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TRANSPOSING AN INTERNATIONAL CONVENTION INTO DOMESTIC LAW: A CHALLENGE FOR LAW REFORM AGENCIES

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I INTRODUCTION

[1] In this paper I shall attempt to identify some of the challenges likely to confront a law reform agency, located anywhere in the world, engaged in the exercise of transposing an international treaty into domestic law. As I shall endeavour to demonstrate, within this superficially straightforward task lies a series of potential complications and pitfalls. These do not relate only to the exercise of legislative drafting – which, on its own, will be far from uncomplicated. Rather, other related questions, of both a policy and pragmatic nature, also arise. An examination of this topic throws up for consideration some central and inter-related themes: the rule of law; equality before the law; the right of access to a judicialised tribunal; the independence of the judiciary; and the familiar concepts of rights, duties, discretion and enforcement.

[2] What of the exercise of transposing an international convention into municipal law? I would suggest that any project of this kind must, at the very outset, confront the truism that government policy and law reform are inextricably linked. Where international treaties are concerned, many governments are wary, even suspicious and occasionally downright schizophrenic. Governments change from time to time and, simultaneously, some international treaties tend to ebb and flow, acquiring greater or lesser prominence throughout the international community and expanding with the addition of new Protocols. In the modern world, greater, rather than lesser, prominence is increasingly the norm. It has become progressively difficult for governments to ignore the weight and influence of various international organisations, in particular the United Nations. Accordingly, nowadays, at least in theory, conditions are favourable for a law reform project entailing the conversion of an international convention into municipal law. However, very early engagement with government, with a view to securing the strongest legislating commitment possible [and the necessary resources!], is plainly indispensable.

[3] I have selected as my main example the European Convention on Human Rights and Fundamental Freedoms ("*the European Convention*") and the domestic transposing statute, the Human Rights Act 1998. While this was not a project of the English Law Commission, it appears to me that law reform agencies throughout the world can usefully learn something from this particular statutory model. I propose to give some consideration also to one of the best known international conventions produced by the United Nations, namely the Convention on the Rights of the Child (1989). This particular instrument is not only topical but also of global interest. Furthermore, in the writer's opinion, the prospect of this international convention being converted into domestic legislation, in whole or in part, in certain states of the world seems far from fanciful.

[4] For further reading, I would commend to colleagues the stimulating reflections and observations of Lord Bingham in The Rule of Law,[1] Chapter 10. For Lord Bingham, the basic principle in play is uncomplicated and unambiguous:

> "*The rule of law requires compliance by the state with its obligations in international law as in national law*".[2]

Lord Bingham concludes his treatise with the following challenging statement:

> "*If the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order*".[3]

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[1] Published by Allen Lane (Penguin Group), 2010.
[2] P. 110.
[3] P. 129.

Finally, given the theme of the present paper, I draw attention to the following observations:

> "*The notion that there is a great gulf fixed between national and international law is contradicted both by the osmotic absorption of customary international law into national law … but also and even more prominently by the involvement of the national courts, here and elsewhere, in deciding questions of international law …*
>
> *The inter-relationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other*".[4]

[4] Pp. 117-119.

II THE EUROPEAN CONVENTION

[5] While the European Convention is a product of the organisation known as the Council of Europe, it nonetheless has a significantly wider international pedigree. It came into existence in 1950, just two years following the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly (on 10th December 1948). Thus, in its preamble, the European Convention expressly refers to the latter, noting that it "*… aims at securing the universal and effective recognition and observance of the Rights therein declared*".

[6] The context in which the European Convention was framed is all important. It was a response to current and past events in Europe marked by a series of destructive wars between nations. The Council of Europe was established as the first of a series of post-Second World War attempts to unify the nations of Europe.[5] The European Convention was also a response to the growth of communism in Central and Eastern European States. Furthermore, it was a reaction to the appalling violations of human rights which Europe had witnessed during the Second World War. It enunciates the dominant principles which govern Western European States, proclaiming:

> "*Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms.*
>
> *Reaffirming their belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend …*
>
> *Being resolved, as the governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and* ***the rule of law,*** *to take the first steps for the collective enforcement of certain of the rights stated in the Universal declaration …*"

[7] I have intentionally highlighted the words "*the rule of law*" for the elementary reason that this, in my view, must be the guiding and dominant principle for all law reform agencies. It is the constant, and unforgiving, touchstone of all law reform activities. This may properly be described as a global principle. I shall revert to this theme presently.

[8] The European Convention has another global dimension. As it is an international treaty, it is governed by the Vienna Convention on the Law of Treaties.[6] The Vienna Convention enunciates a basic rule of interpretation: every Treaty –

> "*… shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[7]

The "*context*" of a treaty includes its preamble and any agreement or instrument relating to and made in connection with it.[8] The subsequent practice of the parties to a treaty and any relevant rules of

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[5] See the Statute of the Council of Europe 1949 [1949] – [1949] CMND 7778.
[6] 1155 UNTS 331, UKTS 58 (1980) CMND 7964.
[7] Article 31.

international law shall be taken into account, together with the context.[9] The rules of interpretation enshrined in the Vienna Convention are accepted as rules of customary international law, binding upon all states, irrespective of whether they are parties to the Vienna Convention. Finally, the Vienna Convention is observed in the interpretation of the European Convention.[10]

[9] The organs, or institutions, which are charged with the responsibility of implementing and enforcing the European Convention are threefold: the Committee of Ministers, the European Court of Human Rights and the European Commission of Human Rights. I propose to reflect briefly on one of the landmark decisions of the European Court, as it provides telling guidance on some of the factors which a law reform agency must weigh carefully if proposing domestic legislation to give effect to an international convention. In ***Golder –v- United Kingdom***, one of its earliest decisions, the European Court had to confront squarely the principles to be applied in interpreting the Convention. The central question to be determined was a challenging one: although the Convention did not expressly protect the citizen's right of access to a court, could this right, plainly fundamental, be implied? The court answered affirmatively. In doing so, its focus was on Article 6(1) of the Convention, which provides, in material part:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…..*"

For the Court, two questions had to be addressed:

> "*(i) Is Article 6(1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?*
>
> *(ii) In the latter eventuality, are there any implied limitations on the right of access or on the exercise of that right which are applicable in the present case?*"[11]

[10] In view of the prolixity of the passages in question, I have assigned these to Appendix 1 to this paper. For present purposes, it suffices to note that, following a carefully reasoned analysis, the European Court answered the first of these questions in the affirmative, highlighting in particular the international plane to which the European Convention belongs and the applicable rules and principles of international law. The European Court also answered the second of the questions posed for its consideration in the affirmative. Thus it concluded that the citizen's right of access to the courts is not absolute. Rather, it is subject to implied limitations which are proportionate.[12] . It has been held that these can include limitation periods which are framed in reasonable terms, do not have the effect of extinguishing the essence of the right and promote legal certainty.[13] Law reform agencies will doubtless take careful note of the desirability of a transposing domestic statute addressing squarely the question of

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[8] Article 31(2).
[9] Article 31(3).
[10] Golder –v- United Kingdom [1975] 1 EHRR 524, paragraph 29 and Johnston –v- Ireland [1986] 9 EHRR 203, paragraph 51.
[11] Paragraph 25.
[12] Paragraph 38.
[13] See for example, **Stubbings –v- United Kingdom** [1996] 23 EHRR 213, where the court upheld a statutory limitation period governing civil claims for alleged childhood sexual abuse – see especially paragraphs 54/55. Another example is vexatious litigants: **H –v- United Kingdom** [1985] 45 DR 281.

how the national courts are to deal with the jurisprudence of any relevant supra-national court or comparable entity. In short, the clearer and more complete the domestic statute in all respects, the better.

