THE JUDICIARY OF THE SUPERIOR COURTS 1820 to 1968 : A SOCIOLOGICAL STUDY

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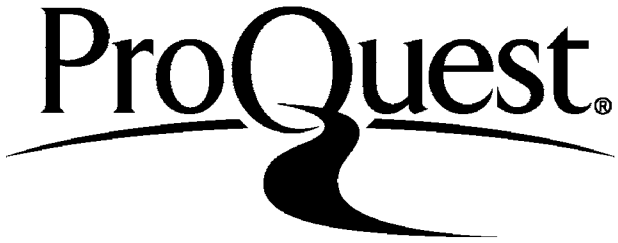

Abstract

This study is an attempt to construct a social profile of the judiciary of the superior courts during the period 1820-1968. The analyses cover a wide range of characteristics including parental occupation, schooling, class of degree, age of call to the bar and age at appointment to the bench. These indices are used to determine how far opportunities for recruitment to the bench have been circumscribed by social origin, to assess the importance of academic qualifications and vocational skills in the achievement of professional success and to describe the pattern of the typical judicial career. The division of the total population of judges into four cohorts, based on the date of their initial appointment to the superior courts, allows throughout for historical comparison, demonstrating the major points of change and also underlining the continuities in the composition of the Bench during the period studied. The relationship between the law and politics provides a central point of discussion, focusing on an examination of the changing influence of political considerations in judicial appointments and a review of the main supports for judicial independence in contemporary England. This is set against a comparative survey of methods of judicial selection, drawing particularly on American and French experience. A separate chapter is devoted to an examination of the Lord Chancellorship, of the changing nature and duties of that office and of the social origins of its occupants. The study includes a description of the changing power and prestige of the Bench and the varied reactions that the judges have historically aroused in the performance of their functions. It ends with an attempt to show how the accumulated experiences of the judiciary, especially within the legal profession operate to set them apart from the society they judge.

CONTENTS

A list of the tables included in this thesis is given on pp. 320 - 322.

Introduction

The medieval clothes, dog latin and monastic ritual of the Inns bear witness to the ancient origins of the Bar; but if today too much of the past seems to cling to the profession, the explanation lies less in this uncritical adherence to historic trappings than in a failure to escape from the fetters of nineteenth century professionalisation.

The formulation in the last quarter of the century of a detailed professional code with rules of entry and conduct, while it provided a guarantee for client and public, at the same time successfully promoted the self interest of the Bar. At the centre of this development was the Bar Council, organised in the first place in reaction to proposals of the Judges' Rules Committee which threatened the financial interests of the junior Bar; by the 1920's it had consolidated the major restrictive practices of the profession and set itself up as guardian of its members morals and purses.

The development of a cohesive and rigid professional organisation was accompanied by the crystallisation of its ideology. Professionalisation, wrote Morris Finer Q.C.(1)

> "----took place in the matrix of an individualistic society in which the lawyer's client were the landowners, the farmer, the trustee of the marriage settlement, the employer and the company promoter. It was a society in which two categories of right - property and freedom of contract - were paramount. The lawyer served to protect these rights, and his profession took its tone and outlook from the wealthy and middle classes who were principally concerned with them."(2)

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(1). Now Mr. Justice Finer.

(2). Morris Finer, Q.C., "The legal profession", in M. Zander ed; What's Wrong with the Law? Published by the BBC(1970) p.44.

Victorian middle-class ideas of social justice were absorbed by the profession and carried forward into the twentieth century, together with a judicial system which, after some six hundred years of haphazard growth, had been completely recast by the reformist zeal of the nineteenth century. Almost another century passed before the essentially Victorian foundations of the court structure were again subjected to rational analysis and reform.

It is surprising therefore that of all periods in legal history the nineteenth and early twentieth centuries have been the most inadequately chronicled; that an era when considerable headway was being made in civil law reform and the expansion of special legislation and in which the form and content of the contemporary legal system was fundamentally cast should have aroused so little interest. In Alan Harding's Social History of English Law(1) a work of well over 400 pages, only 17 are devoted to the structure of the legal profession and the courts in the nineteenth and twentieth centuries.

In 1967 Brian Abel-Smith and Robert Stevens prefaced their own attempt to correct the deficiency with these words:

> "While many legal historians had written about the history of courts, lawyers and the law up to the end of the eighteenth century, surprisingly little, we found, had been written about the histories of the nineteenth and twentieth centuries. Moreover the interest of many legal historians did not extend beyond the development of substantive law; that is the doctrines of the law rather than the social and political background of the legal system. In turn the social and political historians who had written about the previous two hundred years had not found the legal profession or legal administration worthy of serious study.(2) The developing social sciences had so far failed to take an interest in matters legal; while all too often works on the legal system seemed to jump from the Middle Ages to the 1960's with only a casual

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(1). Penguin, (1966)

(2). This contrasts with the general historians of the medieval period who have usually given legal institutions a central position in their commentaries.

> glance at the legislation of the 1870's. While there were studies of solicitors and official histories of the Inns of Courts, surprisingly little had been written about barristers, judges, legal education, legal aid or the evolution and work of the courts during the last two centuries."(1)

Up to the 1960's only two pieces of empirical evidence on the social origins of the legal profession had emerged; and in both cases these data were largely incidental to the author's main purpose. Sir Francis Galton, in his Hereditary Genius published in the latter part of the nineteenth century, was concerned with the eminent antecedents of the superior judiciary only in so far as they substantiated his thesis of inherited ability.(2) Similarly, Morris Ginsberg's analysis of admissions to Lincolns Inn, contained in Studies in Sociology, formed just a part of the material used by him to study variations in social mobility.(3) Harold Laski, inspired by the American legal realists, made frequent critical observations on the judges' handling of cases involving class issues: "....the fact that the lawyer is usually a member of the property-owning class," he commented, "tends to make him ..... sympathetic towards the general outlook of that class."(4) But, because he was writing at a time when many lawyer-politicians were attaining an infamous prominence, Laski's attention was focused principally on the direct relationship between the Bench and politics, producing a detailed analysis of the political antecedents of the Bench, and evaluations of the judicial appointments system and the office of Lord Chancellor.(5)

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(1). B.Abel-Smith and R. Stevens. Lawyers and the Courts, Heinemann (1967) pp v-vi.

(2). Watts, 2nd ed. (1892).

(3). Methuen, (1932).

(4). H.J. Laski, The State in Theory and Practice. Allen & Unwin (1935) p.179.

(5). H.J. Laski, A Grammar of Politics. Allen& Unwin, 5thed. (1967)
" " , Reflections on the Constitution. Manchester University Press. (1951).
" " , Studies in Law and Politics. Allen & Unwin (1932)

Since the mid-fifties there has been growing sociological interest in this country in the study of elites and professions,[1] social groups that are both clearly defined and well documented; but apart from some fairly superficial observations on the social backgrounds of the contemporary Bench in the superior courts, the judiciary, unlike the cabinet, the higher civil service, the bishops, the senior military and leaders of industry, have not before been subjected to comprehensive sociological analysis. Similarly, the Bar, though included in general works on the professions,[2] has not been singled out for more detailed consideration. The lack of such a study has inevitably placed some limitation on my own work; for comparison between the judges and the Bar as a whole, I have had to rely mainly on impressions gained from general literary material. Forecasts of the future

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(1). B. Abel-Smith, A History of the Nursing Profession. Heinemann, (1960).

G.H. Copeman, Leaders of British Industry, Gee, (1955)

R.K. Kelsall, Higher Civil Servants in Britain:From 1870 to the Present Day. Routledge & Kegan Paul, (1955).

W.L. Guttsman, The British Political Elite,MacGibbon & Kee, (1963).

B.A. McFarlane, The Chartered Engineer, Unpub. Ph.D. Thesis, London (1961).

D.H.J. Morgan, "The Social and educational background of Anglican bishops - continuities and change". B.J.S.(1969) pp.295-310.

C.B. Otley, Social Background of Senior Officers of the British Army 1870-1959 Unpub. Thesis, Hull University (1962)

A. Tropp, The Teachers, Heinemann (1957)

(2). A.M. Carr-Saunders & P.A. Wilson, The Professions. Cass,(1964)

R. Lewis & A.E.U. Maude, Professional People. Phennix House, (1952)

G.L. Millerson, The Qualifying Associations. Routledge & Kegan Paul (1964)

W.J. Reader, Professional Men. (The Rise of the Professional Classes in Nineteenth Century England) Weidenfeld & Nicolson, (1966).

composition of the judiciary based on the present composition of the Bar and the solicitors branch of the profession have been even more conjectural though I have been assisted to some extent by an unpublished study of the contemporary legal profession carried out in 1966.(1)

In so far as it provides a case study for describing methods of recruitment to the pinnacles of a key profession, for illuminating the social distribution of power and status, and for assessing the relative contributions of such factors as education, social origins and political activity to the achievement of professional success, this analysis emulates the earlier works on elites. At another level a study of the judiciary, of those who are seen to dispense, and often to epitomise, 'justice', makes a contribution to the sociology of law, a discipline which in England, still lacks a sound factual basis.

The rejection of the mechanistic interpretation of the judicial role by the American legal realists in the thirties and their promulgation of the doctrine that judicial decisions are at least partially attributable to the social experiences and values of the judges, though valuable in itself, was not immediately accompanied by any systematic study of the background characteristics of the judiciary. For many years the sole contribution was Cortez Ewing's descriptive analysis of the career patterns and political affiliations of the Justices of the Supreme Court appointed during the period 1789-1937.(2) But the publication in 1959 of John Schmidhauser's influential 'Collective Portrait' of

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(1). H.R. Harris, The legal Profession in England and Wales. Unpub. Thesis. Reading University. (1966)

(2). The Judges of the Supreme Court, 1789-1937 Minneapolos, University of Minnesota (1938)

the Supreme Court Justices,[1] marked the beginning of more rigorous research into the social attributes of American judges and provided the groundwork for more sophisticated analyses of judicial decision-making.[2]

In this study of the social experiences of the senior English judges, essentially a study of a group, I have not attempted to relate specific background characteristics to individual judicial behaviour. I have simply indicated throughout what, as a result of the common experiences of the judges appears as the dominant ideology and temperament of the Bench as a whole, emphasising its persistently homogeneous and isolated character. In my assumption that the background experiences of the judiciary are principally directed towards consensus and unanimity, I have adopted a standpoint wholly opposite to that of the major American studies of judicial behaviour, whose main hypothesis is that background factors are a major cause of division or variance among the judges. The difference in the two approaches is partly methodological; studies which seek to relate background factors to actual decision patterns in multi-judge courts by measuring the degree to which a particular characteristic is correlated with a particular type of decision contain an element of bias, since they must exclude from analysis the majority of cases, which are decided unanimously.

The difference also derives from the distinctively constitutional role of the American Supreme Court, - the most common subject of such studies, - which has no parallel in the English judicial system. The political content of that court's

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(1). Midwest Journal of Political Science Vol.3 No.1 (1959)

(2). S. Nagel, 'Political Party Affiliations and Judges' Decisions', 55 Am. Pol. Sci. Rev. 843 (1961) and "Ethnic Affiliations and Judicial Properties' 24 J. of Politics 92 (1962)

work makes it an obvious target for the identification and analysis of individual idealogical standpoints. Further, though the origins and experiences of the higher-level American judges are sufficiently uniform to allow of the identification of a 'collective personality', they do possess more potentially divisive characteristics, in terms, for example, of their ethnic and regional backgrounds. most important, they lack that rigidly defined career structure which plays such a very significant part in the 'socialisation' of the English judge.

The Study

The structure of the superior courts.

Centuries of piece-meal growth had produced by 1820 a judicial system that was an uneasy amalgam of past expedients, an unco-ordinated medley of courts whose jurisdiction was ill-defined [1] and often in conflict. The courts of common law and equity, the court of Admiralty, and the ecclesiastical courts all administered separate bodies of law, with separate procedures and separate vocabularies of technical terms; it was not uncommon for proceedings on one issue to be conducted in two courts simultaneously. The greatest confusion arose between the systems of common law and equity which, according to Holdsworth, were "not merely rival but even directly contradictory".[2] He recalls

(1). "In Knight & Marquis of Waterford (1844) 11 Cl. and Fin. 653, fourteen years of litigation merely resulted in the discovery by the House of Lords that the plaintiff had mistaken his remedy." Sir William Holdsworth, A History of English Law. Methuen, Sweet & Maxwell, 7th ed. (1966) Vol.I p.634.

(2). Though R.M. Jackson regards the two systems as having been complementary rather than conflicting. "By the early nineteenth century", he writes, "a working partnership was well established." (The Machinery of Justice in England. C.U.P. 6th ed. 1972 , p.7.)

Palgrave's statement in 1834 that,

> "It must appear a singular anomaly to a foreigner, when he is informed that our English tribunals are marshalled into opposite and even hostile ranks; guided by maxims so discrepant, that the title which enables the suitor to obtain a decree without the slightest doubt or hesitation if he files a bill in equity, ensures a judgement against him should he appear a plaintiff in a declaration at common law. And exercising their respective jurisdictions by means of form and pleadings, which have as little similarity as if they existed among nations whose laws and customs were wholly strange to each other."(1)

The three Common Law courts, Queen's Bench, Common Pleas and Exchequer, each had a chief and puisne judges and were united only by the Court of Exchequer Chamber, in which appeals from the judges of any of them were heard by judges of the other two. Equity was administered by the Lord Chancellor, the Master of the Rolls and the Vice-Chancellors. During the nineteenth century, other superior courts were set up. In 1851 an equity court of appeal was introduced, manned by two Lords Justices sitting with the Lord Chancellor; and in 1857 two special courts were established, the Court of Probate and the Court of Divorce and Matrimonial Causes, the latter presided over by the Lord Chancellor, the Chief Justices and the senior puisne judges plus a judge ordinary of the court, who was also the judge of the Probate Court and the old Admiralty Court.

It was not until 1873 that any serious programme of re-organisation and rationalisation was undertaken in thesuperior courts. The first Judicature Act, passed in that year and implemented in 1875, provided for the consolidation of all the existing superior courts to form one Supreme Court of Judicature, combining a High Court of first instance and a single Court of Appeal; subject to certain rules, it was provided that common law and equity

(1). Holdsworth op. cit. p.635.

Figure I

The structure of the superior courts of law

Superior courts in the nineteenth century prior to the Judicature Act 1873

1 The High Court of Chancery

2 Court of Queen's Bench

3 Court of Common Pleas at Westminster

4 Court of Exchequer

5 High Court of Admiralty

6 Court of Probate

7 Court for Divorce and Matrimonial Causes

8 Assize Courts

9 Exchequer Chamber (common law appeals)

10 Lords Justices in Chancery (Chancery appeals)

11 Appellate jurisdiction of Privy Council in Lunacy and from the High Court of Admiralty

12 Other Appellate Jurisdiction

S U P R E M E C O U R T O F J U D I C A T U R E

Judicature Acts 1873-5

T H E H I G H C O U R T (Justices of the High Court)		T H E C O U R T O F A P P E A L (Lords Justices of Appeal)
Chancery Division		
Queen's Bench Division	After 1881 Queen's Bench Division	
Common Pleas Division		
Exchequer Division		
Probate Divorce and Admiralty Division[1]		
Assizes		

H O U S E O F L O R D S. Final Court of Appeal for Great Britain and (now Northern) Ireland. (Lords of Appeal in Ordinary.)

Appellate Jurisdiction Act 1876.

Source: R.M. Jackson - The Machinery of Justice in England, C.U.P. 6th ed. (1972) p.9.

(1). This Division ceased to exist on 1 October, 1971, and was in effect replaced by the Family Division. The change was accompanied by a certain amount of redistribution of business among the three divisions: Admiralty jurisdiction was transferred to the Queen's Bench Division and contentious probate work to the Chancery Division, while the new division took over miscellaneous family jurisdictions previously exercised by the other two courts, such as adoption, guardianship and matrimonial property disputes.

should be administered concurrently in every court by every judge, and that, where there was any conflict the rules of equity should prevail. The existing judges of the courts of common law, the court of Chancery, the Probate and Divorce court, and the court of Admiralty were constituted judges of the High Court. It was divided at first, into five divisions, three of them representing the old common law courts. The only reason for this was to avoid putting either of the Chief Justices or the Chief Baron out of office. In the event, both Sir Alexander Cockburn, Chief Justice of the Queen's Bench and Chief Baron Kelly died in 1880; the following year the Common Pleas Division and the Exchequer Division were abolished by Order in Council and their jurisdiction transferred to the Queen's Bench Division. Lord Coleridge, the Chief Justice of the Common Pleas became the Lord Chief Justice of England. The office of Vice-Chancellor was discontinued,(1) and the Master of the Rolls became president of the new Court of Appeal, which was modelled on the earlier Court of Appeal in Chancery.

The decisions of the Court of Appeal were intended to be final and the appeal jurisdiction of the House of Lords was abolished by the Judicature Act; but in 1876 the new Conservative government, urged on by the peers, passed the Appellate Jurisdiction Act, restoring a final appeal to the Lords, though providing for the appointment of two Lords of Appeal in Ordinary, paid professional judges with life peerages who would also be appointed to the Judicial Committee of the Privy Council as vacancies

(1). Revived by the Administration of Justice Act, 1970 C. 31,s.5.

occurred.[1] The Supreme Court, however, retained its now misleading title.

Almost a century later on January 1, 1972, the Courts Act 1971 came into operation. The Act gives effect with some modifications to the proposals for a major restructuring of the higher courts of England and Wales made by the Royal Commission on Assizes and Quarter Sessions.[2] The Supreme Court now consists of the Court of Appeal , the High Court and a new Crown Court, which inherits the criminal jurisdiction of the abolished courts of quarter session and assize. The High Court Judges continue to exercise the jurisdiction of the High Court in civil cases and sit in the Crown Court for the trial of more serious offences. The Act also provides for the appointment of a permanent bench of Circuit judges to deal with criminal cases in the Crown Court and civil cases in the county courts; for this purpose some thirty new full-time appointments are being made,

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(1). The sequence of events leading up to the passing of the Supreme Court of Judicature Acts, 1873-5, and the Appellate Jurisdiction Act 1876, are documented in R. Stevens, 'The Final Appeal : Reform of the House of Lords and Privy Council, 1867-76.' 80 LQR 3473 (1964)

The Appellate Committee of the House of Lords continues to be the subject of controversial debate:-
G. Drewry, 'One appeal too many ?' B.J.S.Vol XIX No.4 (1968)

L. Blom-Cooper and G. Drewry, 'The House of Lords: Reflections on the social utility of final appeal courts.' Mod. Law Rev. May, 1969

L. Blom-Cooper,Q.C. and G. Drewry, Final Appeal: A Study of the House of Lords in its Judicial Capacity, Oxford, Clarendon, (1972)

(2). Cmnd 4153 (1969)

in addition to those Circuit judges recruited from the existing county court benches and the full-time judges exercising criminal jurisdiction at the Central Criminal Court and elsewhere. Part-time Recorders will also assist in the work of the Crown Courts. In accordance with the Beeching Report's emphasis on the need for flexibility, the Act allows for a considerable degree of judicial mobility between jurisdictions; thus, a judge of the Court of Appeal may in theory at least be requested to sit in the Crown Court or in a county court, or a High Court case may be allocated to a Circuit judge.(1) A more flexible approach is also encouraged by the provision that the High Court and the Crown Court may sit anywhere in England and Wales.

The Judges

For the purpose of this research a list of appointments to the superior courts was obtained initially from a Chronicle of English Judges, Chancellors, Attorneys General, and Solicitors General, compiled by R.C. Mitchell.(2) This was later checked against and supplemented by the Law Lists and Whittakers Almanacks. In 1820, at the beginning of the period covered by this study, 14 judges sat in the superior courts; during the next 148 years, up to the end of 1968, 563 more appointments were made. But the total number involved in this analysis is only 386, since almost a third of the appointments were promotions or transfers within the judiciary. For the purposes of historical comparison, the judges have been divided into four cohorts, based on the date of

(1). By the Supreme Court of Judicature (Consolidation) Act 1925, High Court Judges may sit in the Court of Appeal and the Lords Justice in the High Court.

(2). New York, W.P. Mitchell Printing Co. (1937).

Table 1.

Statutory Increases in the Maximum Numbers of the Judiciary of the Superior Courts

Legislation	High Court Q.B.D.	Chancery	P.D.A.	Court of Appeal	House of Lords Appellate Committee
Judicature Act 1873				5	
Appellate Jurisdiction Act 1876					4
Appellate Jurisdiction Act 1913					6
Judicature Act 1925	17	6	2		
Appellate Jurisdiction Act 1929					7
Supreme Court of Judicature (Amendment) Act 1935	19				
Supreme Court of Judicature (Amendment) Act 1937			4		
Supreme Court of Judicature (Amendment) Act 1938				8	

Table 1.(Cont.)

Legislation	High Court	Court of Appeal	House of Lords Appellate Committee
Judicature (Amendment) Act 1944* (Min.17 Q.B. 5 Ch. 3 P.D.A.)	32		
Appellate Jurisdiction Act 1947			9
Patents & Designs Act 1949	33		
High Court and County Court Judges Act 1950	39		
Restrictive Trade Practices Act 1956	42		
Administration of Justice (Judges and Pensions) Act 1960	48	11	
Criminal Justice Administration Act 1962	53		
Administration of Justice Act 1968	70	13	11
Maximum Number of Judges Order 1970**	75	14	

* Since 1944 the Lord Chancellor has been able to make adjustments in the number of judges appointed to each division of the High Courts according to changes in the volume of litigation.

** Under S.1(2) of the preceding Act.

their initial appointment to the superior courts.(1) The periods of appointment have been chosen to give cohorts of roughly equal size. The most recent cohort, composed mainly of members of the contemporary Bench, is the smallest.

Period of appointment.	Number of judges appointed.
1820 - 75	106
1876 - 1920	103
1921 - 1950	91
1951 - 1968	86
TOTAL	386

The thirty-one men who held the office of Lord Chancellor between 1820-1968 are considered separately; they are included in the study, first because the Lord Chancellor is a judge of the superior courts, though the political and administrative functions of the office have gradually come to predominate over the judicial role,(2) and second, because it is the Lord Chancellor who forms the link between the political and legal worlds and is ultimately responsible for all appointments to the superior Bench.

Data were collected about each judge and Lord Chancellor according to the following breakdown.

1. (a) Date of birth.
   (b) Birth order.
   (c) Date of marriage.
   (d) Number of children.
   (e) Date of death.

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(1). The fourteen judges who were in office in 1820 though appointed before that date have been included in the first cohort.

(2). Though the present Lord Chancellor , Lord Hailsham, is very active judicially.(See below p.188) Former Lord Chancellors usually participate more frequently in the judicial work of the House of Lords.

2. (a) Date of appointment to the Bench.
   (b) Record of legal career.
   (c) Date of retirement.

3. Father's name, title and occupation.

4. (a) School.
   (b) University.
   (c) Academic record - class and subject of degrees.

5. Political activities.

6. Other experience.

Most of the information was readily available,[1] nearly all the judges having entries in the Dictionary of National Biography or Who's Who. Data which could be verified from other sources indicated that in general these standard works of reference could be accepted as accurate. The other main sources consulted were Burke's Peerage and Landed Gentry, the registers of the Inns of Court and the records of the universities of Oxford, Cambridge and London. Additional material was gleaned from various works on the legal profession and from individual biographies.

The validity of this type of study depends ultimately on the adequacy and accuracy of the biographical data; I was therefore fortunate in being able to attain a high degree of completeness using a variety of reliable sources. In only three instances was I unable to trace any information ; for the rest the completeness of the data varied at the individual points of inquiry. Thus in most cases information on the principal career stages, - age at call to the Bar, at taking silk and appointment

(1). See Appendix A.

to the Bench, - was exhaustive; the lacunae were negligible. On social class and education the proportion of required material successfully obtained was lower though satisfactory, with an overall average of some 85%. The proportion of data lacking was highest on class of degree, averaging 25.1%, ranging from 42.6% in the earliest cohort to 16.0% in the most recent; on the other hand the subject read at university showed a very high and fairly constant degree of completeness, averaging just under 92%. With regard to higher education in general, however, the stated averages do not properly represent the sufficiency of the data, lack of information on this point simply indicating in the majority of cases a lack of such experience. Specific response rates for all topics and more detailed comments are given in their appropriate places in the tables and text.

The study is divided into four main sections. Part One sets out to examine the socio-economic composition of the English Bench over the past century and a half and to determine how far opportunities for entry into the group have been circumscribed by social origin. Two indices have been employed; the first and most directly relevant, father's occupation, is used both as the basis of a social class analysis and for a straight-forward examination of the intergenerational movement between occupational groups. The influence of heredity is considered in terms of professional self-recruitment and a comparison made with other groups. Particular attention has been paid to the role of patronage in the nineteenth century and the extent to which its influence on success and advancement within the legal

profession was weakened by the demand for competent lawyers. Secondly, in so far as type of education received is both a reflection and determinant of social class, particularly in the private sector, the educational histories of the judges have obvious socio-economic implications. But the examination of their educational background goes further; because of the homogeneity of the pattern that emerges from the analysis of the schooling and further education of the judiciary, I have been able to draw some tentative conclusions about the intellectual character of the Bench as a whole, both by an assessment of the adequacy and content of the teaching to which they were exposed and by an examination of their individual academic achievements. As part of the study of social background, I have also sketched out a demographic profile of the judiciary; analysis of judicial fertility, nuptiality and mortality are compared with similar data for the peerage and for the general population and some useful, if predictable, results have been otained. This section has, however, because of inherent limitations in the basic data and its predominantly statistical nature, been included as an appendix rather than in the main body of the thesis.

Part Two of the study looks at the typical judicial career; the sequence, from call to the Bar through Queen's Counsel and minor judicial appointments and ultimately to the Bench of the superior stage is analysed on an age and time-scale basis; the resulting patterns demonstrate a high degree of overall consistency throughout the period studied. Movement of the judges within the superior courts is examined, principally in terms of 'promotions' from the High Court to the Court of Appeal; this is followed by an analysis of the termination of the judicial career, centring on the question of a fixed retirement age. The section

ends with an historical review of judicial remuneration.

In the third part, 'Politics and the Judiciary', I have considered the changing importance of the House of Commons as a stepping stone to the Bench, and in particular the question of the Law Officers' supposed right of preferment to high judicial office. The 1920's emerge as a watershed and events of these years tend to dominate this section. The manoeuverings of certain politicians and lawyers, the continued vitiation of judicial appointments by political considerations and the overt expression of partisan views by sitting judges both on and off the Bench scandalised both profession and public and provided ammunition for critics of capitalist society like Harold Laski; but the period marked a turning point and from then on we observe a pronounced strengthening of judicial impartiality and independence. Systematic analysis of relations between the judicial and political spheres has been confined to England;I have, however, used existing information on the experiences of America and France in a comparative survey which considers how far political abuses are likely given any particular method of judicial selection. A separate chapter is devoted to an examination of the Lord Chancellorship, of the changing nature and duties of that office and of the social and educational origins of the men who have held it since the turn of the nineteenth century.

The last section departs from the empirical base of the earlier part of the study. The first half traces historical shifts in the status and power of the Bench and the varied reactions from hyperbolic eulogy to bitter criticism that the judges have

aroused in the performance of their functions. And in the final chapter I have considered the phenomenon of judicial isolation and attempted to show how the accumulation of their experiences, especially within the legal profession, operate to set them apart from the society they judge.

PART I: THE SOCIAL AND EDUCATIONAL BACKGROUNDS OF THE JUDICIARY.

Chapter I

The Social Origins of the Superior Court Judiciary.

It is said that one practising barrister in reply to the question "What manner of men are the judges?" remarked,

> "Largely what you would expect; gifted and talented members of the upper classes. England has its normal quota of success stories from rags to riches, its millionaires who started as office boys, its tycoons who sold newspapers on street corners. But no one other than a gentlement in the class sense of the word has ever graced the high court bench. Working class origins are not recommended for anyone with judicial ambitions."(1)

An analysis of the social composition of the Bench over recent years (i.e. the 86 judges appointed in the period 1951-68) supports this view. The largest group of judges, almost half, were those classified as upper-middle class, most of them sons of members of the senior professions or middle-range entrepreneurs. Some 10% were sons of peers or landed gentry, and another 15% had fathers who were knights or were themselves members of an elite group. The lower-middle class accounted for just 9% of the judges; and only one, whose father was a colliery official, could conceivably be described as working-class. The pattern of social recruitment to the judiciary has a distinctly upper-class flavour.

That it has become fashionable, since the fifties, to point with some relish to the narrow social backgrounds of the judges is, in part, a reflection of the developing interest in the sociology of law, an acknowledgment, albeit a superficial one, of the subjective element in the judicial process. This attitude derives also from a contemporary preoccupation with the composition and interaction of all elite groups; a preoccupation which has, in terms of English society, displayed itself both in a number of

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(1). B. Abel-Smith & R. Stevens, Lawyers and the Courts. Heinemann (1967) p.299.

comprehensive socio-historical studies of single groups,[1] and in less scientific criticism of the 'establishment' as a whole.[2]

In 1956 the Economist wrote, "A study of the reference books confirms that nearly all bishops are the children of those who would not have been too greatly fluttered by the coming of a bishop to tea."[3] To-day, most elite groups, higher civil servants, top businessmen and judges, - would qualify for similar comment; all are characteristically upper-middle class and display a high degree of self-recruitment.

What is peculiar to the judiciary, however, is the relative consistency of its pattern of recruitment; since the early nineteenth century there has been little change in the social composition of the Bench. Though there appears to have been some decline in the representation of the traditional elite on the Bench, the variation is not significant. Yet studies of other elites have demonstrated a definite widening in their social base, have shown that a century ago they were much more firmly rooted in the upper echelons of society, drawing very strongly on the landed and titled classes; membership of the government, the executive agencies, the military and the church, was then wholly dependant on an extensive system of patronage, which rested on the possession of landed property. Thus, according to Guttsman, of all Cabinet Personnel appointed between 1868-86, 55% (27) were members of the aristocracy;[4] and this is a very

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(1) R.K. Kelsall, Higher Civil Servants in Britain : From 1870 to the Present Day. Routledge & Kegan Paul, (1955)
W.L. Guttsman, The British Political Elite. MacGibbon & Kee, (1963)
C.B. Otley, Social Background of Senior Officers of the British Army 1870-1959. Unpub. Phd.thesis. Hull University.(1962).
D.H.J. Morgan, The Social and educational background of Anglican bishops - continuities and change. B.J.S. (1969) pp.295-310.
(2) Hugh Thomas ed., The Establishment. Anthony Blond (1959)
(3) The Economist. (Oct.20, 1956)
(4) Guttsman. op.cit. Table 11 p.79.

Table II

Social class origins of the judges[1]

Period of appointment	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Social class					
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)

(1). See Appendix B for a discussion of the methodology of the class analysis.

exclusive group, for Guttsman defines the aristocratic population rigidly, including only those who were descended from a holder of a hereditary title in the grandparent generation and hence excluding the sons of the newly ennobled and those who had received hereditary titles themselves. In contrast, of the 106 judges appointed between 1820-75 only 19 (17.9%) were landed or titled; only 4, on Guttsman's definition, were aristocrats. In addition, there were, if anything, during the middle years of the nineteenth century rather more members of the lower social strata on the Bench; some 14% of the judges were of either lower middle class or working class origins. This means, in effect, that at least until the final quarter of the nineteenth century, the judiciary were an elite characterised by an unusual degree of social nobility.

Law was recognised in the eighteenth and nineteenth centuries as one of the principal avenues of social betterment for "the lower middle class, the sons or proteges of small gentry, yeoman or burghers".(1) "A legal career", writes Halevy, "was open to the ambitions and talents of the poorest, and it led to the very highest positions in society".(2) Similarly Trevelyan has stated that "the number of English County families founded by lawyers is even greater than those derived from the cloth trade".(3) The early Victorian view of A. Polson supports these retrospective assessments of social mobility within the legal profession. "The only road to the highest stations in this country", he wrote, "is that of the law".(4) He refers also to a list given by Sir Edward Coke of "near two hundred great and noble families which had even in his time risen by the law". Lord Thurlow, the lawyer son of a clergyman, who

(1). Pilot Papers. II. No.4. (Dec.1947) p.85.
(2). E. Halevy, A History of the English People in 1815. Fisher Unwin (1924) p.19.
(3). G.M. Trevelyan, English Social History. Longman, Green, 2nd ed. (1946) p.126.
(4). A. Polson, Law and Lawyers. Longman Green, (1840) Vol.I.p.V.

rose to become Lord Chancellor, was once abused by the Duke of Grafton for his 'plebeian extraction, and his recent admission into the peerage'; Thurlow, unabashed, replied, "I am amazed at his Grace's speech. The noble duke cannot look before him, behind him and on either side of him, without seeing some noble peer who owes his seat in this House to his successful exertions in the profession to which I belong."(1)

It may be that there was more upper class representation amongst the Bar than on the Bench; sons of the ruling classes frequently held largely nominal posts, while those lower down the social scale had greater motivation to work and strive after the pinnacles of their profession. The wealthy man, to Polson's mind, was more likely to tread "the primrose path of dalliance", than "the steep and thorny way to heaven".(2) The hard road of the law was therefore left mostly "to the feet of the poor and the steps of the needy, to younger sons or men of small origin".(3) Private means could even be a hindrance to individual professional success. "There are very few", wrote Addison about the Inns of Court, "that make themselves considerable proficients in the studies of the place who know they shall arrive at great estates without them".(4)

This ignores, of course, the importance to professional success of all forms of patronage - political, financial and personal. During the nineteenth century progress in the church, for example, was almost wholly dependent on the availability of

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(1). J.H. Burton, Political and Social Economy. Edin. Chambers, (1849) pp.132-3.

(2). Polson. op.cit. p.40

(3). Sir Lewis Namier, The Structure of Politics at the accession of George III. Macmillan, 2nd. ed. (1968) p.42.

(4). ibid.

benefactors and the exercise of influence. So Trollope wrote,

> "And this was what you call a cure of souls. (A) man had absolutely had his living bought for him by his uncle, - just as he might have bought him a farm. He couldn't have bought him the command of a regiment or a small judgeship. In those matters you require capacity. It is only when you deal with the Church that you throw to the winds all ideas of fitness".(1)

To a practising barrister patronage was less important; though political and legal connections could be a great help, and perhaps ultimately crucial to judicial appointment, "no one was likely to entrust his interests, his property, perhaps his liberty or his life, to anyone who was recommended on grounds of friendship alone".(2) Ability and hard work were, therefore, essential to success at the Bar and men were seldom raised to the Bench who had not distinguished themselves at the Bar. Even in appointments to the very highest judicial offices, (the Chief Justices, Chief Barons, Lords of Appeal, Masters of the Rolls and Presidents of the Family Division) where political interests often played a crucial role,(3) social background does not appear to have been a major consideration; an analysis of the social class origins of the 106 men who have held these offices gives results very similar to those obtained for the whole superior judiciary. (Table III).

"The Bar", as W.J. Reader observes, "offered an opportunity to those who had little to rely on but their wits and energy, and some eminent lawyers ---- came from comparatively humble origins, or at any rate from origins where neither money nor interest was plentiful".(4) But this point must be given a

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(1). A. Trollope, The American Senator. O.U.P. (1951) p.290.

(2). W.J. Reader, Professional Men (The Rise of the Professional Classes in Nineteenth Century England). Weidenfeld & Nicolson. (1966) p.22.

(3). See Chapter 7.

(4). W.J. Reader, ibid.

Table III

Social class origins of the senior judges (1)

Period of appointment	1820-1920	1921-68	Total 1820-1968
Social class			
I.	15.5% (9)	14.6% (7)	15.1% (16)
II.	8.6% (5)	12.5% (6)	10.4% (11)
III.	46.6% (27)	50.0% (24)	48.1% (51)
IV.	10.3% (6)	8.3% (4)	9.4% (10)
V.	6.9% (4)	-	3.8% (4)
Not known	12.1% (7)	14.6% (7)	13.2% (14)
Total	100% (58)	100% (48)	100% (106)

(1). i.e. the Chief Justices, Chief Barons, Lords of Appeal, Masters of the Rolls and Presidents of the Family Division.

proper perspective, the references to the 'poor and lowly social origins' of some lawyers, made by writers such as Halevy and Namier have been used principally to emphasise a comparison with the closed and firmly upper-class character of other elite occupations and are clearly not to be confused with the poor of Rowntree and Booth, or , indeed, with any ordinary manual wage-earner. For though the pattern of judicial recruitment was characterised early on by a recognition of individual merit, access to the elite continued to be heavily circumscribed, if not by any form of overt social discrimination then certainly by the financial restrictions on entry to the profession.

That an aspirant to the nineteenth century Bar was expected to have received a gentleman's training and to demonstrate some proficiency in the classics was alone sufficient to exclude the majority, whose family resources had not extended to a public school or similar education; and the adoption of competitive professional examinations in the second half of the century, while strengthening the meritocratic qualities of the profession, also incréased the educational expenses involved. Further, according to an estimate of the Complete Book of Trades (1842), an intending barrister needed capital of somewhere between £1,000 and £1,500; this amount, if carefully managed, was deemed sufficient to cover the cost of professional fees and deposits and to insure against the pecuniary difficulties invariably encountered during the early years at the Bar.(1) By the end of the century the basic sum required to become a barrister had risen to about two and a half thousand pounds.(2)

(1). The Complete Book of Trades (or the Parents' Guide and Youths' Instructor) - by several hands. (1842) p.486.

(2). W.W.R. Ball, The Students' Guide to the Bar. Macmillan, 7th ed. (1904) p.61

These financial prerequisites created a bias in the social composition of the profession. An analysis by Morris Ginsberg of the social origins (in terms of father's occupation) of those admitted to Lincolns Inn between 1886 and 1927,[1] showed that it was only towards the very end of that period that there were any signs of the working class beginning to penetrate the legal profession. The proportions were very small; Class III, sons of skilled wage-earners, accounted for only 1 of the 190 admissions between 1919 and 1922, and only 2 out of the 119 admitted in the period 1923-27.[2] For those of low socio-economic status the greatest obstacle to the attainment of a judicial appointment has clearly been the initial impracticability of entering the legal profession rather than inequality of opportunity within the profession.

It has been easier in the post-war period with the increasing accessibility of the grammar schools and the provision of maintenance grants for higher education for working-class children to obtain the type of education required by the professions; yet the existence of the public schools and middle-class domination of the educational opportunities offered by the State have ensured the maintenance of a strong class differential in educational, and hence occupational, chances. The legal profession continues to impose its own financial deterrent; in 1968, Abel-Smith and Stevens placed the minimum cost of being called to the Bar at over £170, with cramming fees and other special costs the sum involved might approach £400.[3]

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(1). Except for the years 1894-1903 and 1912-18. Foreign and colonial students were not included in the analysis.

(2). M. Ginsberg, Studies in Sociology. Methuen,(1932) p.170.

(3). B. Abel-Smith & R. Stevens, In Search of Justice. Allen Lane, (1968)pp.100-01.

The pupillage year might account for another £800 - £1,000. On the other hand the financial uncertainties of early practice have been mitigated by the introduction of Legal Aid.

In the absence of firm data on the social origins of the present Bar, it is impossible to predict with any accuracy, the composition of future Benches. The experience of other elite groups provides no useful guide. Thus both Kelsall and the Fulton Report(1) indicate that the recruitment area of the higher civil service has been extended during the past thirty years; but comparison between the civil service elite and the judiciary is limited, the former including more junior ranks and hence forming a much larger group. More important, entry to the civil service does not involve a candidate in heavy costs and the pattern of future reward is more certain.

One study of the contemporary legal profession does indicate that the social composition of the judiciary is unlikely to change for some time, unless the whole system of appointments is radically revised and barristers deprived of their judicial monopoly.(2) If judges are to be chosen from all sections of society, the selection pool itself must be expanded; the most obvious short-term innovation would be to open the Bench of the higher courts to solicitors.(3) Prof. Chapman is an advocate of this course.

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(1). Kelsall. op.cit.

Fulton Report Vol.3. (1) - Social Survey of the Civil Services.

(2). H.R. Harris, The Legal Profession in England and Wales. Unpub. Ph.D. thesis. Reading University (1966)

(3). See below pp.107

> "In general", he writes, " the ordinary career of a solicitor in private practice or local government fits him far better for judicial office than the normal career of a barrister. Solicitors come from a far wider social, educational and political background, and are consequently less liable to suffer from those social and political blind spots which mark a good proportion of the present higher judiciary".(1)

Yet it is possible that those solicitors appointed to the Bench, especially to the superior courts, might not be so 'socially average' nor have such a breadth of experience as Prof. Chapman suggests; there is probably no difference in the social backgrounds of leading barristers and solicitors. Initially at least the judiciary might well be drawn from much the same social group as it has been for the past one hundred and fifty years. The selection of judges has now a distinctly personal flavour, based on reputation within a relatively small and intimate group; it is difficult to envisage such a system operating on a country-wide scale with a population of some 21,000 practising solicitors. Without additional radical changes in the method of judicial appointment, in professional training, and in the educational system as a whole, another 'self-recruiting' elite might soon emerge.

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(1). B. Chapman, British Government Observed. p.53.

Occupational groups and self-recruitment.

Though father's occupation has already been employed in this study as the determinant of social class, a separate examination of the specific occupational groups into which the judges' fathers fall, gives an added dimension and a greater substance to the portrayal of their social background; it has also the advantage of being less open either to subjective errors of judgement or to methodological criticism.

The results of such an analysis, given in Table IV, show the largest proportion of judges, some 40%, to have had parents who were members of the liberal professions, 'divinity, physic and the law'; but the latter, as one might expect, is predominant, family tradition acting as a major determinant of entry into any profession. Thus Prof. R.K. Kelsall, in a study of professional recruitment, showed that there was a strong tendency for the children of lawyers, doctors, clergymen and teachers to enter their father's occupation.

> "The available evidence all suggests that the recruitment to the four professions considered was relatively much greater from families already engaged in these occupations than from other families". (1)

On the legal profession in particular he wrote,

> "In the second half of the nineteenth century, less than a third of the Cambridge sons of barristers and lawyers chose a legal career; the other three professions taken together were more popular with the Church or teaching as the commonest after the law itself. By 1937 and 1938, however, nearly half of the graduate sons of fathers in the legal profession were following the Law; and a further 16 percent were engaged in one of the other three professions". (2)

(1). R.K. Kelsall, "Self-recruitment in Four Professions". D.V.Glass ed. Social Mobility in Britain. Routledge (1954) p. 317.

(2). ibid. p. 313.

Table IV

Occupations of the judges' fathers

Occupational Group.	Period of appointment: 1820-75	1876-1920	1921-50	1951-68	1820-1968
	Percentage of fathers in each group				
Law	18.9% (20)	22.3% (23)	35.2% (32)	24.4% (21)	24.9% (96)
Church	12.3% (13)	15.2% (16)	5.5% (5)	7.0% (6)	10.4% (40)
Medecine	7.6% (8)	5.8% (6)	2.2% (2)	8.1% (7)	6.0% (23)
Politics	5.7% (6)	7.8% (8)	3.3% (3)	1.7% (1)	4.7% (18)
Teaching (all grades)	1.9% (2)	2.9% (3)	2.2% (2)	2.3% (2)	2.3% (9)
Armed Forces	8.5% (9)	1.9% (2)	1.1% (1)	5.8% (5)	4.4% (17)
Engineering and Architecture	-	-	2.2% (2)	3.5% (3)	1.3% (5)
Finance (1)	3.8% (4)	3.9% (4)	7.7% (7)	14.0% (12)	7.0% (27)
Entrepreneurial(2)	19.8% (21)	27.2% (28)	17.6% (16)	16.3% (14)	20.5% (79)
Administration (3)	3.8% (4)	2.9% (3)	5.5% (5)	3.5% (3)	3.9% (15)
Landowning (4)	17.9% (19)	15.5% (16)	11.0% (10)	8.1% (7)	13.5% (52)
The Arts (5)	0.9% (1)	2.9% (3)	2.2% (2)	1.2% (1)	1.8% (7)
Miscellaneous	3.8% (4)	-	3.3% (3)	5.8% (5)	3.1% (12)
Not known	17.9% (19)	8.7% (9)	15.4% (14)	12.8% (11)	13.7% (53)
Total occupations	130	121	104	98	453
Total of judges' fathers (6)	106 (100%)	103 (100%)	91 (100%)	86 (100%)	386 (100%)

(1). Including banking, accounting, stockbroking and insurance.

(2). Merchants, directors, etc. - includes all occupations, not otherwise listed, directed to profit-making.

(3). Including all engaged in civil, colonial or diplomatic service or in public administration.

(4). Those listed in Burke's Landed Gentry and members of the hereditary peerage and baronetage.

(5). Includes artists, musicians and journalists.

(6). The number of occupations exceeds the number of fathers, since some of them held more than one position; in particular many of the landowners were also in paid employment and many of those who were for some time Members of Parliament also had other occupations, especially the law.

Table V.

Self-recruitment in the judiciary

Period during which judge first appointed

Occupation of father	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Superior court judge	4	6	9	3	22
Lord Chancellor	1	1	1	-	3
Holder of other judicial office, Q.C. or serjeant	6	2	8	6	22
Other Barristers	1	8	5	4	18
Solicitor	8	7	10	8	33
Total of all fathers in the legal profession	20	23*	32*	21	96
Total judges appointed during each period	106	103	91	86	386
Percentage of self-recruitment	18.9%	22.3%	35.2%	24.4%	24.87%

(* One father in each of these periods was a member of both branches of the profession).

Morris Ginsberg in his analysis based on the parentage of those admitted to Lincolns Inn between 1886 and 1927 found that during that time the sons of the existing legal profession represented a consistently high proportion of the prospective barristers, exceeded only at times by those of 'gentlemanly' stock and during the period 1909-13 by the combined forces of 'Other Professions'.(1) The average percentage of fathers in the legal profession, for the whole period was about 23%. A study of the contemporary legal profession by H.R. Harris, although not directly comparable, suggests that this figure has remained fairly stable.(2) Using a sample of 445 barristers and 555 solicitors, Harris found that 20% of all the respondents(3) were sons of lawyers - 6% sons of barristers and 14% sons of solicitors. Of the barristers only, 11% of those responding were sons of barristers and 10% sons of solicitors.

An analysis of the legal pedigree of the superior court judiciary indicates that, if anything, there has been a greater degree of self-recruitment,(4) among the elite than among ordinary lawyers; further, the proportion of lawyers' sons appointed to the judiciary has been significantly higher during the last fifty years than in the previous century. However, a comparison of the judiciary with two other elite groups, bishops and army officers, shows that their degree of self-recruitment has not been abnormally high. At only one time,

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(1). Ginsberg. op.cit.p.171.

(2). Harris. op.cit.pp.77-8.

(3). The overall response was 58%.

(4). Self-recruitment is taken to mean the appointment to the Bench of sons of lawyers in general rather than sons of judges. The latter will be termed Judicial self-recruitment.

Table VI

Self-recruitment in British Elites, 1870-1960

Superior Court Judiciary			Diocesan Bishops(1)			Senior Army Officers(2)		
Year	Percentage self-recruitment	Total membership of elite	Year	Percentage self-recruitment	Total membership of elite	Year	Percentage self-recruitment	Total membership of elite
1875	15%	33	1880	31%	29	1870	24%	80
1900	22%	36	1900	39%	31	1897	37%	63
1925	28%	39	1920	58%	38	1926	38%	48
1940	43%	44	1940	51%	43	1939	38%	45
1960	29%	70	1960	53%	43	1959	44%	36

(1) Source of data - D.H.J. Morgan, Social and Educational Background of English Diocesan Bishops in the Church of England 1860-1960.
Unpub. M.A. thesis, Hull, 1964.

(2) Source of data - C.B. Otley, Social Background of Senior Officers of the British Army, 1870-1959.
Unpub. thesis, Hull, 1962.

about 1940, do they appear to have achieved a rate of self-recruitment at all comparable to either of the other elites. The church, in particular, has tended to draw its leaders from amongst those whose fathers were themselves clergymen in the Church of England, especially during the last fifty years.

