THE JUDICIARY

The Report of a JUSTICE Sub-Committee

CHAIRMAN OF SUB-COMMITTEE

PETER WEBSTER, Q.C.

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COUNCIL'S FOREWORD

THIS Report was commissioned by JUSTICE from a sub-committee which was given wide terms of reference. When the first draft was presented to the Council, a number of its members felt unable to support some of the recommendations. Others had strong reservations about the wisdom of re-opening the controversy between the two branches of the legal profession which had only just been resolved during the passage of the Courts Bill, or of engendering mistrust of the judiciary in those who, without reading the full Report, might draw unjustified inferences from the recommendations alone.

Before a final decision on the draft Report had been made, some extracts which did not convey an accurate impression of it were published, through a breach of confidence and without authority, in the Press. There has also been increasing public interest in matters concerning the judiciary, and criticism of the attitudes and decisions of some individual judges.

In authorising the publication of the Report, the Council of JUSTICE expresses no corporate opinion about the contents and does not publish it as a JUSTICE report; it is published as a report of the Sub-Committee which prepared it. It is hoped that its contents will set a standard for the level of responsible and informed opinion on which discussions of matters of this kind can best be conducted if they are to prove useful and constructive.

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Introduction

We were appointed as a Sub-Committee of Justice's Standing Committee on Civil Justice in December 1967. Our terms of reference, which were given to us by the Standing Committee with the endorsement of the Council of Justice, were simply "The Judiciary." Between January 1968 and March 1971 we held twenty meetings. The composition of our Sub-Committee appears on a title page of this Report.

It may be helpful for us to anticipate here what we say in the body of our Report by summarising our principal recommendations and briefly discussing some of them. Our main recommendations are: that solicitors should be eligible for appointment as Circuit judges, and that academic lawyers should be eligible for appointment to the appellate courts; that there should be a consultative committee to assist the Lord Chancellor in appointing judges; that a number of measures should be considered with a view to improving the environment in which judges have to work; that judges should have the opportunity of special training before they first sit; that a judicial commission should be established with powers to investigate complaints about the behaviour of judges and make recommendations, and in conjunction with the Judicial Committee of the Privy Council to remove a judge for incapacity or misconduct; that trial judges should retire at seventy and appellate judges in general at seventy-five; and that provision should be made for early retirement on medical grounds with full pension.

In our view some of these recommendations should be given greater priority than the rest, for example the extension of eligibility to solicitors and academic lawyers, the provision of training, and the establishment of a machinery for the investigation of complaints. Conversely, our recommendation that there should be a new procedure governing the removal of a judge from office is clearly not a matter of

any urgency; and we are very conscious of the fact that many people, rightly anxious to protect the independence and standing of the judiciary, may be affronted by the very suggestion that any new procedure is necessary. We respect such feelings. We recognise that in this case, as in some others, the reforms which we advocate are prompted partly by a desire to remedy any imperfections. On the other hand every experienced lawyer knows that in the very rare instances in which a judge ought to be made to retire, nothing can be done in practice if he cannot be persuaded to do so. This might not matter if judges were, for instance, heads of departments, so that other people could do their work if they could not do it properly themselves. But only the judge himself can do his work, so that even if such an occasion arises only once in a decade the system which enables nothing more than persuasion to be attempted must be imperfect, and, on such an occasion, seriously imperfect.

Our recommendation that solicitors should be eligible for appointment as Circuit judges has already been partly implemented by the Courts Act 1971. Some will say that it is therefore no longer necessary to resurrect a controversy which did little to generate harmony within the legal profession or respect for the profession on the part of those outside it. But the Courts Act does not, in our opinion, go far enough in the direction of necessary reform, and the conditions which solicitors must satisfy to become eligible for appointment to the Bench are, we believe, such as to make it both difficult and embarrassing for the best solicitors to make themselves eligible. For this reason we think that our discussion of this question continues to be relevant despite the advent of the Courts Act. But there is another reason also: our Committee includes both solicitors and barristers and we have reached an agreed conclusion after having considered each others' views. So far as we know, no similar body has published any discussion of the problem and we hope that ours, in which we have tried to set out all the general arguments on each side and to assess them, will help to put the issues into perspective and to remove them from the battlefield of the correspondence columns onto the conference table.

We have no doubt that some will criticise this Report on the grounds that the judicial system works well and that to discuss it as we have done, still more to propose alterations to it, will engender a lack of confidence in the judiciary. We recognise, with pride and respect, that our judicial system, particularly in the High Court, is known to work well and, indeed, to be the envy of many lawyers and laymen in many parts of the world. In these circumstances we doubt whether a committee such as ours has the power to undermine confidence, whatever we might say. In any event, we are living, for better or worse, at a time when, as public knowledge of and participation in public affairs grows, more and more institutions are scrutinised, appraised and criticised. Often the criticism is unfair, usually because those responsible for it are not fully informed of the facts or closely acquainted with the relevant considerations and implications. We have foreseen that sooner or later the judiciary will become a subject of popular debate, and this is already beginning to happen. At least one of our objects in writing this report is to enable a committee consisting of solicitors, barristers, academic lawyers and laymen to make available the contemporary facts and relevant considerations so that any public debate can at least be better informed.

We have not taken any formal evidence but individual members of the Committee have had discussions and have corresponded with various members of the legal profession in England and Scotland and (in connection with age and retirement) with members of the medical profession. We have been given information by the Lord Chancellor's Department.

The Committee is deeply indebted to its Secretary, Mr. Joseph Harper, for his invaluable assistance throughout its deliberations and in the preparation of this Report.

I. Scope of the Report

1. The judge, sitting either alone or with a jury, administers the law. If the law is to be respected, he must be respected, and if justice is to be seen to be done, he must be seen to be doing it. In many ways he is the embodiment of the law.

2. In general our judges are held in high respect by both public and lawyers. But it would be wrong to suppose that all judges are universally respected or that, because most of them are, the judiciary as an institution needs no improvement.

3. The purpose of this Report is to scrutinise those aspects of the institution which, we believe, may be in need of improvement, to ask constructive questions and to make recommendations. In some areas, original and painstaking research of a psychological, sociological, and even medical character is probably needed before the questions can be definitively answered, but it seems to us that something of value can be gained by giving our answers to the questions on the material available to us, and by making our recommendations, if only so as to promote constructive discussion about the subject.

4. We believe that our modern judges at all levels would be the first to welcome inquiry into the matters touched upon in this Report. There has from time to time been criticism of individual judges. It has been said that some are too old for the work, that some are out of touch with the people and with the developments of modern society, that some (and particularly those concerned with the criminal law at quarter sessions) became stale and egotistical to a point where injustice could have resulted, and that some county court judges habitually behave in a manner which leaves much to be desired. Such criticism may sometimes be justified in individual cases, but the questions we raise in this Report imply no criticism of our

judiciary, taken as a whole. Indeed in this respect we have no reason to differ from Lord Goodman when he said:[1]

> "I believe, and I am proud to say, having travelled widely and seen courts in many parts of the world, that there are few countries, if any, which can find judges of the quality, of the learning and the integrity that we are happy to possess. I think we should be very slow indeed to take any measures that would damage that position, very slow indeed to take any measures that might damage the quality and integrity of the holders of judicial office."

5. The questions we propose to discuss are:

(i) Should the pool from which judicial appointments are made be enlarged? Specifically, should solicitors, academic lawyers or chairmen of administrative tribunals be eligible for appointment? Should politics or the social background of candidates for appointment be taken into consideration?

(ii) Should there be a career judiciary?

(iii) Should the present method of appointment be improved?

(iv) What are the pressures on the judiciary, and how can they be alleviated? (In this context we discuss, *inter alia*, the effects of ritual and overwork, and the risk of staleness.)

(v) Should judges be given training? Should there be a Judicial Staff College or a training centre? Should there be a probationary period for judges?

(vi) Is there adequate control over the judges after their appointment?

(vii) Is there an adequate power to remove them?

(viii) Should there be a "judicial commission"?

(ix) At what age should judges retire, and should there be provision for early retirement?

[1] *Hansard*, House of Lords, January 29, 1968, Vol. 288 at col. 616.

Background to the questions: the role of the judiciary and their numbers

6. The function of the professional judiciary in our legal system must be seen in the context of the legal system as a whole. The vast majority of criminal cases and a significant proportion of matrimonial disputes, nearly all involving questions of fact, are dealt with by lay magistrates, guided on the law by their clerks, most of whom are solicitors. The much smaller number of more serious criminal cases is dealt with by a jury, presided over by a professional judge. A comparatively small number of civil cases, mostly arising from accidents at work and on the highway, is dealt with either by county court judges or by High Court judges, and the jurisdiction of county court judges is being steadily increased. The vast majority of civil disputes are settled by negotiation between the parties' legal advisers, and never reach the courts at all . Under 5 per cent. of all writs issued come to trial.[2] Nonetheless the criteria by reference to which the majority of our disputes are settled are those established by the courts, *i.e.* the judges.

How many judges are there?

7. It appears that there are fewer professional judges per million of the population of England and Wales than in nearly all other European or Commonwealth countries. This is primarily because over 98 per cent. of criminal cases are tried by the 18,500 or so unpaid magistrates. However, in spite of this, the proportion of 8 per million as contrasted with say, Switzerland (121), France (82), Norway (58), Canada (76), Australia (29) and Scotland (15) is startling. In fact the proportion of Queen's Bench Division judges in 1968 of 1 per 1·26 million population was exactly the same as in 1871.[3] These figures on their own may, however, be misleading because England and Wales in any case has a somewhat low proportion of lawyers to the general population; for instance, in 1963 there were 296,000 lawyers in the

[2] See Civil Judicial Statistics for the year 1969, CH 1950 Cmnd. 4416.
[3] *Hansard*, House of Lords, January 29, 1968.

U.S.A., which gave a proportion to the general population of 1 in 637, whereas comparable calculations for England and Wales produce a figure of around 1 in 2,000.[4]

8. But the absolute number of judicial appointments is considerable. In 1970 the total number was made up as follows[5]:

L.C., L.C.J., M.R., Pr.Family Division and V.-C. of Chancery Division	5	
Lords of Appeal	11	
Lords Justices	13	
Puisne judges	70	
Official Referees	3	
Central Criminal Court and Crown Recorders	20	
Masters of the Supreme Court	24	
County court judges	101	(in 356 courts)
Full time chairmen and deputy chairmen of Q.S.	18	
Stipendiary magistrates	47	
Part-time Q.S.Posts	395	
Registrars	88	(full-time)
	20	(part-time)

In addition to this there are presidents or chairmen of many other courts and tribunals, like the Industrial Court, the Lands Tribunal and the Patents Appeal Tribunal.

[4] Johnson and Hopson: *Lawyers and their Work.*
[5] Source: Report of the Royal Commission on Assizes and Quarter Sessions.

II. Should the Source from which Appointments are to be Made be Enlarged?

9. As is well known, all judicial appointments, with some minor exceptions, are made from practising members of the Bar. We have been told by the Lord Chancellor's Office that the average number of new permanent full-time judicial appointments (excluding masters and chairmen of tribunals, but including county courts, quarter sessions etc.) was twenty per annum during the period 1963–67. Of these, two thirds were junior barristers. It should also be noted that two of the stipendiary magistrates appointed were solicitors. In addition, many part-time appointments were made. Between 1960 and 1968 an average of seven appointments were made annually to the High Court Bench, and just over six to the County Court Bench.

10. It is pointed out in the Beeching Report [6] that, in an attempt to keep pace with the growing volume of work, the number of High Court judges has been more than doubled in the last thirty years. It is very difficult to tell how much the Bar has increased in size during that period, since there are no reliable statistics for the period before 1953, but, during the period 1953–68, the number of practising barristers has fluctuated between 1,907 and 2,379, of whom roughly 75 per cent. practise in London.

11. In fact those members of the Bar available for judicial appointment are far fewer than these figures suggest. No High Court or Circuit judge can be appointed from barristers who have practised for less than ten years and no county court judge from those with less than seven years experience. In reality far greater experience than this is required.

12. According to Abel-Smith and Stevens,[7] at any particular time there are not more than twenty-five active Chancery and 145 Common Law Queen's Counsel from

[6] Cmnd. 4153 at para. 37.

[7] *In Search of Justice*, p. 175.

whom to choose High Court judges, and a number of these may not be suitable for appointment because of the state of their practices or their age. Our view is that the numbers of those really qualified, as distinct from those nominally eligible, for appointment to the High Court Bench at any particular time are very considerably lower than these quoted figures. At paragraph 115 of their Report the Beeching Commission (dealing with shortage of available barristers experienced in some courts) emphasised the gravity of the situation:

> "A factor which is even more restrictive than cost, both in the short and medium term, is the capacity of the Bar. When applied as it is forced to be by the present court system, it is inadequate to satisfy the demands made on it to serve its double function of providing Counsel and supplying the pool from which the judiciary is drawn. Although, provided there were suitable incentives, the Bar could no doubt be considerably enlarged, an expansion of capacity at all levels of competence and experience would take many years to achieve. Moreover, the last to be affected by a larger recruitment to the Bar would be those levels from which the higher ranks of the judiciary are drawn. The present potential of the Bar, therefore, sets a limit to the possibility of increasing judge power without sacrificing judicial quality and without denuding the Bar of its leading members, and this limitation will only be eased slowly because, for many years to come, it will depend upon past changes in the strength of the Bar rather than upon any recent or future increase in the rate of expansion."

Should solicitors be eligible for appointment?

13. A number of suggestions have been made for widening the pool for judicial recruitment, most of them advocating that solicitors should become eligible for appointment to the Bench. Though some solicitors (mainly justices' clerks) have been appointed as stipendiary magistrates and others as county court registrars, solicitors

were until very recently excluded altogether from the ranks of the senior judiciary, and in particular from the High Court and County Court Benches. There are powerful arguments both for and against this policy, and we considered them very fully even before the passing of the Courts Act 1971, which has made some changes in the previous system. We think that our conclusions on this subject are still relevant, and we therefore set them out below.

14. The main arguments in favour of allowing solicitors to be eligible for appointment to the Bench (which we will discuss more fully below) are these:

(i) the Bar has become numerically inadequate to provide the exclusive source for appointment, unless the quality of the Bench and of the Bar is to be jeopardised;

(ii) although many solicitors may not have experience or qualifications such as to equip them for the Bench, it cannot be said that there are not some who do;

(iii) the larger the pool of candidates the better the chance of a good judicial appointment;

(iv) eligibility for the Bench would enhance the dignity, self-respect and pride of an honourable branch of the legal profession;

(v) any lawyer embarking on his career whether as a barrister or a solicitor should be entitled to regard the Bench as a possible goal.

