LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RT HON. THE LORD THOMAS OF CWMGIEDD

'LAW REFORM *NOW*' IN 21ST CENTURY BRITAIN: BREXIT AND BEYOND

SIXTH SCARMAN LECTURE

GRAY'S INN

26 June 2017

---

(1) INTRODUCTION

1. It is a singular honour and privilege to have been invited to give the sixth Scarman Lecture, which are given at two yearly intervals. I will attempt to follow in the footsteps of the very distinguished previous lecturers.[1]

2. I have taken as the first part of the title of this lecture words with which Lord Scarman would have been very familiar: Law Reform *Now* – the three words which formed the title of the Gerald Gardiner and Andrew Martin book which contained their blueprint for what would become the Law Commission[2]. As Sir Geoffrey Palmer QC, in the course of tracing the origins and huge success of the Law Commission in his 2015 Scarman Lecture, recalled, it started with a proposition; one they took to be axiomatic: ". . . that much of our English law is out of date, and some of it shockingly so."[3] They were not wrong.

3. The problem highlighted was that both common law and statute law needed a fundamental overhaul, which was a consequence of their historic and incremental development. Developments over the centuries had not, with some very notable exceptions, been systematised or rationalised. Inconsistencies had arisen, and had been left uncorrected. Obsolete laws remained on the statute book. Although there had been much activity during the zeal of Victorian era (when, for example, the law of marine insurance was codified and much of the

---

[1] I wish to thank Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, and James Burke, Legal Adviser to the Lord Chief Justice, for their help in preparing this lecture.

[2] For a discussion of the background see G. Palmer, *The Law Reform Enterprise: Evaluating The Past and Charting the Future* (Scarman Lecture 2015) <http://www.lawcom.gov.uk/wp-content/uploads/2015/05/Scarman_Lecture_2015_as_delivered.pdf>

[3] G. Gardiner & A. Martin (ed), *Law Reform Now* (Victor Gollancz) (1963) at 1 cited in G. Palmer ibid at 5.

criminal law and procedure was shorn of its brutal past), there had been no widespread or systematic continuation of that work. The work of the Law Revision Committee, established in 1934, and its successor the Law Reform Committee, established in 1952, had seen notable achievements; for example, the Law Reform (Miscellaneous Provisions) Act which updated many out-of-date principles and provisions was the result of the first report of the Law Revision Committee. The Committee was established on 10 January 1934; its first report was dated 17 March 1934 and the Act giving effect to it received the Royal Assent on 25 July 1934. However, these Committees had many limitations, such as lack of Parliamentary time and a reluctance to look at the law of other states.[4] Furthermore, as many of us know, committees that meet at 4.30 pm have their obvious disadvantages.[5] There was no Committee for the reform of the Criminal Law until 1959.

4. Law Reform *Now* was initially published in 1963. It was reprinted in May 1964. A few short months later in October 1964, Gardiner, by then Lord Gardiner, became Lord Chancellor in Harold Wilson's newly elected Labour government.[6] He did so on the basis, agreed beforehand with Wilson, that the government would turn his and Martin's blueprint into reality.[7] Wilson was as good as his word, and in June 1965, the Law Commissions Act became law[8], despite the opposition from former Lord Chancellors[9]. It is unusual for an idea to move so quickly from articulation to inception. It was, however, an idea that appealed to the times, and the idea common in the early 1960s that the world would be reinvented in '*the white heat of the technological revolution*', which was central to the Wilson government's appeal to the public[10] and was part of the political tide.

5. Since its creation, the Law Commission has made a signal contribution to the reform and development of our law.[11] As a consequence it is in much better shape than it was in 1963. Lord Gardiner and Andrew Martin identified a problem. They proposed the solution and saw it implemented. And Lord Scarman, as the first Chairman of the Law Commission of England and Wales, and his many successors have ensured that the Commission fulfilled and continues

[4] See ECS Wade: *The Machinery of Law Reform*; N Hutton: *Mechanics of Law Reform* (1961) 24 M.L.R. 1 and 18
[5] As Lord Gardiner wrote "the Law Reform Committee did useful work, but the trouble was that it consisted of busy judges, barristers, solicitors and academic lawyers who only met about once a month at 4.30 after a day in court and at 6 someone would say: I am afraid that I have to go now." (1971) 87 LQR 326 at 328.
[6] See G. Gardiner in P. Archer & A. Martin (eds.), *More Law Reform Now*, (Rose) (1983) at ix.
[7] See B. Hale in M. Dyson, J. Lee & S. Wilson Stark (eds.), *Fifty years of the Law Commissions: The dynamics of law reform*, (Bloomsbury) (2016) at 18.
[8] Law Commissions Act 1965.
[9] See Heuston, *Lives of the Lord Chancellor's 1940 -1970* at 230.
[10] See G. Palmer ibid at 6.
[11] Law Commissions Act 1965, s.1.

to fulfil its aim. As Lord Simon once put it, the Law Commission was "the most successful institutional innovation of [his] lifetime".[12] That it was and continues to be so successful is a testament to its creators and all those individuals who have worked at the Law Commission. As a Welshman, I can say how deeply indebted Wales is for the work done specifically for Wales, even though it is also the incidental beneficiary of the work on tenancies intended for England as well, but not adopted in England.

