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**LAW REFORM IN CONTEXT**

[This address will consider three inter-related topics:  
The Rule of Law, the Northern Ireland Law  
Commission and the Human Rights Act 1998]

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## **I     INTRODUCTION**

**[1]**   It is with enormous pleasure that I have seized the invitation of Dr. Thomas Murphy to address this audience. I am indeed honoured to do so.

**[2]**   It seems to me that there are inextricable links which join together, almost seamlessly, certain topics, or concepts, which are sometimes considered to be freestanding – the rule of law, judicial independence, the common law, parliamentary law making and law reform. Properly analyzed, these doctrines and subjects do not exist in isolation from each other. Rather, each merges with, fortifies and nourishes the other. This address will attempt, in part, to reflect on this interdependence.

**[3]**   I shall also examine the role and responsibilities of the Northern Ireland Law Commission within this broader ambit. This relatively new statutory organisation, properly explained and understood, is a prime illustration of the rule of law, law making and law reform in action. The unmistakable connection between the Law Commission and the population at large will also be considered. More of this later.

**[4]**   On the 10<sup>th</sup> anniversary of the Human Rights Act 1998, it also seems appropriate to reflect on the current position and influence of this statute of towering importance in our legal system and constitutional order. The Human Rights Act cannot be divorced from the doctrine of the rule of law and the subjects of law making and law reform.

**[5]**   Finally, some consideration of the discrete subject of human rights at birth and death and how this is related to the machinery of the Human Rights Act 1998 and the development and reform of the law will hopefully be of interest to the audience.

## II THE RULE OF LAW

[6] It is not uncommon for the world's political leaders to speak of the rule of law in major addresses or interviews. In 1988, Margaret Thatcher said:

*"The freedom of peoples depends fundamentally on the rule of law".*

In 2003, in a speech to the US Congress, Tony Blair stated:

*"Ours are not western values, they are the universal values of the human spirit ... freedom not tyranny; democracy not dictatorship; the rule of law not the rule of secret police".*

More recently, in a BBC interview in 2009, Barack Obama said:

*"Democracy, rule of law, freedom of speech, freedom of religion – those are not simply principles of the West to be foisted on [other] countries, but rather what I believe to be universal principles that they can embrace and affirm as part of their national identity".*

Statements of this kind, superficially at least, are attractive and appealing to many people. But what is the true meaning of **the rule of law**?

[7] In 1885, Professor A V Dicey, the Vinerian Professor of English Law at Oxford, published "*An Introduction to the Study of the Law of the Constitution*". He suggested that the rule of law has three meanings. Firstly, no citizen can be punished except for breaching a properly made law following a judicial decision. Secondly, no one is above the law and all are subject to the same law administered in the same courts. Thirdly, general constitutional principles (such as the right to personal liberty) are the result of judicial decisions determining the rights of private persons in particular cases brought before the court. This is widely acknowledged to be the first attempted comprehensive definition of the rule of law. More recently, Lord Bingham, universally recognised as one of the outstanding judges of the last two centuries, coined the following formulation:

*"The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".<sup>1</sup>*

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<sup>1</sup> Tom Bingham, "The Rule of Law", published in 2010.

[8] The rule of law has a notable universal dimension. It is enshrined in, for example, the preamble to the Universal Declaration of Human Rights (1948), which proclaimed that it is –

*“... essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by **the rule of law.**”<sup>2</sup>*

In European Convention of Human Rights (1950), it was stated that the Governments of European countries had “*a common heritage of political traditions, ideals, freedom and **the rule of law.***”<sup>3</sup> It also features in Clause 1 of The Constitution of South Africa (1996) which, in declaring the values on which the Republic is founded, juxtaposes the “*supremacy of the Constitution and **the rule of law.***”<sup>4</sup> Furthermore, it is no coincidence that the rule of law occupies a prominent position in the EU Treaty. Article 6/1 provides:

*“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and **the rule of law,** principles which are common to the Member States.”<sup>5</sup>*

As this cornerstone provision of the Treaty recognizes, the rule of law is one of the values which binds and unifies the diverse and disparate Member States of the European Union.

[9] It may be said, uncontroversially, that the primary meaning of the rule of law is that everything must be done according to law. Thus every Government Minister who, or Government agency which, purports to act in any given field must justify the action in question as authorised by law – which will normally (though not invariably) mean authorised by parliamentary legislation. Acts of governmental power routinely affect the legal rights, duties and liberties of the individual. All such acts must be shown to have a strict legal pedigree. The courts are the arbiters of whether the necessary legal pedigree exists. Thus the rule of law is founded on the principle of legality. This formulation of the doctrine of the rule of law focuses attention on the exercise of executive power – the acts, directions and decisions of government ministers and officials, indeed all public officers. Lord Bingham couches this in the following terms:

*“Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were*

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<sup>2</sup> My emphasis.

<sup>3</sup> My emphasis.

<sup>4</sup> My emphasis.

<sup>5</sup> My emphasis.

*conferred, without exceeding the limits of such powers and not unreasonably*".<sup>6</sup>

Within this pithy, but profound, formulation one can readily identify the central tenets of contemporary judicial review which, again per Lord Bingham –

*"... is an excellent description of this exercise because it emphasizes that the judges are reviewing the lawfulness of administrative action taken by others. This is an appropriate judicial function, since the law is the judges' stock in trade, the field in which they are professionally expert. But they are not independent decision makers and have no business to act as such. They have, in all probability, no expertise in the subject matter of the decision they are reviewing. They are auditors of legality: no more, but no less"*.<sup>7</sup>

**[10]** It is generally recognised that the rule of law has an important *secondary* meaning in all well developed systems of administrative law: it is that government should be conducted within a framework of recognised rules and principles which restrict the exercise of discretionary power and are designed to prevent its abuse. Once again, it is the courts which are the arbiters of the legitimate use – and misuse – of governmental power.

**[11]** The doctrine of the rule of law is also identifiable in the following profound words, in which the function and responsibility of the courts are duly emphasized:

*"[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"*.<sup>8</sup>

Lord Bingham suggests that the rule of law also embraces the following principles<sup>9</sup>:

- (a) The law must be accessible and so far as possible intelligible, clear and predictable.
- (b) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

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<sup>6</sup> "The Rule of Law" p. 60.

<sup>7</sup> Ibid, p. 61.

<sup>8</sup> The Queen -v- Ministry of Defence, ex parte Smith [1996] QB 517, p. 556 (per Sir Thomas Bingham MR).

<sup>9</sup> *Supra*, pp. 31, 48, 55, 66, 85 and 110.

- (c) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
- (d) The law must afford adequate protection of fundamental human rights.
- (e) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
- (f) Adjudicative procedures provided by the state should be fair.
- (g) The state must comply with its obligations in international law as in national law.