The principal arguments against the proposal are:

(vi) solicitors lack the necessary experience, particularly experience as advocates;

(vii) appointment of solicitors to the Bench would erode the distinction between solicitors and barristers, and tend towards fusion;

(viii) if judges were no longer exclusively appointed from the Bar, the Bar would be less attractive and might therefore be weakened;

(ix) the present system of appointing judges, which has been said to depend upon the Lord Chancellor's personal knowledge of the Bar, would be unworkable because he could not be expected to know personally all the eligible solicitors.

15. Each of the arguments both in favour of the proposal and against it merits further consideration.

For the proposal

(i) *The Bar is numerically inadequate*

In recent years both the Bar and the Bench have grown in numbers but the Bench has grown much faster than the Bar (see Beeching Report, para. 37 and para. 10 above). It seems to us (though we have no supporting statistics) that during the last ten years many more appointments have been made to the Bench from barristers about, or under, fifty years of age than were made previously. We have no doubt that there should be many relatively young men on the Bench; at the same time we believe that there should always be a substantial number of skilled and experienced silks in their middle or even late fifties if the Bar is to remain a strong, independent institution. It cannot be a good thing either for the Bar or for the legal profession as a whole to siphon away to the Bench the cream of the Bar immediately, or very soon after, it reaches the top. Moreover at the lower level we have heard a number of complaints about the quality of county court judges. In short it is our view that if the Bar is to remain the exclusive source for appointment, then either the quality of the Bench or the strength of the Bar (and possibly both) will be in jeopardy.

(ii) *It cannot be said that no solicitor would make a competent judge*

We will discuss the experience and qualifications of solicitors in relation to the general argument in subparagraph (vi) below, but whatever the merits of that argument this proposition is not open to challenge. So long as there remains a shortage of candidates for judicial

appointment, indeed even so long as it is in the public interest that the best possible appointment should always be made, it must follow that any solicitor who would make a competent judge should, in principle, be eligible for appointment. Whether or not any particular solicitor would be appointed would depend, then, not on eligibility but on whether he had the necessary qualifications or qualities.

(iii) *The lower the pool of candidates, the better the chance of a good judicial appointment*

This proposition speaks for itself. Applied to the facts the figures are that there were in 1969 24,409 solicitors with practising certificates of whom, at a very rough estimate, 15,000 are likely to have been in practice for more than ten years. As at September 30, 1970, of the 2,584 practitioners at the Bar 1,476 were of over ten years' seniority. No one would suggest that every solicitor would make a good judge (in fact it is probable that, all other things being equal, solicitors are less likely to be qualified for the job than barristers), but if there were no more than half a dozen solicitors at any one time who by reason of their qualifications were potential candidates for appointment, and if only one or two of them were to be appointed from time to time, it must follow that this wider field of choice would be desirable.

(iv) *Eligibility would enhance the dignity of an honourable branch of the profession*

This too is a proposition that is self-evident. We suspect that few solicitors would want to be made judges; but many more of them, clearly, are aggrieved by the fact that as a profession they are considered to lack the qualities, qualifications and experience necessary for a good judge. It would be right that they should tolerate this sense of grievance if, in truth, none of them could make a good judge. If, on the other hand, some solicitors do have (as we think they have) the necessary attributes then their sense of grievance is justified and should be removed—unless to do so would be contrary to the public interest.

(v) *Solicitors should be entitled to regard the Bench as a possible goal*

This is much the same point as the one we have just discussed. Against this argument it is said that nowadays a solicitor who aspires to the Bench can quite easily transfer to the Bar: a solicitor of at least three years' standing need only read as a pupil in barristers' chambers for six months, and he is then eligible for call to the Bar. But this, surely, is more easily said than done. There must be many professional men who cannot decide until about their middle thirties where their best talents and interests lie. How can such a man support himself, and a family (which by that age he almost certainly has) during his pupillage and the early months and years of his new practice at the Bar? He cannot even be certain that he will ever succeed in it.

Against the proposal

(vi) *Solicitors lack the necessary experience, particularly as advocates*

(a) One of the most common arguments adopted by those who oppose the appointment of solicitors to the Bench is that their experience does not qualify them for the functions they would have to perform. According to a report in the *Law Guardian* of a lecture by Lord Diplock at King's College London, by far the greater part of the judge's task was to find out what actually happens. Lord Diplock said that when he was a Q.B. judge on Circuit he seldom had before him any case, criminal or civil, in which a competent third year law student, with Archbold, *Salmond on Tort* and Redgrave's *Factory Acts* to hand, could not have decided guilt or liability *once he had found out what actually happened* (although deciding upon the sentence or the measure of damages was another matter—and the most difficult part of the judicial function at first instance). Our judicial process was based on the adversary system and our courts were bound by the strict rules of evidence. These factors could easily bemuse witnesses and jurors. The good judge was he who could ensure that the facts were elicited, from the recounting, within the rules of evidence,

of the sensed experiences of witnesses who are often of limited vocabulary and used to "telling a story in their own words." He had to make these facts clear to himself, and, in a criminal case, to a jury of ordinary men and women. No one who had not himself had considerable experience of the practice of advocacy could successfully carry out this part of the judicial function.

We are not suggesting that it is in fact Lord Diplock's view that solicitors are not qualified to perform the judicial function; the quotation, nonetheless, succinctly summarises not only the function of the trial judge but also the principal argument of those who hold that view. We ourselves, though recognising the force of the argument, and the difficulties which may face a solicitor with little court experience when he tries his first case, nonetheless do not regard them as sufficiently formidable to justify the contention that solicitors should not be eligible for appointment or to outweigh the advantages of appointing properly qualified solicitors to the Bench if, in other respects, to do so would be in the public-interest. We cannot accept that making solicitors eligible for appointment would be contrary to the public interest. The public interest would only be adversely affected if solicitors were to be appointed who lack the necessary qualifications.

(b) Even if experience as an advocate is an indispensable qualification (which we doubt) there are many solicitors who practise with success in the county courts, and many who do so in other tribunals, *e.g.* the General Medical Council. Not only should these solicitors be eligible for appointment to the County Court Bench [8]; some of them must almost certainly have the necessary qualifications. Nowadays, it is argued, they would have to be made Circuit judges; as such they would have to try criminal cases, which they have not sufficient experience to enable them to do. That same comment could fairly have been made about many of our present High Court judges who, having had

[8] Under s. 20 of the Courts Act 1971 Circuit judges by virtue of their office are capable of sitting as county court judges. Subject to what is noted in para. 20 (below) this could mean that solicitors could sit as county court judges in exceptional circumstances.

little or no experience of criminal cases while at the Bar, have had to sit frequently as judges on assize in criminal cases, and have often had to do so immediately after appointment.

(c) In short, we conclude that though many solicitors would lack the desirable experience and qualifications, not all would do so. We doubt whether any particular experience or qualification is indispensable, and in any event these are matters which should affect the question whether any particular solicitor should be appointed to the Bench; they should not dominate the principle of eligibility. In any event most of us have had experience of solicitors who have exercised judicial functions of various kinds with admirable lucidity, authority and impartiality, and provided that the system of appointment is efficient, there should be little difficulty in ensuring that solicitors who lack the necessary qualifications are not appointed. Moreover, if the proposal which we make later is adopted (namely that all judges on appointment should have at least the option of being given some months' "training") any initial disability will be reduced. Finally, it is to be remembered that it is the duty of the advocate, be he barrister or solicitor, to assist the court, and his overriding duty not to mislead the court. We have little doubt that newcomers to the Bench are habitually given considerable assistance both by the Bar and (on assize) by the clerk of assize.

(vii) *Appointment of solicitors to the Bench would tend towards fusion*

(a) The argument, which is a fundamental one, is that to appoint solicitors to the Bench would blur, if not erode, the distinction between the two sides of the profession and so constitute a stride in the direction of fusion.

(b) We have not considered the merits or demerits of fusion: some of us tend to favour it but some of us are convinced that to fuse the legal profession in this country would be contrary to the public interest, whether or not it would be in the interests of the profession itself, and neither the Law Society nor the Bar Council regard fusion as being

in the interest of their members or in that of the public. Whatever the merits of the respective arguments we consider that the appointment of solicitors to the Bench would not, in fact, do anything significant to promote fusion.

(c) The mere fact that a solicitor had been made a judge could not, of itself, affect the relationship between the two sides of the profession because he, when made a judge, would have given up his professional work as a solicitor just as a barrister who becomes a judge gives up his practice. Accordingly the argument that the introduction of the proposal would lead to fusion must rest, we assume, on two grounds: first that it would break the Bar's monopoly of appointment to the Bench, and secondly that it would encourage solicitors to wish to become advocates. In either case, it is said, this could lead to fusion.

(d) We do not see that breaking the Bar's monopoly of appointment to the Bench can bring about fusion unless it be because it reduces the attraction of the Bar and thereby weakens the Bar to the point at which it loses its ability to provide a separate service. This point, namely the effect of appointing solicitors upon the attraction and strength of the Bar, we discuss below in sub-paragraph (viii).

(e) It may be that the introduction of the proposal would encourage more solicitors to wish to practise advocacy (although we think this must be very speculative) and, to press further for rights of audience in the Crown Courts and in the High Court. Even if they were to obtain these rights, we think it probable that very few would use them; moreover the fact that solicitors already have rights of audience in magistrates' courts, county courts and tribunals (which together hear many more cases than were heard at quarter sessions and in the High Court) does not appear to have blurred, still less eroded, the distinction between the two sides of the profession.

(f) Nonetheless, suppose we accept, for the purposes of the argument, that the distinction between the professions would be blurred if solicitors were to be given additional rights of audience as a result of becoming eligible for

appointment to the Bench, what then? We are convinced that neither the Bar nor any other body is entitled to a monopoly unless it is in the public interest; just as we are convinced that the legal profession as a whole will only be allowed to enforce those rules which preserve the separate functions of barristers and solicitors if it is in the public interest that those separate functions should be preserved. If they should be preserved in the public interest (as many of us believe) we believe that the profession as a whole will—and will be allowed to—retain or make such rules (including rules which lead to apparent "monopolies") as are necessary in order to preserve those separate functions which it is in the public interest to retain.

(viii) *The Bar would become less attractive*

(a) This argument, which we also take seriously, is that the Bar will weaken in quality and size if the existing system is altered otherwise than to a very small extent. For, notwithstanding the fiscal provisions first introduced by the Finance Act 1956, it is in practice difficult, particularly now that post-cessation receipts are taxed and since many barristers have to wait over a year for their fees, for members of the Bar other than the most successful to make any adequate provision for their later years; in conditions of inflation and economic uncertainty their difficulty is accentuated. So long as there are no partnerships at the Bar there is no way in which they can receive remuneration from their old chambers when they have retired. While in practice they may not become active directors of companies. They depend, therefore, to a large extent, if they are to remain in practice, upon the receipt of a pensionable job or office. Solicitors, and particularly those of the calibre who might become judges, are frequently in a position to receive remuneration from their firms after they retire, find it easier (because they can and do practise in partnership) to make provision for pensions on their retirement, and are in a position to become directors of companies whilst practising and to remain directors after they retire. Moreover, it is easier for a solicitor to remain in active practice until his

early seventies than it is for a member of the Bar, unless he is of outstanding reputation.

(b) On the other hand, solicitors carry large overheads in running a practice. Comparatively few in fact hold directorships and, even if they do, it is quite usual for the fees attributable to such directorships to form part of the firm's general revenue. Young solicitors joining partnerships have to provide working capital to finance work in progress, almost always these days out of earnings; they also frequently have to provide in some way towards pensions for retiring partners as well as providing for their own under the Finance Act 1956 provisions. Few, if any, solicitors amass capital out of earnings; the most the majority expect at the end of their working lives is a self-financed pension.

(c) The Bar might become appreciably less attractive if the chances of promotion from it to the Bench were to be substantially reduced. But even if solicitors were to become eligible, we do not foresee that, in practice, any great number of them would either seek or be given appointments; furthermore we have already noted that the numbers of the judiciary have grown at a faster rate, relatively, than the numbers at the Bar. We do not think that the Bar will ever cease to have considerable attraction for those who enjoy the independence of life in practice, who have an appetite for the work which it does and who savour the risks and the rewards of the Bar as a career.

(d) We doubt, therefore, whether the attraction of the Bar would be appreciably diminished. But in the final analysis we would take the view that, even if its attractions were to be appreciably diminished, that factor alone should not be allowed to block a reform which we believe to be in the public interest. Only if there were grounds for suspecting that the reform, if introduced, could so weaken the Bar as to threaten the existing structure of the profession would we have misgivings about its introduction. We are convinced, however, that no such grounds have been demonstrated.

(ix) *The present system of appointment would be unworkable*

This we accept. But we do not see that the virtues of the present system (which we discuss in Chapter IV below) outweigh the benefits of the reforms we suggest, and we therefore conclude that the system of appointment (about which in any event we have misgivings), should give way to the proposed reform, rather than vice versa.

16. In conclusion, therefore, we are in favour of making solicitors generally eligible for appointment to the Bench and for appointing such of them as are properly qualified. We think that they should be eligible for appointment only as county court or Circuit judges, but at the same time we recommend that every reasonable opportunity should be taken of appointing county court and Circuit judges to the High Court Bench. If the salaries of county court and Circuit judges remain at aproximately their present level relative to earnings in the legal profession, the chance of promotion from the County Court Bench to the High Court might provide a better incentive to a solicitor contemplating applying for an appointment as a county court or Circuit judge.

17. Before leaving the question, however, we have considered whether it would be in the interests of solicitors to accept such appointments.

18. At the outset it should be noted that a reliable investigation by an independent firm of consultants in 1961 concluded that the solicitors' profession was 5,000 short. Though this figure has been twice discounted by the Prices and Incomes Board it draws some colour from the fact that the number of solicitors in practice in proportion to the population has fallen in the last hundred years. (In 1863 there were 10,200 practising solicitors and attorneys, in 1900 15,881 and in 1963 20,269. Populations of England and Wales in comparable years for which data is available are 1861 : 20,066,000; 1901 : 32,528,000; and 1961 : 46,072,000). It may be asked with some justification whether a profession which is already, on its own publicised

figures, undermanned by 25 per cent. could stand the further strain which would be an inevitable consequence of judicial appointments. Our view is that the depletion would be relatively so small as to be insignificant.

