THE LAW COMMISSION OF ENGLAND AND WALES

GRAY'S INN, LONDON

MONDAY, 20 FEBRUARY 2006

LAW REFORM & HUMAN RIGHTS - SCARMAN'S GREAT LEGACY

The Hon Justice Michael Kirby AC CMG

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To put it plainly, Leslie Scarman was one of the most influential minds in the common law of the twentieth century. He was a distinguished judge; but this was not what made him special. His singular contributions lay in the part he played in introducing institutional law reform as a regular fact of our legal life and his early endorsement of legally protected human rights in a culture traditionally hostile to that idea. As I shall show, there was a unity in his legal philosophy. It continues to have an impact. His beneficiaries are legion, not only in Britain but in the four corners of the world where the common law is practised.

I first met Scarman in 1975. I had just been appointed foundation Chairman of the Australian Law Reform Commission. He had then recently retired as the first Chairman of the Law

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* Justice of the High Court of Australia. One-time Chairman of the Australian Law Reform Commission.

Commission of England and Wales. He was graceful and energetic in our encounters. A stooping figure with a face that few who looked on it could forget: pale, high cheek bones, dimples occasionally showing in the sunken cheeks whenever his taut skin would permit it[1]. He was genuinely interested in the plans for law reform that we were formulating on the opposite side of the world. His enthusiasm was infectious.

Nearly a decade later, in 1983-4, we had two further encounters. He wrote a foreword to a book of essays of mine[2]. It was an introduction that mixed in equal portions his support for youthful Australian enthusiasm for the "all-embracing, universal approach" to law reform whilst adding due warnings about the "doubting voices to be heard in the dark jungle of the law". He noted Sir Michael Kerr's unanswered question about winning parliamentary time to consider proposals for law reform. But he commended a bold approach "to all with a social conscience"[3]. And he asked quizzically, "Who has no such conscience?". For Scarman, life without social engagement was unthinkable. Yet he saw, from great experience, the need to work within the legal system to give

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1 Sybille Bedford's description in *As It Was* (Picador, 1990) describing Scarman as a judge in *In the Estate of Fuld Deceased* [1965] P 405, a probate suit that lasted 91 days.

2 Foreword by Lord Scarman in Michael Kirby, *Reform the Law* (1983, OUP, Melbourne), vi.

3 *Ibid*, vii.

social conscience a reality and to improve the law's capacity to deliver justice.

By this time, Scarman had become Baron Scarman of Quatt, a Shropshire village near the Welsh border. We met again in New Zealand in 1984 where he was the principal judicial guest at the national law conference, held in Rotorua[4].

The conference fell during the week of Anzac Day. This is a holiday that Australia and New Zealand share to commemorate the landing of their joint army corps at Gallipoli in Turkey in a brilliant but ultimately fruitless endeavour of the British Empire to open a second front in the Great War. Scarman was everywhere during that conference. He mixed with us, sharing fully in our antipodean democracy. He was utterly without airs and graces. He joined the Australasian participants at the Dawn Service. Beckoned to the shore of Lake Rotorua by Maori soldiers, past and present, we gathered at Ohinemutu in the swirling mist, emanating from subterranean volcanic effusions. Because of his height Scarman stood out - tall and spare. He joined us in reverence to the moment that our three nations shared. Maori and Pakeha New Zealanders, Australians and British were brought together in the special harmony

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[4] See "Lord Scarman" [1983] *New Zealand Law Journal* 329.

of our history, lost blood, wars, our liberties and the enduring legal system that we have in common.

Scarman was a natural leader. Most of us in Rotorua deferred to him for his fame and achievements which were already considerable. I secured a photograph showing us together during the conference. Alongside an image that Lord Denning had signed for me two decades earlier at the Sydney Law School, the photograph has accompanied me in my chambers throughout my career. Denning and Scarman, two distinct, creative leaders of the common law[5]. They were heroic figures. They had an influence that spread throughout the Commonwealth of Nations and beyond[6].

There were important differences in the approaches to law of Denning and Scarman. As a judge, Scarman was much more traditional and less creative. He saw the way to overcome obstacles to justice in the law "not by departure from precedent but by amending legislation"[7]. He was quite fearful of too much judicial invention in the courtroom. He thought that this could lead to

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5 M McGinness, *Obituary of Lord Scarman* (2005) 79 *Australian Law Journal*, 525 at 526 ("McGinness")

6 See eg the foreword by Dr L M Singvi to the lecture *Law Reform in a Democratic Society* (1985), New Delhi, India, writing of Lord Scarman's reputation in India.

7 *Pirelli General Cable Works Ltd v Oscar Faber and Partners* [1983] 2 AC 1 at 19.

"confidence in the judicial system [being] replaced by fear of it becoming uncertain and arbitrary in its application". He was anxious lest this would render "society ... ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today"[8].

Scarman's appointment to the House of Lords, where judicial choices must legitimately and often be made to re-express the old law and to make it more fitting for new times, made little difference. He remained relevantly conventional as a judge. He kept his personal liberalism in firm check or channelled it carefully as, for example, in his decision on the law of blasphemy in the *Gay News* case[9]. In *Sidaway v Governors of Bethlem Royal Hospital*[10], he declined to fashion a completely new principle of informed consent for medical treatment, although final courts in Australia[11], Canada[12] and elsewhere were to experience no such hesitations.

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8 *DuPont Steels Ltd v Sirs* [1980] 1 WLR 142 at 171-172 (HL).

9 *Reg v Lemon (Whitehouse v Gay News Ltd)* [1979] AC 617 at 658.

10 [1985] AC 871 at 876. See also *Gilllick v West Norfold AHA* [1986] 1 AC 112 at 186 and S Lee, *Judging Judges* (1988), "Lord Scarman" at 154, 157 (hereafter "Lee").

11 *Rogers v Whitaker* (1992) 175 CLR 479.

12 *Reibl v Hughes* [1980] 2 SCR 880 at 894-895; (1980) 114 DLR (3d) at 13. In *Rogers*, the High Court of Australia declined to apply *Bollam v Friern Hospital Management Committee* [1957] 1 WRL 582; [1957] 2 All ER 118 or to follow *Sidaway* [1985] AC 871.

For this restraint Scarman was sometimes criticised as an unreliable 'liberal', who failed to use his proper authority as a judge - especially in the final court - to push the law in the directions that modernity and justice could readily sustain[13]. Yet in a sense, it was Scarman's very disinclination to exhibit creativity from the judicial seat that propelled him towards the two great instruments of reform with which his name will always be attached. I refer to his commitment as the first Chairman of the English Law Commission and his pioneering advocacy, from as early as 1974[14], of acceptance of the European idea of a charter of fundamental human rights. It was by parliamentary law reform and by judicial creativity specifically authorised by parliamentary law, that Scarman thought English law should develop; and basically not otherwise.

The Law Commission that Scarman helped to establish still flourishes. It became the model for like institutions throughout the Commonwealth of Nations. It still is. But his dearest wish was to live to see the *Human Rights Act* 1998 (UK) come into force. This wish was granted to him. By endorsing and ensuring the success of these new institutions and procedures, Scarman put his imprint on

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13 Lee, 154 at 155.

14 *English Law: The New Dimension* (Hamlyn Lectures), London, Stevens and Sons, 1974. See at 16-18.

the present and the future face of English law. It was a mighty contribution. My purpose is to chronicle it.

Because this is the first lecture to honour Leslie Scarman, I must say something of the parts into which his life was be divided. I will acknowledge his service as a judge by indicating some of the many instances in which his reasoning has been accepted and applied in Australia. I will describe his marvellous contribution to establishing the modern institutions of law reform that have spread throughout the world. I will recount the ongoing challenges for institutional law reform that he foresaw twenty years ago in his foreword to my book. Finally, I will demonstrate the critical importance for good governance of the bold appeal that Scarman made for enshrining fundamental human rights and freedoms in the law. I will demonstrate the importance of his appeal. It came just in time.

EARLY LIFE AND WAR YEARS

Leslie Scarman was born on 29 July 1911 in Streatham. As chance would have it, this was only a few miles from Brixton, a suburb that would later play an important part in his life. He said that his grandfather was "a complete Cockney" who married a French Protestant. Their son, his father, became a Lloyds'

underwriter. He described his mother as a "fierce and lovely" Scot[15]. He was educated at Radley College, thanks partly to scholarships that he won by his precocious talent. At Brasenose College, Oxford, he achieved a double First. In 1936 he joined Middle Temple as Harmsworth law scholar.

The advent of the Second World War saw Scarman enlist in the Royal Air Force. After a time at a desk in Abigdon, he was appointed to Bomber Command in North Africa where the later Air Chief Marshall Tedder enlisted him to out-manoeuvre an endeavour to have him serve in Courts Martial. The young lawyer outwitted the Air Ministry that eventually dropped the idea. Tedder kept Scarman in his entourage. He was there with Tedder and General Eisenhower when General Jödl surrendered the Germany Army at Rheims[16].

