

ON ASSESSING THE ROLE OF COURTS IN SOCIETY

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Introduction

It is now widely accepted that courts are not merely a forum for resolving disputes in society but also an important social institution. Courts often make decisions which shape the life of the community and crystallize social norms, political philosophies, and human commitments into binding law. Along with the other branches of government, the courts take part in the political process of governing the people. This is an aspect which judges do not often admit. The judiciary plays an important role in society. As Chief Justice Bora Laskin of the Supreme Court of Canada observed, it is a "unit of government,"¹ an aspect which is sometimes denied by his English brethren across the Atlantic.

The role of the courts in society is determined not only by the judges' perception of their function but also, and perhaps to a greater extent, by the expectations of the public, the executive and the legislature of the courts. Often there is a gap between the judge's perception and others' expectations. Indeed, there is a division of opinion among the judges on the concept of judicial function and there are differences in others' expectations of the nature of the judicial role. Furthermore, the judicial self-perceptions of their role and others' expectations of the courts are swayed by changing conditions and conceptions. Hence the role of the courts in society is not static, but constantly changing and dynamic. Its scope and boundaries are not determined by the judiciary alone but by other political and social institutions, as well, in a continuous process.

The purpose of this paper is to analyze the criteria for assessing the judicial role in society. The evaluation of the role of courts in society has often been expressed by the employment of the dichotomy between conservatism and liberalism. Academic writers, political leaders, public commentators and other critics employ the dichotomy between "conservative" and "liberal" to express their satisfaction or dissatisfaction with judges and judicial decisions. This paper will examine the criteria for assessing the judicial role and the various meanings of judicial "conservatism" and "liberalism."

Generally the paper will focus on the English judiciary, though the observations and analysis are applicable to other judicial systems. Most illustrations will be drawn from the English experience, but frequent references will be made to comparable problems and illustrations from Canadian and American experience.

In recent years noticeable changes have occurred in England. The paper will examine those recent changes in the judges' perceptions of their role in society and their actual performance in judicial decision-making and extra-judicial activities.

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1. B. Laskin, "The Institutional Character of the Judge" (1972), 7 *Israel L. Rev.* 329, at 330. The nature of the judicial role and the scope of the judicial function are influenced by system factors such as the nature of the constitutional system, legislative and executive inaction. They are also affected by the personal attitudes of judges and the institutional controls on the judges. The system factors and the interaction between personal attitudes and institutional controls are beyond the scope of this paper.

The judicial role in society is determined primarily by the appellate courts and final courts. Hence the paper will focus on appellate courts and, in particular, final courts. Lower courts also make a significant contribution to the shaping of the place of law and courts in society, and will also be referred to on occasion.

Judging by the amount of criticism of the English judiciary which can be found in academic literature, professional commentary, parliamentary debates, political discussion and in the general press, it can be safely said that the courts have sometimes failed to fulfill the expectations of legal scholars, political leaders and the public in general. The opening section will discuss the increasing public criticism of the English judiciary and similar criticisms in Canada and the United States.

The Courts Under Attack: Increased Public Criticism of Judges

The English judiciary as an institution, and individual judges, have been subjected to increased public criticism in recent years. Professional and academic criticism and, more importantly, the general press and political leaders have directed strong criticism at the judges on numerous occasions.

Controversial Cases

Some of the public criticisms have been instigated by controversial cases in which the judgments of the courts and comments made by judges were out of tune with popular feelings or were insensitive to certain segments of the public. These cases are often charged with emotional, ideological, social or political elements, which always transform a routine legal matter into a controversial case which lies in the eye of a public storm and turns an ordinary case into a household word.

It is perhaps useful to mention a number of such cases since 1970, which will be very familiar to British readers, in order to appreciate the extent of public concern with the courts. The case of Pauline Jones (a mentally disturbed woman who kidnapped a baby), the Welch Students case, the Oz Trial,² the Cambridge Students trial,³ the Dock Workers case,⁴ the sequestration of a trade union (A.U.E.W.) political fund,⁵ were all the subject of heated public controversy. So were the Oxford rape case,⁶ the Birmingham bombing case⁷ and the heated controversy surrounding Mr. Justice Melford Stevenson's public attack on the Court of Appeal for criticising him.⁸

In the last two years, several cases which have given rise to a considerable heated public debate deserve special mention. The first was the

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2. *R. v. Anderson*, [1972] 1 Q.B. 304 (C.A.). See S. Shetreet, *Judges on Trial — A Study of the Appointment and Accountability of the English Judiciary* (1976) 198-99.
 3. See S. Shetreet, "Judges and the Executive in England" (1975), 27 Admin. L. Rev. 185, at 194, also containing reports of the Oz trial. See also the cases arising out of the Profumo Affair (1963), *Supra* n. 2, at 189-91.
 4. *Midland Cold Storage Ltd. v. Steer*, [1972] Ch. 630 (5 dock workers imprisoned for contempt. Under threat of general strike, Official Solicitor obtained their release. See *Supra* n. 2, at 321-22.
 5. *Id.*, at 150-51.
 6. *Id.*, at 173 (suspended sentence in a rape case imposed by Judge Chrysmas Humphreys).
 7. *Id.*, at 320 (Failure of Mr. Justice Bridge to recommend a minimum term of imprisonment for six men convicted of murder in planting bombs in public houses.)
 8. S. Shetreet, "A Changing Society, A Changing Judiciary on Both Sides of the Atlantic" (1977), 60 *Judicature* 332, at 337.

Guardsmen's rape case in June 1978. In that case the Court of Appeal (Criminal Division) substituted a six month suspended sentence for a sentence of three years' imprisonment passed on Tom Holdsworth, a young soldier convicted of grievous bodily harm and indecent assault. The guardsman inflicted severe injuries on a young woman in the course of attempting to rape her. The decision gave rise to a public outrage which was well reflected in reports, letters to the editors and editorials in *The Times*.⁹

Another public controversy was instigated by Judge Mackinnon's remarks in the Read race case in January 1978. J. K. Read was prosecuted for incitement of racial hatred, for a statement insulting to colored people.¹⁰ The Judge summed up the case in terms which were not unsympathetic to the defendant, emphasizing the right to free speech. Read was acquitted. After the trial, the Judge made a statement to the defendant which could be understood as encouraging him to continue his anti-immigrant activity and concluding by "wishing him well"¹¹ (which, as it turned out, was his ordinary way of concluding his statements to defendants before him). The case provoked heated public controversy with very high emotional tones.¹²

In December 1979, public debate was aroused when Judge King-Hamilton refused to discharge a jury that had acquitted four anarchists and required the jury to remain until they heard a statement by another accused who pleaded guilty. The Judge remarked that the jury had "been remarkably merciful in the face of the evidence" and added that he prayed to God "that none of you will have cause to regret your decision."¹³

Very sharp attacks were directed at Lord Denning in May 1979, particularly from union leaders and from lawyers ideologically inclined to the Labour Party, for his statement that the trade unions were a challenge to the rule of law.¹⁴ Lord Denning came under fire again in January 1980 when he and two other Lord Justices granted an injunction to restrain the leaders of the main steel union from spreading their previous strike. Lord Denning held that the unions ought not extend the strike to the private sector, because they were trying to further a political not a trade dispute.¹⁵ Union leaders, on the other hand, proclaimed that strikers should not obey "three men in wigs."¹⁶

9. *The Times*, June 18, 1977, at 3, col. 1; June 20, 1977, at 2, col. 5; June 21, 1977, at 1, col. 4, and at 15, col. 1; June 22, 1977, at 17, col. 4 and at 13, col. 5; June 23, 1977, at 17, col. 4; June 24, 1977, at 15, col. 4; June 25, 1977, at 15, col. 4; June 28, 1977, col. 4; June 29, 1977, at 1, col. 1 and at 4, col. 6; July 2, 1977, at 13, col. 4; July 9, 1977, at 2, col. 3; July 20, 1977, at 2, col. 8 and at 9, col. 4.

10. He said on a murder of an Asian youth: "One down, one million to go."

11. The Judge said to Read: "By all means propagate your views that you have, but try to avoid provoking the sort of action that has been taken against you. I wish you well." See "That Summing Up," (1978), 75 *The Law Society's Gazette*.

12. *The Times*, Jan. 9, 1978, at 2, col. 8 and at 13, col. 1; Jan. 10, 1978, at 2, col. 5 and at 17, col. 4; Jan. 11, 1978, at 1, col. 6 and at 15, col. 5; Jan. 12, 1978, at 15, col. 4; Jan. 13, 1978, at 15, col. 5; Jan. 14, 1978, at 1, col. 7, at 2, col. 2 and at 15, col. 5; Jan. 18, 1978, at 1, col. 1 and at 2, col. 1.

13. *The Observer*, Dec. 23, 1979, at 4, col. 4.

14. Mr. Michael Foot called Denning's remarks "grotesque" and stated that Denning had "made an ass of himself," *The Guardian*, May, 1979. Nine Labour law teachers attacked Lord Denning for "intervening in politics" *The Guardian*, Apr. 23, 1979. The Haldane Society of Socialist Lawyers adopted a resolution calling for Lord Denning's resignation in view of his "extreme anti-trade union attitude," *The Guardian*, May 5, 1979. There were also voices in Denning's support, e.g. Cambridge law teachers, *The Guardian*, May 4, 1979, and others, *The Guardian*, Apr. 25, 1979. See also T. Harper, "The Judiciary and the Trade Unions" (1979), 129 *New L. J.* 431.

15. *Dupont Steels Ltd. v. Sirs*, [1980] 1 W.L.R. 142 (C.A.); rev'd. [1980] 1 W.L.R. 142 (H.L.).

16. *The Economist*, Feb. 2, 1980.

There were also other judicial incidents which were the subject of public criticism, though much less intense.¹⁷

Dissatisfaction with Judicial Role

But criticism of judges does not take place only as a result of certain judicial rulings and statements. Judges have often been generally criticised for a host of blames, vices, failures and negative attributes. Usually the academic and professional critics of the courts phrase their criticism in restrained terms. The judiciary, they say, has been timid, unimaginative,¹⁸ not active, not creative,¹⁹ orthodox,²⁰ conventional, or conservative in its law-making functions and that it has over-practised judicial self-restraint.²¹ Sometimes they go further and bestow upon a judge the title of "socially reactionary"²² or "the high priest of rigid *stare decisis* and the limited role for the judiciary,"²³ both titles conferred on Viscount Simonds.

But the evident criticisms come from politicians. This is illustrated by the attack on the judiciary launched by Mr. Michael Foot, when the Labour Leader of the House of Commons. In May 1977, he said that if the rights and freedoms of the people, especially trade unionists, had been wholly dependent on judges, "we would have precious few freedoms in this country."²⁴ This statement caused a public furor which compelled Mr. Foot to defend himself by explaining that his remarks were in a historic context and not aimed at present-day judges.

On another occasion, Mr. Foot used the expression "trigger-happy judicial finger" in reference to Mr. Justice Donaldson.²⁵ The Attorney General, Mr. Silkin, defended Mr. Foot, which also attracted some criticism.²⁶ These attacks on judges are another demonstration of the increased public pressure which has been exerted on judges in recent years.

The judicial system was also at the centre of public controversy on numerous occasions in respect of many aspects of the administration of justice such as the plea bargaining process,²⁷ identification evidence,²⁸ and the Tony Burke affair.²⁹

Besides the purely academic criticism and the political comment on the judiciary, there is also the academic analysis with a political message. This

17. E.g., Lord Denning's statement that the "mobs were out," *The Times*, Aug. 29, 1977, at 3, col. 7; Judge Wild's remarks to two Libyan students that "people of your origin never admit anything," *The Times*, Jan. 25, 1978, at 7, col. 2; Judge Hill's statement that people who spent their unemployment benefits on drink should have their ears cut off, *The Times*, Mar. 3, 1978, at 4, col. 5.

18. Lord Lloyd, "Do We Need A Bill of Rights?" (1976), 39 *Mod. L. Rev.* 121, at 125.

19. P. McAulgan, "The Challenge of the Environment," in Reason (ed.), *English Law and Social Policy* (1975) 23.

20. R. Stevens, "The Role of a Final Appeal Court in a Democracy: The House of Lords Today" (1965), 28 *Mod. L. Rev.* 509, at 513, 517.

21. L. Blom-Cooper and G. Drewry, *Final Appeal* (1972) 364.

22. *Id.*, at 157.

23. M. R. MacGuigan, "Precedent and Policy in the Supreme Court" (1975), 45 *Can. B. Rev.* 627, at 659 n. 215.

24. *The Times*, May 16, 1977, at 1, col. 1.

25. *The Times*, May 15, 1974, at 2, col. 6; May 18, 1974, at 15, col. 5.