Judicial self-recruitment was first described by Sir Francis Galton in his book 'Hereditary Genius'. Studying the judiciary for the period 1660-1865, he found that out of 286 judges more than one in every nine had been either father, son or brother to a judge and that other "high legal relationships" had been even more numerous.(1) To state the amount of family association within the judiciary in this collective fashion is, however, a little misleading, since each relationship is counted twice. The actual number of judges' sons appointed to the Bench during this period was only 15, giving a 5% degree of self-recruitment, a figure approaching my own estimate for the years 1820-1968, that is 6% or 7.5% if Lord Chancellors are included.(2)

The past century and a half has seen three great legal dynasties in the superior courts, - the Coleridges, the Romers and the Russells; each of these families has supplied three generations of judges to the Bench. The Coleridge dynasty began in 1835 with the appointment of John Taylor Coleridge to the Queens Bench; in 1873 he was joined by his son John Duke Coleridge who was made Chief Justice of the Common Pleas and later became the first Lord Chief Justice; after an interval of some thirteen years, Lord Coleridge was followed by his son, Bernard Coleridge,

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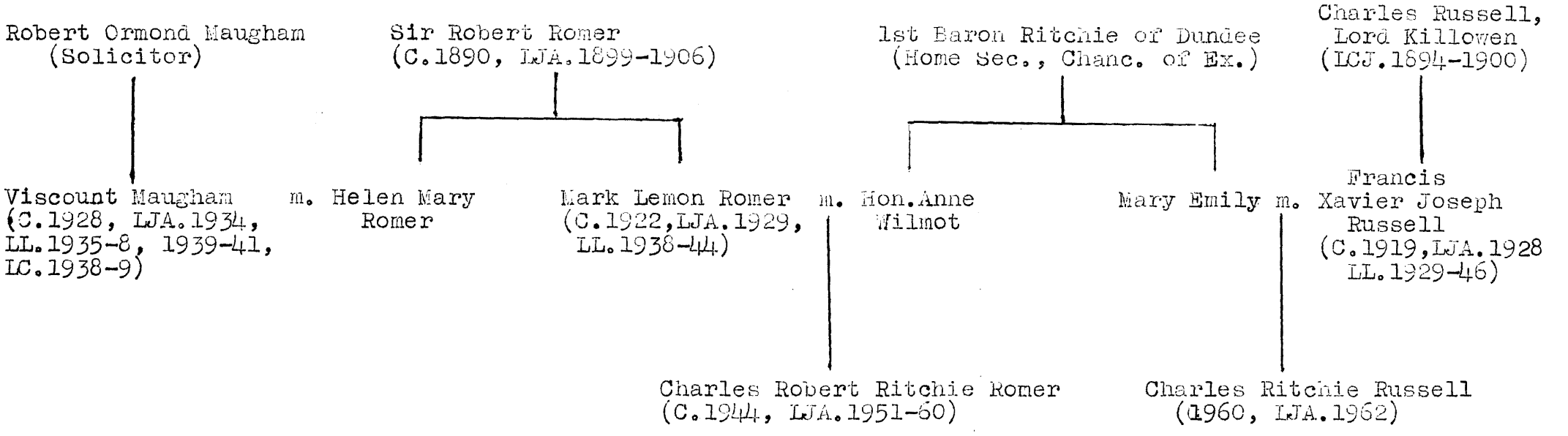
(1). Sir Francis Galton, Hereditary Genius. Watts,2nd ed.(1892)p.62

(2). In June, 1970 Lord Hailsham (Quintin Hogg) became Lord Chancellor, the first time that the son of a Lord Chancellor had been appointed to that office.

Figure II.

The Romer-Russell Alliance



Abbr. C – Chancery Division.
LL – Law Lord.
LC – Lord Chancellor.
LJA – Lord Justice of Appeal.
LCJ – Lord Chief Justice.

who was appointed to the High Court in 1907, the first peer of the realm to attain that distinction. The Romers and the Russels have similar histories in the Chancery and Appeal courts and the two families, joined by marriage, have a family tree that might well be the envy of any aspiring barrister.

Trade, 'society' and the legal profession.

A considerable number of those who made their way to the Bench, particularly in the period 1876-1920, came of commercial stock, a few, sons of small shopkeepers, others, like Mr. Justice Fry, members of well-known entrepreneurial families; most though belonged to the diverse and expanding merchant class, a section of the community not easily placed in social terms. At the individual level social ranking obviously varied according to such factors as size of enterprise and type of merchandise, but during the neneteenth century the position of the whole mercantile class appears uncertain. In former times, trade had frequently provided a livelihood for younger sons of the aristocracy and formed the backbone of many landed estates but by the nineteenth century commerce had acquired a social taint and traditional society, albeit hypocritically, held those associated with it in contempt. In Trollope's words,

> "Merchants as such are not the first among us; though it perhaps be open, barely open, to a merchant to become one of them. Buying and selling is good and necessary; it is very necessary and may, possibly be very good; but it cannot be the noblest work of man; and let us hope that it may not in our time be esteemed the noblest work of an Englishman."(1)

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(1). A. Trollope, Dr. Thorne. O.U.P., (1963) p.12.

Thackeray's characters were rather more vehement.

> "The selling of goods by retail is a shameful and infamous practise, meriting the contempt and scorn of all real gentlemen." ----"I've been accustomed to live with gentlemen, and men of the world and fashion, Emmy, not with a parcel of turtle-fed tradesmen."(1)

G.P. Judd offers an explanation for this widespread attitude:

> "A snobbish antagonism to trade reached its peak only in the Victorian period, when the landed interest, on the defensive with its economic pre-eminence lost and the cult of land worship dying, gave a last determined counterblast to the rising industrial order". (2)

To sons of the ambiguously-placed merchant classes, prosperous but frowned upon by the traditional upper and middle classes, the law, a socially prestigious occupation with a professional success rate dependant on ability and industry, and largely unhampered by social considerations or family connections, offered golden opportunities. Early patrons of the rising public schools, heavy educational expenses and a lack of immediate rewards presented no problem for prosperous businessmen; the commercial classes, moreover, needed lawyers.

For the rest, the judges appear to have been drawn in fairly random fashion from the higher non-manual occupations; minor variations, such as the increase in the number of judges with 'financial' fathers appear to have no obvious explanation or significance. It remains, however, to consider the judges of titled and landowning origin; this social sector may be variously termed class, occupational group or elite. I have, for this and reasons which will emerge in the following argument, chosen to examine this particular group in detail separately from the two previous analyses.(3)

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(1). W.M. Thackeray, Vanity Fair. Chaps 5. & 20.
(2). G.P. Judd.IV, Members of Parliament 1734-1832. New Haven, Yale University Press,(1955) p.55.
(3). The landowning group included in the occupational analysis differs from the traditional landed upper class only in that it omits life peers.

The Judges and the traditional elite.

Though the territorial aristocracy of the nineteenth century still held matters of state, worship and war firmly in their grasp, within judicial precincts their immediate influence was, we have observed, less keenly felt, the rigours of the legal professions excluding all but a handful of that privileged class from the Bench. To-day their numbers are even fewer; only 9 of the 86 judges appointed between 1951-68 were from the landed upper class, though in fact the decline in their proportion of appointments, from almost 19% for the major part of the nineteenth century to 10.5% in recent years, is not statistically significant.

It is important to remember, however, when examining retrospectively the landed connections of any special group, that over the past century it has become increasingly difficult to delineate a traditional, landowning class. In the latter part of the nineteenth century the economic predominance of commercial interest fostered by industrialisation made the derivation of an additional income from either industry or commerce an almost essential prerequisite of landownership. The landed interest, blest with a strong instinct for self-preservation and adaptable in the face of a lost cause, were therefore content to confine their distaste for trade to the level of social discrimination, at the same time investing their otherwise diminishing resources in the prosperous mercantile enterprises of their 'inferiors'. In the latter half of the nineteenth century an informed and perceptive commentary on London society appeared; its author,

supposedly 'A Foreign Resident', wrote,

> "No doubt caste prejudices have still tremendous force; it is nearly impossible to overpass the barriers set up by centuries of separation. Nevertheless the shrewed observer may notice changes, silently and not easily appreciable, at work. He sees that the so-called, but impoverished, Brahmin does not dispise the methods by which the pariahs have won wealth. It is a curious but significant fact that peer and parvenu frequently invert their roles nowadays. A duke becomes the partner of the general provider. My Lord Londonderry sells coal openly in the London streets; peers join with perruquiers in carrying on hair-dressing in the Burlington Arcade; the brother of the Queen's son-in-law sells tea, and another of the family is a broker who deals in stocks and shares". (1)

Even social barriers were occasionally lowered to allow of intermarriage between the landed and the most successful and acceptable entrepreneurial families, the former benefiting financially, the latter gaining entree to society.

> "Marriages ---- that might, according to old narrow-minded traditions, seem ill-assorted, prove undeniably happy; in the prevailing dearth of good alliances, blue-blooded parents are glad enough to accept plebeian offers that promise substantial settlements. This is especially true of such as come from beyond the Atlantic. No very searching inquiry is made into the origin of the fortunes that American heiresses bring their well-born English swains. There is no stain in trade antecedents provided they are geographically remote".(2)

From the 1880's onwards, falling rents, due to the increasingly uncompetitive position of British agriculture, made serious inroads on the security of agricultural land,(3) a security which was judged by many property holders to be finally undermined in 1909 by the Liberal Government's taxes on land values; a decade later the results of the war were felt

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(1). Society in London, by A Foreign Resident. Chatto & Windus, (18-) pp.161-2.

(2). ibid. p.162.

(3). Though a large number of the territorial aristocracy, - the urban landlords and those whose tenants produced milk for urban markets - were not affected by the great depression.

in the imposition of even higher levies. Fearing further 'attacks' many of the traditional ruling class divested themselves of their territorial assets. The "steady, inexorable spread of landlessness among the former great families", is demonstrated in the changing qualifications for inclusion in Burke's Landed Gentry.(1) Until the 1914 war it was necessary to possess some 2,000 acres; since then the stipulated quantity of land has gradually diminished and more and more landless have been included.

The gradual loss of their most distinctive characteristic, landownership, substantially changed the nature of the whole traditional elite. But in relation to judicial ancestry in particular, a more significant phenomenom has been the steady growth of the titled classes by the creation of new titles and the institution of life peerages; both have in effect diluted the elite's traditional element. A closer examination of those judges whose origins lay in the highest social class reveals that some 30% of them were the sons of either 'new' or life peers, thus, somewhat paradoxically, intensifying the notion that the acquisition of judicial status has owed more to achievement than to any ascribed rights of lineage. It must be admitted, however, that at least until the end of the nineteenth century , peerages were rarely extended to any but those of impeccable social and economic origin.(2)

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(1) . L.G. Pine, Ramshackledom: A Critical Appraisal of the Establishment. Secker & Warburg, (1962) p.66.

(2). According to Bromhead, even Ramsay MacDonald in the twenties and thirties, when distributing peerages to political supporters, "showed a certain preferance for men whose social background would make them inconspicuous in an aristocratic assembly."
P.A. Bromhead, The House of Lords and Contemporary Politics. 1911-57. Routledge, (1958) p.26.

Table VII

Social ranking among the judges from Social Class I

Period of appointment	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Sons of:-					
Hereditary peers or baronets	4	3	1	1	9
Newly created peers or baronets	3	3	3	1	10
Life peers	-	1	5	2	8
Landed gentry	12	10	6	5	33
Total Class I.	19	17	14(1)	9	59(1)

(1). Mr. Justice MacNaughten's father was created a Lord of Appeal in 1887 and also in 1911 became 4th Baronet of Dundarave, Antrim.

During the eighteenth century, writes Guttsman in his study of the British political elite, "the bulk of the new peerages went either to men who already held Scottish or Irish titles, or to members of the landed gentry." (1) This practise continued throughout the first fifty years of the Victorian age; "all but 10 per cent of the newly created peers were" he says, "of aristocratic or gentry backgrounds."(2) "Ennoblement rarely conferred what did not already exist."(3)

But many of that 'exceptional' 10 per cent must have been drawn from the law; thus in 1856 Lord Campbell in a speech on the Wensleydale Peerage, a test case for the introduction of life peerages for lawyers, spoke of the proposal as "an injustice to the middling and humbler ranks of society, to whom a prospect has hitherto been held out of mixing with the ancient nobility through the profession of law" (4)(5) And indeed, of the ten fathers in this study who were newly created peers or baronets, 9 were themselves judges, - three of them, the Lords Erskine, (1806) (6) Chelmsford (1858) and Finlay (1916), Lords Chancellors, and the remainder, judges of the superior courts, Chief Justice Denman (1832), Chief Baron Pollock (1844), Lord Chief Justice Coleridge (1873), Lord Wrenbury (1915) and Mr. Justice Phillimore, bart. (1881).

For the most part, these were sons of the professional middle class, though undoubtedly, either by their own efforts or inheritance, financially well-endowed. For in the nineteenth century, possession of property, preferably land, was a crucial restricting factor in the granting of titles; it was

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(1). Guttsman. op.cit.
(2). ibid, p.117
(3). W.L. Guttsman, The English Ruling Class. Weidenfeld & Nicolson,(1969) p.9.
(4). ibid. p.75. (quoting from Hansards Parliamentary Debates. 3rd series. vol.40. cols.353-4.
(5). Campbell spoke from the heart; he was the son of a Scottish Minister.
(6). Date of acquiring title.

inconceivable that hereditary honours should be bestowed on anyone with insufficient means to "sustain the dignity", that is, to maintain the visible status of their position and, further, to guarantee financial independence for their descendants.(1) On this point, aristocratic propriety would not easily bend even, as the case of Lord Wensleydale testifies, in the interests of a strong judiciary .

In 1856 it was proposed that a peerage should be granted to James Parke, a former Baron of the Exchequer; unfortunately Parke's judicial qualification seemed to outweigh his material resources. On the advice of Lord Chancellor Cranworth he was therefore created a peer, Baron Wensleydale, but only 'for and during the term of his natural life'; the majority of the Lords, interpreting this as an attack on the hereditary basis of the peerage, accepted the power of the crown to confer such a title but effectively nullified it by withholding from the new peer the privilege of sitting and voting in Parliament. Ultimately after much argument a full hereditary peerage was granted, fears about the new Baron's inability to provide for the future being dissipated by his advancing years, and lack of male heirs, all three of his sons having died in infancy.

The need for expert lawyers to carry out the appeal work of the House of Lords without the burdens of a hereditary title was finally met twenty years later with the passingof the 1876 Appellate Jurisdiction Act which instituted the office of Lord of Appeal in Ordinary. At first the full privileges of the House were only extended to acting Lords of Appeal, but in 1887 it was enacted that a retired Law Lord might continue

(1). In the early twentieth century and particularly after the war the association between the possession of wealth and elevation to the peerage acquired a more dubious nature. Lloyd George is reputed to have earned over three million pounds for the Liberal Party by the sale of peerages.

to sit and vote as a member of the House of Lords during his lifetime . Until 1958 only the Lords of Appeal were eligible for life peerages; this explains why, out of the eight fathers of judges who were life peers, only one - Lord Fisher, the former Archbishop of Canterbury (1) - was not himself an eminent judge.

Paradoxically, the parentage of these 'legal' life peers was if anything of rather higher social standing than that of the judges' fathers who were newly created peers. Nevertheless the main conclusion to emerge from this analysis is that a sizeable proportion of what may generally be termed the traditional social elite proves here to be a legal elite, representative of the overall pattern of occupational self-recruitment rather than of a general class bias in professional recruitment or achievement.

In summary, the contemporary Bench of the superior courts proves, as an elite group, to be typical in its pattern of social recruitment. Historical analysis reveals, however that in the past the legal profession has been exceptional in its emphasis on ability as a determinant of success and hence in its relative rejection of overt patronage and class bias; the absence, historically, of the traditional landed class as a dominant sector of the Bench is particularly striking. A distinct

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(1). Father of Mr. Justice Fisher. Queens Bench Division 1968-70.

upper-middle class pattern has nonetheless emerged in the membership of the Bench, limits to social mobility via the profession being set by educational and financial, and thus social restrictions on entry into the profession. Occupational self-recruitment, as in other professions and elite groups, is also an important feature of both entry to the Bar and appointment to the Bench.

Chapter 2.

The Judiciary and the Public Schools.

An analysis of the type of education received by the judiciary provides, as an alternative to fathers' occupation, an index with which to construct a social profile of the group, defines the general limits of the members' intellectual resources and gives some indication of the type of values likely to dominate the superior courts. As expected, the educational histories of the judges conform in general to the characteristic elite pattern of public school and Oxbridge.

Public schools are here defined as those schools which were at any time members of the Head Masters' Conference, as recorded in the Public Schools Year Book,(1) and the original reports of the conference. This definition , employed in most similar studies, has proved the most convenient and comprehensive; but in view of the importance of the independent schools in the lives of the judiciary and the often confused picture of education which emerges from the nineteenth century, it is worth reviewing briefly their development, and illuminating some deficiencies of the definition.

The 'public school', subject of interminable treatese, furious polemic, nostalgic adulation and sundry Royal Commissions, has not, as a concept, been distinguished by any great consistency in its use. Thus, E.C. Mack, in the introduction

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(1). Though the 'public schools', as a particular group within the general system of independent education were, of course in existence, long before the establishment of the Head Masters' Conference, i.e. 1870.

to his authoratitive work on the schools writes:

> "In the eighteenth century some writers limited it to mean only Eton and Winchester, excluding even Charterhouse and Westminster. In the early nineteenth century, Rugby and Shrewsbury and even Harrow, were often ommitted and day schools like St. Pauls and Merchant Taylors and the semi-charitable Christ's Hospital included. As late as 1861, though Cheltenham and Marlborough had long been great upper-class schools, the Public School Commision could designate as the Public Schools the seven old boarding-schools and the two day schools mentioned above. To-day,(1) with every school that has the slightest pretension of serving the upper classes calling itself a Public School, there is complete confusion. The Headmasters' Conference has been reduced to limiting the term to those schools that have governing bodies. On this tenuous basis, it excluded Sheffield School from the Conference in 1927, (the Labour Party, having gained control of Sheffield, dispensed with the school's governors)".(2)

Most authorities on the history of the education system believe that the origins of the public schools are to be found in the free grammar schools, that is, those schools which offered free tuition to all or some of the scholars. These schools were also distinguished by their non-local character. The ordinary endowed grammar schools, restricted their intake of 'peregrini' (foreigners or strangers) and were, therefore, predominantly day schools, occasionally with a small boarding attachment. The policy of the public schools was to take a greater number of pupils from outside their immediate environs and thus they developed into boarding institutions. Towards the end of the seventeenth century, the differentiation between the great public schools and the remainder of the grammar schools became more marked.

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(1). circa 1940.

(2). E.C. Mack, Public Schools and British Opinion,1780-1860 Methuen, (1941) p.xiii fn.

> "Winchester, because of the scale of it's foundation, and Eton, because of its royal patron, (1)had always been pre-eminent amongst the English schools. Other schools, on account of their size or antiquity, or because of the social status of many of their pupils, began to occupy a more prominent position. They were frequently referred to as 'the great schools' but the term 'public school' had not yet attained its modern significance."(2)

With the growth in the importance and popularity of these schools, came an inevitable increase in the numbers of fee-payers, relative to foundation scholars.(3) During the eighteenth century the distinction between the two types of grammar school was finally settled and the public schools established themselves as institutions for the education of the wealthier classes, though some of the landed classes still preferred to employ private tutors. By the close of the century Eton still retained seventy scholars, but these were, writes Mack, "lost in a school of four or five hundred young bloods from the ruling classes".(4)

If we take as our earliest definition of a public school, a non-local, endowed, boarding school serving almost entirely the upper classes, then until about 1840, only seven schools may be so termed, that is, Eton, Harrow, Rugby, Shrewsbury, Winchester, Westminster and Charterhouse. If the 'boarding' criterion is waived, then St. Pauls and Merchant Taylors may also be included - in short, all the schools which were later to be the subject of the Clarendon Commission. The particular social

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(1). Henry VI.
(2). S.J. Curtis, History of Education in Great Britain. Univ. Tutorial Press,(1948) p.52.
(3). The scholars received only tuition free. Boarding and entrance fees and 'extras' were paid by all pupils.
(4). Mack, op. cit., p.399.

composition of each of these major public schools and their relative popularity at different periods has varied considerably. While eighteenth century Eton was the school of the Tory aristocracy, its rival Harrow, received the patronage of the Whigs. Winchester, until the 1790's ,was much less favoured by the ruling classes. But all seven of the great boarding schools had become, by the beginning of the nineteenth century, the preserve of the upper classes, the old aristocracy and landed gentry, the new capitalists of the industrial revolution, eager to adopt the gentry's style of life, and some of the more prosperous and well-connected members of the professional classes. The day schools, St. Pauls and Merchant Taylors, dependant on local demand had a larger intake from the lower middle classes, but nevertheless enjoyed great prestige and were throughout the century accorded similar status by being included with the other seven whenever these were referred to.

Inevitably success had its imitators in the form of the large number of proprietory schools[1] which sprung up during the middle years of the nineteenth century, to meet the needs of the rising professional classes, amongst them University College School (1833), The City of London School (1837), Marlborough College (1843), and Haileybury College (1862); some, like Marlborough, later became

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(1). These schools were, like business enterprises, financed by an issue of shares.

endowed. These schools, both day and boarding institutions, were modelled on the existing public schools and owed much to the inspiration of Drs. Arnold and Thring.(1) But, though the influence of such men was important in establishing the particular intellectual and moral climate of the schools, their path was defined and their success ensured by a set of conditions peculiar to that time. R.H. Tawney describes four factors as decisive to the development of the schools.

> "They were", he writes, "the Industrial Revolution, with its flood of new wealth; the deficiencies, both in number and quality of existing day-schools; the modernisation of communications; and the careers opened by the expansion of the empire, the reform of the civil service and the growth of the professions. The first greatly increased the demand for high secondary education. The second and the third put a premium on boarding-schools and made recourse to them practicable. The fourth ensured that the aptitudes cultivated by them would find little difficulty when school-days were over, in securing suitable employment". (2) Tawney continues, "it is not an accident that the boarding-school boom followed closely on a railway boom, that three times as many public schools were founded in the thirty years between 1841 and 1871 as in the whole country before 1841 ...."(3)

The new schools, like their predecessors quickly became the exclusive province of the rich, excluding the majority by the costliness of the services they provided; scholarships were available but were mostly won by boys whose parents could afford an equally expensive preparatory education. With a few exceptions, public school boys were drawn from a small and privileged social group. By the mid-nineteenth century, "the scattered handful of

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(1). T.W. Barnford casts some doubts on the extent of Arnold's influence: "--- the usual assumption that Arnold's reputation brought about a revolution must be treated with reserve." Early Victorian headmasters, he says, were not easily converted to new ideas. "As with all men of stature, others have created a legend around him." (T.W. Barnford, The Rise of the Public Schools. Nelson, (1967) pp.51-3. See also T.W. Barnford - Thomas Arnold. (1960).)

(2). R.H. Tawney, The Radical Tradition. Allen & Unwin,1964, p.53.

(3). ibid. p.54.

semi-charitable institutions which represented the Public School system in the sixteenth century, had become a vast network of upper class schools".(1) Attendance at one became a pre-requisite for entry into the higher walks of life.

Classification of schools.

Having due regard for the complexities of the schools system, the following classification was ultimately considered to be the most accurate and practicable for this study.

1. The Clarendon schools.
2. Other Public schools - independent schools at any time in membership of the Headmasters Conference.(2)
3. Direct grant schools at any time in membership of the H.M.C.(3)
4. Independent and direct-grant schools not in membership of the H.M.C., including those old endowed grammar schools which either closed down or were taken over by a Local Authority.
5. All secondary schools wholly maintained by Education Authorities in England and Wales or Scotland. (Scottish Grant-aided Voluntary Schools have been classified as 'direct-grant').
6. Private schools - independent schools under private ownership.
7. Foreign schools - including schools in Ireland.
8. Private tuition.

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(1). Mack, op. cit. p. 399.

(2). The Headmasters Conference includes at present: - 133 independently financed schools, 66 direct-grant grammars and 15 ordinary grammar schools.

(3). There are 179 direct-grant grammar schools in all. These are financed partly by fees and funds, partly by the Department of Education; they are obliged to take not less than a quarter and not more than a half of their pupils from the state system.

Table VIII

Schools attended by the judges.

Period of appointment	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Type of school	Percentage of judges attending each type of school[1]				
1. Clarendon	34.0% (36)	35.0% (36)	45.1% (41)	32.6% (28)	36.5% (141)
2. Other Public	8.5% (9)	19.4% (20)	26.4% (24)	39.5% (34)	22.5% (87)
3. Direct-grant	2.8% (3)	8.7% (9)	11.0% (10)	8.1% (7)	7.0% (27)
4. Other Independent	15.1% (16)	8.7% (9)	3.3% (3)	1.2% (1)	7.8% (30)
5. Maintained	-	-	6.6% (6)	10.5% (9)	3.9% (15)
6. Private	7.6% (8)	6.8% (7)	-	-	3.9% (15)
7. Foreign	2.8% (3)	5.8% (6)	4.4% (4)	2.3% (2)	3.9% (15)
8. Private Tuition	9.4% (10)	6.8% (7)	1.1% (1)	-	4.7% (18)
Not known[2]	27.4% (29)	16.5% (17)	7.7% (7)	5.8% (5)	15.3% (59)
Total Judges	100% (106)	100% (103)	100% (91)	100% (86)	100% (386)

(1). Some judges, particularly in the earlier periods, attended more than one type of school. Hence the figure 'total judges' is smaller than the column totals.

(2). Quite a large number of the nineteenth century judges have left no record of any formal schooling; undoubtedly most of these either attended small local private schools or were privately tutored. Of the few twentieth century judges whose early educational experiences are omitted from their biographies in standard works of reference, it seems reasonable to assume that most of the schools attended were of a non-independent status.

Table IX

Schools attended by two or more judges

School	Number of judges attending school (1)
Eton	35
Winchester	29
Rugby	17
Westminster	17
Harrow	15
Charterhouse	10
St. Pauls	8
Haileybury	7
Merchant Taylors	6
Shrewsbury	6
Manchester Grammar	5
Bedford	4
Downside	4
Fettes	4
Marlborough	4
Mill Hill	4
University College	4
Beaumont	3
City of London	3
Clifton	3
Greshams	3
Highgate	3
Kings College	3
Lancing	3
Oundle	3
Royal Academical Institute, Belfast	3
Tonbridge	3
Uppingham	3
Aberdeen Grammar	2
Bury Grammar	2
Dulwich	2
Edinburgh Academy	2
King Edward's, Birmingham	2
Liverpool College	2
	220

cont/...

(1). In a few cases (approx. 6%) the judge received only part of his secondary education at one of these schools.

Table IX (continued)

School	Number of judges attending school
	220
Liverpool Institute	2
Reading	2
Ruthin	2
St. Francis Xavier College	2
Stonyhurst	2
Wellington	2
Wigan Grammar	2
	234

Table IX (continued)

Schools attended by two or more judges

Period of appointment	School	Number of judges attending school
1820 - 75	Eton	14
	Winchester	6
	Harrow	5
	St. Pauls	5
	Westminster	4
	Charterhouse	3
	Reading	2
1876 - 1920	Eton	11
	Rugby	7
	Westminster	7
	Harrow	5
	Merchant Taylors	3
	Winchester	3
	Aberdeen Grammar	2
	Liverpool College	2
	Manchester Grammar	2
	Mill Hill	2
1921 - 50	Winchester	12
	Rugby	7
	Charterhouse	5
	Eton	5
	Haileybury	3
	Harrow	3
	Shrewsbury	3
	Westminster	3
	Bury Grammar	2
	Clifton	2
	Marlborough	2
	Merchant Taylors	2
	Wellington	2
	Wigan Grammar	2

Table IX (continued)

Period of appointment	School	Number of judges attending school
1951 - 68	Winchester	8
	Eton	5
	Greshams	3
	Shrewsbury	3
	Westminster	3
	Charterhouse	2
	City of London	2
	Downside	2
	Dulwich	2
	Fettes	2
	Haileybury	2
	Harrow	2
	Marlborough	2
	Oundle	2
	Rugby	2
	St. Pauls	2
	Uppingham	2

Over the century and a half covered by this study, the number of judges attending the Clarendon schools has remained fairly constant but there has been a stiking increase in the percentage of judges recruited from all public schools, from some 42% for those appointed during the middle years of the nineteenth century to over 70% for those appointed since 1920. Other studies of elite groups have shown a similar growth pattern in public-school representation; Kelsall's investigation of the Higher Civil Service is probably the only exception.(1) In 1942 the Fleming Committee were told that out of 830 bishops, deans, judges, stipendiary magistrates, Indian civil servants, governors of Dominions and directors of banks and railway companies, 76 per cent came from public schools, and of these almost half came from twelve major public schools.(2)

Table IX provides an additional measure of the impact of these institutions which, attended by only 5% of the current school population, have a quite disproportionate influence in public life. All but 8 of the 37 schools attended by more than one member of the judiciary since 1820 are well-known public schools; of the others, five - Manchester Grammar, Kings College, University College, King Edwards, Birmingham and the Royal Academical Institute, Belfast, - are famous direct-grant schools; only one, Wigan Grammar, is a state school.

A comparison over time indicates that the domination of all nine Clarendon schools has been fairly consistent, but that Eton

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(1). R.K. Kelsall, Higher Civil Servants in Britain: From 1870 to the Present Day. Routledge & Kegan Paul, (1955).

(2). Fleming Report, p.54

and Winchester have clearly been the main educative influence on the judiciary. This conforms to the school background of other elite groups. "With two exceptions,"(1) writes T.H.J. Bishop, "national leadership groups can be divided into two types: those where Eton is far ahead of a field in which Winchester has a prominent place; and those where Eton and Winchester are among several leaders."(2) In the case of the judges, however, the Wykehamist influence is stronger than usual. Eton has over the whole period produced slightly more recruits for the Bench, although Winchester has predominated for the past fifty years; but Eton is, after all, one of the largest public schools, and Winchester one of the smallest. In his study of Winchester, Bishop provides a table, devised by Mrs. B.N. Clapham, which makes allowance for this factor.(3) It does so by expressing each school's contributions as multiples of the numbers it would contribute if all secondary schools made equal contributions in proportion to their size. The effect of making allowance for size is to show that Wykehamists have a much better chance of becoming judges than boys from other schools. Bishop comments, "Not surprisingly, the field in which Wykehamists probably register their greatest success is the law, a profession where brains and conservatism come strikingly together."(4)

The relatively high representation of Wykehamists in the superior court lends some support to the argument(5) that the judges are an intellectually distinguished group. Winchester

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(1). Trade union leaders and board members of state-owned industry.
(2). T.H.J. Bishop, in collaboration with R. Wilkinson, Winchester and the Public School Elite: A statistical Analysis. Faber & Faber, (1967) pp. 43-4.
(3). ibid. p.45.
(4). ibid. p.20.
(5). Tested more rigorously in Chapter 3.

Table X. The School background of British Elite Groups

School	No. of Boys in 1907	Total	M.Ps.	Govt. Servants	F.R.Ss.	F.B.As.	Judges	Church Dignitaries
Winchester	400	9.3	5.3	9.8	4.6	22.1	15.6	7.5
Eton	1,032	8.4	16.9	10.9	1.6	4.9	5.8	2.4
Westminster	260	5.7	3.7	11.9	2.7	2.4	3.3	9.5
Harrow	600	5.6	8.3	7.2	2.4	7.3	3.7	4.0
Rossall	150	4.7	3.8	5.6	-	8.4	5.7	9.8
Rugby	570	3.9	3.7	5.4	2.0	3.3	5.0	3.5
Bootham	81	3.3	6.8	-	6.8	4.2	-	-
Marlborough	600	3.1	3.1	2.4	2.3	4.2	2.7	7.4
Charterhouse	560	2.6	3.1	1.9	1.3	4.5	4.1	2.6

Source: Mrs. B.N. Clapham (unpublished)

has been one of the few public schools which throughout its history has held scholarship in continuous esteem, though its academic laurels were not really won until towards the end of the nineteenth century. Since then, the Wykehamist reputation has been well deserved; although 6 out of seven Winchester pupils are commoners selected financially rather than intellectually, a study by K. Hutton of their intelligence quotients has shown the scholarly stereotype type to have suffered little from exaggeration.(1) Hutton concluded from the results of his analysis that exceedingly few scholars were not in the top 1% of the population but, further, commoners were also shown to be an intellectually select group though not, of course, as select as the scholars. The Wykehamists tested were all born in the 1930's but Hutton contends that the distribution of intellegence which he found among these scholars and commoners would be true of all Wykehamists back to those born in the 1890's.

Although they may be criticised on other counts, the ability of Winchester and the other public schools to provide 'a product which competes successfully in most markets' is to-day rarely questioned. The eighteenth century public school presented a quite different picture, providing an education that was poor preparation for any office demanding a modicum of learning or integrity. The schools were, like Oxford and Cambridge, rigidly classicist. Until 1840 an endowed school could not, by law, introduce other subjects, such as modern languages or mathematics except as optional courses; the curriculum was restricted solely to the teaching of Latin and Greek and religious instruction. Science was contemptuously ignored. It was, writes Bamford,

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(1). K. Hutton, "Intelligence Quotients and Differential Fertility; Some observations from Winchester College". Eugenics Review Jan. 1953.

> "as though the English heredity did not exist. Newton had died over 130 years before, the Industrial Revolution was more than a century old and the heroic age of industry associated with Boulton, Watt and Murdoch was already more than fifty years in the past. England was rapidly being covered with railways and the great scientific and industrial spectacle of the Hyde Park Exhibition was a ten-year-old memory."(1)

The schools were unaffected; universally admired, the industrial and craft associations of the physical sciences rendered them wholly unsuitable as objects of study for the progeny of the landed upper-class. For them, at least three quarters, and sometimes as much as eighty per cent of the time in class was devoted to the classics and relevant areas of history and geography; this was the ideal programme for the development of a well-trained mind and character. Yet, E.C. Mack writes, "Few boys profited ..... even to the extent of acquiring a smattering of classical learning; if they carried away anything as a result of their labours, it was a permanent aversion to any form of intellectual endeavour."(2)

These weaknesses in the educational establishments which nurtured the future leaders of society reflected the comparative lack of interest in the intellect felt by most Englishmen; only at Winchester and Westminster was learning more respected.(3) It was not until about the 1830's that the upper and middle classes began to pay more attention to the intellectual side of education; though even Arnold, one of the educational pioneers, listed his aims as "first, religious and moral principle; second, gentlemanly conduct, (and only) thirdly, intellectual ability."(4)

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(1). T.W. Bamford, The Rise of the Public Schools. Nelson, (1967) p.89
(2). Mack, op. cit. p.28
(3). And at the Scottish academies and the newer boarding establishments of the non-conformist denominations which aimed at a more vocational education to fit boys for a career in commerce, industry or the professions.
(4). Mack, op, cit. p.249

But certainly it was not only the academic aspects of the schools that called for radical reform; the moral and social climate of the eighteenth and early nineteenth century public schools, with their strange amalgam of harsh authority and arrogant libertarianism, provided poor breeding grounds for the Bench. The public school society which Mack described so vividly was "like a society of primitive savages - a world of brutal compulsions and taboos, in which happiness and freedom could be won, if at all, only after much hardship and struggle. The average individual suffered cruelly." ... "High handed tyranny and cruel bullying were almost universal occurences at all schools."(1) 'Boy freedom' provided a perfect environment for intimidation and sexual perversion. If any knowledge was gained it was "the mere knowledge of vice." Discipline was harsh; the birch and the strap were the principal instruments of order, character-formation and even intellectual training. Bamford points to a strong positive correlation between eminence and a strong right arm; "all the great headmasters were renowned floggers."(2)

The absence of scholarship and orderly discipline in the early nineteenth century schools was due largely to the solidarity of the boys; public school boys came from a narrow social stratum and possessed a powerful group unity, exemplified most strikingly in the series of actual rebellions that took place in all the public schools at the turn of the century. In 1793, Winchester had its 'Great Rebellion', "when the boys armed with swords, bludgeons and stones, barricaded themselves in the school and hoisted the Red Cap of Liberty; it had another in 1818 when the Riot Act was read and the 'rebels', induced to

(1). Mack, op. cit. pp.42-3, 156.
(2). Bamford, op. cit. p.66.

leave their stronghold by the promise of a fortnight's holiday, were captured by troops."[1] Troops were also used at Rugby in 1797 when the boys blew off a door with a petard. But these were not the fore-runners of Lindsay Anderson; most of the school 'rebellions' were conservative protests against innovations or the withdrawal of established rules and privileges, especially in relation to the use of leisure. It is therefore not altogether surprising that one of the leaders of the second Winchester uprising was William Page Wood, one of the Vice-Chancellors and later, as Lord Hatherley, Lord Chancellor.

It was not until the second half of the nineteenth century, and particularly after the Public Schools Act of 1869, that standards in the schools began to show some improvement, due largely to external pressures from parents and the rivalry of the newer proprietory schools. Academically, socially and morally, the schools acquired a new sense of responsibility and with increased organisation the grosser deficiencies of earlier years gradually disappeared. There were weaknesses; the curriculum was still restricted, and at least until the 1920's, the education provided by the public schools, with their emphasis on "liberal", non-vocational training, the inculation of a corporate spirit, and the importance of sport and moral improvement, definitely encouraged the development of character to the disparagement of brains. This was the era par excellence of the stiff-upper-lip and the team spirit.

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(1). W.L. Burn, The Age of Equipoise. Allen & Unwin, (1964)p.67.

Inevitably the schools themselves were to produce some of their sharpest critics,(1) but this was far outweighed by their worldly success as a direct and exclusive training ground for all public offices, turning out "manly, well-adjusted, honourable boys, moulded into unthinking conformity and inbred with a passionate idealistic loyalty towards authority."(2) And, what was particularly crucial for those destined for a legal career, a reverence for, even an obsession with, tradition.

It is hazardous, in describing the 'judicial background', to attempt to assign a relative importance to each of the various formative factors in their lives; thus to stress in this case, the influence of the public schools on judicial behaviour. It is impossible to be sure whether characteristics of the judiciary that may be attributed to the effects of a public school education, are not produced at root by the common culture of their home and class environs, or later in life, by their professional experience. Similarly the 'old-boy net' itself, the tendency for the judiciary and other elite groups to be overwhelmingly dominated by former public school boys may simply reflect the class composition of these institutions. Attendance at a public school, particularly one of the exclusive Clarendon schools, invariably implies membership of a family of some social standing and wealth; therefore, in terms of professional success, the public school may be important only in so far as it reinforces the existing social and economic advantages of those who go there, providing them with an additional and distinctive social badge.

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(1). "Thirty years ago", writes John Vaizey, "their literate products obviously loathed them - books from The Loom of Youth on savaged them and in 1934 (as Phillip Toynbee tells it) Esmond Romilly at the age of fifteen founded a magazine called Out of Bounds which was 'against Reaction, Militarism and Fascism in the Public Schools'. (J. Vaizey - The Public Schools, in H. Thomas ed. The Establishment Anthony Blond, (1959) p.26.)

(2) Mack, op. cit. p. 292.

Chapter 3.

Higher and Professional Education

The Judges and the Universities.

In 1956, the Economist reported that the most noteworthy fact about the educational background of the judiciary was the preponderance of university men on the Bench.(1) Many become barristers by being students as the Inns of Court but, it said, a university education is obviously a great help in getting to the top. Some factual evidence supporting this point is to be found in an unpublished thesis by H.R. Harris on the contemporary legal profession.(2) 88% of all the 271(3) practising barristers studied by Harris were graduates. However, it is only the sub-sample of 88 barristers aged 45 and over which is relevant for the purposes of comparison with any of the judges; of these, only 75% were graduates. The number of university men in the most recent cohort of judges (i.e. those appointed to the bench during the period 1951-68) is significantly higher, 81 out of a total of 86 (about 95%). Although I have some reservations about the reliability of the data drawn from Harris' thesis, owing to the smallness of the sub-sample and the high rate of non-response, these comparative figures do provide some foundation for the hypothesis that a university education is important to the achievement of success within the legal profession. Obviously no conclusive statements can be made on this subject in the absence of more substantial data on the educational backgrounds of barristers in general.

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(1). "Judges Summed Up", The Economist, (Dec.15, 1956)

(2). H.R. Harris, The Legal Profession in England and Wales. Unpub. Ph.D. thesis. Reading University,(1966) p.70.

(3). 61% of his original sample of 445 barristers.

Table XI

Universities attended by the judges

Period of appointment (period of University attendance)	1820-75 (1790-1845)	1876-1920 (1846-90)	1921-50 (1891-1920)	1951-68 (1921-38)	1820-1968 (1790-1938)
University	Percentage of judges attending each university				
Oxford	16.0% (17)	35.0% (36)	47.3% (43)	48.8% (42)	35.8% (138)
Cambridge	37.7% (40)	27.2% (28)	27.5% (25)	34.9% (30)	31.9% (123)
London	1.9% (2)	16.5% (17)	5.5% (5)	8.1% (7)	8.0% (31)
Trinity, Dublin	6.6% (7)	4.9% (5)	1.1% (1)	1.2% (1)	3.6% (14)
Edinburgh	-	4.9% (5)	2.2% (2)	2.3% (2)	2.3% (9)
Glasgow	0.9% (1)	1.9% (2)	1.1% (1)	2.3% (2)	1.5% (6)
Liverpool	-	-	4.4% (4)	1.2% (1)	1.3% (5)
Manchester	-	-	2.2% (2)	1.2% (1)	0.8% (3)
Aberdeen	-	1.0% (1)	-	-	0.3% (1)
Queens, Belfast	-	-	1.1% (1)	-	0.3% (1)
Queens, Galway	-	1.0% (1)	-	-	0.3% (1)
St. Andrews	0.9% (1)	-	-	-	0.3% (1)
Foreign Universities	1.9% (2)	1.9% (2)	4.4% (4)	2.3% (2)	2.6% (10)
Total judges attending university (1)	64.2% (68)	87.4% (90)	87.9% (80)	94.2% (81)	82.6% (319)
Judges not attending university	4.7% (5)	3.9% (4)	3.3% (3)	-	3.1% (12)
Judges with no record of university attendance	31.1% (32)	8.7% (9)	8.8% (8)	5.8% (5)	14.2% (55)
Total judges	100% (106)	100% (103)	100% (91)	100% (86)	100% (386)

(1). The total of judges attending university is, throughout, slightly smaller than the total of all universities attendances by judges because a few judges in each period attended more than one university, particularly those who went to a foreign university.

Table XI demonstrates how the number of judges attending university has increased since the beginning of the nineteenth century, corresponding to an overall growth in the university population, as the provisions for further education have improved and the prestige and popularity of the new universities grown.(1) But it was particularly the second half of the nineteenth century which saw a real boom in university education, mainly in response to the rising demands by the professions for qualification by written examination. The new professional requirements, though still vitiated by considerations of wealth or patronage, and though far from stringent by contemporary standards, converted the sons of the leisure classes to a more formal style of education than they had previously enjoyed.

The most salient feature of the table is not the general increase in 'graduate' judges, but the consistently high number of Oxbridge men recruited to the Bench, constituting for the whole period some 80% of all those judges who attended university. There has been some reversal in the relative fortunes of the two universities; for most of the nineteenth century more Cambridge men reached the superior courts, but since 1876, Oxonians have been predominant. The only time when there was any significant difference in the proportion of judges graduating from the two ancient foundations, as compared to other universities, was for those appointed to the Bench during the period 1876-1920; of these 90 judges, whose student years may be roughly located in the period 1846-90, only 71% had been at Oxbridge. During this period an unusually large number of the future judges attended the new University of London(2) or rather its two constituent colleges,

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(1). Until the nineteenth century the Grand Tour had, for the landed classes, often acted as a substitute for university.

(2). Founded 1836.

Kings and University. This is hardly surprising; the foundation of these colleges was essentially a response to the educational demands of the new middle class, many of whom were at that time excluded from the ancient universities by virtue of either their religion[1] or their financial condition and who were in any case looking for the kind of scientific and professional education disdained by those institutions.

During the second period five Edinburgh graduates were also appointed to the superior courts. The explanation for this judicial invasion from north of the border lies in the provisions of the Appellate Jurisdiction Act 1876 which allowed for the appointment of members of the Faculty of Advocates to the Appellate Committee of the House of Lords. Indeed, all but one of the judges studied who were graduates of Edinburgh University, have been Lords of Appeal in Ordinary. The exception is one of the present judges of the Family Division, Mr. Justice Orr.

Though a few graduates of Liverpool and Manchester Universities have made their way to the Bench during the twentieth century, the educative influence of these city universities on the judiciary has dwindled in recent years. The number of judges from Trinity College, Dublin has inevitably diminished as a result of Irish independence.

Turning again to the dominant Oxbridge theme, Table XII shows that few of the colleges established before 1945[2]

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(1). Of the 17 judges educated at London during this period at least 8 were not members of the Church of England; 6 were non-conformist and two were Roman Catholic.

(2). By which time all the judges in the study had completed their university careers.

Table XII (a)

NUMBER OF JUDGES ATTENDING EACH CAMBRIDGE COLLEGE (1)

COLLEGE	NUMBER OF JUDGES
Trinity	58
Trinity Hall	13
Gonville & Caius	13
Kings	7
St. Johns	6
Pembroke	5
Emmanuel	4
Christs	3
Corpus Christi	3
Jesus	3
Downing	2
Peterhouse	2
Sidney Sussex	2
Clare	1
Magdalene	1
Queens	1
St. Catherines	0
Selwyn	0
TOTAL	124

(1). Colleges founded during the past decade have not been included.

Table XII (b)

NUMBER OF JUDGES ATTENDING EACH OXFORD COLLEGE (1)

COLLEGE	NUMBER OF JUDGES
Balliol	24
New	22
Christ Church	20
University	11
Trinity	8
Corpus Christi	7
Magdalene	6
Exeter	5
Oriel	5
St. Johns	5
Wadham	5
Brasenose	4
Jesus	4
Queens	3
Lincoln	2
Merton	2
Worcester	2
Hertford	1
Keble	1
Pembroke	1
St. Edmund Hall	0
College unknown	1
TOTAL	139 (2)

(1). Colleges founded in the past decade are not included.

(2). One of the judges, Chief Baron Richards, was a student at both Jesus and Wadham colleges.

have failed to produce at least one judge, but the major contributors have been Trinity, Cambridge and the three Oxford Colleges, Balliol, New College and Christ Church. These four colleges between them account for almost half the Oxbridge judges and have provided twice as many judges as all the other universities taken together. Balliol has an enviable record of success in all spheres. "Life", said Lord Samuel, "is one Balliol man after another".(1) But it is from Trinity College, Cambridge that the highest proportion of judges is recruited; though this is the largest Oxbridge college, its relative contribution is inexplicably disproportionate.

The key to the judicial success of some of the other colleges may lie in their close connections with the major public schools. Thus, until at least the middle of the nineteenth century there existed a restrictive scholarship system, linking in particular Winchester and New College, Oxford (another Wykehamist foundation), Westminster and Christs College, Oxford, and Eton with Kings College, Cambridge. Scholarships were rarely won on intellectual merit alone; in most cases they were reserved by statute for men who came from particular schools, particular localities or particular families. Thus the two old boy nets of public schools and Oxford and Cambridge Colleges reinforce each other. Whatever the influence of any individual college, the overall ascendancy of Oxford and

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(1). A. Sampson, Anatomy of Britain To-day. Hodder & Stoughton, (1965) p.226.

Cambridge has remained unchallenged, fulfilling Polson's maxim that "no student comes to the bar more qualified for success, than he whose general education has been completed at Oxford or Cambridge".(1)

It would be imprudent to draw any general conclusions from these data without consideration for the changes which have taken place since the eighteenth century in the previsions for higher education. In these days of UCCA and multi-choice, it is easy to forget that in previous centuries the range of seats of learning has been more limited. Until 1828 there were just seven universities in the whole of the United Kingdom; only two of these were in England; Scotland, with a smaller population boasted four - Edinburgh, Glasgow, Aberdeen and St. Andrews; the seventh was Trinity, Dublin. The Oxbridge monopoly of higher education prevailed throughout most of the nineteenth century; only five other universities, Durham, London, Belfast, Manchester and Wales, were added before the end of the century.(2) Half of the present 44 universities received their charter after 1940, that is after all the judges in the study had entered upon their university careers. Attendance at Oxford and Cambridge may be used as an index of high social status but it should be emphasised that the distinction between Redbrick and Oxbridge is a comparatively new phenomenon, a point which has not always been made clear in other studies of elite groups.

There is some evidence that there are substantially fewer Oxbridge men at the contemporary Bar than on the Bench(3) but

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(1). A. Polson, Law and Lawyers. Vol.I Longman, Orme, Browne, Green & Longman, (1840) p.32.

(2). Other establishments for higher education, the university colleges, came into being during the nineteenth century e.g. Liverpool, Southampton, Bristol, but did not receive their charters until the present century.

(3). Harris op.cit.

without further historical evidence on the university records of barristers in general, it is impossible to say whether, in so far as they are recruited mainly from Oxford and Cambridge, the judges are a representative sample of the senior branch of the legal profession or whether they are an atypical group. If the latter is true, then changes in the university composition of the bar will not result in a similar effect upon the Bench; but if the selection of judges is random in terms of the university education of barristers then we may expect to see less of an Oxbridge bias in future Benches.

Judicial Scholars.