III THE HUMAN RIGHTS ACT 1998

[11] The Human Rights Act 1998 ("*HRA 1998*") is the parliamentary statute which gave domestic effect to the European Convention. The tenth anniversary of this statute was celebrated recently. I propose to offer some general reflections on the statute, before concentrating on *the machinery* which it enshrines for the purpose of giving effect to the international convention in question.

General

[12] The launch date for the Human Rights Act 1998 ("*HRA 1998*"), 2nd October 2000, now seems a distant occurrence. While most judges and practitioners were aware that something was stirring, few dared to predict the impact which this seminal statute has unquestionably had. One infamous prediction was that it would provide a field day for crackpots. Others expressed themselves in more cautious and solemn terms. In one of the early decisions, the English Court of Appeal cautioned that HRA 1998 should not be deployed to escort the court "*down blind alleys*".[14] Within a mere three months of the commencement date, an intervention by one senior English judge sparked a debate about whether Convention rights have any similarity to "*iatrogenic disease*".[15] In a letter decision, the same judge categorised HRA 1998 as one of the "*constitutional statutes*", ranking it alongside Magna Carta, the Bill of Rights 1689, the Act of Union, the European Communities Act 1972 and the major constitutional devolution statutes of 1998 (The Scotland Act and others).[16]

[13] The legal community was awash with predictions that some of the newly incorporated ECHR rights would have a major influence – in particular Article 5 (Liberty), Article 6 (Fair Trial), Article 8 (Private and Family Life) and Article 10 (Freedom of Expression). There were confident expectations that these particular rights would dominate subsequent jurisprudence and exert a real and concrete influence on the lives of citizens. I apprehend that few would have predicted, however, that during the decade to follow major questions relating to birth and death would occupy both the European Court and the highest United Kingdom courts. That this has occurred illustrates the profound influence which ECHR rights, suitably buttressed by the admirable machinery of HRA 1998, have had in a newly evolving legal culture. Lord Woolf has suggested that the statute has profound constitutional significance, since underpinning it is the concept that in a democratic society, both governmental action and powers granted by Parliament are limited, the rationale being that "*… the recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy*".[17]

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[14] ***Daniels –v- Walker*** [2000] 1 WLR 1382, pp. 1386-1387.

[15] Per Sir John Laws: ***R –v- Speers*** [2001] paragraph 54.

[16] Thorburn –v- Sunderland City Council [2003] 2 WLR 247 where, in the unpromising context of what his Lordship described as the "*dry enough subject*" of weights and measures legislation, one finds a pronouncement of some profundity:

"*[62] …In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental…And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.*"

[17] "Human Rights. Have the public benefited?" [2003] 121 Proceedings of the British Academy 301-303.

[14] HRA 1998 has been variously described as revolutionary, constitutional, historic and dynamic. All of these adjectives seem apposite. It is one of the most important measures of law reform in the history of the legal system. Arguably its greatest impact is that it does not belong to some isolated, hermetically sealed compartment of the law: rather, it applies to **all laws** – both legislation and the common law – in a dominant, pervasive and reforming manner. Since its introduction, this statute has become the barometer for testing the validity of all pre-existing and subsequently made laws, whether legislation or rules and principles of the common law. This very concise outline serves to convey the unmistakable impact which this statute has had on our legal system during its relatively brief lifespan of ten years.

The Legislative Machinery

[15] Bearing in mind that it was designed to give effect in domestic law to most (but not all) of the human rights protected by the European Convention, HRA 1998 was designed under the government logo of "*Bringing Rights Home*". Some considerations of an intensely pragmatic nature are worth noting:

(a) HRA 1998 did not give domestic effect to **all** of the rights guaranteed in the European Convention. Rather, the United Kingdom legislature exercised a democratic choice, determining to exclude some of the Convention rights from the domestic statute.

(b) During a lengthy run down to the operative date of the statute, much time and resources were invested in the education and training of the judiciary and any interested legal practitioners.

(c) A substantial quantity of government funding was required for this purpose.

(d) The exercise which culminated in the new legislation – extensive consultations, debates, proposals, revised proposals and related steps – was both widespread and inclusive and undoubtedly contributed to a carefully planned instrument of legislation which has proved to be efficacious and robust. Notwithstanding, the Government's prior engagement with the population has been criticised in some quarters.

(e) Both the existence and the content of the legislation owe much to the interventions, influence and support of many senior judicial figures.

(f) Careful consideration was given to comparable models in other countries – particularly New Zealand and Canada.

[16] HRA 1998 established the structural machinery designed to provide for the recognition and enforcement of the incorporated European Convention Rights. The legislation contains the following main tools:

(a) Rules of interpretation.

(b) The preservation of parliamentary sovereignty.

(c) A definition of "*public authority*".

(d) A scheme for legal proceedings.

(e) Rules concerning judicial remedies consequent upon legal proceedings.

(f) Provision for the interaction between Convention rights and any other rights or freedoms conferred by United Kingdom law.

(g) Special provision is made for two of the Convention rights transposed - freedom of expression and freedom of thought, conscience and religion.

(h) A regulation of the interaction between domestic legislation and the international treaty – in particular, concerning derogations and reservations.

The Role of the Courts under the Legislation

[17] I propose to focus particularly on the role and responsibilities conferred on the courts by HRA 1998. This reflection quickly stimulates consideration of a series of inter-related themes: the rule of law, the separation of powers, the right of access to a court and the independence of the judiciary.

[18] In the machinery established by HRA 1998, the courts occupy a central position. The courts feature in one of the earliest provisions of the statute, **Section 2**, which requires any court or tribunal "*… determining a question which has arisen in connection with a Convention right …*" to take into account any relevant decision, declaration or opinion of the three Strasbourg organs – the European Court of Human Rights, the Commission and (frequently overlooked) the Committee of Ministers, *insofar as relevant.* From this point of departure, the overarching role – and responsibility - of the courts features repeatedly: in **Section 3** (the requirement to construe all primary and subordinate legislation in a manner compatible with the convention rights, *so far as it is possible to do so*); **Section 4** (declarations of incompatibility); **Section 5** (intervention of the Crown in certain court proceedings); and, next, **Section 6**, which is really the fulcrum of the entire statutory regime:

> "*(1)* ***It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...***
>
> *(3) In this Section 'public authority' includes –*
>
> > *(a) a court or tribunal, and*
> >
> > *(b) any person certain of whose functions are functions of a public nature,*
>
> *but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament*".

[My emphasis].

[19] By **Section 7**, the mechanism for the affected citizen to establish that a public authority has acted, or proposes to act, contrary to Section 6(1) is twofold:

(a) The citizen may bring proceedings against the authority under the Act in the appropriate court or tribunal; or

(b) He or she may rely on the Convention right concerned *in any legal proceedings*.

But the citizen's right to have recourse to either of these mechanisms arises "*… only if he is (or would be) a victim of the unlawful act*". The "*appropriate court or tribunal*" is the Judicial Review Court limb of the High Court. If proceedings are brought before this court, **Section 8** becomes operative, as this regulates the topic of **judicial remedies**:

"*In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and equitable*".

In subsections (2) and (3), Parliament has imposed certain limitations on the power of the High Court to select an award of damages as the appropriate remedy: in short, where some other remedy (e.g. a declaration or a quashing order) is considered by the court to be adequate, damages will not be awarded.

