well as *Re Howard*[27] in which a trust set up for a parrot, was also held validly charitable. These cases seem to suggest there is no fixed limit in what can constitute a sufficient section of the public, yet they were both justified by finding a benefit to humans which simply seems to circumvent the problem.

Re Foveaux[28] is another old case in which a trust set up for the Society for the Total Suppression of Vivisection was held to be subject to the same principles that were applied in the earlier cases. Chitty J, citing the case of *Lewis v Fermor*[29], passed an opinion on the

[24] ibid 479.
[25] (n 17).
[26] *Re Haines* (The Times, 7 November 1952).
[27] *Re Howard* (The Times, 30 October 1908).
[28] (1895) 2 Ch 501 (Ch).
[29] (1886) 18 QBD 532 (QB).

definition of cruelty, and held that 'the infliction of justifiable pain [on animals] is not cruelty'.[30]

In regard as to whether the trust was charitable, it was held: '...cruelty [to animals] is degrading to man, and a society for the suppression of cruelty to the lower animals… has for its object… the advancement of morals and education among men.'[31] The fact that cruelty to animals has been portrayed as degrading to man reinforces the idea that animals are regarded simply as objects of human interests and that any benefit that would result from the suppression of cruelty to animals is only relevant in so far as it applies to man. The fact that animals would gain from this purpose seems to be superfluous, which has sparked critics like Nobis to argue that animals should be able to benefit from charity law themselves.

Cases like *Re Foveaux* simply reproduce the sentiments in previous case law by concluding that the 'intention is to benefit the community'[32] and mankind. Each of these judgments appears to be in need of reform since although the approach taken towards animals may have been parallel to society's views at the time. This is no longer the case.

The idea of an associative link between the treatment of animals and the benefit to man has long since been an established practice and crosses many different borders within the law such as criminal law. Yet, research has resulted in a move towards protecting animals and humans from domestic abuse.[33] In addition, there has been significant commentary on why 'we must treat animal cruelty as a domestic violence offence when committed with the purpose of harming or coercing the human victim'.[34] This reflects what was held in

[30] (n 28) 507.
[31] ibid.
[32] ibid.
[33] Vivek Upadhya, *'The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization'* [2014] Emory Law Journal 1163.
[34] ibid.

University of London as it relies on the fact that a human being is involved to advance the law, even if the animal itself would benefit from protection.

Considering that these cases are from the nineteenth century, it is perhaps more understandable that this derogatory view of animals was held. However, the effect of *University of London* case has been to set a precedent prompting stagnation as more recent cases barely evolve the law surrounding animal charities.

For example, in *Re Wedgwood*[35], Swinfen Eady LJ emphasised the importance of elevating the human race, as the testator had bequeathed money to the National Anti-Vivisection Society in his will. The Court of Appeal held that the trust was validly charitable as Swinfen Eady LJ explained: 'Such a trust would tend to discourage cruelty, and thus to stimulate humane and generous sentiments in man, and by these means promote feelings of humanity and morality generally.'[36]

It is important to note that Swinfen Eady LJ has introduced the notion of morality but has addressed this term as being synonymous with humanity. As previously suggested, there is no reason to assume only humans have the capacity for morality, and the fact that this has been determined by the courts shows the level of subjectivity in relation to deciding animal charity cases, and therefore cannot be effective.

Again this case approves *University of London*[37], as the fact that the money from these organisations would have benefited the animals was not sufficient enough to satisfy the public benefit requirement. This fails to show the change of attitude in society and shows that charity law was becoming stagnant.

[35] [1915] 1 Ch 113 (Ch).
[36] ibid 122.
[37] (n 19).

Another case which distinguished between a benefit to humans and a benefit to animals was *Re Grove-Grady*[38] which was dissimilar to the other cases in that it involved a trust set up for wild animals including animals that could be dangerous to humans. Romer J held that this trust was validly charitable and that it was possible to include within the scope of the trust animals which were harmful to the human race.

This seemed to mark a slight improvement within the law as wild animals could now gain charitable status, which was no longer confined to domestic animals. However, this case was taken to the Court of Appeal where the decision was reversed. Lord Hanworth held:

> 'The one characteristic of the refuge is that it is free from the molestation of man, while all the fauna within it are to be free to molest and harry one another. Such a purpose does not, in my opinion, afford any advantage to animals that are useful to mankind in particular, or any protection from cruelty to animals generally. It does not denote any elevating lesson to mankind.'[39]

It can be argued that the mere knowledge of these sanctuaries existing could constitute a public benefit, even if this benefit is conferred upon humankind or the animals. Either way, such an argument would render this judgment out of date. It must be asked whether this position on charity law would still be adopted today as environmental protection and conservation are now implicitly regarded and accepted as charitable. This case could have been pivotal in the law on animal organisations in terms of including domestic and wild animals in the scope of the public benefit requirement, if it were not for Lord Hanworth's reversal.

[38] [1929] 1 Ch 557 (CA).
[39] ibid 574.

The view that the scope of the public benefit requirement is confined to mankind has been repeated time again in the common law; *Re Price*[40] per Cohen J, *Re Moss*[41] per Romer J, *Re South Place Ethical Society*[42] per Dillon J, and *Re Green's Will Trusts*[43] per Nourse J. In each of these judgements, it has been concluded that as long as there is a benefit to humans - albeit mental, moral or educational – then the trust can be deemed validly charitable, regardless of the effect on the animals.

There have thus been many cases where the judges have approved Lord Cranworth's decision reinforcing the idea that an animal welfare organisation can only be charitable because it benefits mankind. In the words of Peter Radan, 'in the cases to date, courts have made much of, and readily accepted, this utilitarian argument'.[44] It is evident that the argument is utilitarian as well as ineffective, as there is a critical lack of evolving common law and it is unlikely that this would apply to modern day situations. This complex justification of a benefit to mankind should no longer be necessary.

IV. *National Anti-vivisection Society v IRC*

The leading, and most problematic, case on the public benefit requirement is *National Anti-vivisection Society v IRC*[45] which concerned a society set up with its object to abolish vivisection in order to 'awaken the conscience of mankind'.[46] The Court of Appeal (House of Lords dismissing the appeal) found that a society in support of suppression of vivisection was not charitable because of a significant detriment to mankind if such a suppression was to be allowed. On appeal, Grant K.C. contended:

[40] [1943] Ch 422 (Ch).
[41] [1949] 1 All ER 495 (Ch).
[42] [1980] 1 WLR 1565 (Ch).
[43] [1985] 3 All ER 455 (Ch).
[44] Peter Radan, 'Antivivisection and Charity' [2013] Syd LR 519, 535.
[45] [1948] AC 31 (HL).
[46] ibid 32.