6. This is not to say that the law does not remain in many parts obscure, in need of clarification or consolidation. As each of the Law Commission's work programmes demonstrate: there is always more than needs to be done. Its task is all the more important now due to the growth of litigants-in-person: where the State fails to provide the means for individuals to access legal advice in a system of law and procedure that is designed on the assumption that they will be represented, it becomes all the more critical that the State ensures that the law itself is clear and readily understandable by its citizens.

7. The Law Commission is engaged now on a large number of important tasks and intends to embark in its forthcoming Programme on yet more of great importance. Its current projects include a new Sentencing Procedure Code – so badly needed to remedy the complexity of the current statute law; search warrants – so relevant to terrorism and organised crime; revision of the Land Registration Acts; updating of the law of wills; misconduct in public office; protection of official data; Welsh planning law; and bills of sale – a real relic of our Victorian reform and now hopelessly out of date. Topics for the next Programme floated in last year's consultation booklet included confiscation; offensive online communications; surrogacy; weddings; leasehold law; and arbitration; and the Commission recently suggested to the House of Lords Constitution Committee that there is an urgent need to simplify the notoriously complex Immigration Rules. It is vital that the Commission fulfils the duty imposed by the 1965 Act to keep under review all of the law of England and Wales. If they do not, I am sure no one else will. Law Reform Now remains as important as it did in 1964.

8. However, the title of this lecture has a second part: "21st century Britain: Brexit and beyond". These words encapsulate two issues of overriding importance that I wish to examine and to propose that the Law Commission has a further vital role to play. They are closely interrelated.

[12] Lord Simon of Glaisdale quoted in G. Zellick in G. Zellick (ed.) *The Law Commission and Law Reform*, (Sweet & Maxwell) (1988) at 76.

(1) The first relates to Brexit – probably amongst the biggest peacetime issues that the UK has ever faced and without doubt the most complex in legal terms. One consequence of the United Kingdom's decision to leave the European Union is that it faces the prospect that large parts of its law will need to be subjected to detailed scrutiny and potentially wide-ranging amendment, with other parts of the law only made subject to minor revision. Given the extent of European Union law and its integration into domestic law since 1972, the task is enormous in scale. It will call for reform on a wider scale than Gardiner and Martin could ever have imagined would be necessary when they were contemplating in the 1960s the need to correct the then consequences of English law's historic development.

(2) The second relates to today's version of "the white heat of the technological revolution": the digital age. As should be readily apparent to us all the future is going to be radically different from the past in many ways. We are all familiar with the challenges the Internet and social media, in particular, pose for as diverse a range of matters as privacy, jury integrity, and the efficacy of court orders. Digitalisation equally raises challenges to, for instance, our concepts of ownership, of contract, of employment status and rights,[13] of intellectual property rights, and consumer rights. With the development of coded currencies such as Bitcoin questions arise concerning regulation, as can be seen from developments in the United States,[14] and the prevention of fraud. And where countries develop concepts of e-residency, as for instance Estonia has done since 2014 and which enables anybody, anywhere in the world to conduct business throughout the European Union so as to enjoy "all the freedom that comes with being an incorporated business in the EU"[15], the potential for complex legal issues to arise becomes all the more acute.

9. The relationship of the digital revolution to Brexit is clear. As I will explain, it will be necessary for the UK as a nation State with its own laws to ensure that its laws remain a law of choice for international commerce and, for reasons of trade in goods and services, retains at least an equivalence, if not better, with the laws of other states as they develop. As these issues are of such profound importance and difficulty, I want to examine the role that the Law Commission, one of the most valuable resources of our State, can undertake in helping the State meet these enormous challenges.

---

[13] See, for instance, *Pimlico Plumbers Ltd & Anr v Smith* [2017] IRLR 323; *Aslam & Ors v Uber BV & Ors* [2017] IRLR 4.
[14] For an outline of legal developments in the United States see: E. Murphy, M. Murphy & M. Seitzinger, *Bitcoin, Questions, Answers, and Analysis of Legal Issues,* (2015) <https://fas.org/sgp/crs/misc/R43339.pdf>.
[15] A. Ross, *The Industries of the Future,* (Simon & Schuster) (2016) at 210.

10. In tonight's lecture I want to explore these issues. I will do so first by examining the role that the Law Commission should properly play in respect of the immediate legislative issues arising on Brexit. I then want to look more broadly at the role of the Law Commission for the future of keeping our law in line with the digital age and with the developments in Europe and elsewhere, a vast task indispensable to our future as a trading State.

(2) THE LAW COMMISSION AND THE PROCESS OF BREXIT

The current position

11. Last Wednesday, 21 June 2017, when Her Majesty the Queen opened Parliament, her Speech announced that HM Government would introduce a Bill to repeal the European Communities Act 1972.[16] This will be the centrepiece of Brexit-related legislation. In March of this year, HM Government published a White Paper setting out in slightly greater detail its plans for how what was referred to as a "*Great Repeal Bill*" would operate.[17] The principal effects of the Bill, when passed, will be to end the direct applicability of EU law in the domestic law of the UK and to incorporate the *acquis communautaire* into domestic law.