I would highlight two particular features of these formulations. The first is that some of them are couched in less than absolute terms: this is a classic characteristic of the common law, which is intrinsically flexible and adaptable and, hence, responsive to changing circumstances, new social conditions and the evolution of society generally. Viewed thus, the common law possesses a unique constant, ageless quality. The second is their inter-relationship with each other: it is not easy to proclaim and understand any of these freestanding principles without simultaneously considering the others.

### **An Independent Judiciary**

[12] As these varying formulations of doctrine and principle demonstrate, the rule of law and the independence of the judiciary are inseparable elements of a modern constitutional democracy. Plainly, the rule of law cannot function properly and effectively unless adjudication upon the legality of governmental acts is carried out by judges who are independent of the executive. Judicial independence is, therefore, a cornerstone of the rule of law. Properly appreciated, it explains and illuminates the doctrine of the separation of powers. In the context of the United Kingdom, it has been observed that “... *the British Constitution, though largely unwritten, is firmly based upon the separation of powers*”<sup>10</sup>. This is also captured in the following statement:

*“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”.*<sup>11</sup>

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<sup>10</sup> *Duport Steel -v- SIRS* [1990] 1 WLR 142, p. 157 (per Lord Diplock). And see Lord Hoffmann’s lecture “Separation of Powers” [2002] JR 137.

<sup>11</sup> “Administrative Law” (Wade and Forsyth, 10<sup>th</sup> Edition, p. 19).

[13] 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 independence: neither partner can survive without the other. At a recent 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**”*<sup>12</sup>

As a pre-requisite to appointment, every judge 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).

[14] Judicial responsibility, of course, goes hand in hand with judicial independence. No judge has any dispensing power – that is to say the power to set aside or disregard the law. Thus it was observed by Thomas Fuller in the mid 17<sup>th</sup> century:

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<sup>12</sup> The words of the Rt. Hon. Lord Judge, Lord Chief Justice of England and Wales: 16<sup>th</sup> Commonwealth Law Conference, Hong Kong, 9<sup>th</sup> April 2009 – my emphasis.

*“Be ye never so high the law is above you.”*

This followed the public trial, and ensuing execution, of a king who had proclaimed that *“Rex is Lex”*. This claim was exposed as fallacious because it was plainly inimical to the rule of law. The King’s claim was a legal heresy because he asserted that he was the law, whereas, in truth, he was a mere subject of the law. Thus the law is a superior medium binding on everyone, sovereign and citizen alike. Judges are obliged to reflect on this doctrinal truism from time to time, particularly in judicial review cases. The essence – and burden - of judicial responsibility has been described by Lord Judge CJ in these terms:

*“Having been entrusted with huge power, judges have an ultimate responsibility to see that when exercising the power vested in them, they use it lawfully in precisely the same way as **they** ensure that political and other powers vested in other institutions of the State are exercised lawfully.”*<sup>13</sup>

[15] It is well recognised that respect for and protection of judicial independence provides a bulwark for the citizens of every civilised society. In June 1998, the judges of the Commonwealth formulated the principle of judicial independence in these words:

*“Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects”.*

In the United Kingdom context, Lord Bingham of Cornhill has stated:

*“Independence of the judges (or, put negatively, the protection of judges from executive pressure or interference) is all but universally recognised as a necessary feature of the rule of law”.*<sup>14</sup>

The doctrine of the separation of powers requires appropriate deference by Government and Parliament to the decisions of the court. Per Lord Bingham again:

*“Just as the courts must apply Acts of Parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree with them or*

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<sup>13</sup> [My emphasis]

<sup>14</sup> Independent Jamaica Council for Human Rights -v- Marshall-Burnett [2005] UKPC 3 and [2005] 2 AC 356, paragraph [12].

*not, so Parliament and the executive must respect judicial decisions whether they approve of them or not, unless and until they are set aside”.*<sup>15</sup>

Thus the rule of law encompasses a discernible measure of mutual respect between each arm of the three powers of the State – government, parliament and the judiciary  
[ see *infra* ].

### **International Recognition and Statutory Guarantees**

[16] Judicial independence, an inseparable element of the rule of law, is an internationally recognised value of longstanding. See, for example, the Resolutions of the General Assembly of the United Nations.<sup>16</sup> Reference may also be made to a resolution of the UN Economic and Social Council.<sup>17</sup> In similar vein are the well known “Bangalore Principles of Judicial Conduct”.<sup>18</sup> In short, the independence of the judiciary derives from, and is an integral feature of, two seminal principles or doctrines: the first is the rule of law and the second is the separation of powers.

[17] While it may appear somewhat remarkable, the recognition by statute of the independence of the judiciary in the United Kingdom did not occur until the Constitutional Reform Act 2005.<sup>19</sup> In Northern Ireland, the parallel provision is contained in Section 1 of the Justice (Northern Ireland) Act 2002. Pursuant to the latter provision, the First Minister, the Deputy First Minister, Northern Ireland Ministers and everyone responsible for any matter pertaining to the judiciary or the administration of justice “**must uphold the continued independence of the judiciary**”.

### **ECHR**

[18] Article 6 of the European Convention on Human Rights and Fundamental Freedoms provides:

*“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.**”*

[Emphasis added].

In the United Kingdom, Article 6 is one of the Convention rights implemented by the Human Rights Act 1998 (a subject to which I shall return presently).

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<sup>15</sup> In *Re McFarland* [2004] UKHL 17 and [2004] 1 WLR 1289, paragraph [7]

<sup>16</sup> Resolutions 40/32, 29<sup>th</sup> November 1985 and 40/146, 13<sup>th</sup> December 1985.

<sup>17</sup> Resolution 1989/60, 15<sup>th</sup> Plenary Meeting, 24<sup>th</sup> May 1989.

<sup>18</sup> Adopted by the Judicial Group on Strengthening Judicial Integrity – at The Hague, 25/26 November 2002.

<sup>19</sup> See particularly Sections 1 and 3.

Section 6 of this statute makes it unlawful for a court (and for any public authority) to act in a way which is incompatible with any of the protected Convention rights. There are no wasted or superfluous words in Article 6 ECHR. The stipulation is that courts and tribunals must be both independent *and* impartial. These are separate, cumulative requirements.