> "The office of a judge is really a sufficient guarantee that its possessor is exceptionally gifted." Wrote Sir Francis Galton, almost a century ago, "In other countries it may be different from what it is with us, but we all know that in England the Bench is never spoken of without reverence for the intellectual power of its occupier".(1)

A more objective assessment of the judges' intellectual capabilities is provided by an examination of their university records; and, indeed, the following table, which analyses the classes obtained by the judges in their undergraduate degrees, gives considerable support to Galton. As a group, the superior judiciary have consistently demonstrated a high standard of academic achievement; throughout the whole period covered by this study at least a third of those appointed to the Bench have been the holders of first-class degrees.(2)

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(1). Sir Francis Galton, Hereditary Genius. Watts, (1869)

(2). It is likely, of course, that a disproportionate number of those for whom the degree class is not known were placed in the lower classes, but this does not affect the absolute numbers of those definitely known to have firsts.

Table XIII

Degree-classes taken by the judges[1]

Period of appointment	1820-75	1876-1920	1921-50	1951-68	1820-1968
Degree class					
First	75.8%	63.9%	40.7%	36.4%	51.1%
	25	39	24	24	112
	36.8%	43.3%	30.0%	29.6%	35.1%
Second	9.1%	31.1%	35.6%	43.9%	32.9%
	3	19	21	29	72
	4.4%	21.1%	26.3%	35.8%	22.6%
Third	9.1%	3.3%	18.6%	18.2%	12.8%
	3	2	11	12	28
	4.4%	2.2%	13.8%	14.8%	8.8%
Pass (Fourth)	6.1%	1.6%	5.1%	1.5%	3.2%
	2	1	3	1	7
	2.9%	1.1%	3.8%	1.2%	2.2%
Total Degree class known	100%	100%	100%	100%	100%
	33	61	59	66	219
	48.5%	67.7%	73.8%	81.5%	68.7%
Degree class not known	29	21	19	13	82[2]
	42.6%	23.3%	23.8%	16.0%	25.1%
Total degrees	62	82	78	79	301
	91.2%	91.1%	97.5%	97.5%	94.4%
No record of degree	6	6	2	2	18
	8.8%	8.8%	2.5%	2.5%	5.6%
Total with University records	68	90	80	81	319
	100%	100%	100%	100%	100%

(1). Where more than one degree was acquired by a judge, I have included in the analysis that in which the highest class was obtained.

(2). This includes 4 judges, - 3 appointed in 1921-50 and 1 in 1951-68, who were War Service candidates on shortened courses; all attained distinction.

Some problem arises, however, when we attempt to define more precisely the nature of such an achievement; for it is necessary not only to estimate, by comparison with other groups, the value of a high class of degree but also, since we are dealing with data, much of which belong to a very different educational age, to assess the simple worth of the degree itself. Thus Ogilvie writes, "It is amusing to remember how Eldon had taken his degree at Oxford in 1770; He was asked two questions, - 'What is the Hebrew for the place of the skull?' He replied, 'Golgotha'. 'Who founded University College?' He replied, 'King Alfred', and having thus satisfied the examiners in Hebrew and History, he graduated."(1)

J.W. Adamson's work on English Education 1789-1902 throws some light on this disconcerting statement.(2) Until the nineteenth century examinations at the Universities (Oxbridge) took the form of disputations; students were required at stated periods to argue a thesis in the presence of their seniors. The disputations were conducted in a sort of Latin; the student "kept an Act" as respondent when he maintained a "question", or an "opponency" when he took the opposing side. However, by the nineteenth century, says Adamson, "keeping an Act had become a formality to be complied with rather than a useful element in University education".(3) All students were obliged by statute to take part in the disputations and they could still be very difficult exercises but the majority of students who did not intend taking honours, the 'poll-men', were allowed to get round

(1). V. Ogilvie, The English Public School. Batsford, (1957) p.115(fn)
(2). J.W. Adamson, English Education 1789 -1902. C.U.P. (1930) pp.70 - 80.
(3). ibid. p.74.

the statute by a devise called "huddling". Adamson describes one of these ceremonies which took place in 1837, two years before the last Cambridge Act was performed.

> "Thomas Styles from the Respondents' seat speaking in Latin: 'Newton was correct; Wood was correct; Locke was correct'. John Noakes from the Opponents' seat likewise speaking in Latin - 'If your disputations are false, they fall; but they are false, therefore they fall'. These words are repeated until Thomas Styles has kept the requisite number of Acts, and John Noakes the requisite number of Opponencies. They then change places and Thomas Styles refutes John Noakes with John Noakes's own syllogism, and Da capo ad libitum."(1)

This, then, explains the surprising manner in which Eldon acquired his degree. But the disputations should not be taken too seriously, nor their importance over-estimated. At Cambridge from 1780 onwards they were subsidiary to the Senate House Examination, instituted in the mid-eighteenth century which was the effective test of scholarship and which decided the placings in the class list. Similarly, at Oxford a public examination was in force by 1802.(2) The examination at Cambridge was taken by all candidates for the B.A. degree whether potential honours men or not; but the test was not uniform - "the preliminary sifting by college tutors and the prescribed university exercises, such as the Acts and the like, draw a clear line between those who aspired to honours and 'the poll'." (3)

> "At neither University" says Adamson, "was the standard for a 'pass' severe.(4) Candidates who 'gained a class', that is, passed with honour were placed in Class I or

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(1). J.W. Adamson, op.cit. p.75. (quoting, B. Dann Walsh - A historical account of the University of Cambridge and its colleges in a letter to the Earl of Radnor, 1837)

(2). Public Examination Statute 1800.

(3). J.W. Adamson, op.cit. p.76.

(4). There were for some time two exceptions to the normal examination system. Until 1834, New College, Oxford, examined its own students and until 1851 students at Kings College , Cambridge, were given degrees on the recommendation of their tutors.

> Class II, the latter being divided between a first and second bracket. In the early days of the statute of 1800, the second bracket, virtually a third class, included the majority of honours men. Of all the successful candidates more than one-third as a rule gained a class; the remainder simply passed." (1).

The distribution of classes for candidates at twentieth century Oxbridge has, as Table XIV shows, been rather different, more students obtaining a second or third and very many fewer taking only a fourth or pass.

Table XIV

Class distribution of Oxford degrees (1921-36) and Cambridge degrees (1937-38) (2)

	Oxford matriculants 1921 - 36	Men who left Cambridge in 1937 and 1938
First	9%	11%
Seconds	31%	36%
Thirds	27%	26%
Pass	15%	19%
Fail	18%	8%
Total	100% (3,899)	100% (280)

Alterations in the delineation of the classes themselves provide some explanation of changes in the distribution of degree classes gained by the judges.(3) Thus, a large percentage of those in the earliest group, for whom no degree class could be discovered, would undoubtedly have been 'pass' students. Later judges stood more chance of obtaining a class. It is clear, though, that in comparison with the general distribution of

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(1). J.W. Adamson. op.cit. p.78

(2). These data are extracted from tables given in T.H.J. Bishop and R. Wilkinson, Winchester and the Public School Elite : A Statistical Analysis. Faber & Faber,(1967)pp.142-3.

(3). Oxford and Cambridge, which provided in any case the university education of the majority of the judges are taken in this respect as being representative of all universities.

Table XV

Comparison of degree-classes taken by Wykehamists and judges (1)

Degree class	Wykehamists born 1820 - 1922	Judges appointed 1876 - 1968
First	23.6% 443 9.3%	46.8% 87 34.7%
Second	39.9% 751 15.8%	37.1% 69 27.5%
Third	27.9% 524 11.0%	13.4% 25 10.0%
Pass Fourth	8.6% 162 3.4%	2.7% 5 2.0%
Total degree class known	100% 1,880 39.5%	100% 186 74.1%
Degree class not known(2)	1,553 32.6%	53 21.1%
Total degrees	3,433 72.1%	239 95.2%
No record of degree	1,326 27.9%	12 4.8%
Total with university records	4,759 100%	251 100%

(1). Bishop & Wilkinson op.cit. - data taken from Table 5 pp.134-5.

(2). "Wykehamist modesty notwithstanding, it is likely that a disproportionate number of those who did not report won mere passes, or Fourths. The distortion however was probably minor". ibid. p.133.

classes, their allocation of firsts and seconds has been disproportionately high. Further proof of judicial ability is provided by a comparison of their intellectual achievements with those of Wykehamists, the intellectual cream of the whole schools system. (Table XV). The judges appointed after 1875 acquired significantly more firsts than Winchester boys of the same generations.

Of all the judges, Lord Justice Scrutton, (Queens Bench Division 1910, Court of Appeal 1916-34), had perhaps the most impressive academic record. At University College, London, he acquired a first in English, an M.A., an LL.B and a fellowship. He also won a scholarship to Trinity College, Cambridge, where he gained a first in both the Moral Sciences and Law Tripos, was senior Whewell scholar in international law and won the York prize for legal essay four times. He was President of the Cambridge Union and won two scholarships to the Inns of Court.

Though academic attainment is by no means the only, nor always an accurate, index of overall ability, the law has, undoubtedly, attracted some of the richest minds, drawn not only by its worldly prizes, but also by its intellectual intricacies and opportunities for oratory. It remains to consider whether the content of the education received by the judges has always been of a kind best suited to their future function.

Legal Education

The role of the ancient universities during the nineteenth century was as much social as intellectual, their primary object the production of gentlemen rather than scholars. Despite the

demands of industrialisation, the emphasis was on a liberal, non-vocational form of education and with the exception of the Church, Oxford and Cambridge had almost ceased to provide a training for the professions. The Oxford University Commission of 1852 deplored it as "---- a serious loss, both to Oxford and the learned professions that the Studies which would prepare young men to enter professional life, should have been so completely neglected." (1)

The founding of the Vinerian chair of law of Oxford in 1758 had aroused no real interest in that subject and at Cambridge the study of law involved little intellectual effort, even though Trinity Hall had been founded as early as 1350 for the express purpose of legal study. Commenting on the legal education provided by Oxford in the mid-nineteenth century, Herbert Broom marvelled "---- that in that ancient seminary where Vacarius taught, and where in modern times the genius and eloquence of Blackstone so conspicuously shone, the study of jurisprudence and of the laws of England should be allowed to languish." (2)

Until about 1700 the Inns of Court had provided a very strict educational system for prospective barristers, consisting predominantly of public readings and disputation. But gradually the functions of the Inns as law schools fell into neglect and the next century and a half was distinguished by the almost total lack of educational activity within the Inns. Admission to the Bar was in no way restricted by formal intellectual

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(1). F.G. Brooke, "The Early Victorian Years of London University - Its Influence on Higher Education and the Professions".

(2). H. Broom, "Legal Education ", Transactions of the National Association for the Promotion of Social Science,(1858) p.123

requirements: "Dining in Hall was the only survival and it was almost literally true that a man ate his way to the Bar". (1) Self-help was the only method of learning.

> "The student would try to obtain a seat in a lawyer's office where he could study the forms of pleading and conveyancing and would attend the courts when they were sitting to learn legal method. Most of his law would be learned from such books as he could afford to buy or borrow. If he began to practise too soon the chances were that he would never learn much law; but if he put it off too long he might confuse himself beyond salvation". (2)

A witness before the 1852 Commission described the "social routine of what is now called a legal education." A young man

> "-----entered at one of the Inns of Court, is received as a pupil for a year by some eminent conveyancer to whom he gives a hundred guineas for the privilege of going daily to this chambers ---- He finds that he has purchased the right of walking blindfold into a sort of legal jungle. Masses of papers are daily placed before him, every sheet of which contains numberless terms as new and strange to him as the words of a foreign language and the bare meaning of which he rarely arrives at before the clerk announces that the client has called to take the papers away -----. This unpropitious year at length over, the youth is doomed to go through a second year of like probation, at the same cost and almost as unprofitable, in the chambers of a special pleader or an equity draftsman, and by the end of that year he is so bedevilled and so wearied that he gives up the attempt as hopeless and becomes a clergyman." (3)

This absence of organised education was not felt by the profession as a reproach. As late as 1883 Dicey wrote

> "If the question whether English law can be taught at the Universities could be submitted in the form of a case to a body of eminent counsel there is no doubt whatever as to what would be their answer. They would reply with unanimity and without hesitation

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(1). Council of Legal Education, Calendar ,p.2. quoted:- C.H.S. Fifoot, Judge and Jurist, 1837 - 1901. Stevens (1959) p.21.

(2). J.H. Baker, An Introduction to English Legal History Butterworths (1971) p.76.

(3). Fifoot op.cit. pp.21-22.

> that English law must be learned and cannot be taught and that the only places where it can be learned are the law courts or chambers."(1)

Throughout the second half of the nineteenth century successive attempts were made to remedy the sad state of legal education, but the response was lukewarm and progress slow. In 1846 a Select Committee on legal education stated that it was significantly inferior in England and Ireland compared to that in "all the more civilised States of Europe and America". Their recommendations included a qualifying examination, an examination on entry to the Inns, terms to be kept by attendance at lectures and not by eating dinners, and an extension in law teaching in universities. After some delay the Inns reluctantly agreed to co-operate in the establishment of a Council of Legal Education, intended to maintain uniform legal education before admission but practical reforms were minimal. In the same year, 1852, the first examination was held on a voluntary basis; only seven candidates attended. Two years later, when threatened with a Bill, the Inns finally introduced a compulsory entrance examination but the low standard deprived it of much value. Compulsory examination for call to the Bar was delayed for another twenty years, the professional lethargy of the Inns encouraged by protests that it would deter "country gentlemen who wished merely to acquire such status and so much professional knowledge as would be useful to them as Magistrates, Politicians, Legislators and Statesmen". (2)

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(1). Dicey, Inaugural Lecture, "Can English Law be taught at the Universities?" delivered at Oxford, April 21, 1883, (quoted in Fifoot op.cit.)

(2). A. Harding, A Social History of English Law, Penguin (1966) p.348

In the middle years of the nineteenth century some serious efforts at legal education began to emerge in the universities. In 1851 Oxford established a B.C.L. degree and three years later Cambridge set up a Board of Legal Studies. These innovations were consolidated when an Honours School of Jurisprudence was established as an independent entity at Oxford in 1871 and two years later the Cambridge Law Tripos became a separate study. Even so, for various reasons, but mainly because it still carried a vocational rather than an academic image, law at the older universities failed for many years to attract either good students or prestige; the best students still read Greats or mathematics or entered the new History School; and

> "----Law tended to be a refuge for those whose main interest lay on the river or rugby field, in the Pitt or Carlton. Some form of law degree could be acquired with an absolute minimum of knowledge".(1)

Yet the requirements for the Cambridge degree of Bachelor of Laws, described by Herbert Broom in 1858, seem quite rigorous:

> "----an examination must now be passed in the ninth term of residence ----. The subjects of examination for honours are four-fold, being Roman Law, the Elements of English Law, The Constitutional History of England, International Law and the History of Treaties. Besides submitting himself to the examination, every candidate for honours is required to prepare an essay on some historical point of law, to be afterwards publicly recited, and he has also to discuss publicly a legal question with one of the examiners, who are the Regius Professor of Law and three members of the Senate chosen by the University. To qualify, moreover, for the degree of LL.B, attendance must be given at the lectures of either the Regius or Downing Professor of Law during at least two terms". (2).

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(1). B. Abel-Smith & R. Stevens, In Search of Justice. Allen Lane (1968) p.57

(2). Broom, op. cit. p.123.

Nevertheless at both Oxford and Cambridge those actually aiming at a legal career were encouraged to read more reputable subjects, so that academic Law had little influence in fashioning the minds of the nineteenth century Bench.

Disdained by the old universities, cultivation of the serious study of law was left to the new institutions of higher education in London and the industrial conurbations. In particular, the 'Benthamite Institution', University College, heavily patronised by secular Utilitarians, dissenters and Jews, enjoyed considerable popularity during the early years after its foundation. According to F.G. Brooke, John Austin's early lectures on Jurisprudence were attended by many famous contemporary figures, including John Stuart Mill, Edwin Chadwick, Lord Brougham, the Romilly brothers and Lord Belper; professional law students were more inclined to seek guidance from his fellow professor, A. Amos. But competition from the Law Society which began to organise lectures in the 1830's, the absence of compulsory professional examinations to provide an incentive to serious learning and the necessity of passing the B.A. before proceeding to the law degree, gradually undermined support for law in the college and the Chairs lapsed for a period of some years.(1) In their provision for the teaching of science, technology and medecine, London and the other civic universities and colleges achieved remarkable successes but as training grounds for the traditional 'gentlemanly' occupations they were still eclipsed by the ancient universities with their classical curriculum.

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(1). Brooke, op.cit.

> "Like many judges of my generation," Lord Diplock once admitted, " I received no formal education in the law. I comfort myself that this was also true of the judicial architects of the common law during the whole of the eighteenth and nineteenth centuries ----" (1).

Table XVI shows clearly that until at least the 1920's the courts were dominated by men who had received the traditional Oxbridge education, either classics, mathematics or a combination of the two. For, even ignoring the fact that the public schools also offered purely classical/mathematical curricula and that most undergraduates were therefore better qualified to read those rather than any other subject, whatever their future professional ambitions, during the eighteenth and most of the nineteenth century, the opportunities for alternative study in not only law, but any other subject, arts or science, were severely limited.

At Cambridge, until 1824, there was only one tripos, and although this included questions in ethics and metaphysics, it was essentially a mathematics tripos. A classical tripos was introduced in 1824 but for the next twenty-five years, this second tripos was open only to those who had achieved mathematical honours. Oxford, on the other hand, had a distinctly classical orientation, with mathematics in second place. The mathematical candidates were, however, sufficiently numerous for the degree examination to be divided into two schools, literae humaniores and mathematics, each having its own separate class list; it was quite common for a man to achieve "double honours", that is to appear in both lists, as some of the judges did. Because most of the earlier judges - those who had attended university between the end of the eighteenth century and the

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(1). Lord Diplock

Table XVI

Subject of degrees taken by the judges

Period of appointment	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Subject of degrees	Percentage of graduate judges taking each subject				
Classics	6.5% (4)	32.5% (27)	29.5% (23)	13.8% (11)	21.5% (65)
Maths	47.0% (29)	12.0% (10)	3.8% (3)	1.3% (1)	14.2% (43)
Classics and Maths (Double Honours)	6.5% (4)	9.6% (8)	-	-	4.0% (12)
Classics or Maths	14.5% (9)	3.6% (3)	-	-	4.0% (12)
Total degrees in classics and maths	74.2% (46)	57.8% (48)	33.3% (26)	15.0% (12)	43.6% (132)
Law	12.9% (8)	26.5% (22)	47.4% (37)	61.3% (49)	38.3% (116)
Law and Modern History	-	4.8% (4)	3.8% (3)	3.8% (3)	3.3% (10)
Modern History	-	-	11.5% (9)	12.5% (10)	6.3% (19)
Other Arts	-	12.0% (10)	3.8% (3)	3.8% (3)	5.3% (16)
Science	1.6% (1)	1.2% (1)	2.6% (2)	3.8% (3)	2.3% (7)
Not known	12.9% (8)	9.6% (8)	5.1% (4)	8.8% (7)	8.9% (27)
Total graduate judges(1)	100% (62)	100% (83)	100% (78)	100% (80)	100% (303)

(1). Some judges took degrees in more than one subject.

middle of the nineteenth, - were Cambridge rather than Oxford men, their educational backgrounds were more mathematical and less classical than those of their successors. "The qualities of speed and accuracy which brought success in the Tripos," it has been observed, "were much the same as those which brought success in the law courts."(1) Both universities, however, even when new schools were established, continued to hold intermediary examinations which always included either Greek or Latin, so that some study of classics was compulsory for all B.A. candidates. It was no great exaggeration for a nineteenth-century legal pundit to write,

> "There have been men, indeed, who have risen to the very highest honours of the (legal) profession without the advantages of a classical education; but it would be as prudent to imitate their conduct as it would be to obtain for a son a lieutenancy in the French artillery, under the expectation that he would, therefore become emperor of the French." (2)

As Table XVI shows, it is only since the 1920's that 'lawyers' have constituted a majority of the Bench and the influence of the classicists waned. The proliferation of law departments within the universities and proposed reforms for the rationalisation of legal education will undoubtedly be reflected in an ever-increasing number of judges possessing a law degree; but the advantages of this trend will be limited unless the teaching of the subject is given a wider base. Since those members of the legal profession who constitute the subject of my study had for the most part completed their education before 1949, I do not wish to dwell unduly on the state of contemporary legal education, particularly as this topic has

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(1). J.P.C. Roach, "Victorian Universities and the National Intelligentsia". Victorian Studies Vol.II, No.2. Dec.1959. p.133.

(2). Polson, op. cit. p.5.

been dealt with very capably in a number of works.(1) However, as one of the chief faults in the system has been, until very recently, a singular lack of reform, many of the criticisms of contemporary legal education may be applied to the past fifty years as a whole. The new scheme of education and training for Bar students introduced in April, 1970 may also merit brief consideration, for the purpose of predicting possible, though obviously far-distant, changes in the intellectual character of the judiciary.

Although, during the present century, many intending barristers have studied law at university, qualification for legal practise depends upon acquiring an independent professional qualification. To-day this qualification may be gained after eating the requisite number of dinners and by passing the Bar examinations. The standard of these examinations has aroused considerable criticism in the past. As recently as 1960 the Oxford Lawyer Editorial commented, that "the client pays for the advice of a profession whose qualifying examination would not even be a stiff test for a school-child blessed with a good memory".(2) This low standard has been partly due to the fact that those who set the Bar examinations have had to take account of the many candidates from overseas whose first language is not English. Ironically, solicitors , who enjoy less social prestige than barristers and who are largely excluded from consideration for the judiciary, have, until now, started their legal careers with much better educational qualifications. Since solicitor's examinations are taken almost exclusively by persons who intend to practise in England, the test is considerably more exacting than that for the Bar. In addition a period of practical

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(1). G. Gardiner & A. Martin, eds.,Law Reform Now
The Oxford Lawyer, Vol.XIII, No.2, (Michaelmas,1960)
Abel-Smith & Stevens, op.cit.

(2). The Oxford Lawyer, op.cit.

apprenticeship is also required, of five years or three years for a graduate. The new regulations introduced by the Council of Legal Education are an attempt to remedy this situation. The reforms, based on a Memorandum of the Senate of the Inns of Court to the Lord Chancellors committee,(1) involve both harder examinations and practical exercises in advocacy; in line with this, academic standards for entering the Inns have been raised.

The publication of the Ormrod Report(2) in March 1971 advanced the cause of more radical change in professional training. The Report underlined the continuing inadequacies of the present system: "it involves duplication and overlap, leading to the poor utilisation of scarce resources, particularly accommodation, library provision, and perhaps most crucial of all, suitable teaching staff".(3) The answer to these problems it said lies in a closer alliance between the profession and the universities which teach law. To this end the majority report of the committee recommended that new vocational courses should be provided within the university and college of higher education structure, instead of in professional law schools. But the general consensus of the profession was perhaps better represented by the minority of the committee who thought that the profession should continue to provide vocational training in its own schools. Substantial differences regarding the content and location of vocational teaching present a major hindrance to the implementation of the committee's wider proposals.

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(1). Published in November 1968.
(2). Cmnd 4595
(3). The Times (March 31st, 1969)

The effect of reforms in the system of legal education and examination, both accomplished and proposed, will, if they fulfil their promise to produce a better qualified Bar, eventually make some mark on the Bench; but, since the superior judiciary, particularly the Law Lords, are already something of an intellectual elite, greater benefit would probably be felt through some extension in the field of their learning, rather than through any improvement in the formal academic records of the judges.

Unlike their continental counterparts, contemporary English judges do not, before their appointment, receive any formal training in penal methods.(1) Many individual judges attempt to remedy this conspicuous weakness by their own efforts. John Watson writes of one

> "---High Court judge who makes a practice of obtaining regular reports from prison and borstal governors and the wardens of detention centres on the progress of the men and women he has committed to their care. 'Few people except us', said a high prison official....., 'have any idea of the trouble he goes to'."(2)

In recent years some progress has been made on a more organised and official basis. In 1961 the Report of the Streatfield Committee (3) emphasised that judges must keep themselves informed by visits and by reading but they also recommended the provision of a standard booklet giving information on forms of sentence, together with data about national trends in crime and research material on the treatment of offenders. This suggestion

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(1). Of course, to advocate courses in penology for judges is to accept that they should continue to deal with sentencing as well as the determination of guilt; the more radical view holds that the function of sentencing should be taken away from the courts and vested in some expert body.(See, for example, S.& E.T. Glueck, Later Criminal Careers (1937); M. Fry, The Future Treatment of Adult Offenders (1944); N. Walker, Sentencing in a Rational Society (1969).

(2). John Watson, "Judgement" The Times (Saturday Review)(Jan.11th 1969)

(3). Cttee on the Business of the Criminal Courts (Cmnd 1289)

was subsequently met by the publication of a Home Office guide, The Sentence of the Court, an invaluable handbook for professional sentencers. Since 1964 the Queens Bench judges have held regular conferences designed to minimise inconsistencies in sentencing; these are attended by distinguished criminologists who keep the judges up to date with recent developments in their field. The Lord Chancellor has also arranged for the provision of a voluntary week-long course in penology to be held annually for barristers appointed to lesser judicial offices.

But these are relatively minor improvements - too little and too late. A barrister should be given every opportunity for acquiring some grounding in the elements of penology as part of his early training; and a judge should regard the treatment of offenders as

> "an ordinary subject to be studied as part of his professional equipment. Is it too much to hope, "asks R.M. Jackson, "that the legal profession may come to regard the subject of sentencing as being as important as, say, the rules of evidence."

Other reformers have been less temperate in their demands.

> "The professional sentencer", writes Watson, "needs an appreciation of the social and economic conditions that tend to breed crime, the motivation of the criminal and some perception of his psychological make-up".(1)

As early as 1916 Judge Brandeis put the case rather more strongly when he issued the warning that a lawyer who had not studied sociology and economics was very apt to become a public enemy.(2) The notion that every potential recruit to the Bench should acquire proficiency in a wider range of social science subjects clearly lacks realism, but we might reasonably expect lawyers to have

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(1). John Watson, op. cit.

(2). Lord Wilberfore, "Educating the Judges", Journal of the Society of Public Teachers of Law. Vol.X no.4. (Dec.1969)p.261.

some understanding of those areas of other disciplines which are most pertinent to their own work. Both branches of the legal profession in England have indeed now begun to recognise the importance of including in the professional curriculum some study of social policy, of theories of deviance and of other non-law subjects of special concern to legal practitioners.

It is also widely recognised that the lawyer's field of practical experience needs to be extended. Lord Wilberforce has particularly enphasised this.

> "I would like to see it made part of the young lawyers' training to spend a period, paid if you like, doing social security work. .....it would give him an invaluable background on which to build later if he is called on to practise or to act judicially in this field."(1).

In relation to industrial injuries and the pathology of work with machines he has recommended that "the law student or the young barrister during vacation or the judge on sabbatical leave spend three months on an assembly line".(2) Further,

> "The educative process in all stages in both branches needs to bring the lawyer into touch with actuarial techniques, and ..... accountancy methods, rather than leaving him with the impression that a gentleman soils his hands by touching figures."(3)

But Lord Wilberforce remains, in common with most of his fellow judges, convinced of the distinction that must be drawn in the trial situation between the judicial decision and the expert advice which either precedes or follows it. He concludes that

> "broadening of education or training or experience is desirable for all lawyers, and all judges should be aware, and be helped to remain aware, of what movements there are in the sciences of the mind. But the lawyers' job and the judges' job do remain distinct from that of the expert."(4).

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(1). Lord Wilberforce, op. cit. p.260
(2). ibid. p.262
(3). ibid. p.263
(4). ibid. p.262.

PART II: THE JUDICIAL CAREER PATTERN

Chapter 4

The Bar[1]

Call to the Bar

The early working life of the average judge is not distinguished by a wealth of experience in fields other than the legal profession; for most, it provides their only paid employment. Professional tradition and restrictive practise have prescribed that the progress of a judge will be peculiarly uniform and well-ordered; a clear pattern emerges, ornamented at each stage by an antique terminology and ritual.

Every judge begins as a student at one of the Inns of Court; to become a student, a person must satisfy the University matriculation requirements,[2] produce two character references and pay the necessary fees. A student at an Inn of Court must not be gainfully employed unless the Benchers allow that this is compatible with his position as a student; membership of another profession is a disqualification. A student is usually eligible for call to the Bar when he has passed the Bar examinations, kept eight dining terms,[3] paid the appropriate fees, attained the age of 21 and signed the Call Declaration. The student's name and description must also be 'screened' in the Hall, Benchers' Room and Treasurer's Office of all the Inns for four days in the term of his call. Anyone who intends to practise at the Bar must in addition keep another four dining

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(1). This section does not in general apply to those Lords of Appeal appointed from the legal professions of either Scotland or Ireland. For further details on the former see:-

D.M. Walker, The Scottish Legal System. Edin. W. Green 3rd ed. (1969)

N. Wilson, The Sociology of a Profession: The Faculty of Advocates. Unpub. thesis. Ph.d. Edin. 1965.

(2). Since April 1969 the minimum educational requirement has been passes in five subjects of the G.C.E. Examination, at least two of which must be grade (€) A-levels. Previously only grade (E) was required.

(3). Term is kept by dining in Hall any three days in each term.

terms and either complete a twelve month period of pupillage in the chambers of a barrister of at least five years standing or complete the Practical Training Course provided by the Council of Legal Education.

Since the beginning of the nineteenth century, there has been a decline in the age at which the judges have entered upon their careers as barristers. Call to the Bar was delayed for a

Table XVII The judges' average age of call to the Bar

Period of appointment	Age
1820-75	27.2
1876-1920	25.8
1921-50	25.3
1951-68	25.1

considerable percentage of the nineteenth century judges by their practise as special pleaders. Until the passage of Indictment Act, 1915, an indictment was a pleading on the part of the Crown which, like any other pleading, was open to objection on any one of a great variety of grounds. The pleader, therefore had to anticipate every probable failure by the witnesses to prove the main offence by inserting Counts in the indictment to anticipate any alteration. His task demanded great erudition and skill in all the niceties of pleading and though both the fees and the status were low, special pleading was a recognised method both of earning money and of attracting clients. It served as an excellent apprenticeship to the Bar. Polson quotes an eminent judge, - "There are but two ways of getting on in the law - special pleading or a miracle - I preferred the former."(1) But a number of years practise as a pleader meant that those with such experience were not usually called to the Bar until they were over 30. If those judges known to have been special pleaders are

(1). A. Polson, Law and Lawyers. Vol. I. Longman, Orme, Browne, Green & Longmans, (1840) p.27.

not included, the average age of call to the Bar for the earliest appointments cohort, is reduced to 24.36 years, more in line with the later periods.

About 600 barristers are now 'called' each year to the English Bar: of these 75% are from overseas. Some 4,000 Barristers are actually domiciled in Britain but for many of these it is simply a nominal occupation, which confers a saleable prestige; in addition, industry and commerce or the Civil Service sometimes prove more attractive and lucrative than the Bar. For some time the body of practising barristers stood at just over 2,000(1) with only about 240 newly called barristers entering into practise each year. The professional judiciary, whose numbers have increased appreciably,(2) are, with some minor exceptions, appointed exclusively from practising members of the Bar; it therefore caused some concern that the profession showed no signs of being able to attract more recruits. The Report of the Beeching Commission drew attention to this 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 extension 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."(3)

(1). In the early nineteenth century there were about 800 barristers in practise.
(2). The number of High Court judges has more than doubled in the last thirty years.
(3). Report of the Royal Commission on Assizes and Quarter Sessions 1966-69, para.115 (Cmnd 5143)

The long-term prospects are rather better. In 1971 the Bar Council reported that the number of barristers now in practise in England and Wales is the highest ever recorded - 2,584 - some thirty per cent higher than it was ten years ago and the greatest net increase (5.5 per cent) in a single year since statistics have been kept.(1)

The dilemma of staffing the courts from the resources of the Bar raises the vexed question of whether solicitors should be eligible for appointment to the higher judicial offices. The traditional argument against the appointment of solicitors to the Bench is that in most cases a solicitor's experience in dealing with pure points of law and his knowledge of court procedure and the conduct of trials will be considerably less than that of a barrister. Court skills might perhaps, not be very difficult to acquire, but the selection of judges from over 20,000 practising solicitors, the majority of whom are never seen in action, would be problematic. There are a number of solicitors widely respected for their specialist knowledge in certain fields, such as company law, who rarely consult counsel except where compelled for pleadings and the like to do so; but for many of these judicial office would not present an attractive alternative to an interesting and financially rewarding practise.

The first breach in the Bar's monopoly over judicial appointments has been made by the Courts Act, 1971, under which a solicitor may indirectly become eligible for appointment as a circuit judge: by section 21(2) either a barrister or a solicitor of ten years' standing may be appointed a recorder, and a recorder judge.(s.16). However, although a solicitor in private practice

(1). New Law Journal 1971.

may find it possible to take an appointment as a recorder and in due course become qualified to be a circuit judge, a solicitor who is a stipendiary magistrate or county court registrar is not likely to be able to seek appointment as a recorder since a minimum of 30 days' service a year is expected to be required. Thus, as Professor Borrie has pointed out, solicitors whose existing work might be thought to make them particularly suitable for appointment as circuit judges are virtually ruled out.(1)

Queens Counsel

After a number of years practise at the Bar a barrister may become a Queens Counsel.(2) Originating in the use of irregular retainers for 'learned Counsel' to assist the Law Officers with the Royal Work during the sixteenth century, the Queens Counsel had become by the eighteenth century an established legal order appointed by royal patent. By this time they had ceased to be in any real sense the monarch's counsel and simply became a body of counsel who for one reason or another, often political, had been given a rank superior to that of ordinary counsel.(3)(4) To-day any barrister of not less than 10 years standing may apply for silk by writing to the Lord Chancellor during February

(1). G. Borrie, The Courts Act 1971, New Law Journal June3,1971.p476

(2). Commonly known as 'taking silk' because a Q.C. may wear a silk instead of a stuff gown.

(3). A special license was required for the purpose of appearing against the Crown, but this was refused only if the Crown wished to be represented by the Q.C. concerned. An increasing volume of litigation against the Crown and Crown Departments demanded the eventual abolition of this procedure and in 1920 Queens Counsel were granted a general dispensation to appear against the Crown without a licence.(D.M. Walker op.cit.p.270)

(4). W. Holdsworth, A History of English Law, Vol. I Methuen & Sweet & Maxwell,7th ed. (1966)

asking to be recommended to the Crown.[1] An applicant must be sponsored by two judges who are prepared to answer questions on his ability and status.

The process of granting silk is shrouded in mystery; applicants are not told how to frame their applications and no one knows precisely what criteria are used for selection. Abel-Smith and Stevens deduce

> "..... that the policy is to try to avoid flooding the market, to ensure that the total number of silks in particular fields is not greatly in excess of the amount of work for them to do..... It is also assumed that the character of the applicants is considered; any lapse in the highest standards of professional conduct or even personal conduct may prevent a barrister from ever being appointed..... In these matters it is believed that Lord Chancellors (or the Lord Chancellor's Office) take the advice of the judges on the particular circuit or in the particular division in which the applicant practises."(2)

Until Jowitt's Chancellorship (1944-51), virtually all applications for silk were granted unless there were some clear reason for not doing so. As a result taking silk merely indicated that a junior had reached the state when he would like to cut down on his smaller work. To-day the honour is not granted quite so readily ....."taking silk now involves entering into a totally different existence, and the changing rules for appointment have made the process of applying for silk a test of gamesmanship or brinkmanship."[3] Of the hundred or more barristers who applyfor silk each year, only between twenty and thirty are usually appointed,[4] though the unsuccessful applicants are not debarred from trying again the following year.[5]

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(1). Appointments are announced at the beginning of the Easter vacation.
(2). B. Abel-Smith & R. Stevens, In Search of Justice. Allen Lane, (1968) p.118.
(3). ibid.
(4). 1969 was an unusually good year for silks. 38 were granted. Normally about 10% of the practising bar are Q.C.'s.
(5). The Times (April 5th, 1969) (Editorial).

Youth may be a temporary prohibition.

There appears to be some doubt about the degree of political consideration still remaining in the appointment of Q.C.'s. In 1958 Henry Cecil considered that it was still customary to grant automatically the application of those lawyers who were M.P.'s. and had been called a sufficiently long time.(1) In the mid-sixties Nan Wilson also wrote, "There is a tradition that barristers who become M.P's will be granted a patent of Q.C. on more lenient terms than others and hence, they are sometimes designated artificial silks by their professionally more proficient brethren."(2) P.G. Richards, on the other hand, while recognising this as an earlier practice, believes that it has now been stopped.(3)

In April, 1966, 22 juniors were appointed Q.C's. At the extremes one had been a junior for 33 years and another for only 13 years, but the average time from call to the Bar to taking silk was 19.8 years - twice as long as the traditional period of 10 years which must elapse before a junior applies to the Lord Chancellor for appointment as a leader.(4) Indeed, since 1820, only 8 of the judges had become Q.C.'s after just 10 years at the Bar. At least 6 of these judges had definite political connections; 2 were M.P's when they were created silks, the other four reached the Commons after their elevation to that rank.

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(1). H. Cecil, Brief to Counsel. Michael Joseph,(1958) p.150

(2). N.Wilson, The Sociology of a Profession : The Faculty of Advocates. Unpub. Ph.D. Edinburgh (1965) p.38.

(3). P.G. Richards, Patronage in British Government. Allen & Unwin (1963) p.136.

(4). H.R. Harris, The Legal Profession in England and Wales Unpub. Ph.D. Reading. (1966) p.265.

Significantly also, the majority were destined for the highest judicial office, among them, Lord Chief Justice Hewart and Lord Evershed, a Master of the Rolls, who was made a Q.C. at the very tender age of 34; an achievement surpassed only by William Garrow one of the early nineteenth century Barons of the Exchequer who received his silk when he was only 33. Most of the judges were obliged to wait rather longer for the honour and as the following table demonstrates, there has been little change in the pattern of "promotion".

Table XVIII

The judges' average age of taking silk.

Period of appointment	Avarage age of taking silk.	Average time from call to Bar to taking silk.
1820 - 75	44. 0	17. 6
1876 - 1920	43.5	18. 1
1921 - 50	43. 2	18. 2
1951 - 68	45. 9	21

In Brief to Counsel, Henry Cecil emphasises that to remain a junior does not mean that a barrister is of small importance. Many juniors, he says, become County Court judges and a few become High Court judges without ever becoming a Queens Counsel.(1) The immediate advantage that accrues to a barrister when he takes silk is that he will for the most part only deal with court work and will have the assistance of a junior. A Q.C. will also earn higher fees, although overall a junior may earn more than a Q.C. A successful junior may indeed experience a sharp reduction in fees, if he fails to attract sufficient work as a leader.

(1). Cecil. op. cit. p.147.

Yet if a barrister sets his sights on the Bench, it is almost imperative that he take silk. A Queen's Counsel is, in Mrs. Gaskell's words, "as like to be a judge as a kitten is like to be a cat;"(1) for the past century, over 80% of all the English judges have been drawn from their ranks.

During the earlier part of the nineteenth century, fewer, though still a majority of barristers trod the 'silken' path to the Bench. Some chose instead, the alternative route by which a successful barrister might raise himself above the ordinary counsel, namely the acquisition of a patent of precedence. This conferred the same dignity and privileges as a silk but did not carry the disabilities which attached to the office of a leader; until 1920 a Q.C. could not appear against the Crown without the Crown's license and, as the office was a paid one, appointment to it vacated a seat in Parliament. A patent of precedence did not expose its holder to these disadvantages; nor was he obliged to abandon the smaller work of the Bar. As the Law Journal commented in 1926 "It is not easy to say exactly why it has become extinct."(2)

In the case of the nineteenth century judges, if those who had held patents are included with the silks, the percentage of the judiciary selected from amongst the 'senior' barristers moves closer to the contemporary figure, almost 70%; but even allowing for this the trend is towards a greater silk monopoly. This tendency was observed with regret, by Ensor some forty years ago.(3) "Some of the most learned and judicially minded men at the Bar at any given time will not be K.C's or at any rate not fashionable ones. But in England it is difficult for Lord Chancellors - themselves always famous ex-advocates - to give due weight to this," he wrote. Not so much regard should

(1). Mrs. Gaskell, Wives and Daughters, Smith,Elder & Co.(1883)p376.
(2). Law Journal, (Oct. 30th 1962)p.283.
(3). R.C.K. Ensor, Courts and Judges in France,Germany and England. O.U.P. (1933) p.108.

Table XIX

The Bar histories of the judiciary

Period of appointment	Percentage of judges who were:- Queen's Counsel	Junior Counsel to the Treasury	Holders of patents of precedence	Other Counsel	Total[1] judges
1820-75	60.4% (64)	5.7% (6)	7.5% (8)	26.4% (28)	100% (106)
1876-1920	83.2% (79)	10.5% (10)	1.1% (1)	5.3% (5)	100% (95)
1921-50	84.9% (73)	7.0% (6)	-	8.1% (7)	100% (86)
1951-68	83.3% (70)	7.1% (6)	-	9.5% (8)	100% (84)
1820-1968	77.1% (286)	7.6% (28)	2.4% (9)	12.9% (48)	100% (371)

(1). These figures do not include the Scottish or Irish Law Lords, although most of them have been silks. The status of Queen's Counsel was not conferred upon Scottish advocates, except upon the Lord Advocate, Solicitor-General and Dean of Faculty, until 1897. "At this time", writes Nan Wilson, "members of the Scottish Bar of great seniority and experience were offended by the attitude of English 'silks' who claimed precedence over them in the House of Lords, Privy Council and in Parliamentary Committees, where Scottish and English counsel had the right of audience. Accordingly in 1897 the Faculty petitioned the Queen to create a roll of Queen's Counsel in Scotland". Mrs. Wilson concedes that it is probably easier to become a Queen's Counsel in Scotland than in England: and that within the profession itself the office probably does not command the same prestige as it does in the South. (Wilson.op.cit.)

be paid in appointing judges, to standing at the Bar, and more, said Ensor, to the possession of distinctively judicial qualities; his advice had little effect. An unfortunate consequence of appointing judges almost solely from Q.C's. is that many able juniors and solicitors believe, though probably without foundation, that the judges will only listen to the silks.(1)

Only one other category of barristers has a really favourable chance of being appointed superior judge, the Junior Counsel to the Treasury. These two Treasury 'devils' appear on behalf of the crown in civil cases, on the instructions of the Treasury Solicitor, - one in common law, the other in equity. The appointments carry considerable prestige and are reserved for barristers of some standing; of the 26 Junior Counsel who held office between 1879(2) and 1968, all but five were, after a few years, appointed to the High Court Bench.(3)

Until 1873 it was traditional that, whether or not they were also Queen's Counsel, all common law judges should be appointed from the ranks of the Serjeants-at-Law. The serjeants were the earliest and most exclusive of the various classes of lawyers; (4) they rapidly acquired a monopoly of advocacy in the Court of Common Pleas after its identity was clearly established in the thirteenth century and later as the practise of appointing ecclesiastics to the Bench died out, took over the prerogative for themselves, though the qualification of the coif was never laid down in a statute. But from the beginning of the seventeenth century onwards it was increasingly common

(1). R.C.K. Ensor, op.cit. p.107 fn.1.
(2). Prior to this date the names of the Junior Counsel to the Treasury are not recorded in the Law List.
(3). The Junior Counsel to the Treasury should not be confused with the Treasury (or Crown) Counsel, who are the permanent prosecuting counsel at the Central Criminal Court; these counsel originally briefed by the Treasury Solicitor, hence the name, have since 1908 been instructed by the Director of Public Prosecutions. (J.U.J.Edwards, The Law Officers of the Crown. Sweet & Maxwell, (1964) pp. 390-91. (4). J.H. Baker, A History of the order of Serjeants at Law. Unpub. Ph.D. thesis. London. (1968)

for barristers to be created serjeant and judge more or less simultaneously, and many famous judges, including Coke, Blackstone and Mansfield, never practised as serjeants in the Common Pleas. In his thesis on the history of the order J.H. Baker observes that, "About half the members of Serjeants' Inn in the nineteenth century had gone there merely to satisfy the legal requirement; although some judges were still chosen from the serjeants, this had become the exception rather than the rule."(1) Thus of the 56 common law judges appointed between 1820-75 only 16 had been granted the title any significant time before their appointment to the Bench. "After 1850 only two new judges (Hayes and Pigott) had been practising serjeants, whilst over thiry were appointed per saltum. The fiction", writes Baker, "reached its height when Sir Robert Collier, Attorney-General was made a serjeant in order to be made a justice of the Common Please in order to be made a member of the Judicial Committee of the Privy Council, a double leap which occasioned a storm of criticism."(2)

The 1873 Judicature Act,(3) recognising the mere formality of the procedure, provided that no person appointed a judge should be required to take or to have taken the degree of serjeant-at-law. The first High Court judge without a coif was Manisty, appointed on October 31st, 1876. The eventual extinction of the order of serjeants had been determined in 1670 when it was finally settled by a decision of Charles II that the King's Counsel should take precedence over all except the King's Serjeants. The order itself was never dissolved but the last

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(1). J.H. Baker. op.cit.p.
(2). ibid.p.270.
(3). 36 & 37 Vict. c.66 s.88.

non-judicial serjeants were created in 1868 and the last serjeant, Lord Lindley, died in 1921.

The would-be judge moves steadily up the legal hierarchy and, but for excursions to the Palace of Westminster, has little opportunity to acquire experience in other walks of life; most begin and continue without break in the legal profession, constrained by professional regulations, the high opportunity-costs incurred in any attempt to broaden horizons and the inexorability of the career process. The one time when he may acquire some extra-curricular experience is in the early, financially stringent years at the Bar when he may undertake some private work; but even this is usually confined to the legal sphere - tutoring candidates for law examinations, lecturing and examining in law at universities and for the Inns of Courts, law reporting and writing legal articles. A number undertake some form of journalism but only about 10% of all the judges covered by this study are known to have been employed entirely outside the legal profession; these were in a variety of occupations - auditor, trainee architect, scientist and inventor, apprentice auctioneer, medical attendant, stock jobber and war-time broadcaster. Few of the most recent judges have deviated far from the legal path, though Mr. Justice Ormrod of the Family Division was for a while house physician at the Radcliffe Infirmary, Oxford and for many years lecturer in forensic medicine at Oxford Medical School, and Mr. Justice Glynn-Jones, formerly of the Queens Bench, is a qualified pharmacist.

Though the judges may have been reluctant to venture beyond the legal pale altogether, it has not been uncommon for them to

Table XX

Judges with experience in a solicitor's practice.

Period of appointment to the Bench	Former solicitors	Articled or otherwise employed in a solicitor's office	Total judges with experience of solicitors' work	Percentage of all judges(1) with such experience
1820-75	4	15	19	17.9%
1876-1920	6	7	13	12.6%
1921-50	4	1	5	5.5%
1951-68	5	-	5	5.8%
Total				
1820-1968	19	23	42	10.8%

(1). Scottish and Irish Law Lords are included in this table.

sample life in the junior branch of the profession before assuming the more prestigious, if sometimes less lucrative, role of barrister. During the nineteenth century, such experience was viewed very favourably. In 1840, one legal mentor recommended "a clerkship in a solicitor's office" as "a useful school for the bar;" Lord Brougham, he said, had once publicly declared in the Court of Chancery, that if he had to recommence his legal studies he would begin as a clerk in an attorney's office.(1) And this was in spite of the fact that from 1762 onwards an attorney or articled attorney had to discontinue practising as such at least two years before call to the bar.(2) Since 1961(3) time spent as an admitted solicitor has been included in years of standing at the Bar for the purpose of meeting requirements for appointment to a judgeship, and according to one former judge, though only a very few barristers are intially solicitors, a high proportion of these find their way to the Bench, demonstrating perhaps the possession of strong achievement motimation ?(4) Nonetheless, in the absence of any actual data on the proportion of all barristers who begin their professional life in solicitors' offices, it is impossible to assess properly the significance of such experience for future success.

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(1) Polson op.cit. pp.28-9

(2) R.Fletcher ed., The Pension Book of Grays Inn, Vol II, 1669-1800 Chiswick Press, (1910) p.xxiv

(3) Barristers (Qualification for Office) Act, 1961.

(4) Cecil op.cit. p.14

Judicial experience.

Though becoming a Queens Counsel or a Treasury 'devil' may be a prerequisite of appointment to the superior judiciary, critics of the system may not consider these ranks sufficient recommendation for the exercise of the judicial function; for if an English judge is the apotheosis of impartiality, then the senior members of the Bar, nourished by a diet of fierce advocacy, must lie close to the opposite pole. Yet the two roles are not wholly incompatible, nor the qualities which they require mutually exclusive; for the barrister does not choose the position he must take up in any particular case, even though at times the assumed role and his own feelings may coincide. Indeed, the less the partiality shown by an advocate to his clients the better; a barrister has the advantage who appreciates and hence anticipate his opponent's arguments. Further the years of practical experience at the Bar enables a judge to consider the arguments of counsel with greater discernment, discounting those elements which derive more from forensic art than from fact.