> 'The Crown suggests that the material or physical benefits of modern research on balance outweigh these moral benefits but the court cannot go into such a question of comparison of quantum of benefit. It cannot weigh the moral benefits resulting from the society's purpose against material benefits derived from vivisection, since any conclusion so reached must be merely the personal opinion of the judge as an individual'.[47]

This view aligns with the philosophical perspective in that the question of whether animals can have their own individual benefit is based upon morality. Here, Grant KC argues that the conclusion in this case was inherently subjective as it is a matter of opinion of each judge. This subjectiveness is evident in that the decision was not a united one with MacKinnon and Tucker LJJ and Lord Greene MR dissenting. Introducing the idea of a public which includes animals, would eliminate the possibility of subjectivity within judgements. It was held:

> 'We are satisfied that if experiments on living animals were to be forbidden (i.e. if vivisection were abolished) a very serious obstacle would be placed in the way of obtaining further medical and scientific knowledge calculated to be of benefit to the public... There was no express evidence before us [of] any public benefit in the direction of the advancement of morals and education amongst men… but if it must be assumed that some such benefit would or might so result, and if we conceived it to be our function to determine the case on the footing of weighing... we should hold, on that evidence, that any assumed public benefit in the direction of the advancement of morals and education was far outweighed by the detriment to medical science and research and consequently to public health.'[48]

However, this judgement fails to acknowledge other means of obtaining medical and scientific knowledge such as toxicology research. Indeed, Nobis argues that not one person has proved that vivisection 'is necessary for medical progress' or even proved that a 'specified

[47] ibid 35.
[48] ibid 33.

amount of vivisection is… indispensable for… overall medical benefits.'[49] Statistically, '92% of new drugs that pass preclinical testing, which routinely includes animal tests, fail to reach the market because of safety or efficacy failures in human clinical trials'.[50] With regards to this fact, the courts have essentially presumed that there would be some detriment to science or mankind sacrificing the benefit to animals as a result, despite the absence of a rational explanation. This relays the outdated approach taken towards animals by judges and illustrates that they should not 'stand trapped by precedents from a previous social era'.[51] While, the judgement given by the House of Lords is archaic and fails to reflect the current social view of animals, other jurisdictions such as Ireland have responded[52]. Peter Radan addresses this by asking 'whether the decision of the House of Lords still stands as good law today'.[53] He concludes:

> '...whether more recent evidence on the utility and value of vivisection in terms of the medical benefits to mankind would now alter the balance of the utilitarian argument in favour of NAVS is not altogether clear, although it can be reasonably argued that the balance is not as firmly in favour of vivisection as it was said to be by Lord Wright in 1948.'[54]

Therefore, Lord Wright's arguments set out in this case – that abolishing vivisection would cause a 'calamitous detriment of appalling magnitude',[55] are severely discredited by numerous critics as there is strong support for reasoning that animal tests are largely unnecessary and inapplicable to humans. For example, Knight addresses this in his article adding that 'human benefit cannot be assumed',[56] due to the fact that adverse reactions in medical trials are unlikely to be accounted for. Therefore, the statistics found to justify a benefit to humans can also be discredited on the basis that they are fundamentally flawed,

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[49] Nobis (n 3) 56.
[50] Andrew Knight, *The Cost and Benefits of Animal Experiments* (Palgrave Macmillan 2010).
[51] Robert Pearce, John Stevens, Warren Barr, *The Law of Trusts and Equitable Obligations* (5th edn, OUP 2010) 366.
[52] *Armstrong v Reeves* (1890) 25 LR Ir 325.
[53] Radan (n 44) 519.
[54] ibid, 539.
[55] (n 45), 49.
[56] Knight (n 50) 290.

reinforcing the position that animal testing and human benefit have little positive correlation.

On this basis, the reasoning behind the finding that this society was not charitable cannot be upheld as it is not contemporary relevant. Yet, the fact that law of charity is an ever-changing concept and can reflect the intentions of society was accepted by the courts as they recognised that what was once deemed charitable may no longer be charitable if the views of society have evolved and *vice versa*. Indeed, Lord Simonds himself stated that a 'purpose regarded in one age as charitable may in another be regarded differently'.[57] Hence, while common law allows for cultural changes to influence charity law, animal organisations continue to experience difficulty with regards to the public benefit requirement as the change of societal attitudes (that morality of animals is potentially at a higher level than initially credited by critics like Carl Cohen, and the fact that they fall within the scope of 'sentient being' alongside humans) remain to be recognised.

This change in circumstances was in particular noted by Jonathan Garton who comments on the *National Anti-Vivisection* case in mind:

> 'This was the culmination of a shift in societal values regarding animals and their welfare throughout the late eighteenth and nineteenth centuries, as they gradually stopped being seen merely as a useful commodity and became viewed as 'human companions, possessing individual identities'.[58]

This is again reflected by Hilda Kean who considers the growing assumption that animals are more than solely useful to mankind and describes animals generally as 'human companions, possession individual identities'.[59] Both Garton and Kean provide a strong basis for a conclusion that society's attitudes towards animals have changed considerably.

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[57] (n 55) 74.

[58] Jonathan Garton, 'National Anti-Vivisection Society v IRC' in Charles Mitchell and Paul Mitchell, *Landmark Cases in Equity* (Hart Publishing 2012) 529.

[59] Hilda Kean, *Animal Rights: Political and Social Change in Britain since 1880* (Reaktion Books 1998) 13.

If it is possible to regard all animals as human companions and afford them protection under charity law, then as Jonathan Garton states that 'it ought to be possible to abolish the prohibition without compromising the public benefit requirement'.[60]

V. Should Animals Have the Same Rights as Humans?

There are some critics, such as Carl Cohen whose argument was explored in section II[61], who completely dismiss the idea that animals should have moral rights. Yet, there are other critics, outside the legal realm, whose arguments can nonetheless be influential in addressing the question of whether animals should have moral rights.

As a direct response to the article published by Nobis, Neil Levy compared Nobis to Cohen in order to strengthen his argument. He claims his article is merely an 'exercise in devil's advocacy' and insists that he is 'a supporter of... better treatment of non-human animals' yet he also has an issue with moral individualism in that it has 'counterintuitive implications'.[62]

As Levy points out the fact that Cohen has based his conclusions around moral individualism means that his argument starts to fall apart, but Levy continues to suggest an alternative in focussing on 'natural kinds,' for which he refers to LaPorte.[63] Levy notes the importance of the non-arbitrary nature of 'classifying organisms into species' and also how 'our moral intuitions seem to track species membership quite closely'.[64] Each of these points provides a fair distinction between humans and animals yet fails to expand on why this distinction prevents animals from having rights.

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[60] Garton (n 58).
[61] Cohen (n 5).
[62] Neil Levy, *'Cohen and Kinds: A Response to Nathan Nobis'* (2004) Journal of Applied Philosophy 213.
[63] Joseph LaPorte, *Natural Kinds and Conceptual Change* (Cambridge University Press 2004) 19.
[64] Levy (n 62) 216.

Rather, Levy simply suggests that 'it is far from clear to [me] that justice to animals requires granting them rights'.[65] The most influential paragraph from this article states: 'Animals may be much more morally considerable than Cohen seems to think, without however possessing the inherent value and therefore the moral rights that Regan[66], for instance imputes to them.'[67]

Here, he is attempting to draw a balance between the types of rights that should be given to animals. Perhaps the answer does not lie in allowing animals the extent of rights that humans enjoy, yet surely the inclusion of animals within the scope of the public benefit requirement falls within the range of protections suggested by Levy. By acknowledging that animals may be more morally significant than is currently believed, he implies that a balance is yet to be found with regards to animals within the law generally, including charity law.

VI. Animal Charities should be prima facie Charitable

The emphasis of this essay is to provide compelling reasons in support of animal charities being *prima facie* charitable and to demonstrate how previous case law dictates otherwise.

The case of *Re Tetley*[68] addresses the difficulty that has arisen out of the guidelines set by previous judges. Although Lord Sterndale M.R. accepts the reasoning behind the need for a benefit to mankind, by saying that 'one would quite agree' that an incidental educative benefit to mankind fulfils the public benefit requirement[69], he also fails to find a logical reason for the separation of philanthropic purposes and the prevention of cruelty to animals generally. He implies that the law surrounding animal charities is unclear as he recognises it

[65] ibid 217.
[66] Tom Reagan, *The Case for Animal Rights* (University of California Press 1983) 13.
[67] Levy (n 62).
[68] [1923] 1 Ch 258 (CA).
[69] ibid 266.

is difficult to hand down a decision where there is 'no governing principle which can be applied'.[70] He poses the question of why a benefit to mankind for the prevention of cruelty to animals should be charitable whereas a benefit to mankind for philanthropic purposes should not be charitable. This highlights the main flaws in the 'benefit to humans' reasoning adopted in English law as it is not uniform in its approach. If a benefit to animals was accepted as part of the public benefit requirement, it would result in much more succinct judgements.