12. It is not for me as a judge to comment on these matters for the most part. By and large they are matters for the political branches of the State. As I said recently, mutual respect for the role and functions of the other branches of the State – and non-interference in the discharge of those functions – is fundamental to the independence and interdependence on which our unwritten constitution relies.[18]

The repatriation of the acquis: interpretation by the judiciary

13. However, the repatriation of the *acquis* does present two principal issues that are highly relevant to the judicial branch of the State. The first is how jurisprudence of the Court of Justice of the European Union is to be treated following Brexit and how the *acquis* in so far as unamended by Parliament is to be interpreted by UK courts. This is a matter of great technical complexity. That is why, as the President of the Supreme Court told the Constitution Committee of the House of Lords in his evidence,[19] the judiciary has been giving technical assistance to HM

[16] https://www.gov.uk/government/speeches/queens-speech-2017

[17] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf

[18] Michael Ryle Memorial Lecture. 15 June 2017 https://www.judiciary.gov.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf

[19] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/president-and-deputy-president-of-the-supreme-court/oral/49543.html

Government as to the possible options open to them. This has been done in accordance with established Guidance to ensure proper constitutional boundaries are maintained.[20]

14. Some might find it surprising that such assistance is being given – possibly even at odds with judicial independence. On the contrary, such assistance is being given to protect judicial independence. As Baroness Hale said in her evidence to the Constitution Committee:

> one major concern that we have in the court, and probably throughout the judiciary, is that it should be made plain in statute what authority or lack of authority, or weight or lack of weight, is to be given to the decisions of the Court of Justice of the European Union after we have left, in relation both to matters that arose before we left and, more importantly, to matters after we leave. **That is not something we would like to have to make up for ourselves, obviously, because it is very much a political question, and we would like statute to tell us the answer**. (emphasis added)[21]

15. If there is a gap or uncertainty in legislative provision or the provision has to be interpreted in a context for which it was never intended, the judiciary must nonetheless answer legal questions that arise in the disputes brought before the courts. Such legal questions may or may not arise in a politicised or political context, but, regardless, the judicial task is the same: deciding disputes without fear or favour and according to law, as the judicial oath demands. As I recently observed,[22] this past year has seen a number of instances of the judiciary being called upon to decide cases which those in the executive government or in the legislature considered to be more appropriate for action by Parliament or the Executive. It has therefore been characterised as judges 'making political decisions' and given rise to attacks on the judiciary. [23]

16. Part of the reason such cases arise seems to me to be an increase in parties' recourse to the courts when the executive or a legislature has not made the law clear or given the courts clear guidance as to the way in which the law intended for one context (a Union of States with many Union institutions)) is to be applied in another (a single state without such institutions). Therefore, technical assistance by the judiciary to the executive or legislative branches of the State as to their discharge of their functions – such as with the status of CJEU jurisprudence and the interpretation of the *acquis* in the very different situation post Brexit – may go part of

[20] https://www.judiciary.gov.uk/wp-content/uploads/2016/07/guidance-to-the-judiciary-on-engagement-with-the-executive.pdf
[21] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/president-and-deputy-president-of-the-supreme-court/oral/49543.html
[22] Lionel Cohen Lecture https://www.judiciary.gov.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf and Keynote Address to the General Assembly of the European Network of Councils for the Judiciary (ENCJ). https://www.encj.eu/images/stories/pdf/GA/Paris/encj_resilent_justice_lord_thomas.pdf
[23] I gave evidence on this topic to the House of Lords Constitution Committee (http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chief-justice/oral/49312.html) and also considered it in the Lionel Cohen and Michael Ryle Lectures and the ENCJ Keynote Address.

the way in avoiding "political' issues being litigated and, accordingly, is protective of judicial independence.

Legislating for Brexit and the necessary changes to the acquis

17. The second principal issue, and in my view much more important and difficult issue which the repatriation of the *acquis* presents for our State, is the scale of the change that will have to be made to the *acquis* to enable it to function effectively as our domestic law shorn of its EU context at the moment of Brexit. In addition to domestic alterations, where other countries, supra-national institutions, or international agencies are involved, there will also need to be new international agreements, which may be subject to ratification. To effect the necessary changes to the domestic law, the use of delegated powers is intended. This will not necessarily be straightforward, with a fine balance being called for. The White Paper acknowledges this:

> "The Government is mindful of the need to ensure that the right balance is struck between the need for scrutiny and the need for speed. This White Paper is the beginning of a discussion between Government and Parliament as to the most pragmatic and effective approach to take in this area."

18. When statutory instruments are used to alter the law, there is a real risk that those adversely affected by such changes – including those who consider the changes to be unscrutinised policy changes – may challenge the secondary legislation in the courts. The courts have no interest in being drawn into "political decision-making"; this is an area where it should be for Parliament to have made the political decision with as much scrutiny as is practicable. It is bad for our democracy for "political" issues to be brought to the courts. How can this risk be lessened?