19. Finally, allowing as we do that some solicitors would for a number of different reasons want to become Circuit judges, the question has to be asked whether such an appointment would be financially acceptable.

According to paragraph 8 and Table 1 of the second Report of the Prices and Incomes Board on Solicitors' Remuneration (1969: Cmnd. 4217), the mean income of solicitors in the upper quartile (from whom it is hoped judicial appointments would be made) was £5,373: at that time county court judges were paid £6,200. On these comparative figures and making allowance for a proportionate increase in the remuneration of each, the financial incentive may not be great, but we doubt whether it would constitute a positive disincentive.

20. It may be thought that the Courts Act 1971 goes some way towards implementing our conclusions. Though this is to a certain extent true, in our opinion it does not go far enough. Under section 16 Circuit judges must be barristers of at least ten years' standing, or Recorders who have held office for at least five years. Under section 21 Recorders may be appointed from barristers or solicitors of at least ten years' standing. Not only will it be difficult for senior partners to take time off from practice for at least five years to sit as Recorders in (probably) some other part of the country, but it is potentially embarrassing for the individual concerned if, having marked himself out by such appointment as a judicial aspirant, he is not eventually awarded a full-time appointment. Many of those with the most suitable qualities will be deterred by the fact that they have had little if any experience in criminal courts. Furthermore these proposals do not do anything to answer the points we make below (paras. 21 *et seq.*) about the eligibility of academic lawyers for judicial appointments.

Should academic lawyers be eligible for appointment?

21. So far as we know, until the debate on the Administration of Justice Bill in the House of Lords (*supra*) there had been little debate about the possibility of appointing academic lawyers to the Bench since the late Harold Laski, at the suggestion of Lord Chorley, attempted to persuade the then Lord Chancellor, Lord Sankey, to appoint Professor Gutteridge to the Bench.[9] Apparently Lord Sankey found the suggestion opposed by those whom he consulted and regretfully dropped it. The arguments for appointing academic lawyers to the Bench, in so far as they differ from those relating to solicitors, are worth discussion.

22. (a) In favour of such appointments it should be stressed that the law is not getting any simpler, and there is no lack of those who are concerned lest many reforms of the law currently proposed may not obscure rather than clarify it. Whether the law becomes more or less complex, there is no doubt that the trained academic mind would be useful in any event on the appellate Bench, where mastery of sources is at a premium. Moreover, we believe that the Law Commission receives much constructive assistance from academic lawyers. This is not surprising because, whereas the practising lawyer devotes the greater part of his time to the preparation and conduct of relatively few cases, and in no logical order, the academic lawyer has time carefully to examine all the cases within his field. The resulting breadth of systematic knowledge and understanding should be of considerable value in appellate courts.

(b) Furthermore it should be stressed that, though the good that could be done by the academic lawyer as one out of three or five members of a court might be limited, so also would the chance of harm. To put it at its lowest, an academic lawyer could perform a very useful function in an appeal court. A further advantage of making such appointments would be the closer links that would be forged between the colleges and the universities on the one hand and practitioners of the law on the other. The cross-flow of ideas could only be mutually beneficial. Moreover

[9] See Heuston, *Lives of the Lord Chancellors*, 1885–1940 (1964).

many academic lawyers have already had judicial experience as magistrates, a few have sat as legally qualified chairmen of quarter sessions, and many are on paper qualified for the Bench since they are also barristers of sufficient seniority. A number of academics have developed considerable expertise in sentencing, penology and criminology.

23. One source of support for those who would appoint academic lawyers to the Bench is the experience in the U.S.A., where academic lawyers such as Felix Frankfurter and William O. Douglas have made distinguished contributions to the law and where judges such as Holmes, Cardozo and Frank have brought their valuable experience into the teaching of the law. On the other hand, it must be borne in mind that the Supreme Court has, but the High Court has not, the power of judicial review, which Abraham [10] expresses as:

> "the power to hold unconstitutional and hence unenforceable any law, any official action based upon a law, and any other action by a public official that it deems to be in conflict with the basic law, in the United States its Constitution."

Against this background it is not surprising that academic lawyers have proved some of the best judges of the Supreme Court, nor that Paul Freund, the eminent American constitutional lawyer, could write:

> "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the Supreme Court is zero. The significance of the greatest among the Justices who have had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and more particularly, legal philosophers." [11]

Nor is it surprising that Judge Learned Hand could say:

> "I venture to believe that it is as important to a judge called upon to pass judgment on a question of constitutional law, to have a bowing acquaintance with Acton and Maitland, with Thucydides Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant as with books which have been specifically written on the subject." [12]

[10] *Judicial Process*, 2nd ed. at p. 283.
[11] Idem at p. 52.

24. It may be that too much reliance can be placed for our purposes on the contributions of academic lawyers to American law. For all that, we do not think that those contributions should be discounted altogether.

25. Despite these persuasive arguments in support of the proposal there are some against it. For instance, R. E. Megarry (now Megarry J.) notes in his book *Lawyer and Litigant in England* that the cloistered existence of the faculty common room is far removed from the cut and thrust of the court room, experience of which is essential as training for the Bench. Furthermore, whilst "in academic law the facts are clear whereas the law is uncertain: in the practice of the law, usually the facts are uncertain but the law is clear." [13] This is the same point as that made by Lord Diplock, that by far the greater part of the judge's task is to find out what has actually happened. As against this, however, appellate courts rarely if ever find primary facts (save possibly in interlocutory matters); and we see little reason why an academic lawyer should be less proficient at drawing correct inferences of fact than a lawyer who has been in practice and has tried cases. It is true that appellate courts often have to consider whether there is evidence to support the trial judge's finding of primary facts, and that in some instances they have to decide whether a decision was reasonable in the light of the evidence. But we do not think that lack of trial experience should disqualify an academic lawyer from participating in this function. In fact at the present day, as is well known, academic members of university have become increasingly

[12] See Abraham at pp. 52–57.
[13] p. 119.

involved in the practical affairs of government and administration and it is in no sense accurate to describe their present situation as a " cloistered existence."

26. It is also argued, sometimes indeed assumed, that the only satisfactory qualification for the Bench is success as an advocate. While there is little doubt that skill as an advocate is associated in part with an ability to gauge relevance and see issues in perspective, the assumption is that these faculties can only be acquired through experience in advocacy. We question the validity of this assumption.

27. A fear that has been expressed is that academic lawyers (or even solicitors) sitting as judges would be unable to control counsel. This idea shows the Bar in such an unfavourable light as to be unworthy of serious consideration. A man who has the reputation and ability to be considered for judicial appointment should attract enough respect to enable him to control his court. It is true that an excessively timid person could be eligible for appointment because of a formidable academic reputation; but this factor would have to be taken into account in the process of selection.

28. In our opinion, therefore, academic lawyers should be eligible for appointment to the Court of Appeal, or at all events to the House of Lords.

Should chairmen of administrative tribunals be eligible for appointment?

29. There is now an enormous number of administrative tribunals, something over 2,000. They handle an immense volume of work which is vitally important to the ordinary citizen, *e.g.* the industrial tribunals, the social security tribunals, Criminal Injuries Compensation Board, rent assessment committees, mental health review tribunals, local valuation courts, and a host of others.

30. It is often said that our system of administrative law leaves much to be desired. The legal profession is not much interested in it. The judges in the ordinary courts have little acquaintance with it. The quality of the chairmen of the tribunals is not always as high as might be wished. There is no advancement for the chairman of an administrative tribunal to a judgeship in the ordinary courts. There is no administrative division of the High Court to exercise the supervisory jurisdiction.

31. We suspect that, on occasion, there must be a chairman of an administrative tribunal who would make a competent judge, and a number who could introduce in the Circuit Bench or the High Court a detailed knowledge and experience of administrative law which could not fail to be beneficial and enlivening. We doubt whether the possibility of making such an appointment would arise otherwise than rarely, but the fact that the possibility existed should enhance the prestige and the efficiency of these tribunals, and go some way to attracting younger men to them. We return to this subject in the next chapter.

III. Career Judges

32. A further important matter which needs to be considered in relation to the appointment of judges is the possibility of a career judiciary. This is the system in most of the countries of Europe, and it could become a live issue when this country joins the Common Market.

33. In essence a career judiciary implies a department of the civil service, the new entrants working as clerks followed by promotion to judicial appointment in the lower courts at about the age of thirty and appropriate further promotions, with, at the age of forty to forty-five, eligibility for appointment as a judge of the ultimate court of appeal or supreme court.

34. There are a number of arguments in favour of such a system. One is that it treats "judging" as a profession in which promotion depends on ability at "judging" rather than ability in a different though allied field such as advocacy. However, we do not feel attracted to the system because:

(a) There is an increased chance of indiscipline in the lower courts with the youngest judges.

(b) The incidence of appeals is far greater. In West Germany, according to Professor E. J. Cohn, one-third of all cases go to appeal and one-third of these go to a further appeal.

(c) In any system where promotion is based on a civil service decision, there will be a tendency to promote a safe man. Whether or not the system is administered with absolute fairness, executive control of judicial appointment and promotion does not commend itself to the majority of lawyers.

35. We do not therefore recommend a career judiciary for the High Court or Circuit Benches. Different considerations apply, however, to administrative tribunals.

36. As a result of the Franks Report in 1957 and other pressures, chairmen of these tribunals are now appointed by the Lord Chancellor and are usually legally qualified. In some respects administrative tribunals now function very well: legal representation is normally allowed, the rules of procedure are scrutinised by the Council on Tribunals, allegations of procedural injustice are investigated by the Council on Tribunals or the Parliamentary Commissioner, and there is usually a right of appeal to the courts on a point of law. However, the position regarding their chairmen is not entirely satisfactory. They tend to be of advancing years with an average age in the sixties; many are in fact in their seventies and young men are rarely appointed. Their tenure of office is often for three-year periods, but in practice nearly always renewable.[14] There is no recognisable pool of candidates. Selection and appointment is an extremely haphazard affair.[15] Terms and conditions of service vary enormously, from an annual salary (rare) to daily or other periodic fees to virtually voluntary service. There is no pool of youngish legally qualified career chairman available.

37. We therefore advocate the establishment of a pool of legally qualified career chairmen, youngish men in their thirties, or even in their twenties in some cases, who would give their whole time to administrative tribunal chairmanship. They would be drawn from the ranks of barristers, solicitors and academic lawyers. They would receive an appropriate salary. They would develop considerable expertise in administrative law.

38. We do not advocate the disbandment of the present system, and we recognise the very considerable integrity and expertise brought to their task by the existing chairmen. What we would like to see is a strengthening of the service by the creation of a cadre of career chairmen. In order to

[14] House of Commons, March 6, 1970.

[15] "Composition of Administrative Tribunals," Susan McCorquodale [1962] P.L. 298–326; *Tribunals in the Social Services*, Kathleen Bell 1969; *Justice in the Welfare State*, Harry Street. See also the Annual Reports of the Council on Tribunals and of the Parliamentary Commission.

ensure selection of the right people it would be possible to begin by a part-time appointment or an appointment for an initial period of, say, one year, with no guarantee of renewal or permanent appointment, although permanent appointment should normally be the ultimate aim in view. The Council on Tribunals could develop a training scheme, which is notably lacking at present.

39. We think that the advantages of such a system would be considerable. The quality of justice administered in administrative tribunals would be improved. The chairman would tend to be a middle-aged expert rather than an elderly generalists. He could begin as a deputy chairman of a small tribunal and be groomed for the more important posts. Good quality men would be attracted to the work. Transfer of career chairmen from one type of tribunal to another would promote uniformity and consistency of procedures.

IV. Should the Present Method of Appointment be Improved?

40. If judges are to be appointed from a field that is wider than the practising Bar, there will be a need to consider a change in the present system of appointment. At present the Lord Chancellor is responsible for all judicial appointments and even though promotion to the Court of Appeal and the House of Lords is made by the Prime Minister, he does so on the advice of the Lord Chancellor. Lord Gardiner when Lord Chancellor supported the *status quo*; he said in the House of Lords [16] that the appointment of judges " is much more important, I think, than anything else the Lord Chancellor does, more important than his office of Speaker of this House, and more important than his cabinet work."

41. Lord Gardiner relied to a large extent on his personal knowledge of those in practice at the Bar, and according to him the system worked because he really knew the Bar,[17] and the present Lord Chancellor has said much the same. We in fact doubt whether any Lord Chancellor can know at first hand every prospective appointee, even Lord Chancellors who go to that office straight from the Bar. Certainly he will know those who practise in his field, and his personal acquaintances, but there must be many who fall into neither of these categories. We understand that before making an appointment the Lord Chancellor habitually takes (but is not governed by) the opinion of existing members of the judiciary and others. Although we have some misgivings, we accept that so long as the sole source of selection for the judiciary is the Bar, the system probably works well enough. But if the pool for appointments were to be extended beyond the Bar so as to include solicitors, academic lawyers or chairmen of administrative tribunals it would be palpably inadequate,

[16] *Hansard*, January 28, 1968, Vol. 288, at col. 636.
[17] See *Hansard supra*, col. 636.

because no one person could possibly know every potential appointee.

42. Paradoxically some of the greatest strengths of the English system are also those which cause it to be questioned. For instance, the security of tenure enjoyed by the judiciary (which we would in no way wish to impair) puts a great burden on the initial selection procedure. As Lord Gardiner said in the debate quoted above, "However good the law is, if a judge is appointed who ought not to have been made a judge, then everything is wrong." The English practice of relying on a single judge can aggravate the problem; though there is now a retiring age of seventy-five a poor appointee can be a blot on the bench for many years. The situation is, potentially at least, made worse by the fact that there is no probationary system and no training, except in a limited sense for those who have been appointed to sit as commissioners of assize while still at the Bar.

