

PART 4 : Who decides what is “reasonable” ?

4.1 The improper nature of Lord Hoffmann’s diatribe.

The first consideration is that, consequent upon the need to have very close regard to their effect upon case law precedent, it is the common understanding and appreciation amidst appellate justices the world over, that, when giving the reasons for their decisions (the *ratio decedendi*), they should be especially circumspect and cautious ; and in particular that, they ought not to stray beyond that which it is strictly necessary to say, for the resolution of the disputed issue(s) of law raised by any particular appeal. In this country the ambit or scope of those issues are supposedly set down, as required by statute¹, by means of a question or questions of law, cited by the court below, as being of “*general public importance*”.

However, it is particularly important to note that, the statute does not require the court, from whose decision the appeal is sought, to cite a point of law, the answer to which will permit the cause to then be fully disposed of with justice ; but rather that they must merely cite a point of law, of general public importance, which they deem is “*involved in the decision*” and is a point which it appears to that court “*is one which ought to be considered by*” the House of Lords. In the present instance, at the very outset of this critique, I have already reiterated those questions cited, both by the Court of Appeal [Criminal Division] in the *Jones* part of this case, and those cited by the Administrative Court of Queen’s Bench Division of the High Court, in the *Ayliffe & Swain* part.

Under the title “*Disposition*”, at paragraph 68, and also at the first sentence of his paragraph 69, Lord Hoffmann makes it plain beyond question that he fully appreciates his conclusions, thus far stated, on the non-adoption or assimilation of the crime of “aggression” into the domestic common law, so answers those points, as cited by both of those courts below, in both of the matters under appeal, in a manner that fully “disposes” of both or all of the appeals. Consequently, it was not then necessary for him to have gone any further in order to “dispose” of any of those appeals, but he did so in open defiance of the convention. In so doing, he cites as his authority for the power of the Appeals Committee to so stray beyond the confines of the certified points, the case of the *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349. It is particularly important, therefore, to begin by an examination of what was said in that case, to determine if Lord Hoffmann’s unsupported reference to it, is justified as he asserts.

The case involved an appeal, brought by Mr Gallagher, against his conviction for murder before the winter assizes sitting in Belfast. In brief, and because it is not necessary for our present purpose to go into the facts in any great detail, his appeal to the Northern Ireland Court of Criminal Appeals, was based on his submission that, the Lord Chief Justice of Northern Ireland (Lord Macdermott C.J.), had misdirected the jury in his trial, as to the point in time (on the day of his wife’s murder) that they should have had in mind when deciding on his defence of temporary insanity. The appeal court upheld that submission and felt constrained by their then statutory powers to do nothing else besides overturn his conviction. Not surprisingly in these circumstances, the Attorney-General for Northern Ireland asked for a point of law of general public importance to be cited and for leave to appeal to the House. The appeal court so cited a point of law, but then upon refusing leave to appeal (which was of course subsequently granted by the House itself instead) actually gave grounds for so refusing (no longer the usual practice) in which they made it clear that, in their view, even if the point of law which they had cited as “being involved”, were to be answered in the prosecution’s favour (as it were), never the less that would not in their view lead to a reversal of their decision to overturn the conviction.

In these, one would hope, more than somewhat unusual circumstances then, it is useful to examine the opinions given in House as to whether, and if so to what extent, the statutory language used (s.1(1) of the Administration of Justice Act, 1960) which remains identical in all material respects to that which still pertains under the 1968 Act today, constrained the House to consider only those issues, raised by the case, as were strictly necessary to answer the point of law cited by the court below. Let us begin with Lord Goddard (@ p.369) as follows :

¹ See s.33 (2) Criminal Appeals Act, 1968.

“ It may well be that in many cases the answer to the specific question will dispose of the appeal, as in the case of the appeal recently before the House where the question submitted was whether there is still such an offence as misprision of felony. An answer in the affirmative upheld the decision of the trial court and no further question arose or could arise. But for the reasons given by my noble and learned friend Lord Reid it is clear that this may not be always the case, yet the House must dispose not merely of the question certified but of the appeal and if to enable this to be done it becomes necessary to consider other matters, in my opinion they must have power to do so. “

(emphasis added)

Equally consider the words of Lord Tucker (@ p.370) as follows :

“ It will always be a matter for the exercise of its discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that an appellant can as a matter of right raise any such point. In the present case I consider the point certified of necessity requires an examination of the decision of the Court of Criminal Appeal, and when this decision is looked at it becomes clear that in order to dispose of the appeal the direction of the Lord Chief Justice to the jury on the law with regard to the defence of insanity, as applied to the evidence given at the trial, must be considered.”

(emphasis added)

Finally then consider also the words of Lord Denning (@ p.383) as follows :

My Lords, I have thus dealt with the case by considering the point raised by the Court of Criminal Appeal; and by dealing with it, I think it is possible to dispose of the appeal. If it were necessary to consider any other point in order to dispose of the appeal, I would certainly be prepared to do so, for I take the view that, once leave to appeal is given to your Lordships' House, all points are open as well as the point stated, and that it is not correct for the Court of Criminal Appeal to limit the appeal to the point which they consider to be of general public importance. Your Lordships will be able, of course, to prevent any abuse of this power. “

(emphasis added)

Accordingly, whilst there clearly seems to have been some disagreement amongst their Lordships, as to whether or not the cause of the Queen versus Gallagher could be adequately and justly disposed of by consideration only of the point of law of general public importance cited by the appeal court below, never the less they were clearly all agreed that, if and in so far as it may prove necessary to go beyond that exercise, in order to do so, then they had the necessary discretion to so proceed. Clearly, what their Lordship wanted, and felt that in the interests of justice it was necessary for them to be able to do, was to determine whether or not Mr Gallagher's conviction ought to stand. They all decided that it should.

The question then becomes, is this then authority, as Lord Hoffmann asserts, for his discretion to launch into, what frankly amounted to nothing less than a lengthy 'philosophical diatribe' on the merits of the original decisions, in the magistrates' courts, of the two District Judges involved in the cases of *Ayliffe et al.* & *Swain* respectively ; on the topic of the "reasonableness" of those appellants conduct, when that was admittedly nothing whatever to do with the scope of the point(s) of law certified by the appeal court below? Not, let it be remembered, merely as some sort of lengthy *obiter dictum* observation, but rather as a further specific reason for upholding the convictions handed down by those District Judges (see in particular para.88 of Lord Hoffman's opinion). The answer must surely be no, and for the very simple reason that such was not necessary in order to dispose of the appeals. Once he had decided that, the judges in those cases, were right to exclude the defences based upon "aggression" being a part of the law contemplated by the statutory language relied on by those Appellants², that was an end of the matter for those appeals, there clearly being no need to go further in order to uphold those convictions.