[20] At this remove, it seems appropriate to bring to mind the centrality of the role occupied by the High Court in the HRA 1998 machinery. For many centuries, it has been the function of independent judges in the United Kingdom to adjudicate on disputes between citizens and disputes between citizens and the state. Although appointed by the King, for the purpose of adjudicating on disputes between citizens, judges became increasingly independent. With the passage of time, judges increasingly displayed the courage and integrity required to resist the whims of despotic monarchs and to develop the common law in a way which can now be seen compatible with the fundamental rights of citizens. Some of these were initially enshrined in Magna Carta. Today, some of the leading HRA 1998 commentators and practitioners proudly boast about the clearly demonstrable links between the statute (on the one hand) and the common law dating from Magna Carta (on the other). The independence of judges was underwritten by Parliament in an important piece of legislation, the Act of Settlement 1700. Pursuant to this statute, judges held tenure of appointment for as long as they were of good behaviour and could be removed from office only pursuant to a resolution of both Houses of Parliament. In the whole of English history, *no High Court judge has been removed from office***.** It is worth recalling the long title of the Act of Settlement:

"*An Act for the further limitation of the Crown and better securing the rights and liberties of the subject*".

[21] I raise this topic fundamentally for the purpose of suggesting how appropriate it is that a truly independent judiciary should adjudicate on Convention rights issues. It serves as a reminder of the operation of the rule of law in society. The separation of powers means that there is an executive which governs society; an elected Parliament which legislates for society; and an independent judiciary which adjudicates upon disputes between citizens and public authorities. The adjudication of these disputes lies at the heart of HRA 1998. The function, and responsibility, of independent judges in the framework of the rule of law is encapsulated in what Lord Bingham said in 1996:

"[The court] *has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision makers, it must not shrink from its fundamental duty to do right to all manner of people*".[18]

These are profound words indeed. They are also echoed in the following formulation:

""*The right to carry a dispute with the Government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law*".[19]

[22] Few would deny that the independence of the judiciary is a value of supreme importance throughout the developed world. Equally undeniable is the marriage of the rule of law and judicial

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[18] The Queen –v- Ministry of Defence, ex parte Smith [1996] QB 517, p. 556 (per Sir Thomas Bingham MR).

[19] "Administrative Law" (Wade and Forsyth, 10th Edition, p. 19).

independence: neither partner can survive without the other. At a recent international conference, one of the most senior English judges offered the following formulation of judicial independence:

> "*In a democratic country all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it.* ***Ultimately, however, it is the judges who are guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen as well as the integrity of the constitution by which those rights exist. The judge therefore cannot be out for popularity. He – or she – cannot please everyone. He should never try to please anyone. That includes the judge himself. He should never use his office to confirm his predilections or to allow his prejudices to gain some kind of spurious judicial respectability***".[20]

As a pre-requisite to appointment, every judge in the United Kingdom must pronounce an oath (or affirmation) whereby he undertakes –

> "*… that I will do right to all manner of people without fear or favour, affection or ill will according to the laws and usages of this realm".*

This is another facet of the rule of law. While judges administer the law, they are also primarily *accountable to* the law. Thus, properly understood, judicial independence is not some kind of privilege enjoyed by judges. Those who assert the contrary are mistaken. Judicial independence is a bedrock of our system of government in a democratic society and a safeguard of the freedoms and rights of the citizen under the rule of law. This requires judges to be independent of the legislative and executive arms of government – the separation of powers (about which more later).

[23] The unwritten British constitution is firmly based on the separation of powers i.e. the separate of judicial power from executive power. The courts are the interface between the citizen and government. While many such disputes are now determined by specialised tribunals, these are subject to the control of the superior courts. Thus every citizen in dispute with the government has a constitutional right to bring such dispute before a court, where it will be determined by judges of the highest independence. This is the cornerstone of the HRA 1998 regime. The protection and promotion of Convention rights would be barren indeed in the absence of mechanisms for judicial adjudication.

Summary

[24] Law Reform agencies will doubtless take note that HRA 1998 was the product of a series of comprehensive and intensive exercises, which spanned a lengthy period and required extensive resources. A central theme of these exercises was that of *consultation*. All members of society and interested organisations and professions had ample opportunity to express their views about the proposed new legislation. The depth and robustness of the consultation exercises has undoubtedly proved to be one of the virtues of the new statute. Furthermore, the active involvement, co-operation and support of the senior judiciary throughout the pre-enactment period was crucial, for at least three reasons. The first was the central role to be given to the judiciary under the proposed new statutory model. The second was that the willingness of the judiciary to treat this as a unique constitutional

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[20] The words of the Rt. Hon. Lord Judge, Lord Chief Justice of England and Wales: 16th Commonwealth Law Conference, Hong Kong, 9th April 2009 – my emphasis.

measure to be interpreted and applied purposively was essential. Thirdly, this enhanced the profile of the evolving legislation. In addition, the proposed new legislation had substantial and influential support from other sectors – although, ultimately, the opposition Conservative Front Bench, supported by certain sections of the media, opposed it.

[25] Another possible lesson for law reform agencies arising out of the formulation and ultimate adoption of HRA 1998 is that of *patience*. The process, in retrospect, was a painstaking one. The legislation was not enacted until fifty years after promulgation of the Universal Declaration and forty-eight years after the execution of the European Convention. Furthermore, the movement in support of giving domestic effect to the Convention, which included some judicial activism, had been active for over thirty years. Yet another lesson is that of *flexibility and adaptability.* Throughout this protracted period, legislative proposals were revised and re-revised. As the debate intensified, the legislative quality inevitably improved. Ultimately, there emerged a constitutional statute, a superbly crafted model, of simply monumental importance.

IV THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

[26] Adopting the now established practice of many jurists and other interested writers, including judges, I shall describe this, in shorthand, as "*UNCRC*".

[27] UNCRC was adopted by the General Assembly of the United Nations, without vote, on 20th November 1989, appearing in the Annexe to the Resolution.[21] It entered into force on 2nd September 1990 one month after ratification by the 20th State.[22] Over sixty States have become Parties. The Convention enshrines a series of human rights values and standards in respect of children viz. every child below the age of eighteen years. Previously, children enjoyed some protection, by virtue of the principles of general international law and Article 24 of the International Covenant on Civil and Political Rights. It was the product of ten years of consideration by the UN Human Rights Commission and its "title deeds" include the Universal Declaration of Human Rights[23] and the Declaration of the rights of the child.[24]

[28] UNCRC subjects States Parties to a series of obligations. The most salient of these are as follows:

(a) To ensure that the substantive rights protected are enjoyed without discrimination of any kind.[25]

(b) To ensure that children are protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of their parents, legal guardians or family members.[26]

(c) To ensure that the best interests of the child "*shall be a primary consideration*" in all actions concerning children.[27]

(d) To provide each child with "*such protection and care as is necessary for his or her wellbeing … and, to this end, shall take all appropriate legislative and administrative measures*".[28]

(e) To ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with safety, health, supervisory and other appropriate standards.[29]

(f) To "*… respect the responsibilities, rights and duties of parents … in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention*".[30]

(g) To recognise "*that every child has the inherent right to life*".[31]

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[21] U.N.DOC.A/44/25.
[22] In accordance with Article 49(1).
[23] See Articles 2 and 25 especially.
[24] Adopted by the UN General Assembly on 20th December 1959.
[25] Article 2(1).
[26] Article 2(2).
[27] Article 3(1).
[28] Article 3(2).
[29] Article 3(3).
[30] Article 5.