43. No system of appointment can provide the complete answer. The best that can be done is to attempt to avoid the evils of the bad appointment. As we have noted this could become more of a reality with the great increase in full-time judicial appointments following the implementation of the Beeching Report. We therefore recommend that the Lord Chancellor retains control of the appointment machinery, but that he is helped in his task by a small advisory appointments committee. The system would allow for interested bodies to make recommendations, or for interested persons to apply to the appointments committee. The appointments committee could comprise representatives of the Law Society, the Bar, academic lawyers, the judiciary and perhaps some lay members, *e.g.* highly trained and experienced personnel officers skilled in selection procedures. This committee could then make recommendations to the Lord Chancellor who could either accept or reject them. This would not prejudice the right of the Lord Chancellor to go outside the candidates recommended to him or indeed, if he so wished, to suggest names for consideration to the appointments committee, but he would be obliged to submit his own proposals to the

Committee for their comments and could not, therefore, make appointments without reference to them or without considering their views. We do not anticipate that the sort of person who would be appointed would differ very much at the High Court level. But our proposal would cure the informality which has often in the past attended, *e.g.* the appointment of deputy chairmen of quarter sessions; some of our witnesses maintained that the only qualification possessed by many of these appointees was the recommendation of the chairman who, when he retired, was often succeeded by his own deputy; others suspect that appointment to the ranks of Junior Prosecuting Counsel at the Old Bailey carries with it an automatic reversion either at that court or at one of the London quarter sessions. Our proposal would allay these suspicions. Moreover, there would at least be a rational system, the nature of which would be known. A similar system is used for the appointment of Federal judges in the United States.[18]

[18] See Abraham, *op. cit.*, p. 28.

V. The Social Background of Judges

44. Critics of the judiciary have recently become aware (as though it were previously not true) that the judges come from a fairly narrow social background. A survey published in *The Economist* [19] noted that 76 per cent. had been to a major public school and the same proportion had been to Oxford or Cambridge (in fact 50 per cent. went to Oxford). We attach as Appendix II to this report an extract from a more recent sociological study which, summarised, shows that between 1820 and 1968 47·4 per cent. of the High Court judiciary came from the upper middle class.

45. From the evidence it appears that many of today's judges come from a fairly narrow segment, namely the upper middle classes (not upper classes as many commentators suggest). In fact the Bar has in the past been so organised that it was difficult for a substantial number of persons from poor backgrounds to make their way in the profession. The result has been that the leaders of the Bar tended to come from a narrow social background and it is from among these that judicial appointments were made. But these conditions by no means obtain with equal force today. Given enough ability and drive one need not wait very long before making a living at the Bar, and what gap still remains can be bridged by scholarships, lecturing, and other outside work. What is more questionable is whether success at the Bar may not by itself promote the development of "middle-class" attitudes, whatever one's early background.

46. Whilst there is little doubt that middle-class attitudes may affect the opinions of judges (*e.g.* in the past opposition by some to the abolition of capital and corporal punishment, and to divorce and homosexual law reform) this does not prove the link between opinion and decision. Moreover, a tendency for a division of opinion amongst the judges on issues like these has emerged.

[19] December 15, 1956.

47. Although the class structure seems to remain more or less constant, the barriers which separate the classes are probably becoming less rigid. The range and efficiency of communication through the media of literature, the press, radio and television are increasing. The social climate is, probably, becoming progressively more "democratic." All these factors tend to erode class distinctions and reduce their implications. There can nevertheless be no doubt that the social backgrounds of many judges and the attitude of detachment to which they are conditioned during their years of practice at the Bar, can produce difficulties of communication and understanding between them and people of lesser privilege and education who appear before them. With few exceptions judges have had no opportunity to acquire first-hand knowledge of the problems of poverty or of the different pressures, loyalties and social values that operate in strata of society other than their own. Different social groups tend to have different ethical norms. A person's conduct in the witness box, which may not affect the issues being tried, may effectively discredit his value as a witness. When cross-examined he may feel inferior and become anxious and confused. Without any intention of deceiving the court, he may give the answer which he thinks is required of him and may feel that he has to deny behaviour to which a person with more confidence would quite happily admit. Some judges not only fail to understand this and thus make unfair critical comments, but they also tend to expect unrealistic standards of common sense and behaviour, particularly from witnesses whose social background differs from their own.

48. It would not necessarily improve this situation to appoint judges from working class backgrounds. Those of us who have practised in magistrates' courts have not noticed that working class magistrates show any special sympathy for defendants from similar or poorer backgrounds. It is probably true to say that, in the criminal courts, the ever-increasing use of probation and social inquiry reports has done more than anything else to bridge the gap when it comes to sentencing. But it is plainly desirable that, so far as it is possible, those who aspire to

become judges should in the course of their training and careers have enjoyed opportunities of learning at close quarters something about the motives and pressures that influence the attitudes of most members of the community. No training can give a judge the power of imagination which enables him to put himself in the place of the man who stands before him but, if he has that power, then greater knowledge will enable him to exercise it more effectively. We refer to this problem again in the chapter on the training of judges.

Politics and appointment

49. It became fashionable, after the late Harold Laski published his *Studies in Law and Politics*, to investigate the political background of the judiciary. His study however only covered the period 1832–1906 and though it would be impossible to deny that during that period much attention was paid to the claims of party [20] there does seem to have been a change since then. This does not mean that no judges have been active in politics prior to appointment. The *Economist* study quoted above found, for instance, that 23 per cent. of Supreme Court judges at that time had been either M.P.s or candidates (11 per cent. Conservative, 10 per cent. Liberal and 2 per cent. Labour). However, one thing can be said with confidence and that is that most of the recent so-called "political" appointees were appointed for their legal ability and might even have reached the Bench earlier were it not for the fact that they were in politics. Latest research moreover indicates that the period studied by Laski was in fact exceptional in English legal history, and the claims of politics were not so insistent and successful either before or after. Clearly, legal ability and not political service must continue to be the principal criterion for judicial preferment.

[20] See also Heuston: *Lives of the Lord Chancellors.*

VI. Can the Pressures on the Judiciary be Alleviated?

50. Few will doubt that judging must be an exacting task, requiring not only intelligence and understanding but also detachment and freedom, so far as is possible, from unnecessary pressures. Some pressures are unavoidable: others may stimulate rather than oppress. But in a few respects we feel that the judge's task could be eased by the alleviation of pressures, which could in some instances result in an incidental improvement in the performance of advocates and witnesses. The specific matters we propose to discuss are ritual, the remoteness and isolation of the judge, the pressure of time and staleness.

Ritual

51. Constitutionally, the judge on assize has represented the Crown; but in practice most of the ceremonial attendant upon the judges, and the status given to them, are common to all High Court judges wherever they may be sitting. No doubt in the past the majesty, awe and splendour of the law in the person of the judges fulfilled a vital social function in an unsophisticated society. But whatever advantages majesty, awe and splendour may have, they can carry concomitant disadvantages, particularly if they are allowed or encouraged to conceal the man. An awestruck witness may, literally, forget himself; so, in a different sense, may a judge who is over-impressed by his own trappings. It may be, and probably is, the case that the ritual attachments to the judicial role still have a function which is more than traditional and sentimental. We believe, however, that they should at least be examined so as to see whether, if only in part or occasionally, they can be relaxed without loss.

52. Ideally there should be little or no need for robes or ritual. The judge should listen and judge, the advocate should advocate, and the witness should be himself. Nonetheless an element of formality, including uniform, may have a place in the scheme of things in order to identify

roles, to de-personalise individuals, to enable the public to follow the accustomed procedure of which they have some awareness, and to enable the accumulated wisdom of centuries to be used quickly in the shape of the rule instead of the fresh decision at every stage. It may be that the integrity and absence of corruption in our legal system derives in part from the formal procedures we adhere to.

53. On the other hand ritual is reduced to a minimum or may even become non-existent, before the Industrial Court, some administrative tribunals, some planning and public inquiries (notably the Roskill Commission on the Third London Airport) and tax assessment appeals. In many of these cases we are convinced that any form of ritual would be unnecessary and that it would probably be time-consuming and inhibiting and therefore, by definition, inefficient. Moreover, no wigs or robes are worn by the judges who sit in the highest courts of the land, the House of Lords and the Judicial Committee of the Privy Council.

54. It may be said that there is more of a place for ritual in the criminal courts. But even in this respect there has been inconsistency in practice: Recorders were wigged and gowned, but chairmen of county quarter sessions were not. And we have heard convincing evidence that some parties and witnesses have been positively overawed by the formality of the judges' procession on assize and, in consequence, have done themselves (and perhaps have got for themselves) less than justice.

55. Although we are in favour of judges, particularly in criminal courts, being wigged and robed, many of us believe that an attempt should be made to reduce ritual to a minimum, and we are convinced that the present instances of ritual should be re-appraised and their implications considered by a competent body which should include among its members not only lawyers and laymen but anthropologists and psychologists.

Remoteness and isolation

56. Associated with ritual is the problem of the remoteness and isolation of the puisne judge who at present spends

more than three-fifths of his working life on circuit and therefore, almost certainly, away from home. The sense and appearance of remoteness and isolation is both social and geographical. As for the social aspect, we recognise that for justice to be seen to be done the judges must be seen to be both impartial and uncorrupt; but we doubt whether this requirement justifies the extent to which the judges are expected to isolate themselves, and we suspect that this very isolation may be such a burden to some of them as in fact to impair their efficiency. As for the geographical aspect, although life in judges' lodgings (where wives can sometimes but by no means always stay with their husbands) has been, is and no doubt always will be congenial to some, the indications are that this form of life, separated from home and family for substantial parts of the year, is becoming progressively less congenial to more and more—particularly the younger—judges. In general we doubt whether any benefit can accrue from removing a judge from his ordinary family and social contacts at the time when he embarks on what is in many respects a new and in every respect a vital career. Common sense tells us that people do their jobs best if they can go to them from, and return to, ordinary family and social life which they enjoy, and we recommend that everything possible should be done to minimise the time spent away from home by those who prefer to be there.

The pressure of time

57. It has often appeared in the past that some of those administering the law have held the view that judicial time is precious, more precious in particular than that of the parties or witnesses. Where there is a backlog of cases awaiting trial (as there usually is at present) it can readily be conceded that each case should be tried as speedily as possible so that justice in other cases should not be too long delayed. But if that factor is disregarded (as should before long be possible) we doubt whether upon a cost analysis it would appear that the court's time is more costly than that of the parties; moreover it is the public which pays

for the court's time.[21] We think that a sense that time is pressing can (and sometimes does) have two adverse effects: the trial as a whole may be hurried so that the parties, their advocates, or their witnesses, cannot (or think that they cannot, which is just as bad) present their cases fully; and the judge may on occasion feel an obligation to deliver an *extempore* judgment or summing-up when otherwise he would not do so. As a consequence, he may lose the benefit of reflection and, exceptionally, the benefits of arguments or even evidence being presented when he has either come to a conclusion earlier than is necessary or proper, or when with part of his mind he is already preparing his judgment. Judges in the United States are provided not only with secretaries but also with the assistance of law clerks, whereas our judges are not even provided with secretaries. Their clerks have neither legal nor secretarial training. We strongly suspect that this must appreciably add to the burden of some of them and we recommend that secretarial assistance be made available to every judge who requests it.

Staleness

58. Luckily there is an official awareness of this as a problem. The *Streatfeild Committee*[22] criticised the Crown Courts mainly because of the undesirability of judges remaining continuously on criminal work, particularly if they were always in one place. The Beeching Commission felt that something like the same problems existed where judges did the same kind of civil work continuously.[23] Furthermore the Commission met resistance from High Court judges to being isolated in the provinces, and a preference for varied work. Accordingly they recommended[24] that High Court judges should continue to circulate freely throughout England and Wales and that no judges should sit continuously in one place or do work of substantially the same kind, year in and year out.

[21] *Cf.* Beeching Report, para. 67.
[22] 1961: Cmnd. 1289, Chap. 5.
[23] Para. 150.
[24] Para. 153.

59. One of the arguments canvassed in the debates on the Administration of Justice Bill 1970, was that caution must be observed in creating specialist divisions of the courts because they breed their own specialist bar from which their judges are recruited; judges who in turn may turn out to be too narrow in knowledge and experience. Excessive specialisation may lead to staleness. Specialisation in criminal cases also may have undesirable consequences. The rules of evidence, which tend to favour the accused, may induce a judicial attitude favouring the prosecution. The judge may come to know too well the police, probation officers, and even the accused persons. Criminal trials usually involve a lesser intellectual content than civil cases, and the criminal judge lacks the stimulus or satisfaction of having to find the facts.

60. Accordingly we endorse the recommendation of the Beeching Commission that no judge should do work of substantially the same kind, year in and year out.

The judge is human

61. Most people, including most judges, recognise this fact which, it may be thought, goes without saying. Yet in at least one sense the judge is required to be less than human and in another more. He is to be less than human in that he is required to rid himself of prejudice; he is to be more than human in that he is (formally) required to be always right. We are advised that both these requirements, being unreal, can affect behaviour and even judgment, particularly of a psychologically vulnerable personality. We doubt whether either of these requirements can be removed: their oppressive effect could however be mitigated if fewer opportunities were given to the judge to shelter behind the judicial trappings, if he were to be given more time in which to exercise his judgment, and more opportunities to lead a normal social life.

Assessors

62. The Judicature Act 1925, s. 98 (1) enables judges in the High Court or Court of Appeal to sit with assessors

where the court thinks it expedient to do so. Many of those who preside over public inquiries and other tribunals of various kinds sit with, and appear to derive benefit and assistance from, assessors; but judges seldom do so (except in Admiralty). We believe that more use should be made of them in cases where the principal issues depend upon technical or scientific evidence.

Other pressures

63. Both the adversarial system and the rules of evidence and procedure, where they favour one party overmuch, inevitably tempt the judge to lose some of his impartiality and to "take sides," if only to redress an imbalance either inherent in the system or present in the particular case. In *Jones* v. *National Coal Board* [25] Lord Denning M.R. said:

> "The judge's part in all this is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their work; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

Any improvements in the system of trial and in the quality of advocacy are bound to ease the judges' tasks and improve their performance of them. The burden of their tasks would be reduced and their efficiency in performing them would be raised if they were to be less overworked than they are at present, and if when first appointed they had already received some training. Neither of these results could be achieved, nor could all of the pressures of time referred to in paragraph 57 be reduced, without increasing the establishment of the judiciary; but we discuss first the question of training as one of principle.

[25] [1957] 2 Q.B. 55.