Another effect of this approach would be to make charitable status more accessible to closed animal sanctuaries since there would be no requirement for the public and humans to gain from it. At the present time, it is difficult for closed animal sanctuaries that are shut off to the public to attain charitable status which seems both illogical and inconsistent. The fact that they do not directly benefit mankind by allowing the public access, should not be a justification for eliminating the possibility of charitable status. It seems unnecessary that the courts should discriminate against closed animal sanctuaries when the purpose of the organisation is parallel to an open animal sanctuary. However, an animal organisation open to the public has an advantage in that is accepted as a type of organisation that can be validly charitable. This discrepancy has severe consequences closed sanctuaries because 'for many of them, having such a purpose characterised as "charitable" brings them public credibility'.[71]

In *The Upper Teesdale Defence Fund*[72], the court recognised as charitable a fund set up for a sanctuary preserving flora and fauna, into which humans were not permitted, thus suggesting that closed animal sanctuaries could be validly charitable. Although there was no obvious benefit to mankind, the fund was held to be for the public benefit in the sense that environmental protection of this sort would be beneficial in future years. This reasoning does show a small improvement within the law by overruling the outdated direction in *Re*

[70] ibid.
[71] Radan (n 44) 520.
[72] [1969] Ch Com Rep 10-11.

Grove-Grady[73], yet nonetheless it remains justified by the eventual advantage to humans. The problem in charity law caused by omitting animals from the public benefit requirement can be overcome by making animal organisations prima facie charitable purely on the basis of benefitting animals.

Therefore, it must be asked whether the public benefit requirement has been interpreted correctly by the courts and whether the judges are right to take such a strict view of animal sanctuaries; also whether the heavier burden placed upon animal sanctuaries in proving they are charitable is justified.

There has been a slight move toward an animal based benefit in other jurisdictions, providing the basis for a persuasive precedent in England. This can be seen in the fairly recent case of *Re Howey*[74] in which Miss Howey set out in her will that her property shall be held on a trust as a cat and bird sanctuary. It was held: 'A true sanctuary, whether mankind is permitted entry or whether it be wilderness, would be upheld as charitable.'[75]

Somers J then goes on to qualify this statement, by referring to English law, to the effect that 'material or moral welfare of *mankind* is enhanced'[76] effectively reverting back to the problem within charity law. As previously noted by Levy, Somers J discusses the balancing act when he quotes Windeyer J[77] to the effect that 'assuming an obligation to keep a basin filled with water and to put out food for birds'[78] cannot be charitable but a true sanctuary can.

[73] (n 38).
[74] [1991] 2 NZLR 16.
[75] ibid 16.
[76] ibid.
[77] *RSPCA v Benevolent Society of New South Wales* (1960) 102 CLR 629.
[78] ibid 649.

Although there are plenty of critics who think that humans deserve greater rights by virtue of belonging to 'a unique group that enjoys unique rights'[79], there are just as many commentators across the globe who think otherwise. Ellen-Marie Forsberg bases her article around debate on the Norwegian animal welfare legislation, aspects of which can be applied by analogy to the public benefit requirement, which concerns the issue of animal integrity 'and not only welfare'.[80] Suggestions are made to the effect that animals can exist on the same plane if we interpret them as sentient beings rather than kinds or species.

Nobis is one advocate of categorising animals as sentient beings, suggesting this solution as the answer to his question; 'why are animals of such a rights-generating kind?'[81] He breaks Cohen's arguments down to prove that 'animals and moral agents [humans] are both of a kind e.g. the kind "sentient being"'[82] and since they share this property, they both have the capacity to have moral rights. If we both have the capacity to have moral rights, then why is it that animals do not have the capacity to have the right to benefit from charitable status whereas humans do? Nobis insists that 'the boundary of our kind is not marked by species or moral agency'[83] yet this is evident within the law of charity as our moral agency is what includes us in the scope of public benefit but excludes animals.

The majority of the common law depicts humans as the only group that can confer a benefit from a charity, yet there are few exceptions, including *Marsh v Means*[84]. In this case it was held that a trust for the protection or welfare of animals is prima facie charitable, and can be considered to fall within the fourth head of Pemsel's[85] case. Yet, it is unclear whether the trust was prima facie charitable because it benefitted humans or because it benefitted the

[79] Nicholas H Lee, 'In Defense of Humanity: Why Animals Cannot Possess Human Rights' (2014) 26 Regent Univ L Rev 457.
[80] Ellen-Marie Forsberg, 'Inspiring Respect for Animals through the Law? Current Development in the Norwegian Animal Welfare Legislation' (2011) 24 Journal of Agriculture & Environmental Ethics 351.
[81] Nobis (n 3) 50.
[82] ibid 50.
[83] ibid 57.
[84] (1857) 3 Jur NS 790.
[85] (1891) AC 531 (HL).

animals but it this case nonetheless highlights the prevalence of animal organisations applying to be charitable.

The question of why animal charities are charitable because they benefit mankind gives rise to broader philosophical questions such as why animals and humans cannot be treated as one of the same kind and the way in which this understanding impacts on the extent of rights available to them within the law. James Rachels[86] poses such questions by asking whether humans are the only rational beings. This is relevant to the current debate because if it can be concluded that animals are rational beings, then Cohen's kind approach fails. Rachels seems to reject the idea of human dignity and he does so by relying on the fact that 'Darwinism undermines human dignity by taking away its support'.[87] He states:

> 'Traditional morality, no less than traditional religion, assumes that man is 'a great work.' It grants to humans a moral status superior to that of any other creatures on earth. It regards human life, and only human life, as sacred, and it takes the love of mankind as its first and noblest virtue. What becomes of all this, if man is but a modified ape?'[88]

In light of this, Rachels has attempted to blur the lines between men and apes, and animals in general. If this is so, then it is possible to see why there should be no distinction between a benefit to man and a benefit to an animal. Rachels addresses this as devalue to humans and an increased value to non-human life, and demonstrates the impact this understanding would have in all areas of the law such as matters of 'suicide and euthanasia, as well as a revised view of how we should treat animals'.[89] This revised view may give rise to a development in terms of the benefit non-human lives can derive from a charity, since if animals are included in that scope, then more flexibility would be afforded to closed animal sanctuaries and organisations.

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[86] James Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford University Press 1990).
[87] ibid 4.
[88] ibid 1.
[89] ibid 5.

VII. Conclusion

The common law surrounding the public benefit requirement has interpreted the statue rigidly and literally, implying that a benefit to humans is the only relevant factor when determining charitable status. This is an extremely fixed position to take as it fails to entertain how animals can benefit from charitable status, especially considering the multiple arguments which suggest that animals can possess the moral capacities and achieve individual identities. If it is therefore apparent that animals can be considered equal to humans, as both can be categorised as sentient beings, then the law should reflect this recognition. Such an understanding would accord with the societal shifts towards animals which are seen as human companions. Yet, the law recognises that a great detriment to the well-being of animals is acceptable if it achieves a possible benefit to mankind. As the status of animals is increasing within social hierarchy, it is reasonable to expect the law to accept and incorporate this into areas such as charitable trusts, by making animal charities *prima facie* charitable, regardless of whether they are open or closed.