Parliamentary scrutiny

19. This is too big a question to answer in this lecture, but one which needs the greatest possible public debate. It is therefore apposite for me to say a brief word about Parliamentary scrutiny of the Brexit legislation in the context of looking at the role of the Law Commission in the 21st century.

20. It is, of course, a matter for Parliament – in the passage of the Repeal Bill and the terms in which it grants delegated powers to the Executive – as to how, when, in what form, and to what degree it effects and superintends the legislative and policy changes flowing from Brexit. However, my concern is that as much as possible is done to reduce the likelihood of the judicial branch of the State being called upon – as some will no doubt allege – to make "political decisions". It is axiomatic that the greater the level of public debate and Parliamentary scrutiny of an issue, the greater the likelihood the resulting primary or secondary legislation will be well-

thought out, tested, coherent and as Her Majesty said in her speech to Parliament reflect "the widest possible consensus",[24] such that a court is less likely to be asked to resolve policy questions.

21. As to public debate, the media in all its forms will play an important role. As to Parliamentary scrutiny there are many options, including:
    - the use of specific Acts as the Queen's Speech envisaged;
    - pre-legislative scrutiny;
    - laying statutory instruments in draft as part of the affirmative procedure;
    - the super-affirmative procedure;[25]
    - the involvement of Select Committees;[26] or,
    - some new procedure devised to meet the needs of this unprecedented legislative challenge. One of many possible ideas would be to build on the model of the Procedural Rules Committees which enable procedural law to be updated by committees' expert in the subject matter who consult widely. Drafts would then be subject to approval by the Executive and scrutiny by Parliament.

22. It is not for me, as a judge, to go any further, but those in the Executive and in Parliament, in discussing this great issue, must take into account the necessity of ensuring the judiciary is not left making what are or are perceived to be political decisions and choices. Consideration and careful thought therefore needs to be given about what level of scrutiny is required and how this is to be achieved. Given the timescale, this debate needs to be had and concluded as quickly as possible. I will, however, address what I would propose as a vital role for the Law Commission, based on utilisation of a current procedure for Law Commission Bills.

The current Law Commission procedure[27]

23. Let me first summarise the current procedure. Following deficiencies, or rather delay, in how Law Commission proposals were dealt with by the Executive and Parliament, the system for legislating for such proposals was reviewed and revised. The negotiations for this revision began

[24] As was set out by HM Government in the Queen's Speech. See Note 16 above.
[25] As described in Erskine May's *Parliamentary Practice* (24th Ed.), "The super-affirmative procedure has been implemented in enactments where an exceptionally high degree of scrutiny is thought appropriate, for instance, for the scrutiny…of 'Henry VIII powers'. It provides both Houses with opportunities to comment on proposals for secondary legislation and to recommend amendments before orders for affirmative approval are brought forward in their final form." See page 677 for further information.
[26] This can be done as part of the super-affirmative procedure, where Standing Orders provide for proposals made under certain enactments to be referred to specific select committees, See ibid. at pages 677-678.
[27] There is a helpful Briefing Paper prepared by the House of Commons Library, which sets out the position and practice very clearly: http://researchbriefings.files.parliament.uk/documents/SN07156/SN07156.pdf.

under the Chairmanship of Sir Terence Etherton and were completed under the Chairmanship of Sir James Munby. The Law Commission Act 2009 came into force in 2010, and placed a duty on the Lord Chancellor to report to Parliament about implementation of Law Commission recommendations.[28] In tandem, a Protocol was agreed in 2010 between the Law Commission and the Lord Chancellor (on behalf of the Government).[29] This provides among other things that before approving the inclusion of a law reform project in a Law Commission Programme, the Lord Chancellor will expect the Minister with relevant policy responsibility to give an undertaking that there is "a serious intention to take forward law reform in this area (if applicable in the case of the particular project)". The 2009 Act and the Protocol have enabled the Commission to focus on projects with a real prospect of implementation. The Protocol also provides for Ministerial referrals to the Commission.

24. Once a reform programme has been agreed or a referral made, resources provided and the work carried out, the Commission lays a report before Parliament recommending what should be done. In all cases the hallmark of the Law Commission's work is that it is independent and non-political, such that when its proposals reach Parliament they can be considered on a non-partisan basis and without taking up too much time on the floor of either House. The House of Lords has a special procedure for uncontroversial Law Commission Bills. Most of the work is done by a Special Public Bill Committee. It seems to me that in the years to come, when so much Parliamentary time will be occupied by Brexit-related matters of a political nature, it would be sensible for there to be more use made of procedures which facilitate the enactment of legislation which is non-partisan.

25. The most recent example of the special procedure was the Bill which became the Intellectual Property (Unjustified Threats) Act 2017.[30]- possibly as technical an area as one can imagine. As summarised succinctly in the report:

> "Patents, trademarks and design rights are valuable intellectual property rights and a vital foundation of economic growth. These rights ensure that innovation is rewarded and encouraged. The law provides a means by which they can be effectively enforced; through legal proceedings for infringement. However, making unjustified or groundless threats to sue a competitor for infringement can have unfair and harmful effects on legitimate business activities. Intellectual property law therefore has long-standing provisions which protect certain businesses from being harmed by unjustified threats."