26. See Letters to the Editor, *The Times*, May 15, 1974, at 2, col. 6; May 16, 1974, at 19, col. 5.

27. E.g., in the wake of the publication of a study by J. Baldwin and M. McConville, *Negotiated Justice* (1977); also in connection with one of three judgments of Mr. Justice Melford Stevenson, reversed on the same day by the Court of Appeal, involving pressure on a defendant to plead guilty. *The Times*, Feb. 20, 1976, at 1, col. 7; Feb. 21, 1976, at 1, col. 7; Feb. 24, 1976, at 2, col. 3; Feb. 25, 1976, at 2, col. 7; Feb. 26, 1976, at 3, col. 6.

28. *The Guardian*, Mar. 29, 1977 (The case of Davis and Warrington).

29. *New Statesman*, Oct. 5, 1979; Oct. 19, 1979. Burke was freed after it had been established that he had been convicted of murder.

type of politico-academic criticism of the judiciary is illustrated by Professor Griffith's recent book, *The Politics of the Judiciary*.

Parliamentary Motions Against Judges

The public pressure on judges is also well illustrated by the significant increase in the number of motions tabled in Parliament for removal or resignation of judges. This measure, which has rarely been used in the past — and then only in isolated cases — seems to be much more employed by MP's as a measure to exert pressure on judges. In the first quarter of this century only two motions for removal of a judge were recorded. One in 1906 (Mr. Justice Grantham) and the other in 1924 (Mr. Justice McCardie).³⁰ In the second quarter of this century only one motion criticising a judge was registered in 1932.³¹ In the second half of this century there were parliamentary motions in 1960 (criticising Mr. Justice Stable for threatening a jury) and in 1965 (criticising *Ward v. James*).³² Against this background, the tabling of five motions for removal or resignation of judges between the end of 1973 and the beginning of 1978 would seem of more than transient significance.

Motions for removal or resignation were tabled against Mr. Justice Donaldson (1973);³³ Judge Humphreys (over lenient sentence) (1975);³⁴ Mr. Justice Melford Stevenson (attack on Court of Appeal) (1976);³⁵ and Judge Mackinnon (1978).³⁶ MP's also called for the dismissal of the judges of the Court of Appeal (Criminal Division) who quashed a 3-year imprisonment sentence in the Coldstream Guardsman rape case in June 1977.³⁷ Although quite different in nature, one should also mention the removal of Sheriff Peter Thomson, a Scottish judge, for political activities.³⁸ The increasing number of motions against judges gives the impression that, as *The Times* put it, Labour MP's are "in hot pursuit of judges."³⁹

The increasing pressure on the law and the machinery of justice also finds its manifestation in the establishment, over the strong opposition of the Lord Chancellor,⁴⁰ of the Royal Commission on Legal Services, to study the quality of legal and judicial services.

Judges Drawn into Political Questions

The courts have, in the last decade, been drawn into more cases which are politically charged. The establishment of the National Industrial Relations Court in 1971 and the need to resolve questions concerning trade unions in various contexts have often drawn the courts into controversy.

30. *Supra* n. 2, at 148-50. Mr. Justice Grantham was also criticised in Parliament in 1911. *Id.*, at 149.

31. Mr. Justice McCardie's criticism of Scrutton L.J., *Id.*, at 171-72. There was also a Parliamentary question concerning newspaper articles by Lord Hewart in 1935. *Id.*, at 176.

32. *Id.*, at 172-73.

33. *Id.*, at 150-51.

34. *The Times*, June 23, 1975, at 2, col. 6. For the details, see *Supra* n. 8.

35. *The Times*, Feb. 24, 1977, at 2, col. 3 and at 15, col. 1-3; Feb. 26, 1977, at 3, col. 6.

36. *The Times*, Jan. 12, 1978, at 3, col. 2 and at 8, col. 1; Jan. 17, 1978, at 2, col. 5; Jan. 18, 1978, at 2, col. 5.

37. *The Times*, June 24, 1977, at 8, col. 4; July 19, 1977, at 10, col. 2-4 (The judges — Wien, Roskill and Slynn, J.J.).

38. *The Times*, July 28, 1977, at 4, col. 8; Dec. 1, 1977, at 2, col. 8; Dec. 6, 1977, at 2, col. 4-7; Dec. 7, 1977, at 10, col. 3-6; Dec. 16, 1977, at 17, col. 4. (The Judge published a political pamphlet in support of holding a plebescite on Scottish home rule).

39. *The Times*, July 19, 1977, at 4, col. 5.

40. Information was obtained in personal interviews with knowledgeable people in England.

Gouriet and *Grunwick* are recent examples. The greater willingness of the judiciary to review executive action has also meant that the courts may render decisions which are contrary to those of political decision makers, i.e. Ministers, with unavoidable political overtones as in the cases of *Tameside*, *Laker*, and *Congreve*.⁴¹ Judges became involved in political questions extrajudicially as well as a result of conducting inquiries. A recent example is Lord Scarman's inquiry of the *Grunwick* dispute. The use of judges for controversial investigations has a long history.⁴² In spite of criticism from many quarters, this objectionable practice continues.

"Conservatism" and "Liberalism" as Yardsticks of Judicial Role

While popular pressure on the judges has reached the present level only in recent years, strong criticisms of the English judiciary from many quarters have been voiced since the beginning of this century. The judges have been criticised for being divorced from the community and being out of touch with reality. Other complaints against the judges were that they have failed to adapt the law to changing conditions, and that they have frustrated legislative policies by adhering to Common Law doctrines based on an individualistic philosophy long abandoned by society. Narrow canons of statutory interpretation and the over-rigid doctrine of precedent, sometimes accompanied by social bias, have frequently been blamed for the frustration of legislative social programs. Judges were charged with excessive reluctance to review executive decisions. They were often criticised for their narrow social backgrounds, and for failing to promote law reform and for obstructing reform when others proposed it.⁴³

This extremely long and diverse list of charges drawn against the judiciary has invariably been used to show that the English judiciary was "conservative" or, to mention a few synonyms, "orthodox," "conventional," "not innovative," "not creative," and "unimaginative."

In the final analysis, the critics assert that the judiciary's perception of its own role and the way in which it performs its functions are different from their expectations. They expect the judiciary to be innovative, imaginative, liberal, creative, widely representative of the general society, and in close touch with the community. But, as they see it, the judiciary has pulled in the opposite direction on all counts.

To signify their disapproval of the role of the judiciary in society, court critics have used an all-embracing term "judicial conservatism" or its synonyms, under which they have put a long list of objectionable attributes, attitudes and patterns of behavior; these are in fact the antonyms of the attributes, attitudes and patterns of behavior which they would have liked to see in the judiciary.

American and Canadian Perspectives

Criticism of the judiciary and dissatisfaction with the role of courts in society transcends national boundaries. Expressions of dissatisfaction with the role of the courts in society in other countries are also phrased in terms

41. *Secretary of State for Education v. Tameside*, [1976] 3 W.L.R. 641 (H.L.); *Laker Airways Ltd. v. Department of Trade*, [1977] 2 All E.R. 182 (C.A.); *Congreve v. Home Office*, [1976] 1 All E.R. 706. (C.A.).

42. *Supra* n. 2, at 354-63 (also containing strong criticism of the use of judges for controversial investigations).

43. See J. Griffith, *The Politics of the Judiciary* (1977); B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (1967).

of judicial conservatism and liberalism. The legal profession and the judiciary in Canada and the United States have been described, with varying degrees of emphasis, as being conservative, traditional or orthodox.

The Canadian judiciary has been criticised for insufficient protection of civil rights,⁴⁴ undue adherence to precedent,⁴⁵ for being very pro-employer in labor disputes,⁴⁶ for unimaginative conservatism,⁴⁷ for having been "not innovative in its approach to administrative law," and for deciding cases "on narrow points of law, without much regard to the broader policy aspects of its work."⁴⁸

While the dominant impact of the Warren Court in the United States has given the American judiciary a strong liberal image, particularly outside the United States, it has not escaped criticism that it is conservative. Professor Glendon Schubert writes that "By and large, the strongly conservative orientation of the legal profession has in fact resulted in the courts functioning much more in accordance with the conservative than with the liberal ideal."⁴⁹

In a recent study, the American legal profession has been castigated for its opposition to legal reform⁵⁰ and for bigotry in excluding blacks from the American Bar Association until very recently, for limiting the role of the lawyer of non-British origin, and for doing all it could to preserve the traditional elite.⁵¹

Criteria for Assessing Judicial Role: In General

The evaluation of the nature of the judicial role and scope of judicial function may be based on numerous criteria, which will be examined in the ensuing discussion. The most recurrent terms in any assessment of the judicial role are the twin terms "conservative-liberal," which are employed to express the dissatisfaction or satisfaction with the courts and judicial decisions.

Criticisms of conservatism have been directed at a whole range of aspects of courts and judges. Likewise the criteria employed for categorising court decisions, judges and their activities and attributes as "conservative" and "liberal" are varied and manifold. This has brought about some confusion and vagueness to the subject and requires a thorough examination in an attempt to draw the line between the numerous meanings of the terms "conservative" and "liberal" to clarify the criteria for categorisation.

An examination of the academic legal and socio-legal literature and debates and discussions in the general press and by politicians suggests that judicial conservatism is perceived as an all-embracing label which encom-

44. D. Gibson, "And One Step Backwards: The Supreme Court and Constitutional Law in the Sixties" (1967), 53 Can. B. Rev. 621.

45. *Supra* n. 23.

46. P. Weiler, *In the Last Resort* (1973) 122.

47. D. Clark, "The Supreme Court of Canada. . . and Administrative Law" (1976), 14 Alta. L. Rev. 5.

48. D. Jones, "The Supreme Court of Canada and Administrative Law" (1976), 14 Alta. L. Rev. 1, 4.

49. G. Schubert, *Judicial Policy Making* (rev. ed. 1974) 184.

50. J. S. Auerbach, *Unequal Justice* (1976) 48, 53-62.

51. *Id.*, at 48-49, 65, *passim*. In 1939, the admission to the American Bar Association of a prominent black Federal judge was opposed. *Id.*, at 65. See also the opposition to the appointment of Brandeis, the first Jewish nominee to the Supreme Court, *Id.*, at 66-73.

passes a host of attributes, attitudes and patterns of behavior which cannot be easily grouped together by any possible criteria; indeed, some of them are far apart.

How is judicial conservatism perceived in the academic literature and public debates? A primary attribute of conservatism is the general reluctance or opposition to change. But there are specific attributes and characteristics which are frequently mentioned in the context of judicial conservatism. The narrow social origin of the judges, predominantly from the upper middle class, has been a major basis for classification of the judiciary as "conservative." Certain patterns of conduct in extra-judicial activities have been taken as indicators of conservatism, such as strict standards of behavior, remoteness from the community, rigorous standards for judicial appointment and promotion. Likewise, the opposition to or the reluctance to support reform of the law and legal institutions, and lack of or limited interest in reforming judicial organization or in introducing and extending programs of judicial education, have also been included as characteristics of conservatism.

A long list of attributes, attitudes and patterns of conduct have been mentioned as manifestations of judicial conservatism on the bench. Bias in favor of the upper class, mechanical judicial reasoning, excessive adherence to judicial precedent, the denial that judges make law, interpretation of the law so as best to maintain the status quo in general by restrictive interpretation of "social" or "progressive" legislation, refusal to take into account broad policy considerations and reluctance to review administrative action have all been used as indicators of judicial conservatism.

The employment of the terminology of "conservative" and "liberal" to assess the role of judges, courts and the nature of judicial decisions is based on a multitude of distinct groups of criteria. First, it is based on the assessment of patterns of judicial decision-making, and may employ a number of criteria such as the result analysis or content analysis of judicial decisions. The content analysis may focus on the process of judicial decision-making or on the substance of the decisions. Second, the employment of the terminology "liberal-conservative" is based on the assessment of judicial conduct in court. Third, it is based on the evaluation of the patterns and standards of conduct in extra-judicial activities. Fourth, it is based on an analysis of the social composition of the judiciary. In the following section of this article, each of these groups of criteria will be analyzed.

Result Analysis of Judicial Decisions

Scalogram Analysis of Judicial Voting Patterns

Frequently, decisions are classified as conservative or liberal according to the result reached in cases decided on their merits. Decisions in favor of workers, labor unions, defendants in criminal trials, and in favor of litigants (normally persons or public interest groups not corporations) generally seeking protection of their rights against government and administrative agencies or against big business (e.g., to protect the environment) will normally be classified as "liberal." On the other hand, decisions against them will be classified as "conservative." This criterion is widely used, particularly by political scientists and statistical analysts, who

measure the voting patterns of judges solely on the basis of the result of the case according to each judge's vote, regardless of his reasoning or the content of his decision. Judges whose voting pattern is consistent may be classified as "conservative" or "liberal," and those who swing are classified as moderates.⁵² The groups of judges who are "liberal" or "conservative" are termed liberal and conservative blocs respectively. This scalogram analysis was applied to Supreme Court decisions in the United States, and to a lesser extent in Canada and other countries.⁵³ This analysis is possible in divided appeals, where the court was not unanimous and majority and dissenting opinions were handed down.