VII. Should Judges be Given Training?

64. Unlike his continental counterpart, the English judge is expected to assume his duties with no specific training. No pre-appointment course of any sort is provided, nor is there any regular system of probation. In spite of this, the standard of justice in this country is admitted to be very high. This could be either because successful judges are born not trained, or because advocacy is the best training for the Bench. There is no doubt that because of the extreme orality of proceedings in an English court a mastery or even an awareness of the skills of advocacy is an advantage: the question is whether it or some training course in lieu of it is an essential condition if less trouble of judicial appointment. This problem could become a matter of great concern if and when judges are appointed from outside the ranks of practising barristers.

65. There is, furthermore, a disturbing aspect of appointment to the High Court Bench which could be regarded as the antithesis of the notion of training. Many appointees, when appointed, have for long, and in some cases throughout their careers, been subject specialists. Immediately upon appointment they have to abandon their specialist expertise and become jacks-of-all-trades; for instance, judges are quite often appointed to the Queen's Bench Division who have had little or nothing to do with the criminal law since the time of their pupillage about twenty years previously. These judges have the ability and ready mastery of detail to become experts in new subjects very quickly, but it seems a little hard on the litigants in the first cases they try, and a misuse of their talents, that they are not either employed within their specialisations, or given time and opportunities to acquire a more general knowledge of the law.

66. Though there is no training before appointment, the Lord Chief Justice has tried to ensure that Queen's Bench judges receive a modicum of training afterwards. The

Donovan Committee on Criminal Appeals criticised the use of newly-appointed puisne judges in the hearing of criminal appeals. However valuable it might have been for the Lord Chief Justice to train them in the art of sentencing, the appeal court was not the place to do it. Nowadays this training function with regard to sentencing is carried out in the regular sentencing conferences (initially convened at the instance of Lord Parker, then Lord Chief Justice) at which distinguished criminologists keep the judges up to date with recent developments. We think that there is a need for an extension of this system and that judges should be encouraged and be given the time (perhaps by an occasional sabbatical period) to keep up with advances in learning, particularly in the actuarial, sociological and psychological fields. No one could expect expertise in such a range of subjects, but a familiarity with the basic terminology and concepts, coupled with a knowledge of trends, is essential. Greater familiarity with these subjects would tend to induce a more sympathetic approach to their exponents and tend to avoid the unfair criticisms of distinguished experts (widely regarded as lamentable) which have sometimes been voiced by judges. We recognise that appointments falling vacant could not immediately be filled if, in the case of a High Court judge, he were to receive a period of training before first sitting as a judge. In short, if a system of training were to be introduced it would probably be necessary to train judges in advance so as to provide in effect a pool out of which appointments could be filled as they fell vacant. This in turn would involve an increase in the establishment of the judges. Far from deploring such an increase we would welcome it, for there can be little doubt that the judiciary is undermanned and the judges overworked. If this is right then the system must, in the long run, be inefficient. The immediate cost of increasing the establishment would, we suspect, be all but wholly offset by the long-term benefit of increased efficiency.

67. *We therefore recommend*:

(a) that any training given to a judge should be after appointment;

(b) that training should be for a period of three to six months;

(c) that during this period the judge should be free to go into any courts he wished and to observe trial procedures and techniques;

(d) that he should have the opportunity to consult with appropriate specialists, *e.g.* criminologists, actuaries and social welfare experts, during his training period;

(e) that all judges (including temporary judges) should be required to visit a variety of penal institutions; and

(f) that there should be regular refresher courses available for all judges to enable them to keep up to date in relevant studies in sociology, psychology, medicine economics etc.

68. In putting forward our proposals for some kind of training for judges we have borne in mind that appointees are of high intelligence and that they already have a profound knowledge of certain branches of the law and an ability to master new subjects quickly. They are also, above all, self-disciplined. They have exercised quasi-judicial functions in the giving of opinions and will have a fair appreciation of what the task will involve. Accordingly we feel that it would be wasteful to provide specific courses of instruction. The judges themselves could be expected to know the areas in which they are most deficient.

Should there be a judicial staff college?

69. In our opinion there is very considerable need for some sort of judicial staff college, training centre, law centre or judicial institute similar in character to the Military Staff College, the new Civil Service College and, in particular, to the New York University Institute of Judicial Administration, which is well known for the important role it plays in educating American judges.

70. The college or centre could embrace the following activities:

(i) providing facilities for new judges to train themselves (though most of their training would probably be obtained by sitting in at trials);

(ii) sentencing seminars;

(iii) training new magistrates (approximately 1,000 are appointed every year: only part, perhaps only one week or one or two long weekends, of their training would be provided at the College);

(iv) courses for experienced magistrates;

(v) training chairmen of administrative tribunals (of which there are now over 2,000);

(vi) training court officials;

(vii) legal education of various kinds, including refresher courses for practising lawyers;

(viii) Law Commission seminars;

(ix) entertaining legal visitors from abroad.

71. A judicial college would enable training to develop systematically and logically, with continuity; it would bring together judicial personnel of many different types; it could develop a cadre of skilled instructors and courses of real value.

Should there be a probationary period for judges?

72. It has been suggested that all judges should undergo a probationary period before an appointment is ratified. We do not favour this idea. Lawyers and litigants would not have so much respect for a probationer, and the problems of finding another job or resuming practice should the appointment not be ratified would be both difficult and humiliating. A probationer judge, knowing that he was subject to scrutiny, might feel ill at ease when sitting on the Bench while living in judges' lodgings. In our view it is essential that at all times a judge should be, and feel himself to be, independent. Our proposals for improved training whilst in office, and for the complaints and removal procedure discussed below, should do away with any requirement for a probationary period.

VIII. Is there Adequate Supervision of Judges after their Appointment?

73. It was with considerable diffidence that we approached a discussion of the possibility of supervision of the judges, because effective supervision necessarily imports control. Whilst few today follow Montesquieu in believing that there is a true separation of powers in England, the independence of the judiciary remains a highly-prized feature of the "unwritten" British Constitution. Any discussion of control is thought to risk acceptance of some compromise of this principle, which already in many parts of the world is no more than a pretence.

74. However, the virtual irremovability of a judge coupled with the recent increase in their numbers means that there is a greater chance of complaint from disappointed litigants. The question which we asked ourselves was whether anything should be done about such complaints, and if so what.

Arguments for and against a complaints procedure

75. There are two principal and allied arguments against a regular complaints procedure. First, it is said that it would, or might, encroach on the independence of the judiciary. This attitude is part of what today's sociological observers of the legal system call the "pedestal" theory of the judiciary, *i.e.* that it is of the essence of the ritualistic aura of the judges that they must be placed in a position where they are apart from all mankind, and their behaviour outside the range of scrutiny or criticism. Though such a theory could well be appropriate for a relatively simple form of society it seems out of keeping with our more sophisticated technological age and, moreover, it is possible that confidence in the judiciary is decreased by inviolability from informed criticism or investigation, rather than the contrary.

76. Secondly, it could be suggested that the administration of justice might suffer if judges were subject to scrutiny and investigation, since this might deter them from taking a strong, forthright and independent line in their decisions and judgments. In a sense the very taking of this view would imply a lack of faith in the integrity of our judges, but in any case its validity would depend largely on the power given to the investigating body; provided that nobody other than an appeal court or a body of palpable superiority had power to make a critical judgment, the fear would be unfounded.

77. What most people, both lawyers and litigants, seem most to object to can be classed as behavioural defects, mainly occurring amongst the lower judiciary. At an early stage in our meetings we decided it would be inappropriate to particularise instances of alleged misbehaviour, although we all have no doubt that instances occur sufficiently often to justify our consideration of the problem. The robust view of one of our correspondents is that some judges abuse their position by seizing "every available opportunity to make public statements whose purpose is at best marginally utilitarian and at worst pompous and egotistical," and that there is further a small number whose *obiter dicta* "increase in sententiousness in inverse proportion to their legal distinction and knowledge of criminology." We do not regard these comments, limited as they are in their application, as lacking foundation.

78. As we have already pointed out, it is very difficult to prophesy how good a particular appointee will be as a judge. It is also in practice virtually impossible to remove him once he has been appointed, and there is no existing system of supervising or controlling him short of removing him.

79. On the whole therefore there would seem to be much to be said in favour of some kind of complaints machinery, namely that such a procedure:

(a) might encourage increased confidence in the judiciary;

(b) might lead to improvement in standards of judicial behaviour;

(c) might provide a remedy in specific cases of injustice to individuals, whether professional or private, or to sections of the public.

80. This is not to say that the problem is necessarily an extensive one, for it *is* generally agreed that standards of judicial behaviour have improved considerably in recent years. All the same, every practising member of the profession is familiar with a number of bad cases; there is thus clearly a need for a critical evaluation of the present somewhat indeterminate machinery for complaints, and for a consideration of possible improvements to or reform of it.

Source of complaints

81. (i) *Professional.* These may be either specific or general. Thus a complaint may be made about the way a judge has behaved towards a particular counsel or solicitor in a particular case, or there may be a more general complaint from a branch of the profession, or some section of it, which has a grievance against the behaviour or prejudices of a particular judge.

(ii) *Litigants.* There may be cases where a litigant wishes to complain about a judge's behaviour, which might not necessarily form an appropriate subject-matter for an appeal. For instance, the litigant may complain that the judge gave the appearance of being biased, hasty or discourteous.

(iii) *Witnesses.* Witnesses who have appeared before a judge may have complaints about their treatment.

(iv) *Persons not parties to the action or witnesses.* Judges do occasionally denounce the behaviour of someone who is not a party to the proceedings and who has no opportunity to give evidence, to appear or to be represented.

(v) *The general public.* Either the public as a whole or more likely some section of the public may have a grievance against a particular judge, *e.g.* that he is exhibiting particular prejudices.

82. There are, broadly speaking, three ways in which complaints about a particular judge's conduct of a case or his actual decision can be ventilated and assuaged. First, there can be an appeal; secondly, there can be some kind of a complaints machinery; and thirdly, and somewhat more drastically, proceedings can be instituted for the judge's removal. We have considered all three.

(a) *Appeals*

83. The English trial system, whether civil or criminal, is said to be accusatorial. The judge is not an inquisitor (as in many continental systems) in control of the questioning and charged with determining the truth or falsity of an allegation. Rather he is an umpire; he does not frame the charge in a criminal case or draft the statement of claim in a civil one. He is there to listen to the evidence and, at the end of the day, sum up or give judgment on the basis of the law and of the evidence presented. Somewhat surprisingly the English judge does not even have, save in very exceptional circumstances, power to call any witnesses.[26]

84. However, the judge has certain powers, *e.g.* to ask questions and to comment on a defendant's failure to testify. The appeal courts give some protection against judges who abuse these powers and there are a number of cases in which appeals concerning the actual conduct of the case were allowed.[27]

85. Perhaps unfortunately, the Court of Appeal seems unwilling to allow an appeal even when it would appear that the conduct of the judge cannot but have had some effect on the jury, the advocates or the witnesses and certainly

[26] *R.* v. *Cleghorn* [1967] 2 Q.B. 584 and *R.* v. *Tregear* [1967] 2 Q.B. 574.

[27] See *R.* v. *Clewer* (1953) 37 Cr.App.R. 37 and *Jones* v. *National Coal Board* (*supra*) and more recently *Taylor* v. *Taylor* [1970] 2 All E.R. 609.

has gone well beyond the bounds of the judicial function as delineated by Lord Denning M.R. in *Jones's* case (*supra*). The extraordinary case of *R.* v. *Hircock* [28] is a good example. The appellant sought leave to call evidence of the trial judge's conduct during the defence counsel's address to the jury. Apparently "when defence counsel told the jury that he was going to run through each defendant's case in turn, the prospect did not seem attractive to the chairman. He said 'Oh, God,' laid his arm across his head, and made groaning noises. According to one statement he kept sighing and groaning, and spoke testily to counsel." Although the court held that the Criminal Appeal Act 1968, s. 23 (1) (*c*) clearly allowed it to receive such evidence, it was not admitted. It was held that "while the court would not wish to condone any impatience of a discourteous kind, the fact remained that there was nothing to stop counsel from making his address to the jury and no indication that the judge was disparaging the defendant rather than his counsel."

86. We recommend that consideration be given to amending the Criminal Appeal Act 1968 so as to make conduct of this sort a specific ground of appeal.

(b) *Disciplinary control*

87. At present there is no regular channel of approach for complaining about a member of the judiciary. There seem to be at least two groups of possibilities; the first is via those persons who could rightly have some authority, like the Lord Chancellor (who can, for instance, remove county court judges and who could have removed chairmen of quarter sessions—though he has apparently never done so) or the Lord Chief Justice. We understand that some complaints about judges made by solicitors to The Law Society are passed on by the President of The Law Society in this way. The second seems only to be open to members of the Bar and is channelled via the Bar Council or Circuit Bar Mess. In such a case the Chairman of the Bar Council or the leader of the Circuit makes the complaint

[28] [1970] 1 Q.B. 67.

known to the judge either personally, through the Attorney-General, or through a common friend (perhaps another judge), in the hope that the problem can be resolved with a minimum of fuss.

88. Although we have been told that both approaches are occasionally used, they are open to a number of obvious criticisms, the main one being that even if the complaint is passed on to the judge nothing more can be done than that, because neither the Lord Chancellor nor anyone else has any constitutional power to interfere. Our evidence is that where complaints are made officially there is never any official announcement of a decision or result, except in those very rare cases where a judge makes a later apology in open court. The less formal approach is of course not open to disgruntled litigants and is sometimes dependent on the barrister not fearing to jeopardise himself by being identified as the source of the complaint. Though at best it is a somewhat indirect way of making a judge aware of a complaint, it is too uncertain to be relied on. Although the merits of having a complaints procedure are arguable, it is indisputable that if we do have one it should both be effective and seem to be so.

89. In our discussions two alternative complaints procedures were drawn to our attention, those existing in Scotland and in Sweden.

90. In Scotland, the Dean of Faculty has a duty to protect the interest of the Bar and all its members. In the past it was not unknown for him, if counsel were not being given a fair hearing, to intervene personally in order to remind the judge or judges of the rights and privileges of an advocate, and thereafter to remain in court seated beside the counsel appearing in the case, to make sure that the warning was heeded. Nowadays however such a complaint would be dealt with privately and after the event. The Dean investigates the complaint and, if he thinks it justified, he will have a word with the judge in question or possibly with the Lord President (who is expected to take it up with the judge). This procedure appears not to work as well as

it should and, though a number of complaints of which the Dean must have been aware have been made, it seems that little or nothing has been done about them.