[28] The most recent report is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/582679/implementation-of-law-commission-proposals-report.pdf.
[29] http://www.lawcom.gov.uk/wp-content/uploads/2015/06/lc321_Protocol_web.pdf.
[30] http://services.parliament.uk/bills/2016-17/intellectualpropertyunjustifiedthreats.html

The Special Public Bill Committee heard evidence from the Law Commission of England and Wales and the Scottish Law Commission; and also from one current and one former judge of the Patents Court, Mr Justice Birss and Sir Robin Jacob.[31] This example is not in isolation. Other examples reported on by the Lord Chancellor include: aspects of unfair terms in consumer contracts; modernising aspects of juror misconduct; fiduciary duties of insolvency intermediaries; and social investment by charities.

Making use of the Law Commission for Brexit law changes

26. As part of the repatriation of the *acquis*, a number of difficult decisions will have to be made. Some of the changes to the law to be repatriated will be highly political, some neutral, and some entirely routine. Likewise, and regardless of the level of political sensitivity, some laws can be repatriated simply (with or without necessary modification); others, less so.

27. In the course of a short debate on a question concerning the Law Commission in 2014, Lord Faulks, then Minister of State for Justice, said:

> "Although the Law Commission provides invaluable assistance to any Government of whatever colour on law reform, there is no obligation on the part of a Government to bring forward proposals: it is a question of using a valuable resource…The fact that the Law Commission examines a subject and comes up with proposals does not necessarily mean that it has provided the perfect answer, although very often it provides valuable assistance."[32]

It seems to me obvious, in the national interest, that the Law Commission (which I would prefer to characterise as one of the most valuable resources that our State has) should be used to bring its great legal and technical expertise to assist with legislating for Brexit where appropriate in areas which are more technical than political, but nonetheless of the greatest importance to the State.

An example of the suggested role

28. Let me take an example - the issue of applicable law, a topic of limited, if any, political controversy. Unquestionably, however, it is a matter of great technical complexity and something that it is important to get right to ensure the continued attraction of our law as the law of choice and London as the pre-eminent centre for dispute resolution.[33] Unlike the

[31] The evidence is available here: http://www.parliament.uk/documents/lords-committees/Intellectual%20Property/Combined%20evidence%282%29.pdf.
[32] https://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140512-gc0001.htm#14051218000170
[33] It is also an area in which the Law Commission has expertise. The Commission provided advice relating to the *Rome I Regulations* to HM Government in 2011 in the context of the Common European Sales Law: http://www.lawcom.gov.uk/wp-content/uploads/2015/03/Common_European_Sales_Law_Summary.pdf

enforcement of judgments which will largely depend on negotiation with other states, this is a matter within the control of Parliament.

29. At present the applicable law framework, so far as matters of contract and tort are concerned, is governed by the *Rome I* and *Rome II* Regulations respectively. For instance, in relation to contracts, the current *Rome I Regulations* provide a relatively simple provision. However, there are various savings provisions, one of which is essentially a consumer protection clause that gives primacy to the law applicable in country where the consumer is habitually resident. Post-Brexit, such provisions could simply be re-enacted largely word-for-word for maximum certainty and continuity. Or, the position prior to the *Rome I Regulations* could be restored (namely that under the *Rome Convention*), but that would lead to divergence and, in our consumer context, a loss of protections. Or, the *Rome I Regulations* could be re-enacted with more-than-minor modifications, so as to meet domestic policy objectives that might not sit entirely squarely with the EU regime. Or, no doubt, something else.

30. The question of what should replace the Regulations is not definitively answered. Many have provided suggestions – Professor Adrian Briggs QC [34] in the 2017 Combar Lecture, other academic lawyers[35], the Commercial Bar Association,[36] the Financial Markets Law Committee,[37] and the Justice Committee,[38] amongst others, have all sought to analyse the options and put forward their proposals and solutions. It may be that the answer is the re-enactment of Rome I and Rome II, but the Executive and Parliament need to take a decision based on independent and authoritative analysis and advice.

31. It seems to me that this is precisely the type of issue the Law Commission could be called upon to assist with – a technical and complex subject that would benefit first from apolitical scrutiny. Having assessed the current position and the future need, the Law Commission could put forward draft proposals. Such an approach would allow for any "policy questions", such that there were, to be answered before finalising the legislative changes needed. Something akin to the specialist Parliamentary procedure which I have outlined could then be utilised. I have no doubt it would be as speedy a process as that of the Law Revision Committee in 1934.