Lord Diplock in a lecture given at Kings College, London, emphasised that 'by far the greater part of the Judge's task was to find out what actually happens.'(1) Our judicial process is based on the adversary system and our Courts are bound by strict rules of evidence; these factors, he said, 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 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

(1). 3. Dec. 1969.

and often also to a jury of ordinary men and women. It was Lord Diplock's opinion that no one who had not himself had considerable experience of the practise of advocacy could successfully carry out this part of the judicial function.

Yet despite these affinities between Bar and Bench, the essential difference in function remains; the transition from barrister to judge might have caused more problems were it not for the fact that candidates for the higher judiciary have had the opportunity for acquiring some judicial experience in an inferior court, whilst they are still practising at the Bar. At the Common Law Bar most silks and some juniors with criminal practices were, until 1972, appointed as Recorders, the sole judges of borough Quarter Sessions. Since this office was part-time only, the appointee might continue in private practice. It was also customary to supplement the numbers of the High Court judges on circuit by the appointment of silks as Commissioners of Assize. Both offices were often a prelude to appointment as a High Court judge. Some of the judges studied had also gained experience as Chairmen or Deputy Chairmen of Quarter Sessions and in various other inferior courts, such as the Salford Hundred Court of Record, the Crown Court at Liverpool, the Appeal Court of the Isle of Man and the Court of Bristol Tolzey; some of the Law Lords were, of course, appointed from Scottish or Irish courts. As Table XXI shows, it became increasingly rare for a barrister to be appointed to the superior courts without a 'trial-run' in at least one, and often more, of the lower courts, so reducing the possibility of an 'unfortunate' appointment. But, with the replacement of

Table XXI

The judges' experiences in the lesser courts.

Period of appointment	Number of Judges	Percentage of judges with previous judicial experience	Average number of previous judicial offices held by each judge with previous judicial experience	Percentage of recorders among the judges with previous judicial experience
1820-75	106	35.8% (38)	1.13	65.8% (25)
1876-1920	95	35.8% (34)	1.12	70.6% (24)
1921-50	85	52.4% (44)	1.25	65.9% (29)
1951-68	84	71.4% (60)	1.93	85.0% (51)
1820-1968	370	47.6% (176)	1.43	73.3% (129)

The figures in this table are somewhat distorted by the inclusion of the Chancery judges, who do not normally have the opportunity to acquire judicial experience before their appointment to the Division. A clearer picture of the majority of the judiciary may be given by ommitting the Chancery bench from this analysis. The percentage of judges in each period from 1876 onwards, having experience of the lower courts, then becomes 47.2%, 68.8% and 82.1% respectively.

quarter sessions, assize courts and the ancient local courts by the Crown Court system, it is estimated that there will be a considerable reduction in the use of part-time recorders and that the appointment of deputy Circuit and High Court judges will be less necessary than the frequent appointment in recent years of commissioners of assize.(1) Future opportunities for acquiring preliminary judicial experience will therefore be much reduced; accordingly the need for some form of training for judges after appointment will become more pressing.

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(1). G. Borrie, "The Courts Act, 1971" New Law Journal, (June 3, 1971)

> "Every judicial appointment is a leap in the dark and the wonder is that we do not more often fall into a crevasse" - Mr. Justice Megarry (1)

> "---- anyone who is appointed a judge is, I suppose, as astonished at the metamorphosis which is forced upon him as a colourless grub that suddenly finds, he can fly with painted wings" - Lord Wilberforce (2)

Chapter 5.

Judicial Office

Appointment to the Bench

The judges, we have observed, are usually appointed from amongst those who are considered the most eminent members of the Bar - the Queens Counsel and the Treasury Counsel. Baldwin once told Laski that when a judgeship was vacant "an average of 100 KC's. write in to explain their claims ...."(3) Apart from professional competence, the only other requirement is unquestioned moral probity; before the war no divorcees were appointed to the bench, and even now, according to Abel-Smith and Stevens,

> "---having been the guilty party in a divorce case would be a serious detriment to anyone wishing to reach the bench..... Even a bachelor with a reputation for high living might find himself out of favour with the Lord Chancellor's Department". (4)

The only formal qualification for appointment is years of standing at the Bar; a puisne judge of the High Court must be a barrister of at least ten years standing; a Lord Justice of Appeal must be either a barrister of fiteen years standing or an existing High Court judge; the Lord Chief Justice, Master of the Rolls and the President of the Probate, Divorce and Admiralty Division must also have spent fifteen years at the Bar,

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(1). R.E. Megarry, Lawyer and Litigant in England (Hamlyn Lecture). Stevens (1962) p.146

(2). Lord Wilberforce, "Educating the Judges", Journal of the Society of Public Teachers of Law. Vol.X.No.4.(Dec.1969)p.

(3). Holmes-Laski Letters (The Correspondence of Mr. Justice Holmes and Laski, (1916-35), ed. Mark de-Wolfe Howe O.U.P.(1953)p.997.

(4). B. Abel-Smith & R. Stevens, In Search of Justice Allen Lane (1968) p.177.

Table XXII

Average age of first appointment to all the superior courts (1)

Period of appointment	Age
1820 - 75	54.93 years
1876 - 1920	54.32 "
1921 - 50	54.32 "
1951 - 68	54.56 "

(1). Includes Scottish and Irish Law-Lords.

Table XXIII

Average age of appointment to the High Court

Period of appointment	Age
1820 - 75(1)	54.58 years
1876 - 1920	53.82 "
1921 - 50	54.21 "
1951 - 68	54.60 "

(1). Includes the Vice-Chancellors.

or be a High Court Judge or a Lord Justice of Appeal; and the Law Lords must be barristers of fiteen years experience or be High Court or Court of Appeal Judges of two years standing. These basic qualifications are usually fulfilled long before there is any chance of judicial appointment. Only one judge since 1829 has been appointed under the age of 40 - Lord Justice Thesiger, who was appointed direct to the Court of Appeal in 1877 when he was only 39 and had had precisely fifteen years experience at the Bar. The vast majority of the superior judiciary have not been appointed until they are well over fifty years old.

Though it is frequently suggested that it is now customary to appoint younger judges, Tables XXII and XXIII show that there has been virtually no variation for at least a century and a half in the average age of appointment to the Bench. Further, an examination of the most recent appointments, that is the nineteen judges appointed to the High Court between 1966 and 1968, reveals a similar average age of 54.79 years. The one change which has occurred since 1820 is in the distribution of the ages of individual judges. Whereas the ages of those appointed between 1820 -75 ranged from 40 to 75 (giving a standard deviation of 6.5), the range for those appointed since 1951 extends only from 46 to 67 (a standard deviation of 4.4). The Bench now receives fewer recruits of either very tender or very advanced years.

Promotion

One notable feature of the appointments to the High Court, demonstrated in Table XXIV, is that those judges destined for promotion to the Court of Appeal or to the Appellate Committee

Table XXIV

Average ages of first appointment to the High Court related to subsequent career pattern

Period of appointment	Average age of appointment to the High Court.		
	All judges	Judges promoted to the Court of Appeal	Judges promoted to the Appellate Committee
1820 - 75	54.58	53.33	46.67(1)
1876 - 1920	53.82	52.0	48.75
1921 - 50	54.21	51.68	51.75
1951 - 68	54.60	52.23	50.40

(1). Only 3 judges.

were, on average, appointed earlier than those who remained in one of the High Court divisions.

I use the term "promotion" cautiously; a regular career system has long been considered incompatible with judicial independence but recent practice has not always given strong support to the doctrine. There used to be a convention that judges after appointment should not be promoted, because the possibility of promotion might tempt them to seek through their decisions the favour of the promoting authority. Certainly this has generally applied to the County Court judiciary. Since the creation of the County Courts in 1846 there had been only one County Court judge promoted to the High Court (in 1920) until the immediate post-war years when 3 County Court judges and the judge of the Salford Hundred Court were appointed to the High Court. But, as Geoffrey Sawer comments, the rarity of such appointments is probably due more to a theory as to the basic qualifications required of judges in the two types of court, rather than regard for the convention of non-promotion, which, as far as the superior courts are concerned, is now largely disregarded.(1) The promotion of judges from the High Court to the Court of Appeal and from both to the House of Lords has become quite customary, as has the appointment of the Chief Justice and Master of the Rolls from among the existing members of the Bench.

In the 1930's appointment from among the Supreme Court judges to the higher judicial offices and to the House of Lords was exceptional. So R.K. Ensor wrote, "It is a fair thing to say that when a man is appointed to the Supreme Court he does not

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(1). G. Sawer, Law in Society. Oxford, Clarendon Press,(1965) pp.73-4

look for promotion but takes his job ..... as something final."[1] Of the important offices, only the Master of the Rolls was commonly promoted from the Bench, presumably because the position called more definitely for juristic accomplishment than that of either Lord Chief Justice or Lord Chancellor, whom the Prime Minister usually chose from among the highest in Bar rank of his political followers, that is, the Law Officers.

The only High Court judges whom Ensor considered to have any significant prospect of promotion to the Court of Appeal were those of the Chancery Division. Table XXV(a) shows the composition of the Court of Appeal in terms of the High Court divisions to which the Lords Justice of Appeal were originally appointed. Judges from the Queens Bench have always formed the majority of the Court of Appeal; in fact their representation has gradually increased. But this is to be expected, simply because they numerically dominate the High Court, considerably outweighing the combined forces of the other two divisions. If this is taken into consideration, to give the proportionate representation of each division, a quite different picture emerges; it is the Chancery judges who have been consistently over-represented, as one might also expect from the nature of their work. Table XXV(b) demonstrates that a Chancery judge has a rather better than fifty-fifty chance of being appointed to the Court of Appeal. That no Probate judges were appointed to the Court until after 1920 is largely explained by the fact that four of the five judges in the division were promoted to the office of President.

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(1). R.C.K. Ensor, Courts and Judges in France, Germany and England O.U.P. (1933) p.5.

Table XXV

Appointments to the Court of Appeal related to initial appointment in the High Court

(a)

Period of appointment to the Court of Appeal	1876 - 1920	1921 - 50	1951 - 68	Total 1876 - 1968
Division of original appointment	Percentage of Lords Justice of Appeal from each division (Numbers in brackets)			
Queens Bench Division	37.8% (14)	46.7% (14)	66.7% (16)	48.4% (44)
Chancery Division	29.7% (11)	36.7% (11)	20.8% (5)	29.7% (27)
Probate, Divorce and Admiralty Division	-	6.7% (2)	29.2% (7)	9.9% (9)
Common Pleas Division	5.4% (2)	-	-	2.2% (2)
Exchequer Division	5.4% (2)	-	-	2.2% (2)
Appointments direct from the Bar	21.6% (8)	13.3% (4)	-	13.2% (12)
Total appointments to(1) Court of Appeal	100% (37)	100% (30)	100% (24)	100% (91)

(1). The numbers of judges from all the divisions - plus direct appointments - is greater than the total number of appointment to the Court of Appeal from 1921 onwards, because a few judges sat in both the Queens Bench and PDA Division.

Table XXV

(b)

Period of appointment to High Court.	1876-1920	1921-50	1951-68(1)	1876-1968
Division of original appointment.	Percentage of judges from each division who are promoted to the Court of Appeal			
	(The number of judges appointed to a division during each period is given in brackets)			
Queens Bench Division	30.2% (53)	34.8% (46)	20.0% (55)	28.3% (154)
Chancery Division	56.0% (25)	52.4% (21)	18.2% (11)	47.4% (57)
Probate, Divorce and Admiralty Division	- (5)	37.5% (16)	12.5% (24)	19.6% (46)

(1). No conclusions may be drawn from the figures for 1951-68, since 'promotions' from this group are not yet completed; the move to the Court of Appeal is made on average after nearly nine years service in the High Courts.

It is no longer the practice, as it was during the first seventy years of the Court of Appeal's existence, to make appointments direct from the Bar. Between 1876 and 1900 over a quarter of the Lords Justices of Appeal were provided by the Bar; significantly 9 (75%) of them had been M.P's. and all but 2 of these were Law Officers.(1) The last direct appointment to the Court of Appeal was that of Lord Justice Somervell in 1946. Similarly, it is twenty years since a member of the English Bar was elevated straight to the lofty heights of the Appellate Committee of the House of Lords, without having first spent some years in either the High Court or the Court of Appeal or, what has been most common, both. Until the 1930's the appointment of political favourites with no judicial experience was more usual, so that commentators such as Ensor and Laski, writing at about this time, considered that the chances of a Supreme Court judge being promoted to the Lords were relatively remote.

> "Here, if anywhere", wrote Ensor, "it might be thought that the principle of promoting tried judges from below would apply; and so it does, but not on a scale that can occasion very great expectations in the breasts of judges of the Supreme Court. For here, too, it is a common practice to appoint barristers who have rendered service in politics but held no previous judicial post." (2)

In fact the early lack of judicial advancement owes rather more to the practice of reserving a proportion of the places on the Appellate Committee for representatives of the Scottish and Irish Bench and Bar than to political preferment; whilst only four of the 22 Law Lords appointed before 1921 were recruited direct from the English Bar, 8 were Scottish or Irish lawyers, -

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(1). See Chapter 7.

(2). R.C.K. Ensor, op.cit. p.4.

five of them judges and three barristers. Since 1921, when Carson was raised to the Appellate Committee, only one Irish judge, Lord MacDermott, has received this legal accolade; it is still customary, however, for two or three of the Law Lords to be of Scottish origin;(1) apart from these - 6 in all - the thirty-nine Lords of Appeal appointed between 1921-68 have all been drawn from the Supreme Court.

During the early nineteenth century, when the courts had in any case overlapping jurisdictions, it was not uncommon for judges to be moved from one branch of the superior courts to another; but, towards the end of the century, apart from automatic changes arising from the statutory reorganisation of the courts in the 1870's , the practise of transferring judges within the High Court system was abandoned, and not resurrected until 1945. Since then seven judges have been appointed initially to the P.D.A. Division and later transferred to the Queen's Bench. Apart from these permanent moves between divisions, the judges of the two divisions sometimes assist temporarily in each others courts. The Chancery division is more isolated; the experiment was once tried of sending Chancery judges on circuit, taking criminal cases but, "after the purity of the Chancery Division, they were so horrified whn they were brought face to face with real criminals that they imposed astronomic sentences. The experiment has not been repeated."(2)

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(1). The appellate jurisdiction of the House of Lords in Scottish cases, although not specifically provided for in the Act of Union has never been disputed. Appeals were taken to the House of Lords in the first year of the Union.

(2). H.Cecil, Brief to Counsel.Michael Joseph,(1958) p.48.

Retirement from the Bench[1]

> "A judge," surmised Laski, "is in the first five years of his service, fairly convinced that most of his opinions are wrong in critical cases; in the second five years he will be equally convinced that they are right, and afterwards he will bear himself with serenity whether they be right or wrong. When that serenity becomes habitual, it is time for him to retire." (2)

The Judicial Pensions Act 1959 introduced a retiring age for the judges of the superior courts; those appointed after the passing of this Act and those who choose that its provisions apply to them now retire at the age of seventy-five. Both the St. Aldwyn Commission of 1913 and the 1936 Peel Commission recommended that judges should retire at seventy-two, the normal retiring age in many offices and the age at which County Court judges, since 1934, have usually vacated office. This age limit, however, may be extended to seventy-five for both County Court judges and Circuit judges: it was, therefore, hardly possible to go to a lower figure for the superior judges.

An analysis which confined itself only to those judges who voluntarily retire from office would not give an accurate picture of the judicial cycle, since a considerable percentage of the judiciary do not resign but die whilst still in office. Thus Table XXVI(a) demonstrates that for at least a century and a half, the average judicial career, whether terminated by

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(1). This section includes the Scottish and Irish Law Lords.
(2). H. Laski, A Grammar of Politics Allen & Unwin, 5th ed. (1967) p. 550.

Table XXVI

Average age of judges at the termination of their career

a) All judges

Period of appointment	Total judges vacating office	Average age of either retirement or death whilst in office (to 1 dec.place)	Percentage of judges over 75 at end of judicial career
1820 - 75	103(1)	69.3 years	18.4% (19)
1876 - 1920	103	70.7 "	23.3% (24)
1921 - 50	77(1)	70.6 "	23.4% (18)
1951 - 68	7	67.9 "	14.3% (1)

b) Judges dying in office

Period of appointment	Number of judges dying in office. (Percentage of all judges)	Average age of dying (to 1 dec. place)	Percentage over 75
1820 - 75	47 (44.3%)	68.2 years	14.9% (7)
1876 - 1920	44 (42.7%)	68.8 "	20.5% (9)
1921 - 50	22 (24.2%)	70.6 "	9.1% (2)
1951 - 68	1 (1.2%)	67.0 "	-

c) Judges retiring from office

Period of appointment	Number of retiring judges (Percentage of all judges)	Average age of retirement (to 1 dec. place)	Percentage of retiring judges over 75
1820 - 75	56 (52.8%)	70.1 years	21.4% (12)
1876- 1920	59 (57.3%)	72.0 "	25.4% (15)
1921 - 50	55 (60.4%)	72.0 "	29.1% (16)
1951 - 68	6 (7.0%)	68.0 "	16.7% (1)

(1). 3 judges have been omitted from each of these groups because the data needed to complete the relevant averages has not been obtained.

resignation or the death of the judge, has come to an end some five years before the age which has now been set as the desirable limit to holding office. One might expect that those judges who died in office would be typically older than those who chose to retire, men of declining years reluctant to surrender their high stations; but an examination of the ages at which they died shows that they were rather men whose judicial careers were brought to an untimely end whilst they were still relatively young; only a few of them were over 75.(1)

The average retirement age for the remaining judges appointed before 1950 was both constant and below the new statutory retiring age, although, of course, these averages mask a wide spread of ages; some twenty to thirty per cent. of the retiring judges did not surrender their office until they were over 75. The retirement age of the most recent cohort is lower than that for the previous groups but most of these judges are far from retirement age; it is, therefore, impossible to generalise a trend from this figure. Of the 91 judges appointed between 1921-50 only 11 were still in office at the end of 1968, but all of these, apart from Lord Reid, were still within the retirement limit. Judges appointed before the Judicial Pensions Act have not in general taken advantage of the exemption clause; considering only those judges who, irrespective of the date of their appointment, have resigned from office since 1959, gives an average retirement age of 71.5 years, well below the statutory retiring age, though not significantly lower than in previous periods. In contrast, the American federal judges, particularly

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(1). Until the provisions for pensions were changed by the 1959 Act (see Chapter 6), some judges who were still able to sit, but who were not in really good health, were compelled to remain in office for the full fifteen-year term, in order to qualify for a pension.

those of the Supreme Court, are, despite liberal retirement provisions, more reluctant to leave active service. Far more vacancies occur as the result of death in harness.(1)

Until 1959 a superior judge obviously incapacitated by senility could, technically, be removed from office on a parliamentary address;(2) apart from this there was nothing to stop him sitting in extreme old age. And some did; at least 24 (6%) of all the judges appointed since 1820 were still in office at or beyond the age of 80, the oldest of them all, Mr. Justice Cleasby, still sitting in judgement on his fellow-men when he was 92. Such tenacity was encouraged by the old system of pensions; cases of real disability apart, these were only paid to judges who had completed a full fifteen years' service. Older judges whose powers were failing, but who were still capable of sitting, had therefore a strong inducement to struggle on until they had fulfilled the qualification.

A fixed retirement age for the superior judges was established only after a great deal of controversy. It was opposed principally on the grounds that the Bench might be deprived of men quite capable beyond that age; examples may certainly be cited, notably Lord Reid, who in his eighties is still a mainstay of the Appellate Committee. But these are exceptions and justice may be vitiated by the dimming faculties of old age; for any of the small and powerful body of High Court judges to be unfit in any way is a serious problem. The Court of Appeal can correct some mistakes but justice may be defeated, especially in a jury case, by inattention or partisanship, without committing any technical misdirection or explicit

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(1). H.J. Abraham, The Judicial Process O.U.P. (1968) p. 43.
(2). Though see below pp.175-79.

twist of the law with which the Court of Appeal could deal. Errors of judgement are not the sole prerogative of the old but it is essential that judges inspire confidence, and the public, whether or not there is individual cause, tend not to have so much confidence in a generation that is generally both physically and mentally inactive. Mr. Justice Avory, who continued to sit on the bench until a few days before his death at the age of 83, was undoubtedly in full possession of his faculties, but nevertheless, observes R.M. Jackson, "It was difficult to escape the feeling ---- that a man so old should have no place of power in our society."(1) In similar tone an article in the Economist, written before the establishment of a fixed retirement age, criticised 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".(2)

Laski, surprisingly, was one of those who objected to a retirement age for judges. In 1935 he wrote to Mr. Justice Holmes, "I am having an amusing time with the Lord Chancellor just now trying to prevent him putting an age retirement for judges into his new Bill. I note with amused pleasure that some of the best work in the law is done after 75; that as a rule the younger English judges have not been the most successful; that the older judges are not a whit less radical than the young".(3)

Some feel that even now the retirement age is too high; a Sub-Committee of Justice has for example advocated that some

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(1). R.M. Jackson, The Machinery of Justice in England C.U.P. (1972), 6th ed., p. 373.
(2). The Economist, August 15th, 1956.
(3). Holmes-Laski Letters, ed. Mark de Wolfe Howe, O.U.P. (1953) p. 1475.

distinction be made between trial and appeal judges.[1] A trial judge, has to deal with complex issues of fact and law, summing up immediately the argument in a case is completed. The pace of the appeal courts is more leisurely; there is less reliance on oral proceedings and judgement is often reserved. Most important, appellate decisions are not the decisions of a single judge. The Sub-Committee therefore recommend that the retiring age of all trial judges should be lowered to 70, whilst that for the Court of Appeal remains at 75.

From one point of view, however, it is just as well that some of the more elderly members of the judiciary like Mr. Justice Stable, Lord Justice Danckwerts and Lord Reid, have remained on the Bench beyond the retiring age; there is a limit to which the Bar can, without seriously diminishing its own resources, be called upon to supply recruits for the ever-increasing number of judicial posts.

In August, 1970, the question of judicial retirement took on a whole new aspect, when Sir Henry Fisher, judge of the Queen's Bench Division decided to leave the Bench after only two and a half years to take up a position in the City at a substantially higher salary than he was receiving as a judge.[2] The move was wholly unprecedented and profession and press reacted sharply: the Solicitor's Journal commented,

> "It should not be too much for the country to ask that, in return for the constitutional guarantees of security in their appointments, High Court judges should refrain from resigning unless there are exceptional circumstances". (3)

Many lawyers thought the action inexcusable, a threat to

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(1). Justice Sub-Committee, The Judiciary Stevens (1972) pp. 62-66.
(2). See below pp.182-83.
(3). Solicitor's Journal, August 7th, 1970.

the judges' reputation for probity and impartiality, to their almost sacrosanct status; to accept so readily the enticements of the commercial world was an insult to the Crown, the Bench and the whole profession. Yet, as R.M. Jackson has pointed out, much of the ordinary run of judicial work is characterised by

> "appalling boredom and low intellectual content ---- If a man does accept a judgeship and finds that he has made a mistake it seems very questionable whether he should stick it out until he can retire without comment, for a judge who is bored with his work can hardly be a good judge." (1)

It is clear though that any further departures of this kind would, with the resources of Bar and Bench as stretched as they are at present, pose a serious threat to the quality of the Bench.

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(1). Jackson op. cit. p. 375.

"A judge should try to look as wise as he is paid to look", Lord Hewart C.J.

Chapter 6.

Judicial Remuneration

> "Until judges were paid a comprehensive salary and prohibited from adding to it in any way, it is difficult", writes Henry Cecil, "to say exactly how much each of them was paid. At one time all judges were permitted to add to their salary either by selling offices which were in their patronage or by retaining some of the monies which were paid by suitors for services provided by the Court and it's officers ....." (1)

For centuries the patronage of the Lord Chancellor and the Chief Justices had provided them with incomes considerably in excess of their basic salaries. Until 1833, the Lord Chancellor held eleven offices within his benefice, said to be worth some £24,000.(2)(3) Among the most valuable offices in his gift were those of the Masters in Chancery; these had the care of the suitors' money and earned handsome incomes out of the interest on that money, for which they were under no obligation to account to the suitors. An act of 1551 had forbidden the sale of any office concerned with the administration of justice, but the Lord Chancellor paid little or no attention to the prohibition; Lord Eldon, who probably made more out of the Great Seal than any other man, died in 1838 worth more than £700,000. But all "fringe benefits" from fees and patronage were brought to an end in 1833 when the Lord Chancellor's income was set at £10,000.

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(1). H. Cecil, Tipping the Scales. Hutchinson,(1964), p.209.

(2). A list of the officers formerly in the gift of the Lord Chancellor is given in W. Holdsworth - A History of English Law. Vol.I.

(3). H.Cecil, op.cit. p.225.

The Lord Chancellor continued to receive on appointment a customary 'outfit allowance' of £1,843: 13:0; this covered the cost of items for which he was made liable by acceptance of office, such as state robes, equipages and the stamps on Letters Patent. The Lord Chancellor was apparently expected to spend £1,000 on a silver dinner service, though not all did so; Lord Halsbury used the money for general purposes. In 1912 this part of the allowance was discontinued at the request of Lord Haldane and since then no fixed sum has been granted; instead the Treasury settles the necessary expenses of each individual Chancellor.(1)

During the early nineteenth century, a number of Parliamentary Committees sat to consider the judges' salaries. According to the report of the 1810 Committee, Chief Justices received a salary of £4,000 per annum and were entitled to keep all their suitors' fees; the Lord Chief Baron of Exchequer had a fixed salary of £3,500 and could receive up to £1,500 in fees; while puisne judges received £2,400 plus a possible £1,600 in fees. Pecuniary independence was imposed on the Bench by the Judges' Salaries Act of 1826; the Chief Justices lost their rights to sell offices and all the judges were given fixed salaries.(2)

The Chief Justice of the Kings Bench was given a salary of £10,000 and the Chief Justice of the Common Pleas, £8,000; the Master of the Rolls and the Chief Baron of the Exchequer

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(1). Public Records Office . 1912-18 Lord Chancellors: appointments and retirements. Ref. L.C.C.2. 326 1522/2.

(2). In 1836 the bishops were also given a regular stipend by the Ecclesiastical Commissioners.

received £7,000, the Vice-Chancellor £6,000 and the puisne judges £5,500. All the judges were awarded substantial pensions. Because of the opposition which the innovation of fixed salaries had aroused, more than due recompense was paid for the loss of the previous supplements. Later, the salary of the Chief Justice of the Queens Bench was reduced to £8,000 and that of the other Chief Justice to £7,000; the puisne judges all lost £500.

The salaries of the higher judiciary are normally safeguarded by being charged on the Consolidated Fund, so that unlike most other items of national expenditure, they do not have to be renewed in Parliament each year. Not surprisingly, salary reductions have always been strongly resented and fiercely resisted by the judges. In 1873, Gladstone proposed a cut from £5,000 to £4,000 in the interests of economy.

> "The judges were furious. When asked for comments on the Judicature Bill, they almost all wrote letters to the Prime Minister and Lord Chancellor expressing disgust at the pay cut and almost ignoring the invitation to discuss reform of the courts."(1)

The suggestion was withdrawn.

Again in 1931, the National Government decided to reduce the salaries of the judiciary by twenty per cent in accordance with general cuts applied throughout the whole civil service; the cuts were made under the National Economy Act which provided that the salaries of 'persons in His Majesty's Service' might be reduced. The judges, ably supported by Holdsworth (2) argued that they could not properly be regarded as servants of the Crown and that if their salaries were reduced in this way,

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(1). B. Abel-Smith & R. Stevens, Lawyers and the Courts. Heinemann, (1967) p. 127.

(2). W. Holdsworth, "The Constitutional Position of the Judges" 48 L.Q.R. (1932), pp. 25-36.

the independence of the judiciary would be seriously impaired. A collective memorandum was sent to the Prime Minister.

> "We believe", it said, "that the respect felt by the people for an English judge has been partly due to his unique position, a feeling which will survive with difficulty if his salary can be reduced as if he were an ordinary salaried servant of the Crown. If the salaries of the judges can be reduced almost sub silentio by the methods recently employed, the independence of the judiciary is seriously impaired. It cannot be wise to expose judges of the High Court to the suggestion, however malevolent and ill-founded, that if their decisions are favourable to the Crown in revenue and other cases their salaries may be raised and if unfavourable may be diminished." (1)

This attitude was not likely to endear the judges to the general public, whether it arose from an overdeveloped sense of status or concealed more mercenary motives; all the judges had in fact declared a willingness to share in the common sacrifice but felt the apparent lack of recognition for the independence of their position as "a grievous wrong" not to be endured. One irate judge refused to pay his super-tax and challenged the Commissioners of Inland Revenue to sue him for it.(2) Others, including Mr. Justice Macnaghten, Mr. Justice Maugham and Mr. Justice Avory, threatened to present a Petition of Right. But the government remained adamant and refused to restore the cuts until the economic climate improved. To-day, the judges' concept of pecuniary independence from the State is better supported by the Department of Social Security which spuriously classifies each of them as self-employed person.

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(1). Parl. Debs.,H.C. July 27, 1933.

(2). Holmes-Laski Letters, (The Correspondence of Mr. Justice Holmes and Harold Laski, 1916-35), ed. Mark de Wolfe Howe. O.U.P. (1953) p.1456.

Since 1954 when the emoluments of judicial office were increased for the first time in 124 years, the judges have received fairly regular increments and now receive the substantial salaries shown in Figure III.

Figure III

Judicial salaries[1]

Judicial office	Salary
Lord Chancellor	£18,500
(£14,500 as a judge and £4,000 as Speaker of the House of Lords)	
Lord Chief Justice	£18,500
Lords of Appeal in Ordinary	£17,250
Master of the Rolls	£17,250
President of the Family Division	£17,250
Lords Justice of Appeal[2]	£15,750
Puisne judges	£15,750

An independent review body has now been established which advises the government on the salaries of the judiciary, together with senior civil servants, senior officers of the armed services and the boards of nationalised industry. Increases in the salaries of the higher judiciary, which since 1965 have been made by Order in Council approved by a resolution in each House of Parliament, will in future under the Administration of Justice Act, 1973, be determined by the Lord Chancellor.

Under the Judicial Pensions Act 1959, the judges receive a maximum pension of one half of their salary on completion of fifteen years service or on reaching the age of seventy. Judges

(1). June, 1973.
(2). When the Court of Appeal was created the Lords Justice were given the choice of being made Privy Councillors or of receiving higher salaries than the puisne judges: they chose the former.

who retire after only five years in office receive a pension equal to one quarter of their salary and for service of between five and fifteen years, the pension is fixed on a pro rata basis.

The salaries of the superior judiciary have long been a favourite topic of discussion amongst socio-legal commentators, who appear to see the generosity of their remuneration as standing in need of explanation and justification. Rarely have others in high public office been subjected to similar comment, other than in the course of general egalitarian theses. Yet most of the arguments seem to have ignored the fact that though the office is, both in terms of income and pension, a financially attractive one, the real value of the judicial salary has suffered a dramatic reduction. For over one hundred and twenty years from 1830 - 1954 the judges' salaries remained constant whilst the cost of living and taxation grew steadily; subsequent increases in salary, though considerable, have not been sufficient to offset the losses. Most senior judges are now priced only a little higher than top civil servants and receive considerably less than the chairmen of nationalised industries.(1)

In examining the question of judicial remuneration, it is well to dispense quickly with the notion that the high salaries are designed to lessen the chance of corruption by ensuring that a judge is in a position where he is unlikely to be tempted. There is no evidence to suggest that continental judges, who receive far lower salaries than their English counterparts, are

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(1). G. Routh, Occupation and Pay in Great Britain, 1906-60 Cambridge U.P. (1965) p. 70.

open to bribery; and the declining standard of living of the English judiciary over many years is a clear indication that, once incorruptibility is established, salary has no influence upon integrity.

In 1963, the Times wrote:

> "It is of first-rate public importance that they (the judges) should continue to be men of substance and security. The vast moral authority of the law in this country is bound up in the public mind with the visible dignity of the men who dispense the Queen's justice." (1)

In short, a judge must have sufficient funds to maintain a way of life befitting his station; though since a judge's life outside the courts is notoriously private, the point loses some of its force.

Yet the significance of a high salary may be less one of practical dignity and more one of symbolic prestige. Hilda Kahn, in a study of salaries in the public services, has observed that

> "---- in the case of some very august offices, the salary appears to contain an element of tribute to such office as well as pecuniary reward for its holder. Thus part of the not inconsiderable differential between the pay of a High Court judge and that of a county court judge may well be due not to the actual difference in knowledge and judicial capacity between the two categories, but to the exalted position of the former. A superior judgeship is somehow more conspicuously the repository of the dignity of British Justice than a county court judgeship - which is more of a bread-and-butter affair". (2)

Another explanation of the high salaries is that they are designed to lure successful men from lucrative practice at the Bar. Yet only a very few eminent counsel can expect a very

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(1). The Times, March 14th, 1963.
(2). H.R. Kahn, Salaries in the Public Services in England and Wales Allen & Unwin (1962) p. 361.

high income and this may be severely diminished by taxation, which can fall particularly hardly on those who, like barristers, live by fees and similar payments. Estimates of barristers' earnings show them on average to reach a peak in middle age and subsequently to suffer some decline,(1) partly because of judicial appointments for the abler but also because of the sheer physical strain involved even in maintaining an already successful practice. A judge's salary with pension is worth more than most barristers' practices. Yet there may still be some argument for saying that although promotion to the judiciary undoubtedly means a substantial increase in income for most, the pattern is determined by the really successful. "The salaries", wrote A. Samuels, "should not be such as to deter the best men from accepting judgeships because of much higher earnings at the Bar".(2)

The position of the retiring barrister has been more difficult since March 1968 when the Chancellor of the Exchequer decided to withdraw tax-free allowances on post-retirement receipts. This also affects those appointed to the Bench; for the outstanding fees of the successful barrister were usually sufficient to provide for his outstanding tax liabilities and to cover any immediate drop in his income. At least one judge recently had a minus income and had to sell some capital to pay off the surtax he owed.(3) The real financial advantage of the Bench lies in the prosperous security it provides for the lawyer's later years; a factor which is likely to maintain the present age structure of the Bench.

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(1). Sunday Times, February 5th, 1967.
(2). New Law Journal, 1966.
(3). Observer, August 7th, 1970.

PART III : POLITICS AND THE JUDICIARY.

Chapter 7

Judicial Independence

The Political Experiences of the Judiciary

It is ironical that, despite the apolitical ideal, the only real exception to the judges' lack of experience outside the lawyers' world, has been the time spent by some of them in political activity. The judges themselves have been excluded from the Commons since 1701[1] but the ties between Parliament and the Bar have always been close, with barristers consistently the largest profession in politics. Discussing the structure of politics in the eighteenth century, Sir Lewis Namier wrote,

> "Debates and business in Parliament being of an eminently legal character, 'the gentlemen of the long robe' were welcome in the House, while to them it offered distinct advantages. Most of the highest honours of the profession were usually reached through the House of Commons."(2)

Lord Carson once observed, appropriately enough, that "Though the House of Commons have always disliked lawyers, lawyers have never shown any dislike for the House of Commons."[3]

To-day, roughly a fifth of all M.P's. are or have recently been in legal practise, the majority of them as barristers; according to the Times Guide to the House of Commons 1964, 100 of the 630 Members of Parliament were barristers, (64 of them Conservative, 32 Labour and 4 Liberal). Similarly, the general election of 1966 returned 95 barristers, (54 Conservative,

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(1). Though for two months, from 13 November 1918 to 14 January 1919, Lord Cave was both a Lord of Appeal and Home Secretary. (R.F.V. Heuston, Lives of the Lord Chancellors Oxford, Clarendon, (1964) p.420) See also below p.

(2). Sir Lewis Namier, The Structure of Politics at the accession of George III. Macmillan, 2nd ed. (1968) p.43.

(3). T. Mathew, For Lawyers and Others, William Hodge (1938)

Table XXVII

Political Experiences of the Judiciary

Period of appointment	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Number of judges appointed	106	103	91	86	386
Former M.P's.	51	43	20	4	118
Former Parliamentary candidates	6	11	7	5	29
Total 'political' judges	57	54	27	9	147
Percentage of 'political' judges	53.8%	52.4%	29.7%	10.5%	38.1%

Table XXVIII

Party Affiliations of 'Political' Judges(1)

Period of appointment	1820-75	1876-1920	1921-50	1951-68	Total 1820-1968
Conservative (Tory)	38.3% (19)	48.1% (26)	59.3% (16)	66.7% (6)	45.6% (67)
Liberal (Whig)	49.1% (28)	48.1% (26)	29.6% (8)	22.2% (2)	43.5% (64)
Labour	-	-	7.4% (2)	11.1% (1)	2.0% (3)
Not Known	17.5% (10)	3.7% (2)	3.7% (1)	-	8.8% (13)
Total Political Judges	100% (57)	100% (54)	100% (27)	100% (9)	100% (147)

(1). Until the rise of modern mass parties in the latter part of the nineteenth century, party labels were not so clearly defined. This means that references to party affiliations in the late eighteenth and early nineteenth centuries must be treated with some reservation.

38 Labour and 3 Liberal), and the 1970 election 94 (56 Conservative, 35 Labour and 3 Liberal and other). But while the number of lawyers entering Parliament has remained fairly constant, the number of lawyer-politicians appointed to the Bench has, as Table XXVII shows, declined significantly over the past 150 years. Indeed, no M.P. or parliamentary candidate has been raised to the judiciary since 1962 when Lynn Ungoed-Thomas, a Labour M.P. was appointed to the Chancery Division and the Presidency of the P.D.A. Division was conferred on a Conservative M.P., Jocelyn Simon.

The decline in the number of judges who were once active politicians may be attributed to a fuller acceptance of the idea, energetically propagated by Harold Laski and other early twentieth century radicals, that the exercise of justice should be completely free of all political associations. Yet, while praising all conscious efforts to eradicate any suspicion of patronage from judicial appointments, we have also to recognise that it is no longer easy to combine effectively a successful practise at the Bar with being an M.P., particularly for those who aspire to the Bench. Longer sessions in the House of Commons, the growing demands of committee work and the pressure of constituency business make it increasingly difficult to have both a legal and political career. There are still many barristers in the House of Commons, but with one or two exceptions, these men are not the most eminent members of the Bar and probably aim at ministerial rather than judicial advancement. "Politics and law

have drifted a little apart from each other through a combination of political and economic pressures," writes P.G. Richards, "And this is not a matter for regret".(1)

Of course political experience is not undesirable per se; indeed, it may be valuable in extending a lawyer's range of experience. Certainly, that pillar of neutrality, Lord Chancellor Haldane, believed that a House of Commons training helped "in checking the dangers of abstractness in mental outlook".(2)(3) What is undesirable is if judicial appointments are actually influenced by political considerations, either as a reward for political service or to remove a political opponent. One of the tragedies of an appointments system controlled by politicians is not only that incompetent judges may be appointed but that a potentially first class judge may be lost because he is non-political.

Undoubtedly in the past much attention has been paid to party claims. In his famous six hours speech on the State of the Law, 1828, Lord (then Mr.) Brougham said, in reference to the appointment of judges, that it was a custom "that party as well as merit" should be studied.

> "One half of the bar is thus excluded from the competition; for no man can be a judge who is not of a particular party. Unless he be the known adherrent of a certain system of Government - unless he profess himself devoted to one scheme of policy - unless his party happens to be the party connected with the crown, or allied with the ministry of the day, there is no chance for him; that man is surely excluded. Men must be on one side of the great political question to become judges...."

(1). P.G. Richards, Patronage in British Government. Allen & Unwin, (1963) p.129

(2). Lord Haldane, An Autobiography. Hodder and Stoughton (1929) p.69.

(3). Though this remark referred specifically to the Law Lords.

Giving examples of men who had changed their party in order to fulfill their political ambitions, Brougham went on,

> "The judges have this leaning - they must have it - they cannot help having it - you compel them to have it - you choose them on account of their notoriously having it at the Bar; and you vainly hope that they will suddenly put it off when they rise by its means to the Bench. On the contrary they know they fill a certain situation and they cannot forget by whom they were placed there or for what reason."(1)(2).

A letter sent by Disraeli to the Lord Chancellor, Lord Chelmsford, in 1868 bluntly exposes the political basis of judicial appointments.

> "Dear Lord Chancellor", he wrote, "After all, I regret to observe that Mr. Justice Shee is no more. The claims of our legal friends in the House of Commons, supported as they are by much sympathy on our Benches, must not be treated with indifference, and therefore I venture to express a hope that you will not decide on the successor of Mr Justice Shee with any precipitation. Yours very faithfully, B. Disraeli." (3)

Chelmsford, to his credit, refused to comply with this 'request' though his refusal apparently cost him the Woolsack. But Lord Cairns, his successor, was more amenable and accepted Disraeli's nomination for the vacant judgeship.

Throughout the nineteenth century, patronage was wielded quite indiscriminately at all levels of the judiciary. According to Laski, out of 139 appointments made to the superior courts between 1832 and 1906, 80 were M.P's. at the time of appointment and of these 63 were appointed whilst their party

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(1). A. Polson, Law and Lawyers, VOL. II. Longman, (1840)pp.189-90

(2). Though see below pp.174-75.

(3). Lord Birkenhead, Points of View.

was in office; another 11 had been Parliamentary candidates.(1) Since 1906 a further 227 judges have been appointed to the superior courts; only 23 were M.P's at the time, 19 of them appointed by governments of their own political persuasion. Perhaps the most well-known series of political appointments came during Lord Halsbury's tenure of the Lord Chancellorship. Halsbury, who had won the position of solicitor-general in Disraeli's government by saving Conservative seats in trials of election petitions is said to have almost invariably put service to the Conservative Party above judicial qualities. Yet according to R.F.V. Heuston, Halsbury's correspondence with Salisbury, his Prime Minister, revealed that the possession of a House of Commons seat might be a distinct disadvantage to a candidate for judicial office, however qualified he might otherwise be, since the whips might object to a by-election. Indeed at one stage in the life of the third Salisbury Government, there was a rule requiring the approval of the whole Cabinet before an M.P. was appointed to the Bench.(2) But for this inbuilt restriction, the influence of Westminster on the judicial process during this period might have been more disastrous. On the other hand much of the criticism of Halsbury's appointments may have been exaggerated; Prof. Heuston has estimated that only 7 of Halsbury's 30 higher appointments warrant even the ghost of a suspicion that quality may have been sacrificed on the altar of party patronage.(3)

It has also to be remembered that patronage, of a personal as well as political kind, was until the middle years of the nineteenth century, widely exercised in all walks of life and was the accepted method of distributing desirable posts; it was not then seen clearly as a form of corruption, as an unjust deviation from some more democratic norm.

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(1). H.J. Laski, "The Technique of Judicial Appointment", Studies in Law and Politics. Allen & Unwin, (1932)
(2). R.F.V. Heuston, Judges and Biographers. Inaugural lecture at the University of Southampton (1957) p.12.
(3). Heuston op. cit. Chap 5.

> "You may not like patronage, unless it was on your side, but you had to accept that it existed, that it was respectable, that it was the only known method of selection for a great many official and unofficial appointments, and that it would generally be exercised for personal, political and family advantage."(1)

Indeed, the law, where the possession of some basic learning and integrity was more obviously necessary, was in some ways less susceptible to patronage than say the civil service, the church or the armed forces.(2)

It was not until Lord Haldane's Chancellorship (1912-15) that the policy of political appointments clearly changed, although later Chancellors were not always able to achieve his neutrality, perhaps due to greater pressures from their Prime Ministers. Haldane was clearly fortunate in having as his Prime Minister, Lord Asquith, himself a practising barrister, who was careful to see that every judicial appointment made during his tenure of the office (1906-18) had professional approval. "With Asquith's cordial assent," wrote Haldane, "we decided that in filling the vacancies we would appoint only on the footing of high legal and professional qualifications."(3)

Since the 1930's political appointments have been increasingly infrequent. The Chancellors from 1945 to 1955, Lords Jowitt and Simonds, paid little or no attention to political activities; service in the House of Commons was apparently neither and advantage nor a disadvantage. Abel-Smith and Stevens cite as examples of this neutrality the appointment as a Lord of Appeal of James Reid, a leading Opposition spokesman, by the

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(1). W.J. Reader, Professional Men (The Rise of the Professional Classes in Nineteenth Century England). Weidenfeld & Nicolson, (1966) p.4.
(2). See above pp.30-31.
(3). Haldane, op.cit. p.253.

Labour Government of 1949, and in 1951 the conferring of a High Court judgeship by a Conservative government on a Labour M.P., Terence Donavan.(1) In September 1958 Mr. Grimond referred in a speech to the Liberal Assembly to "the patronage and privilege by which both Socialists and Tories manipulate our politics." Lord Attlee in a letter to the Times, replied, "I was responsible for a large number of appointments to the judiciary and of promotions. Of these the only ones whose political views I know were Lord Somervell and Lord Reid, Conservatives, and Lord Birkett, a Liberal."(2)

However, in an interview with the Economist in 1964, Lord Gardiner did suggest that there had been a revival of political appointments in the not so distant past; a reference, presumably to Lord Chancellor Kilmuir who considered that rewarding men who voted the right way with judgeships was a way of encouraging a higher standard of lawyers in the Commons. He also believed, as did Haldane, that parliamentary life was a way of adding breadth to the otherwise dangerously narrow life of a lawyer, and that such experience should be taken into account in making judicial appointments. Yet even Kilmuir's attitude was a very long way from the overt political patronage which vitiated the judicial system until the 1930's; the road to the Bench is no longer paved with political affiliations and the most recent appointments of M.P. - lawyers have definitely given no cause for renewed anxiety.

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(1). B. Abel-Smith & R. Stevens, In Search of Justice. Allen Lane (1968) p.176.

(2). Thomas Balogh, "The Apotheosis of the Dilettante", H.Thomas ed. The Establishment. Anthony Blond (1959) pp.117-18.

An examination of the political 'records' of the judiciary takes no account of course, of those judges with political leanings who make no overt bid for office within their party,(1) and it has been suggested that the eradication of party patronage has in effect led to a greater imbalance within the judiciary in terms of basic political orientation, that the de facto surrender of judicial appointments to the profession has resulted in a virtual Conservative monopoly. The danger here lies in confusing that small-c conservatism, which is an integral part of the law, with the policies and machinery of the Tory party. Moreover, as Abel-Smith and Stevens point out, not only for the legal profession but for the English in general, being non-political often means being a moderate or inarticulate conservative.(2)

Judicial Preferment

Until recent times the threat to judicial independence posed by the political antecedents of the judges reached its height in the preferment of the Law Officers to the most important judicial posts. Since the sixteenth century the offices of Attorney-General and Solicitor-General have provided spring-boards to the Bench, judicial preferment being granted as a reward for political services. Though whether by ancient right or through sheer political expediency is uncertain. It is clear

(1). The preceding analysis is, moreover, confined to judges active in national politics; those few judges who participated in local politics only have not been included.
(2). Abel-Smith & Stevens op.cit.p.177.
(3). There is evidence of a similar right of preferment in the Irish Republic. "In the instance of a vacancy on the High Court or the Supreme Court the Attorney General has usually the 'first right of refusal as it is called. The Attorney General has been named to such a post seven times under the present Constitution. Only Mr. Patrick Lynch and Mr. Patrick McGilligan were not so appointed" (P.C. Bartholemew, The Irish Judiciary, Notre Dame Press,(1971)).

however that the chief legal advisers to the Cabinet are not the men best suited to fill judicial offices where they might be called upon to consider matters arising from government measures. At a time when such appointments were common, Laski advised that as a safeguard the Law Officers should be disqualified from appointment to the Bench for a period of seven years; in 1932 he wrote,

> "If a vacancy occurs in the highest judicial offices, existing members of the Bench will find themselves barred from access thereto. At the present time, for instance, the Chief Justiceship, the Mastership of the Rolls, and the Presidency of the Probate, Divorce and Admiralty Division are all held by men who played a great part in politics during the last half-dozen years".(1)

An examination of all those who have held high judicial office(2) since 1820 does however not fully confirm the existence of a "doctrine of succession". There has obviously been a strong association between the Law Officers of the Crown and the higher reaches of the Bench. Four of the six barristers appointed to the Chief Barony, between 1820 and the 1870's, when the office was abolished, had been former Attorney-Generals; and of the twenty-one Masters of the Rolls appointed since 1820, nine had been former Law Officers, - 3 of these Solicitor-Generals, 1 an Attorney-General and the remaining five having held both offices. Not all these appointments were made direct from the Law Offices to the Bench however, and it is doubtful whether they were actually 'of right'. Indeed, according to J.B. Atlay, Campbell was probably the only Attorney-General who attempted to assert his "unquestionable right to the Rolls".(3).