As stated, it is not clear where and to what extent animals can satisfy the public benefit requirement, but the only aim of this essay is to argue, with support, that animals can satisfy the public benefit requirement, regardless of whether the trust concerns one animal or many. As written by Charles Darwin: 'Man in his arrogance thinks himself a great work worthy the interposition of a deity. More humble and I think truer to consider him created from animals.'[90] If we are so created from animals, then our application of the law should be so consistent, which is not the case with charity law.

By insisting that humans must benefit in order for a trust to be charitable implies that the courts have taken a traditional view of morality, which should be abandoned in favour of a more inclusionary approach. It may be that it is not for the courts to decide on moral issues

[90] Paul Barrett and others, *Charles Darwin's Notebooks (1836-1844): Geology, Transmutation of Species, Metaphysical Inquiries* (Cambridge University Press 2009).

which is certainly what the common law demonstrates is the case, yet the purpose of this essay is not necessarily to be misanthropic but to provide philosophical reasons why animals should be considered as part of the public within charity law.

An Unnecessary Widening of the Scope of Anti-Social Behaviour? A Critical Examination of the Recent Legal Reforms Tackling Anti-Social Behaviour

Kyle Turner *‡

Abstract

Regulation over Anti-Social Behaviour (ASB) has been difficult due to ASB's controversial definition, range, and minimal age limit. ASB regulation is criticised as overly-inclusive with significant impact on children. Particularly, Anti-Social Behaviour Orders (ASBO) entraps young offenders within the criminal justice system for deviant behaviour. ASBO can also bring criminal proceedings, potentially imprisoning offenders as young as ten for non-criminal behaviour. By examining ASB's legal framework in light of the recent Anti-Social Behaviour, Crime and Policing Act 2014, this dissertation analyses the current legal framework's effectiveness to illustrate how practitioners may better address ASB.

I. Introduction

'Anti-social behaviour' (ASB) is a term used to describe a range of everyday nuisance, crime and disorder that varies from less serious offences, such as littering[1] and graffiti,[2] to more

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[1] Clean Neighbourhoods and Environment Act 2005, s 18.

[2] Anti-social Behaviour Act 2003, s 43.

serious forms of behaviour, such as harassment[3] and intimidation.[4] A study commissioned by Her Majesty's Inspectorate of Constabulary found that victims of ASB do not necessarily distinguish between 'crime' and 'ASB' but attach a 'sliding-scale of importance to incidents.'[5] The types of behaviour that form ASB are often understated; described as being trivial, low-level crime or the result of youthful indiscretion.[6]

This statement incorrectly implies that ASB has an insignificant effect on the quality of life of victims.[7] Research has shown that, as a result of experiencing ASB, victims can become isolated and develop medical conditions such as depression or anxiety.[8] This highlights the importance of having an effective legal framework in place which allows the police to quickly and effectively tackle ASB. This was recognised by the Labour party[9] in a policy document published for the purposes of scrutinising existing law; it was asserted that the reason why pre-1998 criminal law was not effective in tackling ASB was because of the often persistent nature of ASB and the difficulties in collecting evidence[10] to support victim's complaints.[11] Once elected in 1998, the Labour Government sought to address these issues by enacting the Crime and Disorder Act 1998 (CDA 1998),[12] which introduced Anti-Social Behaviour Orders (ASBO's) as the primary legal response to ASB.[13] ASBO's are civil orders

[3] Protection from Harassment Act 1997, s 1.

[4] Home Office, *More Effective Responses to Anti-Social Behaviour* (Cm 8367, 2012).

[5] Ipsos MORI Research Report Prepared For HMIC, *Policing Anti-Social Behaviour: The Public Perspective* (2010).

[6] Home Office, *Defining and measuring anti-social behaviour* (Cm 26, 2004).

[7] Audit Commission, *Neighbourhood crime and anti-social behaviour,* Community Safety National Report (2006).

[8] Metropolitan Police, 'Have you been the victim of anti-social behaviour?' <http://safe.met.police.uk/anti-social_behaviour/been_a_victim_and_need_some_help.html> accessed 2 December 2014.

[9] Labour Party, *A Quiet Life: Tough Action on Criminal Neighbours* (Labour Party, 1995).

[10] Siobhan Campbell, '*A review of anti-social behaviour orders'* (Home Office Research Study 26). See also the discussion by Torbjorn Skarohamar, 'Reconsidering the theory on adolescent-limited and life-course persistent antisocial behaviour' (2009) 49(6) British Journal of Criminology 863.

[11] The primary concern in evidence collection is that victims of ASB often have to go through the traumatising experience of giving formal evidence in court; this experience often damages victims and leaves them feeling let down by the criminal justice system.

[12] CDA 1998, s 1(1).

[13] Enver Solomon and others, Centre for Crime and Justice Studies, *Ten years of criminal justice under Labour: An independent audit* (2007).

which are intended to tackle ASB by imposing restrictive obligations on individuals who behave 'anti-socially' in order to prevent them from engaging in further ASB.[14]

Discussions to replace ASBO's with more 'community-based' measures began in 2010, and this eventually led to the enactment of the Anti-social Behaviour, Crime and Policing Act 2014 (ASBCPA 2014).[15] The Act intends to phase out the ASBO over the next five years, after which, the ASBO will cease to exist. Firstly, this dissertation will examine the definition of ASB; this will create the foundation upon which a critical analysis of the ASBO can be conducted, followed by an examination of the changes introduced by the ASBCPA 2014. The objective is to critically analyse the necessity of the 2014 reforms and their ability to equip legal professionals with power to tackle ASB.

II. ASBO's – an effective means of tackling ASB?

The CDA 1998 introduced ASBO's as the primary legislative response to tackling ASB. An ASBO is a civil order which can be imposed on individuals as young as ten years old who participate in low-level crime.[16] The order was designed to be a preventative rather than punitive measure.[17] Local authorities can impose certain restrictions upon the freedoms of offender's movements and activities in order to prevent them from engaging in further ASB.[18] Local authorities prefer imposing ASBO's to criminal sanctions because of the ASBO's preventative, rather than punitive, nature.[19] Once issued, an ASBO will have effect

[14] (n 12).
[15] ASBCPA 2014, s 1.
[16] (n 12).
[17] Home Office, *Crime and Disorder Act 1998. Anti-Social Behaviour Orders: Guidance* (1998) 3.
[18] As illustrated by *R v Kennedy (A Minor)* (Basildon Youth Court 2012) where terms of an ASBO prevented youth from using train station.
[19] Adam Crawford, 'Governing through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice'. (2009) 49(6) British Journal of Criminology 810.

for a period of not less than two years[20] unless there is consent from both parties to discharge the order.[21]

While the introduction of ASBO's was seen by many to be necessary in responding to ASB, many academics have criticised their enforcement in relation to the minimum age at which an ASBO can be received, the possible viewing of an ASBO as a badge of honour, [22] and the publication of ASBO's and their potential to criminalise non-criminal offences.[23] Each criticism will be now explored in greater detail, with a view to assessing the effectiveness of ASBO's at tackling ASB.