### **The Rule of Law Further Afield**

[19] Some brief reflections on Nigeria are instructive. Nigeria is a sovereign nation and the largest democracy in Africa. Democratic elections were held in 1999, in the wake of sixteen years of military incursions into power which had entailed a cycle of military dictatorships undermining and damaging the country's economic, social and political systems. A new era of democracy dawned. Some of the writings of Nigerian jurists and judges are both profound and illuminating. In a fascinating treatise, two law teachers of the Faculty of Law, Benson Idahosa University, Nigeria have written:

*“Democracy and the rule of law are the pillars of sustainable development and the guarantee of fundamental freedoms in any society. The rule of law is one of the pre-requisites to creating an enabling environment that supports socio-economic growth and political development. The future of democracy rests with the ability of democratic governments to observe the rule of law. **The rule of law is the fulcrum of democracy and the pillar upon which the structures of democracy stand**”.*<sup>20</sup>

In short, democracy and the rule of law are inextricably linked. In order to survive and prosper, both require access to justice; the separation of powers; effective protection of basic rights; and free and fair elections. Notably, the writers make the following observations about the judiciary, in this context:

*“The judiciary occupies a strategic role in the administration of justice and sustenance of democracy. Any political system that uses the rule of law as its method of ordering societal interactions must have a highly trained judiciary that acts independently of the political system ...*

*The judiciary cannot afford to shrink from its sacred responsibility to maintain the rule of law. For democracy to survive, the courts must dispense justice according to the rule of law”.*<sup>21</sup>

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<sup>20</sup> Volume 36, No. 2, Commonwealth Law Bulletin (June 2010), p. 343 – emphasis added.

<sup>21</sup> Ibid, p. 353.

Thus the rule of law should engage the interest and attentions of not only law students. Rather, it features prominently and inexorably in other fields of study – such as politics, sociology and history. This will serve to remind all students of the law that their future careers will inevitably exert influence in some, perhaps many, sectors of society. In short, the rule of law and the particular society in which it operates are inseparable elements of an indivisible whole.

### **The Common Law**

[20] Although appointed by the King, for the purpose of adjudicating on disputes between citizens, judges became increasingly independent. Their independence 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] The central and essential feature of the common law is that it is judge made. The common law is established and developed through the medium of judicial decisions, which apply or adapt or extend principles contained in earlier decisions to contemporary cases. The doctrine of precedent (in Latin *stare decisis*) is an important feature of the common law. This promotes coherence, predictability and consistency. It also subscribes to the subordination of inferior courts to superior courts. Thus, in a hierarchical court system, the decisions of superior courts are binding on inferior courts. They are bound by the essential legal reasoning (or *ratio decidendi*) of the superior court.

[22] The superior courts are, in descending order, the Supreme Court, the Court of Appeal and the High Court. As a general rule, all of these courts are bound by their earlier decisions. However, there are certain important and judge made exceptions to this general rule. These ensure that the common law retains the necessary flexibility and adaptability to react to new and changing circumstances and to deliver fairness to citizens.

### **The Separation of Powers**

[23] The absence of a written constitution is a singular feature of the government of the United Kingdom. This has been explained on the basis that the laws and political institutions evolved peacefully, with the result that, historically, there was no revolution and, hence, the typical product of a revolution i.e. a constitution did not materialise. Because the King was all powerful (“Rex is lex”), the distribution of governmental power was centralised and the separation of powers unclear. This is illustrated in the office of Lord

Chancellor. On the one hand, the Lord Chancellor was the King's most senior adviser, his highest minister. On the other hand, he was also the most senior judge, the head of the judiciary. Thus the Lord Chancellor was the very antithesis of the separation of powers. This is one of the anomalies which precipitated the recent creation of the new Supreme Court in the United Kingdom and the abolition of the office of Lord Chancellor.

**[24]** 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.

**[25]** The third element of the separation of powers is the doctrine of parliamentary sovereignty. Judicial review and parliamentary sovereignty have in common the oversight of executive (governmental) conduct. Thus the courts and Parliament have constitutional roles which are distinct but complementary.

**[26]** The dominance of Parliament (the legislature) in the realms of law making and law reform is self-evident. In the modern era, there are vast quantities of legislation regulating extensive areas of human, commercial and professional activities. Furthermore, within this broad field there is a basic divide – primary legislation and secondary legislation. The former takes precedence over the latter or, differently phrased, secondary legislation depends for its existence and pedigree on the contents of the relevant measure of primary legislation. It is within this broad sphere that the Northern Ireland Law Commission operates – more presently.

### **III THE NORTHERN IRELAND LAW COMMISSION – WHO WE ARE AND WHAT WE DO**

[27] 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.<sup>22</sup> 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.

[28] 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.

[29] 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.

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<sup>22</sup> The relevant provisions of the 2002 Act, as amended, are contained in an appendix hereto.

- (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.

**[30]** 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 :

- (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.

**[31]** 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**

**[32]** 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 1<sup>st</sup> 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.

**[33]** 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.

**[34]** 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.

**[35]** 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. The Land Law Project is scheduled to be completed by the end of this calendar year, when a report incorporating draft legislation, will be transmitted to the Department. The scheduled completion dates for the remaining First Programme projects are:

- (a) Business Tenancies Project: 28 February 2011.
- (b) Vulnerable Witnesses Project: 31<sup>st</sup> March 2011.
- (c) Bail Law Project: 30<sup>th</sup> November 2011.
- (d) Multi-Unit Developments Project: later date to be finalised.

### **The Commission's Second Programme of Law Reform**

**[36]** The Commission is currently in the process of consulting with regard to the contents of its Second Programme. There has been an opportunity for any interested citizen, professional body or organisation to make known to the Commission their suggestions for law reform (although the time limit is just about to expire). 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 the first quarter of 2011. 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.

[37] As the statutory provisions make clear, the Commission exercises a significant influence in the process of legislating and law reform in Northern Ireland. The Commission's proposals to the Department for the inclusion of specific projects in its periodic law reform programmes will be preceded by a robust and thorough process, which will include a comprehensive exercise of public consultation. This exercise will facilitate appropriate engagement with relevant Government Departments, interested professions, the business sector, the voluntary sector, the judiciary and any other interested parties or groups. This exercise will be accompanied by appropriate publicity, which will include deployment of the Commission's website and the organisation of appropriate public events. As required by statute, the Commission will also consult with the other Law Commissions in the United Kingdom and the Irish Law Reform Commission. Furthermore, there will be an opportunity for specific engagement with those most likely to be affected by the adoption of any given law reform project.

[38] The Commission will carefully consider each of the proposals emerging from the consultation process. In doing so, the Commission will apply 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.

**[39]** The Commission's independence will 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 will be 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 will be followed by appropriate communication between the Commission and the appointed official throughout the duration of the project in question which will entail, *inter alia*, attendance at project steering group meetings. This engagement and liaison will be to the mutual benefit of the Commission and Government. All of these processes will 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.

### **The Bail Law Reform Project**

**[40]** This is one of the five projects which the Commission's First Programme of Law Reform incorporates. In this jurisdiction, 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.

**[41]** 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 Belfast Telegraph 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.

[42] 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. This exercise in public consultation is considered by the Commission to be a vital aspect of the project. Today's event is an important aspect of the accompanying publicity. Those expected to respond 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. Others are encouraged to do likewise. It is emphasised that there is no hierarchy of consultees and respondents. Those who decline to engage and contribute at this stage will lose this golden opportunity to influence and shape future legislation in this important sphere. The Commission looks forward eagerly to receiving the views and suggestions of all interested citizens and organisations. 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.