Returning to the Bar in London with an OBE, the young Scarman began to build a successful practice with an eclectic group of clients who ranged from communists to Sir Oswald Mosley of Blackshirts fame[17]. He was inspired by the stories of great advocates of the past. However, realising that he lacked the

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15 Quoted McGinness (2005) 79 *Australian Law Journal* 525.

16 *Ibid.*

17 *Ibid.*

theatrical flourishes of his heroes, he turned his attention to the purer topics of law. It was to be a happy encounter and lasted for the rest of his life.

Equally happy and enduring was his marriage in 1947 to Ruth Clement Wright. She, and their son, were to share Scarman's remarkable career and to survive him to witness the national and international honour accorded to his name.

Scarman took Silk in 1957. As an advocate he declined to embrace well meaning, but mistaken, judicial suggestions that he regarded as wrong in law[18]. He demonstrated, as he later would as a judge, an abiding fidelity to the law that sometimes made him appear conservative and uncreative. In 1961 he was appointed to the High Court. His background was thus one normally associated "with traditional judges - public school, Oxford, a First in Greats, a long and happy marriage, and informed enthusiasm for the arts, especially opera ... "[19].

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[18] S Sedley, Obituary of Lord Scarman, *The Guardian*, 10 December 2004. (hereafter "Sedley, Obituary").

[19] Lee, 160.

LAW REFORM

All of this goes to show the dangers of stereotyping. It was Lord Chancellor Gerald Gardiner, appointed when the Wilson Labour Government took office in 1964, who saw in Scarman the perfect lawyer to launch his bold new idea: the Law Commission. Law reform was a major objective of the government and of Gardiner. Scarman was the man to put institutional law reform on the map as a parliamentary strategy for improving the whole body of the law. What was needed was a permanent institution, not merely a reactive activity where fires were already burning[20]. The task before the new Commission was daunting[21]:

> "English law today is contained in some 3,000 Acts of Parliament, the earliest of which dates from the year 1235, in many volumes of delegated legislation made under the authority of those Acts, and in over 300,000 reported cases. ... The result is that it is today extremely difficult for anyone without special training to discover what the law is on any given topic; and when the law is finally ascertained, it is found in many cases to be obsolete and in some cases to be unjust".

For Scarman, these features of English law were "plainly wrong". Hence the establishment of the Law Commissions to keep "the law as a whole under review and [to make] recommendations

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20 Sedley, Obituary.

21 *Proposals for English and Scottish Law Commissions* (January, 1965), 2.

for its systematic reform". In the place of individual decisions by separate government departments and agencies, a new body would submit a programme and pull together the efforts to assist Parliament to modernise, simplify, consolidate and, where appropriate, codify the law.

In the Law Commission's first programme on consolidation and statute law revision[22] Scarman and his distinguished first team of Commissioners, Professor L C B Gower, Mr Neil Lawson QC, Norman Marsh and Andrew Martin QC, expressed optimism that the new approach of the Commission to statute law revision "will not only reduce appreciably the number of Acts remaining to be consolidated, but also facilitate consolidation by getting rid of these unnecessary provisions which tend, as things now are, to make consolidation difficult"[23].

If this vision of root and branch cleansing of the statute book was unduly optimistic, doomed to defeat by the ever-increasing number and size of laws made by or under Parliament[24], the aim was certainly a noble and worthy one. And at the helm was a lawyer

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22 Law Com No 2 (1965).

23 *Ibid*, 6.

24 G Calabresi, *A Common Law for the Age of Statutes*, Harvard 1982, 1; J Steyn, "Dynamic Interpretation Amidst an Orgy of Statutes", (2004) 35 *Ottawa Law Review* 163 at 164.

displaying rare gifts. Many would later comment on his great instincts as a "listener-judge"[25]. He was strong for consultation. This attitude of bottom-up government in the place of top-down rule had its source in Scarman's fundamental respect for the dignity, rights and insights that human beings can offer to lawyers charged with shaping the law. He listened not just because it was courteous but because it was often productive.

It was under Scarman that the Law Commission initiated procedures that involved professional and expert consultation by the use of Working Papers[26]. But there were broader strategies designed to tackle the narrow and sometimes antagonistic interpretation of legislation that not infrequently frustrated the implementation of Parliament's purpose, driving the legislators into more and more detailed prescription[27]. In his new post in the Law Commission, Scarman must sometimes have felt like Air Marshall

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25 See eg Lee, 189.

26 The Law Commission, *First Annual Report* (1965-1966), (Law Com No 4 1966, 3 [11]); Law Commission *Second Annual Report*, 1966-1967 (Law Com No 12, 6 [28]).

27 See eg Law Com, First Annual Report 1965-6 (Law Com .....), Item XVII, "Interpretation and Statutes", p 17 [112]. This was a constant theme of Scarman's. On a visit to Australia in 1980, he declared that the High Court of Australia was, in this respect, "more English than the English". See A Nordlinger, "Lord Scarman provokes response" (1980) 15(4) *Australian Law News* 40; cf L Scarman, "Ninth Wilfred Fullagar Memorial Lecture: The Common Law Judge and the Twentieth Century - Happy Marriage or Irretrievable Breakdown?" (1980) 7 *Monash University Law Review* 1.

Tedder. Gifts of micro-management were essential, for there were a thousand tasks, legal, consultative and administrative to be performed. But the macro-function of viewing the entire battlefield could never be forgotten. This required special talents of perception, imagination, persuasion and leadership. In Scarman, the Law Commission was greatly fortunate. As well as being a good listener, he was sharp in analysis, brimming over with ideas, sweet in disposition, egalitarian in relationships but also resolute in action. He became the example and beacon for institutional law reformers everywhere.

PUBLIC INQUIRIES

In 1969, Scarman conducted the first of four major enquiries for which he earned public recognition and cross-party political respect. This was an inquiry into troubles that had occurred in Belfast and Londonderry. The inquiry took two years. It necessitated all his skills of discussion and negotiation which he had refined in the Law Commission. It took him far from courtrooms into schools and community halls. His report was widely praised[28]. It led to the arrival of British troops to keep order in the Province.

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[28] *Report on Northern Ireland* (1972), Cmnd 566.

A second inquiry took place in 1974. It concerned a riot in Red Lion Square in London after rival left-wing and right-wing demonstrators had clashed over immigration rules. The clash led to the death of a participant in the disturbances. Scarman's report blamed an international Marxist group for starting the dispute by deliberately attacking the police. His practised hand, careful listening and quick and skilful analysis with recommendations for action again commanded public and governmental appreciation[29].

In 1977 he conducted a third inquiry into the Grunwick trade union dispute. But it was his fourth and last major inquiry, in 1981, into riots that had broken out in Brixton, near where he had been born, that captured the greatest attention and earned him much acclaim[30].

For two days and nights in April 1981 riots had raged in Brixton. Three hundred people were injured and twenty-eight buildings were set ablaze. The violence spread to Bristol, Leeds and Merseyside. Circumstances of racial tension and police ineptitude demanded an inquiry chairman who was at once firm and

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29 *Red Lion Square Disorders of 15 June 1974* (1980), Cmnd 5919.

30 *The Scarman report: report of an Inquiry by the Right Honourable the Lord Scarman* (1982, Penguin, Middlesex).

approachable, trusted and insightful. For the British Government, under Prime Minister Margaret Thatcher, Scarman might have seemed a little risky because of his personal reputation for liberalism. Yet once again he showed consummate ability and skills that were original and virtually unique. He tackled the causes and not just the symptoms of the problem.

The achievement of the Brixton report was the outreach of Scarman to groups and individuals angry and unrepentant in the raw public mood that followed the unrest. In performing his inquiry, Scarman showed forbearance in responding to the anger of some of those who came to participate in the proceedings. When one Rastafarian shouted and swore at him in a public session, Scarman insisted that he should have his say. Twenty minutes later, when the contrite protester asked permission to return to the hearing that he had quit, Scarman readily gave his agreement[31]. Some lawyers and judges at the time questioned his appearances on television. Yet looking back, most would say now with Lord Bingham of Cornhill: "I can see ... that he was utterly right"[32].

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31 *The Economist,* 1 January 2005, p 68 (Obituary of Lord Scarman).

32 Quoted in McGinness (2005) 79 *Australian Law Journal* 525 at 527.

By his procedures and his report, Scarman helped to defuse the dangerous situation. His recommendations included the appointment of more police from minority communities; the establishment of police-community liaison groups; the adoption of policies to reduce ethnic unemployment; and the introduction of new police rules to make racial discrimination a disciplinary offence. By these proposals, Scarman took a first, vital step to improving policing from within[33]. If, looking back, he seemed over-ready to ascribe defects to "bad apples" rather than to a deeper institutional malaise, his reforms were radical for the time. Moreover, they were pitched at the level likely to secure implementation by the then government[34].