(h) To "*ensure to the maximum extent possible the survival and development of the child*".[32]

(i) To give effect to every child's right to a name and to acquire a nationality.[33]

(j) To give effect, so far as possible, to "*the right to know and be cared for by his or her parents*".[34]

(k) To respect "*the right of the child to preserve his or her identity*".[35]

(l) To ensure that a child "*… shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*"[36]

(m) To deal with applications for the purpose of family reunification "*in a positive, humane and expeditious manner*".[37]

(n) To take measures "*to combat the illicit transfer and non-return of children abroad*".[38]

(o) To ensure to each child of appropriate age/capacity "*the right to express … views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*".[39]

(p) To give effect to each child's right to freedom of expression; freedom of thought, conscience and religion; freedom of association; and freedom of peaceful assembly.[40]

(q) Not to subject any child to "*arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation*".[41]

(r) To ensure that each child has "*access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral wellbeing and physical and mental health*."[42]

(s) To give effect to the principle that both parents have common responsibilities for the upbringing and development of the child; to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation while in the care of a parent or legal guardian; to provide special protection and assistance to any child temporarily or permanently deprived of his or her family

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[31] Article 6(1).
[32] Article 6(2).
[33] Article 7(1).
[34] Article 7(1).
[35] Article 8(1).
[36] Article 9(1).
[37] Article(1).
[38] Article 11(1).
[39] Article 12(1).
[40] Articles 13, 14 and 15.
[41] Article 16.
[42] Article 17.

environment; to facilitate that the system of adoption shall ensure that the best interests of the child shall be the paramount consideration; and to give appropriate protection and humanitarian assistance to any child seeking refugee status.[43]

(t) To recognise that any mentally or physically disabled child "*… should enjoy a full and decent life …* "; to recognise the right of every child to "*… the enjoyment of the highest attainable standard of health …*"; to ensure periodic review of mental health detention arrangements; to give effect to the rights of children to benefit from social security; to recognise the right of every child to "*a standard of living adequate for the child's physical, mental, spiritual, moral and social development; and to recognise the right of the child to education.*"[44]

(u) To recognise the right of a child to enjoy and practice his particular culture and religion and to use his language; to recognise the right of the child to rest and leisure; to protect the child from economic exploitation; to protect children from the illicit use of narcotic drugs and psychotrophic substances; to protect children from all forms of sexual exploitation and abuse; to prevent the abduction or "trafficking" of children; to protect the child against "*all other forms of exploitation prejudicial to any aspect of the child's welfare*"; to protect the child from torture or other cruel, inhuman or degrading treatment or punishment; to give effect to the relevant rules of international humanitarian law which protect children; to assist the physical and psychological recovery and social re-integration of exploited or abused children; and to refrain from recruiting children under fifteen years to the armed forces.[45]

(v) To treat any child accused of a criminal offence in a manner consistent with the promotion of the child's sense of dignity and worth; to provide certain minimum fair trial guarantees to such children; to provide a range of sentencing options for children; and to adopt "*doli incapax*" legal rules.[46]

Thus, UNCRC enshrines an extensive series of rights and corresponding obligations. These are expressed in relatively dense detail, in terms which may fairly be described as general and, in certain places, aspirational. If domestic implementation of any of these Convention provisions were proposed in any state, I foresee great challenges for any law reform agency concerned – a mixture of extensive debate, emotive interventions, limited economic resources, extraterritorial research, political controversy and frequently shifting positions. The challenges for law reformers would undoubtedly be substantial.

[29] An examination of the terms of UNCRC provides a salutary reminder of the truism that the language of international conventions and treaties is, generally speaking, not the language of domestic legislation, in whatever country. International conventions have a tendency to give expression to a series of general principles, values, standards and aspirations. They frequently do so in expansive and elastic terms. This will inevitably present any law reform agency contemplating the implementation of an international convention in domestic legislation with very significant challenges. Clearly, as a minimum, the law reform agency concerned will be anxious to discover whether any other state has already conducted this exercise and, if so, how. One trusts that, in any such exercise, the Human Rights Act 1998 will prove to be an instructive and illuminating model.

[43] Articles 18, 19, 20, 21 and 22.
[44] Articles 23, 24, 25, 26, 27 and 28.
[45] Articles 30-39 inclusive.
[46] Article 40.

[30] Furthermore, some international conventions establish their own machinery for the protection and enforcement of any rights which they create. Examples include the UN Human Rights Committee;[47] the Inter-American Commission and Court of Human Rights;[48] the African Commission on Human and People's rights;[49] and the European Convention institutions already discussed.[50] UNCRC does not belong to this category. The importance of highlighting this factor is that the law reform agency concerned will undoubtedly wish to study with care the decisions, recommendations and jurisprudence of any relevant international body established under the Convention being considered for implementation. These will provide a valuable source of guidance, information and education relating to the interpretation and application of many of the Convention's provisions. This, in turn, will be reflected in the law reform agency's report to government, its views and recommendations and any draft legislation. This should also stimulate debate on whether these sources should be addressed in the domestic legislation and, if so, in what terms.

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[47] International Covenant on Civil and Political Rights 1966, Part IV.
[48] American Convention on Human Rights 1969, Chapters VII and VIII.
[49] The African Charter on Human and People's Rights 1981, Part II.
[50] See paragraph [9] above, Section II of the European Convention and the Statute of the Council of Europe.

V CONCLUSION

[31] Any law reform agency could be readily forgiven for concluding, at first blush, that the task of incorporating into domestic law an international convention or treaty should not prove difficult. After all, hasn't all the groundwork and spadework been completed? The reflections in this paper will hopefully serve to highlight the fallacy of this point of view. The exercise of transposing an international instrument into domestic law gives rise to a whole series of factors – economic, political, social and legal amongst others. Furthermore, it demands a special approach to both consultation and legal research, comparative and otherwise. A scrupulous examination of whether existing domestic law reflects, even in part, any of the international conventions provisions is also essential. Law reform agencies would also do well to remember that international instruments such as UNCRC profess to embody *minimum* standards, values and protections. Thus a progressive law reform agency might be emboldened to recommend to government a generous form of transposition which gives effect to *additional and more efficacious guarantees and protections*.[51]

[32] This may be illustrated by one final example. The incorporation of the European Convention into domestic United Kingdom Law via HRA 1998 has not discouraged the Northern Ireland Human Rights Commission from expending much time and energy in formulating in draft a special Bill of Rights for Northern Ireland – an impressive piece of work. This contains a series of human rights different from and additional to those protected by HRA 1998. It is, I consider, uncontroversial to describe the response of government to date as unenthusiastic. This is not the occasion upon which to explore either the reasons for this reaction or what the future might hold. It prompts me to recall, however, two things in particular. The first is that the English Law Commission was established almost *a full four centuries* after it was first proposed – by none other than Francis Bacon, a remarkably talented man of great foresight. In 1597, he exhorted "*the establishment of a body of commissioners to investigate laws and report to Parliament*".[52] The enactment of the Law Commission Act 1965 signalled an end to the engrained piecemeal and *ad hoc* approach to law reform. Secondly, and on a lighter note, one recalls the famous witticism of Mr. Justice Astbury:

> "*Reform, reform, aren't things bad enough already?*".

It is possible, I suppose, that there are elements of this viewpoint in the current impasse concerning the Northern Ireland Bill of Rights.

[33] As an important footnote, law reform agencies based outside the United Kingdom may wish to note the Law Commission Act 2009. This important statutory measure strengthens, at one and the same time, the position of the Law Commission in England and parliamentary interest in the systematic development of law reform through the agency specially appointed for this purpose. Fundamentally, this new statute addresses the longstanding problem of converting Law Commission reports into legislation. The formalities and safeguards of the newly enacted statutory structure address this issue admirably, establishing a model of obvious and enviable strength. For further reading, there is a useful commentary by Louis Blom-Cooper in the journal "Public Law" [2010, July, 441-442; a Sweet and Maxwell publication].