² i.e. s.3(1) of the Criminal Law Act (CLA), 1967, re the word "crime", and s. 68(2) of the Criminal Justice and Public Order Act, 1994, re the word "offence", respectively.

However, that misapprehension is by no means the limit of Lord Hoffman's unprecedented behaviour in launching into his diatribe. For even if he were merely to have offered it as *obiter* commentary, *in extenso* as it were, in relation to the matters in *Ayliffe & Swain*, which he was clearly at liberty to do, as well as with respects to the matters in *Jones et al*, to which it was of necessity only *obiter*, there being as yet no decision in those cases either to uphold or overturn ; then he has still acted, not merely I submit without precedent, but moreover and much more gravely, without regards to the rudimentary interests of the first principle of natural justice, *audi alteram partem*.

As I have stated at the outset I was present throughout the hearing of these appeals before the panel of five Law Lords in the House. I am thereby in a position to state categorically that, when it came the turn for a rebuttal submission to be made by Mr.K.Starmer QC, who was instructed in the *Jones* matters, he made the point, as Lord Hoffman gives him credit for (see para 69 of his opinion), that the entirety of the submissions just then made by Mr Perry (in response for the Crown) and going to the issue of the "reasonableness", or otherwise, of the various Appellants' behaviour, was clearly completely outside of the scope of any of the points of law cited, by any of the courts below, in any of the cases. So that, in his (Mr Starmer's) respectful submission, the House ought not then to deal with that aspect in judgement.

However, he then went on to state specifically that, unless the panel of the Committee indicated otherwise, he therefore did not propose to address them on the law going to any of that issue, which would have required his taking further instructions and a very great deal longer in submissions – he specifically averred to the matters raised being so weighty and involved, as to merit in his opinion possibly two further days of submissions. No such indication being made, either by Lord Hoffman, nor any other of their Lordships, Mr. Starmer, then proceeded without in fact making any further submissions on the point. Mr R Singh QC, replying later on behalf of the Appellants in the matters of *Ayliffe et al & Swain*, merely adopted Mr Starmer's submissions on this aspect, adding nothing further himself.

Now I do not say for a moment that Lord Hoffmann, nor any other of their Lordships, were under any obligation to give Mr Starmer a further two days, or anything like that, to make his further submissions, although that much further time had in fact been allotted for the hearing of the combined appeals, and was not in the event used ; but what I do say, and quite emphatically, is that, having heard argument from only one side on the issue (i.e. on behalf of the Crown), to have then sat dumb in response to Mr.Starmer's statements, only to then launch into an eight or nine page diatribe on the subject in his judgement, without having had the advantage of hearing both sides on the points involved, amounts to nothing less than a flat out denial of the Appellants' right, in natural justice, to be heard.

Judicial proceedings, most especially proceedings on appeal before a country's supreme judicial forum, ought not, I trust all can agree, to be treated as some breed of debating game, in which the participants enter into in order to try to score debating points off one another. I respectfully submit, it ought not ever to be a matter for parties, whether appearing in person or through counsel, to have to use, of necessity, the very limited time available to them to present their causes, so as to have to guess at which aspects, possibly involved or touching upon a case, as might be the ones which the judge or judges are minded to pick out of the potential morass of issues, for finding against them in their final judgement. If a judge has a particular difficulty, or more than one, with a legal aspect(s) of a case being presented by a party to proceedings, and after having heard that party on those difficulties, he remains none the less unconvinced by them, then all and well, he may rule against them on it in his judgement, if he deems that proper. If, however, he keeps his concerns to himself, silent throughout the proceedings, and at the end the party has made no mention of the issue going to the cause of his concern, he ought not to then say smugly to himself, "*a ha!*, he didn't deal with that aspect because he has no answer to it" and then go on to base his judgement, even in part, upon his own untested view of the matter. As I say that is gamesmanship and not cricket. It is not as if this particular Law Lord hasn't a history for making extravagant and seriously consequential *obiter* observations which then cause great consternation to the administration of justice until a subsequent opportunity hopefully arises to correct them by the House itself.³ This appears, to this commentator, to be yet a further regrettable example of that phenomenon.

³ for instance see esp. the observations of Lord Steyn in *Dunnachie –v- Kingston-upon-Hull City Council* [2005] 1 AC 226, when rejecting the earlier *obiter* views of Lord Hoffmann, given in *Johnson v Unisys Ltd* [2003] 1 AC 518 (@ para.55 et seq.), as to whether s.123(1) of the Employment Rights Act, 1996, allows for compensation to be made for "*non-pecuniary loss*".

4.2 “Reasonableness” is a question of fact for the jury.

Let me now turn then to a consideration of the constitutional merits, or rather lack thereof, in that diatribe by Lord Hoffmann. He begins by making the point, as if it needed making over the course of several paragraphs (70-73), that for the use of force to be justified, under the provisions of s.3 of the CLA 1967, in addition to its having to be directed at the prevention of a crime, the statute says that it must also only be such as is “*reasonable in the circumstances*”. Having done so he then states (@ para 74) as follows :

“ The crucial question, in my opinion, is whether one judges the reasonableness of the defendant's actions as if he was the sheriff in a Western, the only law man in town, or whether it should be judged in its actual social setting, in a democratic society with its own appointed agents for the enforcement of the law. ...”

Let me say at the outset that the even more crucial question, which the mere asking of Lord Hoffman’s ‘crucial question’, raises to my mind, is, who is the “one” to judge, at least in the first instance, whether or not a defendant’s actions were, to use the precise language of s.3 CLA 1967 “*reasonable in the circumstances*” – Is it a question of law for the judge, or a question of fact for the jury?