The Brixton report represented a powerful performance. It was watched within and outside Britain[35]. It stamped Scarman's personality and his gentleness and thoughtfulness[36] on the consciousness of the British public to a degree that few judges have ever attained before or since. Apart from everything else, it helped to show a new face of the British judiciary to ordinary citizens. Not

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33 *Ibid.*

34 *The Economist,* above n 30, 68.

35 *Ibid.* Compare Australian Law Reform Commission, *Complaints Against Police* (ALRC 1, 1975) and *ibid, Complaints Against Police (Supplementary Report)* (ALRC 9, 1978).

36 Sedley, Obituary.

simply remote establishment figures learned in the law; but human beings concerned about feelings of injustice and marginalisation and determined to do what they could to ferret out wrongs and to set them right.

There are, of course, critics of the involvement of serving judges in the conduct of inquiries that have political overtones where those judges are likely to come under attack and suspicion[37]. In Australia, serving federal judges cannot be compelled to perform such functions for the Executive and are now severely limited in the functions they can agree to perform[38]. However, extraordinary events sometimes call forth extraordinary responses. In his inquiries, Scarman showed a sure and deft hand.

THE JUDGE

During his service in the Law Commission, and in the public inquiries that made him famous, Scarman was appointed successively as a Lord Justice of Appeal (1973) and as a Lord of Appeal in Ordinary (1977).

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37 Lord Morris of Aberavon QC discussing the Scarman inquiries (648 HL Debates 883 (31 May 2003) noted J Beatson, "Should Judges Conduct Public Inquiries?" (2005) 121 LQR 221 at 252.

38 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

In the High Court, he had witnessed defects in the divorce law that encouraged his later work in the Law Commission towards the eventual enactment of the *Divorce Reform Act* 1969 (UK). In the Court of Appeal, even in the remarkable era in which Lord Denning presided, Scarman made a mark as a distinguished judge in many cases. He wrote lucid and powerful prose. The same gifts of verbal communication that strengthened the documents of the Law Commission and made the reports of his inquiries compelling reading, were deployed with great effect. This is one reason why we, the judges who follow, in Britain and abroad, often reach for Scarman in the Court of Appeal to guide our own reasoning.

Scarman's command of administrative law may be seen in the *Barnsley Council* case[39]. His awareness of the deep principles of the criminal law[40] and the rules of criminal procedure[41] have proved influential. His expositions of the law of evidence[42] have been useful. Unsurprisingly, his opinions on statutory interpretation, a

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39 *Reg v Barnsley Council; Ex parte Hook* [1976] 1 WLR 1052 at 1058; See *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 509.

40 *R v Preece* [1977] QB 370 at 375-376. This was applied in *Crampton v The Queen* (2000) 206 CLR 161 at 186-187 [61]-[62] and 194-195 [91], [95].

41 *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 498-499. This was applied in *Williams v Spautz* (1992) 174 CLR 509 at 522, 529, 553.

42 *Reg v Kane* (1977) 65 Cr App R 270 applied in *The Queen v Chin* (1985) 157 CLR 671 at 686.

subject of close concern to the Law Commission, have proved persuasive to later generations of judges, searching for a purposive or functional approach to that task in the place of the barren literalism of earlier times[43].

In a comparatively recent case in my own Court, *Coleman v Power*[44], a question arose as to whether legislation should be construed as its language would have been understood by the parliamentarians who enacted it or as a law speaking to contemporary citizens who were bound by its terms. One party invoked the former approach, encapsulated in the maxim: *contemporanea expositio est optima et fortissima in lege*. That approach had some support in Australian authority[45]. My own view was that the statute in question, one concerned with insulting behaviour and public order, was to be read in accordance with its ordinary and current meaning, given the significant intervening changes in community values affecting such matters.

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43 *In re James (An Insolvent)* [1977] Ch D 41 at 72. This was applied in *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 193 CLR 128 at 149 [55]. See also *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 239. This was applied in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 338. See also *Ahmad v Inner London Education Authority* [1978] QB 36 at 48, applied in *Coleman v Power* (2004) 78 ALJR 1166 at 1211 [246].

44 (2004) 220 CLR 1 at 95-96 [246].

45 See *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322-323.

In *Ahmad v Inner London Education Authority*[46], Scarman LJ added a further reason for adopting an interpretation "derived from the living language of the law as read today"[47]. He was there construing a provision of the *Education Act* 1944 (UK). He made it clear that that task was to be accomplished "not against the background of the law and society of 1944 but in a ... society which has accepted international obligations"[48]. This was the approach that I followed in *Coleman v Power* as, effectively, did a majority of the High Court of Australia in that case.

As I know from my own experience in an intermediate court, which was longer than Scarman's there, the most creative aspirations in all save perhaps a judge like Denning, are tamed by the ever-present prospect of a further appeal to a final court. The judicial eagle may want to soar but reality and duty keep it tethered. When, in 1978, Scarman was elevated to the House of Lords, he joined a most formidable Bench: Wilberforce, Diplock, Salmon, Edmund-Davies, Russell of Killowen, Fraser and Keith. It was then that Scarman, the judge, was greatly tested. Yet in the company of giants, he made a mark. I would single out amongst his most

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46 [1978] QB 36.

47 *Coleman* (2004) 220 CLR 1 at 95 [245].

48 [1978] QB 36 at 48.

influential speeches one in the field of administrative law, the *Civil Servants' Union* case[49], and one on constitutional law concerning courts martial, in *Attorney-General v British Broadcasting Corporation*[50]. That decision and the later one in *Home Office v Harman*[51] have influenced the development of the law of contempt in a world that is now more accepting of dissent towards authority[52].

Scarman was by this stage a judge of great experience and skill, writing with assurance on a whole range of legal concerns. Thus, his exposition of contract law in *Woodar Investments Pty Ltd v Wimpey Ltd*[53] has proved influential in Australia[54]. His criticism of the law of privity of contract and his suggestion that the House of Lords might reconsider the cases "which stand guard over

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49 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Lord Scarman affirmed, at 407, that "the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter". This was applied in *DPP (SA) v B* (1998) 194 CLR 566 at 599 [62].

50 [1981] AC 303 at 360. This was applied in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 539 per Mason CJ, Wilson and Dawson JJ and at 572 per Brennan and Toohey JJ.

51 [1983] 1 AC 280.

52 See eg *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

53 [1980] 1 WLR 277.

54 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 117, 165.

this unjust rule" was to encourage the High Court of Australia to re-express the law on that topic[55]. Many of his statements on the law of damages have proved influential in Australia. His elaboration of the law of equity in the context of the specially protected status for married women[56] in *National Westminster Bank Plc v Morgan*[57] encouraged me[58] to seek a new and broader foundation for the protection that would address, amongst other things, an expanding class of vulnerable relationships rather than the category of married woman as such - including people in *de facto* married relationships and same-sex couples.

Scarman's statements on the law affecting infants and children[59], most especially in *Gillick's* case[60] in relation to the

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55 *Woodar* [1980] 1 WLR 277 at 300.

56 See eg *Gammell v Wilson* [1982] AC 27 at 77. This was applied in *Fitch v Hyde-Cates* (1982) 150 CLR 481 at 491, 498; *Lim Poh Choo v Camden and Islington Area Council* [1980] AC 174 at 193. This was applied in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 639, 677 and in *Todorovic v Waller-Jetson Hankin* (1981) 150 CLR 402 at 419, 442, 466. See also *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 173. This was applied in *Johnson v Perez* (1988) 166 CLR 351 at 375.

57 [1985] AC 686 at 708.

58 In *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 406 [66]. See also *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441.

59 See eg *In re W* [1985] AC 791 at 795-796 applied by Brennan J in *P v P* (1994) 181 CLR 583 at 631.

60 *Gillick* [1986] 1 AC 112 at 184.

lawfulness of a doctor's prescribing contraceptives for a girl under the age of sixteen years without the consent or knowledge of her parents, also proved highly influential in Australia[61]. The beauty and power of his exposition can be seen in the following extract[62]:

> "The House's task, therefore, as the supreme court in a legal system largely based on rules of law evolved over the years by the judicial process, is to search the over-full and cluttered shelves of the law reports for a principle, or set of principles, recognised by the judges over the years but stripped of the detail which, however appropriate to their day, would, if applied today, lay the judges open to a justified criticism for failing to keep the law abreast of the society in which they live and work ... If the law should impose upon the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change".

Scarman was conscious of the changing values that must find reflection in the law. He was cautious but always practical - an approach reinforced by his years in the Law Commission and in conducting sensitive inquiries. An illustration of this approach to law can be seen in an important technique that Scarman accepted for preserving the principle of open court hearings whilst protecting in some circumstances legitimate expectations of confidentiality. To

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61 *J v Lieschke* (1987) 162 CLR 477 at 452; *Secretary, Department of Health (Marion's Case)* (1992) 175 CLR 218 at 237, 316-317; *WACB v Minister for Immigration* (2004) 79 ALJR 94 at 107-108 [72]; *Re Woolley; Ex parte Applicants M276/2003* (2004) 79 ALJR 43.