91. However, a more useful remedy is provided by the power of the Lord Advocate to investigate any matter connected with the administration of the law and law courts in Scotland. This is regularly invoked with reference to alleged misbehaviour by the lower judiciary, *e.g.* the sheriffs. In each sheriff court district the Lord Advocate has a local official, the procurator-fiscal, who is responsible only to him and is independent of both police and judiciary. If anyone (lawyer, M.P., private citizen) complains to the Lord Advocate about a sheriff, his complaint will be remitted to the local procurator-fiscal for inquiry. The latter will interview any witnesses and investigate the complaint privately, and finally report back to the Crown Office (the Lord Advocate's department in Scotland). After considering the report the Lord Advocate may write personally to the sheriff about it, he may ask him to come to the Crown Office to discuss it or in an extreme case he may set in motion the machinery for removal of the sheriff.

92. The Lord Advocate's powers are not statutory but arise from his inherent common law right to inquire into anything which concerns the rights and interests of the public of Scotland—not only in relation to the courts but where anyone has a grievance against, say, a local authority or a government department or a hospital board, or even police or other officials or members of the legal profession. There is in principle no reason (even though it might give rise to a delicate situation) why this power should not be exercised in relation to a judge of the Court of Session; so far, however, this has never happened.

93. In Sweden, the office of Judicial Ombudsman (JO) was established in 1809. His function is to keep a check on all administrative and judicial personnel and processes and to disclose departures from required or desirable standards of fairness and efficiency. Partly because of the part played by JUSTICE in the first examination in this

country of the role and function of the Ombudsman, our Committee has been able to study the relationship of this official to the judiciary in Sweden in considerable depth. Thoughout the succeeding paragraphs, it should be borne in mind that Sweden has a career judiciary, with the consequence that many judges are much younger and less experienced than those in England.

94. Every four years a special parliamentary committee elects a person of "known legal ability and outstanding integrity" to serve as JO. Normally a prominent judge will be chosen and in terms of salary and esteem he is equivalent to a Supreme Court judge. The same person is not often re-elected for several terms.

95. In investigating the conduct of the judges the JO acts primarily on the complaints of private citizens. However there is nothing to stop him initiating an inquiry himself. He has an absolute discretion as to whether to pursue further any complaint and he is not even under an obligation to prosecute should he find that there has been illegal conduct.

96. In carrying out his duties he may attend any court hearings (though he may not express any views at them) and may compel disclosure of information he requires. He may make an adverse report to parliament, initiate prosecution, order compensation to be paid out of state funds or merely come to an informal agreement with, for instance, an impatient judge that he will mend his ways.

97. Many of the situations with respect to the administration of justice which have been the subject of the JO's investigation and remedy are to a greater or lesser extent covered by other agencies in England, for instance complaints of delays by court officials and non-observance of procedural safeguards in criminal cases.

98. Needless to say, in a country like Sweden where, as in England, the standards of administration of justice are very high, not many complaints concerning the judges are found to be justified.

Recent figures made available to us are:

	Total complaints received	*Complaints against judges*	*Result*
1966	1719	218	1 prosecution and fine of junior judge
1967	1858	218	1 prosecution and fine of junior judge
1968	2127	229	No prosecutions

99. Since any discussion concerning the merits of the JO inevitably provokes one on the independence of the judiciary it is worth making a few comments on the Swedish attitude towards this problem.

100. As can be seen from paragraph 98, very few complaints are found to be justified. Accordingly many judges welcome the JO system because they feel as much protected as threatened by its existence since they know that unfair complaints which they cannot personally answer will be dealt with by the JO. Furthermore those we have consulted maintain that the independence of the judiciary is not in jeopardy because the JO cannot reverse or vary a decision of a judge (which can only be done on an appeal) and because once the JO decides to institute a formal prosecution it is for the Courts themselves to determine the truth or falsity of the allegation.

101. No direct guidance can be provided by considering the French disciplinary system because France too has a career judiciary. Nonetheless it should not be disregarded in a discussion such as this. In France the Conseil Supérieur de la Magistrature acts as a disciplinary committee with jurisdiction over all judges. It is presided over, when sitting as a disciplinary committee, by the First President of the Cour de Cassation (the highest court), although under the Constitution the President of the Assembly and the Minister of Justice are its normal President and Vice-

President respectively. Thus neither the legislature nor the executive can participate in the disciplinary control of the judges. Judges can be disciplined for professional misconduct, which is defined by Article 43 of the Ordonnance 58–1270 of December 22, 1958, as:

> " Any breach by a judge of the duties of his profession to behave with honour, with delicacy and with dignity constitutes a disciplinary misconduct."

Sanctions range from reprimand to removal from office (with five intermediate sanctions). There is no appeal.

What can be done in England?

102. Though we have much to learn from other systems it does not follow that any particular method can be imported without modification. For instance, the system in Sweden whereby a judge can be prosecuted and fined for judicial misbehaviour would be undesirable and unnecessary in this country, particularly since one of the most frequent grounds for prosecution is that the judge has presided over a case in which he has, albeit often only indirectly, an interest, a ground for which in this country an appeal would lie.

103. Accordingly there seem to be a number of methods of supervision which are possible:

(i) *The Lord Chancellor.* Since he is head of the judiciary it is probably right that there should remain an informal channel of complaints through him to the judges. But we doubt whether this is a sufficient long-term solution, particularly since he has no constitutional power to interfere. The Lord Chancellor has enough to do with his present day-to-day tasks without adding to them; moreover since he is a political figure, it could be said that he is less impartial or perhaps possessed of less freedom of action than a wholly independent tribunal.

(ii) *The Judicial Ombudsman.* If eventually a system could be designed which would retain the merits and share none of the defects of the Swedish Ombudsman we feel that this would be the ideal, if costly, solution.

(iii) *A complaints tribunal or judicial commission.* A complaints tribunal composed solely of judges could be open to the objection that *esprit de corps* among the judges might render it ineffective. A representative tribunal (including non-lawyers) presided over by a judge, or a judicial commission, seems a better solution. It would be unwise to attempt to define too precisely the forms of impropriety or misconduct which might be the subject of its investigations, but these should quite clearly cover complaints about the behaviour of a judicial officer in connection with the carrying out of his judicial functions (at least in so far as these fall outside the scope of the appeal system).

104. We think it unnecessary at this stage to make any detailed proposal. We do regard it as desirable, however, that there should be a formal procedure for bringing complaints before a specific tribunal, that the tribunal should be independent both of the legislature and of the executive, that its proceedings should be in camera, that its decisions should not normally be published and that safeguards should be provided if possible to protect judges from paranoid and frivolous complaints. Rules might provide that (save in very serious cases) a judge would only be answerable to the tribunal after a number of complaints had been received and been deemed, prima facie, to be well founded.

105. Probably the mere fact that there was an authority whose function would be to investigate complaints impartially could be expected of itself to remove many sources of complaint. The main advantage of providing such a procedure is that it would afford a regular channel of complaint to an impartial tribunal; this would inspire confidence and act as a deterrent to misbehaviour which might otherwise persist and remain unpunished.

Is there adequate power to remove judges?

106. Initially we did not think it necessary to consider the removal of judges. However, it was obvious that the resignation of Abe Fortas, a justice of the United States Supreme Court, under threat of impeachment raised issues which are of general importance to any system which genuinely tries to reconcile the independence of the judiciary with the need to remove a judge who abuses his position or is otherwise unfit for office. The situation is almost [29] without precedent in the history of the higher judiciary in many common law countries, and is unlikely to recur frequently anywhere; nevertheless we have felt it was worthy of a detailed discussion which is comparative in scope. This is contained in Appendix I to our Report.

107. The principle of judicial independence is of such fundamental constitutional importance that it requires no justification here; but it is a necessary corollary of this principle, if respect for the judiciary is to be preserved, that an effective procedure should exist for removing a judge who is manifestly unfit to continue. Moreover the concept of the independence of the judiciary means primarily, if not exclusively, independence from political interference. It certainly does not mean that no judge should be removed from office under any circumstances whatsoever. The problem is to devise such a procedure without prejudicing the principle. Recognition of the principle that judges should not be liable to arbitrary dismissal by the executive is a datable event, closely associated with both the English and the American revolution. The ninth specification of the American Declaration of Independence states that "He [George III] has made judges dependent on his will alone for the tenure of their offices,

[29] Impeachment proceedings have not been brought against a member of the United States Supreme Court since 1805 when an attempt to unseat Samuel Chase for alleged partiality against the Jeffersonian cause was unsuccessful. The only case resulting in the removal of a judge under the Act of Settlement procedure was that of Sir Jonah Barrington, an Irish judge who was found guilty of malversation in office and removed in 1830.

and the amount and payment of their salaries." Before the revolution of 1688, most English judges (not the Barons of the Exchequer) for most of the time [30] held their offices at the will of the Crown. The Act of Settlement, passed in 1700, provided that after the accession of the house of Hanover to the throne judges' commissions be made *quamdiu se bene gesserint*, and later statutes say the same thing in English, "during good behaviour." [31] Identical language is used in the United States Constitution (Article III, Section 1).

108. Two criticisms may be made of the use of the term "good behaviour" as the sole condition of tenure; that it is imprecise, and that it is inadequate. So far as precision is concerned, although it has been construed by the courts in other contexts, *e.g.* under the British Museum Act, it is uncertain whether the same definition would be applicable to judges, and in fact there have been few attempts to specify the type of misbehaviour which would warrant the removal of a judge. Another provision of the United States Constitution, that the President, Vice-President and all civil officers of the United States (a term which includes Federal judges) "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery or other High Crimes and Misdemeanors," (Article II, Section 4), is hardly more helpful. The Canons of judicial ethics of the American Bar Association are more specific. According to Canon 4, "A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infraction of law; and his personal behaviour not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

[30] Not during the Commonwealth period, when they were appointed during good behaviour.

[31] Supreme Court of Judicature (Consolidation) Act 1925, s. 12 (1) (judges of the High Court and Court of Appeal, except Lord Chancellor, who may be dismissed by the Queen on the advice of the Prime Minister but may continue to take part in the judicial activities of the House of Lords) and Appellate Jurisdiction Act 1876, s. 6 (Lords of Appeal in Ordinary).

109. While the inclusion of extra-judicial behaviour is no doubt commendable, the wording at least of the last part of the Canon suggests an ideal standard rather than a minimum standard of behaviour below which a judge would be liable to removal. A distinction between the two standards is essential to the argument but rarely observed. What is required therefore is a recognition that misconduct, to warrant dismissal, must be serious; and that it includes the judge's conduct outside the exercise of his judicial functions.

110. It may be thought that these two points should be made explicit, but apart from this there would seem to be no need for greater precision in an area where the decision will inevitably depend to a large degree not on any general rules but on the circumstances of the individual case. As an alternative to defining misconduct more closely, therefore, it may be preferable to try to secure that adequate procedures are introduced for arriving at the final decision, and that this decision is taken by a competent body, acting judicially, and not susceptible to external pressures. The analogy with other forms of discipline, ranging from the jurisdiction of professional bodies over their members to the criminal law, cannot be pressed too far, since these other forms are generally concerned with offences of varying importance to which differing penalties are attached. In the case of the judiciary, however, it is obviously difficult to provide for sanctions less than dismissal, though a judge could, for example, be suspended for six months and then allowed to resume his duties. In many systems, no doubt, there is an effective apparatus of informal sanctions, but this leaves unsolved the problem of the judge who will not retire.

111. We said that two criticisms may be made of the term "good behaviour"; first that it is imprecise and second that it is inadequate. We think it inadequate because it allows only for misconduct and not for incapacity. (It is perhaps arguable that "good behaviour" includes the question of incapacity, but if so it should be spelt out.) John Pickering, a judge of the S. District Court for the

District of New Hampshire, was impeached for "insanity" and removed from office by the Senate in 1804. This act was described by John Adams as "an infamous and certainly an illegal conviction." In our opinion judges should be removed for proved incapacity, mental or physical.

112. Closely related to the question of incapacity is that of incompetence. Indeed, but for the existence of some notorious instances of unsuitable judicial appointments, it might be thought that all cases of incompetence could be adequately subsumed under the head of incapacity. Unfortunately there remains the occasional appointment which turns out to be a disastrous error, the more so because the judge concerned remains obstinately fit in mind and body. The line here between the mildly eccentric and the wholly wrong-headed would be hard to draw; any decision as to incompetence would necessarily appear relatively subjective, in contrast to the apparent objectivity of, say, a medical certificate. Moreover, the evidence would come, necessarily, from the judge's handling of actual cases. Perhaps for this reason, there seems to be no instance in the common law system of an explicit provision for removal of a judge on grounds of incompetence,[32] and in our opinion judges should not be removed from office for incompetence.

113. Having taken all these factors into account, we recommend a statutory scheme containing the following provisions:

(i) A judge of the Supreme Court may be removed from office only for incapacity to perform the functions of his office (whether arising from infirmity of mind or body or from any other cause) or for misconduct, and may not be removed except in accordance with the procedure prescribed.

[32] Under the Banda Constitution in Malawi a judge is removable for incompetence in the performance of the duties of his office, or misbehaviour, on the resolution of an absolute majority of the National Assembly: see Republic of Malawi (Constitution) Act 1966 (No. 23 of 1966), 2nd Sched., s. 64; Annual Survey of Commonwealth Law 1966, p. 80.

(ii) If the Lord Chancellor decides that the question of removing a judge is to be investigated, he shall appoint a judicial commission which shall include a majority of and in any event not less than three persons who hold or have held high judicial office and which shall not include any past or present Member of Parliament or any person who holds or has held any political appointment.

(iii) The judicial commission shall inquire into the matter, report on the facts, and recommend whether the question of removal of the judge should be referred to the Judicial Committee of the Privy Council. If the commission so recommends, the Judicial Committee shall consider the question, and shall advise Her Majesty whether the judge ought to be removed from office. Alternatively, in order to obviate a two-tier system, the matter could be referred directly to the Judicial Committee without the preliminary sifting process.

(iv) If the question of removing a judge has been referred to a judicial commission the judge may be suspended from performing the functions of his office. The suspension may be revoked and automatically ceases to have effect if the commission recommends that a reference to the Judicial Committee shall not be made or if the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.