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(1). Laski, op.cit p.
(2). Preferment to the Woolsack is considered in Chapter 9.
(3). J.B. Atlay, The Victorian Chancellors, Smith Elder (1906)

The most controversy has arisen, though, over the Law Officers' right of preferment to the Chief Justiceship. J.LL.J. Edwards, who has produced a comprehensive study of the Law Officers, tells of a number of pronouncements from various quarters recognising a limited right of succession.(1) In 1850, for example, when questioned by the Select Committee on Official Salaries on the issue of Judicial patronnage, Lord John Russell, the Prime Minister stated that the Attorney-General of the day had "no claim except for the Chief Justiceship of the Common Pleas". But, says Edwards, the foundation for this belief is not convincing. Out of 42 Chief Justices of the Common Pleas from the beginning of the seventeenth century to the Judicature Act of 1873, mo more than eighteen had previously been Attorney-General, and not all were direct appointments. During the same period, out of 34 Chief Justices of the Queens Bench twelve had been Attorney-General. These figures do not, as Edwards says, bear out a particular right of preferment to the Common Pleas. However, there appears to have developed by the nineteenth century, if not an actual right, certainly a general bias in the appointment of both Chief Justices in favour of the Law Officers. Thus of the 10 Chief Justices of the Common Pleas in office from 1820 until 1880, when the two justiceships were merged, three had been Solicitor-General and five both Solicitor-General and Attorney-General; from 1820-1968 there have been thirteen Chief Justices of the Queens Bench or as they are now called, Lord Chief Justice; nine of these were former Attorney-Generals, 6 of them also Solicitor-General.(2)

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(1). J.LL.J. Edwards, The Law Officers of the Crown. Sweet & Maxwell (1964).

(2). Lord Inskip was the only Lord Chancellor ever to be appointed Lord Chief Justice.

Table XXIX

Political experiences of the Lords Chief Justice

	M.P.	Solicitor-General	Attorney-General	Lord Chief Justice
Lord Tenterden (Charles Abbott)	–	–	–	1818-32
Lord Denman	1819-26, 1830-32	–	1830	1832-50
Lord Campbell	1830-34, 1834-	1832	1834	1850-59(1)
Lord Cockburn	1847	1850	1851-52, 1852-56	1859-80
Lord Coleridge	1865-73	1868	1871	1880-94
Lord Russell	1880-94	–	1886- 1892-94	1894-1900
Lord Alverstone (Richard Webster)	1885-1900	–	1885-86, 1886-92, 1895-1900	1900-1913
Lord Reading (Rufus Isaacs)	1904-13	1910	1910-13(2)	1913-21
Lord Trevethin (Alfred Lawrence)	–	–	–	1921-22
Lord Hewart	1913-22	1916	1919-22	1922-40
Lord Caldecote (Thomas Inskip)	1918-29 1931-39	1922-24, 1924-28, 1931-32	1928-29, 1932-36(3)	1940-46
Lord Goddard	–	–	–	1946-58
Lord Parker	–	–	–	1958-71

(1). Lord Campbell was also Lord Chancellor from 1859-1861.

(2). Lord Reading was the first Attorney-General to become a member of the Cabinet and in 1931, ten years after his retirement from the Bench, he was made Foreign Secretary.

(3). Also Secretary for Dominion Affairs 1939, Lord Chancellor 1939-40, Dominion Secretary 1940 and Leader of the House of Lords 1940.

Table XXX

Political experiences of the Chief Justices of the Common Pleas

1820 - 1880

	M.P.	Solicitor-General	Attorney-General	Chief Justice of the Common Pleas
Lord Dallas	1802-06	1813	-	1818-23
Lord Gifford	1817	1817	1819	1824
Lord Best	1802- 1812-	-	-	1824-29
Lord Tindal	1824-29	1826-29	-	1829-46
Lord Truro (Thomas Wilde)	1831-32, 1834-41, 1841-46	1839	1841,1846	1846-50(1)
Lord Jervis	1832-50	1846(2)	1846	1850-56
Lord Cockburn	1847	1850	1851-52, 1852-56	1856-59
Lord Erle	1837-41	-	-	1859-66
Lord Bovill	1857	1866	-	1866-73
Lord Coleridge	1865-73	1868	1871	1873-80

(1). Lord Chancellor 1850-52.

(2). For three days only.

In 1872 Gladstone had informed the Queen,

> "that the Cabinet have taken this opportunity of recording their opinion that, with the passing of the Judicature Act, all claims of either or both Law Officers to a succession as of right to any particular judicial office (claims which were never adequately established) have naturally dropped; so that their promotion would henceforth rest on qualification and service only, not on the possession of the post of Law Officer".(1)

Again, in 1937, during debates on the Ministers of the Crown Bill, the government of the day denied that there was any foundation for the Opposition's suggestion that the Law Officers were in any way entitled to high judicial office.

Yet despite these expressions of just intent, the claim to the Chief Justiceship seems to have continued until 1946, and to have engendered in 1921 an unpleasant political intrigue of doubtful constitutionality.(2) Lord Reading, the Lord Chief Justice, bored with judicial work, was anxious to return to the "glitter of diplomacy" he had enjoyed as Ambassador to Washington. When the Viceroyalty of India, the choicest prize in the Prime Minister's patronage fell vacant, Reading, a close personal and political friend of Lloyd George, was therefore the main contender. Gordon Hewart, then the Attorney-General, was consequently expected to exercise his 'right' to first refusal of the Chief Justiceship and succeed Reading. Lloyd George, however, wanted Hewart to temporarily give up his claim because of his value to the government in the House of Commons; he planned

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(1). Letters of Queen Victoria, 2nd series. Vol.II. p.290, cited in Edwards op.cit.

(2). The following account is taken from a number of sources, mainly the biographies of the chief protagonists.
R. Jackson, The Chief - The biography of Gordon Hewart,Lord Chief Justice of England 1922-40 Harrap,(1959) Chap 7.
H. Montgomery Hyde, Lord Reading.Heinemann,(1966)pp.313-44.
F.E. The Life of F.E. Smith, First Earl of Birkenhead, by his son the Second Early of Birkenhead. Eyre & Spotteswoode,(1969) pp.402-07.
P.G. Richards, Patronage in British Government.Allen&Unwin(1963)

meanwhile to find some ageing and tractable judge who would fill the post until requested to surrender it to the Attorney-General.

Hewart was unhappy about the proposal and at first refused to stand down, but under pressure of persuasion from Lloyd George and Reading, - he was told that Reading's going to India depended entirely on his agreement to the plan, - and threatened with the possibly permanent loss of the Chief Justiceship, he finally succumbed. It was agreed that he should be given the opportunity publicly to refuse an offer of the post; but this condition was subsequently ignored and press reports were released from Downing Street to the effect that Hewart had agreed to be passed over. The Attorney-General was worried; he had, he realised, received nothing in writing from either the Prime Minister or the Lord Chief Justice mentioning the agreement. Further cause for concern was revealed by Carson to whom Lloyd George had previously confided that though Reading wanted to be made Viceroy, there was some difficulty about money; Reading had lived expensively, he had not completed his full term for pension as a judge and the Viceroyalty carried no pension. Lloyd George and he therefore intended that another judge would fill the post only until Reading had wearied of India, when he would come back to take up his office again in qualify for the pension. If this was their true intention and Hewart had simply been fobbed off with the tale of his own political indispensability, it was never carried out. Reading apparently had second thoughts about depriving Hewart of the Chief Justiceship, temporarily or permanently; at his departure to India he addressed a farewell note to Lloyd George begging him to appoint Hewart, "if you can possibly do it". Montgomery Hyde, Reading's biographer, suggests that

the Prime Minister, annoyed at this about-face, may therefore have seen himself to be released from any earlier plan to re-appoint Reading.(1)

Lord Chancellor Birkenhead, a firm supporter of Hewart's interests, who, suspiciously, had been abroad during the 'discussions' over the appointment, was furious when he heard what had been arranged; he wrote to the Prime Minister setting out in strong terms his objections.(2)(3) "The matter is, in my opinion", he wrote, "of the gravest importance both in relation to the future of our judicial system and to the credit and indeed the existence of the present Government". What they intended was a clear infringement of judicial independence; the Supreme Court of Judicature Act 1873 provided that judges of the High Court should "be removeable only for the most serious judicial misbehaviour and then in the most public and open manner". "The proposal under contemplation, however, would make the Lord Chief Justice a transient figure, subject to removal at the will of the Government of the day, and the creature of political exigency."

If the plan were to become public knowledge, he emphasised, the credit and reputation of both the government and the courts would suffer incalculable harm. Despite Birkenhead's protests and murmerings within the legal profession as a whole, the plan went ahead. In April 1921 Mr. Justice Lawrence was at the age of 77 appointed Lord Chief Justice of England "According to report",

(1). Montgomery Hyde op.cit. p.335.

(2). The full text of this letter, Lloyd George's reply and a further letter from Birkenhead are given in Appendix D

(3). The Life of F.E. Smith. pp.402-07.

writes Montgomery Hyde, "before the appointment was made Lawrence wrote out his letter of resignation, leaving the date blank, which document he gave to the Prime Minister."(1) The following year before the coalition fell he read of his own resignation in the Times. Hewart and Lloyd George had meanwhile resumed their friendship; the bargain was kept and Hewart became Lord Chief Justice. The incident stands as one of the grossest abuses of the judicial appointments system in recent times and it is ironic that Hewart who appears, by comparison, as the more sympathetic personality in the proceedings was later to be indicted as "perhaps the worst Lord Chief Justice of England since the seventeenth century."(2)

In 1946 the pattern of appointments to the Chief Justiceship was changed when Mr. Attlee selected for the post Lord Goddard, a judge of some fourteen years experience, at all levels of the superior courts, who, though he had run as an Independent Conservative candidate in the 1929 election was not an active lawyer-politician. In 1958, when the retirement of Lord Goddard was though to be imminent, letters appeared in the Times pressing for a similar appointment; the petition was granted in the person of Mr. Justice Parker of the Queens Bench Division.

It has been suggested that Gladstone, who repudiated the Law Officers' right of preferment to the Chief Justiceship, was himself largely responsible for the establishment of a new claim to the Mastership of the Rolls. The grounds for this are to be

(1). Montgomery Hyde op.cit. p.344.

(2). Heuston op.cit. p.519.

found in letters written by Gladstone in 1881 and 1883 to Sir Henry James, his Attorney-General, in which it was apparently assumed that he was entitled to be offered the offices of Lord of Appeal and Master of the Rolls respectively. Similar overtures were made to Farrer Herschell, Solicitor-General from 1880-85; he, too, declined the posts. But the evidence is not wholly convincing; the offers, comments J.LL.J. Edwards, probably owe more to outstanding personal qualifications than to any renewal of a right to advancement.(1) The same judgement might be applied to the last two incumbents of the Presidency of the Probate, Divorce and Admiralty Division, who were both former Solicitors-General. Sir Jocelyn Simon, particularly, was the leader of the divorce bar.

In 1871 Robert Porret Collier, a former Attorney-General, was appointed to the Bench of the Common Pleas; he was the last of the very few nineteenth century Law Officers, mostly Solicitors-General, to accept an ordinary puisne judgeship and his was in fact, only a token appointment for a few days, a technical qualification for the paid judgeship on the Judicial Committee of the Privy Council which he was then given. Since that time only one other former Law Officer has been made a High Court judge; Lynn Ungoed-Thomas, Solicitor-General in 1951 was, in 1962, raised to the Chancery Bench. Law Officers have usually been inclined to covet the more illustrious judicial prizes.

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(1). Edwards op.cit.

I have suggested earlier[1] that the past membership of the Appellate Committee of the House of Lords has been less vitiated by political appointments than some writers have led us to believe; Tables XXXI (a) and (b) illustrate the point. Of the 62 Lords of Appeal appointed between 1820 and 1968, 40 (64.5%) had no political record whatsoever; and of the 18 (29.0%) Law Lords who had formerly been Law Officers, only five were English, the remainder being appointed from either the Scottish or Irish Bars.[2] The tables also demonstrate quite clearly that the vast majority of the Law Lords, whether or not they had previously been active in politics, had, contrary to Ensor's view been promoted from some other superior court. In defence of Laski and Ensor, it must be said that the appointment of politician-lawyers to the Lords was most prevalent in the period of their writing, and the activities of some of the higher judges more political than at any time since.

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(1). See Chapter 5.

(2). The practice of appointing the Scottish Law Officers to High judicial office persists. In D.M. Walker's words: "Appointment as Lord President or Lord Justice-Clerk is usually made direct from the Bar, usually by the promotion of a Law Officer. Only occasionally has the Lord Justice-Clerk been promoted Lord President, and it is rare for a judge already on the Bench to be promoted Lord President or Lord Justice-Clerk. It is apparent that promotion to the Bench is commonly the reward for political service or support, and there is practically no chance of promotion to the Bench for the advocate who is politically inactive, unless he should attain the office Dean or Vice-Dean of Faculty, though it is fair to say that the system has brought to the offices of Lord President and Lord Justice-Clerk and to the Bench some outstanding lawyers whose contributions to the development of Scots law have been of permanent value . Some others have been merely adequate." (The Scottish Legal System, Edin. Green 1969)

Table XXXI

Judicial and Political experiences of the Law Lords

a) English

Period of appointment to Appellate Committee	Number of English Law Lords appointed during period	Law Lords with previous experience in the superior courts			Law Lords with no previous experience in the superior courts		
		Law Officers	M.P's.	Others	Law Officers	M.P's	Others
1876-1920	13 (100%)	1 (7.7%)	1 (7.7%)	7 (53.8%)	3 (23.1%)	1 (7.7%)	-
1921-50	18 (100%)	-	-	17 (94.4%)	-	-	1 (5.6%)
1951-68	14 (100%)	1 (7.1%)	1 (7.1%)	12 (85.7%)	-	-	-
1876-1968	45 (100%)	2 (4.4%)	2 (4.4%)	36 (80.0%)	3 (6.7%)	1 (2.2%)	1 (2.2%)

b) Scottish and Irish

Period of appointment to Appellate Committee	Number of Scottish and Irish Law Lords appointed during period	Law Lords with previous experience in the superior courts of Scotland or Ireland			Law Lords with no previous experience in the superior courts of Scotland or Ireland		
		Law Officers	M.P's.	Others	Law Officers	M.P's	Others
1876-1920	8 (100%)	5 (62.5%)	-	-	3 (37.5%)	-	-
1921-50	6 (100%)	1 (16.7%)	1 (16.7%)	-	3 (50.0%)	-	1 (16.7%)
1951-68	2 (100%)	1 (50.0%)	-	1 (50.0%)	-	-	-
1876-1968	16 (100%)	7 (43.8%)	1 (6.3%)	1 (6.3%)	6 (37.5%)	-	1 (6.3%)

The Law Lords,[1] as full members of the House of Lords, eligible to take part in all the work of the House, [2] are, more than any of their fellow judges, at continuous 'political risk'. A convention debarring judicial peers from participation in debates of a politically controversial nature is now meticulously observed; in the past it has been much abused. Thus in April 1925, Laski wrote to Mr. Justice Holmes, "Here, at the moment there is a tendency to judicial nepotism that is harmful and judges are doing more (e.g. Carson and Summer) in the Lords than is, I think, wise."[3].

The appointment of Edward Carson as a Lord of Appeal in 1921 had been ill-advised. Carson, a successful barrister and M.P.[4] was at the heart of the violently controversial Irish question, had become indeed the acknowledged leader of the Ulstermen both in and out of Parliament and was reckless in his devotion to the Orange cause. Even on a professional basis, the appointment was a surprising one; Lords of Appeal are, as P.A. Bromhead observes "generally men who have distinguished themselves in the rather more narrow fields of the Law than

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(1). The term Law Lords, may be used in a broad sense to include all peers holding or having held high judicial office; here it is used to designate only the Lords of Appeal in Ordinary, the Lord Chief Justice and the Master of the Rolls, i.e. all the sitting judicial peers, except the Lord Chancellor.

(2) It is possible for a Law Lord to be appointed to an ordinary ministerial office. Lord Macmillanwas appointed Minister of Information in 1939, but, writes P.A. Bromhead, this wartime precedent should not be regarded as of general validity.(The House of Lords and Contemporary Politics 1911-57,Routledge (1958)

(3) Holmes-Laski Letters (The Correspondence of Mr. Justice Holmes and Harold Laski 1916-35)O.U.P.(1953)p.733.

(4) Carson was a Unionist M.P. from 1892-1918, held office as First Lord of the Admiralty in the Conservative Government (1917) and was a member of the Coalition War Cabinet. (1917-18).

Lord Carson."(1) Of all this Lloyds George and Birkenhead, who selected him, were fully aware. If, as Carson's biographers suggest, they had by the appointment reckoned on procuring his silence, they had seriously miscalculated.(2) When, soon after Carson's appointment the Coalition negotiated a Treaty between England and Ireland setting up the Irish Free State, the new Law Lord not only spoke in the House of Lords on this explosive political question, but also made a violent speech at a meeting in Burton-on-Trent in which he denounced the 'treachery' of the government to the loyalists in Southern Ireland. His conduct was severely criticised and the general question of the Law Lords right to free political comment discussed at some length in the House of Lords.(3)

Most of Carson's fellow judges strongly disapproved of his activities. Involvement in controversial political issues, said Lord Buckmaster, must inevitably damage the reputation of the whole judicial system. Judges should be impartial in politics as in law. The Lord Chancellor's reaction was more heated;

> "If a Law Lord in this House is to be at liberty to go upon a political platform and to make party attacks upon the Government of the day", he demanded, ".....is there anything in the world to prevent the whole body of our Judges and Nisi Prius Judges distributing themselves in political hordes over the country, supporting and opposing candidates, impeaching or defending the Government of the day?"(4)

Viscount Finley and Lord Sumner supported Carson, but Sumner was far from being a neutral commentator himself. His

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(1). Bromhead op.cit.
(2). E. Marjoribank & I. Colvin, The Life of Lord Carson Gollancz (1932-36).
(3). Parl. Debs. (HL). Vol. XLIX, 22nd, 27th, 29th March 1921.
(4). ibid 22nd March cols. 903-5.

participation in the legislative work of the Lords was probably greater than that of any of his fellow Law Lords,(1) and in 1926 Laski wrote of him, ".... I can see in recent years here definite signs ..... of a definite interaction between his decisions in the Lords and the speeches he (very wrongly) makes there in eager defence of Toryism".(2) In the debate on Carson, Sumner's evidence on the political activities of earlier legal peers was firmly rejected by Haldane; Lord Chief Justice Ellenborough had certainly sat in the Cabinet but his presence there had given rise to sharp public criticism,

> ".....so sharp that no Lord Chief Justice will ever sit in the Cabinet again.....Lord Macnaghten, it is said, took part in debates, and I dare say that Lord Watson(3) did also. But these eminent men made it perfectly clear that although they claimed the right as Peers they never spoke on great partisan questions. They felt that if they did it would be disastrous to the prestige and confidence enjoyed by your Lordships' House as a judicial body. It is difficult to combine the functions of a judge and a politician."(4)

Laski's reaction to the debacle was surprisingly light-hearted.

> "The latter (Carson) is now the stormy petrel of the Lords", he wrote, "and though I agree with Birkenhead that his political activities are intolerable in a judge, I must say that he adds to the spice of life."((5).

Despite the furore, Carson remained in office; but from that time the non-political role of the Law Lords was more clearly established and the situation has never been repeated.

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(1). G. Drewry & J. Morgan, "Law Lords as Legislators" Parliamentary Affairs, VolXXII. No.3 1969, p.233.
(2). Holmes-Laski Letters. p.845
(3). Lord Macnaghten, Lord of Appeal in Ordinary, 1887 - 1913.
Lord Watson, " " " " " 1880 - 99.
(4). Parl. Debs. (HL)Vol.XLIX. 22nd March, 1922, col.724
(5). Holmes-Laski Letters. p.415

There was indeed a conscious policy at the end of the twenties to replace obviously political Law Lords who retired with 'professional' men such as Atkin and Russell.(1) A recent study of the legislative activities of the Law Lords during the period 1952-67,(2) demonstrates that their contributions to House of Lords debates are now confined principally to discussing the legal/moral implications of law reform. By and large the contemporary Law Lords, unlike their 1920 forebears live up to their image as a politically neutral caucus of legal advisers.(3)

(1). R. Stevens, "The Role of a Final Appeal Court in a Democracy; The House of Lords Today". Mod.Law Rev.161 XXVIII No.5. (1965) p.517.
(2). Which is given in support of this thesis.
(3). Drewry & Morgan, op.cit.

Security of tenure

Once in office, it is essential to freedom that the judiciary be wholly independent of the executive; if a judge is under the direction of a government or can be removed from office at will, his impartiality will be at risk whenever a case comes before him in which the government is involved as a party or is likely to favour a particular decision. Laski was emphatic on this point,

> "For it is obvious that if the executive could shape judicial decisions in accordance with its own desires, it would be the unlimited master of the State. The interpretation of the law must, therefore, be entrusted always to a body of persons whose will cannot be bound by the will of the executive. They must be able to call the executive to account". (1)

Both British and American experience have shown that if the independence of the judiciary is ensured, then even overtly political appointments may be rendered virtually harmless; for membership of a political party, however formerly active, is no guarantee that a judge will hand down judgements in keeping with the official party line. Thus Geoffrey Sawer contends that "identification with the organised profession remains the main social determinant for the views of such appointees, irrespective of the party affiliations accompanying their political offices".(2) Entrenched legalistic principles(3) and the weight of professional opinion will usually be the major factors in deciding a judge's future behaviour on the Bench - what Henry J. Abraham calls his "real politics";(4) and these may differ quite crucially from his political label. This

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(1). H.J. Laski, A Grammar of Politics, Allen & Unwin, 5th ed. (1967), p. 542.
(2). G. Sawer, Law in Society, Oxford, Clarendon (1965).
(3). See below pp. 250-54.
(4). H.J. Abraham, The Judicial Process, O.U.P. (1968), pp. 75-78.

"uncertain quantity" once caused President Truman to observe that

> "---- packing the Supreme Court can't be done, because I've tried it and it won't work ---- Whenever you put a man on the Supreme Court he ceases to be your friend. I'm sure of that". (1)

He might have been forewarned by the words of Charles Warren, an authority on the Supreme Court, who, some 20 years before had written,

> "---- nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the President appointing him have been disappointed". (2)

Even in America, where politics play a prominent role in the legal system, the judicial mind retains an unusual degree of independence. How much more so in England where the links between the political and legal worlds have been so attenuated?

The most important support for judicial independence derives from the judges' security of tenure. In the more Hobbesian days of the Stuart Kings, the English judges held their office "durante bene placito nostro" (according to our good pleasure) and were, therefore, to all intents and purposes the Sovereign's tools. The judges were lions, "yet lions under the throne, being circumspect that they did not check or oppose any points of sovereignty."(3)(4)

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(1). Abraham, op.cit. p. 76 (from a lecture at Columbia University, April 28th, 1959).
(2). ibid.
(3). Francis Bacon, "Of Judicature" in The Essays, Dent (1906) p. 165.
(4). Chief Justice Edward Coke was the exception; though his arguments were in many quarters considered treasonable, he stood firm for judicial independence and the rule of common law over royal prerogative, refusing to be cowed by either Crown or Woolsack.

Though even from the very earliest times, according to Sir Kenneth Roberts-Wray, some of the judges - certainly the Barons of the Exchequer - were appointed during good behaviour, the Royal displeasure then being manifested not by dismissal but by suspension; presumably, comments Roberts-Wray, dismissal at the ipse dixit of the Sovereign would have violated the common law.(1)

Judges actually ceased to be appointed 'during pleasure' from the beginning of the reign of William III, though the practice did not receive statutory backing until 1701. The Act of Settlement then provided that the judges of the superior courts should be appointed for an indefinite term "quam diu se gesserint", (as long as they will have performed well). Later statutes seemed to confirm that not only should a judge continue to hold office "during good behaviour" but that he should be dismissable only by the Crown on an address presented by both Houses of Parliament.(2)(3) Under such terms, the judges receive better protection than they would have been given, had it been laid down simply that in order to remove one of them a statute was required; for the House of Lords cannot be by-passed and thus the removal of a judge would have to be endorsed by the leading men of his own profession. The term "good behaviour" is imprecise and parliament probably has complete discretion to decide what constitutes sufficient

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(1). Sir Kenneth Roberts-Wray, Commonwealth and Common Law (1966).
(2). Appellate Jurisdiction Act, 1876, s.6.
Supreme Court of Judicature (Consolidation)Act 1925, s.k2 (1).
(3). Appellate Jurisdiction Act, 1876, s. (6), Supreme Court of Judicature (Consolidation) Act, 1925, s. 12(1). The Lord Chancellor is, of course, an exception. It should also be noted too that security of tenure is in no way vitiated by the legislature setting a reasonable age for retirement, provided the retiring age is fixed in a general way for each judicial rank.

grounds for terminating a judge's tenure, though, writes Henry Cecil, "the principle has been established that removal should not be asked for unless real moral blame is attributable to a judge or he is incompetent by reason of mental and physical ill-health".(1) No English judge has, however, been removed under the provision of the Acts,(2) and their interpretation is by no means certain.

One authority, Sir Kenneth Roberts-Wray, maintains that the superficially simple language of the Acts conceals two major weaknesses; it is not clear, he says, first, whether removal by the Queen on an address is the only method of removing judges and 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. Roberts-Wray considers that judges are removable by an address on grounds other than strict misbehaviour and that for misbehaviour alone are removable by other means;(3) thus a judge might be removed by a criminal information in the Queen's Bench Division at the suit of the Attorney-General, or under the "good behaviour" clause by dismissal by the Queen without address from both Houses. A judge might also be deprived of his office by its abolition in the course of judicial re-organisation; the oft-repeated proposals for the abolition of the appellate jurisdiction of the House of Lords are a case in point.

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(1). H. Cecil, Tipping the Scales, Hutchinson (1964), p144.
(2). Since 1701 only nine petitions for the removal of an English judge of the superior courts have been brought under the Act of Settlement and none have been successful; the one effective case was brought against an Irish judge, Sir Jonah Barrington, who was found guilty of malversation and removed from office in 1830.
(3). Roberts-Wray, op. cit., pp. 485-90.

In so far as no method of removal has been employed for at least 150 years, discussion of possible procedures appears to be a rather academic exercise. More important, if, as Roberts-Wray contends, the liability to removal on parliamentary address was intended as "a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof",(1) then the statutory foundations of judicial independence begin to look a little hollow.

> "It may be asked why Parliament, having laid down the principle that a judge holds office during good behaviour, should take to themselves an unqualified power of removal. In 1700 Parliament had had its own quarrel with the Crown but it was not hand-in-glove with the Judges; and, as Coke's experience shows, the Judges were not to be trusted to maintain their own independence. So it may be that Parliament, though content to leave the removal of a Judge for provable acts of misconduct to judicial process, reserved to itself, and to no one else, an overriding power to remove a Judge who had lost their confidence."

Roberts-Wray concludes,

> "If one is asked whether this safeguard for judicial independence in England is satisfactory, the answer must be that it is not. ---- Emphasis on this negative answer should however, be tempered by the reflection that a series of conflicts between the Legislature and the Judiciary during the eighteenth century and nineteenth century have established a tradition of mutual respect for each other's rights; and if today an address for the removal of a Judge were to be proposed, it is to be hoped that one could confidently assume that there would be no question of putting on the party Whips." (2)

Constitutional formulae can never in themselves provide a permanent guarantee of judicial independence, for they may at any time be swept aside by the authority of Parliament; but

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(1). Roberts-Wray, op. cit., p. 485.
(2). Ibid., p. 484.

judicial independence is now firmly founded in a strong public and professional consensus that deplores executive interference in the dispensation of justice. And in effect under the present system such are the complexities and difficulties in the successful operation of any formal removal procedure that not only is the independence of the judiciary as a whole ensured, but it also seems that in most cases an individual judge, if so determined, will be able to stay in office, even though he may be genuinely incapable of properly performing his function.(1)

Unless there is a motion for an address for his removal, a judge may not, by convention, be criticised in Parliament. One of the rare occasions when this took place was in 1924 when George Lansbury tabled a motion for the removal of Mr. Justice McCardie. Summing up in the libel case, O'Dwyer -v- Nair, McCardie had expressed the view that General Dyer who had given the order to fire on the Amritsar mob, had been wrongly punished by the Secretary for India. The motion was withdrawn after a statement from the Prime Minister reprimanding the judge.

> "His Majesty's Government", he stated, "will always uphold the right of the judiciary to pass judgement even on the Executive if it thinks fit, but that being the right of the judiciary it is all the more necessary that it should guard against pronouncements on issues involving grave political consequences which are not themselves being tried." (2)

The rebuke was a timely one; in modern times the dangers of judicial involvement in politics were probably never greater

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(1). Though the recent Administration of Justice Act, 1973, provides that if the Lord Chancellor is satisfied by medical evidence that a judge is disabled by permanent infirmity from the performance of his duties or in such a way as not to be able even to indicate a desire to resign, he might, with the concurrence of other senior judges, declare the judge's office vacant.

(2). Parl. Debs. (H.C.), June 17th, 1924, cited in E.S. Turner, May It Please Your Lordship, Michael Joseph (1971), p. 229.

than they were in the nineteen twenties. The relative detachment of contemporary judges from the political arena makes it easier for both judges and politicians to maintain an atmosphere of mutual respect.

Outside Parliament, the conduct of the judges and the decisions of the courts are more frequently exposed to criticism, especially by the media; though even here the judiciary have achieved extensive immunity against allegations of partiality or incompetence by their development of the doctrine of contempt. The respectful silence which by the 1930's had superseded the often virulent critiques of judicial appointments and judicial behaviour heard in earlier years was undoubtedly well-earned; but it also owed much to the judges' increasing use of their power to commit for contempt those who criticised them. There is no limit to the amount that a defendant on a charge of contempt may be fined or the length of time he can be imprisoned, and the judges' punishments, particularly those dealt out to the press, have sometimes seemed excessively harsh.

The recent widespread criticism of proceedings for contempt(1) have centred largely on the issue of freedom of the press, but this apart, it is doubtful whether the reputation of the judiciary is enhanced by the suppression of genuine criticism. "Justice," said Lord Atkin, "is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, though outspoken, comments of ordinary men."(2)

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(1). The Phillimore Committee set up in 1971 to consider possible changes in the law of contempt has yet to publish its report.

(2). Ambard v. Att. Gen. for Trinidad and Tobago [1936] A.C.323 at p.335.

The degree of immunity from criticism which the judiciary now enjoy would be easier to justify were it counterbalanced by a reciprocal form of protection for others engaged in the legal process. But a judge enjoys absolute privilege in his judicial capacity; he may not be held for civil or criminal proceedings because of anything he may say or do as a judge, even if it is alleged to have been malicious or in bad faith, unless he has acted outside his jurisdiction;(1) and the latter exception cannot in practice apply to a superior judge who enjoys unlimited jurisdiction. The privilege is nowadays rarely abused; but still it is not unknown for a judge to make unnecessarily critical and offensive remarks about a litigant or counsel appearing before him. Judicial improprieties of this type may often be dealt with through the Court of Appeal, but for those which do not fall within the Court's jurisdiction, there exists no alternative procedure for formal complaint. It is debatable whether the institution of an official complaints procedure would be an infringement of judicial independence; its precise effects would obviously depend on a number of variables: the composition of the complaints' authority, its sphere of competence and its powers. It is certain, however, that judicial inviolability by suppressing criticism of individual judges is more likely to diminish rather than increase public confidence in the judiciary as a whole.

Judicial independence has usually been discussed in terms of freedom from interference by the executive or legislature,

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(1). Anderson -v- Gorrie I QB 668 (1895).

but a recent article in an American journal carried the following warning,

> "In modern times ---- anyone concerned with the Rule of Law and the risks apparent in judicial conflicts of interest must stress also the need for independence of the judiciary from business or corporate interests of all kinds." (1)

The judicial ethic guarantees that no one holding full time judicial office will undertake any commercial employment; the position of the retired judge is more equivocal. Though there is a tradition that on retirement a judge will not engage in business, this has not been strictly observed; Lord Chancellors Birkenhead and Kilmuir both took up a number of company directorships after leaving the woolsack. The Lord Chancellor's unique constitutional position and the precariousness of his tenure of office may entitle him to be excepted from the general rule;(2) nevertheless these events, together with the unexpectedly early retirements of Lords Radcliffe and Devlin, prompted Abel-Smith and Stevens to comment in 1968 that, "If this habit were to spread to the High Court judges, there might well be pressures to impose some bar on post-judicial activities, to protect the 'mystery' of the judicial office."(3) The danger lies not so much in any erosion of esoterism as in the suspicion that judicial independence is jeopardised if a judge has appearing before him a company which is in a position to give him a lucrative directorship.

Two years later the issue was resurrected in dramatic fashion when Mr. Justice Fisher retired from the High Court Bench after only two and a half years in office to join the

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(1). G. Borrie, "Judicial Conflicts of Interest in Britain", American Journal of Comparative Law, Vol. XXVIII, No. 4, p. 697.

(2). Former Lord Chancellors are prohibited from returning to practice at the Bar.

(3). Abel-Smith & Stevens, op. cit., p. 178.

board of Schroder Wagg, the city merchant bank. The judge's action was widely condemned on a number of grounds,[1] in particular that

> "---- after it became known that judges were likely to be in negotiation with big business concerns over their future employment, their reputation for absolute impartiality and integrity, which is as valuable as the impartiality and integrity themselves would suffer." (2)

The bad publicity attendant on this sudden exchange of wig for bowler underlines the necessity for the maintenance of a strong judicial ethic of noninvolvement in commercial as much as political affairs; and one which extends to post-retirement activities.

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(1). See above p. 139.
(2). Solicitors' Journal (7th August, 1970).

Chapter 8

The Lord Chancellor

This office, "one of great antiquity, much dignity and considerable importance," dates at least from the reign of Edward the Confessor (1042-66) and possibly even from as early as the Seventh century.(1) The Chancellor was then a kind of secretary to the King, attending to documents containing royal grants or charter and acting as custodian of the King's Seal. Gradually the position grew in status and importance, until the Lord Chancellor became the sovereign's confidential advisor. For centuries the holder of the office was invariably an ecclesiastic, largely because the Church had a virtual monopoly on literacy; but Queen Elizabeth's appointment of Nicholas Bacon as Lord Keeper of the Great Seal(2) set the trend for appointing eminent lawyers to the office and by the beginning of the following century the precedent was firmly established.(3) The Lord Chancellor is the first subject in the realm after the Archbishop of Canterbury, and although it is not strictly necessary for the fulfilment of his functions on the Woolsack, every Chancellor in modern times has been created a peer immediately upon his appointment.

The most notable feature of the office of Lord Chancellor is that it combines three quite separate functions. The holder is head of the legal profession and senior judge, Speaker of the House of Lords, a member of the Cabinet and the government's chief

(1). R.F.V. Heuston, Lives of the Lord Chancellors, 1885-1940. Oxford, Clarendon Press, (1964) p.XV.

(2). An office which carried the powers of the Lord Chancellor's office but did not have the same prestige. It was therefore, used in former times when for various reasons it was thought inexpedient to confer the greater dignity.

(3) Though the Lord Chancellorship requires no legal qualification and it is theoretically possible for a layman to be appointed.

Table XXXII

The Lord Chancellors

	Terms of office
Lord Eldon (John Scott)	1801-06, 1807-27
Lord Lyndhurst (John Singleton Copley)	1827-30, 1834-35, 1841-46
Lord Brougham (Henry _____)	1830-34
Lord Cottenham (Charles Christopher Pepys)	1836-41, 1846-50
Lord Truro (Thomas Wilde)	1850-52
Lord St. Leonards (Edward Burtenshaw Sugden)	1852
Lord Cranworth (Robert Monsey Rolfe)	1852-58, 1865-66
Lord Chelmsford (Frederick Thesiger)	1858-59, 1866-68
Lord Campbell (John _____)	1859-61
Lord Westbury (Richard Bethell)	1861-65
Lord Cairns (Hugh McCalmont ____)	1868, 1874-80
Lord Hatherley (William Page Wood)	1868-72
Lord Selbourne (Roundell Palmer)	1872-74, 1880-5
Lord Halsbury (Hardinge Stanley Gifford)	1885-86, 1886-92, 1895-1905
Lord Herschell (Farrer _____)	1886, 1892-95
Lord Loreburn (Robert Threshie Reid)	1905-12
Lord Haldane (Richard Burdon _____)	1912-15, 1924
Lord Buckmaster (Stanley Owen _____)	1915-16
Lord Finlay (Robert _____)	1916-19
Lord Birkenhead (Frederick Edwin Smith)	1919-22
Lord Cave (George _____)	1922-24, 1924-28
Lord Hailsham (Douglas McGarel Hogg)	1928-29, 1935-38
Lord Sankey (John _____)	1929-35
Lord Maugham (Frederick Herbert _____)	1938-39
Lord Caldecote (Thomas Walker Hobart Inskip)	1939-40
Lord Simon (John Allesbrook _____)	1940-45

Table XXXII (Cont.)

	Terms of office
Lord Jowitt (William Allen _____)	1945-51
Lord Simonds (Gavin Turnbull_____)	1951-54
Lord Kilmuir (David Patrick Maxwell Fyfe)	1954-62
Lord Dilhorne (Reginald Edward Manningham-Buller)	1962-64
Lord Gardiner (Gerald Austin_____)	1964-70

legal adviser. He is the only man who combines the powers of the judiciary, the legislature and the executive, a living negation of Montesquieu's theory of the separation of powers: "That anomalous figure who contradicts and completes the strange logic of the British constitution".(1)

It is the holder of this controversial office who, ultimately, must take responsibility for the appointment of superior court judges. Yet, as we have already seen, though political affiliation has in the past been a significant factor in the selection of the judges, candidates have rarely, if ever, been selected purely on the basis of political considerations, nor judicial independence subjugated to executive interest.

It is invevitable, given an office with such wide scope and discretionary power, that the manner in which the numerous duties of the Lord Chancellor are performed and the relative emphasis given to each function, will depend largely on the personality of the holder and, indirectly, on the characteristics of the government to which he belongs. Some Chancellors have accentuated the political importance of the office. Birkenhead, for example, was an undoubted power in the Cabinet; but most of his successors have been less prominent as members of the executive, for as one of them wrote, "with the increasing pre-eminence of the Commons in controlling legislation and policy, no minister in the Upper House can have more than a secondary influence".(2) The Lord Chancellor now tends to have

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(1). Judges Summed Up, The Economist Dec 15.1956.
(2). Viscount Simon, Retrospect. Hutchinson (1952)

something of an 'elder statesman' role, - witness, for example, the part played by Lord Dilhorne in the 1963 battle for the Tory leadership. Further, acceptance of the Chancellorship means an end to the highest political ambitions. Hence Lord Birkenhead's equivocal reaction to the proffered Woolsack.

> "It was a dazzling prospect even for F.E. Smith, who never set limits to his ambition. To become, at forty-six, the head of the English Judiciary and to preside over the House of Lords would have fulfilled the wildest dreams of almost any brilliant barrister. And yet there was reason to hesitate. The acceptance of the Woolsack meant that he must leave the House of Commons and thus virtually abandon all hope of becoming leader of his party and, if the fates were kind, of taking office as Prime Minister".(1)

Since the war the Lord Chancellors have had less time for sitting in their judicial capacity with the Law Lords, and have concentrated more on their legislative and administrative functions;(2) Lord Gardiner in particular sat hardly at all during nearly six years of office. He considered the appointment of judges his most important function as Lord Chancellor, more important than his office of Speaker of the House of Lords.(3) Yet a considerable amount of his time was spent in legislative sittings of the House; a record of the number of sitting days on which each peer attended the House during the period 1963-68 shows him to have had an attendance rate of 98%.(4)

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(1). F.E. The Life of F.E. Smith, First Earl of Birkenhead, by the Second Earl of Birkenhead. Eyre & Spottiswoode (1959) p.330

(2). Lord Hailsham has proved a remarkable exception to this rule. (G. Drewry, 'Lord Chancellor as Judge' New Law Journal 28 Sept.1972,p.885)

(3.) Parl Debs. H.L. 28 Jan 1968 Vol 288 col.636.

(4). House of Lords Paper (No.66) - Lords Attendance. 26th March 1969.

The Lord Chancellor's main task, as an earlier Chancellor, Lord Kilmuir saw it was "to be responsible for seeing that the machinery of law and administration is in working order".(1) In addition to his traditional duties of appointing judges, Queen's Counsel and the 16,000 Justices of the Peace, the Lord Chancellor now has general responsibility for the exercise of judicial functions by those special and administrative tribunals that the welfare state has conceived in such proliferation. The office also carries considerable ecclesiastical patronage, and various duties connected with the Land Registry, the Public Trustees and Public Record Office, and the care of lunatics; post-war Chancellors have been further burdened with the increasingly important responsibilities relating to legal aid and law reform, - consolidating, simplifying and reconciling the law with changing social needs.

In the performance of this arduous role, the Lord Chancellor has, of course, the assistance of his own small department of civil servants; some of the work too is shared by the Law Commissioners and the three standing committees, the Statute Law Committee, the Law Reform Committee, and the Committee on Private International Law. Yet it is difficult not to sympathise with the plea of successive holders of the office that "it is beyond the strength of any one man to perform the work that ought to be done".(2) On the other hand, the Lord Chancellor is, unlike

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(1). A. Sampson, Anatomy of Britain To-day. Hodder & Stoughton, (1964) p.174.

(2). Report of the Machinery of Government Committee. Cmmd.9230 (1918), ch. X, para.3., cited in R.M. Jackson, The Machinery of Justice in England C.U.P. 6th ed. 1972.

other Ministers, always an expert on the business of his department; in particular, he has the advantage of being a member of that closed professional circle from which judicial appointments must be made and is in a position to gather well-informed opinions about possible candidates for the Bench.

It is inevitable, even disregarding overt political patronage, that a Lord Chancellor in nominating the judiciary will still be the subject of certain biases; it is reasonable to assume that he will tend to select those with origins and experience similar to his own. An analysis of the Chancellor's social background gives general support to this assumption though it is impossible within the limitations of this study to measure in any precise way the extent of such insidious influences.

The Social and educational backgrounds of the Lord Chancellors 1820-1968.

In terms of basic social origins, the 31 Lord Chancellors in office between 1820-1968 differed little from the judges they appointed; using the same method of classification,(1) the majority, some 55%, rank quite definitely as members of the upper middle class. Fewer were drawn from Classes I and II but the only significant difference was in the higher proportion of Lord Chancellors from the lower middle class; it is probable though that some of this difference may be accounted for by the non-response factor in the judicial analysis.

(1). See Appendix B.

Table XXXIII.

Comparison of the social class origins of the Lord Chancellors and the Judges.

Class	I	II	III	IV	V	Not known
Lord Chancellors	9.7% (3)	9.7% (3)	54.8% (17)	25.8% (8)	-	-
Judges	15.3% (59)	12.7% (49)	47.4% (183)	9.6% (37)	1.3% (6)	13.5% (52)

Over the whole period studied, there were no significant variations in the pattern of social recruitment to the Chancellorship, nor any relationship between the class origins of the appointee and the politics of the party in power. My observations on the parentage of the Lord Chancellors differ slightly from those of R.F.V. Heuston, who has compiled an authoritative biography of the twelve holders of the Great Seal from 1885-1940;(1) these were, he says, with two exceptions, from solidly middle-class backgrounds. The difference is partly one of terminology and possibly also of discrepant personal prestige scales; Heuston tends to down-grade individual social origins.(2) Thus the fathers of Lords Loreburn and Halsbury were,

(1). R.F.V. Heuston, op.cit.

(2). The 'down-grading' propensity of great men and their biographers was summed up by the Second Earl of Birkenhead, who wrote of his father, F.E. Smith, "The life at home to which he was afterwards fond of referring as though it had been one of grinding poverty, was happy, regular and prosperous. ..... It was his habit wilfully to distort the picture of his youthful indigence, in the same way as some men are tempted to recall imaginary grandeur, because he saw his past in creditable contrast with his later fame and prosperity". (F.E., The Life of F.E. Smith, First Earl of Birkenhead, by the Second Earl of Birkenhead Eyre & Spottiswoode.

according to him, simply barristers; he omits to say that Lord Loreburn's father was also a colonial judge and a knight, and that Halsbury's father was of sufficient note to be included in the Dictionary of National Biography in his own right. His two "lowlier" exceptions are Lord Sankey, son of a draper in a provincial town, and Lord Buckmaster, son of an agricultural labourer, later an inspector in the Science and Art Department, South Kensington. Buckmaster Senior in fact rose to be Professor of Chemistry in that organisation, which was to become part of Imperial College.

A more detailed analysis of fathers' occupations also reveals few differences between the Chancellors and the judges; rather predictably the largest group of fathers were themselves lawyers, though none had occupied the Woolsack or sat in the superior courts; (1) the most illustrious, forensically, were Lord Loreburn's father, Sir James Reid, chief justice of the Ionian Islands protectorate, and Lord Cottenham's father, Sir William Weller Pepys, master in Chancery. More surprising, perhaps, is the lack of obvious connections with sources of political power and patronage; of the nineteenth century Chancellors, only one, Lord Hatherley the son of Sir Mathew Wood, businessman, political reformer, Lord Mayor of London and friend of Queen Caroline, appears to have had influential parentage. It is obviously impossible, however, to be certain about this without more detailed information on family backgrounds; political or financial championship for Chancellors, or judges, may sometimes have come from less immediate sources; some of the well-represented 'Reverend' fathers, whose own careers were,

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(1). Until June 1970 when Quintin Hogg son of Lord Hailsham, a former Lord Chancellor, was appointed to the Woolsack.

Occupations of the Lord Chancellors' fathers

Table XXXIV

Occupation	Percentage of fathers in each occupational group
Law	25.8%(8)
Church	19.4%(6)
Medicine	6.5%(2)
Politics	9.7%(3)
Teaching (all grades)	6.5%(2)
Armed forces	3.2%(1)
Entrepreneurial*	22.6%(7)
Administration	3.2%(1)
Landowning	3.2%(1)
The arts	9.7%(3)
Not known	3.2%(1)

* For an explanation of the last four occupational groups see the corresponding analysis for the judges.

Schools attended by the Lord Chancellors

Table XXXV

Type of School*	Percentage of Lord Chancellors attending each type of school
1. Clarendon	35.5%(11)
2. Other public	32.3%(10)
3. Direct grant	9.7%(3)
4. Other independent	9.7%(3)
5. Maintained	-
6. Private	6.5%(2)
7. Foreign	3.2%(1)
8. Private tuition	3.2%(1)

* See above p.

Universities attended by the Lord Chancellors

Table XXXVI

University	Percentage of Lord Chancellors attending each university
Oxford*	48.4%(15)
Cambridge*	19.4%(6)
Edinburgh	9.7%(3)
London	6.5%(2)
Trinity, Dublin	3.2%(1)
St. Andrews	3.2%(1)
Foreign	9.7%(3)
Total Lord Chancellors attending university**	87.1%(27)
Lord Chancellors not attending university	13.0%(4)
Total Lord Chancellors	100% (31)

* The numbers of Lord Chancellors produced by the individual colleges were as follows:

Oxford: Wadham - 3, Balliol, Magdalene and New - 2, Christs, Christ Church, Jesus, Merton, St. Johns, Trinity and University - 1.

Cambridge: Trinity - 4, Trinity Hall and Kings - 1.

** Three Lord Chancellors attended more than one university.

during the nineteenth century, so highly dependent on patronage, may, for example, have been younger sons of more well-endowed and well-situated families than their own occupation initially suggests.(1)

The school and university experiences of the Lord Chancellors have been largely what one would expect, similar to those of the judiciary and of most other elite groups. For over a century attendance at a university has been something of a prerequisite for a Chancellor : only four of the total 31 did not attend any institution of higher education, and three of these held office before 1868. The majority of the Chancellors went to either Oxford or Cambridge, although since 1885 Oxonions have clearly been predominant; no 'provincial' university in England has succeeded in producing an occupant for the Woolsack.

According to some sources the Chancellor must be a member of the Church of England, and for this reason, it is said, neither Lord Russell of Killowen, a Roman Catholic,(2) nor Lord Reading, a Jew, was appointed to the office; both were given instead the Lord Chief Justiceship. Certainly, although some of the Chancellors have been non-conformist or declared agnostics, none have been Jewish or Roman Catholic. The question is of some contemporary relevance as the present Attorney-General, Sir Peter Rawlinson who might otherwise be deemed heir apparent

(1). This reflects a general shortcoming of all class analysis based solely on parental status.

to the Woolsack, would appear on account of his Roman Catholicism to be ineligible to hold the office.

Authority for the belief that Roman Catholics are still debarred from the Lord Chancellorship rests principally on the combined effect of S. 12 of the Catholic Relief Act, 1829, and S.2 of the Test Abolition Act, 1867. However a notable exception to the usual interpretation of these Acts has recently emerged. The Plowden Legal Society, an association of Roman Catholic Lawyers, has unearthed the text of an opinion given in 1900 by Lord Haldane and two colleagues for an anonymous client, later revealed as Lord Russell; their opinion was that on a true construction of the statutes there was no absolute bar on the appointment of members of the Roman Catholic church to the Lord Chancellorship.(1) Nevertheless, the apparently ambiguous nature of the provisions regarding religious exclusion from that high office indicate the advisability of repealing the enactments concerned to remove any remaining doubt; ".....their survival," observed the New Law Journal, "is contrary to the policies of non-discrimination which ought to inform our public life..... In any event, the range of choice (of candidates for the Lord Chancellorship) - never likely to be wide - ought not to be avoidably restricted."(2)

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(1). The Times 18th June 1971.