III. Ten years old – Too young to be issued with an ASBO?

One of the main criticisms of the ASBO is that the order can be enforced against a child as young as 10 years of age. It is of no coincidence that this corresponds to the current age of legal responsibility in England and Wales.[24] In the Home Office's original draft guidance on ASBO's, it was envisaged that applications made against children who are ten years old would only be made in exceptional circumstances.[25] Initially, this may have been the case, but 'the numbers of ASBO's imposed on children has grown rapidly'.[26] It also appears that very little is required to justify the imposition of an ASBO: ten-year old twins have been issued with ASBO's for playing ball games near their house.[27]

[20] (n 12), s 1(7).
[21] ibid, s 1(9).
[22] Aikla-Reena Solanki and others, *Anti-social Behaviour Orders, Youth Justice Board* (2006).
[23] Raymond Arthur, *Young Offenders and the Law: How the Law Responds to Youth Offending* (Routledge, 2010).
[24] Children and Young Persons Act 1933, s 50 – as amended by CYPA 1963, s 16.
[25] Home Office, *'Draft Guidance Document: Anti-Social Behaviour Orders'* (1998).
[26] Home Office (n 25) 3.
[27] *R v Weeks (A Minor)* The Guardian, 23 December 2004.

Further clarification was added in the Home Office guidance on ASBO's in 1999, where it was submitted that, in many cases, it would not be appropriate to apply for an ASBO against a ten year old child; in fact, ASBO's were designed to be issued against adolescents from ages twelve-to-seventeen years of age.[28] This appears to suggest that, normally, an application for an ASBO against a young child will be inappropriate.[29] Pitts argues that the age is currently set too low and, as a result, 'first time offenders and troublesome youngsters fall unnecessarily into the ambit of the criminal justice system.[30] Morgan suggests that young persons are being drawn into the system for 'relatively minor acts of transgression'.[31] This criticism could be justified given the fact that the United Kingdom is a signatory to the United Nations Convention on the Rights of a Child (UNCRC) and is, therefore, under an obligation to uphold the basic rights and freedoms of children when implementing domestic law.[32] The UNCRC have themselves been critical of the age set under the 1998 Act and claim that the criminalisation of ten-year olds under the 1998 Act may be unjustified, given children's 'emotional, mental and intellectual immaturity'.[33]

The UNCRC have recommended that the UK increase the current age to address these concerns. However, the intention behind ASBO's is understood to be a preventative and pro-active approach to changing and influencing the behaviour of youngsters who fall within the ambit of the criminal justice system.[34] It appears that the UNCRC may have failed to take into account the legislative intent behind the ASBO.

[28] Home Office (n 17) para 2.1.

[29] However, cases such as *R v Weeks (A minor)* seem to cast doubt on this.

[30] John Pitts, 'The Recent History of Youth Justice in England and Wales' in Tim Bateman and John Pitts (eds) *The RHP Companion to Youth Justice* (Russell House Publishing 2005).

[31] Rod Morgan and Tim Newburn, 'Youth Justice' (2007) in Mike Maguire et al (eds) *The Oxford Handbook of Criminology* (OUP 2007).

[32] United Nations Convention on the Rights of the Child 1577 UNTS 3.

[33] UN Committee on the Rights of the Child, General Comment No. 10 (2007) – Children's Rights in juvenile justice, CRC/C/GC/10, 25 April 2007.

[34] UN Committee on the Rights of the Child, Forty-ninth sessions. Concluding Observations: United Kingdom Of Great Britain And Northern Ireland, CRC/C/GBR/CO/4, (2008, para.78).

The Royal Society has conducted research into children's capacity to appreciate their acts as anti-social. They stress that children cannot be culpable for their actions because, 'at the age of ten, the brain is developmentally immature and continues to undergo important changes linked to regulating one's own behaviour'.[35] More recent research conducted by the Centre for Social Justice (CSJ) notes the current age as now 'somewhat arbitrary' and 'increasingly questionable', recommending that the age be increased given the improved research in child development.[36] Advocacy groups such as Liberty advance the view that 'no matter what bad behaviour a child is involved in, they deserve the opportunity to learn from their mistakes'.[37] It is possible for the ASBO to be considered a learning tool because of its aim to act as a deterrent; however, the fact that ASBO's are perceived as 'badges of honour' by some youths appears to cast doubt over this argument.[38]

Notably, it was not the Home Office's original intention to criminalise young children, but ASBO's have been issued against ten-year olds. An example is Alfie Hodgin's case where the defendant was granted an ASBO for terrorising the community'.[39] Criticism over the minimum age raised concerns over children being drawn into the criminal justice system so early and, in some cases, being criminally prosecuted despite engaging in behaviour which is not in itself criminal. Despite arguments put forward in favour of both increasing the minimum age of criminal responsibility and the ASBO age, any alteration is unlikely as it would be 'politically unworkable due to public opinion'.[40] Former House of Lords judge, Lady Butler-Sloss echoed these sentiments, signalling the difficulties for a Government wishing to increase the minimum age.[41]

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[35] Royal Society, *Brain Waves Module 4: Neuroscience and the Law* (2011) 14.

[36] The Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (January 2012) 22.

[37] Alex Gask, Liberty Civil Liberties Group, *Anti-Social Behaviour Orders and Human Rights* (2004).

[38] As discussed on p 6 'Badges of Honour – Have ASBO's become counterproductive?

[39] *R v Hodgin (A Minor)* (Wirral Magistrates Court, 1 December 2014).

[40] Lady Butler-Sloss in Adam Gabbatt, 'Balls rejects call to raise age of criminal responsibility' *The Guardian* (London, 15 March 2010) < http://www.theguardian.com/uk/2010/mar/15/balls-rejects-bulger-killers-call> accessed 29 November 2014.

[41] ibid.

IV. 'Badges of Honour' – Have ASBO's become counterproductive?

In a Government commissioned study, the Youth Justice Board (YJB) found that parents and professionals often felt that ASBO's have been perceived as 'badges of honour'.[42] The criticism levelled by the YJB is that ASBO's are no longer an effective deterrent against engaging in ASB because youths now aspire to receive an ASBO and intentionally participate in ASB in order to receive one. As a result, the ASBO may be counterproductive in tackling ASB. [43]

ASBO's have also been criticised for providing young persons with a potentially stigmatic label.[44] It can be argued that the 'negative connotations of the deviant label' affects the way in which individuals are treated.[45] As a result, some youths can feel excluded and marginalised from society, feeling that the only way to gain recognition is by acting anti-socially. ASBO's can have a long-lasting impact on the individual with young persons who may not have actually acted anti-socially can find themselves entrapped within the criminal justice system.[46] There is thus concern that youths can become trapped unfairly due to local authorities' ease in obtaining these orders and the breadth of behaviours which fall under the 1998 Act.[47]

V. Publication of ASBO's – Is publication proportional to effective enforcement of an ASBO?

In 2005, the Home Office published guidance on the publicising of ASBO's.[48] The guidance states that there is an implied power in the CDA 1998 to publicise an order so that the order

[42] Solanki and others (n 22).
[43] Pat Strickland and John Bardens, *House of Commons Library: Home Affairs* (2010) SN/HA/1656.
[44] Vici Armitage, 'The Inbetweeners: Young people making sense of youth anti-social behaviour' (Doctoral Thesis, Durham University 2012).
[45] ibid.
[46] Public Bill Committee, *Written evidence for the Criminal Justice Alliance* (HC 2013-14, col WA14).
[47] Which is discussed in 'Criminalisation of non-criminal behaviour' on p 9.
[48] Home Office, *Publicising Anti-Social Behaviour Orders Guidance* (2005).

can be correctly enforced.[49] It is possible for details of ASBO's to be published in local print, on television media, and in leaflets and newsletters.[50]