### **The Northern Ireland Law Commission and Universities**

[43] 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.

Today's event marks a first step in what I sincerely trust will be a long, productive and mutually beneficial relationship between the Commission and this university.

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

## IV THE IMPACT OF THE HUMAN RIGHTS ACT 1998

### Introduction

[45] The launch date for the Human Rights Act 1998 (“HRA 1998”), 2<sup>nd</sup> 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*”.<sup>23</sup> 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*”.<sup>24</sup> 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).<sup>25</sup>

[46] 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*

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<sup>23</sup> *Daniels -v- Walker* [2000] 1 WLR 1382, pp. 1386-1387.

<sup>24</sup> Per Sir John Laws: *R -v- Speers* [2001] paragraph 54.

<sup>25</sup> *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.*”

*by protecting human rights is essential to the proper functioning of democracy*".<sup>26</sup>

[47] HRA 1998 has been variously described as revolutionary, constitutional, historic and dynamic. All of these adjectives see apt. 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.

### **Article 2 ECHR**

[48] Under the deceptively simple banner "Right to Life", Article 2 ECHR states:

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

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

*(a) in defence of any person from unlawful violence;*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*

*(c) in action lawfully taken for the purpose of quelling a riot or insurrection".*

Before examining the content and scope of this right in some discrete scenarios, it is appropriate to recall that it has been repeatedly described as basic, fundamental and supreme. In the language of the European Court, Article 2 "... enshrines one of the basic values of the democratic societies making up the Council of Europe".<sup>27</sup> Comparable pronouncements are found in the texts of the UN Human Rights Committee and the Inter-American Commission on Human Rights. Long before the advent of HRA 1998, the common law had recognised a person's right to life as "*the most fundamental*

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<sup>26</sup> "Human Rights. Have the public benefited?" [2003] 121 Proceedings of the British Academy 301-303.

<sup>27</sup> *McCann -v- United Kingdom* [1995] 21 EHRR 97, paragraph 147.

of all rights".<sup>28</sup> In the specific context of Article 2, the European Court has emphasized the well established principle that given the object and purpose of the Convention as an instrument for the protection of individual persons, it must be interpreted and applied in a manner which renders its safeguards practical and effective.<sup>29</sup> In equally uncompromising language, the European Court has stated that the circumstances in which the deprivation of life may be justified [per Article 2/2] must be strictly construed, given the fundamental nature of the right in play and the consideration that no derogation from Article 2 is permissible in peace time.<sup>30</sup>

[49] In these unavoidably limited reflections, I propose to focus on how, in a series of domestic and European decisions, Article 2 has been judicially interpreted and applied in three particular situations:

- (a) Newly born children.
- (b) Unborn children.
- (c) Assisted suicide.

These three groups have featured prominently in certain landmark decisions of the United Kingdom and Strasbourg courts, particularly during the past decade.

### **At Birth**

[50] It might be said, with the benefit of hindsight, that the legal community had a foretaste of the kind of dramatic issues which would later arise when, in the year 2000, *Re A (Children) (Conjoined Twins)*<sup>31</sup> was decided. It is worth recalling that the hearing of the appeal in this emotional, compelling and highly challenging case was spread over several days in September 2000, with judgment pronounced on the 22<sup>nd</sup> day of that month. HRA 1998 was just around the corner. Unsurprisingly, Article 2 ECHR featured prominently in the written submissions of one of the intervening parties, Pro-Life Alliance.

[51] Jodie and Mary, the conjoined twins, rapidly became household names. They were less than two months old when the Court of Appeal pronounced judgment. They were joined at the lower abdomen. While Jodie was capable of independent existence, an operation to separate the girls would inevitably result in Mary's death. Mary attributed her existence to a common artery, whereby Jodie circulated oxygenated blood for both of them.

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<sup>28</sup> *Bugdaycay -v- Secretary of State for the Home Environment* [1987] AC 514, at p. 531, per Lord Bridge.

<sup>29</sup> *McCann*, paragraph 146.

<sup>30</sup> See Article 15(2), permitting derogation in respect of deaths resulting from lawful acts of war. Notably, in *Ocalan -v- Turkey* [2005] 41 EHRR 45, the European Court held that the arbitrary deprivation of life pursuant to capital punishment laws *or* the deprivation of life pursuant to the execution of a sentence of a court which is not independent and impartial in the Article 6 ECHR sense would contravene Article 2: see paragraph 166.

<sup>31</sup> [2000] 4 All ER 961.

Absent the separation operation, both would die within a matter of months, as Jodie's heart would fail. The Trust's doctors formed the view that the operation should proceed. Only one of the girls could survive, if both were not to die: would the court's sanction life for one and death for the other? The girls' parents declined to consent, giving rise to an application to the court by the Trust for a declaratory order. The application succeeded at first instance and the appeal was dismissed.

[52] In the opinion of the Court of Appeal, the fundamental question was whether it was in the best interests of one twin that an operation be performed to separate her from the other, thereby preserving and extending the other's existence, in circumstances where the first twin would inevitably die in consequence. By a majority, the Court of Appeal answered this question in the negative. Ultimately, this supremely difficult dilemma was resolved by resort to the welfare principle enshrined in Section 1(1) of the Children Act 1989. To what extent, if at all, did Article 2 ECHR influence the outcome of this landmark case? In short, in this moving and difficult case, the right to life enshrined in Article 2 ECHR did not operate to protect or preserve a newly-born baby's existence. On the contrary, it was construed as justifying the medical intervention which would terminate that existence, based on the justification that such termination would occur in any event, while the intervention would save the life of another child. Thus the right to life of one baby trumped the right to life of the other. One can be reasonably confident that neither those who framed ECHR nor those who promoted and devised HRA 1998 foresaw this kind of sad, moving and highly complex matrix. In truth, the influence of Article 2 in the resolution of the issues which exercised the court was quite limited.

[53] A recent illustration of yet another "life or death?" case is provided by *Re OT (a child)*<sup>32</sup>. In that case, a baby aged ten months was suffering from a mitochondrial condition. Various medical interventions had been undertaken to no avail. The Trust's physicians formed the view that these attempts would remain unsuccessful and, moreover, were causing the baby gratuitous pain. They sought a declaration from the court that they could lawfully discontinue the treatment, in circumstances where death would inevitably ensue. The judge acceded to their application. Interestingly, the case was (apparently) so clear cut that the Court of Appeal refused permission to appeal.