62 *Gillick* [1986] 1 AC 112 at 183.

avoid the conceptual and practical problems of a court's making a non-publication order concerning the identity of a person or thing, Scarman endorsed the so-called "*Leveller* expedient", named after the case in which it was described[63]. In many instances, competing difficulties can be avoided by the simple expedient of obviating the use of the name or identity to be protected and substituting a pseudonym, or initials, or by writing that name on a document that is within the control of the judge and not publicly disclosed without an order permitting that course. This eminently sensible procedure is commonly followed in Australia to protect the identity of police informers and others[64]. It was endorsed by Scarman in the *Leveller* litigation. Of course, there are cases where disclosure will be required in the public interest[65] or to assist a party in the presentation of its case, as for example to demonstrate that party's innocence of an offence[66]. But for most cases, the *Leveller* expedient is practical and works well.

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63 *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 469, 470. This was applied in *Cain v Glass [No 2]* (1985) 3 NSWLR 230 at 246; *John Fairfax and Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 472; *Witness v Marsden* (2000) 49 NSWLR 429.

64 See eg *Attorney-General for NSW v Mayas Pty Ltd* (1988) 14 NSWLR 342.

65 See eg *In a Matter of an Application by Chief Commissioner of Victoria Police* (2005) 79 ALJR 881 at 895 [83].

66 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 218, 229, 232 applied in *Cain v Glass [No 2]* (1985) 3 NSWLR 230 at 246-247 per McHugh JA.

Scarman's decision in the *Sidaway* case[67] held back from embracing a robust principle of informed consent for medical procedures. Yet it nudged English law a little way in that direction, anticipating further steps taken in later decisions that Scarman did not feel that he should take[68]. In Australia and elsewhere, his reasons in *Sidaway* were considered carefully in the elaboration of the stronger principle that was endorsed in *Rogers v Whitaker*[69]. That principle has been applied ever since[70].

Scarman's approach to matters of practice and procedure in the law can be seen in many decisions. In *Maynard v West Midlands Regional Health Authority*[71], he wisely cautioned appellate courts over the disadvantages they face when reconsidering a trial on the transcript record. Conventionally, those disadvantages had been explained by reference to the trial judge's unique ability to assess the

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67 *Sidaway* [1985] AC 871 at 882. See comment in *Rogers v Whitaker* (1992) 175 CLR 479 at 489.

68 See eg *Bolita v City and Hackney Health Authority* [1998] AC 232; *Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR P53 at 59; *Chester v Afshar* [2005] 1 AC 115 at 42 [9], 143 [15], 163 [88], 166 [99].

69 (1992) 175 CLR 479 at 483-484.

70 *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 275 [19], 297 [81] and *Rosenberg v Percival* (2001) 205 CLR 434 at 439 [6], 453 [62]; 476 [140].

71 [1984] 1 WLR 634 at 637.

credibility of witnesses from their appearance in court. As this notion has suffered a battering in the face of scientific research about the unreliability of telling truth from falsehood on the basis of appearances, Scarman's alternative rationale for caution has taken on a greater importance. This is the difficulty of recapturing the "feeling" of a case from selected passages of transcript quoted when compared with the trial judge's position, absorbing all of the evidence and considering it as it unfolds in sequence[72].

There are many other cases in which Scarman's reasons in the House of Lords have proved significant, including in Australia, as an exposition of the law. In administrative law there is the decision in the *Federation of Self-Employed*[73]. In constitutional law there is the *Dupont Steels* case[74]. In criminal procedures, involving the provision of a permanent stay of proceedings that are greatly delayed or otherwise unfair, Scarman's reminder[75] that the community expects

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72 *Fox v Percy* (2003) 214 CLR 118 at 126 [23]. See also *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 330 [89] and *Pledge v Roads and Traffic Authority* (2004) 78 ALJR 572 at 581 [43].

73 *Reg v IRC; Ex parte National Federation of Self Employed* [1982] AC 617 at 650; see *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 81.

74 *Dupont Steels Ltd v Sirs* [1980] 1 WLR 142 at 168; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 79 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355 [13], 369 [47].

75 *Reg v Sang* [1980] AC 402 at 454-455.

trials to be fair proved timely and influential in Australia[76]. So did his warnings about the limited role of judicial interference in prosecutorial decisions[77].

Although glimmerings of creativity were to be found in Scarman's judicial work, for the most part he was very cautious, even in the Lords. Generally speaking, he did not accept suggestions that the law should be restated in significant ways by the courts. Perhaps the clearest instance of this can be seen was in his response to the case of *Gay News,* prosecuted for blasphemous libel for suggesting that Jesus Christ, in His lifetime, was a homosexual who engaged in promiscuous sex with the Apostles and other men.

A private prosecution was brought against the publishers and the jury were charged that it was not necessary for the Crown to establish any intention on the part of the publishers, beyond that to publish the document found to be a blasphemous libel. According to this instruction, no specific intent to blaspheme was required. The House of Lords[78] was evenly divided. Lord Diplock and Lord

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76 eg *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29, 33, 52.

77 *Ridgeway v The Queen* (1995) 69 ALJR 484 at 507; *Williams v Spautz* (1992) 175 CLR 509 at 520, 529.

78 *Reg v Lemon* [1979] AC 617. For later cases see *Gay News Ltd v United Kingdom* (1982) 5 EHRR 123 and *Reg v Bow Street*

Footnote continues

Edmund-Davies held that proof of specific intent was obligatory. Viscount Dilhorne and Lord Russell of Killowen were of the contrary view. History seemed to be on the side of the latter. However, the developing principles of the criminal law and modern notions of free and diverse expression appeared to favour the former view.

Scarman cast the decisive vote. He sided with history and the traditional expression of the law of blasphemy. Yet he offered a special and personal justification for his opinion, seeking to reconcile it with his conception of "a plural society which recognises the human rights and fundamental freedoms of the European Convention"[79]. This was the need to balance freedom of expression with "duties and responsibilities" that were formulated "for the protection of the reputation or rights of others". The conviction of *Gay News* and its editor was thus confirmed. Scarman expressly stated that it was not open to the Law Lords, acting judicially, "to extend the law beyond the limits recognised by the House[80] ... or to make by judicial decision, the comprehensive reform of the law which I believe to be beneficial".

Stipendiary Magistrate; Ex parte Chowdhury [1990] 3 All ER 986.

79 [1979] AC 617 at 665.

80 *Bowman v Secular Society Ltd* [1917] AC 406.

Of course, this decision has to be judged in the context of judicial and social attitudes of 1979, not those of a plural Western democracy twenty-five years later. Attitudes to homosexuality were still generally primitive and punitive at that time. Scarman acknowledged that the accused "would have said, and truly said, that he had no intention to shock Christian believers but that he published the poem ... to comfort practising homosexuals by encouraging them to feel that there was room for them in the Christian religion". He assumed the honesty and sincerity of the publisher's motives. However, he adhered to the old expression of the offence of blasphemy dating back to the seventeenth century.

For Scarman, it was for Parliament, if anyone, to change the ingredients of the offence. It was not for the courts - even the nation's final and supreme court. He hinted that the law should indeed be changed in order to address, in the modern context, the original purpose of blasphemous libel, namely "to safeguard the internal tranquillity of the kingdom"[81]. He argued strongly that the offence should be altered by legislation to protect the religious feelings of all, including non-Christians now living in a pluralist society. He made it clear that "my criticism of the common law offence of blasphemy is not that it exists but that it is not sufficiently comprehensive. It is shackled by the chains of history".

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[81] [1979] AC 617 at 658.

The responses to Scarman's shackling approach at the time were mixed. Some regarded this, and other decisions in which he participated judicially, as demonstrating, in a judge of proved sensitivity and insight sitting in the final court, a deep conservatism which no amount of liberal talk could disguise[82]. For people of this view, cases like *Gay News* amounted to a betrayal of the responsibility and choices inherent in a final court. Others saw Scarman's position as principled, avoiding "judicial activism" and limiting the ambit of invention from the judgment seat. It was this demonstrated sense of restraint that made Scarman, the judge, specially attractive to supporters of Ronald Dworkin's views about limited judicial involvement with policy, as expressed in Dworkin's book, *Law's Empire*[83].

Professor Simon Lee classified Scarman as a "great judge" of his time precisely because he put his skills to good use - as much in his inquiries as in his judicial decisions - exhibiting "a shrewd appreciation of the role of law in society - of the policy factors". But there is no doubt that Scarman had a much more restrained notion of judicial creativity than was to develop after his time. Ironically, this development was almost certainly a consequence of the creative

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82 See remarks of Mr Ken Livingstone cited McGinness (2005) 79 *Australian Law Journal* 525 at 526.