My instincts tell me that the word “reasonable” is an ordinary English word, of immediate common purport and understanding by ordinary Englishmen, and that it is of the utmost fundamental premise, in English law, that whether or not a person has behaved reasonably, is quintessentially a question of fact and degree, in each and every instance for those whose function it is to decide such matters, and to do so on the facts relevant to, and raised by, each case on its own merits. But are my instincts in this respect well founded? I am bound to concede, and happy to do so, that if this is generally true of the use of the word “reasonable”, even though it appears in this instance in a particular statutory context, then it should generally also be true of the concept of “reasonableness” throughout the criminal law. In particular, we know from the following observation of Edmund-Davies L.J. (as he then was) in the matter of *R v McInnes* [1971] 3 All E.R. 295, that the concept, as expressed in the s.3 defence, is common to the broad common law defence of self-defence as well (@ p.311) :

“ Section 3(1) of the Criminal Law Act 1967 provides: ‘*A person may use such force as is reasonable in the circumstances in the prevention of crime ...*’, and in our judgement the degree of force permissible in self-defence is similarly limited.“

I submit that, given the words of the statute, there can be no merit whatever to the contention that, though the question of the “degree of force” it is reasonable to use, is a question of fact for the jury to decide; the question as to whether or not it is reasonable to use force at all, in the first place, is one of law for the judge to decide. The statute states that only a single test applies, i.e. was it “reasonable”, and logically then this test must be applied equally to any artificial sub-division of the issue. The matter is merely a question of where on the complete spectrum, albeit starting with no force at all, does the limit of “reasonableness” place the answer ?⁴ I submit then that my instincts are thus fully confirmed by the following observations of Lord Morris of Borth-y-Gest, when giving the judgement of the Privy Council in the matter of *Palmer v the Queen* [1971] 1 AllER 1077, in an appeal from Jamaica, on the issue of who decides what, in relation to the defence of self-defence, in a jury trial, as follows :

“In their Lordship’s view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend on the particular facts and circumstances. ... Of all these matters the good sense of the jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence.”

⁴ This approach is affirmed for instance by the opinion of Lord Diplock in the *A-G for N. I.’s Reference* (No.1 of 1975) [1976] 2 AllER 937 (HL) @ 947 decided with respect to. s.3 of the CLA 1967 in N.Ireland and which was in identical terms.

Now none of this is to say that there is no place for the law to give direction, based upon broad principles and general rules, which will then be of guidance to the considerations of the judges of fact, in any particular case. Indeed, clearly that is the proper and appropriate function of the law, and in this regard I suggest, there are presently at least five such broad areas of direction, which are already offered, to some greater or lesser degree, by the common law, on when and to what degree it is reasonable to use force in order to prevent crime. They are as follows :-

- Proportionality : meaning that the degree of force used should be proportional, when judged against the gravity or seriousness of the crime prevented, or sought to be thereby prevented⁵.
- Immediacy : meaning that the need for immediate action ruled out any available non-forceful alternative remedy, which is a matter most often closely related to the question of the time available left to “prevent the crime”.

Interestingly, the law in Scotland seemingly knows no doctrine of justification in right of crime prevention whatever (equivalent to s.3 of the CLA 1967), either in statute or the common law⁶, which I imagine ought in theory at least (but I think not in practice) to make the job of a policeman in Scotland very much harder at the legal margins than for his English counterpart.. However, it does at least share the general defence of “necessity” under the common law, and the “reasonableness” of any conduct, which it is sought to justify under this head, is again a common consideration. In the anti-nuclear “protest” case of the *Lord Advocate’s Ref. (No.1 of 2000) [2001] JC 143*, already mentioned above, the Scots law approach to the application of that aspect, reached perhaps a “high water” mark when Lord Prosser, giving the opinion of the High Court on Appeal in Edinburgh, said (@ para. 37), as follows :

“ It is clear that timing is a crucial consideration. Immediacy of danger is an essential element in the defence of necessity. Unless the danger is immediate, in the ordinary sense of that word, there will at least be time to take a non-criminal course, as an alternative to destructive action. A danger which is threatened at a future time, as opposed to immediately impending, might be avoided by informing the owner of the property and so allowing that person to take action to avert the danger, or informing some responsible authority of the perceived need for intervention. That authority could then consider whether intervention was in its view necessary, and whether and how it could be carried out legally. If there is scope for legitimate intervention in the time scale set by the circumstances, it is difficult to see why the law should allow a third party to intervene by actions that would ordinarily be characterised as involving criminal conduct. One might not weigh the conduct of the rescuer or intervener in too fine a balance, and there may be marginal cases of difficulty. But making allowance for human judgment in the heat of the moment, the danger to which the individual claims to respond must have the character of immediacy. “

It is submitted that, when applied instead to the defence of crime prevention, the question here in issue obviously becomes one of “was there time available” for the defendant to prevent the crime by non-forcible means instead? If the answer is that there was, however, then this in turn merely raises further questions like, what measures (if any) did the defendant undertake to pursue such alternative remedies? If the time was there, and there were alternatives available, and yet they took no such measures, then they may be in an impossible position to satisfy a jury that their conduct, in using force instead, was “reasonable in the circumstances”. However, it must in justice also be open to a defendant, who has had time to pursue a non-forcible alternative, to present evidence to show that he did indeed so pursue just those very alternatives, conscientiously and determinedly and repeatedly. If then he can further show, that all of his reasonable efforts were frustrated and ignored at every turn, by the official law enforcement authorities, a not unheard of occurrence in the “real world” quite apart from so-called ‘protest cases’ then it should still be open to him, to have the opportunity to satisfy a jury of his peers, that all that was then reasonably left to him in the end, was the measured and proportionate use of force. That is just plain fair.

⁵ See *Farrell v Secretary of State for Defence* [1980] 1 WLR 172 ; and the *Criminal Law Revision Committee 7th Report*; Cmnd 2659 at paragraph 23.

⁶ See esp. *Palazzo v. Copeland* [1976] J.C. 52, the Lord Justice-General at page 54

- Efficacy: meaning thereby the likelihood of the preventative measures taken, proving successful in preventing the crime occurring, or continuing, as the case may be.