(v) A judge (not being a judge of the Supreme Court) who is removed from office by the Lord Chancellor may appeal against that decision to the Judicial Committee. The Judicial Committee shall appoint a judicial commission under paragraph (ii) of this Scheme and paragraphs (iii) and (iv) of this Scheme will apply.

This recommendation, if implemented, would meet any suggestion that, by providing less cumbersome machinery than at present exists for removing judges on account of misconduct, the independence of the judiciary would be put into jeopardy. For only the Lord Chancellor could set the machinery in motion and a judge, if submitted to it, would be tried by a tribunal consisting primarily of members of the judiciary and free from political influence.

The judicial commission

114. In order to simplify and to unify our three proposals for (i) an advisory committee for appointments, (ii) a complaints tribunal and (iii) an *ad hoc* tribunal to consider a recommendation for removal to go to the Judicial Committee of the Privy Council, we recommend the establishment of a permanent judicial commission as an institution to encompass all three bodies, having the composition recommended in paragraph 113 (ii) above.

IX. At What Age should Judges Retire, and should there be Provision for Early Retirement?

115. In the past, if not at present, a typical caricature of a judge has depicted an old man. It is salutary to consider the comment underlying such a portrait of an element of the constitution and to reconsider the question of retirement, with regard to which there are three main questions which can be asked. First, should there be a retiring age for judges? Secondly, if so, when? And thirdly, should there be any special provision for premature retirement, for example for reasons of health?

The need for a retiring age

116. Though the Judicial Pensions Act 1959 fixed a retiring age of seventy-five for all new appointees there are many who would oppose the imposition of any arbitrary retiring age. There have been many alert, receptive and profound judges who have exceeded this age. In some occupations, e.g. that of a conductor, pianist, writer or painter where the concentration and ability required is very great, there is no retiring age and some of the greatest creative artists and thinkers have remained creative up to and even beyond the age of eighty-five. Moreover we live in an era in which there are more old people than ever before. Without going so far as advocating a gerontocracy it could be said that we have something to gain from employing their talents provided that they are capable of performing their allotted tasks.

117. However persuasive these arguments might appear we are bound to say that on the whole those in favour of a retiring age are more convincing. We expect a lot from our judges; they must concentrate for long periods on the presentation of oral evidence; they must master many new and complex branches of the law; and at the end of a case they must come to a decision. The incidence of arterio-

sclerosis (which gradually and almost imperceptibly impairs the faculties) increases greatly after the age of fifty; furthermore the older a person becomes the less naturally receptive he becomes to new attitudes and ideas. This all matters greatly in judges because of their security of tenure and because of the great power they wield; the English practice of relying on a single judge at first instance merely aggravates the problem. Professor R. M. Jackson neatly summarised the position: "The sound argument for a retiring age is that judges must inspire confidence, and that, on the whole, people do not care to be judged by those who belong to a generation that is generally inactive." [32a] Prima facie, therefore, exceptional treatment of the judiciary can only be justified if there is something which differentiates the judicial from other occupations. We cannot find any significant difference.

The age of retirement

118. Judicial appointment in the Superior Courts is until age seventy-five. The age of seventy-two, extendable to seventy-five, has been fixed for county court judges and seventy for stipendiary magistrates. Many people feel that all these ages are too high; in an article in *The Economist* [33] there was criticism of the fact that judges were allowed to continue "in a job which requires the keenest faculties at an age when other men are deemed suitable only for some gentle gardening." Complaints were also made about the practice of appointing elderly judges to sit as commissioners after their retirement. In the House of Lords there is no retiring age.

119. It seems that for almost all occupations the age of sixty to sixty-five is deemed an appropriate retiring age, although this age is not always fixed solely because it is that beyond which incompetence sets in; encouragement and development of younger talents, so that the best use of them can be made while in their full maturity, may also be an element in the choice. Since 1948 company directors

[32a] *The Machinery of Justice in England*, R. M. Jackson, 1967, p. 295.
[33] December 15, 1956, *i.e.* before the 1959 Act.

have been subject to a retiring age of seventy,[34] although it is admitted that the section is so riddled with exceptions as to be of less than its apparent value.

120. There is an obvious danger in pitching the retiring age too low: we have been told that there is no particular age at which it can be said that impairment of the faculties will occur. Furthermore, the effects of forced retirement can be adverse both on individuals and the public attitude.

121. There would however also be a danger in pitching the retiring age too high, even if as a compromise medical examinations or psychological tests were to be made compulsory for all those within, say, seven years of retirement. One of our witnesses, an expert on gerontology, put it as follows:

> ". . . We know very little about the mental changes in old age of exceptionally intelligent people. There is no doubt that, for physical and mental reasons, it is a good thing that most of us are made to retire some time between sixty-five and seventy. I certainly know of no tests which would pick out early mental changes in highly intelligent and civilised people.
>
> My personal opinion would certainly be that judges should be persuaded to accept retirement at say seventy, or at the latest seventy-five, but I do not think that medical examinations or psychological tests would be practical politics."

122. We felt that some distinction should be drawn between trial and appeal judges. A trial judge (particularly on Circuit) has to undergo some personal discomforts and has to deal with complex issues of fact and law, summing up immediately the argument in a case is completed. The slightest error in his direction to a jury could result in a successful appeal. No one who is not physically fit should be asked to perform such tasks. In addition, the strain on the trial judge is greater than that on the appellate

[34] Companies Act 1948, s. 185.

judge because the trial judge has to ascertain the truth from the evidence, to travel the Circuits and, perhaps most important of all, to sit and to decide alone.

123. The pace of the appeal courts is less strenuous; there is less reliance on oral proceedings, and judgment is more often reserved. Physical fitness, other than good sight and hearing and the absence of medical conditions which are likely to provoke irritations, is not so important. Most important of all, appellate decisions are not the decisions of a single judge.

124. Accordingly, we recommend that the retiring age for trial judges (High Court, Circuit judges, county court judges and stipendiaries) be lowered to seventy whilst that for the appellate courts (Court of Appeal) remains at seventy-five. We recommend that a retiring age of seventy-five be introduced in the House of Lords subject to a discretion vested in the Lord Chancellor enabling him to extend the limit in exceptional cases.

Should there be provision for premature retirement?

125. We were very much impressed with the need for some kind of medical and psychological tests to detect the arteriosclerotic and those suffering from presenile defects. But we were also impressed (though medical opinion is apparently not unanimous) with the difficulty of providing adequate examinations. Many of our informants felt that the real problem was not necessarily caused through ageing; in many cases pronounced and prejudiced views (*e.g.* reluctance to attach weight to psychiatric evidence) and personal idiosyncrasies which have existed all along merely become more pronounced with age. In these cases the real need is for some kind of pre-appointment testing, but this we consider quite impracticable.

126. We feel that there is a need for regular medical examination for judges if satisfactory tests can be devised. The scheme could provide for annual examinations for all judges once appointed, or it could be limited so that only judges above a certain age, say sixty-five, would be

examined. However, certain points would have to be borne in mind before any such scheme were to be implemented:

(i) Any tests would have to allow for the fact that failing powers could be almost imperceptible even though nonetheless real. A common result of arteriosclerosis is loss of memory; even though this may be crucial, particularly in a trial judge, the fact that it may be intermittent might make it hard to detect.

(ii) The fact that the imposed retirement was selective could impose invidious decisions on certain people, and a reconciliation between provisions for early retirement on medical grounds and the constitutional principle of the independence of the judiciary would also be necessary.

(iii) Since every judge on his appointment gives up his personal career, it should be accepted that, if he is compulsorily retired before he has reached his retirement age, he should be granted a full pension.

(iv) A failure to come up to the high physical standards required would not imply unfitness for anything other than the judicial appointment. Good use could be found for the talents of judges retired on medical grounds in other disciplines or fields.

X. Summary of Recommendations

127. Accordingly we recommend for consideration the following proposals:

(i) That solicitors and chairmen of administrative tribunals should be eligible for appointment to the Circuit Bench (coupled with a recommendation that there should be regular promotions from the Circuit to the High Court Bench) and that academic lawyers should be eligible for appointment to the Court of Appeal and the House of Lords (paras. 16, 28, 31).

(ii) That there should be no career judiciary, except for legally qualified members and chairmen of administrative tribunals (paras. 34–38).

(iii) That the Lord Chancellor should retain the patronage of appointment but that he should be assisted by a consultative committee or judicial commission (para. 43).

(iv) That with a view to improving the environment in which the judge has to work:

(a) a competent body should be appointed to consider the implications of court ritual (para. 55);

(b) everything possible should be done to minimise the time spent away from home by those judges who would prefer to be there (para. 56);

(c) secretarial assistance should be made available to any judge who requests it (para. 57);

(d) no judge should do work of substantially the same kind, year in and year out (para. 60);

(e) the establishment of judges should be increased (para. 66).

(v) That immediately after appointment, for a period lasting between three and six months:

(a) a judge should be free to go into any court he wished and to observe trial proceedings and techniques; and

(b) he should have the opportunity to consult with appropriate specialists during this period (para. 67).

(vi) That there should be regular refresher courses available for all judges (para. 67).

(vii) That there should be a judicial staff college (paras. 69–71).

(viii) That the Criminal Appeal Act 1968 should be amended so as to make certain specific conduct on the part of the judge a ground of appeal (paras. 85, 86).

(ix) That there should be a complaints tribunal or judicial commission to investigate complaints about the behaviour of judges and to make recommendations (paras. 103 (iii), 113 (ii) and 114).

(x) That there should be a power to remove a judge for incapacity or misconduct in accordance with a prescribed procedure involving a judicial commission and the Judicial Committee of the Privy Council (para. 113).

(xi) That a judicial commission should be established to combine the functions of advisory committee for appointments, complaints tribunal, and tribunal to consider recommendations for removal of judges (para. 114).

(xii) That trial judges should retire at seventy and appellate judges at seventy-five (para. 124).

(xiii) That provision (by way of medical examination and receipt of early pension) should be made for early retirement after sixty-five on medical grounds (para. 126).

Appendix I

Comparative Survey of Provisions Concerning Removal of Judges

1. It is widely believed that in England a judge can be removed from office only by the Queen on an address presented by both Houses of Parliament. This belief may have received some confirmation in the wording of the Supreme Court of Judicature (Consolidation) Act 1925, which applies to all judges of the High Court and of the Court of Appeal except the Lord Chancellor, and the similar wording of the Appellate Jurisdiction Act 1876, which applied to Lords of Appeal in Ordinary. The 1925 Act provides that the judges in question "shall hold their offices during good behaviour subject to a power of removal by His Majesty on an address presented to his Majesty by both Houses of Parliament."[1] The 1876 Act provides that every Lord of Appeal in Ordinary "shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown but he may be removed from such office on the address of both Houses of Parliament."[2]

2. The apparent clarity of the language of the Acts is deceptive. It leaves unanswered two principal questions; first, whether removal by the Queen on an address is the only method of removing judges; secondly, whether good behaviour is the only condition of tenure, or whether they may be removed, either on an address or by other procedures, on other grounds as well. These questions are fully considered by Sir Kenneth Roberts-Wray, who reaches the conclusion that a judge is removable on an address for misbehaviour or on other grounds, and is removable by other means for misbehaviour alone.

[1] s. 12 (i).
[2] Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, 1966, 485–490.

3. If this conclusion is correct—and it is sufficient for the purposes of the discussion that it is an arguable interpretation of the relevant legislation—the question arises by what means other than by address a judge may be legally removed from office. A remarkable variety of possible methods can be identified. It seems that a judge can be removed:

(i) *By writ of scire facias* to repeal the patent by which the office was confirmed.[3] Judges are appointed by letters patent, and the writ of *scire facias* is the normal method of repealing the patent; it appears that this use of the writ was not affected by the Crown Proceedings Act 1947.[4]

(ii) *By a criminal information* in the Queen's Bench Division at the suit of the Attorney-General.

(iii) *By an Act of Parliament* abolishing the judge's office, for example in the course of a judicial reorganisation. Thus the jurisdiction of the House of Lords to hear appeals in English cases would have been abolished in 1874 but for a general election resulting in a change of government. This would not have led to the removal of any judges, since the judicial functions of the House of Lords were not then exercised by peers specifically appointed for that purpose. It is clear, however, that the abolition of the appellate jurisdiction of the House of Lords proposed in 1963 in a joint paper by the former Lord Chancellor and Attorney-General[5] must have resulted in at least the demotion, if not the removal, of a number of judges. A minor precedent can be found in a judicial reorganisation in Ireland when a judge was retired on full pay. As a further safeguard of judicial independence, there is much to be said for a provision that a judicial office should not be abolished while it is occupied by a substantive holder. Such a provision was

[3] See the argument of Mr. Denman (afterwards Lord Chief Justice), counsel for Sir Jonah Barrington before Parliament in 1830, reported by Alphens Todd, Vol. II, pp. 858–859.

[4] See Roberts-Wray, *op. cit.*, pp. 487–490; R. M. Jackson, *The Machinery of Justice in England* (3rd ed.), p. 233n.

[5] Gerald Gardiner and F. Elwyn Jones, "The Administration of Justice," in *Law Reform Now*, ed. Gerald Gardiner and Andrew Martin (1963), p. 15 *et seq.*

in fact included in a number of Commonwealth constitutions. The objection to it is that it might make very difficult a bona fide large-scale re-organisation of the courts.

(iv) *By impeachment before the House of Lords* at the suit of the House of Commons. This procedure is no doubt obsolete, having last been used in 1805, but has never been formally abolished.

(v) *By dismissal by the Queen.* If the above interpretation of the Acts is correct, the Queen may remove a judge without address from both Houses but only under the "good behaviour" clause—that is, for official misconduct, for neglect of official duties, or (probably) on conviction of a serious offence.[6]

4. It is questionable whether even this constitutes an exhaustive list of ways of removing judges; it is possible, for example, that a judge might be disqualified from holding judicial office by being disbarred by his Inn.

5. Closely related to the power of removing judges is the power of controlling their salaries. The connection was recognised by both the Act of Settlement which provided that "judges" commissions be made *quamdiu se bene gesserint* and their salaries ascertained and established[7] and by the United States Constitution which provides that the judges "shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."[8] The constitutions of some American states, however, contain no corresponding provisions and an extreme example of the attendant dangers is provided by the legislature in one state which, infuriated by a decision of its highest court, reduced the judges' annual salaries to 25 cents. In England the salaries of judges are charged on the Consolidated Fund, so that they need not be voted annually by Parliament, but this does not protect them against legislative or even administrative encroachment.