83 R Dworkin, *Law's Empire*, 244, 1986.

impetus of law reform and human rights that Scarman released in the law. Creativity there would be. But for Scarman it would flow only from sources that he regarded as legitimate.

Most of us exhibit various inconsistencies in our makeup. On particular issues and in particular cases, we may show alternatively inclinations to stability and change; unyielding application of the old law and elsewhere creative choices to overcome clear injustices[84]. In this, Scarman was no different. At various times, his rhetoric, powerful as it was, reflected both moods. Yet, more than for most, there was a fundamental unity in Scarman's judicial approach. Generally, he thought it enough for a judge, even in the House of Lords, to find and apply the old law. If change was needed, Scarman's view was, normally, that this was a role for Parliament, assisted by a body such as the Law Commission. To enlarge the judicial role something more and new was needed. The adoption of fresh approaches to statutory interpretation[85] and the incorporation

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[84] M D Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Hamlyn Lectures 2003) (London, Sweet & Maxwell, 2004) at 40.

[85] *In re James (An Insolvent)* [1977] Ch D 41 at 71. This was applied in *Attorney-General for the Commonwealth v Tse Chu Fai* (1998) 193 CLR 128 at 149 [55]. See also *Air India v Wiggins* (1980) 71 Cr App R 213 at 218; *Morris v Beardmore* [1981] AC 446 at 455. This was applied in *Coco v The Queen* (1994) 179 CLR 427 at 454; *R v Entry Clearance Officer; Ex parte Amin* [1983] 2 AC 818 at 836. This was applied in my dissent in *IW v The City of Perth* (1997) 191 CLR 1 at 52. See also *South West Water Authority v Rumble* [1985] AC 609 at 617. This was applied in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

of fundamental human rights in English domestic law were, for Scarman, the prerequisites to greater curial innovation.

Looking back, it may have been the very caution in Scarman's concept of what it was to be a judge that set his more liberal instincts searching for new and principled ways to contribute to creativity through law reform, through purposive interpretation and through protection of fundamental rights and freedoms. Certainly, these were the innovative directions that he took in the law. As a judge he was masterful in the synthesis of legal doctrine. But it was usually for analysis, exposition and restatement of the law that he was respected. For inventiveness we are obliged to look elsewhere.

THE PROMISE OF LAW REFORM

Scarman retired from active service as a judge in January 1986, shortly before his seventy-fifth birthday. By that time he had become the Senior Law Lord[86]. On the English Bench there was nowhere else to go. Yet he remained strongly engaged with issues of law reform and increasingly with questions of human rights. He discovered more time to indulge his love of opera, a passion that dated back to witnessing, with the Allied Commanders in Rome in 1944, *Madame Butterfly,* performed soon after Rome's liberation[87].

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[86] McGinness (2005) 79 *Australian Law Journal* 525 at 527.

[87] *Ibid.*

Scarman's courtesy to everyone was legendary; but his resolve was unmistakeable. In retirement, he became involved in the campaigns to reopen the convictions of a number of Irish prisoners: the Tottenham Three, the Guildford Four, the Birmingham Six and the Maguire Seven. He was criticised for assailing the majority conclusions in the *Spycatcher* case[88] in a letter to *The Times* published before the reasons were available. It was said that his action, in this respect, was "misguided"[89], especially because the majority had taken pains to explain their conclusions by reference to human rights concerns that had ostensibly motivated his letter.

Scarman served a long term as Chancellor of Warwick University (1977-1989). His service to British society and the law was honoured by many Fellowships and Doctorates. He had good taste and thoroughly disapproved of formal dinners, describing them as a "menace to men in public life. It's heavy, it's tedious and it's tiring". He made one exception for dinners at Middle Temple where he felt "among one's own"[90]. He nominated as his recreations

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88 *Attorney-General v Guardian Newspapers Pty Ltd* [1987] 1 WLR 1248 at 1282 (HL). A different conclusion was reached in Australia. See *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 affirming *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 10 NSWLR 86 (NSWCA).

89 Lee, 162.

90 James Morton, Obituary of Lord Scarman in *The Independent*, 10 December 2004.

gardening and walking in Hyde Park with his wife, Ruth. When he died at Westgate on Sea in Kent on 8 December 2004, she and their son were left to witness the mixture of grief and acclaim in Britain and abroad that centred on this remarkable, engaging man.

THE PROMISE OF LAW REFORM

In retrospect, Scarman's legacy can principally to seen in the creation of a sound institutional base for law reform, the adoption in English law of human rights as a legal concept and the improvement of society that has derived from these and other innovations. His contribution to law reform extended far beyond his own country. The current President of the Australian Law Reform Commission, Professor David Weisbrot has described what happened in institutions built in Scarman's image[91]:

> "Institutional law reform commissions first made their appearance in the United Kingdom in 1965 and quickly spread throughout the Australian States and Territories; New Zealand and the Pacific Islands; Canada (federal and provincial); Hong Kong and South Asia (India, Pakistan, Sri Lanka and Bangladesh); the Caribbean (Jamaica, Trinidad and Tobago) and Eastern and Southern Africa (South Africa, Namibia, Malawi, Lesotho, Kenya, Uganda, Tanzania, Zaire and Zimbabwe)[92].

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91 D Weisbrot, "The Future of Institutional Law Reform" in B Opeskin and D Weisbrot, *The Promise of Law Reform* (hereafter *Promise*), 18.

92 Footnotes omitted. The footnotes refer to Chapters 1, 17, 28 and 29 of *Promise*.

The force behind this imitation was not simply a late Imperial mimickery of an interesting British invention. It was an appreciation, derived at roughly the same time, of a serious defect in the inherited systems of law-making and governance and a respect for the way in which Scarman and his colleagues had gone about responding to that serious defect. His visits throughout the Commonwealth were tireless. They were inspirational for those working on the systematic reform and simplification of the law. He persuaded many that this was an idea whose time has come.

But what would we say today, forty years on? Has the promise of law reform, as initiated by Scarman, been fulfilled? Have the brave predictions of those early days been sustained? What does the ledger show now, in the cold light of the contemporary, more hard-nosed time of the twenty-first century? These were the questions recently faced by participants who assembled in Australia to mark the thirtieth anniversary of the Australian Law Reform Commission - established ten years after Scarman's Commission was set up.

The reflections of the Australian reformers are found in a book *The Promise of Law Reform*[93]. It records that the process of

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[93] Federation Press, Sydney, 2005.

establishing law reform bodies has continued and, indeed, has stretched beyond traditional common law societies into civil law jurisdictions, such as Quebec and to non-English speaking countries such as Indonesia, Rwanda and Thailand. Some Commissions (as in Ontario and Newfoundland) have been abolished. Yet the institutional response to improvement of the law remains well entrenched around the world[94]. This is a large, enduring and quite possibly permanent result. It owes much to the example and work of the Law Commissions of Britain. They still constitute a most significant legacy from Scarman's implementation of Gerald Gardiner's bold concept.

Obviously, many things have changed in the intervening years so that institutional law reform could not but change too. One change, for the good, may be seen in the attitudes of the judiciary, Parliament, the Executive and the legal profession. In the early years, there were many in the judiciary especially who were hostile to institutional law reform. In Australia, one distinguished State Chief Justice expressed the view that there was altogether too much change in the law. He and others of like mind looked with undisguised suspicion on "those who are paid to be reformers"[95].

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94 E Singini, Foreword in *Promise,* v.

95 J Young, "The Influence of the Minority" (1978) 52 *Law Institute Journal (Vic)* 500.

A measure of the change in professional attitudes since those days may be seen in the growing judicial citation of law reform reports and papers. I do not have figures on United Kingdom citations but I doubt that the proportions would be very different. In 1995, in Canada, the total number of judicial citations of the law reform bodies of Canada was little more than ten. The Australian Law Reform Commission was cited in about thirty cases. Yet by 2004, the Canadian citations had jumped to 160; those of the ALRC were almost 600[96]. Using law reform reports and papers as an accurate summary of the current law, a source of criticism of its provisions and a discussion of its policies has now become commonplace in judicial as well as other legal writings.

Similarly, lawmakers are now much more conscious of the utility of law reform bodies. Where complex and sensitive questions arise, it is not uncommon for judges and parliamentary committees to recommend the referral of particular the issues to the Commission. Sometimes the Executive Government finds this an attractive solution, particularly where public consultation and thorough examination of complex legal subjects needs to be undertaken in order to secure legislation that is right.

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[96] See graph, Figure 14.6, "Judicial citation of Law Reform Work" in B Opeskin "Measuring Success" in *Promise*, 203 at 219.