Again, this was expressly affirmed in the *Lord Advocate's Ref. (No.1 of 2000)*, as a factor in principle which should be relevant to the application of the common law defence of "necessity" in Scotland (see para. 46) and logically it seems rational that the same should be true also of the defence of crime prevention. However, in considering its application to that defence instead, it has to be capable of adaptation to take account of the practicalities of crime prevention. It cannot be right, for example, that if a policeman, on the beat alone, comes across a large gang of youths damaging several cars in the street, he is prohibited from using proportionate force to prevent at least some of the gang from continuing to commit that crime, merely because he hasn't by himself the capacity to prevent them all. It is submitted that, as a matter of public policy, the law should permit a person to use such reasonable force, to try to prevent crime, as their capacities and situation permits them to employ. It should not instead require that they submit passively, in the face of criminality, merely because they have not the capacity to prevent it entirely, if they are capable of and willing to try to prevent at least such part as they can. Of course, if the situation is such that there is simply no possibility whatever of their preventing any part of it, then the question must inevitably arise, not so much as to whether their use of force was "reasonable in the circumstances", but rather whether it was genuinely intended to "prevent" crime by employing it at all.

- Proximity : meaning that the casual nexus, between the place where the crime was or would take place, and the place where the preventative action occurs, were sufficiently proximate to one another.

This is a consideration which has been raised in several decisions given in the magistrates' court, in relation to a s.3 defence in so-called 'protest' cases, but in truth it seems doubtful that it is anything other than a particular facet or practical feature of the efficacy test above. Its merit as a separate head of consideration for instance, at least as respects the defence of "necessity", was expressly doubted yet again in the *Lord Advocate's Ref. (No.1 of 2000)*, at para.47 as follows :

"There was considerable discussion whether the defence of necessity could be available where the place and person or persons under threat from the apprehended danger were remote from the locus of the allegedly malicious damage. We can see no reason in principle why the defence should not be so available. In the modern world many industrial processes have inherent in them the potential for mass destruction over a wide area surrounding a given plant. If a person damaged industrial plant to prevent a disaster which he reasonably believed to be imminent but which he could avoid by the actions taken, there is no compelling reason for excluding the defence of necessity solely on the grounds that persons at risk were remote from the plant provided that they were within the reasonably foreseeable area of risk. "

- Preventative purpose : meaning that the force used should be exclusively directed to achieving the preventative purpose, i.e. there should be no ulterior punitive, compensatory, or retaliatory purpose.

This is a familiar rule, for instance, in the common law defence of "self-defence". A person's use of force will not be capable of amounting to the "reasonable use of force in self-defence" if their sole or main purpose in employing it, was in truth, retaliation instead. The same should, it is submitted, in principle be true of the defence of crime prevention as well.

These five heads then, I submit, reflect the current state of broad guidance or general direction, offered by the common law, on the application of the defence under s.3, going most especially to the factual question as to whether the use of force was "reasonable" in any given case. It will be noted that each is of general and indeed universal application. They do not seek, in any instance to remove the defence from being in the charge of the judges of fact ; but rather that they offer guidance and direction on its use, as applied to the facts raised in any particular case. That, it is submitted, is fully consistent with, not merely the appropriate and proper role for the common law, in relation to a statutory defence, but rather its only lawful role. Guidance as to application, never limitation on availability, which would instead amount to a legislative reduction of the scope of the defence.

4.3 Lord Hoffmann's perspective on "reasonableness".

It is convenient, in light of the above submissions, to now examine the detail of Lord Hoffmann's approach to this matter instead. It will be recalled that he begins his philippic on unlawful crime prevention in modern Britain (see para.74), with a comparison with the isolated sheriff in the Hollywood Western. Despite his having said expressly at the outset that his comments here are instanced by consideration of the concluded cases of *Ayliffe et al. & Swain* (see his para 69), he nevertheless then moves on to consider, against this movie background, specifically the facts in *Jones et al.* instead, a case let it be recalled whose factual merits are still to be decided by a judge and jury in the Crown Court sitting in Bristol ! He concludes that, the facts in the case of Dr. Jones, might be explicable to him, were she a *resistanté* in Nazi occupied France, but not where she owed a duty of allegiance to a state "*which protected and sustained her.*" Having then sought to paint the question in terms of the plot-line for a particularly bad movie, Lord Hoffmann, next looks for authority to support his instinctive outrage at these Appellants' conduct, not from the case law record, but rather from the works of certain modern philosophers. He first cites Weber (in *Politik als Beruf* 1918) followed closely by Hobbes (in "*The Leviathan*") twice on the subject of 'the nature of anarchy and the powers of the state', and concludes (at para77) as follows ;

"But when Parliament speaks of a person being entitled to use such force as is reasonable in the circumstances, the court must, in judging what is reasonable, take into account the reason why the state claims the monopoly of the legitimate use of physical force. "

I hazard to say that certain states in this world may, and indeed most probably do, lay claim to just such extreme and authoritarian claims, and we now have Lord Hoffman's view that this finds support in the philosophies of both Hobbes and Webber, though I know of many that would refute that. However, the suggestion that this then forms a constitutional basis for either the construction of an English statute, or even for that matter a valid appreciation of the English character, I find not merely unconvincing but moreover insulting. It is my firm understanding of the "philosophy of law enforcement", in the history of this Realm, that the police, and for that matter the state itself, operate by and with the consent of the people. That whilst the enforceable duty to respond to the raising of a "*hue and cry*" was itself repealed by statute in 1827, and in any event it is no longer to be heard across our erstwhile green and pleasant land, it nevertheless formed a vital feature of the historical basis for the active role and participation of the people in the keeping of the King's peace, and for their continuing duty to the present day to participate and co-operate in the prevention of crime, for the benefit and sustenance of the commonweal.

Lord Hoffmann then cites as "*in the same spirit as Hobbes*" (see his para.80) a passage from the opinion of Lord Upjohn in *Burmah Oil Co Ltd. v the Lord Advocate* [1965] AC 75 @ 164-165 where he opined:

"No doubt in earlier times the individual had some...rights of self-help or destruction in immediate emergency, whether caused by enemy action or by fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour's house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade."

It is not merely interesting, but I submit vital to observe, as Lord Hoffmann astonishingly fails to do, that when Parliament passed the Criminal Damage Act, in 1971, a mere six years after Lord Upjohn's comments, they included a provision expressly permitting a person to do just precisely what Lord Upjohn here regarded as "obsolescent" ; and what is more, provided that it would be immaterial whether or not that neighbour's belief, as to the threat posed to his own property by the fire and thus the need to take his neighbour's house down, was objectively reasonable or not, so long as he honestly believed it to be⁷. It can, I think, be safely assumed that Parliament faithfully represented the interests, concerns and values of people whose neighbours lived considerably closer together, that did Lord Upjohn's !

⁷ See now esp. s.5 (3) Criminal Damage Act, 1971.