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[51] Readers should be aware of a very recent, significant decision of the United Kingdom Supreme Court in which UNCRC featured quite prominently: see **ZH (Tanzania) –v- Secretary of State for the Home Department** [2011] UKSC 4 – which records, *inter alia*, the incomplete transmission of UNCRC into United Kingdom Law effected by Section 55 of the Borders, Citizenship and Immigration Act 2009: see paragraph [12] (per Lady Hale). Of particular interest, the status of UNHRC as an unincorporated international treaty barely flickers, due (I suggest) in no small measure to the Human Rights Act, which requires the United Kingdom courts to take into account relevant Strasbourg jurisprudence, the latter being influenced in its progressive development and orientation by various provisions of UNCRC.

[52] Neave, Law Reform in the 21st Century – Some Challenges for the Future (11th October 2001).

[34] And finally, I invite you to learn more about the Northern Ireland Law Commission – its statutory structures, functions and responsibilities and its current and anticipated law reform programmes. Please see Appendices 2, 3 and 4 hereto and note the website address :

http://www.nilawcommission.gov.uk

APPENDIX 1

Golder –v- United Kingdom

> *“[34] As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the "object" and "purpose" of the instrument to be construed.*
>
> *In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are "resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" of 10 December 1948. …*
>
> *The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law. It seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of the object and purpose of the Convention.*
>
> *This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that "every Member of the Council of Europe must accept the principle of the rule of law ..."*
>
> *And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.”*

The judgment continues:

> *“[35] “Article 31 para. 3 (c) of the Vienna Convention indicates that account is to be taken, together with the context, of "any relevant rules of international law applicable in the relations between the parties". Among those rules are general principles of law and especially "general principles of law recognized by civilized nations" (Article 38 para. 1 (c) of the Statute of the International Court of*

Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that "the Commission and the Court must necessarily apply such principles" in the execution of their duties and thus considered it to be "unnecessary" to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognised" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

[36] Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid

down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English "determination", French "décidera")."

APPENDIX 2

THE NORTHERN IRELAND LAW COMMISSION

[1] The Northern Ireland Law Commission ("*the Commission*") is a statutory body, established and governed by Sections 50-52 of and Schedule 9 to the Justice (Northern Ireland) Act 2002 ("*the 2002 Act*"), as amended.[53] The creation of the Commission is one of the significant reforms of the Northern Ireland legal system effected by the 2002 Act. By Section 50, the Commission is a body corporate, consisting of a Chairman and four Commissioners. The first appointments were made by the Secretary of State prior to devolution of policing and justice. Henceforth, any new appointments will be made by the Department of Justice.

[2] Pursuant to Section 51 of the 2002 Act, the Commission is obliged to keep under review the law of Northern Ireland with a view to its systematic development and reform. Specifically, the methods prescribed for the performance of this overarching duty are codification, the elimination of anomalies, the repeal of unused legislation and the reduction of the number of separate legislative provisions. Section 51 further provides that the Commission should undertake the simplification and modernisation of the law of Northern Ireland.

[3] Within the ambit of the broad statutory remit set out above, the Commission has certain specific statutory obligations. These are:

(a) To consider any proposals made for the reform of the law of Northern Ireland.

(b) To prepare and submit to the Department of Justice, periodically, law reform programmes.

(c) To make recommendations to the Department about law reform programmes and to pursue such programmes as are duly approved.

(d) Within the ambit of such programmes, to formulate, by means of draft legislation or otherwise, law reform proposals.

(e) Pursuant to any request of the Department to prepare, periodically, comprehensive programmes of consolidation and repeal of legislation.

(f) To provide advice and information (i) to Northern Ireland Departments and (ii) with the consent of the Department of Justice, to Departments of the Government of the United Kingdom and other authorities or bodies concerned with proposals for the reform or amendment of any branch of the law of Northern Ireland.

(g) To obtain such information as to the legal systems of such countries as appears to the Commission likely to facilitate the performance of its other duties.

[4] The Department of Justice must, before approving any Commission law reform programme, consult the Attorney General for Northern Ireland. Furthermore the Commission must transmit to the Department :

[53] The relevant provisions of the 2002 Act, as amended, are contained in Appendix 4.

(a) An Annual Report.

(b) Its law reform proposals, upon completion of the relevant project.

(c) Each law reform programme approved by the Minister.

All of these must be laid by the Department before the Northern Ireland Assembly. Thereafter, the Commission must arrange for publication of these materials.

[5] Pursuant to Section 51(4) of the 2002 Act, in performing its duties, the Commission must consult the Law Commission of England, the Scottish Law Commission and the Law Reform Commission of the Republic of Ireland.

The Commission's First Programme of Law Reform

[6] The Commission's predecessor was the Law Reform Advisory Committee [an ad hoc non-statutory body], operating under the aegis of the Northern Ireland Office, which had a remit confined to civil law. The present Commission was inaugurated on 1st April 2008. After its inauguration, it published a consultation paper which was designed to stimulate the views and suggestions of interested professions, agencies and individuals regarding the content of its First Programme. At this stage, the Commission emphasized that there was potential to reduce the gap between the public and the law. The Commission also stressed that it is an independent statutory body.

[7] There was a substantial and enthusiastic response to the consultation invitation. Over forty proposals for law reform were received. These were rigorously scrutinized by the Commission. This process resulted in the Commission submitting certain proposals to the Secretary of State (then the responsible Minister), which were duly approved. As a result, the First Programme of Law Reform was duly published. There are five law reform projects within this programme, as follows:

(a) Land Law Reform.

(b) Business Tenancies Law Reform.

(c) Reform of the Law and Procedures relating to Vulnerable Witnesses in Civil Cases.

(d) The Law and Procedures relating to Domestic Multi-Unit Developments (i.e. flats/apartments).

(e) The Law and Practice of Bail in Northern Ireland.

[8] In making its recommendations to the Secretary of State, the criteria applied by the Commission were, broadly, importance, suitability and resources. The application of these criteria entailed, with reference to each of the individual proposed projects, an assessment of the extent to which the existing law is unsatisfactory; the scale of any perceived deficiencies or disadvantages; the potential benefits and costs arising from reforming the law; the presence or absence of political sensitivities or controversy; whether any other agency is better equipped to undertake the project; the desirability of having a good mix of law reform projects at any given time; the expertise of the appointed Commissioners and their legal staff; and available funding.

[9] Thus the Commission's First Programme comprises five separate law reform projects. Each of these has reached differing stages of advancement. The most advanced, for historical reasons, is the land law reform project, an inheritance from the Commission's predecessor. This project has just been

completed. At the beginning of December 2010, the Commission forwarded to Government the final report, incorporating draft legislation. The scheduled completion dates for the remaining First Programme projects are:

(a) Business Tenancies Project: 28 February 2011.[54]

(b) Vulnerable Witnesses Project: 31st March 2011.[55]

(c) Bail Law Project: 30th November 2011.

(d) Multi-Unit Developments Project: later date to be finalised.

The Commission's Second Programme of Law Reform

[10] As the statutory provisions make clear, the Commission potentially exercises a significant influence in the process of legislating and law reform in Northern Ireland. Regrettably, the potential for the Commission to expand its influence in and contribution to society is being progressively curtailed by diminishing public resources. Every effort is being made, internally, to ensure that this negative impact is minimised to the greatest extent possible. The Commission's proposals to the Department for the inclusion of specific projects in its periodic law reform programmes are preceded by a robust and thorough process, which includes a comprehensive exercise of public consultation. This process facilitates appropriate engagement with relevant Government Departments, interested professions, the business sector, the voluntary sector, the judiciary and any other interested parties or groups. Such exercises are accompanied by appropriate publicity, including deployment of the Commission's website and the organisation of appropriate public events. As required by statute, the Commission also consults with the other Law Commissions in the United Kingdom and the Irish Law Reform Commission. Furthermore, there is an opportunity for specific engagement with those most likely to be affected by the adoption of any given law reform project. All of this is harmonious with a modern system of efficient, expeditious and effective independent law reform.