The analysis of voting patterns of judges in all the cases has frequently shown that some justices did not seem to affiliate with either the conservative or liberal blocs. Moreover, within each of the blocs a considerable number of inconsistent votes was found. This called for further refinement of the result-oriented categorisation of judicial ideologies, which was attained by introducing a qualifying subject-matter control which narrowed the range of cases which were analysed. This refined approach distinguishes between three attitudes: political liberalism and conservatism, social liberalism and conservatism, and economic liberalism and conservatism.⁵⁴ The analysis of each of the attitudes is based on the cases which raise political, social or economic matters respectively, and not on the general pool of the cases.

Political liberalism is the belief in the support of civil rights and liberties; political conservatism is the upholding of law and order, and supporting the status quo. Some analysts distinguish between political liberalism, which relates to the protection of substantive constitutional rights such as freedom of the press or freedom of religion, and pro-defendant-accused attitudes in criminal cases which focus on procedural civil rights such as due process or the right to counsel.⁵⁵ This approach is suitable to countries such as Canada or England where procedural rights are not guaranteed by constitutional provisions.

Social liberalism advocates equality in the areas of political representation, citizenship and ethnic status; social conservatism opposes equality of access to political process and representation, to the economy and to social status. Economic liberalism advocates a more equal distribution of wealth, goods and services; economic conservatism protects free enterprise, vested interests and property rights, and supports broad differentials in wealth and income between workers and property owners. The proponents of this classification admit that it does not mean that it will always divide between liberal and conservative judges as "it is quite possible for a judge to feel that he is being consistent in his ideology if he favors political liberalism and economic conservatism, for the combination of attitudes means to uphold both the personal and property rights of the individual."⁵⁶

This analysis, which resorts to subject-matter classification, uses criteria

52. See generally *Supra* n. 49.

53. See e.g., G. Schubert and D. J. Danelski (eds.), *Comparative Judicial Behaviour* (1969).

54. *Supra* n. 49, at 160-61.

55. See S. R. Peck, "A Scalogram Analysis of the Supreme Court of Canada 1958-1967," in Schubert and Danelski, *Supra* n. 53, at 293; also found in (1967), 45 Can. B. Rev. 667.

56. *Supra* n. 49, at 161.

of content only for the purpose of selecting the cases which will serve as the basis for the analysis. But once those cases are selected according to subject-matter classification, the analysis is confined to the voting, to the result in each case.

Lack of Scalogram Analysis of English Cases

Statistical analysis of English appellate cases is not available. This may be attributed to several factors which make the application of statistical methods to English cases difficult or unreliable:⁵⁷ the relatively small number of appeal cases, the selective law reporting which further disturbs the sample, the statutory requirement of *per curiam* decisions in the Court of Appeal (Criminal Division),⁵⁸ and finally, the hearing of appeals by panels which are constantly shifted and rotated. It may also be attributed to an unfavorable approach of English scholars to statistical studies of judicial decisions. Yet, even though these same factors apply to Canada, one can find a fair number of statistical studies of Canadian Supreme Court decisions.⁵⁹

Result Analysis: English Illustrations

Scalogram analysis of English appellate decisions is unavailable, but result-oriented categorisation of cases is frequently employed. The divisions of the judges in the House of Lords in workmen's compensation cases at the beginning of the century were viewed as reflecting a conservative-liberal dichotomy. Professors Abel-Smith and Stevens wrote that "the judges found themselves split into Conservative (pro-Employer) and Liberal (pro-Employee) Wings."⁶⁰

Similarly, one could classify as conservative (pro-employer) the line of the House of Lords' cases which introduced the notion of the employee's fault as a factor in determining the civil liability of an employer in breach of statutory duty for injuries to an employee,⁶¹ (although the Lords were innovative in creating civil liability for breach of statutory duty in this area). Blom-Cooper and Drewry explain their adverse judgment on these cases:

Workmen very often need to be protected against their own folly. To relieve employers of liability when workmen are the sole authors of their own wrongful act leading to injury is, in some small measure, to let employers worry less about their workmen.⁶²

More frequently mentioned illustrations of conservative decisions (anti-labor unions) are the *Taff Vale Railway Case*⁶³ (holding a union liable for damages from a strike), *Rookes v. Barnard*⁶⁴ and *Stratford v. Lindley*⁶⁵ (allowing torts of intimidation and inducing breach of contracts against a union official threatening to strike if non-member employee was not

57. See F. L. Morrison, *Courts and the Political Process in England* (1973) 93-94.

58. *Criminal Appeal Act 1966*, 1966, c. 31, S. 2 (4) (U.K.).

59. See Peck, *Supra* n. 55; see also D. Fouts, "Policy Making in the Supreme Court of Canada," in Schubert and Danelski, *Supra* n. 53, at 257.

60. Abel-Smith and Stevens, *Supra* n. 43, at 116.

61. See *Supra* n. 21, at 296-97.

62. *Id.*, at 297. See also Abel-Smith and Stevens, *Supra* n. 43, at 308; K. W. Wedderburn, *The Worker and the Law* (1965) 93-94.

63. [1901] A.C. 426 (H.L.). See Abel-Smith and Stevens, *Supra* n. 43, at 114; Griffith, *Supra* n. 43, at 60-62.

64. [1964] A.C. 1129 (H.L.).

65. [1965] A.C. 269 (H.L.). See Abel-Smith and Stevens, *Supra* n. 43, at 307

dismissed), all of which were later reversed by legislation. Similar criticism has been directed at the Supreme Court of Canada. Critics of the Court have charged that it has been pro-employer in labor cases.⁶⁶

Economic conservatism, opposed to state regulation to secure fair distribution of wealth and minimum standards of pay for employees, may be found in *Roberts v. Hopwood*⁶⁷, upholding an administrative decision to surcharge councillors who voted for a weekly wage of 4 pounds sterling, which they considered to be necessary for a dignified minimum condition of living.

The controversial decision of the Court of Appeal in *Ward vs. James*,⁶⁸ limiting the right to jury trial in personal injury cases could be termed as political conservatism⁶⁹ and so could be the case of *Liversidge v. Anderson*,⁷⁰ refusing to review the Minister's discretion to order an administrative detention, and *Duncan v. Cammell Laird*,⁷¹ awarding almost *carte blanche* privilege to the Crown to withhold information in litigation to protect the national interest.

The line of English cases limiting the scope of action which might lawfully be taken by workers and their organizations (strike, picketing, etc.) can be classified as economic conservatism.⁷² Such cases have given rise to complaints of class bias of the English judiciary since the beginning of this century.

Result Analysis: Canadian Illustrations

The result-oriented analysis and the various categories of conservatism and liberalism can also be illustrated by recent Canadian cases.

An illustration of political liberalism is *R. V. Drybones*,⁷³ which held that a drunkenness law applicable only to Indians was inoperative as a violation of equality before the law. In *Attorney-General for Canada v. Lavall*,⁷⁴ the Supreme Court of Canada upheld a statute discriminating against women, in spite of a challenge that the statute was in violation of the *Bill of Rights*. The Court manifested political (and perhaps social) conservatism when it upheld a provision that an Indian woman who married a white man lost her Indian status, while an Indian man who married a white woman did not. *Morgan v. A.G. for Prince Edward Island*⁷⁵ also manifests political conservatism. It held that discrimination against aliens in a *Real Property Act* was only incidental and therefore was valid.

Illustrations of political conservatism in the area of procedural rights are *Hogan v. The Queen*,⁷⁶ which sustained the admissibility of breathalyzer evidence obtained in violation of the right to counsel, and *Mitchell v. The*

66. *Supra* n. 46, at 122.

67. [1925] A.C. 578 (H.L.). This case can be viewed as conservative by content analysis as well. See *Supra* n. 21, at 257-58.

68. [1966] 1 Q.B. 273 (C.A.).

69. Abel-Smith and Stevens, *Supra* n. 43, at 309.

70. [1942] A.C. 206 (H.L.).

71. [1942] A.C. 624 (H.L.).

72. Griffith, *Supra* n. 43, at 57-78.

73. [1970] S.C.R. 282.

74. [1974] S.C.R. 1349.

75. [1976] 2 S.C.R. 349.

76. [1975] 2 S.C.R. 574. For a discussion of *Hogan*, see J. Lyon, "A Progress Report on the Canadian Bill of Rights" (1976), 3 Dalhousie L.J. 39.

Queen,⁷⁷ which held that the right to a fair hearing did not apply to the revocation of a prisoner's parole.

*Rathwell v. Rathwell*⁷⁸ represents social liberalism. In that case, title to all lands acquired during a 30-year marriage was in the husband's name. The couple worked together in the family business. The wife contributed to the common efforts of the family by doing chores, looking after the garden and the like. The Supreme Court of Canada held that there was a common intention that the wife would be an owner of over half of the property, and that there was a constructive trust in her favor. The Court relied on the financial contribution that the wife had made. On the other hand, *Murdoch v. Murdoch*,⁷⁹ which preceded *Rathwell*, represents social conservatism. The facts were the same as in the *Rathwell* case, except that no financial contribution had been made by the wife. The Court held, Laskin, C.J. dissenting, that there was no resulting or constructive trust in favor of the wife, and she was thus denied rights over any part of the family ranch. *Rathwell* reflects a shift in the opinion of the Court towards a greater willingness to bend the legal principles so as to conform with the prevailing social views.

Academic writers have criticized the Supreme Court of Canada for economic conservatism by leaning towards the employers. Professor Paul Weiler wrote that the judge-made law in Canada in labor relations has "strongly favoured employers," although he hoped that the Supreme Court "will adopt a policy of judicial neutrality so well defended in the *Paquet* case."⁸⁰

In the area of civil liberties, result analysis has shown a sharp contrast between court cases in the 1950's and in the 1960's. Professor Dale Gibson has found that, while the Court had upheld the libertarian claims in 94% of the cases heard in the 1950's, it had done so only in 24% of the cases heard during the 1960's.⁸¹

The Problems of Result Analysis

The result-oriented analysis which focusses on the outcome of the case without due regard to its content and to the judicial arguments and reasons, sometimes will not do justice to the decisions nor to the judges. Another problem which result-oriented studies raise is a methodological one. The scalogram analyses exclude unanimous decisions, which comprise the largest group of cases. The confinement of the studies to divided opinions places undue emphasis on differences among the judges. Chief Justice Bora Laskin of the Supreme Court of Canada, commenting on the measuring of judicial performance, has drawn attention to the shortcoming of compilation of "records" on judges, based merely on their voting:

There are very relevant questions of courts' jurisdiction, the scope of an appeal, and the issues presented in the appeal, and the disposition of each of them by unanimous or majority or concurring opinions . . . The yardstick of assessment, whatever they

77. [1976] 2 S.C.R. 570.

78. [1978] 2 S.C.R. 436.

79. [1975] 1 S.C.R. 423. For a discussion of *Murdoch*, see P. Jacobson, "Murdoch v. Murdoch: Just about what the Ordinary Rancher's Wife Does" (1974), 20 McGill L.J. 308.

80. *Supra* n. 46, at 124-25, *Syndicat Catholique v. Compagnie Paquet Ltee.*, [1959] S.C.R. 206.

81. D. Gibson, "And One Step Backwards, The Supreme Court and Constitutional Law in the Sixties" (1975), 53 Can. B. Rev. 621, at 630.

may be, must, if they are to give a picture of a judge's action take account of these factors. Even single issue cases (leaving aside those that raise multiple issues within a particular branch of the law and those that require to canvass separate branches of the law) can give a misleading picture of judges when they are assessed only on how they vote. The lowest common denominator of assent may be all that a majority judgment represents and it may require a dissenting or concurring opinion to make this clear.⁸²

The difficulties in the result-oriented dichotomy of conservative-liberal lie also in the apparent paradox which might be produced by employing these criteria. This may be illustrated by cases which raise a conflict between the right of an individual worker and the powers of a labor union; supporting the union against the workman, as the Warren Court, in the United States has done⁸³ will be defined as "liberal" or more specifically as a manifestation of economic liberalism, even though the result is discrimination of individual workers by the union⁸⁴ or deprivation of his property. On the other hand, if the Court rules in favor of the individual worker, the decision will be classified as conservative. In *Edwards v. Sogat*,⁸⁵ the English Court of Appeal held that a union did not have the unfettered power to expel a temporary member in a "closed shop" (where only union members are employed). It ruled that "The courts of this country will not allow so great a power [to withdraw union membership card, and thus result in his dismissal from his job in a "closed shop"] to be exercised arbitrarily or capriciously or with unfair discrimination neither in the making of the rules nor in the enforcement of them."⁸⁶

The result-oriented categorisation would classify *Edwards v. Sogat* as an illustration of economic conservatism, as it ruled against the labor union; they should (if their judgment is not politically colored) also classify it as a manifestation of political liberalism, for its protection of the individual worker from discrimination and unfairness. This double classification allows one to commend or criticise the decision as liberal or conservative, depending on one's ideological inclination.