Lord Hoffmann's polemic then turns to consider the specific case of where the citizen calls upon the police and other law enforcement agencies, to prevent a crime, but they fail to respond. He concedes (see his para 82) that in the cases of both *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418 and in *R v Chief Constable of Devon and Cornwall, Ex p Central Electricity Generating Board* [1982] QB 458 the courts there held that, in such a case, the citizen (even though he be a corporate business) has the right to use reasonable means to protect both themselves and their property from criminal trespass. However, he seems to have thought it significant that, in the latter case, Lord Denning MR had suggested (as an aside) that, rather than forcibly evicting the trespassers, the Generating Board should have been content to erect a barbed wire fence instead. But that, is manifestly merely an issue of fact going to the general issue of whether or not the Board had exercised its rights reasonably in the sense of "proportionally" to the "crime", in that case an apprehended breach of the peace..

Next Lord Hoffman turns to the specific case of where the citizen has had resort to the courts. But he cites a case, *Monsanto v Tilly* [2000] Env LR 313, in which the courts went fully into and explored the respective rights of the parties in the matter, and the merits of their respective grievances, and having done so declared one party legally entitled to proceed as he wished, even going so far as to grant him (Monsanto) the injunction against interference with his test planting of genetically modified crops which he desired. True, this left *Tilly*, and his fellow protesters dissatisfied with the outcome, but, none the less they had had their "day in court", and the court had fulfilled its function of declaring the rights in the matter. Clearly, howsoever, dissatisfied with that outcome, subject to their rights of appeal, this exhausted the protesters' right to take measures to prevent the planting, in a democratic society governed by the "rules of law" ; although please note, there was never any suggestion, in the facts of that case, that what Monsanto wanted to do was in any way criminal. Lord Hoffmann then gives this as authority for the proposition that (para 84) :

" Often the reason why the sovereign power will not intervene is because it takes the view that the threatened action is not a crime. In such a case too, the citizen is not entitled to take the law into his own hands. The rule of law requires that disputes over whether action is lawful should be resolved by the courts. If the citizen is dissatisfied with the law as laid down by the courts, he must campaign for Parliament to change it. "

Which, so far as it goes, is all well and good, it clearly is a facet of the rule of law, that time permitting, legal disputes should ideally be settled in court, in a civilised and non-forcible manner. But what of the case where the citizen has gone to the courtroom door, to seek a judicial declaration that what is proposed is not merely unlawful, but moreover a crime, and the court has shut the door in his face. For that after all, unlike the history of the Monsanto injunction case cited, is what actually happened with respects to the situation relevant to the facts in the instant appeal. In November of 2002, four months before the start of the war, and the present Appellants' actions, the Campaign for Nuclear Disarmament, acting together with a group of other peace campaigning groups, applied to the High Court for a declaration that the anticipated attack on Iraq, would be illegal, absent a further UN Security Council Resolution expressly authorising it⁸. Richards J. (as he then was) aptly encapsulated the general attitude of the Administrative Court to an application for judicial review of that character when, refusing permission to so much as examine the merits of the application, he said (@ para. 59(ii)).

" A plain purpose of the present claim is to discourage or inhibit the Government from using armed force against Iraq without a further Security Council resolution. Thus the claim is an attempt to limit the Government's freedom of movement in relation to the actual use of military force as well as in relation to the exercise of diplomatic pressure in advance. That takes it squarely into the fields of foreign affairs and defence. In my view it is unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision."

⁸ *R. (Campaign for Nuclear Disarmament) et al. v. Prime Minister of the United Kingdom et al.* [2003] 3 LRC 335

Now I have already examined the lack of merit in the “non-justiciability” argument elsewhere (in Part 3 above), but whatever one makes of that issue, my point here is, that it is utterly useless and indeed hypocritical to invoke, in this case, the merits of resolving legal disputes in court, as a feature removing from the position of the Appellants, in the present case, any merit for arguing that their forcible actions were “reasonable”, when that is precisely what was tried in this instance, and the result was that the court slammed its doors in their face, refusing to so much as examine the merits of their cause.

Finally, Lord Hoffmann concludes the segment of his diatribe headed “*the limits of self-help*” with the following passage invoking the Treason Acts, which had also been relied upon by Lord Bingham, in a like manner, in his earlier opinion (see now para.31), where he, Lord Hoffmann, says (@ para 87) :

“ A time of war is the extreme example of the dangers. Of course citizens are entitled, indeed required, to refuse to participate in war crimes. But if they are allowed to use force against military installations simply to give effect to their own honestly held view of the legality of what the armed forces of the Crown are doing, the Statute of Treason would become a dead letter.”

Clearly their Lordships’ are very aware of the need to keep in mind the continuing application and vitality of the various long established treason statutes, after all, judging from my television viewing and radio listening, the courts of this land must be filled, on an almost daily basis, with those charged with, for instance, the horrific and treasonable offence of “imagining depriving” Her Majesty of Her “*style, honour or royal name of the imperial crown*”⁹.

However, one might then be forgiven for asking, how it is that their Lordships’ imagine the present Appellants, in taking action, ostensibly to uphold her Majesty’s laws, against what they asserted to be the criminal preparations being undertaken at the time by the military forces of a foreign power, had formed the necessary *mens rea* to have been guilty thereby of treason ? Lord Bingham in particular, cites being “*adherent to the King’s enemies in his realm, giving them to them aid and comfort etc..*” within the meaning of the Treason Act 1351. However, in the matter of *Ahlers* [1915] 1 KB 616 the accused was a British subject who acted as a German consular official in London. Upon the outbreak of the Great War he assisted German nationals, of military age, to return to Germany, and was subsequently charged with high treason under the 1351 statute, in respect of “*adhering to the King’s enemies*”. The trial judge failed to direct the jury to consider whether the defendant had intended to so adhere to the King’s enemies, or whether he may have been merely acting under an honest belief that his consular duties required him to assist in the repatriation of German nationals. The High Court quashed his conviction on the basis that a lack of intent, to so adhere, and/or an honestly held belief in his duties, would have afforded a defence to the charge, and that was an issue of fact which ought to have been left to the jury¹⁰. Consequently, if that was true for Herr Ahlers, in 1914, who could have had had no justification for thinking, at that time, that the Ministers of the Crown were criminally embroiling it in an “illegal war”, not then a crime, how much more so must it be for the present Appellants who manifest did, and against whom there is not the slightest scintilla of suggestion that they had any affinity for, let alone adherence to, Saddam Hussein ?