[6] *Earl of Shrewsbury's Case* (1611) 9 Co.Rep. 42c, 50.

[7] Act of Settlement 1701, s. 3.

[8] Art. III, s. 1.

6. In 1931 the Commissioners of Inland Revenue reduced the salaries of the judges of the Supreme Court, purporting to act under the authority of an Order in Council made under the National Economy Act 1931, which provided that the remuneration "of persons in His Majesty's Service" might be reduced.[9] It was argued, notably by Holdsworth,[10] that judges could not properly be regarded as servants of the Crown. The Inland Revenue later restored the cuts in deference to public opinion. The Judges' Remuneration Act 1965 now provides that judges' salaries may be increased, though not reduced, by Order in Council.

7. In Canada the legislature has openly recognised the power to withdraw a judge's salary as a method of avoiding the consequence of tenure. The tenure of judges of the superior courts is guaranteed by the British North America Act 1867 in terms similar to those of the Act of Settlement, though it is a disputed question whether these provisions apply to judges of the federal courts as well as to judges of the provincial courts. In the case of the judges of the provincial superior courts the guarantee of tenure is circumvented by the device of stopping the judge's salary without removing his commission. By section 31 of the Judges' Act[11] "A judge who is found by the Governor in Council, upon report of the Minister of Justice, to have become incapacitated or disabled from the due execution of his office by reason of age or infirmity shall, notwithstanding anything in this Act, cease to be paid or to receive or to be entitled to receive any further salary if the facts respecting the incapacity or disability are first made the subject of inquiry and report as provided in section 33, and the judge is given reasonable notice of the time and place appointed for the inquiry and is afforded an opportunity by himself or his counsel of being heard thereat and of cross-examining witnesses and adducing evidence on his own behalf."

[9] See R. F. V. Heuston, *Lives of the Lord Chancellors* 1885–1940 (1964).
[10] Holdsworth, "The Constitutional Position of the Judges" (1932) 48 L.Q.R. 25–36.
[11] R.S.C. 1952, c. 19.

8. Section 33 provides that the commission of inquiry into the facts shall be composed of one or more judges of federal or provincial superior courts. The threat to invoke this procedure has on several occasions resulted in the resignation of the judge in question.[12] The provisions are unusual in several respects. In the first place they allow for removal without reference to Parliament, which may render the Act unconstitutional. Instead they provide for a judicial investigation, but the final decision in effect rests with the federal cabinet. The provisions apply only to cases of incapacity and disability, not to other forms of incompetence nor to misconduct.

Removal by the executive

9. The United States Supreme Court has said[13]:

> "It is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

Even when judges do not hold office during pleasure, it is undesirable that the final decision should rest with the executive. The danger is twofold; that judges for fear of removal might become too compliant; and that judges who do not prove compliant might actually be removed. It is true that the latter danger has rarely materialised in modern times; even in Nazi Germany control of the judiciary was achieved, where necessary, by other means. Often of course the judiciary was not out of sympathy with the policies it was required to enforce; this may have been true not only of many German judges but also in the recent history of the South African judges, none of whom, it seems, has either been removed or resigned for political reasons. German jurists maintained the principle of judicial independence, but with qualifications: it could be "temporarily suspen-

[12] R. MacGregor Dawson, *The Government of Canada* (2nd ed. 1954), p. 475.
[13] *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935).

ded." [14] But extreme cases [15] apart, so long as the power rests with the executive the risk remains that a decision to remove a judge may appear to have been taken on political grounds, or that the power may appear to have influenced judicial practice. Once it is recognised that political factors should play no part in the decision to remove, any argument for vesting the power in the executive disappears.

Removal by the legislature

10. The Anglo-American method of removal by the legislature was devised as a protection aginst the power of the executive and is explicable only in historical terms. It has been adopted by Canada, Australia and New Zealand.[16] But its historical justification has disappeared in England, with the increasing subordination of the legislature to the executive. Thus the first principal objection to removal by the legislature is simply that it no longer guarantees independence of the executive. The second is that Parliament is master of its own procedures, and that the procedures and rules of evidence appropriate to judicial proceedings which would seem to be required in a case of this kind are unlikely to be followed in Parliament. This objection in turn suggests that Parliament is in any case an inappropriate forum for such proceedings, and the assembled members of Lords and Commons an unsuitable tribunal. But the real dangers of this archaic procedure are more serious than the practical problems it would involve. The mere fact that it is so difficult to initiate, so cumbersome to operate, and so unlikely to produce a satisfactory result—*i.e.* a decision which is just and seen to be just—must mean that there are two dangers: that indirect pressure will be put on a judge, probably by the executive, to resign, simply in order to

[14] Kerr, *Grenzen der richterlichen Unabhangigkeit, Archiv fur Rechtsphilosophie*, Bd. XXVLL; p. 30 *et seq.* cited in *Justiz in Dritten Reich*, ed. Staff (1964), p. 174 *et seq.* Professor Kerr rejected as "utterly false" the suggestion of "a French wit" that a temporary suspension of independence was as unthinkable as a temporary suspension of virginity.

[15] *e.g. Roberts-Wray, op cit.*, pp. 463–464 and pp. 468–469.

[16] Roberts-Wray, *op. cit.*, p. 510.

circumvent the procedures [17] and that a judge determined not to give way may well be able to continue in office for longer than is desirable. It has been well said that the main purpose of the Parliamentary procedure was not to provide a method of removing judges but rather to safeguard them against removal.

Removal by the judiciary

11. If removal by executive and removal by legislature are unsatisfactory, there remains a third possibility: removal by the judiciary itself. This solution seems so obvious that it would be surprising that it had not been more widely adopted, if it were thought that the problem had been rationally considered. In fact there are a few precedents including the International Court of Justice, whose Statute provides that "no member of the Court can be dismissed unless in the unanimous opinion of the other members, he has ceased to fulfil the required conditions." [18] The requirement of unanimity is clearly dictated by the special position of the International Court. There is no recorded instance of an attempt being made to dismiss a judge.[19]

12. Some Commonwealth countries have adopted the principle, first embodied in the Federal Constitution [20] of the West Indies in 1957, that a judge should be removed

[17] In the *Fortas* case it was reported that the Attorney-General had approached the Chief Justice to put certain information before him and that the Department of Justice had intimated that unless Fortas resigned within a certain time, it would release damaging information.

[18] Statute of the International Court of Justice, Art. 18 (1). The procedure is laid down in article 6 of the Rules of Court, but the reference to "required conditions" is nowhere elaborated. It could be taken to refer to any number of very different requirements laid down in various parts of the Statute, *e.g.* Arts. 2, 3 (1), 16 (1), 23 (1) etc. The Pensions Scheme Regulations for Members of the International Court of Justice provide that a judge shall not be entitled to a retirement pension if he has been required to relinquish his appointment under Art. 18 of the Statute "for reasons other than the state of health." (G. A. Resolution 1562 (XV) as amended by Resolution 1925 (XVIII), Art. 1 (1).

[19] Rosenne, *The Law and Practice of the International Court* (1965) Vol. 1, p. 195.

only on the recommendation of the Judicial Committee of the Privy Council.[21] It is usually provided that a judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity or from any other cause) or for misbehaviour and may not be removed except in accordance with the procedure prescribed.

13. The procedure is for a tribunal of three judges to be appointed to inquire into the matter, report on the facts, and recommend whether a request should be made that the question of removal of the judge should be referred to the Judicial Committee.

14. A different judicial procedure has been adopted by three other commonwealth countries. In Canada, as already observed, the removal of a judge for incapacity requires an inquiry before a tribunal of judges. Under the Constitution [22] enacted in Pakistan in 1962 a judge could be removed only by the President if, after inquiry, the Supreme Judicial Council reported that it was of opinion that the judge was incapable of performing his duties by reason of physical and mental incapacity or that he has been guilty of gross-misconduct, and that he should be removed from office. A similar procedure was adopted in Cyprus but a distinction was drawn between judges of the High Court and judges of the Supreme Constitutional Court: in each case the tribunal consists of the judges of the other court.[23]

15. The arguments supporting the establishment of a judicial procedure for the removal of judges do not of course rest solely on political grounds. It is arguable that the safeguard of a judicial hearing is required by the nature of the proceedings themselves.

16. The International Commission of Jurists at New Delhi in January 1959 expressed the view that:

[20] Art. 75 (3).
[21] Roberts-Wray, *op. cit.*, p. 499.
[22] Art. 128.
[23] Arts. 133 and 153.

> "The reconciliation of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be clearly laid down and that the procedure should be before a body of judicial character assuring at least the safeguards to the judge as would be accorded to an accused person in a criminal trial." [24]

Judges of lower courts

17. Under existing statutes, county court judges may be removed by the Lord Chancellor for inability or misbehaviour,[25] while he may remove justices of the peace from the commission of the peace if he thinks fit. He may also ask that a justice's name be put on the supplemental list of justices no longer entitled to exercise functions on the ground of "age or infirmity or other like cause" or if he "declines or neglects" his judicial functions.[26] While there would seem to be less objection to executive discretion in the case of the lower judiciary, it may be thought desirable at least in the case of professional judges (including stipendiary magistrates) to provide for a right of appeal from the decision of the Lord Chancellor to remove a judge from office. The procedure for hearing the appeal could be the same as for the original proceedings for Supreme Court judges except that the tribunal should not be appointed by the Lord Chancellor, but could be appointed by the Judicial Committee itself. Provision is made for this in the scheme proposed in paragraph 109 of the Report.

18. The Commonwealth precedents suggest that the basic choice lies between a tribunal of judges specially established and the use of the Judicial Committee of the

[24] *The Rule of Law in a Free Society*, pp. 12, 310.
[25] County Court Act 1959, s. 8 (1). A county court judge must be given notice of the charges against him and is entitled to be heard: *Ex parte Ramsha* (1852) 18 Q.B. 173, 190: 118 E.R. 65, 71.
[26] Justices of the Peace Act 1949 s. 4 (4). Hood Phillips states that "by convention" the Lord Chancellor does not remove justices of the peace except for good cause, *e.g.* refusal to administer the law because the justice does not agree with it, and cites one such instance in 1949: see *Constitutional and Administrative Law* (4th ed. 1967), p. 356, n. 23.

Privy Council. The latter solution, for judges of all courts, may be preferable on the grounds that it makes use of existing machinery and that the Judicial Committee already has a wide jurisdiction in hearing appeals from disciplinary proceedings before domestic tribunals.

Appendix II

The Social Class Origins of the Judiciary of the Superior Courts (1820–1968)

The following analysis is taken from an unpublished M.Phil. Dissertation by Jenny Brock (University of London). Since assignments to one or other class are often disputed we have included Miss Brock's methodology.

The Social Class Origins of the Judges

Period of appointment *Social class*	1820–75	1876–1920	1921–50	1951–68	*Total* 1820–1968
I. Traditional landed upper class	17·9% (19)	16·4% (17)	15·4% (14)	10·5% (9)	15·3% (59)
II. Professional, commercial and administrative upper class	8·5% (9)	14·6% (15)	14·3% (13)	14·0% (12)	12·7% (49)
III. Upper middle class	40·6% (43)	50·5% (52)	47·3% (43)	52·3% (45)	47·4% (183)
IV. Lower middle class	11·3% (12)	9·7% (10)	8·8% (8)	8·1% (7)	9·6% (37)
V. Working class	2·8% (3)	1·0% (1)	1·1% (1)	1·2% (1)	1·3% (6)
Not known	18·9% (20)	7·8% (8)	13·2% (12)	14·0% (12)	13·5% (52)
Total	100% (106)	100% (103)	100% (91)	100% (86)	100% (386)

Class Assignment According to Father's Occupation or Rank

CLASS I

Traditional landed upper class [1]

Peerage and baronetage.
Landed gentry, *i.e.* included in Burke's.
High Sheriff or Deputy Lieutenant.

CLASS II

Professional, commercial and administrative upper class

Superior or county court judge, bencher.
Bishop, dean.
Major-General and superior ranks.
Rear-Admiral and superior ranks.
Director or owner of large commercial or industrial enterprise.[2]
Shipowner.
Major banker.
Permanent secretary or under-secretary in Civil Service.
Lord Mayor of London, ambassador.
Principal of a university, college, head of major public School.
Editor of national newspaper.
Knightage.

[1] Class I, deviates from the occupational base of the other classes, using instead possession of land and/or a title as the criteria for membership.

[2] Some difficulties arose over the assignment of those fathers who were described as being engaged in some form of entrepreneurial occupation, with little information given as to the size or importance of the business. The majority of these, merchants of various kinds and manufacturers included in the Directory of Directors or a similar register, have been assigned to Class III. A few, whose dealings were on a smaller scale were placed in Class IV. Only directors or owners of large, prosperous and usually well-known companies have been assigned to Class II.

CLASS III

Upper middle class

Professional occupations—barrister, solicitor, town clerk, doctor [3] clergy, accountant, architect, quantity surveyor.
Army major, lieutenant-colonel or colonel.
Captain or commander in navy.
Captain in merchant service.
Merchants and other middle-range entrepreneurs,[2] minor banker, bank-manager, member of Stock Exchange or Lloyds, broker or agent.
M.P. member of colonial parliament, civil servant.
Small landowner or estate manager.
Head of minor public school, university professor.
Editor of local newspaper, artist or composer.

CLASS IV

Lower middle-class

Non-conformist minister, schoolmaster, surgeon,[3] secretary, estate agent, journalist, minor civil servant, government short-hand writer, principal prison officer, army captain.
Minor traders and manufacturers, *e.g.* grocer, baker, bleacher, etc.
Commercial traveller.

CLASS V

Working class

Craftsman—saddler, master cabinet-maker, wig-maker, copper-smith.
Colliery deputy, butler, clerk.

[3] During the eighteenth century medical men were divided into three orders—physicians, surgeons and apothecaries; of these only the physician was definitely classed as a member of a senior profession. The Report of the Select Committee on Medical Education 1834 (Pt. ii, p. 20) refers to "the three inferior grades of surgeons, apothecaries and even druggists." The physicians were a relatively small body distinguished principally by their membership of the Royal Colleges and their possession of a medical degree of university standard; most surgeons were merely licensed. Accordingly, judges during the first two periods, whose fathers were "medical men" but not fully qualified doctors, have been assigned to Class IV, rather than Class III.

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