The inconsistencies in result-oriented categorisation of cases as liberal or conservative can also be illustrated by examination of the classification of the cases dealing with judicial review of administrative action. For example, *Roberts v. Hopwood*,⁸⁷ in which the House of Lords reviewed the exercise of administrative discretion and invalidated a local program to secure a minimum weekly wage, was severely criticised because of the result. It is true that the criticism was not confined to the result, since Lord Atkinson, in the course of his judgment, made the oft-quoted comment that the Poplar Councillors misled themselves by "eccentric principles of socialistic philanthropy."⁸⁸ This was taken to suggest a political bias against the progressive actions at issue in the case. But, as Professor Wade wrote, "Despite remarks such as [Lord Atkinson's], and despite criticisms from literal-minded people, there is no doubt that this decision was fully in accord with

82. *Supra* n. 1, at 345.

83. *Local 357, Teamsters v. National Labour Board* (1961), 365 U.S. 667. On this and other cases, see *Supra* n. 49, at 178-79.

84. *Ibid.*

85. [1970] 3 All E.R. 689 (C.A.).

86. *Id.*, at 696.

87. *Supra* n. 67.

88. *Id.*, at 594.

the settled policy of limiting discretionary powers.”⁸⁹ Willingness to review discretionary power is, of course, an indication of liberalism, as it may enable an individual to seek court protection against the government and its agencies.

Indeed *Liversidge, Cammell Laird, Alridge*,⁹⁰ *Smith v. East Elloe*⁹¹ and other cases, were justly criticised for reluctance to review administrative actions and for ruling against individuals.⁹² Yet the House of Lords was criticised for reviewing administrative action when the result was to invalidate social programs or to limit the powers of Ministers to implement statutes or welfare programs in the area of public health or housing.

The result is, then, that decisions can be classified both as liberal and conservative, depending on whether one concentrates on the political, social or economic aspects of the decision. Thus, it is open to critics of opposite ideological inclinations to evaluate the same judicial decision according to their own set of values and ideological convictions with conflicting results.

To sum up, decision categorisation based solely on results raises difficulties and may often produce an incomplete, inconsistent or even misleading picture. But statistical analysis of judges' voting patterns is generally very useful and can reveal a pretty reliable record of judicial performance. Indeed, there is much correlation between the evaluation of judicial performance by traditional content analysis, and the picture which emerges from statistical analysis of judges' voting patterns.⁹³ The statistical analysis does not only reveal the reflection of the judge's philosophy in his voting, but also indicates changes which occur in his voting pattern during a period of time in a particular area of law.⁹⁴

Statistical analysis and other result-oriented categorisation of judicial decisions must, however, be complemented by content analysis which can reveal a full picture of judicial reasoning and philosophy. Content analysis may also serve as a control for reviewing the validity of the findings in statistical analysis.

A Controversial Exercise in Result Analysis: Griffith's Thesis

Professor John Griffith in his recent book, *The Politics of the Judiciary*, employs mainly result analysis for assessing the role of the courts in English society. Based on his strongly result-oriented analysis of the cases he selected, he advances the thesis that in exercising their political role, English judges are guided by the public interest, as they view it. According to Griffith, the perception by the English judiciary of the public interest is the support of the status quo, social stability, and the authorities. Public interest, as the judges view it, is also the promotion of traditional values and the interests of property owners. This judicial conception, he suggests, produced decisions which were over-whelmingly against students, immigrants,

89. H. W. R. Wade, *Administrative Law* (4th ed. 1977) 362.

90. *Local Government Board v. Alridge*, [1915] A.C. 120 (H.L.).

91. [1956] A.C. 736 (H.L.).

92. *E.g.*, *Supra* n. 21, at 256-62.

93. *See e.g.*, *Supra* n. 49, at 189, for a division of American judges into liberal and conservative according to their voting patterns, which correlates with their categorisation by traditional content analysis.

94. P. Lewis, N. Beran and H. Allen, "An Empirical Analysis of the Voting Patterns of the Warren and Burger Court Justices: Liberal Conservative Dimensions," (1977), 25 *Chitty's L.J.* 75.

trade unions, squatters, defendants in criminal proceedings, non-conformist moral standards, and in favor of educational authorities, property owners, police and immigration officers, and conformist moral standards of behavior. Griffith argues that the judicial conception of the public interest, which he views "merely as 'reactionary conservatism'," "concerns the protection of the State and the preservation of law and order, the protection of property rights, and the promotion of certain political views which are normally associated with the Conservative Party."⁹⁶

In essence, Griffith argues that the judges exercised their role in furthering their own set of values, which was opposed to the interests of unions, the working class, was unsympathetic to immigrants, students and defendants in criminal proceedings, and, on the other hand, was in support of property owners, the ruling classes and the authorities.

Professor Griffith's analysis has to be examined in light of the qualifications and reservations which have already been expressed concerning the result-oriented approach in general. But there are also problems which are raised by his analysis in particular. First, it fails to distinguish between the various categories of the general dichotomy of liberal-conservative according to the division into political, social and economic issues. This results in the disregard of liberal aspects of certain cases and thus produces an inaccurate picture. Second, the selection of the cases upon which Griffith bases his analysis and conclusions is not explained and leaves doubts as to whether the cases selected are truly representative. Third, the analysis is sometimes colored by a strong ideological flavor. Fourth, the study focusses on results and pays insufficient attention to the legal doctrine and the particular circumstances of each case.

The first problem, as suggested, arises because Professor Griffith does not distinguish between the various categories of the liberal-conservative dichotomy according to the division into political, economic and social problems.⁹⁷ As a result, there appear some inconsistencies in his analysis, where certain decisions are classified as conservative in the social or economic sense which could be classified as liberal in the political sense. Most of the discussion in the book concentrates, without using the same terminology, on the economic and social conservatism of the English judges, although some attention is paid to their political conservatism as well. Where the result of a decision could be viewed as manifesting social conservatism or economic conservatism as well as political liberalism, Griffith disregards or belittles the liberal aspects of the decisions.

Ordinarily result-oriented analysis would classify as liberal, decisions which invalidated governmental decisions and ruled in favor of citizens. But Griffith nevertheless would view such decisions as conservative if they ruled against the government but were in favor of property rights, although not necessarily those of big business. When the executive decision set aside happened to be of a Labour Government, Griffith expresses a qualified suspicion that this played some role in the judicial decision.

95. Griffith, *Supra* n. 43, at 213.

96. *Id.*, at 195.

97. See text, *Supra* n. 54-56.

This is illustrated by Griffith's analysis of *Padfield*, *Anisminic*, *Congreve*, *Laker*, *Tameside* and *Gouriet* (in the Court of Appeal).⁹⁸ They all ruled against the Executive and should be classified as liberal in the political sense, but nevertheless are disfavored by Griffith because they indicate social or economic conservatism, or because they ruled against a Labour Government.⁹⁹

Thus, the decision in *Tameside* is viewed as manifesting conservatism because it was against a Minister of the Labour Government and in support of a conservative philosophy. In *Tameside*, the judges set aside a Ministerial order to compel a program of comprehensive schools which had been repealed by a newly-elected Conservative council of education.¹⁰⁰ *Laker* is also disfavored because it ruled against the Labour Government which retreated from the aviation policy previously announced by the Conservative Government.¹⁰¹ The decision in *Congreve* should be classified as liberal as it denied the Minister a power to revoke a television licence of citizens who paid their licence fee before the expiry of their licence to avoid the consequence of an imminent fee increase. It does not seem to involve any aspect which manifests social or economic conservatism, but it is disfavored by Griffith.¹⁰²

The second major problem which the book raises is the selection of the cases upon which the analysis and the thesis are based. One would expect the author to demonstrate that the cases selected are truly representative of the line of judicial decisions in each area discussed. The author could have employed for this purpose the scalogram analysis based on statistical method or he could have chosen a non-statistical method. But he chose to support his thesis on the basis of the selected cases without any explanation of the method of selection and without a discussion of its merits. The result is that the reader is left with doubts as to whether the cases are truly representative.

Doubts concerning Professor Griffith's analysis are strengthened by several more detailed surveys of cases concerning industrial disputes, immigration cases and cases involving protests in public places, which produced an overall favorable judgment on the judiciary. A survey conducted in 1969 of cases in the superior courts involving industrial conflicts has clearly shown that, statistically, "there is less evidence of the influence of judicial bias than might *a priori* have been expected." However, this statistical evidence does offer some basis for the argument that in criminal cases, the Divisional Court of the Queen's Bench has tended to restrict rights.¹⁰³ A detailed survey of cases concerning immigrants in the criminal courts has passed a very favorable judgment on the courts which "have ensured that criminal justice is not biased against but rather, in appropriate

98. *Padfield v. Minister of Agriculture* [1968] A.C. 997 (H.L.); *Anisminic v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Congreve v. Home Office*, *Supra* n. 41; *Secretary of State for Education v. Tameside*, *Supra* n. 41; *Laker Airways Ltd. v. Department of Trade*, *Supra* n. 41; *Gouriet v. Union of Post Office Workers*, [1977] 1 All E.R. 696 (C.A.), rev'd. [1977] 3 All E.R. 70 (H.L.).

99. Griffith, *Supra* n. 43, at 121-32, 209-10.

100. *Id.*, at 126-27, 209-10.

101. *Id.*, at 127-28.

102. *Id.*, at 125-26.

103. P. O'Higgins and M. Partington, "Industrial Conflicts: Judicial Attitudes" (1969), 32 Mod. L. Rev. 53.

cases, in favour of the immigrant in England."¹⁰⁴ Another detailed survey of cases involving protest in public places has shown that courts protect the right of protesters to demonstrate in public places.¹⁰⁵

The Politics of the Judiciary reveals the ideological inclinations of the author. Professor Griffith judges the results of the cases according to his own set of values and ideological preferences, and passes judgment on the results of the cases accordingly.¹⁰⁶ It can be fairly concluded that the book is colored by a certain ideological judgment which affected the analysis. As such, the book should not be assessed on the basis of academic analysis only, but also on the basis of the social and political message it wished to put forward.

Personally, I share many of Professor Griffith's propositions emphasizing social and economic equality. I support those propositions, however, not because they represent valid conclusions of an academic analysis but because they are expressions of my own set of values. In the course of discussing social problems, Griffith seems at times to dismiss too lightly the views opposite to his own.¹⁰⁷ This is illustrated by his analysis of the cases dealing with the scope of the *Race Relations Act*. With all due respect, I fully share Professor Griffith's general philosophy that in the conflict between "the freedom to order one's private life as one chooses"¹⁰⁸ and the right of others not to be discriminated against on grounds of race or color, the latter should prevail.¹⁰⁹ I also strongly believe that racial discrimination is not "an individual right but . . . a social wrong."¹¹⁰ However, on the question where the line should be drawn in particular issues of race relations, the opposite view cannot be dismissed too lightly.

Another difficulty raised by Professor Griffith's book lies in the result analysis itself. The result analysis is difficult in that it does not pay sufficient attention to legal doctrine and the particular circumstances of a case. Being strongly result-oriented, Griffith's book, like other result analyses, offers very limited and sometimes no discussion of the legal doctrines and legal principles which were at issue in the cases.

While it is possible to find decisions where it can be said that judicial attitudes may have influenced the ultimate policy choice and the final result of the case, in most cases the decisions turn on the legal rules and their application to the particular circumstance of the case at hand. The focus on the result to the exclusion or undue regard of the legal and factual arguments in the case produces an analysis which is less than satisfactory. The criticism of a decision for invalidating Minister's orders and decisions of other public authorities is unconvincing if it fails to determine whether the decision was a

104. O. Shylon, "Immigration in the Criminal Courts" (1971), 34 Mod. L. Rev. 135, at 148.

105. D. G. T. Williams, "Protest and Public Order" (1970), 28 Camb. L.J. 96, 101-11.

106. See e.g., the discussion of his assessment of cases interfering with executive decisions, *Supra* n. 99-102.

107. See e.g., Griffith, *Supra* n. 43, at 116-21, for a discussion of the cases dealing with squatters which completely ignores the rights of property owners and the arguments opposing the acquiring of rights by unlawful acts though motivated by poverty not bad motives.

108. *Dockers' Labour Club v. Race Relations Board*, [1974] 3 W.L.R. 533, at 540 (H.L.) (per Lord Diplock).