4.4 Withdrawing the defence in “protest cases”.

At para. 90 of his opinion, under the title “*civil disobedience*”, Lord Hoffmann cites a list of nine cases, beginning in 1988, which he describes as cases in which he identifies the “*emergence of a new phenomenon, namely litigation as the continuation of protest by other means*”. Boy but has he led a sheltered life - even the Chartists didn’t make that extravagant claim ! As well as citing the cases, he helpfully lists also the areas or issues of political controversy they relate to, as follows, nuclear weapons, the first Gulf War, anti-abortion, anti-Newbury by-pass, Trident missiles, fox hunting, Trident missiles again, and two cases involving genetically modified crops, to which of course we may now add the present case viz the Second Gulf War. A veritable potpourri of the political life and most passionate controversies of this country in the course of the past two decades or so.

⁹ An offence under s.3 of the Treason Felony Act, 1848.

¹⁰ Reference taken from “Blackstone’s Criminal Practice” (see B 9.15)

Then, at para.94, at the very the end of his polemic, Lord Hoffmann finally reveals the true purpose and design to which he has been building, up to that point (at para 94) as follows :

“ The practical implications of what I have been saying for the conduct of the trials of direct action protesters are clear. If there is an issue as to whether the defendants were justified in doing acts which would otherwise be criminal, the burden is upon the prosecution to negative that defence. But the issue must first be raised by facts proved or admitted, either by the prosecution or the defence, on which a jury could find that the acts were justified. In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury. Evidence to support the opinions of the protesters as to the legality of the acts in question is irrelevant and inadmissible, disclosure going to this issue should not be ordered and the services of international lawyers are not required.” (emphasis added)

Thus is the final design revealed. Even in the very few instances where so-called “protest cases” involve actions so serious as to have generated a jury trial¹¹, then juries in future are no longer to be trusted to hear, let alone decide, defendant protestors’ claims, to have been justified to act as they have, by reason of “reasonable” conduct defences permitted by the law. Seemingly be that statute, as per in right of crime prevention under s.3, or common law, as per the defences of “necessity” or “self-defence” all of which incorporate an objective “reasonableness” test. Instead this judgement gives the “green-light” to Crown Court judges to not only withdraw those defences from the jury, in all such cases, but more especially to rule them out of court as a preparatory matter. Quite extraordinarily Lord Hoffmann actually specifies that this is permissible, even though the defendant’s apprehension, of the unlawful nature, of the acts against which he is directing his forcible protest, are not merely honestly (subjectively) held but are in fact also reasonably (objectively) held. The implications for English justice are grave indeed.

The first of the cases which Lord Hoffmann mentions, in his list of nine modern protest cases, is *R v Hill, R v Hall* (1988) 89 Cr App R 74. This concerned the conjoined appeal against conviction of two peace campaigners, who had been convicted of a criminal damage charge, in relation to the making of a “symbolic” snip of the perimeter chain-link fence, at the US Naval Intelligence Facility then attached to RAF Brady in Pembrokeshire. The defence offered at trial in the Crown court, in the days when one still had a right of election for jury trial in such cases, was of “lawful excuse” under s.5(2) of the Criminal Damage Act (CDA), 1971. It was the defendants’ claim, in two separate trials, that they believed the “US NavFac” made Pembrokeshire a prime target, in the event of a Soviet nuclear “first-strike” attack against the U.K., and that, as such, they were justified in acting as they had, in order to protect property, namely homes, belonging to themselves and others in the county, thereby put at risk. Both judges not only withdrew the defence from their respective juries, on the grounds that it was manifestly spurious and not justified by any reasonable view of the evidence, but then effectively directed them to convict, on the premise that these defendants had offered no other tenable defence. The defendants’ joined appeals were heard in the Court of Appeal [Criminal Division] by none other than Lord Geoffrey Lane C.J. who gave the leading judgement.

Lord Lane C.J. was painfully aware that, the effect of s.5(3) of the 1971 Act, meant that, if the defence went into the charge of the jury, they would have to be directed to decide on the defendants’ claims, as justifying their conduct, not as they the jury objectively and reasonably regarded them, but rather as to whether they found the defendants’ themselves honestly believed them to be reasonably held. Even Lord Lane CJ. himself accepted that the defendants’ beliefs, howsoever outlandish, were nonetheless honestly held. This was clearly not a prospect acceptable to him and in consequence it became necessary to hit upon a means, within the language of the section, to remove the matter from the charge of the jury

¹¹ To take an obvious example that now means in a criminal damage case an allegation of damage in excess of £5000

Developing upon a line of previously poorly reasoned authorities¹², the answer was provided by looking at the words of the section, which said that the accused must have acted “*in order to protect property belonging to himself or another*”, and holding that this comprised in a separate element of the defence, distinct from the question of the defendant’s subjective (honestly held) beliefs as to the ‘reasonableness’ of the means of protection used. As to this aspect Lord Lane C.J then said (@ p.79) as follows:

"There are two aspects to this type of question. The first aspect is to decide what it was that the applicant in this case, Valerie Hill, in her own mind thought. The learned judge assumed, and so do we, for the purposes of this decision, that everything she said about her reasoning was true. ...
Having done that the judges in the present cases and the judge particularly in the case of Valerie Hill turned to the second aspect of the case and that is this. He had to decide as a matter of law, which means objectively, whether it could be said that on those facts as believed by the applicant, snipping the strand of wire, which she intended to do, could amount to something done to protect either the applicant's own home or the home of her adjacent friends in Pembrokeshire.
He decided again quite rightly in our view that that proposed act on her part was far too remote from the eventual aim at which she was targeting her actions to satisfy the test."
(emphasis added)

In the result, not only did Lord Lane C.J. manage to find a way of removing the subjective issue from the jury, but most astonishingly, by the simple expedient of holding that the question of whether a person has acted “*in order to protect property*” is an objective one, it then apparently also followed that it thereby became a matter of law, for the judge to determine, and not for the jury at all. Yet again this, of course, is pure sophistry. Whether or not a person has acted “*in order to protect property*” is manifestly a question of fact, all be it one that the case can be made for claiming should be decided objectively¹³. Accordingly, as irrational as it sounds, from that point onward the question as to whether or not a person had so acted “*in order to protect property*” became a question of law for the judge to decide instead of the jury. In consequence, the benefit of the statutory defence has since been effectively removed from defendants, whenever the factual circumstances of their defence case, proved unattractive to their trial judge, as being ‘outlandish and fanciful’, thereby neutering the true scope of the defence for the past 17 years.