---

[34] A. Briggs, *Secession from the European Union and Private International Law: the cloud with the silver lining,*
[35] Such as Professor Andrew Dickinson *Back to the Future: The UK's EU Exit and the Conflict of Laws* 12 Journal of Private International Law 195 (2016).
[36] https://app.pelorous.com/media_manager/public/260/COMBAR%20Brexit%20Conflict%20of%20Laws%20%20Jurisdiction%20Report%20as%20sent%20to%20MoJ%2011.1.17%20%28002%29.pdf
[37] http://www.fmlc.org/uploads/2/6/5/8/26584807/brexit_-_english_law_and_jurisdiction_paper..pdf
[38] https://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf

32. Of course, this is just an illustration; other modifications to either the Protocol or the Parliamentary procedure may be required. It is not for me to tell the Law Commission, less still the Executive or Parliament, what should be done, but it is essential in these times that the State uses the Law Commission in this or some other constructive way in the process of Brexit. It is in the clearest interest of our State that technical legislation of this kind underpinning Brexit receives wide debate and clear drafting. The use of the Law Commission in this way is something to which urgent consideration should be given.

(3) THE LAW COMMISSION AND THE FUTURE: BEYOND BREXIT

33. Maintaining the pre-eminence of English Law and of the UK as a jurisdiction of choice will, however, require more than just clarity in the law as it will be at the time of Brexit. I turn, then, to my second theme, which looks beyond Brexit - the vital role for the Law Commission in the future development of our laws in the 21st century. There are three areas to consider.

- The future scope of the Law Commission's work;
- The Commission's ways of working; and
- The Commission's interrelationship with the Executive and Parliament.

(a) The future scope of the Law Commission's work

34. First, the future scope of the Commission's work upon which I embark with all possible caution about the unpredictability of the future.

35. In evidence to the Political and Constitutional Reform Committee, Sir David Lloyd-Jones, the then Chairman of the Law Commission, in answer to a question posed by Simon Hart MP to whether the Commission examined the quality or currency of legislation, said this

> "We have to look of course at the question of whether the law is up to date, whether it continues to meet the needs of changing social conditions, the changing needs of commerce and whether it keeps up to date with technological developments. In addition to that, we are looking at the quality of existing legislation. It is fundamental that legislation, that the law generally, should be accessible and intelligible."[39]

That succinct statement captures both Gardiner and Martin's aims and the statutory function of the Commission, set out in s.3 of the Law Commissions Act 1965. There can be no movement away from that aim. There is a question though of how its aim is developed in the context of the period beyond Brexit.

[39] D. Lloyd-Jones in *Ensuring standards in the quality of legislation* (Report of the House of Commons' Political and Constitutional Reform Committee, 2013-2014) at Ev 69. <https://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf>.

36. The types of problem Gardiner and Martin identified were primarily ones caused by history, by the law developing organically and unsystematically. They were problems from the past, which needed to be solved to ensure the law was fit for today. As such they are problems that focussed on essentially the way the law had developed and the need to systematise and modernise it. These will, no doubt, continue to play a significant part in the way the Commission operates. I have already summarised some of the tasks on which the Commission is engaged and there should be others such as the codification of the criminal law as I explained in my speech at the Mansion House in 2016[40].

37. However, we live in changed times. Parliament will be engaged for some years in Brexit and related issues. There are, however, a number of closely related issues which we must address in considering the scope of the work of the Commission in the time beyond Brexit.

(i) Keeping the law up to date

38. First, how do we plan to keep our commercial law up-to-date in such a way that English law remains the law of choice for modern ways, particularly digital ways, of doing business? One of our greatest historical exports has been the common law, and particularly English contract law. As a State, we have been, in today's terms, a legal innovation hub since at least the age of Lord Mansfield. English law, and the expertise of English lawyers, remains for this very reason a major contributor to our GDP.[41] This is particularly the case in respect of the City of London due to its concentration of specialist law firms and chambers.

39. Maybe some issues can be left to the judges developing the law in the traditional manner, but can this be done for everything that the digital economy will produce? Certainly, the European Commission takes the view that legislative change will be needed to deal with new forms of contract such as the Blockchain and smart contracts. I have no doubt that we must consider whether our law (as it will then be) will need similar legislative updating.

(ii) Keeping pace with developments in other states

40. Second, mention of the European Commission raises another issue. English law has owed its pre-eminence to its flexibility and adaptability, often through the work of judges and sometimes through legislation. Following Brexit, the European Union will undoubtedly continue to

[40] https://www.judiciary.gov.uk/wp-content/uploads/2016/07/lcj-mansion-house-july-2016.pdf
[41] See for instance <https://www.thecityuk.com/assets/2016/Reports-PDF/UK-Legal-Services-2016.pdf>.

develop its own laws. Whatever arrangements are concluded between it and the UK as part of our Article 50 negotiations, continued trade into the EU and other states will need to take account of those developments. Given therefore the likely developments of the law in relation to the digital economy within the European Union and elsewhere, how are we to track developments and decide on the best response?

41. In short, there is a significant need to track development elsewhere which simply cannot be ignored. Until 2019, our law will track in its legislative aspects the law of the European Union, but thereafter what is to happen to ensure that we respond appropriately? Some may think that this is a problem for the future but that would be foolish, as we need to plan now for this very substantial task so vital to the future of every aspect of our economy whether it be legal services, financial services, or manufacturing, which depend on trade with other states.