(2). July 2, (1970) p 607.

Career pattern.

The Lord Chancellors like the judges were on average called to the Bar when they were a little over twenty-five years. The next significant stage in the legal careers was reached rather earlier; twenty-seven of the Lord Chancellors took silk at an average of 40.4 years as against the judges' overall average of 44.1 years. This difference is probably to be explained by the future Lord Chancellors' closer involvement in politics; the ten who were actually in the House of Commons when they took silk were the youngest group of all, with an average age of 36.7 years. The age of appointment to the Lord Chancellorship, dependent as it is on political as well as professional factors, varies considerably around an average of about 61 years; the youngest since 1820 was Lord Birkenhead who was 47 at the time of appointment and the oldest Lord Campbell who was eighty.

Twelve of the Lord Chancellors sat in the superior courts before being appointed to the Woolsack, most of them holding one of the higher judicial offices. Only two Lord Chancellors have been appointed to the superior courts for the first time after leaving the Woolsack, Lord Caldecote who became Lord Chief Justice (1940-46) and Lord Dilhorne, who was created a Lord of Appeal in Ordinary in 1969. Lord Simonds was re-appointed a Lord of Appeal at the end of his period in office as Lord Chancellor (1951-54) and sat on the Appellate Committee for another eight years.

Table XXXVII

The Lord Chancellors' experiences in the superior courts

	Puisne Judges	Appeal judges	Senior judges
Lord Eldon	-	-	Chief Justice of the Common Pleas, 1799-1801
Lord Lyndhurst	-	-	Master of the Rolls 1826-27 Lord Chief Baron 1831-34
Lord Cottenham	-	-	Master of the Rolls, 1834-36
Lord Truro			Chief Justice of the Common Pleas 1846-50
Lord Cranworth	Exchequer Baron, 1839-50 Vice-Chancellor, 1850-51	Lord Justice in Chancery, 1851-52	
Lord Campbell	-	-	Chief Justice of the Queens Bench 1850-59
Lord Cairns	-	Lord Justice in Chancery, 1866-68	-
Lord Hatherley	Vice-Chancellor 1853-68	-	-
Lord Cave	-	Lord of Appeal in Ordinary, 1918-22	-
Lord Sankey	Kings Bench Division 1915-18	Lord Justice of Appeal, 1928-29	-
Lord Maughan	Chancery Division 1928-34	Lord Justice of Appeal, 1934-35 Lord of Appeal in Ordinary, 1935-38	-
Lord Simonds	Chancery Division 1937-44	Lord of Appeal in Ordinary, 1944-51 1954-62	-

The Law Officers

One of the most notable features of the Chancellor's social backgrounds probably lies not in any similarities between them and the judges whom they appoint but rather in the extent to which they have in the past differed from their fellow politicians; this is revealed by W.L. Guttsman's work on the British political elite.(1) Guttsman's study thoroughly confounds the Marxist notion that the government is essentially a committee representing the dominant producers of the country, though industrialisation produced a new, economically powerful urban bourgeoisie , until the later years of the nineteenth century the institutions of political power remained firmly in the hands of the territorial aristocracy. Restrained from direct action by their own interests, by the difficulty of attacking the political power of land, without also attacking the general principle of private property, the industrial and commercial classes, were obliged to await the slower erosion of landed interest by agricultural depression, and the aristocracy's own long-term instinct for self-preservation. Yet some of the more ambitious members of the frustrated upper and middle classes managed to surmount the social, economic and legal obstacles and achieve individual political success; most of these 'new men' who reached the predominantly aristocratic Cabinets of the Victorian era, did so as occupants of the Woolsack.

The men who presided over the House of Lords for most of these years, were as we have seen, anything but aristocratic in origin, and few were from eminent political or legal families.

(1). W.L. Guttsman, The British Political Elite. MacGibbon & Kee (1963)

But Guttsman does not think this at all surprising;[1] Law Officers (the Lord Chancellor, Attorney-General, and Solicitor-General) are, he says, all 'working-class politicians'. They are appointed as much for their legal experience and forensic skill as for their parliamentary ability and political affiliations; and their political life develops rather than hinders their professional careers. Appointment to the Chancellorship invariably means a significant rise in income, (the Lord Chancellor receives a higher salary than the Prime Minister); and the office, though precariously dependent on the fortunes of the government, carries a substantial pension.[2]

The roles of Attorney-General and Solicitor-General may also be seen as profitable ones for, in addition to their generous salaries[3] neither were, in the past, debarred from cultivating their own private practices. Further, the Law Officers of the nineteenth century had every reason to hope ultimately for some judicial appointment, perhaps to the Chancellorship itself. "One cannot help suspecting", writes Guttsman, "that there were among them (the Law Officers) quite a few who entered Parliament with an eye on the main chance".[4]

On the other hand it should be remembered that a contender in the legal political stakes had to be fairly confident of his prospects, for entering parliament was in the nineteenth century a very costly enterprise; seats were expensively 'purchased'

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(1). W.L. Guttsman, op.cit.

(2). In part to compensate for the prohibition against returning to practice at the Bar.

(3). The Attorney-General now receives £13.000.

(4). W.L. Guttsman, op.cit.

and there was no immediate return in the form of a regular salary. Campbell, for example, received an invitation in 1825 to stand for the Stafford seat but was forced to wait another five years before accepting the offer, owing to the high cost of the seat, estimated at about £5 - 6,000.

Table XXXVIII indicates the extent to which the occupants of the Woolsack have been drawn from the ranks of current and former Attorney-Generals and Solicitor-Generals. Since 1820, twenty-five (81%) of the Lord Chancellors had at some time acted as one or both of the governments legal advisers; of the other six, both Lord Brougham and Lord Haldane had had considerable parliamentary experience. Of the seventeen Attorney-Generals who reached the Woolsack, only 5 were appointed direct from the position of first Law Officers; others took a more indirect path, some via other political offices and some first acquiring judicial experience; both Lord Eldon and Lord Truro were Chief Justice of the Common Pleas, Lord Lyndhurst, Chief Baron of the Exchequer, Lord Campbell, Chief Justice of the Kings Bench and Lord Cairns a Lord Justice of Appeal. The Solicitor-General's chance of being appointed Lord Chancellor have been almost as good; of those who did not also become Attorney-General, 8 have since 1820 received the higher accolade. But it is the opinion of J.Ll. J. Edwards, an authority on the Law Officers of the Crown,(1) that according to past precedent neither Law Officer has an actual right of preferment to the Chancellorship. The eighteenth century, he says, provides few examples of either Law Officer being appointed directly to the Woolsack. He admits, however, that this may be partially explained away by the unusually long time for which some of the Chancellors of this

(1) J.Ll.J. Edwards, The Law Officers of the Crown, Sweet & Maxwell (1964).

Table XXXVIII

The Lord Chancellors' experiences in the House of Commons.

Lord	M.P.	Solicitor-General	Attorney-General	Lord Chancellor.
Eldon	1783-99	1788	1793	1801-06, 1807-27
Lyndhurst	1818-2	1819	1824-26	1827-30, 1834-35 1841-46
Brougham	1810-12 1815-30	-	-	1830-34
Cottenham	1831-34	1834	-	1836-41, 1846-50
Truro	1831-32 1835-	1839	1841,1846	1850-52
St. Leonards (a)	1828-32 1837-	1829-30	-	1852
Cranworth	1832-39	1834, 1835-39	-	1852-58, 1865-66
Chelmsford	1840-	1844	1845-46 1852-58	1858-59,1866-68
Campbell	1830-34 1834-	1832	1834 1837-41	1859-61
Westbury	1851-	1852	1856-58 1859-61	1861-65
Cairns	1852-66	1858	1866-67	1868, 1874-80
Hatherley	1847	1851-52	-	1868-72
Selbourne	1847- 1861-66	1861	1863-66	1872-74
Halsbury	1877-85	1875-80(1)	-	1885-86, 1886-92 1895-1905
Herschell	1874-85	1880-85	-	1886, 1892-95
Loreburn	1880-85 1886-1905	1894	1894-95	1905-12
Haldane(b)	1885-1911	-	-	1912-15, 1924
Buckmaster	1906-10, 1911-14	1914	-	1915-16
Finlay	1885-92 1895-1906 1910-16	1895-1900	1900-06	1916-19

Lord	M.P.	Solicitor-General.	Attorney-General	Lord Chancellor
Birkenhead[c]	1906-18	1915	1915-19	1919-22
Cave[d]	1906-18	1916-17	-	1922-24, 1924-28
Hailsham[e]	1922-28	-	1922-24 1925-28	1928-29, 1935-38
Sankey	-	-	-	1929-35
Maugham	-	-	-	1938-39
Caldecote[f]	1918-29 1931-39	1922-24 1924-28 1931-32	1928-29 1932-36	1939-40
Simon[g]	1906-18 1922-40	1910-13	1914-15	1940-45
Jowitt[h]	1922-24 1929-32 1939-45	1940-42	1929-32	1945-51
Simonds	-	-	-	1951-54
Kilmuir[i]	1935-54	1942-45	1945	1954-62
Dilhorne	1943-62	1951-54	1954-62	1962-64
Gardiner	-	-	-	1964-70

Other political offices held by the Lord Chancellors:-

a. Irish Chancellor 1834-35, 1841-46

b. Sec. of State for War 1905-

c. " " " " India 1924-28[2]

d. Home Secretary 1916-18

e. Sec. of State for War 1931-35.

f. Minister for the Co-ordination of Defense 1936-39
Sec. for Dominion Affairs 1939.
" " " " 1940.

g. Home Secretary 1915-16, 1935-57.
Foreign Secretary 1931-35
Chancellor of the Exchequer 1937-40

h. Paymaster-General 1942.
Minister without portfolio 1942-44.
Minister of National Insurance 1944-45.

i. Home Secretary.

(1). Lord Halsbury was given his first legal appointment in the government before he found a place in the House of Commons.

(2). Birkenhead was the first ex-Lord Chancellor to hold another Cabinet office since 1784 when Lord Camden was made Lord President of the Council.

period held office. Lord Hardwicke, for example, held the Great Seal for nearly twenty years without interruption, from 1737 to 1756.

It may be said that though the former practice of appointing ex-Law Officers to other high judicial offices may be deplored and indeed any political contamination of the judicial system be best avoided, the parliamentary, as well as the legal experiences, of the Attorney-General and Solicitor-General serve as a useful apprenticeship for the duties of the Woolsack. As Edwards writes,

> "With the Lord Chancellor's functions apparently in the process of shifting from the predominantly judicial duties to a position where the holder is first and foremost the principal spokesman and advocate for the government in the House of Lords, a much stronger case can be made for the elevation of the Attorney-General to the Lord Chancellorship than to any of the more permanent judicial offices".(1)

A. Harding in his Social History of English Law,(2) suggests that as politics have become more professional and it has become increasingly difficult to combine political and legal careers, the tendency has been to choose the Lord Chancellor from amongst those successful politicians who happen to have the necessary legal qualifications rather than from amongst eminent lawyers with the appropriate political affiliations. The facts do not appear to support his argument. Over the past forty years, four of the eleven Lord Chancellors had never sat in parliament prior to their appointment. In 1929, the

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(1). J.Ll. Edwards, op.cit.

(2). A. Harding, Social History of English Law. Penguin(1967)p.393

Labour government broke with political tradition by appointing as Chancellor a Liberal, Lord Sankey, and when government was assumed by a mainly conservative coalition, he remained in office; Sankey was a Lord Justice of Appeal with some fourteen years experience of the superior courts. Two of his successors, Lords Maughan and Simonds were also experienced judges, both Law Lords and both with relatively 'non-political' backgrounds. The last Lord Chancellor, Lord Gardiner, though lacking in such judicial experience had also never sat in the House of Commons. The legal expertise of other recent Chancellors has rarely been seriously questioned.

Chapter 9.

The Method of Judicial Selection - A Comparative Survey

The superior judges are in theory appointed by the Crown, in practice by the government of the day, the Lord Chancellor nominating the puisne judges and the Prime Minister, relying heavily on the Chancellor's advice, filling the higher judicial offices. The appointment of the judiciary is thus ultimately in the hands of a man who, while he is the head of the legal profession, is also a member of the government and as such can never be non-political. This system of appointment by the executive has in former years been severely criticised; recommending the exclusion of the Lord Chancellor from the Cabinet, Laski, with some though not complete justification, wrote,

> "On this basis, ---- it would be possible at long last, to reform the whole system of patronage, which still bears on its face the character of the age of Lord Eldon rather than our own. Certainly, with the possible exception of ecclesiastical appointments, it is difficult to think of any area where the exercise of the patronage power has been performed to less advantage in this country." (1)

The disappearance of political patronage in judicial selection in England indicates however that the vitiation of judicial appointments by political considerations is not inherent in a system where appointments lie at the discretion of the executive, and that the determinants of judicial independence must be sought within a wider institutional and cultural context rather than in the specific system of judicial selection employed by any given society. The following

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(1). H.J. Laski, Reflections on the Constitution Manchester University Press (1951) p. 153.

examination of the available methods of selection and their application in various countries, though too brief to lead to any definitive conclusions, is an attempt to clarify this point.

The possible alternatives to nomination by the executive were considered in some detail by Laski.(1) Election by the people seems in theory a system nearer to a realisation of the democratic principle, ensuring freedom from the influence of the executive; in reality, very definite objections may be cited.

> "Of all methods of appointment", Laski wrote, "that of election by the people at large is without exception the worst. For either the candidate is chosen for purely political reasons, which is the last ground upon which he should be made a judge, or those who vote for him are not in a position to weigh the qualities upon which his choice ought to depend. ---- Knowledge of the law, the balanced mind, the ability to brush aside inessentials and drive to the heart of a case - that a candidate will possess these qualities can, at best, be known only to a few ----" (2)

Most of the great judges in English history, men like Blackburn, Bowen, Watson, Macnaghten, were entirely unknown to the public outside. Of course election by the people does not wholly preclude the appointment of some very eminent men, but nor does it exclude the totally incompetent. Inevitably under such a system the people will choose the judges not on the basis of judicial qualities but, as American experience has so vividly demonstrated, according to political considerations.

Election by popular vote is widespread in America at state level. The judges sometimes appear on bipartisan or even nonpartisan tickets but loyal service in politics tends to be a prerequisite for nomination.(3) Martin Mayer, in his work on

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(1). H.J. Laski, "The Technique of Judicial Appointment", Studies in Law and Politics Allen & Unwin (1932).
(2). ibid. p.
(3). H.J. Abraham, The Judicial Process O.U.P. (1968) 2nd ed. p.492.

American lawyers, reports that in New York it is generally believed that a contribution of at least $10,000 to a political party is necessary before anyone will be nominated for a judgeship. Across the country, it is quite common for judges not only to be politically active but to run for other office; in 1966 a justice of the Supreme Court of Pennsylvania was a candidate in the Democratic gubernatorial primary; and a justice of the Arkansas Supreme Court ran, as 'Judge Jim', for governor.(1) Curtis Bok, Philadelphia judge and novelist has said that, "a judge is a member of the Bar who once knew a Governor".(2)

The elective term of office for state judges is on average six years; only a few judgeships are held for life. In some states the period of election may be as short as two years, though this is rare. But in any case where responsibility to the electorate is coupled with insecurity of tenure, the judge's impartiality is exposed to severe strain, the need to stand for re-election being more harmful than the initial election of a judge. Few are able to resist the temptation to win the favour of those whose support they need in order to stay in office and are it seems much less likely to 'vote' against 'their' party on the Bench than are appointed judges.(3) As Justice Lummus of the Massachusetts Supreme Court wrote,

> "There is no certain harm in turning a politician into a judge. He may be, or become, a good judge. The curse of the elective system is the converse, that it turns almost every judge into a politician".(4)

The original Canons of Judicial Ethics adopted by the

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(1). M. Mayer, The Lawyers New York, Harper & Row (1966) p. 496.
(2). C. Bok, The Backbone of the Herring New York, Knof (1941) p. 3.
(3). Abraham op. cit. p. 40.
(4). Mayer op. cit. p. 495.

American Bar Association in 1924 called upon judges to "avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions". In 1951 in a rather humiliating retreat, the A.B.A. had to add the sentence,

> "Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or re-election". (1)

Election by the legislature, an alternative method of appointment practised in some American states, appears to raise the same problems. The number of members of the legislature competent to choose the judiciary is usually very small and most are thus swayed by precisely the same political considerations as the popular vote. Comparison with Swiss experience shows, however, that under certain conditions a system of legislative election may work well. In Switzerland judges are elected by the two federal chambers, the Nationalrat (200 members) and the Ständerat (44 members), sitting jointly as the Bundesversammlung, still a relatively small body. The aim is to ensure that German, French and Italian speaking lawyers are appropriately distributed on the Bench and political appointments are virtually excluded from consideration by statute. More important, re-election is the norm, so that to all intents and purposes the judges have security of tenure.(2)

With this exception, executive appointment of the judiciary

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(1). Mayer op. cit pp. 495-6.
(2). Abraham op. cit. p. 34.

has proved the preferred method of selection in most Western countries. As Henry Abraham writes,

> "Someone ---- has to assume responsibility for staffing the courts; it might as well be the executive, who ---- possesses the expertise and has access to all pertinent data ----. At least in theory, the people are always in a position to hold (him) accountable in a free society. To make him responsible for unfortunate judicial appointments is more meaningful and more palatable to the electorate than an arrangement that requires the latter ---- to submerge judges in the political arena ----". (1)

Since the war the general tendency has been for countries where appointment rests ultimately with the executive, to refine the precise means of selection in order to maximise freedom from the possibility of political influence. Thus in France since 1946 candidates for the higher judicial offices have been filtered through the eleven-member 'Conseil Superieur de la Magistrature'.(2) This council, which consists of the President, the Minister of Justice and nine persons of legal background, produces a short-list of prospective judges, from which the President and the Minister make the final choice. Opportunities for political patronage are in any case limited by the size of the group of qualified men from which the selecting authorities must make their choice, for this is small, both in terms of the number of judicial appointments available and of the size of the comparable bodies of candidates in England and America.

Similarly in America, where all of the federal judges are appointed by the President subject to confirmation by the Senate, the power of the executive has been mitigated by the increasingly

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(1). Abraham op. cit. p. 34.
(2). The French Judicial System, published by the French Embassy.

significant role of the American Bar Association's twelve member Committee on the Federal Judiciary. Also established in 1946, this body has held a position of real influence for at least the past fifteen years. The Committee investigates the qualifications of every person considered by the Attorney General as a possible candidate for judicial office. It first makes an informal report on each name under consideration and follows up with a formal recommendation on the candidate picked by the Attorney General. If the Attorney General recommends and the President actually nominates, a person rated unqualified by the Committee, it still has an opportunity to oppose the nomination in the Senate, but it has no special priority and must operate as any other interest group.(1) The Committee operates only on the sufferance of the Attorney General and the and the Senate Judiciary Committee but, according to Joel Grossman, "---- though its relationship is informal, the prospective continuity of this relationship is enhanced by the strong and favourable influence of the articulate press."(2) The existence of the Committee and the increasing importance of consultation with the sitting judiciary as part of the appointments process, is a recognition of the special competence of the legal profession to assist in the selection of judges. It has been effective primarily in setting minimum standards of qualification for judicial office and in preventing the selection of judges purely on the basis of political considerations. Nonetheless in all federal judicial appointments political factors may still be decisive.(3)

All the 96 men who have sat on the Supreme Court Bench,

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(1). Joel B. Grossman, Lawyers and Judges John Wiley (1965) pp. 47-8.
(2). ibid. p. 80.
(3). Abraham op. cit. pp. 28-31.

except Mr. Justice George Shiras (1892-1903), had engaged in at least some public service at various levels of government, often elective, or had been active in politics;[1] and according to Abraham, it is a rather firmly adhered to unwritten law that the President will not normally nominate a candidate for the Supreme Court from the political opposition. "After all, as many a President has been told by his political advisers, Republican or Democratic as the case may be, '---- why should we give these plums to the other guys? ---- surely there are just as many good and deserving lawyers on our side of the fence?'."[2] It is, however, customary to have at least one member of each political party on the high bench, and to satisfy this "requirement" Presidents have occasionally chosen "out-party" judges. The principle of religious and geographical balance in the composition of the Supreme Court, though apparently not a binding consideration, is also influential. The 'Jewish' seat, for example, which began with the appointment of Louis Brandeis in 1916, has never been vacant.[3]

In fairness, it must be noted that the United States Supreme Court has an exceptional jurisdiction and its exact counterpart does not exist in England; to the extent that it has the power to hold unconstitutional and judicially unenforceable an act of the President, the Congress, or a state, the Court is as much a political[4] as a judicial institution. "In retrospect", wrote Times Correspondent, Louis Heren, "the so-called nine old men can be seen to have brought about greater changes in the last 15 years than the 535 senators and representatives and the President with his legions of advisers

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(1). Abraham op. cit. p. 61.
(2). ibid. p. 71.
(3). Grossman op. cit. p. 29.
(4). But not party political.

and bureaucrats."(1) Attempts by President Nixon to restrict the activist nature of the court, developed under Chief Justice Warren, by the nomination of "strict constructionalists" like Clement Haynsworth and Harrold Carswell, have so far been resisted by the Senate.

For the selection of American judges at state level, five distinct systems are currently in use: executive and legislative appointment; popular election by partisan and non-partisan ballots; and the Nonpartisan Court Plan. The first four of these methods are based on the common assumption that men who occupy judicial positions are like other government officials and should, therefore, be chosen by political figures such as governors or legislators, or should be elected directly by the people.(2) The contrary view, that judges are a unique type of public official for which the legal profession should have special responsibility has long been advocated by the American Bar Association, their argument for professional involvement in the judicial selection process being based on professional self-interest in maintaining the quality of the Bench and on their special competency to assess which of their numbers are properly equipped for judicial office.

Failing to increase their influence under existing systems, the American Bar Association developed a new scheme, the Nonpartisan Court Plan; combining both elective and appointive features, this was designed specifically to give lawyers a crucial voice in choosing members of the bench. First adopted in Missouri in 1940, the Plan is now in use in 18 states and

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(1). The Times, April 21st, 19
(2). R.A. Watson & R.G. Downing, The Politics of the Bench and the Bar John Wiley (1969) pp. 529-30.

under consideration in many others; recently it has been proposed for the selection of federal judges as well.(1) The modus operandi varies from state to state but the common aim is to minimise political influence, to promote professional standards and to provide some security of tenure while yet retaining an element of popular control.

The Missouri Plan,(2) the best known version, provides for the constitution of a non-partisan, non-salaried board, composed in equal numbers of lawyers appointed by the bar association and laymen appointed by the governor; no commissioner may hold public office nor an official position in a political party. For each judicial vacancy the commission recommend three candidates from whom the governor makes the final choice. After a probationary period of at least one year, the appointed judge must offer himself to the electorate for a full term of office, six years in the trial courts, twelve in the appellate courts; he runs at the time of a general election on a separate, unopposed ballot which asks simply whether or not he should be retained in office. The political parties have by and large made no effort to influence the elections,(3) and the system, combining "the democratic notion of accountability to the electorate with an intelligent method of selecting qualified candidates for judicial office", has many enthusiastic supporters.

A detailed empirical study carried out by Professors Watson and Downing of the University of Missouri, has shown, however, that many of the assumptions made about the state's

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(1). Watson & Downing op. cit. pp. 329-30.
(2). Mayer op. cit.
Watson & Downing op. cit.
(3). Justice Sub-Committee, The Judiciary Stevens (1972).

selection process by both proponents and opponents of the Plan are erroneous. It is, they maintain, naive or misleading to suggest, as many of the Plan's supporters do, that it has taken the politics out of judicial selections:

> "---- the Plan has not eliminated 'politics' as the term is used in its broadest sense, that is, the manoeuvring of individuals and groups to influence who will be chosen as judges. Rather, it has changed the nature of that politics to include not only partisan forces but also those relating to the interests of the organised Bar, the judiciary, and the court's attentive publics. Nor has the Plan even eliminated partisan politics in judicial selection; vesting the final appointment power in the major political officer of the state is hardly calculated to have that result, particularly since state chief executives often have been able to influence the choice of the three nominees as well ---- The Plan has ---- taken the partisan aspects of judicial selection out of the vortex of local political forces and leadership influence and projected them into the political world of the highest public official in the state." (1)

On the other hand it is agreed that the Plan has not meant that:

> "---- the 'bluebeards' of the legal profession (the large-firm lawyers representing the affluent and prestigious institutions in society) decide who will sit on the bench, as feared by many persons who attack the Plan. Instead the selection system, as it has evolved in practice, is a highly pluralistic one that reflects diverse interests; upper and lower status lawyers; a range of social and economic institutions; sitting members of the judiciary; and the factions and gubernatorial followings of state politics." (2)

But the consequence of the Plan on which lawyers were generally agreed is that it results in the appointment of 'better' judges than are usually chosen under an elective system. In particular, the analysis demonstrated that the Plan has tended to eliminate highly incompetent persons from the state judiciary.(3)

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(1). Watson & Downing op. cit. p. 352.
(2). ibid. p. 6.
(3). ibid. Chap. 8.

Under the Plan, the continuance of each judge in office is, in deference to the democratic ideology, dependent on the approval of the general public; this feature of the selection system has been strongly criticised on the grounds that the participation of the voters is meaningless, that the elections are in essence plebiscites similar to those that usually operate in authoritarian regimes.(1) Two Utah law professors have described, "the plebiscite in which the voters are given a choice between a definite proposal (Should X be retained as a judge?) and an un-named alternative ----" as "---- the most familiar window-dressing of despotism".(2) Supporters of the Plan maintain that while it is true that most judges will automatically obtain an affirmative vote, the elections make it possible for an incompetent or corrupt judge to be removed from office by the voters. Since the inception of the system in Missouri, only one judge has ever been voted out of office and according to Watson and Downing this took place "---- under highly unusual circumstances posing larger issues than the case of the immediate individual involved. Under normal circumstances, a Plan judge has little to fear from the electorate".(3) Viewed in this way, the elective component of the system appears as a mere gesture to democratic sentiment.

The Missouri Plan thus approaches what is apparently emerging as the generally preferred formula for judicial selection, that is, executive appointment tempered by an influential advisory committee. This was also the method that Laski wanted to see applied to the English superior judiciary; recognising the preferability of selection by nomination over

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(1). Watson & Downing op. cit. p. 221.
(2). Mayer op. cit. p. 503.
(3). Watson & Downing op. cit. p. 345.

election, but writing at a time when the powers of the executive in making appointments were still being misused, Laski proposed that appointments should be made by the executive but only with the advice and consent of a standing committee of the judiciary, selected by the judges themselves for say three to five years. Appointments would still rest ultimately with the Lord Chancellor or Prime Minister but "any suggested person would be thoroughly criticised by a representative committee of legal experts".(1)

Some advocates of judicial participation have gone further than Laski, recommending that the judges should have a decisive voice in the selection process. "The recruitment of judges" demanded one student of government, "should be entrusted to the judiciary itself ---- There is a guarantee against political interference and a presumption that judges may form a competent opinion upon the candidate's scholarship and character".(2) Such control would not, he believed, lead to judicial despotism; the possibility of misuse of this power could not in theory be excluded, but "if judges are the guardians of legality and good conscience then quis custodem custodians?"(3) The real danger in judicial control is of a more general and insidious nature; self-selective bodies have an inherent tendency towards conservatism and the particular ethos of the legal profession would undoubtedly accentuate this.

The present system of judicial selection in England, though still officially one of simple executive appointment, has in fact over the years evolved an informal advisory

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(1). H.J. Laski, "The Technique of Judicial Appointment", op. cit. p. 174.
(2). N. Bouropoulos, The Judicial Function in the Modern State, unpublished Ph.D. thesis, L.S.E. (1949) p. 106.
(3). ibid. p. 114.

approach. The Lord Chancellor as a member of the legal profession must always have been influenced to a greater or lesser extent by professional feeling on potential candidates for the Bench, but, with the disappearance of the patronage system, this influence appears to have become more institutionalised. Abel-Smith and Stevens suggest that more effective power over appointments has now passed to the Lord Chancellor's Permanent Secretary who consults the relevant judge and perhaps a number of trusted contacts among practising barristers; though according to one Permanent Secretary, "some of the greatest judges seem to find it virtually impossible to speak ill of any candidate".(1) As Abel-Smith and Stevens go on to say, almost inevitably "some more formal advisory committee procedure will soon be needed ---- Indeed the customary processes of applications, references and testimonials may all eventually have to be introduced in this field as in so many others".(2)

A recent report by a Justice Sub-Committee recommends the setting-up of a consultative committee to assist the Lord Chancellor in appointing judges.

> "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 and perhaps some lay members, e.g. highly trained and experienced personnel officers skilled in selection procedures. The 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

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(1). B. Abel-Smith & R. Stevens, In Search of Justice Allen Lane (1968) p. 372.

(2). ibid. p. 381.

reference to them or without considering their views". (1)

The Sub-Committee admits, however, that the use of such a system would make very little difference to the sort of person appointed at High Court level.

It remains to consider the judicial career services of the Continent. Whereas in the Anglo-American legal system judges are chosen from the ranks of the legal profession, in most European countries the judges are members of a judicial branch of the civil service, specially trained and examined and quite separate from the advocates' profession. In France prospective judges must attend a four year course at the Centre Nationale d'Etudes Judiciaires(2) and initial entry into the service is dependent upon performance in competitive examinations. As a general rule promotions are made entirely within the service and a lawyer who chooses private practice usually abandons all thought of a judicial career, though it is not wholly impossible for an advocate to be appointed to the Bench and some eminent law professors do sit in the highest courts. The main argument in favour of such a system is that judges are selected and promoted on the basis of purely judicial abilities rather than skill in the field of advocacy.

For various reasons, however, the idea of a judicial career service has never been favourably received in this country. First, there is an increased chance of indiscipline in the lower courts because of the possibility that a young unsophisticated judge may find himself outwitted and intimidated by an older and more experienced advocate. This it has been

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(1). Justice Sub-Committee, The Judiciary Stevens (1972) pp. 30-31.
(2). Established in 1959.

suggested, may partly account for the far greater incidence of appeals in those countries where there is a judicial career service. According to Professor E.J. Cohn, in Germany one-third of all cases go on appeal and one-third of these go on further appeal.(1) In England approximately two per cent. of the 50,000 civil cases heard each year in the High Court go on appeal and of these only about 30 reach the House of Lords. Secondly, although with a career system the method of initial entry into the service limits the opportunities for political patronage, judicial promotion within the career structure does raise the possibility of improper influence. Lord Brougham pointed to this danger almost a century and a half ago,

> "Independence of the Bench must always be equivocal, if not nugatory, as long as the Crown exercises the power to promote judges. This looking up for promotion on the Bench as in the Church", he argued, "naturally tended to make men look up to their maker rather than to the public good." (2)

At one time in France the political advocates were a real force, capable of exerting a continuous and insidious pressure on the judges. This arose from the general political situation which, with only a very loose party system, has been described as "a perpetual game of squeeze played by the individual Deputy upon the Ministers in successive weak and short-lived Governments",(3) and from the fact that the most potent Deputies in Parliament are by profession usually advocates. Before the establishment of the Conseil Superieur de la Magistrature, when judges were more dependent on the individual favour of the Minister of Justice, this allowed a possibility that their chances of promotion might depend

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(1). Justice Sub-Committee, The Judiciary, p. 26.
(2). Hansard, 20th May, 1835.
(3). R.C.K. Ensor, Courts and Judges in France, Germany and England O.U.P. (1933) p. 40.

indirectly on some of the men who practised before them. "Certain advocates", wrote Ensor in the thirties, "are widely believed to be able to intimidate the judges whose promotion may lie at their mercy". The belief may, he admitted, have been exaggerated or even untrue. Nevertheless, some advocates became fashionable, and hence prosperous, not because their advocacy as such was outstanding but because they had a 'whip-hand' in politics and it became notorious that the judges dared not stand up to them.(1) The power, real or imagined, of the political advocates has now been effectively curbed by the Conseil Superieur. Yet however neutral the promoting body in party political terms, there remains the danger that a judge will through his decisions attempt to seek favour and appear 'safe'.

The experience of France indicates that where there is institutionalised promotion at all levels of the professional judiciary, some constitutional device may be necessary to ensure judicial independence. There are, however, two other factors to be considered; first, that the situation described above, derived as much from the political structure as from the legal institutions of the country; and second, that any latent weakness in the French judicial career system may be due not to the practice of promotion as such, but to the division between judges and legal practitioners. The fraternity of the Bar in England and the weight of professional opinion provide firm supports for judicial independence, though perhaps at the cost of breadth of social horizons.(2) Nonetheless a hierarchical judicial career structure has never

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(1). Ensor op. cit. p. 41.
(2). See Chapter 11.

commended itself to the English legal profession, having always been regarded as inimical to freedom from executive interference.

The judiciaries of the countries considered in this chapter, England, France and America, have all over the past two or three decades achieved a greater degree of independence from the political machine. The extent of their success and the forms of judicial selection employed by these countries vary considerably; it is therefore difficult to postulate any simple correlation between freedom from political control and specific methods of appointment and advancement. Thus while the system of executive appointment which predominates in America has in comparison to its state elective systems achieved a relative freedom from political considerations, it is still some way from attaining the high degree of independence characteristic of the English judicial system. Nevertheless in general the facts suggest, and most observers agree, that in a representative democracy the appointive system is preferable provided it is supported by security of tenure and that there is a genuine degree of judicial independence. Given the long histories of executive control over judicial selection in all the countries, it is not immediately clear why the exercise of patronage and judicial involvement in politics should have declined at all. In America and France advisory appointment committees which operate as a check on executive powers have been established and a similar informal practice has developed in England; but such specific reform can only be a reflection of much wider changes, such as the rise of the professions as autonomous powers and the related decline of patronage in all fields. Similarly it is obvious that explanations for international variations must ultimately be

sought in the general social structure, beyond the practical workings of the selection systems *per se*.

PART IV: THE JUDICIAL CHARACTER

"....melodrama apart, the man of law lives on in our popular literature as a marked conventional type, though a very creditable one. He varies little. He is learned, if a little limited: dry, with a slightly comical precision: kindly and humane at heart, though on the surface unfeeling and disposed to browbeat: more a man of affairs, than a man of the world. Above all, he is a member of a caste: how should he not be, since he belongs to a profession? Bewigged and begowned, wearing the habiliments of an almost forgotten age, he can still be proud enough of his profession (and make others respect it enough too) to maintain his costume as a uniform and not as a fancy dress. He can bandy Latin tags with his opponent or proffer them with submission to the judge as if they were somehow more pregnant with meaning than their mere English equivalent." (Lord Radcliffe, 'Some reflections on law and lawyers.' Cambridge Law Journal Vol. 10. No.3 1950).

"Judges are the guardians of the gate of an ordered society; to them belong the sacred office of ensuring that the principles of right dealing according to law are pursued by private citizens towards each other, and towards the State, and, most crucial of all, by the State towards private citizens. They must administer justice 'without fear or favour, affection or ill-will'. "(H.G. Hanbury, English Courts of Law, O.U.P. 1960)

"The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."..... "All their lives, forces which they do not recognise and cannot name have been tugging at them - inherited instincts, traditional beliefs, acquired connections, and the resultant is an outlook on life, a conception of social needs, a sense in James' phrase of 'the total push and pressure of the cosmos'which when reasons are nicely balanced must determine where choice shall fall." (B.N. Cardozo, The Nature of the Judicial Process; O.U.P. 1921)

"It is impossible to be a barrister without imagining oneself a judge, and Ducane's imagination had often taken this flight. However, and this was another reason for Ducan's ultimate disgust with life in the courts, the whole situation of 'judging' was abhorrent to him. He had watched his judges closely, and had come to the conclusion that no human being is worthy to be a judge. In theory, the judge represents simply the majesty and impartiality of the law whose instrument he is. In practice, because of the imprecision of law and the imperfection of man, the judge enjoys a considerable area of quite personal power which he may or may not exercise wisely. Ducane's rational mind knew that there had to be law and courts, and that English law was on the whole good law and English judges good judges. But he detested that confrontation between the prisoner in the dock and the judge, dressed so like a king or a pope, seated above him. His irrational heart, perceptive of the pride of judges, sickened him and said it should not be thus; and said it the more passionately since there was that in Ducane which wanted to be a judge." (Iris Murdoch, The Nice and the Good, Penguin)

"A popular judge is a deformed thing and plaudits are fitter for players than magistrates". - Francis Bacon.

"All hail, great Judge!
To your bright rays
We never grudge
Ecstatic praise."(1)

Chapter 10.

Judicial Status and Public Opinion

The anonymous wig that lends to all an air of venerable wisdom, the splendid isolation and imposing height of the bench itself, the deference of counsel and the hushed tones of those less accustomed to the courtly ritual make it difficult to think of these, the 'guardians of an ordered society', the law and the crown,(2) without some feelings of awe. The British judiciary enjoy a dignity and prestige unknown to that of any other Bench in the world, and with some reason. Few would differ from Lord Goodman when he said,

> "I believe, and 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". (3)

The international reputation of the judiciary as the epitome of impartiality and incorruptibility is rarely questioned.

> "In no country in the world does the judicial office stand in higher popular regard than in England. Were a malicious critic of our institutions to hint that the fountain of justice is impure, that an English judge is capable of accepting a bribe, or being turned aside from pursuing his rightful path by executive pressure or favour, he would be

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(1). Chorus in Trial by Jury, Gilbert & Sullivan.
(2). The judiciary are, when the Queen's health is proposed at any function, permitted to remain seated.
(3). Hansard, House of Lords, 29th January, 1968, Vol. 288, col. 616.

> overwhelmed by public execration and riddled by the more effectual shafts of public ridicule. Through centuries of service our judges have come to be associated with all that is finest in our national life". (1)

It is not surprising that the record of actual attempts to pervert the course of justice via the judges has remained blank for well over a century; the last reported instance was in 1832, when a defendant in an action before Mr. Justice Alderson of the Common Pleas sent that judge a ten pound note together with a statement of his case. The defendant escaped prosecution on the grounds that the offence was the result 'rather of ignorance than of crime'.(2) Today, writes C.H. Rolph, an acute and none too sympathetic commentator on judicial ways, an attempt to bribe a judge is the one crime about which it can be said with perfect certainty that a psychiatric examination of the accused would be endorsed.(3)

For those who require a step by step account of the development of judicial incorruptibility, Henry Cecil, himself a judge of the County Courts, has produced a highly readable work, entitled 'Tipping the Scales'. It is impossible, he says, to determine precisely when the tradition was established. The last English judge to be charged with bribery was convicted nearly 350 years ago, but this obviously cannot be accepted as the last instance of the offence; and certainly other types of corruption, such as deciding cases in accordance with the Sovereign's wishes persisted for much longer, so that as late as 1775 Dr. Johnson wrote that a judge might become corrupt and

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(1). H.G. Hanbury, English Courts of Law, O.U.P., 3rd ed. (1960), p. 7.
(2). H. Cecil, Tipping the Scales, Hutchinson (1964), p. 17.
(3). Ibid. p. 9.

yet there be no legal evidence against him. But Cecil considers that it is probably safe to mark out the beginning of the nineteenth century as the point in time by which the pattern of incorruptibility was firmly set; "undoubtedly, as even those who are on other counts no friends of the English judges will be prepared to admit, the tradition of complete judicial immunity to the taking of bribes has certainly been established for very many years".(1)

Other countries have not been so fortunate in the integrity of their judiciary. In 1962 a judge of the New York State Supreme Court was convicted of bribery and sentenced to two years imprisonment. The following year another New York judge was asked to resign after refusing to give evidence in a case relating to alleged corruption.(2) As recently as May 1969 Associate Justice Abe Fortas of the Supreme Court was obliged to resign his post under threat of impeachment proceedings.(3) Mr. Fortas, an old friend of former President Johnson, who tried unsuccessfully to appoint him Chief Justice, was accused of receiving, though later returning, a fee of $20,000 from the family foundation of Mr. Louis Wolfson, now serving a prison sentence for a stock manipulation offence.

Not a whisper of such scandal disturbs the Gothic calm of the English courts but no Bench, however honourable, is innocent of fault; and perversely, it is the very esteem in which the judges are held and the certainty of their own uprightness which has been a source of judicial weakness.

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(1). Cecil, op. cit. p. 15.
(2). Ibid., p. 14.
(3). 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.

> "So high is the standard of judicial probity and morality that there is a danger that the nature of the judicial function may be misunderstood", writes Hanbury. "By a paraphrase of Falstaff, judges are moral, but they are not the reason why morals exist in other men. In a word their function is the enunciation and enforcement of law, not of morality".(1)

But the judges do often appear to see themselves as guardians of the nation's moral conscience, issuing regular pronouncements from the Bench on marital relations, sexual morality and literary freedom.(2) "To be the guardians of other people's morals" commented Mr. Justice McKenna, "comes easily to men over sixty and to some even younger".(3) The judicial office endows these expressions of personal opinion with an unwarranted authority and the public are inclined to attribute to the judges a wisdom about non-legal matters which they do not necessarily possess.(4) This attitude has undoubtedly been fostered by successive governments' employment of judges under the Tribunals of Inquiry (Evidence) Act 1921 to investigate issues of all kinds, but often ones of a scandalous nature in which politics, security and morality are closely mingled.

> "In 1936 Mr. Justice Porter probed much-publicised allegations into a Budget 'leak', with the result that an indiscreet Cabinet Minister, J.H. Thomas, retired from public life. In 1948 a tribunal under Mr. Justice Lynskey uncovered, at great trouble and expense, the operations of the middle man, Sidney Stanley, who had wormed his way into Westminster."(5)

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(1). Hanbury, op. cit., p. 7.
(2). In fairness, the role of moral decision-makers is sometimes thrust upon the judges by legislation, e.g. the Obscene Publications Act 1961.
(3). B. McKenna, "The Judge and the Common Man", Modern Law Review, Vol. XXXII, No. 6 (November 1969), p. 606.
(4). The Law Lords in their legislative capacity, valuable as is their contribution to the Upper House, often demonstrate a preoccupation with the moral implication of law reform, participating most frequently in the stormy debates on such issues as the abolition of the death penalty and the relaxation of abortion law. (G. Drewry & J. Morgan, "Law Lords as Legislators", Parliamentary Affairs, Vol. XXXII, No. 3 (1969).)
(5). E.S. Turner, May It Please Your Lordship, Michael Joseph (1971). p. 237.

In 1963, a year after Lord Radcliffe's investigation of the Vassall affair, Lord Denning headed an enquiry into the equally famous Profumo-Ward episode. The ensuing report was an instant best seller; but there were some who thought the investigation foolish.

> "Since when," asked Jo Grimond, the leader of the Liberal Party, "have the people of this country had to call in a High Court judge, however eminent, in order to carry out a roving commission in the private lives of various individuals, so that we may be informed whether we are behaving ourselves or not? Can you contemplate Mr. Gladstone requiring advice on this subject? Disraeli would have laughed himself silly ----". (1)

The involvement of Her Majesty's judges in quasi-judicial inquiries of this nature has not, it may also be said, met with the universal approval of the judges themselves. Some would sooner see the judicial "charisma" preserved for purely court purposes, and fear it may be frittered away if judges are turned into trouble-shooters for the other branches of government, apart from any inroads made on their valuable time.(2)

There is certainly evidence of a growing tendency to use the judges as Chairmen of Tribunals and ad hoc enquiries to investigate matters of a politically contentious or embarrassing nature.(3) But public respect for judicial wisdom and integrity is not a blank cheque to be drawn on indefinitely and there must be some disquiet lest this practise jeopardise the very reputation for judicial impartiality it seeks to employ.

There is on the other hand, evidence that the judicial role as Royal Commissioners is a declining one. According to W.L. Guttsman, 5 of the 16 Royal Commissions set up between 1944 and 1963 were presided over by High Court Judges; but 7 of the remining 11 were chaired by

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(1). Turner, op. cit., p. 237.
(2). G. Sawer, Law in Society, Oxford, Clarendon (1965).
(3). e.g. Lord Widgery's enquiry into the events of 'Bloody Sunday'; the Wilberforce report on the 1972 miners' dispute. See further G. Drewry, : The Judge as Political Anodyne: NLJ 1974.

academics, whose power on these bodies has steadily increased.(1) It may be argued, though, that the energies of the legal profession, in the nineteenth century an essential component of all Royal Commissions, are now more specifically and more appropriately reserved for the work of the permanent and influential Law Commission and Law Reform Committee.

During the Victorian era the judiciary enjoyed a position of power and fame equalled by few of their successors, participating quite openly in the political arena and enthusiastically performing their creative law-making role in the courts.(2) Throughout the years of reforming legislation, politics and law were inextricably linked in the public mind, and the status and authority of the judges was equalled only by that of the Cabinet. But the turn of the century witnessed both a decline in the popularity of the judiciary and a weakening of their importance within the constitution.

Respect for the Bench and the law it administered was undermined by the violent personal attacks to which individual judges were subjected; particularly bitter criticism was aroused by some of Lord Halsbury's more unfortunate appointments.(3) When Mr. Justice Ridley was appointed to the Queen's Bench Division in 1897, the Law Journal commented, "The appointment can be defended on no ground whatsoever. It would be easy to name fifty members of the Bar with a better claim."(4) Of another of his appointments in 1890 the Law Times wrote, "This

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(1). W.L. Guttsman, The British Political Elite, MacGibbon & Kee (1963), p. 337.

(2). Though they still payed lip-service to the idea that their task was to "find" rather than "make" law.
"As long as we have to administer the law we must do so according to the law as it is. We are not here to make the law." - Lord Coleridge CJ. Reg. v. Solomons (1890) 17 Cox, CC. 93.
"Our duty is simply to administer the law as we find it." - Grove J. Scattock v. Hartson (1875) L.R. I Com. Pl. 109.

(3). See Chapter 7.

(4). Cited in H. Cecil, op. cit., p. 191.

is a bad appointment. Mr. Lawrance has no reputation as a lawyer and has rarely been seen in recent years in the Royal Courts of Justice." According to Henry Cecil, Mr. Justice Lawrance's "greatest distinction was to reserve judgment in a difficult and important commercial case and when - after months - it was hinted to him that the parties would like to know the result, he came into court, and without giving any reasons at all, gave judgment for the plaintiff."(1) It is said that Lawrance's ineptitude prompted the creation of the Commercial List. Mr. Justice Grantham was yet another whose capacity was not equal to his appointment and whose main function often seemed to lie in keeping the Court of Appeal supplied with work. A former M.P., and still an ardent Tory, Grantham was at one time in serious danger of losing his seat on the Bench as a result of apparently biased decisions in the hearing of election petitions.(2) These three together with Mr. Justice Darling (a judge who was strikingly caricatured in Max Beerbohm's cartoon of him passing the black cap to the usher and telling him to have bells sewn on it) placed a severe strain on the reputation of the Bench. "The public and the legal profession had to endure their inadequacies and injustices for a long period of years ---- Much money and much time must have been wasted as a result of their defects, and many litigants must have suffered considerably in mind and estate as a result of their bad judgements."(3)

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(1). Cecil, op. cit. p. 193.
(2). The judiciary as a whole had never welcomed this task which had been thrust upon them by Parliament in 1868. The Lord Chief Justice, Sir Alexander Cockburn, had warned "that the inevitable consequences of putting judges to try election petitions will be to lower and degrade the judicial office, and to destroy or at all events materially impair the confidence of the public in the thoroughgoing impartiality and inflexible integrity of the judges ----". (E.G. Rowlands, Seventy-two Years at the Bar, Macmillan (1924).).
(3). Cecil, op. cit., p. 24.

Confidence in the judges was impaired too by their apparently hostile reaction to the increasing amount of statutory legislation on collective issues such as housing and conditions of employment; because of their highly individualistic, common law orientation, and their lack of experience in the spheres to which the legislation applied, the intention of such statutes was often wholly distorted by judicial interpretation. The relationship between the judiciary and organised labour had never been a happy one; it was not assisted by the famous Taff Vale decision(1) of the House of Lords in 1901 which temporarily revoked the right of peaceful persuasion precariously held by the unions since 1859. This decision, wrote Lord Evershed,

> "---- was the last episode in what had come to be regarded by trade unions and their supporters as a judicial attack on the workmen's right to combine for their own protection and in their own economic interests. There is no doubt that the earlier legislation regulating trade unions had left scope for the invocation and application of the old common law relating to conspiracy both civil and criminal, and that the courts had taken full advantage of the opening given to them. It may perhaps also be that conspiracy was a field offering full scope for the exercise by a judge, consciously or unconsciously of individual bias." (2)

But in spite of, perhaps because of, the evasive and obstructive attitude of many judges, the growth of social legislation persisted; and this, together with the removal of many quasi-judicial decisions on community issues to special tribunals staffed with experts and the failure of the legal world to adapt itself to modern commercial life, led the judiciary to play an increasingly narrow role within society. The tendency for the judiciary to be divorced from political

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(1). Taff Vale Railway Co. -v- Amalgamated Society of Railway Servants /1901/ AC 426.