109. Griffith, *Supra* n. 43, at 90.

110. *Ibid.*

valid application of a legal rule to the particular circumstances.¹¹¹

There are, as has been suggested, reservations to and criticisms of the methodology adopted by Professor Griffith. Likewise, certain specific arguments and propositions advanced by Professor Griffith may be disputed. However, in spite of this, Griffith clearly succeeded in demonstrating the general thesis, illustrated in numerous fields of law, that English judges have been reluctant to accept change and have tended to adhere to traditional values.

Content Analysis of Judicial Decisions

Process and Substance of Decision-making

The second criterion for assessing judicial role is content analysis of decision-making. Here again the assessment of decisions and patterns of decisions employs the dichotomy between conservative and liberal. Categorisation by content analysis of judicial decisions and their authors as "conservative" or "liberal" is based on the examination of two aspects of the decisions: the *process* of the decision-making and the *substance* of the decisions and judicial reasoning. Categorisation of a decision or a judge as conservative or liberal based on the process of decision-making focuses on the concept of judicial function (whether the judge perceives his task as law-making or law-interpreting), the style and approach in judicial reasoning (whether mechanical or policy-oriented), the attitude towards precedent and the perception of the roles of Common Law and statute law. The responsiveness to academic comment, the extent of using newly acquired knowledge from social sciences and criminology, and the attitude toward social aspects in sentencing process, have also been used as indicators of conservatism and liberalism. The liberal judge is one who perceives himself as a law-maker, grapples with policy issues, has a relaxed view of precedent, follows broad and policy interpretations of statutes, is responsive to academic comment, and has favorable attitudes toward the use of social science considerations in sentencing. The conservative judge, on the other hand, holds the opposite views.

The analysis of the *substance* of judicial decisions focuses on the judicial philosophy reflected in the arguments and decisions on the merits. Judicial conservatism in this respect is thought to be manifested in disregard or in limited regard to changing social and economic conditions in favor of harmony in the legal doctrine, in refusal to take into account broad policy considerations, in adherence to orthodox social and political philosophies and old morality, in reluctance to review administrative action, and in restrictive concepts of civil liberties and procedural rights.

The lines dividing the process and substance of judicial decision-making are somewhat blurred and the elements of process and substance are often intertwined and interwoven. Thus, this distinction is useful, but does not lend itself to hard and fast application.

111. *E.g.*, I was not convinced by the critical comments on *Lavender and Son Ltd. v. Minister of Housing and Local Government*, [1970] 1 W.L.R. 1231 (Q.B.) (an application of the rule that a public officer vested by law with a discretion must exercise his own discretion and not depend on others' discretion). Nor was I convinced by the criticism of *Coleen Properties Ltd. v. Ministry of Housing*, [1971] 1 W.L.R. 433 (C.A.) (applying the rule that an administrative decision should be based on evidence). Griffith, *Supra* n. 43, at 114.

There is a strong relationship between the various aspects mentioned. A judge who believes in a broad scope of judicial function and openly admits that he is making law not merely interpreting law, will most likely have a more relaxed view of *stare decisis* than judges who consider themselves merely as law interpreters. This proposition is supported by a statistical study of the Supreme Courts of the four American jurisdictions — New Jersey, Massachusetts, Louisiana and Pennsylvania. The study found that the degree of adherence to precedent depended on the approach to judicial goals and on decision-making orientation. Most judges who considered themselves law-makers gave moderate or slight importance to precedent whereas law-interpreters generally were highly favorable to precedent. Likewise, it was found that mechanistic judges (who perceive the decision-making process as a mechanical process of finding the “right” answer to a legal question) believe in very strict adherence to precedent.¹¹²

Judges who believe in a broad concept of judicial function do not necessarily disregard the value of certainty of the law; they too are committed in variable degrees to *stare decisis* but not in its strict version. Thus Benjamin Cardozo thought that judge-made law was “one of the existing realities of life,”¹¹³ but at the same time he was committed to *stare decisis* and believed that judges should depart from precedent only in special circumstances.¹¹⁴

Precedent

The attitude toward the binding force of precedent is perceived as a major indicator for classification as conservative or liberal. Refusal to depart from precedent normally on the grounds of maintaining certainty of the law, is perceived as an indication of conservatism. Conversely, a relaxed view of the doctrine of *stare decisis* is viewed as a manifestation of liberalism. Judges are aware that adherence to precedent is equated with conservatism. In *Farrell v. Alexander*,¹¹⁵ Lord Justice Scarman (as he then was) disagreed with Lord Denning’s view that the Court of Appeal should not be bound by its own previous decisions. Being aware of the criticism that his view would attract, he added a few comments by way of anticipatory defence: “To some it will appear that justice [in the present case] is being denied by a timid, conservative, adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty — one of the great objectives of law.”¹¹⁶

The English attitude towards precedent has generally been more rigid than in other jurisdictions.¹¹⁷ Lord Denning has long advocated a more relaxed policy on precedent in the Court of Appeal which would allow it to

112. H. R. Glick, *Supreme Courts in State Politics* (1971) 77.

113. B. Cardozo, *The Nature of the Judicial Process* (1921) 10.

114. *Id.*, at 20, 21.

115. [1976] Q.B. 345 (C.A.).

116. *Id.*, at 371.

117. In general the rule is that “[e]very court is bound to follow any case decided by a court above it in the hierarchy, and appellate courts (other than the House of Lords [since 1966]) are bound by their previous decisions.” R. Cross, *Precedent in English Law* (2nd ed. 1968) 6; see also *Supra* n. 21, at 69-75. The Court of Appeal (Civil Division) is bound by its own previous decisions and those of courts of co-ordinate jurisdiction, with three exceptions: (a) where there are two conflicting decisions; (b) where a previous decision cannot stand in light of a subsequent House of Lords decision; (c) where a previous decision was given *per incuriam*. See *Young v. Bristol Aeroplane Company*, [1944] 2 All E.R. 293, at 298 (C.A.). For a recent illustration, see *Industrial Properties Ltd. v. Associated Electrical Industries Ltd.*, [1977] 2 All E.R. 293 (C.A.).

depart from previous decisions which appear, on further consideration, clearly wrong.¹¹⁸ At last his view prevailed in *Davis v. Johnson*,¹¹⁹ only to be reversed by the House of Lords,¹²⁰ which reaffirmed the longstanding role which binds the Court of Appeal to its own previous decisions subject to certain exceptions.¹²¹

Unlike the Court of Appeal, the House of Lords is not bound by its own previous decisions. In 1966, in a practice statement,¹²² the House of Lords abandoned the rigid doctrine of precedent and is now no longer bound by its own earlier decisions. This change of policy was effected because their Lordships recognized that "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law."

As interpreted and applied, this new policy has not brought about the expected changes.¹²³ The House of Lords has ruled in a number of cases that although it "has taken freedom to review its own decisions . . . the House will act sparingly and cautiously in the use made of [this] freedom."¹²⁴ The House held "that the mere finding that an earlier decision is wrong, even by a presently unanimous House, would not in itself warrant departing from it."¹²⁵

Thus, to use Lord Scarman's words, the freedom of the House of Lords not to follow its own precedent was "not, it would seem, likely by over-use to degenerate into licence."¹²⁶

In spite of the limited use by the House of Lords of the 1966 Practice Statement,¹²⁷ it is fair to say, as Mr. Justice Kerr has written, that in general judicial decision-making has become more flexible and the doctrine of *stare decisis* somewhat diluted. Older cases are less cited because they do not cover the problems of modern situations.¹²⁸

Furthermore, there are a number of decisions which overruled older decisions. *Conway v. Rimmer*¹²⁹ can be said to have departed from *Duncan v. Cammell, Laird*.¹³⁰ More recently, in *Milangos v. George Frank*,¹³¹ overruling a long-standing rule, the House of Lords held that judgment could be claimed and given for debts either in the currency of account or in sterling. This decision, allowing foreign currency judgments, can certainly be con-

118. *E.g.*, *Gallie v. Lee*, [1969] 2 Ch. 17, at 42 (C.A.); *Farrell v. Alexander*, [1976] 1 All E.R. 129, at 137 (C.A.).

119. [1978] 1 All E.R. 841 (C.A.).

120. *Davis v. Johnson*, [1978] 2 W.L.R. 553 (H.L.).

121. *Supra* n. 117. Certain decisions of the Court of Appeal allow it to reconsider previous decisions, *e.g.*, The Court has held that it may overrule an interlocutory decision of two Lord Justices. *Boys v. Chaplin*, [1968] 2 Q.B. 1 (C.A.).

122. *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234 (H.L.).

123. See J. Stone, "On the Liberation of the Appellate Judges: How Not to Do It" (1972), 35 Mod. L. Rev. 449.

124. *Broome v. Cassell & Co.*, [1972] 2 W.L.R. 645, at 653-54 (H.L.). See also *R. v. National Insurance Commissioner, Ex Parte Hudson*, [1972] 2 W.L.R. 210 (H.L.) and *Jones v. Secretary of State for Social Services*, [1972] 1 All E.R. 145 (H.L.).

125. *Supra* n. 123, at 470. See also *Kneller v. D.P.P.*, [1973] A.C. 435 (H.L.).

126. Sir Leslie Scarman, *English Law: The New Dimensions* (1974) 5. *But cf.*, *Supra* n. 21, at 517.

127. *Fitzleet Estates Ltd. v. Cherry*, [1977] 3 All E.R. 996 (H.L.), where the House of Lords held that they would not depart from an earlier decision merely because it was wrong and that it was immaterial that the earlier decision had been by a narrow majority. Before the House would depart from an earlier decision, some other ground, such as a material change of circumstances (as in *Milangos v. George Frank Ltd.*, [1976] A.C. 443 (H.L.)), had to be shown which would justify the House adopting such a course.

128. Mr. Justice Kerr, "Modern Trends in Commercial Law and Practice" (1978), 41 Mod. L. Rev. 1, at 7.

129. [1968] A.C. 910 (H.L.).

130. [1942] A.C. 624 (H.L.); see *Supra* n. 21, at 70 n. 2; also Lord Pearce in *Owen v. Pook*, [1970] A.C. 244 (H.L.) said that it overruled *Ricketts v. Wigham*, [1926] A.C. 1 (H.L.).

131. [1976] A.C. 443 (H.L.).

sidered a very radical change of the law, and has been equated with *Donoghue v. Stevenson*.¹³² Other changes relate to the freezing of assets to restrain defendants from removing their assets from the jurisdiction,¹³³ and to the restrictive concept of sovereign immunity in international claims (excluding commercial transactions from the ambit of the immunity).¹³⁴ Although isolated, the judicial pronouncements in favor of introducing the technique of prospective overruling of previous decisions,¹³⁵ reflect some change in the attitudes to precedent.

If one employs the criterion of the attitude toward precedent, one can conclude that the House of Lords has been sporadically liberal, but overall, it continues to be conservative. As might be expected, the evaluation of the House of Lords' recent approach to *stare decisis* depends on the personal values and approach of the evaluator. Thus, to Mr. Justice Templeman, speaking in 1976, the House of Lords "is becoming robust in reversing rules evolved by the common law which do not accord with the needs of modern society,"¹³⁶ whereas Mr. Justice Kerr, speaking in 1977, thought that "[i]n the House of Lords the analytical approach to previous decisions has generally been as cautious and conservative as before [1966]."¹³⁷ With all respect, and admittedly this is the expression of my own bias, I tend to agree with Mr. Justice Kerr. This conclusion is supported by the preceding analysis. In this sense, the House of Lords is conservative and the Court of Appeal is liberal and perhaps, to borrow the terminology of Mr. Justice Kerr, even "radical."¹³⁸

The English attitude to precedent has been criticized by American commentators, who feel that if the judiciary's predecessors were able to make law, then it follows that the present incumbents can change that law.¹³⁹ In the United States the courts are much more liberal in their attitude toward precedent and are prepared to reverse previous decisions. They hold the view that what is "judge-invented" can be "judge-destroyed." This view is well reflected numerically. In at least 105 decisions made between 1810 and 1974, the Supreme Court of the United States overruled its own decisions.¹⁴⁰

While American courts generally hold a relaxed view of the doctrine of precedent, there have been advocates of certainty there as well. Thus, Justice Brandeis believed that *stare decisis* "[i]s usually wise policy because in most matters it is more important that the applicable rule of law be settled than if to be settled right."¹⁴¹

132. [1932] A.C. 562 (H.L.); see *Supra* n. 128, at 11.

133. See *Nippon Yusen Kaisha v. Karageorgis*, [1975] 1 W.L.R. 1093 (C.A.); *Mareva Compania Naviera v. International Bulkcarriers*, [1975] 2 Lloyd's Rep. 509 (C.A.); *Ibrahim Shanker v. Distos Compania Naviera ("The Siskina")*, [1977] 3 W.L.R. 532 (Q.B. and C.A.), [1977] 3 All E.R. 803 (H.L.).