### **Before Birth – In Utero**

[54] The decision in *Paton –v- United Kingdom*<sup>33</sup> did not avail baby Mary in the Conjoined Twins case. *Paton* is one of the remarkably small number of cases in which either of the Strasbourg organs (i.e. the Court and the Commission) has had to pronounce on the thorny and controversial issue of terminating a pregnancy. The subject matter of Mr. Paton's challenge was his wife's decision to have an abortion when eight weeks pregnant. In

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<sup>32</sup> [2009] ECWA. Civ 409.

<sup>33</sup> [1981] 3 EHRR 408

accordance with Section 1(1) of the Abortion Act 1967, two medical practitioners had certified that the continuance of the pregnancy would involve injury to the physical or mental health of his wife. The two had separated and she claimed to be living in fear of the Applicant and on the verge of a breakdown. An application by the father to the Family Division of the High Court for an injunction restraining the abortion was dismissed. The abortion was duly performed within hours of the High Court's decision.

[55] The Applicant subsequently brought a petition under Article 25 ECHR, invoking Articles 2, 5, 6, 8 and 9. The decision of the European Commission is noteworthy, for two reasons. Firstly, the Commission accepted that the Applicant, being the putative father, was so closely affected by the termination of his wife's pregnancy that he was a victim within the meaning of Article 25.<sup>34</sup> Secondly, the Commission held that no violation of Article 2 had been established. The Commission concluded that the unborn life of the foetus could not take priority over a serious risk to the life of the pregnant mother, as this would entail an implied limitation on the mother's right to life over and above the express limitations specified in Article 2. To hold otherwise would be contrary to the object and purpose of the Convention. Accordingly, at its zenith, if the foetus could claim a right to life under Article 2, it would be subject to the aforementioned limitation. However, the Commission declined to supply a definitive answer to this question, reasoning and concluding as follows:

*"[23] The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a 'right to life' of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion complained of is compatible with Article 2(1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the 'right to life' of the foetus."*

Thus the complaint was declared inadmissible as manifestly ill-founded. In the very small number of cases where these issues have arisen, the Commission has essentially reasoned and concluded in these qualified and unsatisfactory terms.<sup>35</sup>

[56] Some of these issues crystallized starkly before the European Court of Human Rights in **Vo -v- France**, [2004] ECHR 326 where, very sadly, an error of identity resulted in the unsolicited and unintended abortion of a Vietnamese lady who was six months pregnant. The doctor concerned was acquitted of unintentional homicide in a judgment of the Cour de Cassation.

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<sup>34</sup> Paragraph 2.

<sup>35</sup> See the convenient summary of the Commission jurisprudence in *Vo -v- France (infra)*, paragraphs 75- 80.

The focal point of the Applicant's petition to Strasbourg was a complaint that the absence of a criminal sanction within the French legal system to punish the unintentional destruction of an unborn child constituted a failure by the State to discharge its duty to protect by law the right to life under Article 2. The Strasbourg court rejected the Applicant's case.

[57] A majority of the judges concluded that the issue of when the right to life begins falls within the margin of appreciation of the Contracting States. The court's expressed reasons for this conclusion are of particular interest. They were twofold. The first is that this issue has not been resolved within the majority of the Contracting States. The second is the absence of any European consensus on the scientific and legal definition of the beginning of life. Thus this *supra*-national court declined to take the lead on an important and controversial issue. It justified this reluctance by reference to the absence of any clearly settled approach within the Contracting States. This stimulates an interesting and topical reflection: in the converse situation, where the Strasbourg jurisprudence does not obviously and fully supply the answer in a HRA 1998 case, are domestic courts any more adventurous than their European counterpart? A very recent decision of the United Kingdom Supreme Court suggests a negative answer.<sup>36</sup> While an extensive treatise of this particular topic is not appropriate here, a review of some earlier decisions of the House of Lords suggests a degree of schizophrenia in this respect.<sup>37</sup>

### Later in Life

[58] The issue of assisted suicide under HRA 1998 first exercised the House of Lords in **R (Pretty) –v- DPP**<sup>38</sup>. Diane Pretty suffered from motor neurone disease, a progressive degenerative illness, with no hope of cure or recovery. While paralysed from the neck downwards, her intellect and capacity of decision making were unimpaired. Her aspiration was to control when and how she would die. She was physically incapable of taking her own life and would require the assistance of her husband to do so. The dilemma thereby generated was whether, in this eventuality, her husband would be prosecuted for the offence of assisting suicide contrary to Section 2(1) of the Suicide Act 1961. The statute further provided, by Section 2(4),

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<sup>36</sup> **R (Smith) –v- Secretary of State for Defence** [2010] UKSC 29 where, by a majority, the Supreme Court held that on the true interpretation of Article 1 ECHR British troops operating on foreign soil are outwith the jurisdiction of the United Kingdom. One of the themes of the majority judgments is that if ECHR (and, hence, HRA 1998) has this reach, the proper forum for so declaring is the Strasbourg Court.

<sup>37</sup> See especially **Re P and Others** [2008] UKHL 38 and [2008] NI 310, where a majority of the House of Lords was undeterred by the fact that the Strasbourg jurisprudence did not clearly answer the Convention issues which arose: see especially per Lord Hoffmann, paragraphs [27]-[38]. The sole dissenting opinion of Lord Walker, to the effect that it was "*far from clear*" that the Strasbourg Court would hold that the relevant domestic statutory measure infringed ECHR, did not prevail: paragraph [82]. Baroness Hale declared that the appeal raised "*an issue of fundamental importance*" in the operation of HRA 1998: What should the domestic court do where a municipal statutory provision is incompatible with ECHR rights, in a sphere which the Strasbourg Court might consider to belong to the margin of appreciation of the Contracting States?

<sup>38</sup> [2002] 1 AC 800

that a prosecution of this *genre* can be instituted only with the formal consent of the DPP. The latter refused to provide an undertaking that Diane Pretty's husband would not be prosecuted and this decision was duly challenged. Appropriately, the case was ultimately considered by the House of Lords, where the fact of divergent views throughout the Council of Europe states was highlighted. This theme emerged particularly in the opinion of Lord Steyn, who also contrasted the European Convention and the UN Declaration on Human Rights:

*"[56] The Human Rights movement evolved to protect fundamental rights of individuals either universally or regionally. The theme of the declaration of 1948 was universal. It involved a common conception capable of commanding wide acceptance throughout the world despite huge differences between countries in culture, in religion and in political systems ... Any proposal that the Universal Declaration should require states to guarantee a right to euthanasia or assisted suicide (as opposed to permitting states by democratic institutions so to provide) would have been doomed to failure. The aspirational text of the Universal Declaration was the point of departure and inspiration of the Convention which opened for signature in 1950. It is to be noted, however, that the Convention embodied in some respects a narrower view of human rights than the Universal Declaration ... The generality of the language permits adaptation of the Convention to modern conditions. It is also, however, necessary to take into account that in the field of fundamental beliefs the European Court of Human Rights does not readily adopt a creative role contrary to a European consensus, or virtual consensus. The fact is that among the forty-one member states ... there are deep cultural and religious differences in regard to euthanasia and assisted suicide".*

Thus, said Lord Steyn, the court must treat with scepticism the suggestion that the Convention *requires* States to render lawful euthanasia and assisted suicide. Lord Steyn's observation about the generality of the Convention's language highlights what I consider to be one of its intrinsic strengths and virtues. This is linked to its description as a living instrument and ensures its enduring ability to adapt to changing conditions. By virtue of these characteristics, there is a readily identifiable affinity between the Convention and the common law.