(2). Lord Evershed, "The Judicial Process in Twentieth Century England", Columbia Law Review, Vol. LXI, No. 15 (May 196) p. 773.

The establishment of the Industrial Relations Court under the Industrial Relations Act 1971 has revived much of the old antipathy between the Courts and organised labour.

and emotional issues was matched by the increasingly 'apolitical' composition of the Bench; judges were no longer typically Westminster men.(1) Removed from many areas of competence and faced with a growing interest in the complexities of decision-making, the courts reacted by withdrawing even further from the field of overtly creative law-making, and adopting a non-critical attitude in regard to administrative actions; denying their discretionary functions, they assumed an apparently passive mechanistic role.

> "By 1932," writes Professor Robert Stevens, "only Lord Russell of Killowen was not an advocate of judicial restraint where social legislation was involved; and that brilliant trio of judges - Macmillan, Atkin and Wright - steered the House away from the dangers of giving decisions in the field of public law which might appear to interfere with the policies of a democratically elected government." (2)

This judicial pose reached its climax during the post-war period, encouraged by Mr. Bevan's statement that the Labour government would tolerate no'judicial sabotage' of its legislation.(3) "Sometimes", comments J.A.G. Griffiths, "they seemed to be leaning over backwards almost to the point of falling off the Bench to avoid the appearance of hostility".(4) He suggests, however, that the judges might have been in some ways trying to show the electorate precisely what they had got, sometimes enforcing the letter of the law rigidly even in the face of the dictates of justice.(5)

That the post-war social legislation was not obstructed by the judges, as it had been previously, is explained by Judith

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(1). See Chapter 7.
(2). "The Role of a Final Appeal Court in a Democracy. The House of Lords Today", 28, Modern Law Review,(1965), p. 516.
(3). Ibid., p. 518, quoting Parl. Debs., Vol. 754, col. 1762 (May 3rd, 1946).
(4). J.A.G. Griffith, "The Law of Property", M. Ginsberg ed. Law and Opinion in England in the Twentieth Century, Stevens (1959), p. 120.
(5). e.g. Smith -v- East Elloe R.D.C. [1956] AC 736.

Shklar in terms of the general consensus that supported reforms particularly in the first years after the war.(1) Although the judges are often accused of exceptional conservatism, the limits to judicial adaptation and adjustment are, she says, to be found within the wider society. Thus the number of judges who appear 'socially oriented' has increased as society as a whole has become more aware of its social obligations.

The declared judicial doctrine of 'decision inevitability', though in practice far from realistic, succeeded at least in heightening the respect in which the judges were held. Criticisms were replaced by reverential eulogy.(2) Her Majesty's judges, said Sir Rupert de la Bere, Lord Mayor for 1953, have a greater understanding of human nature than any other body of men in the world.(3) Even radical critics, though quick to point out the defects inherent in the judges' interpretative function, rarely questioned the basic integrity or competence of any post-war judges. They were considered more fair-minded, more courteous and more 'judicial' than any of their predecessors. One lawyer described them as

> "---- much quieter and nicer than they were. Drunk judges, sadistic judges, rude judges or judges it was sheer agony to appear before have died away; and the spate of recent appointments seems to have produced a character who bears most resemblance to a sensible and charming headmaster at a quite tolerable public school." (4)

If it seemed, however, that the respected position of the twentieth century judge had been achieved only at a loss of real judicial power within modern society, this was largely

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(1). J. Shklar, Legalism, Camb. Mass., Harvard Univ. Press (1964) p. 10.
(2). Though see above p. 238
(3). Quoted in B. Abel-Smith and R. Stevens, Lawyers and the Courts, Heinemann (1967), p. 290.
(4). Sunday Times Magazine (19th May, 1963), article by John Mortimer.

refuted when in the late fifties, the judges showed themselves once again willing to recognise their creative function. The most outspoken of the appeal judges in demanding judicial creativity has been Lord Denning.(1)

> "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers to carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." (2)

Lord Radcliffe had a similar approach.

> "There was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it? ---- Judicial law is always a reinterpretation of principles in the light of new combinations of facts, of which very relevant ones, unprovable by evidence, are the current beliefs of the society in which those facts occur. True, judges do not reverse principles, once well established, but they do modify them, extend them, restrict them and even deny their application to the combination in hand."(3)

There have been critics of this new stance, particularly when, as with Denning, the legalistic approach is disregarded in so flagrant a manner; when, it seems, he is increasingly indifferent to giving even the appearance of dispensing law as distinct from policy.(4) Hugo Young's recent profile of the judge quotes one senior lawyer's opinion of Denning's judgments,

> "Of course an appeal judge has to operate policy. We all know that. But it should be couched in orthodox language. Otherwise people begin to lose confidence in law as law." (5)

But though the revival of overt judicial creativity

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(1). Abel-Smith & Stevens, op. cit., p. 298.
(2). Magor & St. Mellons R.D.C -v- Newport Corporation [1950] 2 All E.R. 1226, 1236 C.A.
(3). Viscount Radcliffe, Not in Feather Beds, Hamish Hamilton (1968), p. 215.
(4). See below p.252
(5). Sunday Times (June 17th/24th, 1973).

inevitably aroused some objections, there has, in general, been approval for the work of those appeal judges[1] who by taking social and economic conditions into consideration, have given to the courts a new relevance and significance.

If during the past decade there has been any doubt of the acknowledged superiority of 'British justice' or the quality of the individual judges, it has been directed at the courts' handling of criminal matters; criticism has centred round a handful of highly publicised and sensational cases, some of them involving other sectors of the establishment. Feelings ran particularly high throughout the imbroglio of the infamous 'Profumo affair'. In September 1963, the Observer editorial read,

> "The public's hitherto almost unquestioning faith in the integrity and independence of Britain's judges could yet become one of the incidental casualties of the Profumo affair. The widespread, if vague feelings of disquiet at the role played by the courts in a number of recent cases has now found expression in the Labour Party's decision to make a political issue of the relationship between the Government and the judiciary." (2)

The main criticism arose out of the secrecy which surrounded the case of 'Lucky' Gordon before the Court of Appeal;[3] it was suggested that the judges involved were 'persuaded' by the Establishment not to disclose certain information which might have damaged the Crown's case against Stephen Ward. The allegation was groundless, the court had acted entirely within its powers; but in the moral furore surrounding the whole affair few of those involved, however

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(1). Most notably Lords Reid, Radcliffe, Devlin and Denning.
(2). Observer (September 15th, 1963).
(3). The appeal was allowed without revealing the contents of certain tape-recordings heard and other statements before the court.

tenuous or innocent the connection, escaped the public pillory.

Any concern about the standard of justice during the past decade, though 'Profumo' and similar cases provided the fuel, probably derived less from any particular failings of the courts, than from a generally critical attitude towards the whole 'establishment'; an attitude characterised by a socio-journalistic preoccupation with the 'hidden power-structure'. The criticisms were not always consistent so that those who spoke of 'improper influence' in one breath and 'power elites' in another sometimes failed to realise that where there is a ruling class or power elite, albeit a diffuse one, active influence is largely superfluous since the prejudices and ideals of its component groups will largely coincide. "The fact is that the judges, on the whole free of positive political attitudes, think on the same wave-length as the governors".(1) Particularly when a Tory government is in power, any similarity in the origins and interests of the judiciary and the executive, will be accentuated by the innate conservatism of the legal profession.

It is dangerous, however, to overstate the affinity between 'legal' and 'political' conservatism. This point is taken up in the following, and final, chapter which considers in more detail the perennial question of 'class justice' and the significance of the judges' professional socialisation.

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(1). L. Blom-Cooper, "Essays in Law Reform: the Judiciary in an Era of Law Reform", Political Quarterly, Vol. XXXVII, No. 4 (1966), p. 380.

"Every profession is a conspiracy against the laity".
George Bernard Shaw.

Chapter 11.

Class Justice and Judicial Isolation

Though in the past the Bench has been less exclusive than other elites, the social and educational backgrounds of the judiciary have never to any extent reflected the social and educational composition of the population as a whole. The socially biased recruitment of all elite groups has invariably been regarded in a critical light, not only with regret that the egalitarian ideal remains unfulfilled, but also with an implication that the performance of the group's proper function is thereby vitiated. Thus defects in the judges' interpretation of early social legislation have usually been seen purely in terms of class conflict. In 1911 Winston Churchill speaking in the House of Commons on the Trade Unions (no.2) Bill said:

> "The Courts hold justly a high, and I think, unequalled prominence in the respect of the world in criminal cases, and in civil cases between man and man no doubt they deserve and command the respect and admiration of all classes of the community, but where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence".(1)

Similarly Laski, while he never questioned the professional integrity of the judges, believed that their socio-economic backgrounds prevented their acquiring a proper understanding of economic and social conditions in society as a whole. "The decision of the House of Lords in the Taff Vale Case" he wrote,

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(1). Parl. Debs. (H.L.)

"was an obvious decision from men who had no experience of the conditions under which trade unions must work ....".(1)

Others have seen, and still see, the quality of justice to be strained on a more everyday level. The narrow social background of the judges creates, it is said, a 'cultural gap', an obstacle to the proper understanding of those who appear before them, whose values, motivations and speech, will often be quite alien to the wellmeaning dispensers of law. A recent report on the judiciary states:

> "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 a strata of society other than their own. ....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".(2)

It is suggested too that there will be a tendency for the judges to attach more weight to evidence given by 'their own kind' than by those of other social groups. One great judge, Lord Justice Scrutton saw this difficulty clearly; writing of the need for impartiality, he stated:

> "This is rather difficult to attain in any system, I am not speaking of conscious partiality; but the habits you are trained in, the people with whom you mix,

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(1). H.J. Laski

(2). JUSTICE Sub-Committee, The Judiciary, Stevens, (1972)p.33.

> lead to your having a certain class of ideas of such a nature that when you have to deal with other ideas, you do not give as sound and accurate a judgement you would wish ----- It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your own class".(1)

Social origins must induce some bias in judges as in other men;(2) but the relationship between socio-economic background and social political outlook is never simple. Thus were the social base of the Bench extended by some means,(3) it is questionable how far there would be a corresponding change in the overall judicial orientation. It is unfortunate in this respect that the effects of social mobility on behaviour patterns and values, or more particularly the phenomenon of status discrepancy, have not yet been the subject of comprehensive study; the only available material is contradictory. Investigators of America's 'radical right' have, according to Seymour Lipset, suggested that some of the newly-rich react to the strains inherent in their position by becoming even more conservative than the old rich and display a tendency to adopt the values and behaviour pattern of the status group above them.(4) In the same way, few of the nineteenth century judiciary and leading members of the Bar could be described as 'progressive', though many of them were of middle class rather than upper class origins; they were on the contrary some of the staunchest of 'establishment' supporters. On the other hand, similar status discrepancies have also been used to account for liberal tendencies.

> "Thus", writes Lipset, "it has been suggested that the nouveaux riches have responded frequently to the experience of having wealth without the corresponding high status by giving support to leftist or egalitarian movements

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(1). 1 Cambridge Law Journal p.8.
(2). In all men - some social observers appear to regard such bias as an upper-class prerogative.
(3). By the appointment of solicitors, for example. See below p.[illegible].
(4). S.M. Lipset, Revolution and Counterrevolution, Heinemann, (1969) pp.167-69.

> that challenge the legitimacy of the traditional basis of social status .... this thesis has been advanced to account for the ....leftism of relatively well-to-do Jews in various countries".(1)

All forms of incompatibility in stratification have been used to explain entirely opposits socio-political reactions; and all seem equally valid. Lipset does indicate, however, that though there may be other contrary factors, there is in general a tendency for individuals to take over the behaviour patterns of higher social classes - "a conservative bias inherent in stratification". This argument can be over-stated; the possible effects of a change in the social composition of the Bench cannot be entirely discounted. Nevertheless, the revolution might not be so radical as some critics of the present system prophesy.

The ascription of simple class-specific values to the judiciary is further confused by the importance of their professional orientation. The seeds of separateness may be sown by an upper-class family milieu and a public-school education but members of the legal profession are their cultivators par excellence. Any 'bias' or 'gap' usually attributed to the narrow class background of the judges may equally well stem from their legal training and experiences and from the very essence of the law itself.

Professional Isolation.

Many lawyers believe it essential to their function to maintain a degree of separateness from the community at large. This attitude has been expressed in extreme form by an eminent

(1). Lipset op.cit.

Australian judge.

> "At the very outset of his career", stated the judge, "during his education, a barrister is supposed to be trained to be apart from the whole community with a view to induce feelings of independence and a knowledge of the principles upon which that independence exist. A barrister is kept aloof from all classes, in order that he may be trained to dissociate himself from the every day life of the public, as constituting in due time a part of his education for a judge, because, as I take it, that quality of independence both in a barrister and a judge, is a matter of education, just as the attainment of knowledge is. He must absolutely ignore all the community and know no man. That is a thing that cannot easily be done unless a man is trained to that particular direction".(1)

Yet it is probably this isolation, this detachment from the contemporary world which has inspired the most criticism of the senior branch of the legal profession as a whole and of the judges in particular; and ironically active disapproval has if anything tended to nourish the fraternity's introversion. J.B. Priestley in a vitriolic New Statesman article observed

> "I have met in my time a few pleasant and lively wig and robe men. But even the best of them, well away from their courts, have never quite seemed to be real contemporaries, honest-to-God neighbours, and I have never felt they were really with the rest of us. There has always been something anachronistic about them. I find it hard to believe they own cars and refrigerators and take their wives to see a film. Even at dinner table, doing their best to keep the talk going, they seem to exist in a queer atmosphere of their own. And I suspect that it is this atmosphere, as well as their whacking great fees and costs, that makes most of us dread any litigation. We feel it would be like trying to explain ourselves to another time, another planet".(2)

The introversion of Bar and Bench might arouse adverse comment but it should occasion no surprise; the life pattern of the English lawyer provides a better blueprint for group

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(1). Lord Wilberforce, "Educating the Judges", Journal of the Society of Public Teachers of Law. (Dec 1969) Vol.X. No.4. P.254.

(2). J.B. Priestley,"Wigs and Robes". New Statesman (17 Aug.1962)

solidarity than any social engineer could devise.(1) First the ethos they share with all professions;

> "From the earliest times" observed that eminent lawyer, Lord MacMillan, "the practioners of a particular art have always shown a tendency to draw apart from the rest of the community and to constitute themselves a separate class or fraternity, with their own ceremonial rites and shibboleths".(2)

The foundations and extent of this professional esprit de corps was analysed in W.J. Goode's article 'Community within a Community'.(3) "Characteristic of each of the established professions" he wrote, "and a goal of each aspiring occupation, is the 'community of a profession'." Each profession is distinguished as a community by the following characteristics.

1. Its members are bound by a sense of identity.
2. Once in it, few leave, so that it is a terminal or continuing status for the most part.
3. Its members share values in common.
4. Its role definitions vis-a-vis both members and non-members are agreed upon and are the same for all members.
5. Within the areas of communal action, there is a communal language which is understood only partially by outsiders.
6. The community has power over its members.
7. Its limits are reasonably clear, though they are not physical and geographical but social.

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(1). In contrast, the American legal profession is far more heterogeneous. "In the United States the socialisation of lawyers shows considerable variation, and this heterogeneity is tied with the societal class structure on the one hand and the internal stratification of the bar on the other. Ethnic origin and class background are varied and show a high correlation with length and quality of pre-law schooling, type and quality of legal education, the incidence of non-legal jobs as part of the work career, and finally, the type and status of legal practise". (A. Rueschemeyer, 'Lawyers and Doctors: A Comparison of Two Professions'. Sociology of Law: ed. Vilhelm Aubert. *

(2) Lord MacMillan, Law and Other Things, Cambridge, (1938) p. 244.

(3) Am. Soc. Rev. Vol XXII (1957) pp. 194-200

*Penguin (1969) p. 275.

8. Though it does not produce the next generation biologically, it does so socially through its control over the selection of professional trainees, and through its training processes it sends these recruits through an adult socialisation process.

Of course, professions vary in the degree to which they are communities, and, though most have neither a physical locus nor extensive blood relationships between the generations, there are exceptions. Thus, in her study of the Scottish Faculty of Advocates, Nan Wilson points out that the advocates do actually operate within specific geographical limits, both working and living in an area of Edinburgh which covers only about one square mile.(1) Further, since there is no heavy in-migration into the group, the founding fathers are often linked by blood with the present generation. These additional factors make the Faculty of Advocates far more of a closed community than most professions.

The same features are present, though to a lesser extent, in the English legal system. Though not wholly confined to a single geographical area, the senior branch of the profession finds in that area of the metropolis which contains the Inns of Court and the Royal Courts of Justice a distinct physical, and 'spiritual', focus; most members of the profession spend their whole working lives within this centre and all spend part of either their training or practice there.(2) On the other hand the importance of the 'provincial' Bar and the sheer size of the

(1). Nan Wilson, The Sociology of a Profession : The Faculty of Advocates. Unpub. Ph.D. Thesis, Edinburgh (1965) p.137.
(2). 75% of all English barristers, including all Q.C's have chambers in London.

English Bar as a whole make it impossible for barristers to interact socially on the same scale as their Scottish counterparts. Yet the English Bar, still small in comparison with other professions, is undoubtedly highly centralised and socially concentrated. The members of Bar and Bench are also distinguished, as we have already seen, by a consistently high degree of self-recruitment within their numbers; family connections accentuate traditional professional solidarity.

The Inns of Court

The Inns of Court, like the public schools and the Oxbridge colleges, are noted for their tendency to foster 'in-group' feelings. Typical of the sentiment aroused in lawyers by the Inns is Lord Birkenhead's statement that, "A Grays Inn man is better than any other man and no damned nonsense about other things being equal".(1)

The origins of the Inns are not clear. It is fairly certain, though, that there were apprentices of the law in the days of Edward I (1272-1307) and it is in connection with them that the 'Inns' or 'hospicia' are first heard of. Judges and serjeants, like others whose work brought them to London, usually had town houses, but the apprentices understandably found it convenient to live in groups. According to the Pension Book of Grays Inn,

> "The earliest hospicies.... most likely originated, as did the halls at Oxford, in the hire of a house by a party of students who, at the requirement of

(1). T.H.J. Bishop, in collaboration with R. Wilkinson, Winchester and the Public School Elits : A Statistical Analysis. Faber & Faber (1967)

the landlord named one of their number as the person responsible for the rest, and afterwards committed to him the direction of their society."(1)

About twenty inns are known to have been used in this way by the apprentices during the fourteenth century but by 1400 they were dominated by the four principal Inns of Court. Most of the early records of these legal societies have been either destroyed or lost, but the Black Books of Lincoln's Inn, which begin in 1422, show that there was by that time a settled academic establishment. By this time, also, the serjeants and judges were almost invariably drawn from members of the four major Inns.(2)

The Inns are voluntary societies governed, in a similar way to the Oxbridge colleges, by the Benchers who are self-perpetuating bodies, new members being selected by the existing members. The Benchers of each Inn have disciplinary powers over their members and may disbar a barrister for 'unbecoming conduct'. In the exercise of this jurisdiction the Benchers are entirely independent of the courts and their action cannot be called in question by them. Appeal to the judges in their capacity as supervisory visitors to the Inns is possible but rarely exercised,(3) and understandably so, for the superior judiciary are always themselves Benchers of their respective Inns. Each of the Inns has its own particular character. The Inner Temple is reputedly the oldest and richest, and produces the largest

(1). Rev. R.J. Fletcher ed. Pension Book of Grays Inn, Vol I. p.XII.
(2). J.H. Baker, An Introduction to English Legal History, Butterworths, (1971), p.69.
(3). See though one recent case In re Shier, Time Law Report, Feb.14th 1969.

number of judges; both the Inner and Middle Temples have tended to restrict their membership to those who have been to the 'best' schools and the ancient universities. Grays Inn is less exclusive, admitting the greatest number of foreign students and paying less attention to school, while Lincolns Inn remains the preserve of the Chancery lawyers.

The social intimacy of the Inns has some advantages; inherent in such a closed community is a system of social control which provide strong sanctions to ensure the maintenance of the rules of professional etiquette. A barrister's general reputation at the Bar is a paramount factor in influencing his appointment to the rank of Queens Counsel or ultimately to a judicial office; and the need to stand well with their professional brethren is a powerful control on the judiciary.

Institutional factors have thus encouraged a corporate spirit within the legal profession and intensified any tendency towards social isolation arising out of the homogeneous origins of its members. But more than this, as I observed at the very beginning of this study, the nature of the legal profession and the law was essentially determined within the context of a highly individualistic society and as such has often been ill-adjusted to twentieth-century needs, and in particular to the operation of statutory legislation of a collectivist type. Once more it was Laski who summed up this point,

> "The attitude of our Courts in trade union cases is, again, unintelligible except as the expression of a mental climate which has never freed itself from the belief that trade unions are organisations threatening

> the equilibrium of a society built upon the principle that the means of production must remain in private hands".(1)

More recently, R.M. Jackson has written

> "The common law is on the whole highly individualistic, upholding the liberty of men to enter into such contacts as they see fit and allowing property owners to do what they like with their own, subject to certain limitations. Modern legislation often cuts across these ideas; statutes regulating conditions of employment and statutes aimed at slum clearance and a better standard of housing obviously conflict with the policy of the common law".(2)

Yet in interpreting such statutes the judges have often assumed that Parliament meant to legislate in accordance with the existing law and not alter any rights of property or freedom of contract; with this assumption the courts have sometimes wrecked a statute. But as the previous chapter demonstrated, this is no longer a major issue; the courts, though they may still retain a basically individualistic orientation, have since the war like the majority of the community come to accept enough of the theory of public action to avoid any fundamental criticism for their treatment of legislation of a collectivist nature.

Legalism

In this brief attempt to illuminate those factors which contribute to the social isolation of the judiciary and thus

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(1). H.J. Laski - The State in Theory and Practice Allen & Unwin (1935) p. 174.

(2). R.M. Jackson. The Machinery of Justice in England. C.U.P. 6th ed. (1972) p.380

also act as possible sources of conflict or misunderstanding between the courts and other sections of society, I come finally to a consideration of the lawyer's fundamental set of beliefs, embodied in the doctrine of legalism.

> "Legalism" explains Judith Sklar, "is the ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules".(1)

The average lawyer is irresistably instilled with a firm respect for the virtue of certainty and a reluctance to approve any new, and therefore possibly arbitrary powers. Even the famous law reformer, Hale, counseled caution,

> "An overbusy meddling with the alteration of lawes, though under the plausible name and pretence of reformation, doth necessarily introduce a great fluidness, lubricity and unsteadiness in the lawes, and renders it upon every little occasion subject to perpetual fluxes, vicissitudes and mutations".(2)

The legalistic ethos, may it is true, be tempered by the exercise of judicial creativity; the fiction that judges do not make law has long been abandoned. But judicial law-making is a purely interstitial activity, a pragmatic response to changing social conditions, carried out within an infrastructure of established expectations.

Judges of the nineteenth century, while in theory supporting the doctrine of decision inevitability, were in practise often enthusiastic law-makers. There is on the other hand some evidence that the contemporary Law Lords, since 1966 when they were given the power to review their own decisions,

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(1). N. Shklar, Legalism, Camb. Mass., Harvard Univ. Press,(1964)p1.

(2). Hale, Considerations touching the Amendment of Lawes (quoted in J. Baker op.cit.)

have adopted a rather more cautious stance than previously;[1] the implication being that they have been inhibited by their new freedom, that an essential equilibrium between desired innovations and the certainty of precedent has been disturbed and that the judges to redress the balance have become more conservative in their decision-making. The appeal judges, Denning excepted,[2] are on the whole most confortable when their responses to changing social and economic circumstances can be veiled by an apparent adherence to the dictates of precedent. Thus Lord Radcliffe, though a notable exponent of judicial creativity, has nevertheless on more than one occasion publicly argued the need for a mask of legalism.

> "If judges prefer to adopt the formula - for that is what it is - that they merely declare the law and do not make it, they do no more than show themselves wise men in practice. Their analysis may be weak but their perception of the nature of the law is sound. Men's respect for it will be the greater, the more imperceptible its development."(3)

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(1). Exampless of this caution are given by Blom-Cooper & Drewry. "In Beswick and Beswick (1968) A.C.58, the House was presented with a golden opportunity to reconsider the longestablished, but much criticised judge-made doctrine of jus quaesitum tertio. Instead their Lordships chose to allow the appeal on narrower grounds, and to leave the issue of reform to the Law Commission and to Parliament. In Owen and Pook (1970) A.C. 244, of the three Law Lords in favour of allowing the appeal, only Lord Pearce was prepared explicitly to grasp the nettle of overruling the earlier decision in question (Ricketts and (1926) A.C.1) Lords Guest and Wilberforce merely distinguished the two decisions. (L. Blom-Cooper & G. Drewry, Final Appeal Oxford, Clarendon (1970) p. 70 fn.2)

(2). See above p.237.

(3). Quoted in Hugo Young, 'Judge of Our Daily Lives' Sunday Times June 24, 1973.

> "We cannot run the risk of finding the archetypal image of the judge confused in men's minds with the very different image of the legislator ....Personally, I think that judges will serve the public interest better, if they keep quiet about their legislative function. No doubt they will discreetly contribute to changes in the law, because, as I have said, they cannot do otherwise, even if they would. The judge who shows his hand, who advertises what he is about, may indeed show that his is a strong spirit, unfettered by the past; but I doubt very much whether he is not doing more harm to general confidence in the law as a constant, safe in the hands of judges, than he is doing good to the laws credit as a set of rules nicely attuned to the sentiment of the day." (1)

Some modern observers of the judiciary intent upon reducing the process of decision-making to the sum of each judge's social experiences and personal foibles, too easily dismiss the significance of the law itself as a socialising factor. The distinctive mode of thinking inevitably associated with the study and practice of the law was more obvious to their predecessor, Harold Laski,

> "When.....so large a part of law is rooted in precedent, it is natural for the lawyer's mind to dwell upon continuity with the past rather than departure from it".(2)

and again,

> "It is almost an inevitable characteristic of the legal mind that it should tend to conservatism. It is largely engaged in the study of precedent .... Lawyers, in fact, are more definitely the servants of tradition than any other class in the community".(3)

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(1). Lord Radcliffe, Not in Feather Beds. Hamilton (1968)

(2). H.J. Laski, The State in Theory and Practice. Allen & Unwin, (1935) p.176.

(3). H.J. Laski, A Grammar of Politics. Allen & Unwin 2nd ed.(1930) p.572.

At least one occupant of the contemporary Bench, Mr. Justice Finer, has demonstrated an awareness of this tendency.

> "The Lawyer, almost irrespective of his politics is by training and self-interest a conservative in the affairs of his own profession. The status quo is part of his mental capital. Every legal reform robs him of an asset he has worked hard to acquire."(1)

This is not, as Shklar emphasises, a matter of 'masking' a specific socio-economic interest. The belief that it does arises out of the cultural content of the law itself which is still very much the child of the middle and upper classes.

It is particularly important to distinguish legalism from political conservatism. As J.A.G. Griffith put it,

> "A lawyer is bound by certain habits of belief.... .. by which lawyers, however dissimilar otherwise, are more closely linked than they are separated... .. A man who has had legal training is never quite the same again...., is never able to look at institutions or administrative practices, or even social or political policies, free from all legal habits or beliefs".(2)

In the last resort the judges' political associations and their class backgrounds may be of less importance than the legalistic values all lawyers inherit through their training and professional experiences.

(1) Morris Finer Q.C., "The legal profession", in M. Zander (ed) What's Wrong with the Law? Published by the B.B.C. (1970).

(2) J.A.G. Griffith, "The Law of Property", M. Ginsberg ed. Law and Opinion in England in the Twentieth Century. Stevens, (1959) pp.17-19.

This study has been first and foremost a factual description of the men who have sat in the superior courts since 1820, an analysis of their social, educational, professional and political histories. My intention was never, as I stated at the outset, to relate the background characteristics of the Bench to the judicial decision-making process. I have though in this concluding chapter taken a very general look at the various factors which, I suggest, contribute to an overall uniformity in the judicial approach and tend to set them apart from the rest of the community; this has been, by its very nature, a highly impressionistic exercise, describing factors that are frequently inter-related. It is evident though, notwithstanding individual variations arising out of differing personal experiences, that the judges are as a whole characterised by singularly homogenous life-cycles, a considerable degree of social insularity, and a strong professional dogma; the judges possess a communal identity rivalled by few other groups within our society.

APPENDICES

Appendix A

Sources of Biographical Data

General biographical references

Dictionary of National Biography.

Who's Who and Who Was Who.

Burke's Peerage.

Burke's Landed Gentry.

Legal Registers

Register of Admissions to the Hon. Soc. of the Middle Temple from the fifteenth century to the year 1944, ed. H.A.C. Sturgess.
Vol. 2: 1782-1909
Vol. 3: 1910-1944. (1949)

Register of Admissions to Grays Inn, 1521-1889 - J. Foster. (1889)

Register of Admissions to Grays Inn from 1890 to date. (unpublished)

The Records of the Hon. Soc. of the Society of Lincolns Inn.
Vol. 2: Admissions from 1800-93. (1896)

Masters of the Bench of the Hon. Soc. of the Inner Temple 1450-1883.
Supplements 1883-1900 (1883)
1901-1918. (1901) (1918)

Inner Temple - Admissions Records and Calls to the Bar. (unpublished)

University Records

Alumni Cantabrigienses - J. Venn & J.A. Venn.
Part II 1752-1900. (Cambridge 1940-54)

The Historical Register of the University of Cambridge to the year 1910, ed. J.R. Tanner (C.U.P. 1917)
Supplements 1911-50.

Alumni Oxonienses 1715-1886 - J. Foster.
(Oxford and London 1888-92)

University Records (continued)

The Historical Register of the University of Oxford to 1900. (Oxford, Clarendon Press 1900)
Supplements 1901-30 (1934)
1931-50. (1951)

University of London: The Historical Record 1836-1926. (Univ. of London Press Ltd. 1926)
Supplements - to 1931, 1932-46, 1947-51.

Miscellaneous works containing biographical data, in particular:

Atlay, J.B., The Victorian Chancellors, Smith (1906-08).

Blom-Cooper, L.J. (ed.), The Law as Literature, Bodley Head (1961).

Foster, J., Men at the Bar. 2nd ed. (1885).

Heuston, R.F.V., Lives of the Lord Chancellors, 1885-1940, Oxford, Clarendon (1964).

Hutchinson, J., A Catalogue of Notable Middle Templars (1902).

Lord Russell, The Royal Conscience.

Smith, F.E. (1st Earl of Birkenhead), Fourteen English Judges, Cassell (1926).

Appendix B

Analysis of the class composition of the superior court judiciary

Though class is a concept basic to the study of society, yet it is not capable of precise definition; no one characteristic can be wholly adequate as a means of assigning every person in a society to an appropriate social class. None the less, if a single criterion must be selected, occupation will usually prove the most complete and useful index for the purpose of distributing a population along a social scale. Though the number of classes and their precise occupational boundaries may vary according to the needs and limitations of any particular study and though individual anomalies may arise an analysis of social origins in terms of father's occupation does throw useful light on the class structure of a group and on the changes occurring over periods of time.

One of the main difficulties in this class analysis was that of making a greater differentiation among the higher ranks of society than has been usual in other class studies. Thus Guttsman, in his analysis of the British Political Elite uses a simple three-fold classification - aristocracy, middle-class and working-class.(1) Similarly, Margaret Stacey divides the inhabitants of Banbury into the three usual classes - upper, middle and working (though complemented by an additional refined status analysis).(2) It was soon obvious that such classifications were too dispersed across the whole social scale to be at all useful in analysing the judiciary who were clearly well entrenched in the upper regions of

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(1). W.L. Guttsman, The British Political Elite MacGibbon and Kee (1963)

(2). M. Stacey, Tradition and Change: A Study of Banbury O.U.P. (1960)

society. Little attention has been paid hitherto to distinctions within the upper classes - they are, after all, a relatively small group - but in order to avoid tediously homogeneous and therefore largely meaningless results, some differentiation within that group has had to be made for the purposes of this analysis.

The following classification, therefore, though obviously drawn up with some regard for similar analyses and for the "general consensus of opinion" on the social status of various occupations, is, ultimately, based on my own estimation of the social ranking of occupations, and, as such is inevitably open to question, both as to its overall structure and in respect of specific allocations. I hope, however, to minimise criticism by describing the main problems which arose in the construction of the classification and by explaining the reasoning behind its final structure.

It was expected that some of the judges' fathers would themselves be socially mobile; the problem arose, therefore, as to whether the judges should be assigned to classes according to the position held by the father at a particular time, according to the father's main occupation or to the highest position held by him. Most studies of social class do not, in fact, specify the criterion used, if any. One which does (i.e. C.B. Otley's thesis on the army elite)[1] states that the index used was father's occupation at or as near as possible to the son's date of birth. It seems reasonable to consider only the position held by the father in the judge's

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(1). C.B. Otley, Social Background of Senior Officers of the British Army, 1870-1959. Ph.D. thesis. Hull (1962)

early years, on the basis that this is the period when the general pattern of the judge's life will be set, although higher positions held by fathers in later life are relevant in terms of the patronage and influence they might carry.

Because much of my data on fathers' occupations were obtained from the Admission Records of the Inns of Court (i.e. when the judge was approximately twenty years old), I decided initially to take as my index of social class, the main occupation held by the father before the judge reached the age of majority - and in addition a 'highest position' for separate analysis. However, the wide limits of the main analysis meant that the number of fathers who warranted two separate classifications was in practice negligible. In addition, because most of the general biographical sources tend to record only the highlights of the parental career and omit the relevant dates, there may be some cases of "hidden" mobility, particularly among those assigned to Class II. In view of these considerations, I finally concluded that it would be more consistent to assign the judges to classes on the basis of the highest position ever held by their fathers, bearing in mind that there may be a slight 'upward' bias in the analysis.

Class Assignment According to Father's Occupation or Rank

Class I.

Traditional landed upper class (a)

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.

Bishop, dean.

Major-general and superior ranks.

Rear-admiral and superior ranks.

Director or owner of large commercial or industrial enterprise. (b)

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.

Class III.

Upper middle class

Professional occupations - barrister, solicitor, town clerk, doctor, (c) clergy, accountant, architect, quantity surveyor.

Army major, lieutenant-colonel or colonel.

Captain or commander in navy.

Captain in merchant service.

Merchants or other middle-range entrepreneurs, (b) minor banker, bank manager, member of Stock Exchange or Lloyds, broker or agent.

M.P., member of colonial parliament, civil servant.

Upper middle class (Cont.)

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, (c) secretary, estate agent, journalist, minor civil servant, government shorthand 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.

(a) 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; it is in a sense the very fact of the members of this class frequently being without occupation that distinguishes them from the less exalted strata.

(b) 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 appeared to be on a smaller scale and lacking in social status were placed in Class IV. Only directors or owners of large, prosperous and usually well-

known companies have been assigned to Class II, e.g. Garrards, Youngers, Frys.

(c) 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. (1) 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. As G.D.H. Cole puts it, "The 'doctor' was not, as such, reckoned a gentleman, unless he was one of the privileged few". (2) Accordingly, judges of the first two appointment cohorts, whose fathers were 'medical men' but not fully qualified doctors, have been assigned to Class IV, rather than Class III.

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(1). The Report of the Select Committee on Medical Education 1834 (part ii, p. 20) refers to "the three inferior grades of surgeons, apothecaries and even druggists".

(2). Studies in Class Structure Routledge & Kegan Paul (1955).

Appendix C.

The demography of the judiciary

The judges, as a clearly defined and well-documented historical group, provided good subjects for demographic analysis; unfortunately, the relatively minor position occupied by this particular inquiry within the whole thesis has meant that the analysis is a rather crude one, based only on 'whole-year' figures(1), and using as the chief measure of nuptiality, fertility, and mortality, the simple arithmetic mean. I hope, however, that within these limitations there have emerged some useful results which might lead to a more detailed and proficient study.

The analysis was mainly an attempt to 'place' the judges demographically and possibly to reveal any peculiarly 'judicial' characteristics; thus, it was expected that the judges, as a professional elite, with a fairly high degree of social mobility among the earlier members, would differ in various ways, - age of marriage, family size, expectation of life, etc., - from the general population; that their behaviour patterns would more closely match those of other leading social groups. The lack of comparable historical data was obviously a problem; specific comparison has, therefore, been confined mainly to Hollingsworth's admirable study of the British peerage(2), with more general comments on the changing life patterns of the professional and upper classes and the population as a whole.

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(1). For individual judges this may create an error of $\pm$11 months; I have assumed however that for the whole population these errors will largely cancel each other out.

(2). T.H. Hollingsworth, "The Demography of the British Peerage." Population Studies. Vol.XVIII. No2. Supplement (1964-65)

For this section only it was easier for comparative purposes - and also more meaningful - to classify the judges according to their date of birth rather than their date of appointment to the Bench (1).

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(1). Five judges, whose date of birth is not known, have been omitted from the demographic analysis.

Marriage.

Throughout the nineteenth century the average age of marriage for both judges and the peerage was, as Tables XXXIX - XLI show, very much higher than that for the general population. There are, however, obvious differences between the former two groups; for the peers' sons in the period from the mid-eighteenth century, to the end of the nineteenth century, there is a slow but definite rise in the age of marriage. The fuller data included in Hollingsworth's study show that this is only part of a general trend towards later marriage within the peerage beginning about 1600 and continuing to the early twentieth century; this may be associated with a corresponding decline in mortality which made less urgent the need to marry off a son or daughter quickly for fear he or she might die. Later marriage was also a form of family limitation. The judicial marriage pattern is less clear. The average age of marriage from the mid-nineteenth century, though more stable, compares roughly with that of the peerage; but this is not apparently the culmination of a gradual rise ; rather the figures for the preceding sixty years suggest that there was a large and sudden fall in the age of marriage. There is no obvious explanation for the abnormally high age at which the earlier judges married, though the general tendency for later marriage among those destined for the Bench may be related to their initial educational commitments and the financial instability of the early years at the Bar.

A more detailed and accurate picture of the judicial marital pattern is obtained by an analysis of the actual distribution of the ages at which individual judges married.

Table XXXIX Mean age at first marriage of judges ever married

Cohort born	Mean age	Total first marriages	
		Age stated	Not stated
1740-99	33.4 years	40	9
1800-24	33.4 "	48	1
1825-49	30.4 "	56	2
1850-74	30.7 "	53	-
1875-99	30.6 "	58	6
1900-24	30.3 "	72	3

Table XL

Mean age at first marriage of peers' sons ever married (1). (1725-1924) (2).

Cohort born	Mean age	Total first marriages
1725-49	29.7 years	356
1750-74	29.6 "	538
1775-99	29.2 "	623
1800-24	30.8 "	779
1825-49	30.8 "	843
1850-74	31.9 "	939
1875-99 (3)	30.0 "	700
1900-24 (3)	27.3 "	226

(1) All Hollingsworth's tables refer to his "secondary universe"; - this consists of all the legitimate offspring (I have considered only the male portion) of the "primary universe". This is defined as:- All peers of any of the five British national divisions (England, Scotland, Ireland, Great Britain and the United Kingdom) who died between 1603 and 1939. It also includes their eldest sons, provided that these were heirs to a peerage on their fifteenth birthday (and even grandsons on the same basis) provided that they likewise died between 1603 and 1939. Peeresses in their own rights are members of the primary universe. Life peers and peeresses are included and the monarchy was treated as a peerage. (Hollingsworth op. cit. p.7.)

(2) ibid. data taken from Table 5 p. 15 and Table 17 p. 25.

(3) In the last cohorts, says Hollingsworth, the means are necessarily lower than would eventually be achieved; many of the cohort members were still alive in 1959 and some would undoubtedly have married after that date.

Table XLI

Mean age at marriage (all marriages) for the general male population of England and Wales (1896-1955).[1]

Marriage date	[2] 1896 - 1905	1906 - 30	1931 - 55
Mean age	28y 5m	29y 2m	29y 2m

(1). ibid. data taken from Table 3 p.12. - based on the Registrar General's Statistical Review of England and Wales, Tables pt. II. 1925 p.123; and ibid. Pt.II. Tables, Civil 1956 p. 76 and 1960 p.72.

(2). No date seems to be available before 1896.

Table XLII shows that throughout the whole period studied, most first marriages took place within the age group 25-34; the majority of judges in the two earliest cohorts were, however, over 30 when they married, whereas since 1825, (mid-nineteenth century in terms of marriage dates) the largest concentration of marriages has been in the 25-29 age group.

Table XLII

(a) Distribution of age at first marriage of judges ever married

Cohort born	Total marriages	0-24	25-29	30-34	35-39	40-44	45-	Age not stated
1740-99	49	2	14	9	6	5	4	9
1800-24	49	8	11	16	6	5	2	1
1825-49	58	5	25	18	3	2	3	2
1850-74	53	3	30	8	6	5	1	-
1875-99	64	6	23	16	7	4	2	6
1900-24	75	13	31	10	10	4	4	3
Total	348	37	134	77	38	25	16	21

(b) Distribution of age at first marriage of judges ever married (expressed as a percentage of all marriages where age is stated)

Cohort born	0-24	25-29	30-34	35-39	40-44	45-
1740-99	5.0%	35.0%	22.5%	15.0%	12.5%	10.0%
1800-24	16.7%	22.9%	33.3%	12.5%	10.4%	4.2%
1825-49	8.9%	44.6%	32.1%	5.4%	3.6%	5.4%
1850-74	5.7%	56.7%	15.1%	11.3%	9.4%	1.9%
1875-99	10.3%	39.7%	27.6%	12.1%	6.9%	3.4%
1900-24	18.1%	43.1%	13.9%	13.9%	5.6%	5.6%
Total	11.3%	41.2%	23.5%	11.6%	7.6%	4.9%

Some of the judges married twice, hardly any three times; their incidence of celibacy, on the other hand, is, in comparison with the peerage and even the general population, relatively low.

Table XLIII

Judicial remarriage and celibacy

Cohort born	First marriage	Second marriage	Third Marriage	Never married[1]	Total judges
1740-99	68.4%	17.5%	-	14.0%	57 (100%)
1800-24	74.1%	14.8%	1.9%	9.3%	54 (100%)
1825-49	86.4%	11.8%	-	1.7%	59 (100%)
1850-74	75.9%	15.5%	-	8.6%	58 (100%)
1875-99	74.0%	11.0%	2.7%	12.3%	73 (100%)
1900-24	78.8%	15.0%	-	6.3%	80 (100%)

(1). The incidence of judicial celibacy is if anything over-stated owing to gaps in the biographical data.

Table XLIV

Sons of peers - proportion per 1,000 never married (1750-1924) (1)

Cohort born	Never married per 1,000
1750-74	179
1775-99	214
1800-24	157
1825-49	134
1850-74	154
1875-99	106
1900-24	132

Table XLV

Proportions per 1,000 aged 45-49 never married, found in the censuses of England and Wales (1851-1951) (2)

Census year	Birth years of group aged 45-49	Never married per 1,000 living (males)
1851	1801-06	121
1871	1821-26	99
1891	1841-46	104
1911	1861-66	127
1931	1881-86	110
1951	1901-06	98

(1). ibid. data taken from Table 11. p.20.

(2). ibid. data taken from Table 12. p.20.

Family Size.

Historical data on fertility is considerably less reliable than that on nuptiality and mortality; and the analysis of reproductive patterns is rendered more difficult by the problem of deciding to what extent changes in family size reflect real changes in fertility and to what extent they are simply by-products of changes in mortality and marriage patterns.

It is clear from Table XLVI, however, that during the second half of the nineteenth century, the judges conformed to the general upper and middle class pattern of reproduction; from the 1860's onwards these classes showed a distinct trend towards smaller families. The impetus for family limitation derived from a complex of socio-economic factors,(1) though principally, as J.A. Banks has shown, from the desire to achieve or maintain a given standard of living.(2) During the middle years of the nineteenth century social status came to depend increasingly on conspicuous consumption, on the need to demonstrate "all the paraphernalia of gentility"; the Great Depression threatened to undermine this way of life, but restricting family size was one method of reducing expenditure, not directly relevant to appearing affluent. "The new emphasis on education and specialised training as a means of preserving and if possible improving the social and economic position of one's children was another factor," writes Kelsall. "And many other influences were at work, including the decline in religious belief, the spread of the scientific attitude of mind, ---- and the emancipation of women. The fewer the children,

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(1). Not, as some have claimed, from the development of better contraceptive techniques.

(2). J.A. Banks, Prosperity and Parenthood: A Study of Family Planning among the Victorian Middle Classes. Routledge, (1954) p.5.

Table XLVI

Mean family size of judges ever married

Cohort born	Mean family size	Total married judges: Family size stated	Total married judges: Not stated[1]
1740-99	5.7	34	15
1800-24	3.7	28	21
1825-49	4.9	47	11
1850-74	2.8	49	4
1875-99	2.4	51	13
1900-24	2.6	63	12

Table XLVII

Family size in the general population (1861-1920)[2]

Marriage cohort	Ultimate family size
1861-69	6.16
1881	5.27
1900-09	3.3
1920	2.47

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(1). It is possible that many whose family size is not recorded were in fact childless.

(2) Hollingsworth. op. cit.

the better the start in life that they could be given."(1)

The process by which family limitation gradually spread downwards through the social classes was a slow one, so that throughout a number of decades there were large class differentials in family size. Planned restriction increased the percentage gap between the classes with the smallest and largest families, the professions and miners, from 24% in the 1850's to 60% in the years 1881-86.(2) A paper produced by T.H.C. Stevenson for the Royal Statistical Society in 1920, based on data from the 1911 Census, showed that at that time the lowest fertility rates were still returned for the most purely middle class occupations - the professions.(3) Even allowing for late marriages, this group was very infertile. Barristers produced on average a family of 1.65, 41% smaller than the national average of 2.80; even when the former figure is standardised to allow for later marriages, it increases to only 1.78.

Stevenson's paper is followed by some interesting comments from Dr. Marie Stopes, based on a study by the nineteenth century geneticist Sir Francis Galton.(4) In this, she affirmed, were a good many examples, making it quite clear that many of the superior, successful families, such as produced judges, admirals and distinguished men in general, had become extinct through marrying with heiresses who by their very nature tended to be physiologically infertile. Galton had examined the

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(1). R.K. Kelsall, Population. Longmans,(1967) pp.18-19.

(2). O.R. McGregor, Divorce in England. Heinemann,(1957) p.83.

(3). T.H.C. Stevenson, "The fertility of various social classes in England and Wales from the middle of the nineteenth century to 1911." Journal of the Royal Statistical Society(1929) LXXXIII pp. 401-44.

(4). Sir Francis Galton, Hereditary Genius; an enquiry into its laws and consequences. Watts, 2nd. ed.(1892) pp.128-32.

descendants of thirty-one judges who gained peerages and who last sat on the Bench previous to the close of the reign of George IV; of these 31 peerages, at least twelve were extinct by the end of the nineteenth century. The reason for this, Galton discovered, was the "particulars of their alliances", a considerable proportion of the new peers and their sons marrying heiresses. The motives for this are obvious, he says; the new peer, or his son, has a title and perhaps a sufficient fortune to transmit to his eldest son, but needs an increase of possessions for the endowment of younger sons and daughters. The heiress, on the other hand, has a fortune but wants a title. Unfortunately, these 'ambitious' marriages are peculiarly unprolific for since the heiress possesses the family fortune, it follows that there are no sons and frequently no other daughters, implying a stock of low fertility; the chances are then that the heiress is not a good child-producer and the line tends to die out. Galton considered this a disastrous institution.

"The most highly gifted men are ennobled; their older sons are tempted to marry heiresses, and their younger sons not to marry at all, for these have not enough fortune to support both a family and an aristocratic position. So the side-shoots of the genealogical tree are hacked off and the leading shoot is blighted, and the breed is lost for ever".(1) These heiress marriages, wrote Galton, had been responsible for bringing to an end within a hundred years the lines of four Prime Ministers - Walpole, Grenville, Rockingham and Canning.

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(1). ibid. p.132.

Galton also reports on another "peculiarity in their domestic relations" that interferes with a large average of legitimate families for the judiciary. In a footnote to his life of Lord Chancellor Thurlow, Lord Campbell writes that when he was first acquainted with the English Bar, one half of the judges had married their mistresses; it was the understanding, he says, that when a barrister was elevated to the Bench, he should either marry his mistress or put her away. According to this extraordinary statement, comments Galton, it would appear that much more than one half of the judges that sat on the Bench in the beginning of this century (the nineteenth) had no legitimate offspring before the advanced period of their lives at which they were appointed judges. This was obviously one of the many occasions when Lord Campbell's lively imagination outran his regard for truth; the number of judges entering into marriage for either the first or second time after their appointment to the Bench was negligible; only 8 of those appointed between 1820-75 married after their appointment, three for the first time, the remainder for the second.