134. *Trendex v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (C.A.).

135. Per Lord Simon, in *Jones v. Secretary of State for Social Services*, *Supra* n. 124, at 198. See A.G.L. Nicol, "Prospective Overruling: A New Device for English Courts?" (1976), 39 Mod. L. Rev. 542.

136. Sir Sydney Templeman, "An English View of the Judicial Function" in H. W. Jones (ed.), *Legal Institutions Today* (1977) 6, 19.

137. *Supra* n. 128, at 8.

138. *Id.*, at 7.

139. K. C. Davis, "English Administrative Law: Another Word from K.C. Davis," [1963] Pub. L. 1.

140. H. J. Abraham, *The Judicial Process*, (3rd ed. 1975) 330. 90 such decisions are listed in A. Blaustein and A. Field, "'Overruling' Opinions in the Supreme Court" (1958), 57 Mich. L. Rev. 151, at 184.

141. *Burnet v. Coronado Oil & Gas Co.* (1932), 285 U.S. 393. Justice Brandeis advocated this view in cases where amending legislation could be expected. In constitutional cases where amendment is not likely, he suggested instead overruling if experience and the force of better reasoning called for overruling of previous decisions.

American critics have attempted to explain why the English doctrine of precedent is far stricter than the American practice. They see the English adherence to precedent is partly attributable to the British system of legal education. Legal education in England is strongly case-oriented, and makes many English judges both more inclined to follow precedent and less ready to listen to academic opinions than their colleagues across the Channel or the Atlantic. The legal education which many (though by no means all) of the English judges had in universities, did not seem to prepare them for modern needs. Indeed, many judges did not have any university legal education at all. By contrast, American critics claim, the universities in America are a source of reform. They attribute this to the fact that university legal education in the United States was not established until the early 20th century, when the national mood was one of reform. This has been contrasted with the parochialism of Oxford and Cambridge in the mid-19th century when university legal education was revived in England.¹⁴² Partly as a result of this, it is claimed, American law schools emphasize creative and critical thinking, whereas in England the stress is placed on ascertaining settled rules of law. This, they argue, results in non-creative thought among the British judiciary, which leads to an unwillingness to change the law and the judicial system.¹⁴³

One cannot but agree that legal education was a significant factor contributing to the English approach to precedent. Some changes, however, are noticeable. Certainly the establishment of the Law Commission heralded the increasing role of academic lawyers in influencing the directions of law reform. Likewise, judges today are much more open to academic comments. But it should be emphasized that the approach to precedent is also a result of the professional socialization and not only of the nature of legal education that the law student had received before he entered the profession.

In Canada, the federal Supreme Court of the land has in the last few years become much more liberal in its approach to precedent and "has taken the decisive action of refusing to follow earlier decisions of its own."¹⁴⁴ The Courts of Appeal in the Provinces, which are the intermediate appellate courts, "have not been bound to a strict application of *stare decisis* and considered themselves free to overrule their previous rulings when reason is shown for their doing so."¹⁴⁵ Canadian courts, however, are more attached to precedent than their American neighbors to the south. A trend toward a more liberal attitude can also be seen, to a lesser degree, in the Australian appellate courts.¹⁴⁶

In order to resolve the conflict between desirable certainty and necessary change of the law, the idea of partial precedential adherence has been suggested as a balance between ensuring a degree of certainty, and gradually adapting the law to new circumstances. The idea calls for a process of legal incrementalism: small changes in the law followed by evalua-

142. *Supra* n. 50, at 79.

143. K. C. Davis, "The Future of Judge-made Public Law in England: A Problem of a Practical Jurisprudence" (1961), 61 *Colum. L. Rev.* 201, at 202. See also, L. Jaffe, "English Administrative Law: A Reply to Professor Davis," [1962] *Pub. L.* 407, at 408.

144. G. F. Curtis, "*Stare Decisis* at Common Law in Canada" (1978), 12 *U.B.C.L. Rev.* 1, at 2. See also *Supra* n. 23.

145. Curtis, *Id.*, at 6.

146. See C. Kidd, "*Stare Decisis* in Intermediate Appellate Courts" (1978), 52 *Aust. L.J.* 274.

tion of the effect, followed in turn either by a further change in the same direction or by a step backwards.¹⁴⁷

It seems to me that this is in fact what many judges do, and what all judges should do. Innovative decisions which depart from previous decisions should be re-evaluated; principles and exceptions should be re-defined in light of the problems raised by the cases which come before them.

Activism v. Self-restraint

The judge's conception of the scope of the judicial function has been a significant criterion for dividing between liberal and conservative. In general, the activist judges are viewed as liberal and their brethren, who exercise self-restraint, are perceived as conservative. The "activist" judge, who holds a broad view of the judicial function, is willing to review executive discretion and does not shy away from what is called judicial legislation when the existing law does not provide for an adequate answer. On the other hand, his brother on the bench, who holds a limited view of the judicial function, is reluctant to review executive action, and refuses to engage in judicial legislation, is perceived as conservative.

It is important to emphasize that the equating of liberalism with activism and conservatism with self-restraint, while generally borne out by practice and experience, is sometimes confusing and misleading. In the first three decades of this century, when the English courts were activist and frustrated social legislation, they were practising conservative activism.¹⁴⁸ Similarly, in the United States, liberalism has been equated with self-restraint and conservatism with activism, due to the hostile activist view of the pre-1937 U.S. Supreme Court to Roosevelt's New Deal legislation.¹⁴⁹

In England, one can also find criticism of judicial self-restraint as the manifestation of objectionable conservatism, as well as criticism of judicial activism which is also viewed as objectionable conservatism.¹⁵⁰ Thus in numerous instances, the refusal of English courts to adapt the law to changing conditions on the ground that it was not proper for the courts to engage in judicial legislation was severely criticized. But when the courts established new legal remedies¹⁵¹ or initiated new legal rules,¹⁵² they were criticized for usurping the legislative function by those who did not like the decisions. The line of English cases in the first three decades, which applied the social legislation very restrictively and as a result frustrated the legislative object, was strongly criticized as conservative activism.¹⁵³

It is therefore necessary to recognize the distinction between the dichotomy of judicial self-restraint and activism, on the one hand, and the classification of liberalism and conservatism on the other. Self-restraint may be generally classified as conservative but sometimes can reflect liberalism. Likewise, judicial activism may generally be viewed as an expres-

147. M. Shapiro, "Stability and Change in Judicial Decision Making: Incrementalism or *Stare Decisis*" (1964), 2 *Law in Transition Q.* 134.

148. See text, *Supra* n. 52-56.

149. *Supra* n. 49, at 187.

150. E.g., *Supra* n. 21, at 364.

151. *Rookes v. Barnard*, *Supra* n. 64.

152. *Ward v. James*, *Supra* n. 68; *Shaw v. D.P.P.*, [1962] A.C. 220 (H.L.); *D.P.P. v. Smith*, [1961] A.C. 290 (H.L.).

153. Here, we mean social conservatism in the terminology explained in the text, *Supra* n. 52-56.

sion of liberalism, but it can sometimes be viewed as a manifestation of conservatism.

Numerous definitions have been offered for judicial activism and restraint, and as might be expected, they are colored by the perception of the judicial role of their authors. The doctrine of self-restraint, as it is generally understood, propounds essentially that the function of the judiciary is to resolve disputes put before the courts within the limits of the law *stricto sensu*, that is, in accordance with legal norms which have been embodied in the law prior to the case at hand. One of the implications of self-restraint is that precedent is binding even if "wrong." On the other hand, judicial activism as it is commonly understood, propounds that the judiciary may introduce legal norms previously unknown to the law in order to resolve disputes. This also implies a relaxed view of the doctrine of precedent.

In general, the division of activist and restrained judges can rest upon their concept of the role of courts in society. The activist judge is in favor of expanding the role of the judiciary, and a restrained judge is one who would prefer to leave it as it is or even to restrict it.

These are only the general lines. The detailed definition of judicial activism is more difficult, but it presents additional dimensions to the definition of judicial activism. According to Professor Glendon Schubert, judicial activism occurs when court policy is in opposition to that of "other decision-makers," including Congress, the President and administrative agencies, lower national courts and organs of state governments.¹⁵⁴ This definition, in this writer's opinion, should be qualified in that, when the policy of the legislature is to expand the courts' jurisdiction, a judicial decision in support of such policy should still be considered as activism.

A much more frequently employed criterion for determining the scope of judicial function and judicial activism is the criterion of social consensus. A recent illustration of the use of social consensus is Lord Devlin's Chorley Lecture.¹⁵⁵ Lord Devlin distinguishes between two levels of judicial activism, one, which he terms "activist law-making," is favorable, and the other, "dynamic law-making," is objectionable. Lord Devlin defines "activist law-making" as "the business of keeping pace with change in the consensus." The consensus in the community is "those ideas which its members as a whole like or, if they dislike, will submit to." "Dynamic law-making" is "the use of the law to generate change in the consensus." Lord Devlin classifies the United States Supreme Court as "dynamic." According to Lord Devlin, the law pronounced by the judges should represent the social consensus, or at most, help it to go in the direction it would take anyway. A judge who goes beyond, is "dynamic," that is, has exceeded the bounds of his judicial function; if he falls short of reflecting the social consensus, he is supposedly, unduly "restrained," according to Lord Devlin's terminology. As to precedent, Lord Devlin presumes a public consensus in favor of the binding power of precedent,¹⁵⁶ which limits the scope of judicial activism.

154. *Supra* n. 49, at 209-10.

155. Lord Devlin, "Judges and Lawmakers" (1976), 39 *Mod. L. Rev.* 1.

156. *Id.*, at 9.

This however creates some difficulty with Lord Devlin's thesis: for how should a judge decide a question for which public consensus supports change in the law, but is governed by a clear precedent?

The other problem with Lord Devlin's thesis is how can one decide whether a public consensus has been reached on a given question? Is it not in fact left for the judge to decide? Also, what majority of the public should support a certain idea before a judge may legitimately crystallize it in a judicial decision?

In spite of these problems, the social consensus can serve as a criterion for the degree of judicial activism. A judge who is prepared to intervene, even in questions which there is public controversy, is more activist than his brother who will intervene only in issues upon which a general consensus has been reached.¹⁵⁷

Lord Devlin and other judges and jurists advocate judicial neutrality in cases which raise controversial issues upon which the community is divided. This is a variation of self-restraint which is supported on the grounds of maintaining political neutrality in the process of judicial law-making.¹⁵⁸ Although neutrality suggests that the judge does not express any views on the issue raised by the case, in fact his decision to remain "neutral" means that he supports the status quo. Hence his inaction, his self-restraint, is not genuine neutrality.¹⁵⁹

As has been explained, there may be different criteria and yardsticks for determining judicial self-restraint and activism or the various levels of judicial activism. But whatever the criteria, the dichotomy between restraint and activist should be viewed as separate from the classification of liberal and conservative, though they are not unrelated.

There is not much dispute over the assessment of English judges along the dichotomy of activism and self-restraint. English judges, as Professor Jaffe has noted, "overdo the gospel of self-restraint."¹⁶⁰ Lord Lloyd observed that English judges are "cautious and timid rather than imaginative."¹⁶¹ the judgment of Blom-Cooper and Drewry, on the House of Lords, is unequivocally critical of the judges' restrictive concept of the scope of the judicial role:

On the evidence we have examined, the House of Lords in its judicial capacity has been meticulously deferential to Parliament in refraining from decisions which reflect on public policy not directly involved in the instant case. Indeed, there is more than a hint here and there that judicial self-restraint is over-practised, and that the Law Lords could be bolder without seriously endangering relationships with the legislature.¹⁶²

A fair judgment on the English judiciary on this aspect of the judicial role warrants a special reference to the Court of Appeal under the leader-

157. Cf., President Agranat and Mr. Justice Landau of the Israel Supreme Court in *Shalit v. Minister of Interior* (1969), (II) 23 P.D. 477; Special volume, *Selected Judgments of the Supreme Court of Israel* (1971). For an analysis, see S. Shetreet, "Reflections on the Protection of the Rights of the Individual: Form and Substance" (1977), 12 *Israel L. Rev.* 32, at 42-43.

158. E.g., H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959), 73 *Harv. L. Rev.* 1.

159. Cf., Mr. Justice Witkon in the *Shalit* case *Supra* n. 157; see Shetreet, *Supra* n. 157, at 43; see also *Supra* n. 50, at 260-61.