Whilst the guidance also states that the intention of publication is not to punish offenders further, it has been argued that 'naming and shaming' offenders can only have a negative effect.[51] One argument which has been put forward is that this process is completely contrary to Article 40 of the UNCRC which states that signatories must provide children with guaranteed privacy throughout all stages of proceedings.[52] Another argument is that it is disproportionate to publicise content such as the offenders' name, age and photograph along with details of the ASBO.[53] The line between the Government's intention of using publication to ensure the efficacy of the order and 'naming and shaming' has become somewhat blurred. A strong illustrative example is the decision of Bridlington Council in Yorkshire to erect an eight-foot pillar in the town centre with pictures of all local ASBO recipients.[54]

VI. Criminalisation of non-criminal offences: A civil order with criminal sanctions

Another criticism of ASBO's is that while they are civil and preventative orders, breaching an ASBO can result in criminal proceedings.[55] Section 1(10)(b) of the CDA 1998 states that the maximum penalty for a breach is up to five years imprisonment. This is controversial and has led to commentators arguing that this can result in offenders as young as ten being

[49] ibid 1.
[50] ibid 7, para 8.
[51] Ian Edwards, 'The Place of Shame in Responses to ASB' (2008) 6(3) British Journal of Community Justice 50.
[52] Pam Hibbert, 'The proposed extension of 'naming and shaming' to the Criminal Youth Court for breaches of ASBO's' *The Barrister* <http://www.barristermagazine.com/archivedsite/articles/issue24/pamhibbert.htm> accessed 30 April 2015.
[53] ibid.
[54] Richard Ford, 'Half of ASBO's broken by Offenders' *The Times* (London, 7 December 2006) <http://www.thetimes.co.uk/tto/law/article2214516.ece> accessed 3 January 2015.
[55] (n 12), s 1(10)(b).

imprisoned for a substantial length of time for breaching an order which was put in place to prevent them from engaging in activity which in itself is not criminal.[56] It is therefore again, my principal argument that the law criminalises young children whose original acts are not criminal.[57]

In applying Section 1 of the CDA 1998 to prove ASB, the court must be satisfied that, in accordance with the criminal standard of proof, the offender has behaved in an anti-social manner,[58] and also that imposing an ASBO is necessary to protect persons from further ASB from him.[59] The necessity element does not require a criminal standard of proof, as instead it constitutes an evaluation by the court and therefore there is no onus on the prosecution to prove a defendant's intent to cause harassment, alarm or distress.[60] An individual can therefore face up to five years imprisonment despite never intending to act anti-socially or there being evidence of any intent. This was illustrated in *R v Hashi (Adam)*[61], where it was held that there was no requirement that the offending behaviour must be witnessed.

A maximum sentence of five years is seen by many to be harsh because the breach of an ASBO is comparable to defiance of a court order[62] which only brings a maximum sentence of two years in civil proceedings under contempt of court.[63] The rationale behind the differences in sentencing were explained by Alun Michael, who rationalised breach of an ASBO as constituting a reaction to 'a pattern of behaviour that damages people's lives over a considerable period of time' whereas mere defiance as involving 'one solitary incident'.[64] This appears to be sound judgment and shows the underlying policy behind breach of ASBO

[56] Raymond Arthur (n 23).
[57] ibid.
[58] (n 12), s 1(1)(a).
[59] ibid, s 1(1)(b).
[60] *R (McCann) v Manchester Crown Court* [2003] 1 AC 787.
[61] [2014] EWCA Crim 2119.
[62] Peter Ramsay, 'Why Is it Wrong to Breach an Asbo?' (2009) Law Society Economy Working Papers 20/09, <http://www.lse.ac.uk/collections/law/wps/WPS2009-20_Ramsay.pdf> accessed 30 April 2015.
[63] Contempt of Court Act 1981, s 14(1).
[64] Standing Committee Bill 30 April 1998, col 4630.

to be one of public protection. This was illustrated in the *R v Dean Boness; R v Shaun Anthony Bebbington*[65] where the court ordered the maximum sentence for breach of ASBO because it was 'necessary to protect persons … from further anti-social acts by the defendant'.[66]

Some commentators see the mere possibility of up to five years imprisonment as a clear threat to offender's fundamental freedoms of expression,[67] liberty[68] and association.[69] The Council for Europe Commissioner and Human Rights expressed fears over 'the ease of obtaining such orders, the broad range of prohibited behaviour and the serious consequences of breach' in relation to the freedoms mentioned.[70] There are several illustrative cases of ASBO's being repealed on human rights grounds. In Ellis Drummond's case, an ASBO which prevented the defendant from 'wearing trousers beneath the waistline' and from 'wearing any hooded clothing with the hood up' was rendered void. [71] Judge Smith in the case stated that 'some of the requirements…struck me as contrary to the Human Rights Act'.[72] The ASBO therefore struggles with the balance it must strike between the offender's freedom of expression and wider-society's rights to protection.

VII. Definitional challenges of ASB pre and post-2014

When drafting the CDA 1998, Parliament attempted to define the concept of anti-social behaviour.[73] Defining such a broad concept proved problematic because it is difficult to identify activities which are anti-social, without considering their impact on others.[74] Section

[65] [2005] EWCA Crim 2395; (2005) 169 JP 621.
[66] ibid 9 [28].
[67] European Convention on Human Rights, art 10.
[68] ibid, art 5.
[69] ibid, art 11.
[70] Alvaro Gil-Robles cited in Andrew Millie, *Anti-Social Behaviour* (Open University Press 2009).
[71] Andrew Hough, 'Teenager's low trouser ban 'breaches his human rights court told' *The Telegraph* (London, 5 May 2010 < http://www.telegraph.co.uk/news/uknews/crime/7676870/Teenagers-low-trouser-ban-breaches-his-human-rights-court-told.html> accessed 20 November 2014.
[72] Human Rights Act 1998.
[73] (n 12), s 1(1).
[74] Office of the Deputy Prime Minister, *Tackling ASB in Mixed Tenure Areas* (2003).

1(1) of the CDA 1998 states that in order to be anti-social, behaviour 'must have caused or was likely to cause harassment, alarm or distress to one or more persons, not of the same household as himself'.[75] Section 1(1) is complemented by the defence contained in Section 1(5) which states that the court must exclude any behaviour which was reasonable in the circumstances. Section 1(5) therefore acts as a safeguard to disproportionate interference with offenders' rights by ensuring that only unreasonable conduct in the circumstances is considered anti-social.[76] It is unclear as to whether Section 1(1) has been widely drafted or left intentionally broad, and as a result, its interpretation is unclear. This creates a difficulty because 'there is frequently a mismatch between an objective measure of ASB and the public perception of what should amount to ASB.[77]

Upon its enactment in 1998, the definition was not well received and again attracted criticism. Despite this, the definition continues to coexist alongside the new definition contained under Section 1(1) of the ASBCPA 2014, for five years after the commencement date of the 2014 Act (October 2014), and after which will cease to exist. There have been a range of criticisms levelled at the 1998 definition. Cornford claims that the definition is 'too broad' as it 'catches an extremely wide range of conduct that goes far beyond the kinds of behaviour typically understood as anti-social'.[78] However, Cowan contests this point and alleges that legislators have intentionally left the definition vague since 'obscurity is a powerful tool of governance'.[79] If Cowan's view is correct, there may be several reasons why legislators have left the definition intentionally imprecise. Firstly, the meaning of ASB is subjective, - 'what may be considered anti-social by one… is acceptable to another' – making it difficult to label ASB with a single definition.[80]

[75] (n 58).

[76] The Anti-social Behaviour, Crime and Policing Bill: *'Opinion'* (Lord Macdonald of River Glaven QC) 2013. Gray's Inn, London.