[59] In *Pretty*, the House of Lords were both unanimous and uncompromising in holding that Article 2 ECHR did not support Mrs. Pretty's case. Lord Bingham characterised the Secretary of State's arguments as

“unanswerable”.<sup>39</sup> Lord Steyn dismissed Mrs. Pretty’s Article 2 arguments in pithy terms:

*“[59] ... Counsel for Mrs. Pretty argued that Article 2 and in particular its first sentence acknowledges that it is for the individual to choose whether to live or die and that it protects her right of self-determination in relation to issues of life and death. This interpretation is not sustainable. The purpose of Article 2(1) is clear. It enunciates the principle of the sanctity of life and provides a guarantee that no individual ‘shall be deprived of life’ by means of intentional human intervention. The interpretation now put forward is the exact opposite viz. a right of Mrs. Pretty to end her life by means of intentional human intervention. Nothing in the Article or the jurisprudence of the European Court of Human Rights can assist Mrs. Pretty’s case on this Article”.*

Mrs. Pretty’s invocation of other Convention rights, in particular Articles 3 and 8, was similarly unsuccessful.

**[60]** The European Court agreed with the House of Lords in all respects but one (*infra*).<sup>40</sup> In particular, the Court stated:

*“[39] The consistent emphasis in all the cases before the court has been the obligation of the State to protect life. The court is not persuaded that the ‘right to life’ guaranteed in Article 2 can be interpreted as involving a negative aspect ...*

*[Article 2] is unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life ...*

***Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life”.***

[Emphasis added].

Accordingly, Article 2 ECHR does not protect any right to die, whether with the assistance of some other person or a public authority.

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<sup>39</sup> Paragraph 5.

<sup>40</sup> [2002] 35 EHRR 1.

[61] The energy and ingenuity of human rights lawyers ensured, however, that the story did not end there. A short time later, Convention issues surrounding assisted suicide resurfaced, in *R(Purdy) –v- DPP*.<sup>41</sup> This time, the twin focus of the legal challenge was Section 2(1) of the Suicide Act 1961<sup>42</sup> and the DPP's policy on bringing prosecutions for the offence of assisting another person's suicide. Deborah Purdy suffered from primary progressive multiple sclerosis, a disease for which there is no known cure. Her condition had deteriorated progressively, to the point where she mobilised with an electric wheelchair, was unable to swallow properly, suffered choking fits when drinking and was incapable of carrying out many basic tasks of daily living. Her aspiration was to be able to end her life, duly assisted, at some point in the future of her choosing, having decided that her continuing existence was unbearable. The basic question for the courts was whether HRA 1998 provided the vehicle whereby she could fulfil this ambition.

[62] The main feature which distinguished this legal challenge from others was the Convention right upon which it was founded, Article 8, which provides:

*“(i) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of this order or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.*

The arguments presented on behalf of Ms. Purdy placed under particular scrutiny the words “*respect for his private life*”, in Article 8(1) and “*in accordance with the law*”, in Article 8(2). It was not in dispute that the DPP is a public authority within the ambit of Section 6(1) of HRA 1998. Thus it is unlawful for him to act in a way which is incompatible with a Convention right. The key to the outcome of this litigation lay in a superficially innocuous passage in the judgment of the European Court in *Pretty*:

*“[67] The Applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the*

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<sup>41</sup> [2005] UKHL 45.

<sup>42</sup> “A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years”.

*Convention. It considers below whether this interference conforms with the requirements of the second paragraph of Article 8.”*

Thus the European Court disagreed with the House of Lords, whose view was that Article 8 was directed to the protection of one’s personal autonomy while alive, but did not embrace a right to decide when or how to die. The European Court held, however, that the relevant interference – Section 2 of the 1961 Act – was necessary in a democratic society for the protection of the rights of others.

**[63]** As a direct result of the decision of the European Court in *Pretty*, Deborah Purdy, some seven years later, was able to overcome the Article 8(1) obstacle and entered the territory of Article 8(2), where the fundamental question became whether the two elements of the relevant interference viz. Section 2 of the Act and the corresponding DPP policy were *in accordance with the law*. Their Lordships acknowledged that the difference between the House and the Strasbourg point on the Article 8(1) issue was “*on a narrow but very important point*”.<sup>43</sup> The House recalled the European Court’s reasoning on this issue:

*“[65] The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity”.*

The House of Lords recognised that paragraph 65 of the Strasbourg judgment was tailor made for Ms. Purdy’s case. Thus the crucial question became: Was the interference in accordance with the law? The resolution of this crucial question entailed consideration of what is sometimes described, in shorthand, as, the Convention principle of legality.

**[64]** As noted by Lord Hope, the Convention principle of legality requires the court to address three distinct questions:

- (a) Is there a legal basis in domestic law for the restriction?
- (b) Is the relevant domestic law or rule sufficiently accessible to potentially affected individuals and sufficiently precise to enable them to understand its scope and foresee the consequences of

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<sup>43</sup> Paragraph 35, per Lord Hope.

their conduct, so as to regulate their lives without infringing the law?

- (c) Assuming that the first two requirements are satisfied, is the application of the relevant legal rule or law arbitrary or disproportionate?

In this context, the concept of “law” is to be understood in its substantive, rather than formal, sense. Thus it is not necessarily confined to the language of the relevant statute. Lord Hope expounded on the principles in play in the following terms:

*“[41] ... Accessibility means that an individual must know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it what acts and omissions will make him criminally liable ...*

*The requirement of foreseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary.”*

The close affinity between these principles of European Human Rights law and the UK doctrine of the rule of law, analysed in Chapter II above, is at once apparent. The House was satisfied that Section 2(1) of the 1961 Act complied with all these requirements. But the focus of Ms. Purdy’s argument was Section 2(4): in what manner could the DPP be expected to exercise his statutory discretion whether to consent to prosecution?