(iii) The need for a body to lead on this

42. Third, in the United States and within the European Union, to take these by way of example, there are non-governmental bodies which are tackling these issues. In United States, the American Law Institute (or ALI) and in the European Union, the European Law Institute (or ELI). But this kind of thinking is not confined to the West – there is already active the Asian Business Law Institute (ABLI) headquartered in Singapore. When ELI was being established in 2009-11, one of the powerful arguments advanced was that Europe (including the European Union) needed an independent body that brought together judges, practitioners and academic lawyers in the same way in which the Law Commission was structured, but with a view to stimulating the development of law. We have therefore in the Law Commission the right body with the right composition.

The role for Law Commission in the time beyond Brexit

43. All these considerations, in my view, relating as they do to a radical change in law and to legal development elsewhere, particularly in Europe, the United States and Asia, call for consideration of a long-term role for the Law Commission as the body charged with ensuring that our legislation meets such radical and fundamental changes and does not leave our State in isolation from global developments on which we will, as a trading State, become even more dependent.

44. Clearly whether it is the Law Commission or some other body that is charged with this essential task is ultimately a political decision. However, the Law Commission has an undoubted track record of very considerable achievement and is eminently suited to this role. I will therefore

proceed on the assumption that such a proposal should be on the agenda for consideration in the immediate future. I therefore turn to consider what, if any, changes may need to be made to its ways of working.

(b) Its future ways of working

The track record of the Law Commission

45. A core strength of the Law Commission is its approach to the law reform process. Working to a core programme that is developed in the light of public consultation, it approaches its task systematically. Working teams of lawyers guided by acknowledged experts in the form of the Law Commissioners and the Chair of the Commission, it draws on a wealth of experience to ensure its proposals make the law more coherent and accessible.

46. One of the great innovations that Lord Scarman brought to the Commission was to secure within it a "permanent detachment . . . of draftsman from the Office of Parliamentary Counsel".[42] As such its recommendations are shaped by the skills of individuals who are expert in the law-drafting process. Lord Scarman's vision of bringing expert draftsman into the Commission should provide a model for developing its ways of working today. As Sir Geoffrey Palmer concluded:

> "The performance of the Commission, within the constitutional constraints in which it operates, has been brilliantly successful. When the Commission's work on statute law is added into the mix, the record looks even better."

But, do the Law Commission's ways of working meet this much wider task? The answer is broadly yes, but I have two suggestions for consideration.

Leading the work

47. Major law firms are, in conjunction with their clients, addressing the issues of the changes in commerce consequent upon digital developments and in looking at how the law keeps pace; so too do bodies such at the Financial Markets Law Committee and the British Insurance Law Association. Furthermore, if equivalence of outcome under law and regulation is to be the standard on which our financial services are traded into other jurisdictions, the problem of ensuring that our law and regulations keep pace in ensuring the same outcomes when others change has been identified as a major issue.

[42] A. Diamond in G. Zellick (ed) ibid at 27.

48. In my view, there could be no better body than the Law Commission for harnessing and coordinating the work being done and ensuring that there are legislative proposals in hand when needed.

Experts in the digital age

49. The Commission will require appropriate help from non-lawyer experts from the digital world. It is likely to be crucial to enable it both to understand the practical consequences of changes being wrought by information technology and to gain insight into changes to come, ones that may well render existing law obsolete or in need of significant revision – future proofing. A deep understanding of the working of the digital age will be crucial to enable effective law to be prepared.

50. One possible model for this might be for the Law Commission to draw on the assistance of an individual expert, as previous Lord Chief Justices and I have drawn on the experience of Professor Richard Susskind. Given the fast-developing nature of this area though, a better model for the Commission might be the Scarman model - having one or more experts, and particularly those with expertise in the fast-paced digital arena, brought from time to time within its teams thus bringing their insights and willingness to consider innovation within the reform process just as Scarman brought Parliamentary draftsmen. Equally, it will help ensure that the Commission is properly forward-thinking in its approach, so that it is able to consider reform in areas where the necessity is anticipated by the experts in the digital age.

51. There are lessons to be learnt by government from what happens when the law does not keep pace with technology. We know how drone technology has developed in the last few years, but it is only now that it is being recognised what impacts this has for criminal law, data protection, and privacy. Laws produced in hasty reaction to high profile failures or abuses of such technological developments invariably have flaws: in Japan following a protestor landing a drone with nuclear waste on the PM's office, a new aviation law was introduced banning drones from areas near airports and above densely populated areas with a fine of up to ¥500,000. The far better model is for legal frameworks to be constructed which maximise the opportunities for such technology to develop and for investment in such innovation in the UK, whilst securing adequate protections against their misuse.

52. If the Law Commission were to utilise the knowledge and expertise of such experts to help devise effective laws for the digital world of the future, it would strengthen the development of

London as the world's leading legal innovation hub.[43] That would help secure the continuing strength of the UK as a centre for legal excellence in the 21st century. There will, of course, be challenges from the United States and from the European Union, which is developing its own approach through its work on the digital single market. Competition is however a spur to greater effort and to further innovation. The Law Commission carrying out a more forward-thinking role should be viewed as an expert resource that will bring focus to shape our response to such competition.