Most importantly, the legal profession now has high expectations of law reform bodies. Certainly in Australia, the old resistance has given way to a general culture of acceptance and appreciation for institutional law reform work. In most parts of the Commonwealth, there are no lawyers of today's generation who have not grown up with busy and productive law reform bodies as part of the regular and familiar legal machinery of the state. In effect, such institutions have become an element of the constitutional arrangements for legal renewal. In most places, this renders them safe from abolition. In effect, they have become part of the furniture. This can have its own problems. Scarman realised, from the first, the importance of keeping the law reform agency as something distinct from the ordinary governmental legal bureaucracy. If this were not done and if independence were not preserved, most of the justification for institutional law reform commissions would be lost.

There are many changes in law reform today when compared to Scarman's day. Thus, the belief in major "block buster" reports, with comprehensive draft statutes addressed to large topics of social concern, has declined in recent times. A more modest view is now adopted of the capacity of legislation to change society and to address its problems[97]. Alterations to the composition of the public

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[97] Weisbrot, in *Promise*, 30. See also M D Kirby, "Are We There Yet?", Chapter 30 of *Promise*, 433 at 438.

sector, down-sizing and privatisation, together with the out-sourcing of former public services means that legislation may not always now be the favoured vehicle for law reform. The introduction of change will today often require a more complex interaction of strategies and practices[98]. Sometimes the proper response to a law reform problem may be a recommendation that the law be left unchanged[99]. Such recommendations tend to throw the implementation rate of law reform reports, measured by ensuing statutes, into disarray. This is a new insight, gained since Scarman's time.

Another new perspective arises in the reconsideration of the notion that law reform is best done by the one professional body that brings together the efforts previously assigned to a multitude of *ad hoc* committees. In Scarman's day, the bold ambition to examine the *whole* law suggested that such examination should be performed by the one coordinating body. With time, this ambition has given way to the demands of powerful Ministers who insist on forming their own committees and appointing their own reformers.

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98 Weisbrot, *ibid*, 35-36; Kirby, *ibid*, 439.

99 The ALRC in its report on the civil justice system in Australia did not recommend major changes to the adversarial system. See Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000) noted Kirby, *ibid*, 438.

Both in the United Kingdom[100] and in Australia[101] major projects to rewrite income tax law have been launched, with support from the Treasury, a body that never seems to be wanting in funds for its pet projects of reform. Treasury is commonly peopled by officers unwilling to trust such an important topic to a small outside group of independent lawyers. In retrospect, the Olympian expectations attributed to law reform agencies established after Scarman's model, now seem naïve and unrealistic. How could any one group of mortals, with extremely modest resources and very many tasks, ever have a real chance of reforming the *entirety* of the law when the target was ever-expanding at an increasing pace[102]?

Just as in today's world commentators, in and outside the law, examine judicial decisions and predict judicial outcomes by reference to any track record exposing deeply felt values, so with inquiries the truth has been learned (if ever it was doubted) that appointments can influence outcomes. We now understand that many topics of law reform are far from value-free.

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100 E Caldwell, "A Vision of Tidiness: Codes, Consolidation and Statute Law Revision", Chapter 3 in *Promise*, 40 at 45-48.

101 M Payne, "Law Reform and the Legislature", Chapter 21 in *Promise*, 302 at 313; cf *Commissioner of Taxation v Stone* (2005) 79 ALJR 956 at 968 [74]-[76]. Senator Payne is a Member of the Australian Senate and chair of the Senate Standing Committee on Legal and Constitutional Affairs.

102 Kirby, above in *Promise*, 442.

Even apparently technical subjects sometimes defy the ambition of a totally pure and neutral treatment[103]. This is why Ministers and their officials commonly like to keep control of the programme of official law reform inquiries and of the people who will perform them[104]. The myth of value-free law may still persist in some quarters in England. Elsewhere in the common law world greater realism has intruded. This has affected not only judicial appointments but also appointments to, and the programmes of, law reform agencies.

One participant in the Australian reflection was Sir Edward Caldwell, who worked with Scarman on family law matters and who returned to the Law Commission in 2002 as Senior Counsel. He describes the bold ambition that Scarman outlined for revitalising the entire body of the law. According to that ambition, customary law, as declared by the judges in more than 300,000 cases, would be moved to a set of interlinking codes expressed in statutory form[105]. This, it was expected, would reduce the bulk of the law. It would

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[103] Weisbrot, above in *Promise*, 29-30. See also R MacDonald, "Continuity, Discontinuity, Stasis and Innovation", Chapter 6 of *Promise*, 87 at 88-89.

[104] See eg J Hannaford, "Implementation" Chapter 15 in *Promise*, 222; L Glandfield, "Law Reform Through the Executive", Chapter 20 in *Promise*, 288. Mr Hannaford was Attorney-General for New South Wales. Mr Glandfield is Director-General of the New South Wales Attorney-General's Department.

[105] Caldwell, above in Promise, 48.

concentrate its sources and expression. Sir Edward Caldwell observes[106]:

> "It is perhaps slightly surprising that Lord Scarman, with considerable experience both in the preparation and interpretation of legislation and writing nine years after the establishment of the Law Commission, should still have such Utopian views of the promise of law reform and of the contribution to fulfilling that promise to be made by law reform agencies".

Yet Scarman's optimism was widely shared at the time. The aspirations were thoroughly immodest. The remit kept pace with the ambitions. But the resources and the capacity to deliver could never do so. In fact, the case law has expanded exponentially, now supplemented by immediate access to the Internet and to many new jurisdictions. The statute book has blown out from approximately 7,500 pages of primary and subordinate legislation in the United Kingdom in 1965 to a total in 2003, including European Union legislation, of approximately 26,400 pages[107]. That figure excludes the 594 page *Income Tax (Earnings and Pensions) Act* 2003 (UK) which was a product of the British Tax Law Rewrite Project[108]. Faced with contemporary realities, some of Scarman's reforming optimism must now be seen as seriously over-confident, even possibly unreal.

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[106] Caldwell, above in *Promise*, 40 at 41.

[107] Caldwell, *ibid*, 42.

[108] Caldwell, *ibid*, 42, fn 7.

Despite that, there remain projects that law reform agencies are still best at delivering. These include boring but essential tasks of statutory consolidation and revision; large tasks touching the interests of many governmental and private bodies; and projects necessitating consultation of the kind that the more traditional committee of the legislature and the Executive Government are ill-suited to perform.

Amongst projects of the last-mentioned variety are those concerning the impact on the law of biotechnology. This was one of the early tasks assigned to the Australian Law Reform Commission[109]. The topic remains an important aspect of that Commission's current programme[110]. It is the kind of work that inter-disciplinary commissions led by lawyers can perform well[111]. When the new Chief Justice of the United States, Roberts CJ,

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[109] *Human Tissue Transplants* (ALRC 7, 1977). See Kirby, in Promise, 439.

[110] Australian Law Reform Commission and Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC 96, 2003) and Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health* (ALRC 99, 2004).

[111] Dr Francis Collins, head of the Human Genome Project, described the work of the ARLC on the law and genome as "a truly phenomenal job that put Australia ahead of the rest of the world". Quoted in D Chalmers, "Science, Medicine and Health and the Work of the Australian Law Reform Commission", Chapter 26 in *Promise* at 374 at 381.

assumed office he was told, accurately, that these were likely to be the main future challenges to the law. The experience of the High Court of Australia tends to confirm this prediction[112].

The foregoing changes and adaptations to institutional law reform leave one crucial defect in Scarman's machinery. It is as serious today as it was in his time. Indeed, it is clearer now because the years have given emphasis to it. I refer to the failure, anywhere, to establish a satisfactory link between the institutional law reform body and the lawmakers with the power to convert proposals for legal reform into action.

Today, as in 1965, this remains the unresolved constitutional deficit of institutional law reform. It may be unresolvable given the advance in the intervening forty years, in the imperium of Executive Government (indeed of Prime Ministerial power) and the jealousy with which the reins of control over legislation are maintained by the chief political actors, advised by key officials[113]. In some jurisdictions governments have given undertakings to announce their

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[112] See eg *Cattanach v Melchoir* (2003) 215 CLR 1. See also *Harriton v Stephens*, High Court of Australia, reserved, 10 November 2005; cf M D Kirby, "Ten Years in the High Court" (2005) ..... *Australian Bar Review* ..... at .....

[113] See eg the chapters in *Promise*, written by J Hannaford, M Payne and L Glandfield above as well as R Sackville, "Law Reform Agencies and Royal Commissions: Toiling the Same Field?", Chapter 19 in *Promise*, 274.

responses to law reform reports within a specified time. The New Zealand Law Minister undertook to do so within six months of the tabling in Parliament of reports of the Law Commission of New Zealand[114]. Earlier Australian Ministers flirted with similar notions, interposing the prior examination of ALRC reports by a Parliamentary Committee. However, most such commitments melt before the sun of the political agenda of the Executive government.