[77] Home Office, *The Drivers of Perceptions of ASB* (Cm 34, 2010).

[78] Andrew Cornford, 'Criminalising Anti-Social Behaviour'(2012) 6(1) CLP 1.

[79] David Cowan and Morag McDermont, *Regulating Social Housing: Governing Decline* (Glasshouse 2006).

[80] Home Office (n 6).

Secondly, legislators may have allowed for 'local definitions to reflect local problems'.[81] While, this allows for flexibility in local policing of ASB, having such a vague definition results in uncertainty as to what behaviour constitutes ASB.[82] This undermines the concept of legal certainty by 'failing to give fair warning to citizens of what kind of conduct may amount to ASB'.[83] This seems to have been the Government's intention with the then Home Office spokesman, Alun Michael reiterating the need for 'widely drawn legislation with clarity of purpose and with clear expectations' in ensuring flexible legal responses to ASB.[84] Thirdly, there is the argument that the definition must be flexible in order to ensure that legal responses to ASB do not become rigid.[85]

This is to say that a flexible definition is advantageous for the police as it allows them room for interpretation when tackling ASB. If this line of reasoning is to be followed, Cornford is perhaps right when he states that the definition is 'too broad' and what he perhaps sees as a 'catch-all' definition has the potential to criminalise those who undertake activity not usually considered anti-social. However, no such criticism has been fruitful and the Select Committee on Home Affairs have since declared that 'it would be a mistake to try to make [a definition] more specific' because an exhaustive list of all behaviour considered to be anti-social would be 'unworkable and anomalous'.[86]

In line with this, the Crime and Society Foundation (The Foundation), in a memorandum submitted to the Select Committee on Home Affairs, highlighted the subjectivity of definition as a key weakness of the 1998 legislation. The Foundation draws the conclusion that government policy responses have become 'inappropriate, expensive and sometimes

[81] ibid.

[82] Stuart Macdonald, 'The Nature of the ASBO' (2003) 66(4) MLR 630.

[83] Andrew Ashworth and others, 'Overtaking on the Right' (1995) 145 NLJ 1501.

[84] Standing Committee Bill 30 April 1998, col 4630.

[85] Home Office, *Anti-Social Behaviour, Crime and Policing Act 2014: Reform of Anti-Social Behaviour Powers, Statutory Guidance for Frontline Professionals* (2014) 1.

[86] Home Affairs Committee, *Fifth Report* (HC 2004-05) para 44.

draconian'[87] because of defining subjectively and the breadth of behaviours which can fall under Section 1(1). Alun Michael argues that it may not be necessary to reconcile the two viewpoints or indeed to define ASB at all, since it is easier and more important to recognise ASB than to define it.[88] MacDonald goes further and states that a definition is not required because 'everyone knows what behaviour is anti-social and so knows how not to behave.[89] This reasoning, however, is reliant on offenders subjectively deciding which behaviours they consider being anti-social and fails to consider legal certainty. It can therefore be argued that multiple definitions allow for flexibility whereas no definition provides uncertainty.

Discussions regarding the controversial definition of ASB came to the forefront during House of Lords debates on the proposed Anti-Social Behaviour, Crime and Policing Bill.[90] Upon its first reading, there was much criticism of the proposed definition which purported to replace the pre-existing definition contained within Section 1(1) of the CDA 1998, which focuses on whether the respondent 'has engaged or is threatening to engage in conduct capable of causing nuisance or annoyance'.[91] Following this proposal, several high-profile and influential bodies submitted written evidence over the course of several parliamentary debates on the proposed change with regards to the consequences of approving the definition.

The Association of Chief Police Officers (ACPO) submitted that the test of 'nuisance or annoyance' required a lower standard of behaviour in comparison to the test of harassment, alarm or distress and expressed fears over an increased public expectation that action would always be taken against perpetrators if the new test was to be implemented. The Criminal Justice Alliance (CJA) also submitted evidence stating that the range of behaviours which

[87] In 2002, the estimated cost of acquiring and enforcing an ASBO was £4,800 and took on average three-months to obtain (see Anesh Pema and Sharon Heels, *Anti-Social Behaviour Orders – Special Bulletin* (Jordans Ltd 2003) for an analysis on this)).

[88] ibid.

[89] Stuart MacDonald (n 82).

[90] Anti-Social Behaviour, Crime and Policing Bill (2013-14).

[91] ibid.

could be classified as nuisance or annoyance were 'limitless'.[92] The House of Lords, upon weighing up all of the evidence eventually rejected the proposed definition and changed it to 'any conduct that has caused, or is likely to cause, harassment, alarm or distress to any person'.[93] This is remarkably similar to the definition contained within Section 1(1) of the CDA 1998, the only difference being that the aforementioned harassment, alarm or distress may now affect 'any person' in order to constitute ASB. The reason for the lack of alteration was explained by Lord Dear who stated that the definition of 'harassment, alarm or distress' was 'well proven, well tried and respected, and has never been faulted. To move away from that is a step in the dark'.[94] As a result of this, pre-2014 criticism of the definition is still valid and shall continue to divide opinion.

Despite the small extent to which reform has occurred, it nevertheless has. Yet, reforms to the definition have been so minor; it does pose the question as to whether the reforms were necessary. Legislators have seemingly reaffirmed the view that flexibility of the definition is paramount and that there is an eagerness to avoid rigidity. Arguably, the new definition extends its predecessor even further by stating that the harassment, alarm or distress may now affect 'any person'. The police should therefore benefit from the changes because it grants them a wider-remit in which to tackle ASB. With regards to the wider-remit in which the police can now act, this seems to be relatively insignificant and in practice will see little change. Changes to the definition were not the only changes made in 2014.

VIII. Reform to the legal framework tackling ASB – A more effective framework post-2014?

The ASBCPA 2014 reformed the legal framework tackling ASB.[95] The Conservative Government's intention behind the reforms was to set out a new victim-focused approach to crime, policing and community safety which focused on the impact of ASB on the

[92] ibid, paras 6-8.
[93] ASBCPA, s 1(1).
[94] HL Deb 8 January 2014, vol 750, col 1542.
[95] ASBCPA.

victim.[96] The reforms therefore seek to involve victims of ASB and wider-society in deciding the appropriate legal response through two new measures – the Community Trigger[97] and Community Remedy.[98] The purpose of the trigger is to give victims of ASB and the community the power to request a case-review where agencies such as councils and the police then work together to find solutions.[99] Applications for a case-review must meet the threshold criteria to be successful, but this may prove problematic in some cases.[100] Victims must report instances of ASB within one-month of its occurrence and must complain at least three-times in a six-month period.[101] This is clearly problematic because individual instances of ASB are not caught under the Act.

Section 101(1) and Section 101(2) of the 2014 Act provide that local police are under an obligation to prepare a community remedy document, consisting of a list of actions they deem appropriate to be carried out by ASB offenders to assist in their rehabilitation'.[102] The police are then obligated to consult with victims to determine the most appropriate course of action. For the Community Remedy tool to be available; there must be evidence that the offender has acted anti-socially and the offender must have confessed to behaving in such a way. In addition, the police must consider the community remedy tool appropriate for handling the situation.[103]

Part 1 of the ASBCPA 2014 introduced civil injunctions as the new primary legal response to ASB.[104] The civil injunction, unlike the ASBO, requires a civil standard of proof, with the requirements being that, on the balance of probabilities, the respondent [aged 10 or over]

[96] Home Office (n 85) 2.
[97] ASBCPA, s 104.
[98] ibid, ss 101 and 102.
[99] Home Office (n 85) 3.
[100] ASBCPA, s 104(1)(b).
[101] ibid, s 104(4)(b).
[102] ibid, s 101(1), (2), (3)(a)-(c).
[103] ibid, s 102(1)(a)-(d).
[104] ibid, pt 1.

has engaged or threatens to engage in ASB[105] and the court considers it just and convenient to grant the injunction in order to prevent further ASB.[106] The minimum age of ten has been retained under the 2014 reforms.