[11] The Commission carefully considers each of the law reform project proposals emerging from the consultation process. In doing so, the Commission applies the following selection criteria:

(a) **Importance to Northern Ireland**. This will incorporate an assessment of potential benefits to and impact on the public, complexity, accessibility and the need for simplification and modernisation.

(b) **Suitability**. The application of this criterion will include an assessment of the demands and dimensions of the candidate project; the desirability of having a good mix of law reform projects at any given time; the projected duration of candidate projects; the skills, expertise and experience of Commissioners and Commission legal staff; and the desirability of any other agency undertaking the candidate law reform project.

(c) **Resources**. The Commission will consider the human and financial resources, current and projected, at its disposal.

(d) **Timing**. It will be necessary for the Commission to estimate the duration of each candidate project, giving effect to the general rule that where a project is unlikely to result in a report to Government, followed by new legislation, within a four-year period it will not be submitted by the Commission to the Minister for approval.

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[54] The final report to Government is currently being printed.

[55] The final draft of this report to Government is being perfected at present.

[12] The Commission's independence does not preclude engagement with the executive at all appropriate stages, both before and after formal ministerial approval of its law reform proposals. Such engagement is plainly harmonious with the legislative intention underlying the relevant provisions of the 2002 Act. Furthermore, it is necessary for the Commission to have appropriate engagement with interested Government Departments during the progress of individual projects. This requires the appointment of a suitably senior official within relevant Government Departments for this purpose. This is followed by appropriate communication between the Commission and the appointed official throughout the duration of the project in question which entails, *inter alia*, attendance at project steering group meetings. This engagement and liaison are to the mutual benefit of the Commission and Government. All of these processes contribute to establishing and maintaining a working relationship between the Commission and the Executive which is mutually beneficial, serves the public interest and facilitates the efficient and expeditious discharge of the Commission's statutory obligations, without compromising its independence.

[13] The Commission is currently in the process of consulting with regard to the contents of its Second Programme and evaluating responses. This consultation exercise has generated proposals from interested parties and organisations for the adoption of new law reform projects. Each of these proposals is being, and will be, scrutinised independently and rigorously by the Commission, applying the selection criteria noted *infra*. At the culmination of this process, the Commission will submit to the Department a draft Second Programme, containing new law reform projects, requesting approval. This will occur in March 2011. Difficult, but exciting, choices are being made. Given the governing statutory framework, this is a particularly important exercise for the Commission. In view of the differing durations and stages of development of the extant First Programme projects, there will be some overlap between the two programmes. Furthermore, some of the new Second Programme projects will be initiated in advance of others. The Commission will explain to the Department its reasons for the proposed prioritization.

The Bail Law Project

[14] I highlight this particular project as it may be of some interest to law reform agencies in other parts of the world. This is one of the five projects which the Commission's First Programme of Law Reform incorporates. In Northern Ireland, there is no central governing instrument of legislation. This contrasts with England and Wales, where the Bail Act was introduced in 1976 and the Republic of Ireland, where a comparable statute was enacted in 1997. In Northern Ireland, there is a patchwork quilt of statutory sources, married with the exercise of the inherent jurisdiction of the High Court. This is considered unsatisfactory, given the substantial importance of bail in the context of the administration of criminal justice and the relatively intense degree of public interest and concern which this subject routinely generates. The Commission believes that there is a persuasive case for the enactment of a unifying instrument of legislation regulating comprehensively the roles and responsibilities of the primary agencies concerned – the police, the Public Prosecution Service and the courts – coupled with some modernisation of the law in this sphere.

[15] It is clear to the Commission, at this stage, that there is a substantial public interest in this project. There are various concerns about the existing law and practice in this sphere; and material misunderstandings abound. The Commission is conscious that there has been a recent surge of publicity about the commission of offences by Defendants granted bail. A mid-2010 newspaper publication suggested that more than 20,000 such offences – including 8 murders, 24 rapes and 150 robberies – were committed during the past two years alone. One of the most celebrated re-offenders is one of the Defendants in the Devlin murder trial. Other well known names include Shoukri, Conlon and Gorski.

[16] This particular project has reached an important stage. The Commission has recently published a consultation paper, which invites all interested professions, agencies, groups and individuals to ***formally*** submit their views and suggestions for reform of the law in this sphere. Those who have responded with final/formal submissions include the key stakeholders and other main agencies with which the Commission has already engaged from the outset of its project. The response has been encouraging. It is emphasised that there is no hierarchy of consultees and respondents. Those who have declined to engage and contribute at this stage have lost this golden opportunity to influence and shape future legislation in this important sphere. The depth and quality of the responses to the Consultation Paper will unquestionably influence the Commission's final report to Government and, hence, the new legislation which will materialise ultimately. The consultation exercise to date has included four public meetings recently conducted at various venues in Northern Ireland, as well as engagement with the influential non-statutory agency The Criminal Justice Issue Group.

The Northern Ireland Law Commission and Universities

[17] At present, the Commission is actively exploring the potential for establishing mutually beneficial links with the three main universities in Northern Ireland. Fundamentally, the subject which the Law Commission and the universities have in common is legal research and learning. This is the bread and butter of all law students, whether undergraduates or postgraduates and it is also a major aspect of the Commission's daily activities. In the Commission, we are most anxious to establish and develop positive and constructive relationships and arrangements with the universities. At this relatively embryonic stage of the exercise, possibilities include:

(a) Placements for second year students from their module, possibly for two days weekly with a duration of around 12 weeks.

(b) A placement for a third year student preparing the 40 credit point dissertation, attending the Commission for 4 days per week during a 15 week period [probably not before October 2011].

(c) As per (b) – but involving the 20 credit point dissertation and attending 2 days per week only.

(d) A "twinning" arrangement between a specific Commission law reform project and the LLM in transitional justice [possibly from October 2011].

(e) The possible attachment of Ph.D students.

(f) Joint seminars and lectures.

As Chairman, I have proactively initiated a programme of delivering suitable addresses to the universities, at various academic levels, with a view to stimulating mutual interest and progress.

APPENDIX 3

The Devolution of Policing and Justice Powers to the Northern Ireland Administration

[18] The scheme of Part 1 of the Northern Ireland Act 1998 ("*the 1998 Act*") is to establish three separate categories of (so-called) "*excepted matters*", "*reserved matters*" and "*transferred matters*". These are linked to the legislative powers of the Northern Ireland Assembly ("*the Assembly*"). In short, a "transferred matter" is any matter which is neither an excepted nor a reserved matter. The legislative competence of the Assembly is confined to transferred matters.

[19] The category of "*transferred matters*" is not set in stone. Rather, the Secretary of State is specifically empowered (by Section 4) to convert specified reserved matters to the status of transferred matters, by Order in Council. Reserved matters are those listed in Schedule 3 to the 1998 Act. They include, per paragraph 9:

> "*(a) The criminal law.*
>
> *(b) The creation of offences and penalties.*
>
> *(c) The prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings.*
>
> *(d) Prosecutions.*
>
> *(e) The treatment of offenders (including children and young persons and mental health patients involved in crime).*
>
> *(f) The surrender of fugitive offenders between Northern Ireland and the Republic of Ireland.*
>
> *(g) Compensation out of public funds for victims of crime*.
>
> *(h) Local Community Safety Partnerships.*"

Paragraph 9 makes clear that subparagraph (e) includes in particular "*prisons and other institutions for the treatment or detention of persons …*".

[20] On 31st March 2020, the Secretary of State, exercising his powers under Section 4(2), made an Order in Council entitled The Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010. By Article 1(2), this came into operation on 12th April 2010. …

[21] In short, most of the policing and justice functions enshrined in paragraph 9 of Schedule 3 to the 1998 Act which were hitherto reserved matters have now become transferred matters viz. have been devolved so that they now lie within the legislative competence of the Northern Ireland Assembly. It may be noted that conversion/transfer is not wholesale: some specified powers belonging to this sphere continue to be reserved matters, thereby remaining under the jurisdiction of the Secretary of State.