160. L. Jaffe, *English and American Judges as Lawmakers* (1969) 59.

161. Lord Lloyd, *Supra* n. 18, at 125. See also Jaffe, *Id.*; McAulson, *Supra* n. 19, and Stevens, *Supra* n. 20.

162. *Supra* n. 21, at 364; see R. Stevens, *Law and Politics* (1979) 459-68, 589-627.

ship of Lord Denning. Here again, as in the issue of the attitude toward precedent, the Court of Appeal has been much more innovative and creative, and in the terminology employed above, it has been much more activist. The numerous cases where the Court of Appeal handed down creative and active decisions which were later revised by the House of Lords very well illustrate this point.¹⁶³

In fairness to the House of Lords, it should be mentioned that in the area of the Common Law, the Law Lords are on occasion prepared to be bold, as illustrated by the innovative decisions in the cases of *Hedley Byrne v. Heller*¹⁶⁴ on liability for negligent misstatements causing economic loss, *Home Office v. Dorset Yacht*¹⁶⁵ on tort liability of government departments, and *Indyka v. Indyka*¹⁶⁶ which changed the basis for recognizing foreign divorce judgments.

As will be noticed, the cases mentioned have been decided since 1963, and this is no accident. As has been suggested by court critics, in 1963 there was a change of mood in the House of Lords in favor of a more creative role for the judges.¹⁶⁷ This change of mood, which was due to changes in the composition of the Court,¹⁶⁸ is illustrated by pronouncements of Lord Radcliffe, Lord Reid and Lord Diplock.¹⁶⁹

There is no doubt that the entry of the United Kingdom to the European Common Market will have important impact on the judicial role in English society. The changes are beginning to be felt in English judicial practices. Section 2(1) of the *European Communities Act 1972* introduced into English law "enforceable Community rights," by which is meant various Treaties of the Common Market and any regulations made by two of its bodies — the European Commission and the Council of Ministers. The European Court is charged with interpreting and enforcing such regulations. The European Laws are less detailed than their English counterparts, and give the courts an active role of interpretation and even, in the event of a lacuna, 'judicial legislation.' As Lord Scarman forecast in 1974, this must

163. For illustrations of cases in which the House of Lords reversed decisions of the Court of Appeal establishing new rules or representing innovative approach and greater protection of rights, see (a) Race relations: *Charter v. Race Relations Bd.*, [1973] A.C. 868; *Docker's Labour Club v. Race Relations Bd.*, *Supra* n. 108; (b) Free speech: *A.G. v. Times Newspapers Ltd.*, [1974] A.C. 273 (The *Thalidomide* case); (c) Precedent: *Davis v. Johnson*, *Supra* n. 120; *Broome v. Cassell*, *Supra* n. 124; (d) The right of deserted wife in the matrimonial home: *National Provincial Bank Ltd. v. Hastings Car Mart*, [1965] A.C. 1175. (e) Standing of a citizen to restrain in civil proceedings trade unions from acting in violation of criminal law: *Gouriet v. Union of Post Office Workers*, [1977] 1 Q.B. 729 (C.A.), [1978] A.C. 435 (H.L.). Other examples of reluctance of the House of Lords to demonstrate judicial creativity: (f) *Midland Silicones Ltd. v. Scruttons Ltd.*, [1962] A.C. 446 (H.L.). *Beswick v. Beswick*, [1968] A.C. 58 (H.L.) (refusing to follow Lord Denning's approach in the Court of Appeal to abolish the rule against third party beneficiaries); (g) *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361, at 406 (H.L.) (leaving to Parliament the solution of the problem of exception clauses) (per Lord Reid).

164. [1964] A.C. 465 (H.L.).

165. [1970] A.C. 1004 (H.L.).

166. [1969] A.C. 33 (H.L.). See e.g., *Miliangos v. George Frank Textiles Ltd.*, *Supra* n. 131 (foreign currency judgments); *Steadman v. Steadman*, [1976] A.C. 536 (H.L.) (part performance); *New Zealand Shipping Co. v. A. M. Staterthwaite & Co.*, [1975] A.C. 154 (P.C.) (a stevedore, third party beneficiaries may rely on an exception clause in a bill of lading); *contra*, *Midland Silicones Ltd. v. Scruttons Ltd.*, *Supra* n. 163.

167. *Supra* n. 21, at 262; *Supra* n. 20, at 522-23.

168. *Id.*, at 158; *Supra* n. 20, at 523 n. 56.

169. Lord Radcliffe critically analyzed the view that judges merely declare the law and do not make it and called for developing the conception of public policy. Lord Radcliffe, *The Law and Its Compass* (1960) 39-40; Lord Reid stated that "[t]he common law ought never to produce a wholly unreasonable result," *Cartledge v. E. Jopling & Sons Ltd.* [1963] A.C. 758, at 772, and that it "must be developed to meet changing economic conditions and habits of thought," *Myers v. D.P.P.*, [1965] A.C. 1001, at 1021 (H.L.). Lord Diplock called for "a purposive construction of the statute as a whole." Lord Diplock, "Administrative Law: Judicial Review Reviewed" (1974), 33 *Camb. L.J.* 233, at 242.

bring with it changes in judicial and parliamentary conceptions of their respective roles,¹⁷⁰ and indeed it is beginning to be felt.¹⁷¹

Lord Denning once likened the *Treaty of Rome* to an incoming tide that cannot be held back.¹⁷² Thus far, careful examination does not seem to support this rather overstated expectation of the European impact on English law. While some European influence on English jurisprudence and judicial practices has been noticed as a result of British membership in the E.E.C., English influence on community law remains very limited. This is due to the great reluctance of British courts to refer questions to the Community Court. In the first five years of Britain's membership in the E.E.C., there were only ten British references, as opposed to the far more frequent references from other European member states.¹⁷³

The English legal system is exposed to other new foreign influences since Britain has entered into other international obligations which also have some effect on its internal law. Special reference should be made to the European Convention of Human Rights, which entitles individuals to apply to the European Commission of Human Rights in Strassbourg.¹⁷⁴ The most recent English case to be heard before the Court of Human Rights is the Thalidomide case,¹⁷⁵ in which the European Court rejected the House of Lords' ruling that the publication of the *Sunday Times* reports on this national tragedy violated the *sub judice* rule and was thus a contempt of court, and held that the restraint on the publication constituted a violation of freedom of expression guaranteed under the Convention.¹⁷⁶

Interpretation of Statutes

The concept of judicial function is very well reflected in the interpretation of statutes. The emphasis on the wording of the statute rather than on the policy issues and the intention of the legislature has been perceived as indicators of conservatism. On the other hand, a judge who follows a policy-oriented approach in the construction of statutes, and is willing to correct flaws created by ill-worded statutes, is liberal.

English approach to statutory construction "has always been rigid and narrow."¹⁷⁷ The English judges proceed on the basis that "the courts are there only to seek Parliament's intentions: if the search proves chimerical or produces unsatisfactory solutions then Parliament alone should correct its own handiwork."¹⁷⁸

The English judiciary adhered to Common Law and "treated the statute throughout as an interloper upon the rounded majesty of the com-

170. Scarman, *Supra* n. 126, at 27. See also Lord Scarman, "Fundamental Rights: The British Scene" (1978), 78 Colum. L. Rev. 1575, at 1579.

171. See text, *Infra* n. 195-96.

172. *Bulmer Ltd. v. Bollinger S.A.*, [1974] Ch. 401, at 418 (C.A.).

173. P. D. Dagtoglou, "The English Judges and European Community Law" (1978), 37 Camb. L.J. 76, at 81 n. 27.

174. See Scarman, *Supra* n. 126, at 10-21 and *Supra* n. 170, at 1580-83.

175. *A.G. v. Times Newspapers Ltd.*, *Supra* n. 163.

176. (1979), Series A, No. 30; 2 Eur. Human Rights Rep. 245.

177. *Supra* n. 128, at 17.

178. *Supra* n. 21, at 364.

mon law. This tendency still persists."¹⁷⁹ Lord Denning has always advocated a more policy-oriented approach to statutory interpretation.¹⁸⁰ His views have been called by Lord Simonds "a naked usurpation of the legislative function under the thin disguise of interpretation."¹⁸¹ For this attitude, Lord Simonds was entitled "reactionary"¹⁸² and a "high priest" of conservatism.¹⁸³

American commentators have criticized the restrictive approach to statutory construction. Professor Davis has pointed out that, even though Parliament has the power to make all relevant laws, it does not have the capacity to do anything but fix broad policies.¹⁸⁴

English judges did not remain unaffected by their criticisms and new ideas. Lord Radcliffe admitted that the judiciary should be aware of the moral and social significance of their decisions¹⁸⁵ and Lord Diplock has spoken approvingly of the change in the approach of the judges to the interpretation of statutes: "the reaction against a liberal construction of the words of individual sections of a statute in favour of purposive construction of the statute as a whole."¹⁸⁶

The call for a more policy-oriented approach to statutory construction does not resolve the differences of opinion on the scope of judicial innovation. As has already been mentioned, Lord Devlin opposes "dynamic law-making" which is not supported by the general consensus, and others support a broader scope of judicial innovation.¹⁸⁷ Moreover, the courts have not as yet relinquished their old restrictive approach to statutory interpretation. Critical comments continue to be voiced of arbitrary application of some parliamentary enactments by the judges and their disregard of "the patent or at any rate easily discoverable intention of the reformed law."¹⁸⁸

American judges follow a policy-oriented approach to statutory interpretation. But this has not always been so. At one time, American judges also demonstrated excessive adherence to Common Law. Statutes in derogation of the Common Law were strictly construed.¹⁸⁹

The narrow English approach to statutory interpretation can be seen in

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179. Sir Leslie Scarman, *Law Reform, The New Pattern* (1968), 47 and see also Scarman, *Supra* n. 126, at 3, 5, 7, and see W. Friedman, *Legal Theory* (5th edition 1967) 453. For an example of judicial approach, see *Ackerman v. Ackerman*, [1972] 2 All E.R. 420, at 424 (C.A.), where Phillimore, L.J. said that s. 5 of the *Matrimonial Proceedings and Property Act, 1970* "was obviously intended to codify existing law and practice." In fact, the section is a new and comprehensive statutory code containing some changes from the old law. For comments on this, see Alec Samuel's letter, "Statute — Judicial Misinterpretation" (1972), 122 New L.J. 502.
180. *E.g.*, *Seaford Court Estates Ltd. v. Asher*, [1949] 2 K.B. 481, at 499 (C.A.).
181. *Magor & St. Mellons R.D.C. v. Newport Corp.* [1952] A.C. 189, at 191. (H.L.).
182. *Supra* n. 21, at 157.
183. *Supra* n. 23, at 659 n. 215.
184. Davis, *Supra* n. 143, at 214.
185. See Lord Radcliffe, *Supra* n. 169, at 56, "I shrink then from this fashion of judges — a comparatively new fashion — of dissociating their decisions from any moral or social significance whatever."
186. Lord Diplock, *Supra* n. 169.
187. Lord Devlin, *Supra* n. 155, at 4. "If a judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law." The English have sometimes justified their reluctance to interfere in controversial policy questions by saying that this helps preserve their independence, and by pointing out that the American Supreme Court has often been criticized in political circles. See L. Jaffe, *Supra* n. 143, at 416. For a recent analysis of the proper role of the judiciary, see E. Levi, "Some Aspects of Separation of Powers" (1976), 76 Colum. L. Rev. 371.
188. "Law Reform in Action" (1976), 126 New L.J. 1.
189. H. Stone, "The Common Law in the United States" (1936), 50 Harv. L. Rev. 4, at 14; R. Aldisert, "An American View of the Judicial Function," in H. W. Jones (ed.), *Legal Institutions Today* (1977) 31, at 39.

the strict rules excluding any extrinsic materials other than earlier legislation and decided cases, unlike the American practice allowing the use of legislative history including reports of committees and legislative debates. The Canadian practice in this regard follows the English approach,¹⁹⁰ rather than the American rule.

Another archaic rule which was followed in England was that the writings of only dead jurists could be cited in courts.¹⁹¹ This rule, which would seem strange to readers in North America or in Europe, "has been tacitly buried for a number of years together with its beneficiaries."¹⁹² While living jurists are now regularly cited in court, they are much less referred to in court decisions. Many English judges still refrain from relying on living jurists. This is contrary to the practice in Canada, the United States and Israel, where living jurists are regularly cited in court decisions.

The strict approach toward the use of *travaux préparatoires* by and large continues to prevail in England, with few exceptions.¹⁹³ However, in relation to legislation based on international treaties, the writings of foreign jurists are referred to.¹⁹⁴ This is another manifestation of the significant influence of the European Common Market on English law.

Based on the preceding analysis, it seems that if the attitude toward statutory construction is employed as a criterion, the English judiciary can be generally classified as conservative.