Birth order.

In a note to Bishop and Wilkinson's study of Winchester,(1) the authors suggest that future studies of career success should wherever possible include data on such family factors as number of brothers and sisters and birth order; the difficulty lies in obtaining adequate and accurate information on such points. In his examination of the judges of England between 1660-1865, Galton recorded the birth order of 120 of the 286 judges(2):-

Only son.	Elder	2nd	3rd	4th	5th	Later
11	17	38	42	9	1	2

His results led him to suggest that social influences were probably against the first son entering the law. "It is clear", he wrote, "that the eldest sons do not succeed as judges half as well as their cadets." If this is true of the earlier period, - and the paucity of Galton's data invites some scepticism, - the trend over the past 150 years has been in the opposite direction. The majority of those recently appointed to the bench have been only or elder sons; the explanation for this must lie partly in the overall decline in family size.

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(1). T.H. Bishop, in collaboration with R. Wilkinson, Winchester and the Public School Elite : A Statistical Analysis. Faber & Faber,(1967) p.190

(2). Galton op. cit. p.78.

Table XLVII

a) Birth order of the judiciary

Cohort born	Only son	Elder	Younger	2nd	3rd	4th	5th	Later	Not Stated
1740-99	3	22	3	11	12	3	-	1	2
1800-24	1	19	1	21	5	7	-	-	-
1825-49	8	20	-	21	6	2	-	1	1
1850-74	8	16	-	19	6	3	3	1	2
1875-99	13	19	5	12	9	3	-	3	9
1900-24	18	28	7	8	8	1	2	1	7
Total	51	124	16	92	46	19	5	7	21

b)

Cohort born	Only and elder sons	Younger sons
1740-99	25	30
1800-24	20	34
1825-49	28	30
1850-74	24	32
1875-99	32	32
1900-24	46	27
Total	175	185

Mortality.

It is a common saying of English and American lawyers that "great judges never retire ---- and seldom die".(1) A special preservative perhaps but more likely a simple case of demographic bias; the judiciary have a tendency to longevity mainly because entry into the cohort is unusual before the age of fifty. Beyond this age the expectation of life has for the whole population changed little over the past century and a half and class differentials have been minimal. The major gains in mortality have been at the younger ages. Thus between 1840/1 and 1910/1 the expectation at birth for males in the general population rose by 15 years from 40 to 55, while at age 65, in over a century from 1785/6 to 1890/1 the expectation increased by only one year. Similarly a comparison of the general population (males) and peers' sons born in the 1840's shows that the expectation at birth for the latter was some twelve years longer than for the former; but by age 55 there was only about 2 years difference between the two groups.

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(1). H. Levy-Ullman English Legal Tradition. Macmillan (1935) p.75 fn.1

Table XLIX

Judicial mortality[1]

a) Mean age at death

Cohort born	Age
1740-99	74.6 years
1800-24	71.1 "
1825-49	75.2 "
1850-74	77.2 "
1875-99[2]	73.2 "

b) Distribution of age at death

Cohort born	45-54	55-64	65-74	74-84	85-
1740-99	1	5	24	18	9
1800-24	2	13	18	17	4
1825-49	2	6	19	21	11
1850-74	-	5	13	27	11
1875-99	-	3	19	12	2

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(1). An examination of those judges who died whilst still in office is contained in the analysis of 'Judicial Retirement'. Table XXVI(b).

(2). In this cohort the mean is lower than will eventually be achieved; 37 of the judges were still alive at the end of 1968. All but two of the judges in the birth cohort 1900-24 were also alive.

Table L

Life expectation of all males in England and Wales (1785-1911)[1]

Cohort born	0	5	15	25	35	45	55	65	75	80
1785/6	-	-	-	-	-	-	16.5	10.8	6.36	4.69
1810/1	-	-	-	-	29.0	22.4	16.0	10.6	6.33	4.73
1840/1	39.9	49.4	42.8	35.8	29.0	22.4	16.2	10.7	6.32	4.82
1860/1	42.3	53.6	46.6	38.9	31.5	24.3	17.6	11.4	6.57	5.11
1875/6	46.1	57.0	49.3	41.3	33.4	25.8	18.3	12.0	6.82	5.03
1890/1	48.8	59.2	50.9	42.5	34.6	26.3	18.6	11.9	-	-
1910/1	55.2	61.8	53.4	44.8	36.1	27.0	-	-	-	-

Table LI

Life expectation of peers' sons (1725-1924)[2]

Cohort born	0	5	15	25	35	45	55	65	75	80
1725-49	38.6	47.5	40.6	34.2	28.0	21.4	15.6	10.5	6.7	5.47
1750-74	44.5	49.7	42.3	35.6	29.8	23.0	17.1	10.8	5.8	3.98
1775-99	46.8	49.7	42.6	37.1	30.9	24.0	16.9	10.7	6.0	4.60
1800-24	49.2	52.1	43.9	37.2	31.1	24.7	18.2	11.8	7.0	4.67
1825-49	52.1	53.4	45.4	38.6	31.7	25.1	18.4	11.8	7.0	4.67
1850-74	54.7	55.8	47.1	39.1	32.1	25.3	18.3	12.7	7.1	5.40
1875-99	53.8	51.8	42.8	37.4	32.8	26.7	19.7	13.4	7.4	5.64
1900-24	60.2	58.5	49.3	42.1	35.5	28.3	-	-	-	-

(1). Hollingsworth op. cit. data taken from Table 45. p.59.
(2). Hollingsworth op. cit. data taken from Table 42. p.56.

In summary, it is clear that as expected the judges, appointed between 1820 and 1968 and born in the period 1740-1924, have, in respect of the general population, been demographically atypical displaying patterns of marriage and reproduction representative of the professional and upper classes. The inherent bias derived from their age of appointment, unfortunately prevents a proper comparative assessment of what superficially appears to be a favourable expectation of life.

Appendix D.

Correspondence between Lord Birkenhead and Lloyd George on the appointment of the Lord Chief Justice in 1921

(taken from F.E., The Life of F.E. Smith, First Earl of Birkenhead, by his son, The Second Earl of Birkenhead. Eyre & Spottiswoode, (1959) pp.402 - 7.)

(Secret)

House of Lords,
S.W.

9th February 1921.

My dear Prime Minister,

With further reference to our conversation yesterday on the subject of the appointment to be made upon the retirement of the present Lord Chief Justice, I think that I ought to recapitulate the effect of what I then said. The matter is, in my opinion, of the gravest importance both in relation to the future of our judicial system and to the credit and indeed the existence of the present Government. You know that it has been my constant object to give you every assistance possible to bear the heavy burden of responsibility which rests upon you. If I now press upon you a view which is contrary to your own, I do so because of the gravity of the issue and the very serious consequences which, in my opinion, would result from the adoption of the course which you had contemplated.

The proposal is, as I understand it, that the person appointed to the vacant office should be so appointed upon the understanding express or implied that he will retire when called upon, and that the Attorney General should withdraw his claim to appointment upon this occasion upon the understanding that the pledge to retire will be exacted from the new Lord Chief

Justice before any change of Government, so that he, the Attorney General, may then be appointed.

For the reasons which I am about to give, I do not think that such an arrangement as this is practicable.

In the first place, I would draw attention to Section 9 of the Supreme Court of Judicature Act, 1873, which provides that 'all the judges of the High Court of Justice ... shall hold office for life subject to a power of removal by Her Majesty on an address presented ... by both Houses of Parliament.'

In my opinion, an appointment to the office of a Judge, upon the understanding express or implied, that the person appointed will retire when called upon to do so, is a clear infringement of this statutory provision. Not only does it violate the letter of the Statute, but it is in defiance of its spirit, and defeats the object for which the enactment was passed. That object was to secure that the Judges should hold office independently of any political or other influence, and should be removeable only for the most serious judicial misbehaviour and then in the most public and open manner.

The proposal under contemplation, however, would make the Lord Chief Justice a transient figure, subject to removal at the will of the Government of the day, and the creature of political exigency. I do not think that if such an arrangement were publicly discussed, it would be found capable of reasoned defence.

To test the question, I would ask you to consider what would happen if the question were put in Parliament, whether the

new Lord Chief Justice had accepted office upon any pledge or understanding that he would resign when called upon, or on the happening of any political event. Such a question must be answered truthfully or untruthfully. I put aside the alternative of an untruthful answer. If it is answered truthfully in the affirmative, the consequences to the Government, to the Lord Chief Justice and to the Attorney General would be disastrous. It can only be answered truthfully in the negative if no such understanding has been entered into or pledge given, and in that event, the security, in exchange for which the Attorney General has surrendered his claims, disappears.

It is necessary further to consider what the situation would be if such an arrangement were entered into in spite of both of the arguments which I have adduced and the public criticism which would be aroused. The Lord Chief Justice ... the highest judicial officer of the Kingdom ... would sit in his Court with the Attorney General constantly appearing to argue before him and with the knowledge in the minds both of the Judge and of the advocate that the latter could at any time displace the former from his seat and occupy it himself. I do not think that such a situation could be contemplated without dismay.

Gossip has already dealt freely with the situation and rumour has been busy with various suggestions - some fantastic - as to the means which the Government intended to adopt for meeting it. Public opinion, therefore, is already awake to the possibility of some such transaction as that which is now contemplated. There can be no doubt that every means will be taken by those

hostile to the Government to probe every detail of the negotiation. It is, therefore, impossible that it should remain undiscovered. Further, on the Bench, at the Bar and among the solicitors, public opinion on the subject is already articulate, and I have no hesitation in saying that were such an arrangement made it would be regarded in all quarters with consternation as a public scandal of the greatest magnitude, and would inflect incalculable harm upon the credit and reputation of the Government.

The exercise of judicial patronage, whether by the Prime Minister or the Lord Chancellor, is always a matter of great anxiety, and I know the attention which you have given to the question of your own judicial patronage whenever it has arisen during my tenure of office. You know also how deadly is criticism on such matters when it is both just and well informed.

The public opinion of the profession has in the past on more than one occasion been a formidable weapon in the hands of the opponents of the Government of the day. I would instance the appoint of Sir Robert Collier to the Judicial Committee by Mr. Gladstone, when a motion to the effect that the circumstances were at variance with the spirit and intention of the Statute and of evil example in the exercise of judicial patronage was only lost in the House of Lords by two votes. Had such a motion been carried, it would have involved the resignation of the then Lord Chancellor (Lord Hatherley). The motion might easily form a model for a similar motion upon the present occasion, and I regard it as certain that such a motion would be carried in the House of Lords. I need hardly point out the inevitable

consequences to my own position which would follow if it was supported (as it would be) by my legal colleagues in this House.

I turn to consider by whom it would be possible that the office of Lord Chief Justice could be filled upon such terms as have been suggested. Lord Finley is approaching 79 years of age. He has in the past rendered the most eminent services as Attorney General and has enjoyed the highest reputation as an advocate. You yourself thought that age unfitted him to hold the position of Lord Chancellor towards the end of 1918. Since then he has sat frequently in the House of Lords for the purpose of hearing appeals, and it is apparent to everyone that the great powers which he once possessed are now gradually leaving him under the burden of his advancing years.

I have no doubt that even if he were willing to accept office on such conditions, professional opinion would condemn the appointment, and lay opinion would inquire how it was that he who was too old to be Lord Chancellor in 1919 was not too old to enter upon the arduous office of Lord Chief Justice in 1921. But in addition, it would become apparent to the whole world immediately upon his assumption of his duties that he had reached an age at which he was unfitted to perform them.

I pass by Lord Sterndale because I am convinced, not only that he would not accept office on any such understanding, but that no one would be found hardy enough to make such a proposal to him. There remain Mr. Justice Darling and Mr. Justice A.T. Lawrence. Whatever may be the excellencies of Mr. Justice Darling, the opinion of his colleagues and of the two professions would be

unanimous in condemnation of such an appointment, and Mr. Justice A.T. Lawrence - sound lawyer as he is - has not shown such qualities as would atone for the circumstances of the appointment, and he is moreover in the 75th year of his age.

In conclusion, I would say that I realise very fully the difficulties that must arise from the appointment of the Attorney General to the Lord Chief Justiceship. No one will lose more than myself by his departure from the House of Commons, or is in a better position to estimate his loss as an advocate for the Crown. The consequential Parliamentary difficulties which arise are also considerable, and any help which I can give to obviate them is at your disposal. I feel, however,most strongly that such difficulties as these must give way before the necessities of the case, and to attempt - in order to deal with them - to patch up the situation in the manner proposed would, for the sake of a temporary emergency, inflict lasting harm upon both the Courts and the Government.

Yours very sincerely,

BIRKENHEAD.

Lloyd George replied:

10, Downing Street,
Whitehall, S.W.1.

Feb.11th 1921.

My dear Lord Chancellor,

I fail to see the point of your lengthy typewritten document with its quotation from the Judicature Act. I never suggested to you the subjects of your elaborate protest. My only proposal

to you was that I should appoint a distinguished lawyers on the express understanding that he should retire at 80. If it is contrary to the Judicature Acts to stipulate that high legal functionaries should not cling to their posts into years of decrepitude then it is high time these Acts were amended.

To take the Attorney General from his present position under existing conditions would be a national disservice. He very nobly responded to the appeal made to him by B.L. and myself in the interests of the nation to forego his claims. He is much too honourable and loyal a man to allow anyone to persuade him to break faith.

As to Finlay's capacity Carson whom you will admit is the most eminent advicate of his day told me the profession would regard his appointment with great satisfaction.

Yours ever,

D. Lloyd George.

House of Lords.
Feb. 11th 1921.

My dear Prime Minister,

1. The question has never arisen whether a judge cd properly be put under a condition to retire at the age of 80 because so far as I know no-one has ever been made a judge at an age which suggested such a stipulation. Campbell was 70 when he became L.C.J. but his vitality was amazing: he was, I think, a record. Carson has not practised before Finlay since the latter became Ld Chancellor. I have sat with him continuously. I by no means say that he is unfit for judicial

work but he is not the man he was and I do not think that he cd undertake the office of L.C.J. The Appointment is yours and if you appoint him I shall loyally co-operate with him but I most earnestly hope that if you do you will make him L.C.J. without any condition, relying upon his age to terminate his tenure of office within a reasonable time. If any condition is imposed I am sure that we shall find ourselves exposed to the risks and difficulties suggested in my letter the suggestion of which was the object of that letter.

2. I have no conceivable object in the matter (except) to help the Government. I have no conceivable personal motive in desiring to see the A.G. become L.C.J. at this moment. What does it matter to me ? So far from advising the A.G. to do anything which is not honourable I have most carefully limited the opinion I gave him to the point already indicated to yourself that a judge cannot be appointed sub condicione be that condition written or verbal. Nor did I volunteer this opinion. He came to me and invited it on the night of my return.

3. The appointment is of coure yours but as Mr. Gladstone pointed out in the Collier crisis: 'In such cases the public will suppose and will rightly and necessarily suppose that the Lord Chancellor is privy and assentient to the policy adopted, and my noble and learned friend was so privy and assentient.'

It is surely better that possible objections should be stated by me who in effect must share the responsibility than from less friendly lips.

Yours sincerely,

BIRKENHEAD.

Appendix E

The Judges of the Superior Courts 1820 - 1968.

Where a judge held more than one office within the superior courts, this is indicated by a simple cross-reference system using an alphabetical coding: - a. Vice-Chancellors. b. Chancery Division .....s. Lords of Appeal in Ordinary.

Chancery

a. Vice-Chancellors

1818 - 27	John Leach	r.
1827 - 30	Anthony Hart	
1827 - 50	Lancelot Shadwell	
1841 - 51	James Lewis Knight Bruce	c.
1841 - 50	James Wigram	
1850 - 51	Robert Monsey Rolfe, later Lord Cranworth	c.d.
1851 - 53	George James Turner	c.
1851 - 66	Richard Torin Kindersley	
1851 - 52	James Parker	
1852 -	John Stuart	
1853 - 68	William Page Wood, later Lord Hatherley	c.
1866 - 81	Richard Malins	
1868 - 69	George Markham Giffard	c.
1869 - 70	William Milbourne James	c.
1870 - 86	James Bacon	
1871 - 73	John Wickens	
1873 - 82	Charles Hall	

b. Chancery Division

1877 - 83	Edward Fry	q.
1881 - 90	Edward Ebenezer Kay	q.
1881 - 97	Joseph William Chitty	q.
1882 - 86	John Pearson	
1883 - 1900	Ford North	K
1886 - 1907	Arthur Kekewick	
1886 - 1900	James Stirling	q.
1890 - 99	Robert Romer	q.
1893 - 1904	Robert S. Wright	k.
1897 - 1904	Edmund Widdrington Byrne	
1899 - 1901	Herbert Cozens-Hardy, later Lord	q.r.
1899 - 1906	George Farwell	q.
1900 - 15	Matthew Ingle Joyce	
1900 - 06	Henry Burton Buckley, later Lord Wrenbury	q.
1901 - 13	Charles Swinfen Eady, later Lord Swinfen	q.r.
1904 - 15	Thomas Rolls Warrington, later Lord	q.
1906 - 18	Ralph Neville	
1906 - 13	Robert John Parker, later Lord	s.
1907 - 37	Harry Trelawney Eve	
1913 - 23	Charles Henry Sargent	q.
1913 - 29	John Meir Astbury	
1915 - 19	Robert Younger, later Lord Blanesburgh	q.s.
1915 - 22	Arthur Frederick Peterson	
1918 - 26	Paul Ogden Lawrence	q.
1919 - 28	Frank Xavier Joseph Russell, later Lord	q.s.
1922 - 29	Mark Lemon Romer, later Lord	q.s.
1923 - 29	Thomas James Cheshyre Tomlin, later Lord	s.
1926 - 38	Albert Charles Clauson, later Lord	q.
1928 - 34	Frederick Herbert Maugham, later Viscount	q.s.
1929 - 38	(Arthur) Fairfax C. Luxmoore	q.

Chancery Division (Cont.)

1929 - 43	Christopher J.W. Farwell	
1929 - 43	Charles Alan Bennett	
1934 - 41	Charles Stafford Crossman	
1937 - 44	Gavin Turnbull Simonds, later Viscount	s.
1938 - 44	Fergus Dunlop Morton, later Lord	q.s.
1941 - 46	Augustus Andrewes Uthwatt, later Lord	s.
1943 - 46	Lionel Leonard Cohen, later Lord	q.s.
1944 - 60	Harry Bevir Vaisey	
1944 - 47	Francis Raymond Evershed, later Lord	q.r.s.
1944 - 51	Charles Robert Ritchie Romer	q.
1946 - 60	Ronald Francis Roxborough	
1946 - 60	Henry Wynn-Parry	
1947 - 49	David Llewelyn Jenkins, later Lord	q.s.
1947 - 59	Charles Eustace Harman	q.
1949 - 61	Harold Otto Danckwerts	q.
1949 - 69	George Harold Lloyd-Jacob	
1951 - 60	Gerald Ritchie Upjohn, later Lord	q.s.
1960 - 62	Charles Ritchie Russell	q.
1960 - 69	(Arthur) Geoffrey (Neale) Cross, later Lord.	
1960 - 70	Denys Burton Buckley	
1960 -	John Pennycuick	
1961 - 64	Richard Orme Wilberforce, later Lord	s.
1961 -	(John) Anthony Plowman	
1962 -	(Arwyn) Lynn Ungoed-Thomas	
1964 - 71	(Edward) Blanchard Stamp	
1965 -	Reginald William Goff	
1967 -	Robert Edgar Megarry	

c. Lords Justices in Chancery

1851 - 66	James Lewis Knight Bruce	a.
1851 - 52	Robert Monsey Rolfe, Lord Cranworth	d.a.
1853 - 67	George James Turner	a.
1866 - 68	Hugh McCalmont Cairns, Lord, later Viscount	
1867 - 68	John Rolt	
1868 -	William Page Wood, Lord Hatherley	a.
1868 - 69	Charles Jasper Selwyn	
1869 - 70	George Markham Gifford	a.
1870 - 76	William Milbourne James	a.
1870 - 76	George Mellish	

Exchequer

d. Court of Exchequer

1799 - 1827	Robert Graham	
1806 - 23	George Wood	
1817 - 32	William Garrow	
1823 - 29	John Hullock	
1827 - 34	John Vaughan	g.
1829 - 39	William Bolland	
1830 - 34	John Bayley	j.
1832 - 45	John Gurney	
1834	John Williams	j.
1834 - 57	Edward Hall Alderson	g.
1834 - 55	James Parke, later Lord Wensleydale	j.
1839	William Henry Maule	g.
1839 - 50	Robert Monsey Rolfe, later Lord Cranworth	a.c.
1845 - 56	Thomas Joshua Platt	
1850 - 74	Samuel Martin	
1856 - 76	George W. Wilshere Bramwell, later Lord	q.

Court of Exchequer (Cont.)

1856 - 60	William Henry Watson	
1857 - 73	William Fry Channell	
1859 - 63	James Plaisted Wilde, later Lord Penzance	n.
1863 - 75	Gillery Pigott	
1868 - 97	Anthony Cleasby	
1873 - 81	Charles Edward Pollock	k.
1874 - 76	Richard Paul Amphlett	q.

e. Exchequer Division

1875 - 81	John Walter Huddleston	h.k.
1876 - 81	Henry Hawkins, later Lord Brampton	k.
1879 - 81	James Fitzjames Stephen	k.

f. Chief Barons of the Exchequer

1817 - 24	Richard Richards
1824 - 31	William Alexander
1831 - 34	John Singleton Copley, Lord Lyndhurst
1834 - 44	James Scarlett, Lord Abinger
1844 - 66	Jonathan Frederick Pollock
1866 - 80	Fitzroy Kelly

Common Pleas

g. Court of Common Pleas

1816 - 38	James Allan Park	
1816 - 29	James Burrough	
1818 - 24	John Richardson	
1824 - 37	Stephen Gaselee	
1830 - 42	John Bernard Bosanquet	
1830 - 34	Edward Hall Alderson	d.
1834 - 39	John Vaughan	d.
1837 -	Thomas Coltman	
1839 - 44	Thomas Erskine	
1839 - 55	William Henry Maule	d.

Court of Common Pleas (Cont.)

1842 - 58	Cresswell Cresswell	n.
1845 - 46	William Erle	j.
1847 - 65	Edward Vaughan Williams	
1850 - 54	Thomas Noon Talfourd	
1854 - 59	Richard Budden Crowder	
1855 - 72	James Shaw Willes	
1858 - 73	John Barnard Byles	
1859 - 75	Henry Singer Keating	
1865 - 71	Montague Edward Smith	
1868 - 76	William Baliol Brett, later Viscount Esher	q.r.
1871	Robert Porret Collier, later Lord	
1871 - 81	William Robert Grove	k,
1872 - 81	George Denman	k.
1873 - 75	George Essex Honyman	

h. Common Pleas Division

1875 - 76	Thomas Dickson Archibald	j.
1875 -	John Walter Huddlestone	e.k.
1875 - 81	Nathaniel Lindley, later Lord	q.r.s.
1876 - 81	Henry Charles Lopes	k.

i. Chief Justices of the Common Pleas

1818 - 23	Robert Dallas	
1824	Robert Gifford, Lord	
1824 - 29	William Draper Best, later Lord	j.
1829 - 46	Nicholas Conyngham Tindal	
1846 - 50	Thomas Wilde, later Lord Truro	
1850 - 56	John Jervis	
1856 - 59	Alexander J. Edmund Cockburn	
1859 - 66	William Erle	g.j.
1866 - 73	William Bovill	
1873 - 80	John Duke Coleridge, Lord	

Queen's Bench

j. Court of Queen's Bench

1808 - 30	John Bayley	d.
1816 - 28	George Sowley Holroyd	
1818 - 24	William Draper Best, later Lord	i.
1824 - 41	Joseph Littledale	
1828 - 34	James Parke, later Lord Wensleydale	d.
1830 - 52	John Patteson	
1830 - 35	William Elias Taunton	
1834 - 46	John Williams	d.
1835 - 76	John Taylor Coleridge	
1841 - 63	William Wightman	
1846 - 59	William Erle	g.i.
1852 - 65	Charles (John) Crompton	
1858 - 61	Hugh Hill	
1859 - 76	Colin Blackburn, later Lord	s.
1861 - 79	John Mellor	
1864 - 68	William Shee	
1865 - 80	Robert Lush	q.
1868 - 72	James Hannen, later Lord	n.p.s.
1868 - 69	George Hayes	
1872 - 76	John Richard Quain	
1872 - 75	Thomas Dickson Archibald	g.

k. Queen's Bench Division

1875 - 90	William Ventris Field	
1876 - 90	Henry Manisty	
1879 - 88	Charles Synge Christopher Bowen, later Lord	q.s.
1880 - 84	Charles J. Watkin Williams	
1881 - 97	Lewis William Cave	
1881 - 92	George Denman	g.
1881 - 87	William Robert Grove	g.

Queen's Bench Division (Cont.)

1881 - 98	Henry Hawkins, later Lord Brampton	e.
1881 - 90	John Walter Huddlestone	e.h.
1881 - 85	Henry Charles Lopes, later Lord	h.
1881 - 1901	James Charles Mathew	q.
1881 - 83	Ford North	b.
1881 - 97	Charles Edward Pollock	d.
1881 - 91	James Fitzjames Stephen	e.
1882 - 1901	John Charles Frederic S. Day	
1883 - 92	Archibald Lewin Smith	q.r.
1884 - 1905	Alfred Wills	
1886 - 1911	William Grantham	
1887 - 97	Arthur Charles	
1890 - 97	Roland (Bowdler) Vaughan Williams	q.
1890 - 1912	John Compton Laurance	
1891 - 93	Robert S. Wright	b.
1891 - 97	Richard Henn Collins, later Lord	q.r.s.
1892 - 1907	William Rann Kennedy	q.
1892 - 1904	Gainsford Bruce	
1897 - 1917	Edward Ridley	
1897 - 1909	John Charles Bigham, later Viscount	p.
1897 - 1923	Charles John Darling, later Lord	
1897 - 1914	Arthur Moseley Channell	
1897 - 1913	Walter G. Frank Phillimore, later Lord	q.
1899 - 1915	Thomas Townsend Bucknill	
1901 - 10	Joseph Walton	
1901 - 10	Arthur Richard Jelf	
1904 - 23	Reginald More Bray	
1904 - 21	Alfred Tristram Lawrence, later Lord Trevethin	m.

Queen's Bench Division (Cont.)

1905 - 10	Henry Sutton	
1907 - 14	William Pickford, later Lord Sterndale	p.q.r.
1907 - 23	Bernard John Seymour Coleridge, Lord	
1909 - 12	John Andrew Hamilton, later Viscount Sumner	q.s.
1910 - 16	Thomas Edward Scrutton	q.
1910 - 15	John Eldon Bankes	q.
1910 - 35	Horace Edmund Avory	
1910 - 37	Thomas Gardner Horridge	
1910 - 25	Charles Montagu Lush	
1912 - 32	Sidney Arthur Taylor Rowlatt	
1912 - 24	Clement Meacher Bailhache	
1913 - 19	James Richard Atkin, later Lord	q.s.
1914 - 29	Montague Shearman	
1915 - 28	John Sankey, later Viscount	q.
1915 - 18	Frederick Low	
1916 - 33	Henry Alfred McCardie	
1917 - 34	Alexander Adair Roche, later Lord	q.s.
1917 - 28	Arthur Clavell Salter	
1919 - 27	(Frederick) Arthur Greer, later Lord Fairfield	q.
1920 - 37	Rigby Phillip Watson Swift	
1920 - 34	Edward Acton	
1921 - 39	George A. Harwin Branson	
1923 - 37	George John Talbot	
1924 - 46	Frank Douglas MacKinnon	
1924 - 27	Hugh Fraser	
1924 - 38	William Finlay, Viscount	q.
1925 - 32	Robert Alderson Wright, later Lord	r.s.
1928 - 41	(John) Anthony Hawke	

Queen's Bench Division (Cont.)

1928 - 47	Ernest Bruce Charles	
1928 - 51	Travers Humphreys	
1928 - 47	Malcolm M. Macnaghten	
1932 - 38	Herbert du Parcq, later Lord	q.s.
1932 - 38	Rayner Goddard, later Lord	m.q.s.
1932 - 44	Geoffrey Lawrence, later Lord Trevethin and Oaksey	q.s.
1933 - 48	Cyril Atkinson	
1934 - 48	John Edward Singleton	q.
1934 - 38	Samuel Lowry Porter, later Lord	s.
1935 - 40	Walter Greaves-Lord	
1935 - 62	Malcolm Hilbery	
1935 - 50	Wilfred Hubert Poyer Lewis	
1937 - 47	Frederick John Wrattesley	q.
1937 - 45	Frederick James Tucker, later Lord	q.s.
1938 - 46	Cyril Asquith, later Lord	q.s.
1938 - 57	Roland Giffard Oliver	
1938 - 54	Reginald Powell Croom-Johnson	
1938 - 68	Wintringham Norton Stable	
1939 - 61	James Dale Cassels	
1939 - 57	Hugh Imbert Periam Hallet	
1941 - 50	(William) Norman Birkett, later Lord	q.
1944 - 57	George Justin Lynskey	
1945 - 51	John William Morris, Lord	q.s.
1945 - 58	Stephen Ogle Henn-Collins	o.
1946 - 57	Frederic Aked Sellers	q.
1947 - 53	Fred Ellis Pritchard	
1947 - 66	Geoffrey Hugh Beslow Streatfeild	
1947 - 60	Lawrence Austin Byrne	o.
1948 - 62	Gerald Osborne Slade	

Queen's Bench Division (Cont.)

1948 - 61	Austin Ellis Lloyd Jones	o.
1948 - 60	Patrick Arthur Devlin, later Lord	q.s.
1948 - 64	Donald Leslie Finnemore	o.
1950 - 54	Hubert Lister Parker, later Lord	m.q.
1950 - 64	William Gorman	
1950 - 66	Patrick Redmond Joseph Barry	
1950 - 66	Terence Norbert Donovan, later Lord	q.s.
1950 - 57	Benjamin Ormerod	o.q.
1950 - 66	William Lennox McNair	
1951 - 61	Gonne St. Clair Pilcher	o.
1951 - 61	Colin Hargreaves Pearson, later Lord	q.s.
1952 - 67	Cecil Robert Havers	o.
1953 - 68	Hildreth Glyn-Jones	
1953 - 56	(Albert) Denis Gerrard	
1954 -	John Percy Ashworth	
1954 - 57	Edward Holroyd Pearce, later Lord	o.q.s.
1956 - 61	(William John) Kenneth Diplock, later Lord	q.s.
1957 -	George Raymond Hinchcliffe	
1957 -	Gilbert James Paull	
1957 - 64	Cyril Barnet Salmon	q.
1958 - 66	(Herbert) Edmund Davies	q.
1958 - 66	Richard (Everard Augustine) Elwes	
1958 -	Gerald Alfred Thesiger	
1959 - 65	(Charles) Rodger (Noel) Winn	q.
1959 - 61	(William) Arthian Davies	o.q.
1960 - 68	Fenton Atkinson	q.
1960 - 66	Eric Sachs	o.q.

Queen's Bench Division (Cont.)

1960 -	Basil Edward Nield	
1961 - 71	(Stephen) Gerald Howard	
1961 -	(Aubrey) Melford (Steed) Stevenson	o.
1961 -	Geoffrey de Paiva Veale	
1961 - 69	John Megaw	
1961 - 72	Frederick Horace Lawton	
1961 - 68	John Passmore Widgery	q.
1961 -	Bernard Joseph Maxwell MacKenna	
1961 -	Alan Abraham Mocatta	
1961 -	John Thompson	o.
1961 - 66	Archie Pellow Marshall	
1962 -	Daniel James Brabin	
1962 - 71	Eustace Wentworth Roskill	
1962 - 71	Maurice Legat Lyall	
1962 - 71	John Frederick Eustace Stephenson	
1962 - 68	Henry Josceline Phillimore	o.q.
1964 -	Helenus Patrick Joseph Milmo	
1965 -	Joseph Donaldson Cantley	
1965 -	Patrick Reginald Evelyn Browne	
1965 -	George Stanley Waller	
1965 - 67	(Frederick) Geoffrey Laurence	
1965 -	Arthur Evan James	
1965 - 69	Eric Herbert Blain	
1966 -	Ralph Vincent Cusack	
1966 -	Stephen Chapman	
1966 -	John Ramsay Willis	
1966 -	Graham Russell Swanwick	
1966 -	Patrick McCarthy O'Connor	
1966 -	John Francis Donaldson	
1966 -	Geoffrey Dawson Lane	
1967 -	Samuel Burgess Ridgway Cooke	

Queen's Bench Division (Cont.)

1967 -	(John) Robertson (Dunn) Crichton	
1968 -	Bernard Caulfield	
1968 - 70	Henry Arthur Pears Fisher	
1968 -	Sebag Shaw	
1968 -	Hilary Gwynne Talbot	
1968 -	Edward Walter Eveleigh	
1968 -	Nigel Cyprian Bridge	

l. Chief Justices of the Queen's Bench

1818 - 32	Charles Abbott, Lord Tenterden	
1832 - 50	Thomas Denman, Lord	
1850 - 59	John Campbell	
1859 - 80	Alexander J. Edmund Cockburn	

m. Lords Chief Justice

1880 - 94	John Duke Coleridge, Lord	
1894 - 1900	Charles Russell, Lord Killowen	
1900 - 13	Richard Everard Webster, Lord Alverstone	
1913 - 21	Rufus Daniel Isaacs, Lord Reading, later the Marquess of	
1921 - 22	Alfred Tristram Lawrence, Lord Trevethin	k.
1922 - 40	Gordon Hewart, Lord, later Viscount	
1940 - 46	Thomas Walker Hobart Inskip, Lord Caldecote	
1946 - 58	Rayner Goddard, Lord	k.q.s
1958 - 71	Hubert Lister Parker, Lord	k.q.

Probate, Divorce and Admiralty

n. Court of Probate

1858 - 63	Cresswell Cresswell	g.
1863 - 72	James Plaisted Wilde, Lord Penzance	d.
1872 - 75	James Hannen, later Lord	j.p.s.

o. Probate, Divorce and Admiralty Division

1875 - 83	Robert Phillimore	
1883 - 91	Charles Parker Butt	p.
1891 - 92	Francis Henry Jeune, later Lord St. Helier	p.
1892 - 1905	John Gorell Barnes, later Lord Gorell	p.
1905 - 17	Henry Bargrave Deane	
1917 - 30	Maurice Hill	
1925 - 35	Alexander Dingwall Bateson	
1930 - 42	George Phillip Langton	
1935 - 45	Alfred Townsend Bucknill	q.
1937 - 45	Stephen Ogle Henn-Collins	k.
1937 - 51	Francis Lord Charlton Hodson, later Lord	q.s.
1942 - 51	Gonne St. Clair Pilcher	k.
1944 - 60	Hubert Joseph Wallington	
1944 - 48	Alfred Thompson Denning, later Lord	q.r.s.
1944 - 59	Henry William Barnard	
1945 - 48	Austin Ellis Lloyd Jones	k.
1945 - 47	Lawrence Austin Byrne	k.
1945 - 58	(Henry) Gordon Willmer	q.
1947 - 48	Donald Leslie Finnemore	k.
1948 - 50	Benjamin Ormerod	k.q.
1948 - 54	Edward Holroyd Pearce, later Lord	k.q.s.
1950 - 62	Charles Arthur Collingwood	
1951 - 68	Seymour Edward Karminski	q.
1951 - 52	Cecil Robert Havers	k.
1952 - 59	(William) Arthian Davies	k.q.
1954 - 60	Eric Sachs	k.q.
1957 - 61	(Aubrey) Melford (Steed) Stevenson	k.
1958 -	Geoffrey Walter Wrangham	
1958 - 66	(Joseph) Bushby Hewson	
1959 - 61	Archie Pellow Marshall	k.

Probate, Divorce and Admiralty Division (Cont.)

1959 - 62	Henry Josceline Phillimore	k.q.
1960 - 72	(Harry) Vincent Lloyd-Jones	
1960 - 70	David Arnold Scott Cairns	
1961 - 71	George Gillespie Baker	
1961 -	Leslie (George) Scarman	
1961 -	Roger (Fray Greenwood) Ormrod	
1962 -	Charles William Stanley Rees	
1962 -	Reginald Withers Payne	
1963 -	Neville Major Ginner Faulks	
1964 -	(Robert) James (Lindsay) Stirling	
1964 -	(James) Roualeyn Cumming-Bruce	
1965 -	John (Brinsmead) Latey	
1965 -	Hugh Eames Pack	
1965 -	Elizabeth Kathleen Lane	
1965 - 71	Alan Stewart Orr	
1966 -	Henry (Vivian) Brandon	

p. Presidents of the Probate, Divorce and Admiralty Division

1875 - 91	James Hannen, later Lord	j.n.s.
1891 - 92	Charles Parker Butt	o.
1892 - 1905	Francis Henry Jeune, Lord St. Helier	o.
1905 - 09	John Gorell Barnes, Lord Gorell	o.
1909 - 10	John Charles Bigham, Lord, later Viscount	k.
1910 - 18	Samuel Thomas Evans	
1918 - 19	William Pickford, Lord Sterndale	k.q.r.
1919 - 33	Henry E. Duke, Lord Merrivale	q.
1933 - 62	Frank Boyd Merriman, Lord	
1962 - 71	Jocelyn Edward Salis Simon	

The Court of Appeal

q. Lords Justices of Appeal

1876 - 81	William Milbourne James	

Lords Justices of Appeal (Cont.)

1876 - 77	George Mellish	
1875 - 85	Richard Baggalay	
1876 - 81	George W. Wilshere Bramwell, later Lord	d.
1876 - 83	William Baliol Brett, later Viscount Esher	g.r.
1876 - 77	Richard Paul Amphlett	d.
1877 - 90	Henry Cotton	
1877 - 80	Alfred Henry Thesiger	
1880 - 81	Robert Lush	j.
1881 - 97	Nathaniel Lindley, later Lord	h.r.s.
1882	John Holker	
1883 - 92	Edward Fry	b.
1885 - 97	Henry Charles Lopes, Lord	
1888 - 93	Charles Synge Christopher Bonwen, Lord	k.s.
1890 - 97	Edward Ebenezer Kay	b.
1892 - 1900	Archibald Lewin Smith	k.r.
1893 - 94	Horace Davey, later Lord	
1894 - 1901	John Rigby	
1897 - 99	Joseph William Chitty	b.
1897 - 1901	Richard Henn Collins, later Lord	k.r.s.
1897 - 1914	Roland (Bowdler) Vaughan Williams	k.
1899 - 1906	Robert Romer	b.
1900 - 06	James Stirling	b.
1901 - 05	James Charles Mathew	k.
1901 - 07	Herbert Hardy Cozens-Hardy, later Lord	b.r.
1906 - 12	John Fletcher Moulton, later Lord	s.
1906 - 13	George Farwell	b.
1906 - 15	Henry Burton Buckley, later Lord Wrenbury	b.
1907 - 15	William Rann Kennedy	k.
1912 - 13	John Andrew Hamilton, later Viscount Sumner	k.s.

Lords Justices of Appeal (Cont.)

1913 - 18	Charles Swinfen Eady, later Lord Swinfen	b.r.
1913 - 16	Walter G. Frank Phillimore, later Lord	k.
1914 - 18	William Pickford, later Lord Sterndale	k.p.r.
1915 - 27	John Eldon Bankes	k.
1915 - 26	Thomas Rolls Warrington, later Lord	b.
1916 - 34	Thomas Edward Scrutton	k.
1918 - 19	Henry E. Duke, later Lord Merrivale	p.
1919 - 28	James Richard Atkin, later Lord	k.s.
1919 - 23	Robert Younger, later Lord Blanesburgh	b.s.
1923 - 28	Charles Henry Sargant	b.
1926 - 34	Paul Ogden Lawrence	b.
1927 - 38	(Frederick) Arthur Greer	k.
1928 - 29	John Sankey, later Viscount	k.
1928 - 29	Frank Xavier Joseph Russell, later Lord	b.s.
1929 - 40	Henry Slesser	
1929 - 38	Mark Lemon Romer, later Lord	b.s.
1934 - 35	Frederick Herbert Maugham, later Lord	b.s.
1934 - 35	Alexander Adair Roche, later Lord	k.s.
1935 - 37	Wilfred Arthur Greene, later Lord	
1935 - 48	Leslie Frederic Scott	
1937 - 46	Frank Douglas MacKinnon	
1938 - 42	Albert Charles Clauson, later Lord	b.
1938 - 45	William Finlay, Viscount	k.
1938 - 44	(Arthur) Fairfax C.C. Luxmoore	b.
1938 - 44	Rayner Goddard, later Lord	k.m.s.
1938 - 46	Herbert du Parcq, later Lord	k.s.
1944 - 47	Geoffrey Lawrence, Lord Trevethin and Oaksey	k.s.
1944 - 47	Fergus Dunlop Morton, later Lord	b.s.
1945 - 50	Frederick James Tucker, later Lord	k.s.
1945 - 51	Alfred Townsend Bucknill	q.o.

Lords Justices of Appeal (Cont.)

1946 - 54	Donald Bradley Somerwell, later Lord	
1946 - 51	Cyril Asquith, later Lord	k.s.
1946 - 51	Lionel Leonard Cohen, later Lord	b.s.
1947 - 48	Frederic John Wrottesley	k.
1947 - 49	Francis Raymond Evershed, later Lord	b.r.s.
1948 - 57	John Edward Singleton	k.
1948 - 57	Alfred Thompson Denning, later Lord	o.r.s.
1949 - 59	David Llewelyn Jenkins, later Lord	k.s.
1950 - 57	(William) Norman Birkett, later Lord	k.
1951 - 60	Francis Lord Charlton Hodson, later Lord	o.s.
1951 - 60	John William Morris, later Lord	k.s.
1951 - 60	Charles Robert Ritchie Romer	b.
1954 - 58	Hubert Lister Parker, later Lord	k.m.
1957 - 68	Frederic Aked Sellers	k.
1957 - 63	Benjamin Ormerod	k.o.
1957 - 62	Edward Holroyd Pearce, later Lord	k.o.s.
1958 - 69	(Henry) Gordon Willmer	o.
1959 - 70	Charles Eustace Harman	b.
1960 - 63	Terence Norbert Donovan, later Lord	k.s.
1960 - 61	Patrick Arthur Devlin, later Lord	k.s.
1960 - 63	Gerald Ritchie Upjohn, later Lord	b.s.
1961 - 69	Harold Otto Danckwerts	b.
1961 - 65	Colin Hargreaves Pearson, later Lord	k.s.
1961 -	(William) Arthian Davies	k.o.
1961 - 68	(William John) Kenneth Diplock, later Lord	k.s.
1962 -	Charles Ritchie Russell	b.
1964 - 72	Cyril Barnet Salmon	k.
1965 -	(Charles) Rodger (Noel) Winn	k.
1966 -	Eric Sachs	k.o.
1966 -	(Herbert) Edmund Davies	k.

Lords Justices of Appeal (Cont.)

1968 - 71	Fenton Atkinson	k.
1968 -	Henry Josceline Phillimore	k.o.
1968 - 71	John Passmore Widgery	k.
1968 -	Seymour Edward Karminski	o.

r. Masters of the Rolls

1818 - 24	Thomas Plumer	
1824 - 26	Robert Gifford, Lord	
1826 - 27	John Singleton Copley, later Lord Lyndhurst	
1827 - 34	John Leach	a.
1834 - 36	Charles Christopher Pepys, Lord Cottenham, later Viscount	
1836 - 51	Henry Bickersteth, Lord Langdale	
1851 - 73	John Romilly, Lord	
1873 - 83	George Jessel	
1883 - 97	William Baliol Brett, Lord Esher, later Viscount	g.q.
1897 - 1900	Nathaniel Lindley, later Lord	h.q.s.
1900	Richard Everard Webster, Lord Alverstone, later Viscount	
1900 - 01	Archibald Levin Smith	k.q.
1901 - 07	Richard Henn Collins, later Lord	k.q.s.
1907 - 18	Herbert Hardy Cozens-Hardy, Lord	b.q.
1918 - 19	Charles Swinfen Eady, Lord Swinfen	b.q.
1919 - 23	William Pickford, Lord Sterndale	k.p.q.
1923 - 35	Ernest Murray Pollock, Lord, later Viscount	
1935 - 37	Robert Alderson Wright, Lord	k.s.
1937 - 49	Wilfred Arthur Greene, Lord	
1949 - 62	Francis Raymond Evershed, Lord	b.q.s.
1962 -	Alfred Thompson Denning, Lord	o.q.s.

Appellate Committee of the House of Lords

s. Lords of Appeal in Ordinary

1876 - 86	Colin Blackburn, Lord	j.
1876 - 79	Edward Strathearn Gordon, Lord	
1880 - 99	William Watson, Lord	
1882 - 89	John David Fitzgerald, Lord	
1887 - 1913	Edward Macnaghten, Lord	
1889 - 1900	Michael Morris, Lord	
1891 - 94	James Hannen, Lord	j.n.p.
1893 - 94	Charles Synge Christopher Bowen, Lord	k.q.
1894 - 1907	Horace Davey, Lord	
1894	Charles Russell, Lord Killowen	
1899 - 1909	James Patrick Bannerman Robertson, Lord	
1900 - 05	Nathaniel Lindley, Lord	h.q.r.
1905 - 28	John Atkinson, Lord	
1907 - 10	Richard Henn Collins, Lord	k.q.r.
1909 - 29	Thomas Shaw, Lord	
1910 - 12	William Snowdon Robson, Lord	
1912 - 21	John Fletcher Moulton, Lord	q.
1913 - 18	Robert John Parker, Lord	b.
1913 - 32	Andrew Graham Murray, Viscount Dunedin	
1913 - 30	John Andrews Hamilton, Viscount Sumner	k.q.
1918 - 22	George Cave, Viscount	
1921 - 29	Edward Henry Carson, Lord	
1923 - 37	Robert Younger, Lord Blanesburgh	b.q.
1928 - 44	James Richard Atkin, Lord	k.q.
1929 - 35	Thomas James Cheshyre Tomlin, Lord	b.
1929 - 48	William Watson, Lord Thankerton	
1929 - 46	Francis Xavier Joseph Russell, Lord	b.q.
1930 - 39	Hugh Pattison MacMillan, Lord	
1941 - 47	" " " "	

Lords of Appeal in Ordinary (Cont.)

1932 - 35	Robert Alderson Wright, Lord	k.r.
1937 - 47	" " " "	
1935 - 38	Frederick Herbert Maugham, Viscount	b.q.
1939 - 41	" " " "	
1935 - 38	Alexander Adair Roche, Lord	k.q.
1938 - 44	Mark Lemon Romer, Lord	b.q.
1938 - 54	Samuel Lowry Porter, Lord	k.
1944 - 51	Gavin Turnbull Simonds, Viscount	b.
1954 - 62	" " " "	
1944 - 46	Rayner Goddard, Lord	k.m.q.
1946 - 49	Augustus Andrewes Uthwatt, Lord	b.
1946 - 49	Herbert du Parcq, Lord	k.q.
1947 - 53	Wilfred Guild Normand, Lord	
1947 - 57	Geoffrey Lawrence, Lord Trevethin and Oaksey	k.q.
1947 - 59	Fergus Dunlop Morton, Lord	b.q.
1947 - 51	John Clarke MacDermott, Lord	
1948 -	James Scott Cumberland Reid, Lord	
1949 - 64	Cyril John Radcliffe, Viscount	
1949 - 50	Wilfred Arthur Greene, Lord	
1950 - 61	Frederick James Tucker, Lord	k.q.
1951 - 54	Cyril Asquith, Lord	k.q.
1951 - 60	Lionel Leonard Cohen, Lord	b.q.
1953 - 61	James Keith, Lord	
1954 - 60	Donald Bradley Somerwell, Lord	
1957 - 62	Alfred Thompson Denning, Lord	o.q.r.
1959 - 63	David Llewelyn Jenkins, Lord	b.q.
1960 -	John William Morris, Lord	k.q.
1960 - 71	Francis Lord Charlton Hodson, Lord	o.q.
1961 - 71	Christopher William Graham Guest, Lord	
1961 - 64	Patrick Arthur Devlin, Lord	k.q.

Lords of Appeal in Ordinary (Cont.)

1962 - 69	Edward Holroyd Pearce, Lord	k.o.q.
1962 - 65	Francis Raymond Evershed, Lord	b.r.s.
1963 -	Gerald Ritchie Upjohn, Lord	b.q.
1963 -	Terence Norbert Donovan, Lord	k.q.
1964 -	Richard Orme Wilberforce, Lord	b.
1965 -	Colin Hargreaves Pearson, Lord	k.q.
1968 -	(William John) Kenneth Diplock, Lord	k.q.

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(The place of publication is London unless otherwise stated).

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TABLES

(Tables I - XXXVIII relate to the period 1820 - 1968 unless otherwise stated).