[22] The detailed outworkings of this landmark statutory reform are contained in a second Order in Council, the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ("*the 2010 Order*"). This is a bulky measure, consequential upon and designed to give full effect to the first Order in Council. The provisions of most interest to and direct impact upon the Law Commission are buried in Schedule 13, which makes certain amendments to the Justice (Northern Ireland) Act 2002 ("*the 2002 Act*"). The effect of these amendments is as follows:

(a) In general, all references to "*the Secretary of State*" are substituted by "*the Department of Justice*".

(b) **Section 51(2)(e)** now provides:

"*(2) For that purpose the Commission must …*

(e) provide advice and information –

(i) to Northern Ireland Departments, and

(ii) with the consent of the Department of Justice, to Departments of the Government of the United Kingdom and other authorities or bodies concerned with proposals for the reform of amendment of any branch of the law of Northern Ireland …".

(d) **Section 51(3)** now provides:

"*Before approving any programme prepared by the Commission, the Department of Justice must consult the Attorney General for Northern Ireland*".

(e) There is a new **Section 51(3)(a):**

"*Before approving any programme prepared by the Commission that includes –*

(a) the examination of any branch of law relating (in whole or in part) to a reserved matter or an excepted matter, or

(b) the consolidation or repeal of legislation relating (in whole or in part) to a reserved matter or an excepted matter,

the Department of Justice must consult the Secretary of State",

(f) There is also a new **Section 52**. This follows the pattern of the earlier amendments, effectively cementing the new axis of Law Commission/ Department of Justice.

[23] The administrative outworkings of these reforms is the establishment of a new Justice Policy Directorate within the new Department of Justice. Fundamentally, the main impact of these statutory reforms is the introduction of the newly-established Ministry of Justice, instead of the NIO, as the main sponsoring Department vis-à-vis the Law Commission. Realistically, it seems highly unlikely that any of the Commission's law reform projects will ever relate to anything other than a transferred matter. Accordingly, the new statutory provisions introducing special requirements in relation to Law Commission projects concerning *reserved or excepted matters* are unlikely to have any practical impact.

[24] This most recent exercise of devolving aspects of government to Northern Ireland is placed in context by reflecting on the following seminal statement:

> "*This is, indeed, a momentous occasion, as Northern Ireland begins to put behind it the conflict, prejudice and division that has* [sic] *blighted the lives of everyone in both communities for a generation. For the first time, all shades of political opinion in Northern Ireland will have a stake in the future. After a quarter of a century, the curtain is finally coming down on direct rule. Of course, there will still be anger about the past and real difficulties undoubtedly still lie ahead, but this generation is now turning the page to the future. In Stormont now, Ministers have been appointed and a government formed. They are waiting only for their powers.*"[56]

Historically, the period of devolution which began in 1921 ended in 1972, its demise being precipitated by, *inter alia*, the misuse of governmental power in the delivery of public services. What was envisaged as a purely short term expedient in 1972 became an ingrained feature of life in Northern Ireland, giving rise to what was described as a state of "*permanent impermanence*".[57]

[25] During the relatively peaceful, but politically turbulent, decade which followed 1998 the devolution of powers to Northern Ireland stumbled and stuttered. Some of the landmark events included the suspension of the newly established Northern Ireland Legislative Assembly. The most recent devolution events are the culmination of progressive political compromise amongst the leading parties. Admittedly, the legislative achievements have been few. This flows fundamentally from continuing disputes about policy. One leading commentator has been prompted to observe:

> "*The 'wicked' public policy issues remain, hastened by the recession and the squeeze on public spending. The lack of an effective political opposition is raised as an impediment to decision making and in holding the two power brokers (DUP and Sinn Fein) to account. The SDLP and UUP claim that Executive decisions are arrived at through negotiations between the two largest parties and their political advisors in a secretive, behind closed doors manner. The lawmaking record of the devolved administration has been equally unimpressive, with sixty-three acts from 1999, some of which are on relatively minor matters …*
>
> *The public's perception of the success of devolution is still significantly conditioned by their perspectives on the political settlement and concomitant power sharing arrangements…*".[58]

[26] In the midst of this devolution picture, the Northern Ireland Law Commission may be seen to be a permanent and reliable fixture, continuing the process of high quality legal research, comprehensive public consultation exercises and the preparation of fully informed reports, incorporating draft legislation, to government. The profile and responsibilities of the Law Commission are probably greater now than at any stage of its (or its predecessor's) existence. The Commission welcomes this exciting and stimulating challenge.

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[56] The words of the Northern Ireland Secretary of State, Mr. Mandelson, introducing the draft Northern Ireland Act 1998 (Appoint Day) Order 1999 in Westminster: **Hansard,** Official Report, 30th November 1999.

[57] Per Sir Kenneth Bloomfield, Head of the Northern Ireland Civil Service, in 1998.

[58] Colin Knox, Devolution and the Governance of Northern Ireland [an excellent recent publication].

[27] AND FINALLY – Please note that the Northern Ireland Law Commission website address is: http://www.nilawcommission.gov.uk/.

APPENDIX 4

JUSTICE (NORTHERN IRELAND) ACT 2002

Law Commission

50. - (1) There is to be a body corporate known as the Northern Ireland Law Commission.

(2) The Commission is to consist of-

(a) a chairman, and

(b) four other Commissioners,

appointed by the Department of Justice.

(3) The chairman is to be a person who holds the office of judge of the High Court.

(4) Of the other Commissioners-

(a) one is to be a person appearing to the Department of Justice to be suitably qualified to be a Commissioner by experience as a barrister,

(b) one is to be a person appearing to the Department of Justice to be suitably qualified to be a Commissioner by experience as a solicitor,

(c) one is to be a person appearing to the Department of Justice to be suitably qualified to be a Commissioner by experience as a teacher of law in a university, and

(d) the other is to be a person who does not hold (and has never held) judicial office and is not (and has never been) a barrister, solicitor or teacher of law in a university.

(5) Before appointing a person to be a Commissioner the Department of Justice must consult-

(b) the First Minister and deputy First Minister, and

(c) the Attorney General for Northern Ireland.

(6) In appointing persons to be Commissioners, the Department of Justice must so far as possible secure that the Commissioners (taken together) are representative of the community in Northern Ireland.

(7) Schedule 9 makes further provision about the Commission.

Duties of Commission

51. - (1) The Commission must keep under review the law of Northern Ireland with a view to its systematic development and reform, including in particular by-

(a) codification,

(b) the elimination of anomalies,

(c) the repeal of legislation which is no longer of practical utility, and

(d) the reduction of the number of separate legislative provisions,

and generally by simplifying and modernising it.

(2) For that purpose the Commission must-

(a) consider any proposals for the reform of the law of Northern Ireland made or referred to it,

(b) prepare and submit to the Department of Justice (from time to time) programmes for the examination of different branches of that law with a view to reform, including recommendations as to the agency (whether itself or another body) by which any such examination should be carried out,

(c) undertake, pursuant to any such recommendations approved by the Department of Justice, the examination of particular branches of that law and the formulation (by means of draft legislation or otherwise) of proposals for reform of those branches,

(d) prepare (from time to time) at the request of the Department of Justice comprehensive programmes of consolidation and repeal of legislation, and undertake the preparation of draft legislation pursuant to any such programme approved by the Department of Justice,

(e) provide advice and information—

(i) to Northern Ireland departments, and

(ii) with the consent of the Department of Justice, to departments of the Government of the United Kingdom and other authorities or bodies concerned with proposals for the reform or amendment of any branch of the law of Northern Ireland, and

(f) obtain such information as to the legal systems of other countries as appears to the Commission likely to facilitate the performance of its other duties.