Despite not yielding to academic pressure in increasing the minimum age, Parliament has taken active steps to recognising youths and their culpability for ASB. The first of these steps is distinguishing minors from adults in relation to issuing a civil injunction. Once issued, a civil injunction takes effect for a fixed or indefinite period against adult offenders, but lasts no longer than twelve months for minors (aged below eighteen).[107] Distinguishing adults from minors signifies an alteration from provisions contained under the 1998 framework, which provided an all-encompassing two-year minimum duration.[108] The imposition of a maximum twelve-month term for minors appears to signal legislative intent to reduce restrictions on children's freedoms. One possible reason for this is that Parliament has taken into account the Royal Society's recent research, which casts doubt over the culpability of minors who commit ASB.[109] Section 14(1)(a) of the ASBCPA 2014 imposes an obligation on all agencies applying for civil injunctions against minors to consult with a youth offending team to ensure the best interests of the child are at the forefront of any decisions made.[110] Many saw this as a legislative attempt bring ASB legislation in line with Article 3 UNCRC.[111] The Children's Commissioner lamented the lack of explicit reference to the 'best interests' principle.[112]

[105] ibid, s 1(2).
[106] ibid, s 1(3).
[107] ibid, s 1(6).
[108] (n 20).
[109] Royal Society (n 35).
[110] ASBCPA, s 14(1)(a).
[111] The United Nations Convention on the Rights of the Child (UNCRC), art 3.
[112] OCCE, *A Child Rights Impact Assessment of the Anti-Social Behaviour, Crime and Policing Bill* (2013) para 4.3.1.

Millie hoped that concerns regarding criminalisation of non-criminal acts would be addressed within the 2014 Act.[113] In seeking to address the concerns, Parliament created the civil injunction as a civil order that gives rise to no criminal sanctions once issued or breached. Despite the breach of civil injunction not being criminal, acting outside of its terms still amounts to contempt of court in civil proceedings and is punishable by up to two years imprisonment for adult offenders.[114] In essence, the maximum sentence for a breach has fallen from the five-years associated with the ASBO to two-years under the civil injunction. There may therefore have been a weakening of the idealistic deterrent effect of ASB legislation as discussed earlier by Alun Michael.[115]

Perhaps more interesting is the reform regarding punishment for minors who breach civil injunctions. Schedule 2, which is given legal effect by Section 12 of the 2014 Act, notes that if a youth court is satisfied beyond reasonable doubt (criminal standard of proof), that the offender [aged under eighteen] has breached an injunction under Section 1, he may be made subject to a supervision order[116] or detention order.[117]

Supervision orders come in three main requirements; supervision, activity or curfew[118] and last for a period not exceeding six-months.[119] It is through these orders that the court imposes positive requirements on young offenders, such as requiring youths to attend meetings with youth offending teams to address the underlying causes of their ASB.

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113 Andrew Millie (2013) 'Replacing the ASBO: An opportunity to stem the flow into the Criminal Justice System' in Anita Dockley and Ian Loader (eds) *The Penal Landscape: The Howard League Guide to Criminal Justice in England and Wales* (Routledge 2013).

114 ibid 86.

115 As discussed in 'Criminalisation of non-criminal offences' on p.9.

116 ASBCPA, sch 2, para 1(1)(a).

117 ibid, sch 2, para s 1(1)(b).

118 ibid, sch 2, para 2(1)(a)-(c).

119 ibid, sch 2, para 2(6).

The potential imposition of positive obligations, will hopefully allow the civil injunction to serve as more of a deterrent than the ASBO did. The imposition of only negative obligations ensured a negative public perception of ASBO's, but the potential for positive elements under the civil injunction may improve public perception of the orders as a rehabilitative measure rather than a punitive one.

Positive obligations also have the potential to change the mind-sets of youths who aspired to receive the ASBO as a 'badge of honour' because youths are unlikely to want to undertake the positive obligations that come with the civil injunction.

The office of the Children's Commissioner for England (OCCE) has criticised supervision orders, suggesting that children may struggle to comply with any positive obligations contained. The OCCE expressed fears that this would result in an increased likelihood of children breaching supervision orders and in turn being issued with more stringent terms or a detention order being sought.[120] Detention orders are seen as the last resort for agencies attempting to prevent offenders from engaging in further ASB and can be issued against children over the age of fourteen years.[121] This means a detention order may only be issued where all other courses of action have been exhausted and the court considers the imposition of a detention order as the only appropriate mechanism to prevent further ASB from occurring. [122]

Minors between the ages of ten and thirteen are therefore excluded and agencies are unable to apply for a detention order. This interesting fact suggests that Parliament has considered the criticisms that were levelled at the minimum ASBO age and is actively seeking to keep young children out of the criminal justice system.[123]

[120] ibid, OCCE (n 112).
[121] ASBCPA, sch 2, para 1(5).
[122] ASBCPA, ss 26, 86.
[123] ibid s 19.

IX. Conclusion

The ASBCPA 2014 has reformed the legal framework tackling ASB in England and Wales and this dissertation provides a critical analysis of the previous legal framework contained under the CDA 1998. It has been necessary to conduct this analysis in order to determine the necessity of the 2014 reforms. The biggest criticism of ASBO's is the minimum age that one can be issued. It has been asserted that the age was set too low and that this led to the over-criminalisation of young children who lacked sufficient understanding to be culpable for their actions but some youths perceived the ASBO as a badge of honour and actively participated in ASB to be issued with one; thus making the ASBO counterproductive in deterring ASB.

On the other hand, some youths were potentially criminalised for acts not typically understood as anti-social, and as a result, the disproportionate publication of their ASBO's terms provided them with a potentially stigmatising label that could have a long-lasting impact in their lives. The pre-existing law also suffered from wide drafting on the definition of ASB, which left the law overly broad in relation to the offences that were considered as anti-social.

The introduction of the civil injunction addressed some of these criticisms. While the 2014 Act has not increased the minimum age at which an order can be issued, it distinguishes between adults and minors and sets a maximum 12 month maximum duration for orders imposed on minors. Furthermore, the introduction of the community trigger and remedy also serve as good additions to the legislative framework, however their effectiveness is undermined because of the high threshold criteria required to request a case review (individual instances of ASB are not caught under the Act). Agencies carrying out a case review have the ability to consider other relevant factors such as the persistence and harm caused by the ASB and this has widened the scope of ASB by allowing local authorities to consider the subjective level of harm suffered by the victim. The 2014 Act imposes an obligation on applicants to consult with youth offending teams to ensure children's best

interests are upheld and the scope for imposition of positive requirements within supervisory orders upon breach addresses any badge of honour concerns.

The 2014 Act also altered the definition of ASB, so that harassment, alarm or distress can affect 'any person' rather than 'one or more persons not of the same household as himself'. This has widened the scope of behaviours that can be considered as anti-social. However, the wider-remit this affords the police in tackling ASB, is likely to be insignificant in practice and leads to the conclusion that there has been an unnecessary widening of the scope of ASB but nonetheless, the creation of the new civil injunction was a step in the right direction.

SHAPING SOCIAL JUSTICE

2015