Often, as was observed in the Australian context, the chief impediment to the implementation of law reform reports is a log-jam created by a governmental decision-making processes that have not kept pace with the needs of contemporary governance. Even for obvious necessities of reform, reports can lie fallow not for reasons of political opposition but because of sheer indifference and institutional failures[115]. The intensity of this problem varies as between countries. To overcome it, improvisions, personal intercessions, gentle nudgings and lobbying techniques are universally adopted by law reform bodies. But the institutions of lawmaking remain basically unchanged. If anything, the outcomes are more problematic as law reform loses some of its novelty and

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[114] See J B Robertson, "Initiation and Selection of Projects", Chapter 7 in *Promise*, 102 at 111-114.

[115] See for example reform of the *Bankruptcy Act* 1966 (Cth), s 82 recommended in Australian Law Reform Commission, *General Insolvency Inquiry* (ALRC 45, 1988), Vol 1, 16 noted in *Coventry v Charter Pacific Corp Ltd* [2005] HCA 67 at [140]-[141].

depends on personnel who struggle to exhibit the charisma and standing of a Scarman.

All democrats want Parliament to succeed as the palladium of the people and the chief organ of lawmaking. However, the lesson of the forty years since Scarman created the Law Commission is that Parliament has not reformed itself to rise systematically to this function. Where Scarman failed to solve the serious institutional flaw in his new design, it should not be surprising that his successors have enjoyed no greater success, anywhere[116].

HUMAN RIGHTS

But what of the second pillar of Scarman's achievements in reshaping the law to an acceptance of notions of fundamental human rights? He was not alone in this achievement. But it did require a very important shift in the thinking that was traditional to lawyers raised with the ideas of the common law of England. To be accepted, it needed safe, reliable and respected supporters. This is what Scarman gave the human rights movement in Britain - a land and a culture traditionally hostile to such notions[117].

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[116] Kirby, above in *Promise* at 445.

[117] A Lester and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004), p 4 [1.09].

For common law lawyers, rights usually comprise only the residuum left by the absence of lawful restrictions, whether expressed in legislation, subordinate legislation or judge-made law[118]. This was a central and long-standing difference between the highly pragmatic, problem-solving character of the common law (based in English ideas and historical instances limiting the intrusions of government) and the more conceptual European notions of the declaratory grants of rights by authority (based in natural law doctrine, reinforced by the teaching of the Roman Catholic Church predominant in much of Europe but not in Britain).

It was probably the terrible events of the Second World War that Scarman and so many others had seen at first hand, together with the discoveries after that conflict of the oppression and acts of genocide, that led the British government to ratify the *European Convention on Human Rights*[119]. Once that Rubicon was crossed and the countries of the new Commonwealth, in their independence constitutions, began to follow the basic rights doctrines of the United States Constitution, it was probably inevitable that Britain itself would eventually follow suit.

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[118] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564 applying *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109 at 283; cf S Gageler, "The legitimate scope of Judicial Review" (2005) 26 *Australian Bar Review* 303 at 304.

[119] The United Kingdom was the first State to ratify the Convention: see A Lester and D Pannick, *Human Rights Law and Practice* (2nd ed, 2004) p 6 [1.16].

Changes in the character and composition of British society and the stimulus of decisions of the European Court of Human Rights hastened the calls for incorporation of the European Convention into British domestic law. However, it was Scarman's Hamlyn Lectures of 1974: *English Law - The New Dimension*[120] that contained the most powerful and influential call, made at a critical time, for this course to be taken. He proposed the establishment of a Supreme Court of the United Kingdom with the power to give the fundamental rights reality in the context of a body of public law that Scarman saw as by now inadequate to the needs of modern governance. His was an heroic vision. It captured the imagination of young lawyers. Like many such ideas, it took decades to be accepted and to prosper.

Scarman's lectures of 1974 constituted a truly original appeal for fresh thinking about the content of the English legal system. They were rendered more influential because of the great legal offices that Scarman had already attained by 1974 and by his authentic credentials as a judge who was quite cautious about the judicial capacity to fix things up[121]. In this, and his warnings against a "naked [judicial] usurpation of the legislative function under the

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[120] Stevens and Sons, London, 1974 ("*New Dimension*").

[121] *Ibid,* 1.

thin disguise of interpretation"[122], Scarman presented quite a contrast to Lord Denning's alternative view that judges had made the common law in the past and could unmake and remould it for the present and the future.

Scarman placed his Hamlyn Lectures squarely in the regional context of British adherence to the European Communities in 1972 and the broader, global moves for the protection of human rights that he saw as being in the lineage of the English *Magna Carta*[123]. Oliver Cromwell had promised a new *Magna Carta*. That promise was lost with the end of the Commonwealth. It was only partly recaptured in the *Bill of Rights* of 1688[124]. Now, by many examples and illustrations, Scarman portrayed the need to arm the contemporary judges of the common law with new tools to solve the multitude of individual and social problems that presented to the law. What the judges could not do, in his view, with the conventional tools and within legitimate judicial choices, they might be able to perform with new statutory powers drawing on ideas derived from the European Convention that Britain and the wider global movement

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[122] *Ibid,* 3, citing Lord Simonds in *Magor Rural District Council v Newport Borough Council* [1952] AC 189 at 191.

[123] *New Dimension,* 14.

[124] *Ibid,* 17-18.

for human rights. He reminded the audience of his Hamlyn Lectures[125]:

> "... [T]he human rights movement, which is now not merely a campaign but a matter of international obligation, reveals the basic imbalance of our Constitution, and points towards the need for a new constitutional settlement. Without a Bill of Rights protected from repeal, amendment, or suspension by the ordinary processes of a bare Parliamentary majority, controlled by the government of the day, human rights will be at risk".

In its time, this was an extraordinary statement. Most of all it was remarkable coming from a leader of a legal system that had looked on rights in quite a different way and which trusted Parliament, not courts, to correct injustices. Scarman had his insight about human rights earlier than most others. He saw that the lessons of recent history, the changing composition of society and the systemic failings of Parliament and the other organs of government made it imperative to introduce new mechanisms of governance. For him, majoritarian parliamentary rule was an inadequate conception of democracy, at least for Britain as it had evolved three parts through the twentieth century.

What brought Scarman, with his generally conventional education and training, to such unorthodox and challenging

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[125] *Ibid,* 69.

conclusions? Was it his experience in the War? Was it his frustration in the administrative law cases he argued as counsel, because of the notorious gaps in that field of law? Was it his experience in the Law Commission, hearing submissions from countless community groups of ordinary citizens, telling of the injustices and inefficiencies they had experiences in the law as it operated in practice? Was it his release from the strictures that oppressed him in the courtroom that set him upon a perception of the society around him, with its many minorities and its growing diversity? Was it his reflection on the serious flaw in the parliamentary solutions to law reform that lay at the heart of the first of the pillars that he had propounded - reform through legislation advised by the Law Commission?

It was probably all of these things. But what is astonishing, and most admirable, is that Scarman came instinctively to a perception that some lawyers still resist but which is reinforced by serious reflection upon the way we are now governed. It is the way we were governed that called forth a new dimension of law. Scarman's gift was that he saw this clearly and expressed it; and was one of the first to do so.

The formalities of our constitutional arrangements, in Britain as much as Australia, no longer accord with the theories that most contemporary lawyers were taught at university. The notions, even the basic institutions, of government are no longer what they were.

In a country with a written Constitution, such as Australia, the document may not even contain a mention of the primary actors on the stage of governance - the Prime Minister, the Cabinet, the political advisers, the political parties, the modern media[126]. None of these is provided for, or even referred to. In Britain, without a comprehensive written constitutional instrument, the defects of constitutional design had become even more manifest. Hence Scarman's search for something better. It was a search that took him to the model adopted two centuries earlier in the United States and more recently in Europe. This involved a written text enshrining a fundamental charter of human rights but operating in a global world where human rights, by now, had become part of international law.

Today, we can see more clearly the changes that have come over our institutions of governance in the last half century. The future directions were not so plain in 1974; but this only makes Scarman's prescience the more remarkable. The changes to which I refer are as true of the United Kingdom as of Australia[127]. The role of the Crown has diminished. In Australia, even the old courtesies are now often neglected. The head of government has taken over

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[126] None of these institutions or persons is mentioned in the Australian Constitution.

[127] cf Lord Hailsham, "Elected Dictatorship", 30 *Parliamentary Affairs* 324 (1997) and Paul Kelly, Cunningham Lecture for the Academy of Social Sciences in Australia, 6 November 2005.

many functions formerly performed by the head of state or her representatives. Even the traditional entitlements "to be consulted, to encourage and to warn"[128] are not always observed now[129]. Reality thus often belies appearances and ancient constitutional traditions. The role of the head of government has enlarged immeasurably and the process escalates whichever political party wins the Treasury Benches.

In part, this seemingly irreversible change has come about because modern media focuses attention on the chief political office-holder. Media assigns special emphasis to him or her. The young journalists - and also the not so young - are endlessly fascinated with the political games that are played. The role of cabinet is sometimes diminished by the functions now played by key ministers, counselled by their political and media advisers. Political staffers are a new phenomenon of great power. Their power has expanded enormously, even since Scarman described his *New Dimension* of law in 1975.