(c) The Law Commission's interrelationship with the Executive and Parliament

53. Brexit and our future relations with the European Union are highly political issues, and are likely to remain so for some time into the future. This raises a question for the Commission that has long been known about the law reform process, although Brexit has the potential to bring it into acute focus. As was pointed out by Stephen Cretney QC, a Law Commissioner from 1978 to 1983,

> 'there is no law reform, however technical, that does not contain within it the seeds of political controversy'[44]

Where the Commission makes proposals concerning post-Brexit legal developments it should be anticipated that political controversy may eventuate. This raises two questions: first, independence; and, second, collaboration with the Executive and Parliament.

54. The first can be dealt with quite shortly. In carrying out its work the Commission must continue to operate in a politically neutral manner. It exists to make proposals to improve the law, and not to further any party-political agenda. As such it must also remain independent of the Executive and Parliament.

55. When Lord Gardiner was considering the best body which could carry out law reform on a sustained basis, he considered creating a departmental committee. However, he decided that a statutory Commission was needed as it would become part of the permanent machinery of government of the State and could not be undone by any future Lord Chancellor.[45] The Commission's current structure of a chairman and four other law commissioners supported by small teams of lawyers remains essentially unchanged from Gardiner and Martin's original vision.[46] The danger which Lord Gardiner foresaw was successfully met.

---

[43] A. Ross ibid at 196ff.
[44] As reported by A. Diamond in G. Zellick (ed) ibid at 22.
[45] See Heuston ibid. at 231-2
[46] G. Gardiner & A. Martin (ed), *Law Reform Now* (Victor Gollancz) (1963) at 8.

56. The expanded role I suggest it should take gives rise to the question of the sufficiency and sustainability of resources for the Commission so that the resources are premised on the specific remit to cover the law relating to the digital revolution. I can see at once the protest that the State simply does not have the resources to contemplate this and the work so vital for the future of the State therefore being killed at the outset. But those that might take this view simply would have no understanding whatsoever of the real world our State faces. It is essential that the Commission by this means or others can keep the developments in the digital age and in other States under constant review. The Commission should be resourced to draw on the wider expertise of industry, legal and academic experts for this purpose. There is the strongest case for its provision. It is investment in a well-established, highly respected resource. At a time when the UK legal sector is facing competition from an increasing number of well-resourced jurisdictions around the world and when digital developments across the world and Brexit pose the unprecedented challenges I have outlined, such investment is one in our legal future. It is both necessary and will pay dividends. In short, we simply cannot afford in the world beyond Brexit not to have this capability.

57. The judiciary learnt that there is no independence without a commitment of resources. This was identified by Lord Browne-Wilkinson in his Francis Mann lecture as essential to judicial independence. It would therefore be vital, if the Law Commission is to be enabled to take on the role that I have suggested, that there be a proper Parliamentary and Ministerial commitment to resourcing appropriately. Without that, given the long term and strategic importance of the role suggested, it would be surprisingly easy for a departmental minister to impede its work by the simple expedient of reducing its resources. There can be no truly independent Law Commission that is enabled to serve our State in the way I have outlined without adequate core funding.

58. If it is so enabled to examine issues relating to the development of the digital market and new digital forms of transaction, I would envisage the Law Commission acting in two ways. First, it would act as a "critical friend" to the Executive and Parliament. It would provide independent and impartial expert scrutiny of legislative proposals, thus improving the law-making process; secondly, it would – just as it has since 1965 – make well-developed and concrete proposals for law reform - a "constructive friend" to the Executive and Parliament. In carrying out this second role it would of necessity have a forward-looking focus on the digital age beyond Brexit.

(4) CONCLUSION

59. Twenty-five years after Law Reform *Now* was published, its subject matter was revisited in a collection of papers in its sequel: More Law Reform *Now*. In one of those papers, it was said that the Law Commission "was a typical child of lawyers' optimism of the 1960s".[47] Optimism waxes and wanes with time. The Law Commission's importance to better law-making is a constant. How it continues to realise that task will however need to change, just as our society itself changes over the coming decades.

60. The optimism of the 1960s was very much based on the idea that there were concrete steps we could take to improve society as we emerged from the long shadow of the Second World War. We should continue to approach the law reform process with that same confidence, not in a Panglossian way, but rather in a typically British, realistic and pragmatic way. With the urgent need for help on the process of Brexit and the inevitable change that is inherent in the growth of the digital world in the world beyond Brexit, the Law Commission must be enabled to play a full role in the ways I have described. So enabled and approaching its task in a forward-thinking way, anticipating change and the need for change, it will help ensure our law remains fit for the world in which we live and in which we must compete today and tomorrow. If it is so enabled, as I believe it must be, I think Lord Gardiner, Andrew Martin and Lord Scarman would be very proud of what their child had reformed itself to be.

61. Thank you.

---

[47] J. Jacob, *Legal Education*, in P. Archer & A. Martin (eds.), *More Law Reform Now*, (Rose) (1983) at 219.