This artifice, however, began to breakdown firstly with the notorious case of *R v Kelleher* [2003] EWCA Crim 3525 (unreported). This was the case in which Mr Kelleher decapitated the former Prime Minister Lady Thatcher ... in the sense that he removed the head of her recently completed statue whilst it was on display in the Guildhall gallery. Mantell L.J. in giving the judgement of the Court of Appeal [Criminal Division], was at pains to affirm that they continued to accept Lord Lane’s C.J. conclusion, as well as being bound by it in any event, that the test was a matter of law for the judge, and thus that the judges in *Hill*, and in Mr Kelleher’s own second crown court trial, had been right to remove the defence under s.5 CDA 1971 from those respective juries. However, he went on to examine the separate question of whether it had also been right, having done so, to then effectively direct the jury to convict. He ended up rejecting the notion. He relied on principally the decision of the House of Lords in *DPP v Stonehouse* [1978] AC 55, and in particular the observations of Lord Salmon (at pp.79-80) as follows:

"Whilst there is no doubt that if a judge is satisfied that there is no evidence before the jury which could justify them in convicting the accused and that it would be perverse for them to do so, it is the judge's duty to direct them to acquit. This rule, which has long been established, is to protect the accused against being wrongly convicted. But there is no converse rule -- although there are some who think there should be. ...If the judge is satisfied that, on the evidence, the jury would not be justified in acquitting the accused and indeed that it would be perverse of them to do so, he has no power to pre-empt the jury's verdict by directing them to convict. The jury alone have the power to decide that the accused is guilty. In an appropriate case (and this was certainly such a case) the judge may sum up in such a way as to make it plain that he considers that the accused is guilty and should be convicted. ..."

¹² See *R v Hunt* (1978) 66 Cr App R 105 and *R v Ashford & Smith* [1988] CLR 682

¹³ However, see the commentary following the report of *Ashford* by Prof JC Smith rejecting the “objective question” analysis.

The question that this approach, respecting the constitutional importance of the role of a jury, in a democratic state, left unanswered, however, was as follows – if it is wrong for a judge to ever direct a jury to convict, even though he is convinced it would be perverse for them to acquit ; then to what extent is it also improper for a judge to withhold or withdraw a defence from the jury’s consideration, merely because he thinks it would be perverse if they were to give the benefit of it to the defendant ?

This question was I submit largely answered, when the time came at long last for the final renunciation of Lord Lane’s C.J. logic, and that occurred when the House of Lords had to decide in the matter of *R. v Wang* {2005} 1 WLR 661. In this case the House ruled (Lord Bingham giving the leading judgement) that it is never lawful for a trial judge to ever instruct a jury to return a verdict of guilty ; even if he considers that the defendant has admitted all the necessary facts to constitute the crime, and has advanced no legally available defence. In such a case the judge would clearly regard a jury verdict of not guilty, as perverse. None the less, the House held quite specifically that a jury is entitled to return a perverse verdict of not guilty, and a judge cannot direct them to convict in order to avoid its doing so¹⁴.

That said Lord Bingham is at pains to preserve the discretion of a trial judge to withdraw a defence from the jury, where he decides that there is “no” evidence upon which the jury, properly directed, could possibly find it available to the defendant. However, in the course of his judgement in that case, Lord Bingham took the opportunity to specifically consider, the logical merit of Lord Lane’s C.J. earlier finding in *Hill* that it had been right, on the facts in those cases, to withdraw the defence of “lawful excuse” under s.5 CDA 1971 from the juries sitting at the Crown court in Haverfordwest, those 17 years earlier. He held (@ para.14) as follows :

“ The majority opinions of the House in *Stonehouse* have been faithfully followed in such later decisions as *R v Thompson* [1984] 1 WLR 962, *R v Challinor* (1984) 80 Cr App R 253, *R v Gordon (Note)* (1987) 92 Cr App R 50, *R v Gent* (1989) 89 Cr App R 247; and *R v Kelleher* [2003] EWCA Crim 3525, the last of these cases being heard and decided by the Court of Appeal very shortly before the judgment now under appeal and containing, in the judgment of Mantell LJ, a very lucid and accurate exposition of the law. *R v Hill and Hall* (1988) 89 Cr App R 74 is not easy to reconcile with the majority opinions. If in those cases there was in truth no evidence of lawful excuse which the jury could be asked to consider, the trial judges were entitled to withdraw that issue from the jury. But the relevant conclusion appears to have been (p 77)

“that the causative relationship between the acts which [the defendant] intended to perform and the alleged protection was so tenuous, so nebulous, that the acts could not be said to be done to protect viewed objectively.”

Like the issue of proximity in *Stonehouse*, this was a question to be left to the jury, however predictable the outcome might reasonably be thought to be. In any event, the juries should not have been directed to convict, as they evidently were (p 81).

Whilst I may regret greatly that this review of the injustice which took place in those cases glosses over the most glaringly insupportable aspects of Lord Lane’s C.J. earlier judgement, and which has denied the full scope of a statutory defence being put before juries for the better part of two decades, nevertheless by a process of “osmotic” common sense, the just result has been reached in the end.

Accordingly, we have now at last reached the point on the authorities where we can say that, in keeping with manifest justice and common sense, it is now the sole function of the trial judge to determine whether there is “any” evidence capable of raising a defence, and in so doing he is not exercising a judicial function, but really an administrative one. The question ought not to be is there “sufficient” evidence capable of sustaining the defence, which calls for an independent assessment by the judge of its of its probative value ; but rather is there “any” evidence, upon which a jury theoretically could, all be it in the trial judge’s view only perversely, sustain the defence claimed ? The jury are entitled to return a perverse verdict, and the judge is not entitled to withhold evidence of a defence on his view of its worth.