Key officers who once worked in the ministries have been shifted into the political offices of the Prime Minister and the

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[128] cf E McWhinney, *The Governor-General and The Prime Ministers* (2005), Ronsdale, 166.

[129] As for example the proposed abolition of the office of the Lord Chancellor which had endured for eight hundred years.

Ministers. The senior public servants have, in many cases, lost their permanence. Their influence, and their capacity and inclination to resist Ministers and more especially the Prime Minister, are diminished in proportion to their declining power and influence[130]. The political party in government, has powers that are not reflected, or even mentioned, in the formal constitutional arrangements. Parliament's powers to control the Executive are diminished by the Executive's powers to offer promotion and patronage to Members of Parliament. The resignation of Ministers for wrong-doing by their Departments now seems to be virtually a dead letter. The most that now appears to happen, and that quite rarely, is that a public servant is disciplined. Ministerial responsibility in the traditional sense has been eroded almost to vanishing point.

In Australia, even the traditional[131] and constitutional role of Parliament, as a body with specific functions to permit or refuse appropriations for the ordinary annual services of government, has been diminished by the adoption of new ways of expressing proposed appropriations, less susceptible to detailed parliamentary scrutiny and control[132]. Occasionally back-benchers snatch a part in

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130 A F Mason, "Democracy and the Law: The state of the Australian political system", *Law Society Journal (NSW)*, November 2005, 68 at 69.

131 *Brown v West* (1990) 169 CLR 195.

132 *Combet v The Commonwealth* [2005] HCA 61.

the political dramas - but this is exceptional and often depends on chance events. It tends to become a story in itself, whatever the issue that is involved.

The sources of lobby interests have been enlarged. The political lobbyist is now a professional operator, paid to gain the ears of those with power or influence upon power. The media has also changed. All too often it lives on emailed releases. It mirrors and creates political moods. It avoids searching analysis and promotes a culture of personality and infotainment[133]. There are notable exceptions but the contemporary mixture of fact and comment and the features of some tabloid media as players in the political game has changed many of the old traditions. Here is another extra constitutional source of power that has expanded greatly in recent times.

The judiciary is a last, independent resource for the protection of basic rights. And even the judiciary is now targeted by politicians and media for their own ends in ways that would not so long ago have been punished as a scandal. We have seen in the United States the high politicisation of judicial appointments. The Acting Prime Minister of Australia in 1996 stated that future appointments

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[133] In consequence there is growing mistrust of electronic news and declining sales of the print media: see D T Z Mindich, *Tuned Out: Why Americans Under 40 Don't Follow the News*, OUP, 2004.

to the High Court of Australia would be "capital C Conservative[s]". If rights are not expressed in the Constitution, or defined by the legislature, the judiciary may be powerless to defend minorities, the vulnerable and unpopular individuals and groups[134].

As we embark on the twenty-first century, the very notion of the "sovereignty" of Parliament has become somewhat inapposite, certainly in a country with a written Constitution that divides the sovereignty of the people amongst a number of institutions which formally make the law. In Britain, talk of the sovereignty of Parliament is still quite popular. This is so despite the marked disparity between the theory of representative and responsible government and the reality of elections held at three, four or five year intervals when a single vote is portrayed as authorising everything that follows in the elected government's lawmaking. The past Chief Justice of Australia, Sir Anthony Mason, has recently observed that the notion that Parliament is responsive to the will of the people, except in the most remote, indirect and contingent way, must now be regarded as "quaint or romantic[135]".

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[134] See eg *B v Minister for Immigration and Multicultural Affairs* (2004) 219 CR 365; *Muir v The Queen* (2004) 78 ALJR 80 at 784 [23]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 04 [109].

[135] Mason, above, 69.

It is into this world of modern government that Scarman's idea of an enforceable statement of fundamental rights is projected. In Britain you have the *Human Rights Act* 1998 (UK), fulfilling Scarman's dream. In Australia, we have desultory talk of a Bill of Rights[136]. However, save for one Territory, and then in modest form, there is no actuality. Politicians of both major political groupings are either luke warm to the notion of legally protected fundamental human rights or strongly opposed. Some of the opponents talk repeatedly of the dangers of "judicial activism" and the threat to democracy. To this talk it is necessary to reply, as Lord Bingham has done[137]:

> "Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts".

The statement made by Lord Bingham appeared in an important decision of the House of Lords upholding the rights of persons of foreign nationality, detained without trial and unconvicted

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[136] *Al-Kateb v Godwin* (2004) 219 CLR 562 at 594-595 [73] per McHugh J referring to G Williams, *The Case for an Australian Bill of Rights* (2005); cf J Allan, "'Do the Right Thing' Judging? The High Court of Australia in *Al-Kateb*" (2005) 24 *Uni of Qld Law Journal*, 1.

[137] In *A (FC) v Secretary of State for the Home Department* [2005] 2 AC 68 at 109-110 [41] citing *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 [27].

but accused under counter-terrorism legislation[138]. It would not have been possible for the decision of the House of Lords in that case, or many others, to have been reached, or the statement to have been made, without the *Human Rights Act*. The enactment of that law came just in time. It was the response of Parliament, in part to the new British relationship with Europe but in part to the urgings of great British jurists, such as Scarman. It is at least open to question whether the Executive Government would have proposed this second pillar after 11 September 2002. Yet now it is there. And its influence is protective and likely to expand with each passing year.

In Australia, suggestions for the adoption of a constitutional or at least statutory Bill of Rights to temper the "decline of the previous high standards of liberal constitutionalism"[139] are brushed aside and are nowhere in prospect. In this respect we are, as Scarman observed when he visited Australia in 1980, "more English than the English" - but we are now like the English as they were before the *Human Rights Act*, not as now. Effectively, Australia is the only modern Western country that must face the challenges of the present age and the changes of the institutions of government that I have described, without a constitutional, or even statutory, charter of rights to temper autarchy with judicial reminders of fundamental freedoms.

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[138] *Anti-Terrorism (Crime and Security) Act* 2001 (UK).

[139] Mason, above p 68.

A MASTER SPIRIT OF THE LAW

Bills of Rights are not a panacea for every defect of the law or of our system of government. Scarman did not suggest that they were. Nor, when they exist, do they give judges a completely free hand to do what they like. They are expressed in words that bind. Around those words has typically accumulated a large body of jurisprudence to guide the judges whenever a provision is relevant. They afford no antidote to the defects and omissions in technical aspects of the law that have no bearing on stated rights. They do not provide an answer to every problem of law reform.

This said, in the context of the very significant changes that have occurred in the way we are governed, statements of binding human rights moderate the risks and defects of the institutions of law-making as they have now evolved. Sir William Wade, as usual, put it well[140]:

> "Subject as it is to the vast empires of executive power that have been created, the public must be able to rely on the law to ensure that all this power may be used in a way conformable to its ideas of fair dealing and good

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[140] W Wade, *Administrative Law* (6th ed, 1988), 7. See also I Harden and N Lewis, *The Noble Lie - The British Constitution and the Rule of Law* (1986), 86; J Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998), 3-31.

> administration. As liberty is subtracted, justice must be added[141]".

It is not given to many judges, to leave a lasting, probably permanent, mark on a nation's basic legal institutions. To achieve two such marks requires an extraordinary human spirit. It suggests a person with special gifts of intellect, emotion, persuasiveness and human empathy. These are the qualities that Lord Scarman deployed throughout his life. They have affected the development of law in the United Kingdom. They continue to influence, if only by example, the development of law in other countries of the common law, including Australia.

It is too early to venture a full assessment of Scarman's role in charting the new dimension of the law in our tradition. Yet we can say with certainty that his influence endures because he tackled fundamental things. Law reform and basic human rights are on a stronger foundation in Britain because of his prescience and public service. The law reform idea has spread far and wide. If it still remains flawed in some aspects of its delivery, the second idea, that of human rights, was Scarman's answer to the need for a judiciary with replenished powers, able to attend to injustices that Parliament had created or overlooked.

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[141] cf *Plaintiff S 157/2004 v The Commonwealth* (2003) 211 CLR 476 at 494 [13].

Both of these ideas derived from Scarman's deep conviction that law and its institutions have to adapt to the real world of modern government. There was a fundamental unity in his thinking about law. To the end, his caution as a judge arose from his deep English conviction that new mechanisms were needed, but that they had to be authorised by Parliament in the name of the people. Those mechanisms duly came. The Law Commission. The *Human Rights Act*. He breathed life into the first. He foresaw the necessity of the second and for it he was an early herald and then a powerful advocate.

For the work of such a master spirit of the law we must be ever grateful. He made a difference. His achievements encourage and inspire us. And his greatest achievement was to see the growing defects in our modern constitutional arrangements and to propose ways by which we could repair them.