**[65]** Under Section 10 of the Prosecution of Offences Act 1985, the DPP had promulgated a Code for Crown Prosecutors, embodying guidance on general principles to be applied in deciding whether a prosecution should be initiated. The House considered that this Code formed part of the relevant law, for the purposes of Article 8(2). Paragraph 5.9 of the Code listed what it described as some public interest factors in favour of prosecution, while paragraph 5.10 enumerated some common public interest factors contraindicating prosecution. The Court of Appeal had noted that many of the factors in these two lists could have no relevance in a case of assisted suicide. The DPP himself had acknowledged this, in formulating his published reasons in the case of Daniel James. Lord Hope considered that the Code fell “... short of what is needed to satisfy the Convention tests of accessibility and foreseeability”.<sup>44</sup> He continued:

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<sup>44</sup> Paragraph 53.

*“The Director’s own analysis shows that, in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all. The question whether a prosecution is in the public interest can only be answered by bringing into account factors that are not mentioned there ...*

*[54] The Code will normally provide sufficient guidance to Crown Prosecutors and to the public as to how decisions should or are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute. This is a valuable safeguard for the vulnerable, as it enables the prosecutor to take into account the whole background of the case. In most cases its application will ensure predictability and consistency of decision-taking, and people will know where they stand. But that cannot be said of cases where the offence in contemplation is aiding or abetting the suicide of a person who is terminally ill or severely and incurably disabled, who wishes to be helped to travel to a country where assisted suicide is lawful and who, having the capacity to take such a decision, does so freely and with a full understanding of the consequences. There is already an obvious gulf between what section 2(1) says and the way that the subsection is being applied in practice in compassionate cases of that kind.”*

Thus, in this landmark case, Ms. Purdy’s appeal succeeded. The relief which she secured is noteworthy. Per Lord Hope:

*“[56] I would therefore allow the appeal and require the Director to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy’s case exemplifies, whether or not to consent to a prosecution under section 2(1) of the 1961 Act.”*

Hence the rarely invoked prerogative remedy of mandamus was considered the appropriate vehicle to rectify the illegality. It is worth highlighting this discrete consideration, having regard to the breadth of the judicial remedies provision of HRA 1998, Section 8. In language which could scarcely be more elastic, Section 8(1) empowers the court to grant “*such relief or remedy, or make such order, within its powers as it considers just and appropriate*”. Section 8 typifies the radical and far-reaching nature of this landmark reforming statute.

[66] So-called “mercy killing” is a very topical subject. I wish to add a brief word on the operation of **the criminal law** in this sphere, having regard to a very recent decision of the English Court of Appeal. **R –v- Inglis**<sup>45</sup> was indeed a tragic case. Thomas Inglis was a fit young man, aged twenty-one years. He suffered catastrophic head injuries and, three months later (in September 2007), his mother injected him with heroin on his hospital bed, intending to end his life. He suffered cardiac arrest, but was resuscitated. His mother was charged with attempted murder. Just over one year later (In November 2008), she repeated her actions (in breach of her bail conditions) and Thomas died. There was no suggestion of assisted suicide. A jury convicted the mother of both attempted murder (In September 2007) and murder (in November 2008). The mandatory punishment of life imprisonment, with a “minimum term” (or “tariff”) of nine years, was imposed. Her appeal against conviction was dismissed.

[67] Delivering the judgment of the Court of Appeal, the Lord Chief Justice stated:

### **“Mercy Killing**

*[37] On any view this case is a tragedy, not only for the appellant, who has lost a precious and loved son, but for the father and brothers of the deceased and the extended family. There is a wider public interest in the case because the issues to which it gives rise are immensely sensitive and difficult, and they have attracted an increasing measure of public interest and concern. Therefore we must underline that the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well established partial defences, like provocation or diminished responsibility, mercy killing is murder. The offences of which the appellant was convicted, and for which she fell to be sentenced, were attempted murder and murder. The sentence on conviction for murder is mandatory. The judge had no alternative but to order imprisonment for life. He then had to assess the length of the minimum period to be served before the possibility of release from prison on licence could arise for consideration. In making that assessment he was obliged to have regard to the statutory provisions in schedule 21 of the 2003 Act.*

*[38] We must also emphasise that the law does not recognise the concept implicit in the defence statement that Thomas Inglis was “already dead in all but a small*

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<sup>45</sup> [2010] EWCA. Crim 2637.

*physical degree". The fact is that he was alive, a person in being. However brief the time left for him, that life could not lawfully be extinguished. Similarly, however disabled Thomas might have been, a disabled life, even a life lived at the extremes of disability, is not one jot less precious than the life of an able-bodied person. Thomas's condition made him especially vulnerable, and for that among other reasons, whether or not he might have died within a few months anyway, his life was protected by the law, and no one, not even his mother, could lawfully step in and bring it to a premature conclusion. Until Parliament decides otherwise, the law recognises a distinction between the withdrawal of treatment supporting life, which, subject to stringent conditions, may be lawful, and the active termination of life, which is unlawful.*

*[39] We cannot decide the case on the basis of whichever of the contradictory strands of public opinion in this extremely sensitive area happens to coincide with our own views, assuming that is, that if we had allowed our personal feelings to impinge on our discussions, that there would be any coincidence of views. How the problems of mercy killing, euthanasia, and assisting suicide should be addressed must be decided by Parliament, which, for this purpose at any rate, should be reflective of the conscience of the nation. In this appeal we are constrained to apply the law as we find it to be. We cannot amend it, or ignore it. "*

Notably, the Lord Chief Justice then referred to what he described as the English Law Commission's "*careful analysis of this profoundly sensitive issue*" in its report "*Murder, Manslaughter and Infanticide*":<sup>46</sup>

*"All "mercy" killings are unlawful homicide.*

*7.4 The law ...does not recognise either a tailor-made defence of "mercy" killing or a tailor-made offence, full or partial, of "mercy" killing. Unless able to avail him or herself of either the partial defence of diminished responsibility or the partial defence of killing pursuant to a suicide act, if the defendant intentionally kills the victim in the genuine belief that it is in the victim's best interest to die, the defendant is guilty of murder. This is so even if the victim wished to die and consented to being killed...*

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<sup>46</sup> [2006] Law Com. 304, Part 7.

*7.6 The current law does not recognise the "best interests of the victim" as a justification or excuse for killing. What it does, instead, is to acknowledge to a very limited extent, that the consent of the victim can be relevant in the context of suicide pacts...*

*7.7 Under the current law, the compassionate motives of the "mercy" killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation) and fear (self-defence). Others would say that recognising a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity "can very easily become simply a mask for anarchy", so the concept of "compassion" – vague in itself – could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives".*

The Lord Chief Justice then observed:

*" [41] In reality, in a true case of mercy killing, provocation is unlikely to provide any defence. The more likely defence would be diminished responsibility. Either defence would reduce murder to manslaughter: it could not result in an acquittal. However, whereas the judge must leave the defence of provocation to the jury if there is evidence to sustain it, whether or not the defendant or his legal advisers have invited the jury to consider it, the defence of diminished responsibility must be raised by the defendant. If the defendant chooses not to canvass diminished responsibility, there is rarely anything the judge can do about it."*

The Court noted that diminished responsibility had not been advanced as a partial defence by the Appellant, while recording the suggestion in medical reports that she was at all material times depressed and suffering from post-traumatic stress disorder. However, this did not constitute a defence, partial or otherwise. Thus the appeal against conviction failed.