¹⁴ See especially para 16 of Lord Bingham’s judgement

4.5 The objection to Lord Hoffmann's directions.

If that is right, as I submit it must be, then equally it must follow, that it is now wholly wrong for superior or appellate court judges, to give directions to first instance judges, on what tests or standards they should apply when making an assessment, as to whether to withdraw a defence from a jury, which is an assessment they are not even any longer supposed to make. Moreover, and more precisely, although it clearly is appropriate for appeals judges, in a proper case, to lay down certain broad principles and guidance, in relation to the general criteria or broad standards, such as the five common law tests I have already now referred to, and as against which the judges of *fact*, be they then magistrates (including therein district judges) or jurors in the crown court, should apply, in relation to the way in which they go about their assessment of "reasonableness", as a question of fact, in any particular case; it cannot be right that, they can also lay down particularly described categories of conduct, such as here in relation to 'action taken to prevent crime allegedly being committed by the state', its servants and agents, and say that, as a matter of law rather than of fact, in every instance, in a "functioning democratic state" such action will always be "unreasonable", and thus unfit to go before a jury for their consideration.

Basically what Lord Hoffman has done here, is to take the unexceptional statutory use of a single ordinary English word, and read into Parliament's intention in employing it, an unprecedented and highly objectionable constitutional innovation, premised on his own philosophical view, justifying the state's asserted "monopoly on the use of force" for the prevention of crime. If he thinks the section should be amended, so as to add a particular definition to the word "reasonable" as meaning "otherwise than in relation to force used against the state/crown, its agents or servants" then, with all due respect, it is he, and not these Appellants, who should be lobbying Parliament, the better to bring about a change in the law to suit his political standpoint. Or if he thinks it is in keeping with his judicial office, and he just might, he can move his amending Bill from the floor of their Lordships' House.

However, as presently written, howsoever distasteful or perverse it may be to Lord Hoffmann, Parliament has chosen to empower anyone in the land, to use force to prevent any crime, being committed by anyone, from the Prime Minister down to a rough sleeper, any where, and at any time, subject to the sole qualification that that person must then subsequently be able to satisfy twelve of their "peers", sitting in a jury box, or more usually a supposedly independently minded magistrate, that it was "*reasonable*" for them do so "*in the circumstances*", and that as they say is the law, and god willing long may it remain so.

Overall Conclusions.

On the one hand, we already know from Lord Hoffmann's prior learned exposition (@ para 66 of his opinion) that, since "...*The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs*", it therefore followed that, it was a decision into "*the exercise of which the courts will not enquire*" (para 65). On the other hand, we now also know that, even were "aggression" or "a crime against peace" to be a crime fully assimilated into and thus a part of our domestic law, then, even if the execution of just such a war waging decision involved the commission of such a crime, a crime let us recall described by Lawrence L.J. when giving the judgement of the IMWC Tribunal at Nuremberg as constituting "*the supreme international crime*", there are never the less no circumstances in which it can ever be "reasonable" for the citizenry to ever use force to try to prevent the commission of such a crime (para 88).

One is therefore left wondering in what sense, if any, Lord Hoffmann understands the constitutional doctrine of "government subject to the rule of law"? If neither the courts, nor the common people, can ever act in order to hold the executive to account for the legality of what it does in this area, then what does that leave – clearly only Parliament, which can only act by withdrawing its confidence in the ruling administration, thereby forcing either a change in policy or a general election. That, however, is not government being made subject to the rule of law, but rather its being made subject to the political will of Parliament, which one can argue (theoretically) represents the will of the people through its elected Parliament. This then truly is the "elective dictatorship" of which Quentin Hogg L.-C. once spoke¹⁵.

¹⁵ See now his Richard Dimbleby lecture given in 1976.

It is not so much the case that I do not recognise this jurisprudence as being consistent with, say that expressed famously by Lord Akin when, in his own war time minority in the House, in *Liversage v. Anderson*, [1942] A.C. 206, he made his now famous and acclaimed dictum “*amid the clash of arms the laws are not silent.*”, later expressly approved by the majority of the House in *Nakkuda Ali v Jayaratne* [1951] AC 66 ; but rather, that it is a position, in my respectful submission, wholly incompatible with the far more robust constitutional stance taken, by no less a figure than Lord Camden, then speaking as Lord Chief Justice of the Court of Common Pleas, in the even more famous matter of *Entick v Carrington* (1765) 2 Wils. KB 275; 95 ER 807, wherein he said (@ p.292) as follows :

“ ... And with respect to the argument of state necessity, or a distinction that has been aimed at between state offenses and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions. Serjeant Ashley was committed to the Tower in the 3d of Charles 1st, by the House of Lords only for asserting in argument, that there was a ‘law of state’ different from the common law; and the Ship-Money judges were impeached for holding, first, that state-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity. If the king himself hath no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative.”

(emphasis added)

It is a sad reflection indeed to think that the judges of the Common Pleas, speaking in the mid 18th Century, had then more backbone to stand up for the rule of law against the Crown’s pleas of “state necessity”, than seemingly do the Law Lords of the early 21st Century, some 250 years later.

Of course, it will be said against this observation, that in the present case Dr. Jones, and the other peace enforcement activists, were not the victims of any illegal state action taken against them directly, and in breach of their civil liberties and human rights, but rather that they chose of their own volition to act, by taking the law into their own hands, and that in this distinction lies all the difference. But that distinction is utterly defeated by consideration of the simple point that, in order to deny these present Appellants their right, under the statute (s.3 CLA 1967), to a defence of justification in right of crime prevention, the House has chosen to deny the very existence of the crime in our domestic law at all, as offensive to the international character of this nation state and damaging of its once proud claims to being a civilised modern democracy, fully a part of the community of nations comprising the civilised world, as that is.

Moreover, secondly, they have moved even beyond this, and Lord Hoffman, at least, (with Lord Mance’s express support – see para.106) has here held that, even if that were a crime fully assimilated into our municipal law, it is not one which, first out of deference to the monopoly, which he asserts is philosophically enjoyed by the Crown on the use of force to uphold the law, and second, in deference to the ‘discretionary nature’ of their prerogative powers for the defence of our Realm, any one in it, be they peace campaigner or High Court judge, is entitled to prevent..

That with respect sounds to me like the not so thin end of a very ugly wedge that culminates in holding aloft of the *fasces lictoriae* through the streets at night to remind the populous who is in control and who controls the administration of the law.

“Find out just what the people will submit to and you have found out the exact amount of injustice and wrong which will be imposed upon them; and these will continue until they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.”

— Frederick Douglass, civil rights activist, Aug. 4, 1857

Robbie Manson
co-founder of the Institute for Law and Peace.
Fiat iustitia ruat cælum