(3) Before approving any programme prepared by the Commission, the Department of Justice must consult-

(c) the Attorney General for Northern Ireland.

(3A) Before approving any programme prepared by the Commission that includes—

(a) the examination of any branch of law relating (in whole or in part) to a reserved matter or an excepted matter, or

(b) the consolidation or repeal of legislation relating (in whole or in part) to a reserved matter or an excepted matter,

the Department of Justice must consult the Secretary of State.

(3B) For the purposes of subsection (3A) "reserved matter" and "excepted matter" have the meanings given by section 4 of the Northern Ireland Act 1998.

(4) In performing its duties the Commission must consult-

(a) the Law Commission,

(b) the Scottish Law Commission, and

(c) the Law Reform Commission of the Republic of Ireland.

(5) The Commission must make an annual report on how it has performed its duties.

Reports etc.

52. - (1) The Commission must send to the Department of Justice a copy of—

(a) each programme prepared by the Commission and approved by the Department of Justice,

(b) each set of proposals for reform formulated by the Commission pursuant to such a programme, and

(c) each annual report of the Commission.

(2) The Department of Justice must lay before the Northern Ireland Assembly a copy of each document received by it under subsection (1).

(3) The Commission must send to the Secretary of State a copy of—

(a) any programme prepared by the Commission and approved by the Department of Justice which includes—

(i) the examination of any branch of law relating (in whole or in part) to a reserved matter or an excepted matter, or

(ii) the consolidation or repeal of legislation relating (in whole or in part) to a reserved matter or an excepted matter,

(b) any set of proposals for reform formulated by the Commission pursuant to an approved programme which relate (in whole or in part) to a reserved matter or an excepted matter, and

(c) any annual report of the Commission which contains anything relevant to a reserved matter or an excepted matter.

(4) The Secretary of State must lay before each House of Parliament a copy of each document received by the Secretary of State under subsection (3).

(5) After a copy of a document has been—

(a) laid before the Assembly in accordance with subsection (2), and

(b) if so required by subsection (4), laid before Parliament in accordance with that subsection,

the Commission must arrange for the document to be published.

(6) In this section "reserved matter" and "excepted matter" have the meanings given by section 4 of the Northern Ireland Act 1998.

(7) Section 41(3) of the Interpretation Act (Northern Ireland) 1954(a) applies for the purposes of subsection (2) in relation to the laying of a copy of a document as it applies in relation to the laying of a statutory document under an enactment.

LAW COMMISSION [Sch.9]

Commissioners' tenure

1 (1) Subject as follows, a Commissioner holds office for the period specified in his appointment (or re-appointment).

(2) A person may not be appointed as a Commissioner for more than five years at a time.

(3) A Commissioner may resign by notice in writing to the Department of Justice.

(4) The Department of Justice may dismiss a Commissioner if satisfied that-

(a) he has without reasonable excuse failed to exercise his functions for a continuous period of three months beginning not earlier than six months before the day of dismissal,

(b) he has been convicted of a criminal offence,

(c) a bankruptcy order has been made against him, or his estate has been sequestrated, or he has made a composition or arrangement with, or granted a trust deed for, his creditors, or

(d) he is otherwise unable or unfit to exercise his functions.

Commissioners holding judicial office

2 (1) A person who holds judicial office may be appointed as a Commissioner without relinquishing that office.

(2) But he is not, unless the terms of his appointment provide otherwise, required to perform the duties of his judicial office while he is a Commissioner.

Salary etc. of Commissioners not holding full-time judicial office

3 (1) The Commission must pay to or in respect of each Commissioner, other than a Commissioner who holds a full-time judicial office, any such-

(a) salary,

(b) allowances,

(c) fees, or

(d) sums for the provision of pensions,

as the Department of Justice may determine.

(1A) If a person who, by reference to any office or employment, is a participant in a scheme under Article 3 of the Superannuation (Northern Ireland) Order 1972 becomes a Commissioner, the Department of Finance and Personnel may determine that (instead of payments being made to him under sub-paragraph (1)(d)) his service as Commissioner is to be treated for the purposes of the scheme as service in that office or employment.

(1B) The Commission must pay to the Department of Justice, at such times as the Department may direct, such sums as the Department may determine in respect of expenditure under the Superannuation (Northern Ireland) Order 1972 attributable to sub-paragraph (1A).

Staff

4 (1) The Commission may employ staff, but subject to the approval of the Department of Justice as to-

(a) numbers,

(b) salary, and

(c) other terms of employment.

(2) The Commission may make arrangements for securing the provision to it of such assistance by persons employed in-

(a) the civil service of the United Kingdom, or

(b) the civil service of Northern Ireland,

as it considers appropriate for or in connection with the exercise of its functions.

(2A) Employment as a member of staff of the Commission is among the kinds of employment to which a scheme under Article 3 of the Superannuation (Northern Ireland) Order 1972 can apply; and, accordingly, in Schedule 1 to that Order (kinds of employment etc. referred to in Article 3), at the appropriate place in the list of “Other Bodies” insert—

“Employment by the Northern Ireland Law Commission.”

(2B) The Commission must pay to the Department of Justice, at such times as the Department may direct, such sums as the Department may determine in respect of expenditure under the Superannuation (Northern Ireland) Order 1972 attributable to sub-paragraph (2A).

Financial provisions

5 The Department of Justice may make grants to the Commission.

6 (1) The Commission must-

(a) keep proper accounts and proper financial records, and

(b) prepare in respect of each financial year a statement of accounts.

(2) The statement of accounts must-

(a) contain such information, and

(b) be in such form,

as the Department of Justice directs.

(3) The Commission must send copies of the statement of accounts relating to a financial year to-

(a) the Department of Justice, and

(b) the Comptroller and Auditor General for Northern Ireland,

within such period after the end of the financial year as the Department of Justice directs.

(4) The Comptroller and Auditor General for Northern Ireland must-

(a) examine, certify and report on the statement of accounts, and

(b) lay a copy of the statement of accounts and of his report on it before the Northern Ireland Assembly.

(4A) Section 41(3) of the Interpretation Act (Northern Ireland) 1954 applies for the purposes of sub-paragraph (4)(b) in relation to the laying of a copy of a statement or report as it applies in relation to the laying of a statutory document under an enactment.

(5) In this paragraph "financial year" means-

(a) the period beginning with the day on which section 50 comes into force and ending with the first 31st March which falls at least six months after that day, and

(b) each subsequent period of twelve months beginning with 1st April.

Miscellaneous

7 The exercise by the Commission of its functions is not affected by-

(a) any vacancy among the Commissioners, or

(b) any defect in the appointment of a Commissioner.

8 (1) The Commission is not to be regarded-

(a) as the servant or agent of the Crown, or

(b) as enjoying any status, immunity or privilege of the Crown.

(2) The Commission's property is not to be regarded as property of, or held on behalf of, the Crown.

9 The Commission may do anything, apart from borrowing money, which it considers is-

(a) appropriate for facilitating, or

(b) incidental or conducive to,

the exercise of its functions.

10 The application of the seal of the Commission is to be authenticated by the signature of any Commissioner or member of staff of the Commission who has been authorised (whether generally or specially) for the purpose.

11 Any contract or instrument which, if entered into or executed by an individual, would not require to be under seal may be entered into or executed on behalf of the Commission by any person who has been authorised (whether generally or specially) for the purpose.

12 A document purporting to be-

(a) duly executed by the Commission under its seal, or

(b) signed on its behalf,

is to be received in evidence and is, unless the contrary is proved, to be taken to be so executed or signed.