**[68]** The Court then turned to consider the mother's appeal against sentence. It is a long established principle of sentencing law that every court, in determining the appropriate punishment in a given case, must identify and then weigh those factors which appear to aggravate the offending and those which serve to mitigate same. In the case of **R –v- Inglis**, the Court of

Appeal's exposition of the identifiable mitigating and aggravating factors is illuminating:

*"Appeal Against Sentence*

*[55] We must focus on all the critical facts and find a balance between them in which justice is appropriately tempered with mercy. Not all the crucial facts provide the appellant with mitigation. Some aggravate her offences.*

*[56] Thomas was helpless. He may have been able to communicate something of the severity of his fear and panic to those who loved him, but we do not and never shall know what his response to any suggestion of euthanasia or an assisted suicide might have been, whether in September 2007 or again in November 2008. It may provide something of a comfort to the appellant and those who loved him if they have come to terms with Thomas's death by convincing themselves that if he could have communicated his wishes he would indeed have asked for his life to be ended. But, we do not know, and we are not prepared to make any such assumptions. As we have explained, this was not an assisted suicide in which the appellant did for her son what he could not physically do and desperately wanted to do for himself.*

*[57] The appellant's actions were deliberate and premeditated, and her compulsive objective was indeed to kill her son. She was motivated throughout by her personal, unremitting conviction that she should release him from the living hell his very limited life had become and which it would continue to be, and also because she herself, in all probability because of her fragile personality and depressive disorders, was unable to cope personally with the catastrophic consequences of the accident. She has never felt any sense of guilt or remorse, and she was and remains convinced that, irrespective of what anyone else might think, her son's life had to be brought to an end.*

*[58] There are a number of features which obviously mitigate the offence, and we have largely set them out in our narrative account of the facts. We have recorded that the appellant has no sense of remorse for what she has done. In this particular case the*

*absence of remorse does not extinguish the mitigation that she has already suffered and will continue hereafter to suffer the terrible grief of the loss of Thomas, as she would put it, as a result of the accident in July 2007. The mitigation consequent on her grief should not be reduced by the absence of remorse for the killing. She was ill equipped psychologically to cope with the disaster which befell Thomas, and for that reason, the consequent stresses and strains on an already fragile personality were disproportionately grave. In our view her mental responsibility for her actions, driven as she was by a compulsive obsession, was diminished if not sufficiently for the purposes of the defence of diminished responsibility, certainly to an extent that reduced her culpability. This combination of factors led to her long obsession with the belief that as his mother she owed a duty to Thomas to end his suffering. And there is no doubt about the genuineness of her belief that her actions in preparing for and eventually killing Thomas represented an act of mercy or that the grief consequent on the loss of her son is undiminished by her responsibility for his death. These are powerful considerations, far removed from the ordinary case of murder.*

*[59] However the appellant's culpability is reduced, it is not extinguished. She had resolved to kill Thomas within a very short time of the accident, almost in its immediate aftermath, and well before the long-term results of the operations and treatment could be known, and indeed while the remaining members of Thomas's family were still hoping that he would survive. She was convinced that she, and she alone, knew what was best for Thomas, to such an obsessive extent that any view to the contrary, however it was expressed, was to be rejected out of hand. This was not a moment or two of isolated thinking, but a settled intention. She tried to kill Thomas and did eventually kill him without a thought to the feelings of anyone else, including his father and his brothers, and indeed the members of the medical professions who were doing their very best to care for him. What is more, she assumed that she knew what Thomas's wishes would have been, and close as the bond between mother and son no doubt was, he was an adult whose mother would not always have been able to speak for him. When the first attempt failed, she ignored the potential consequence to others of denying her involvement in the offence, justifying the*

*possibility that blame might pass unfairly to anyone else on the basis that she must continue to be free to achieve her objective. The process of preparing for trial for attempted murder, and the intimation that there would be a guilty plea, obscured the fact that she was making arrangements to deceive those responsible for her son's care into believing she was not his mother. And perhaps most significantly of all, her unsuccessful attempt to kill Thomas produced a deterioration in his condition without which, as far as we can see, the possibility of the withdrawal of hydration and nutrition would have been most unlikely to arise. In short, harsh as it is to have to say it, she had contributed to the very sorry condition from which, on the day of his death, Thomas was suffering, as well as the risk of the awful death from which she intended to relieve him. Because of her early fixed obsession, she never sought advice or information from medical experts on how the suffering of the patient might be reduced if the decision was made to apply to the court to allow him to die. As it is, her intention that Thomas should die was fixed long before that sad final state was reached because, as far as she was concerned, within a very short time of the accident, Thomas had to die. At that time no one else shared her view, and she decided that she must kill him herself. On the first occasion she failed to kill him, but added to his disabilities, and, on the second she was better prepared, and succeeded. "*

There are no wasted words in this detailed analysis and careful reading will undoubtedly be repaid.

**[69]** Finally, the Lord Chief Justice acknowledged that the appeal presented "**one of the most difficult sentencing decisions faced in this court**"<sup>47</sup> As life imprisonment (properly understood) is the mandatory punishment for a murder conviction, the Court of Appeal could not interfere with this. However, their conclusion was that the minimum term should be reduced from nine to five years. Thus the appeal against sentence succeeded. I trust that the decision in this case will stimulate reflection and informed debate amongst law teachers, criminologists, sociologists, judges and students of law. If nothing else, it exemplifies the enormous challenges and complexities which can arise for judges in the sentencing of offenders.

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<sup>47</sup> Paragraph [61].

## **V CONCLUSION**

[70] In this address I have considered a series of themes, concepts, doctrines and principles. I acknowledge that some of these are, from the perspective of studying and learning the law, freestanding subjects – public law, constitutional law, human rights law and so forth. I hope, however, that students will reflect on how these subjects, themes and principles inter-relate with each other and, further, are inextricably inked to the topics of law making, the development of the law and law reform. This broader canvas oversees, shapes and influences individual law subjects. It is omnipresent, if not omnipotent and law students would, I suggest, do well to develop an awareness of its presence and influence. This, in turn, helps to remind everyone in the world of law – students, teachers, Government service lawyers, practitioners and judges – what our primary function is: we all exist to serve the public faithfully, skilfully and conscientiously. We have in common this great privilege and responsibility. The practice of the law is a noble and rewarding profession. If, in delivering this address, I have succeeded in conveying this challenging and encouraging message alone to you, the members of this audience, the lawyers of the future, I shall have achieved much indeed. I wish you every success and personal fulfilment in your studies and ensuing careers.