Protection of Civil Liberties and Social Rights

Among the other aspects of judicial decision-making, the analysis of the substance of judicial decisions has been the basis for assessing judicial role and categorizing decisions and their authors as liberal or conservative. Decisions which support wider concepts of civil liberties, such as freedom of the press, freedom of religion, equality before the law, are liberal decisions, and so are decisions which provide for procedural safeguards to suspects and defendants in the criminal process. Likewise, decisions which endorse increased accessibility of the courts to citizens or provide for relaxed requirements of standing to sue, or creating new remedies for wrongs in the private or in the public law spheres are hailed as liberal.

On the other hand, decisions which follow a restrictive concept of civil liberties and procedural rights are classified as conservative. And so are decisions which restrict the rights of suspects and defendants in criminal cases, or the rights and remedies of the citizens vis-à-vis governments or official authorities such as applicants for government services and licences, students or immigrants.

The criterion of protection of individual rights for the purpose of assessing the judicial role should be employed consistently, without regard to ideological preferences. If the court endorses a wide scope of procedural

190. G. Gall, *The Canadian Legal System* (1977) 232 *et seq.*

191. See 2 *The Supreme Court Practice* (1979) para. 2023 referring to *Union Bank v. Munster* (1888), 37 Ch. D. 51, at 54 and *Greenlands, Ltd. v. Wilmshurst* (1913), 29 T.L.R. 685 at 687 (C.A.).

192. *Supra* n. 128, at 17. See also, *The Supreme Court Practice, Ibid.*, "Textbooks by living authors should not be cited. . . Nevertheless they are often cited and looked at by the Courts."

193. See *Davis v. Johnson*, *Supra* n. 120; but see *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg*, [1975] A.C. 591, at 614, 638 (H.L.) (allowing the use of Law Reform Committee Report on the pre-statute Common Law positions on the question before the Court).

194. *Supra* n. 128, at 18.

rights, it must be commended whatever the end result of the case. This is so even if the result is that an official program for the benefit of the public has been invalidated owing to breach of a procedural right protected by the court.

For this reason, this writer finds it difficult to accept Professor Griffith's criticism of decisions which require executive decisions (*e.g.*, planning and housing authorities) to comply with what Griffith calls "the stringent, largely judge-made, standards of procedure."¹⁹⁵ Subjecting governmental authorities to procedural requirements of fairness toward persons affected by the decisions, whether they are ordinary citizens, immigrants, welfare applicants or property owners, is generally considered as consistent with the protection of individual rights and should be commended. Indeed, Griffith himself expects the courts to subject police officers or immigration authorities to "stringent" judge-made standards of procedure.¹⁹⁶

The same is true with regard to judicial review of executive action. Assuming that a wider scope for judicial protection of individual rights is sought, then logic and consistency require that wide scope of judicial review should be favorably viewed whatever the immediate result of the case. The support of a wide scope of judicial review of administrative actions may on occasion result in the invalidation of decisions of police or immigration officers and, on other occasions, the invalidation of Ministers' decisions which interfere with individual rights to the benefit of the general public or certain sections of the public.

The approach of judges toward social legislation which creates social and economic rights is frequently employed as a criterion for assessing the judicial role, again along the conservative-liberal dichotomy. Decisions which favor the beneficiaries of such social legislation are hailed as liberal, and those which tend to restrict the rights under the legislation are criticized as conservative.

The English approach toward social legislation in relation to housing, supplementary benefits, social security, and health services has long been criticized. In the first quarter of this century, the English judiciary was severely criticized for frustrating social legislation. Judicial adherence to the *laissez-faire* philosophy, to Common Law doctrines of tort liability and to the 19th century concept of the rule of law allowing limited scope for state regulation, together with the strict canons of statutory interpretation, resulted in the thwarting of the *Public Health Acts*, housing and other social legislation.¹⁹⁷ Criticism of judicial approach to social security, to the pro-

195. Griffith, *Supra* n. 43, at 116.

196. This criticism seems to be due to the strongly result-oriented approach adopted by the author. See text, *Supra* n. 95-111.

197. See generally, B. Abel-Smith and R. Stevens, *Supra* n. 43, at 112-16; W. Jennings, "Judicial Process at its Worst" (1937), 1 Mod. L. Rev. 111; D. Davies, "The Interpretation of Statutes in the light of their Policy by the English Courts" (1935), 35 Colum. L. Rev. 519; W. Jennings, "Courts and Administrative Law: The Experience of English Housing Legislation" (1936), 49 Harv. L. Rev. 426; J. Griffith, "The Law of Property" in M. Ginsberg (ed.), *Law and Legal Opinion in England in the 20th Century* (1959) 116; J. Griffith, "Judges in Politics: England" (1968), 3 Govt. and Opposition 485; H. Laski, *Parliamentary Government in England* (1938); see also Report of the Committee on Ministers' Powers (1932), 4060, Annex V, 135.

blems of the homeless and to tenants' legislation continues to be voiced to this day.¹⁹⁸

On the basis of the criterion of the protection of social rights, one can classify this judicial approach as conservative. In the same manner, one can classify the line of English cases which followed a restrictive concept in the area of workers' rights, including workmen's compensation and the rights of workers and their unions to pursue collective action in furtherance of their interests, such as by way of strike or picketing.¹⁹⁹ The unbenevolent judicial approach to workers has sometimes been attributed to class bias.

In recent years, judges have also been criticized for class bias in sentencing, for bias against women and for racial prejudice. Charges of class bias in sentencing were made in the wake of a suspended sentence for two robberies imposed on a former major in the Life Guard by judges who went to the same school and regiment.²⁰⁰ The judge denied that he was influenced by the defendant's background. This denial did not satisfy the bank employees who sought measures from the Home Secretary on sentencing policy²⁰¹ and protested before the Lord Chancellor at the amazingly lenient sentence given to the robber.²⁰² The Holdsworth case, mentioned above,²⁰³ provoked a public outrage over the sentencing policy, and attracted criticism of judicial prejudice against women. The Read race case, mentioned above,²⁰⁴ also provoked heated public debate on judicial prejudice against immigrants.

The assessment of the judicial role is sometimes based on the judicial approach to administrative law. An unfavorable approach indicates attachment to old concepts of the rule of law and lack of willingness to adapt the law to the changing economic and social conditions which is one facet of conservatism.

English judges in the first decades of this century demonstrated bias against administrative law²⁰⁵ which, as is often argued, resulted in the establishment of administrative tribunals for resolving disputes withdrawn from the ordinary courts.²⁰⁶ The diversion of certain matters from the courts to the tribunals was apparently due not only to the unfavorable judicial approach to administrative law but also, or as some say,²⁰⁷ mainly, due to necessity. Courts could not possibly be expected to handle the hundreds of thousands of cases with which the tribunals (about 2,000 of them) deal. If some decline in the role of the courts has been noticed in the

198. C. Smith, "Judicial Attitude to Social Security" (1975), 2 Brit. J. of L. & Soc. 217; Scarman, *Supra* n. 126, at 43; D. James, "Homelessness, Can the Courts Contribute?" (1974), 1 Brit. J. of L. & Soc. 195; J. Reynolds, "Statutory Covenants of Fitness and Repair: Social Legislation and the Judges" (1974), 37 Mod. L. Rev. 377; *but see* M. Robinson, "Social Legislation and the Judges: A Note by Way of Rejoinder" (1976), 39 Mod. L. Rev. 43. *See generally* Griffith, *Supra* n. 43.

199. Griffith, *Supra* n. 43, at 57-70; *Supra* n. 21, at 294-95, 366.

200. *The Times*, Apr. 2, 1977, at 2, col. 8.

201. *The Times*, Apr. 5, 1977, at 4, col. 1; *The Times*, Apr. 7, 1977, at 4, col. 6.

202. *The Times*, Apr. 27, 1977, at 5, col. 8.

203. *See text, Supra* n. 9.

204. *See text, Supra* n. 10-12.

205. *See* Davis, *Supra* n. 143, at 208: "[E]nglish courts have fallen far short of providing the kind of review that protection against administrative injustice... requires;" and *see* K. C. Davis, "English Administrative Law — An American View" [1962] Pub. L. 139.

206. *See* Abel-Smith and Stevens, *Supra* n. 43, at 112-14.

207. Cf., Lord Wilberforce, "Educating the Judges" (1969), J. Soc. Pub. Teachers L. 254, at 256.

first half of this century, since the 1950's this trend has reversed and they have been entrusted with matters which had at one time been withdrawn from them.²⁰⁸

Responsiveness to Changing Moral Standards and to New Ideas

Standards of morality reflected in judicial decisions also serve as a basis for assessing the judicial role along the dichotomy of liberal and conservative. One can classify as conservative the line of cases permitting the employment of criminal law and particularly the offence of conspiracy for the enforcement of stricter moral standards on those who wish to pursue a non-conformist standard of morality.²⁰⁹ The similar trend of hostile views toward relaxed moral standards appears in other litigation such as in cases involving the review of disciplinary actions taken against female students for breach of rules of conduct in colleges.²¹⁰ Pornography cases may also reflect on the perceptions of the judge and can serve as an indicator for assessment of judicial role. Judges who determine the case according to a strict test, which excludes publication only when they are extremely offensive or repulsive, are more liberal than those who employ a broader test which excludes a wider scope of publications.

Moral standards are reflected in divorce cases as well. The attitude toward divorce can be seen in judicial treatment of cases by the Court of Appeal. Davies, L. J., said in one case that "even in these days there was a stigma attaching to adultery,"²¹¹ but in another, the Court of Appeal (Lord Denning, M. R., Karminsky and Orr L.JJ) expressed the view that adultery was no longer regarded as "a serious social offence."²¹²

The assessment of the judiciary is sometimes based on the responsiveness to academic comment and the acceptance of new approaches and ideas for dealing with social problems such as treatment of offenders and legal aid.

Unlike the practice in the past, the English judiciary is increasingly aware of legal academic opinion and academic writings (of living authorities) are cited by the judges.²¹³ Lord Diplock commented favorably on the "growing dialogue between those lawyers who sit upon the bench as judges and those who as members of the law faculties and universities concern themselves with law as science," as a result of which, "a Hart could engage in public controversy with a Devlin."²¹⁴

208. Abel-Smith and Stevens, *Supra* n. 43, at 294; e.g., *Restrictive Practices Act, 1956*, 4 & 5 Eliz. 2, c. 68, ss. 3, 4 (U.K.); *Industrial Relations Act 1971*, 1971, c. 72, s. 99 (U.K.), repealed by the *Trade Union and Labour Relations Act 1974*, 1974, c. 52 (U.K.).

209. See generally, Griffith, *Supra* n. 43, at 135-41; e.g., the notorious *Shaw v. D.P.P.*, *Supra* n. 152, and *Kneller v. D.P.P.*, *Supra* n. 125.

210. See Griffith, *Supra* n. 43, at 154-57. See Lord Denning's statement on a female student who had a man in her room: "No parent would knowingly entrust their child to her care." *Id.*, at 157.

211. *Collins v. Collins*, *The Times*, Mar. 15, 1972, at 4, col. 4. For criticism of such conservative attitudes towards divorce, see D. Yardley, *The Future of the Law* (1964) 136-37; L. Abse, "The Inevitability of the Matrimonial Offence" (1965), 59 *The Law Society's Gazette* 205-06; B. Abel-Smith and R. Stevens, *In Search of Justice* (1968) 180-81; F. E. Mostyn, "The Present Divorce System; The Judicial Approach" (1970), 120 *New L.J.* 450.

212. *Nast v. Nast*, *The Times*, Jan. 27, 1972, at 14, col. 4. For comments, see "Social Attitudes and Points of Law" (1972), 122 *New L.J.* 255.

213. E.g., *Blackburn v. Attorney General*, [1971] 1 W.L.R. 1037, at 1040 (C.A.). (An article of H. W. R. Wade on sovereignty is cited). *Gouriet v. Union of Post Office Workers*, [1977] 1 Q.B. 729, at 743 (C.A.) (Edwards, *Law Officers of the Crown* cited.) See also, Abel-Smith and Stevens, *Supra* n. 43, at 191.

214. Lord Diplock, *Supra* n. 169, at 234, 235.

Judicial attitudes towards legal aid have also considerably changed. For some time, judges manifested an unfavorable attitude to legal aid and to the right of an accused to counsel. Some judges even pronounced their views from the bench.²¹⁵ Today, however, judges recognize the significance of legal aid and as indicated by Lord Widgery, the Lord Chief Justice, they favor the extension of legal aid. Lord Widgery advocated the idea of a shop-window for the law.²¹⁶ He has, however, expressed concern over the legal aid fee system which he thought was a significant factor contributing to court delay.²¹⁷ This is a legitimate and justified concern over the abuse of legal aid.

Another indication of the responsiveness of the English judiciary to new ideas is their changing attitude to criminology. There is "a . . . growing awareness of the springs of human conduct prompting anti-social (hence criminal) behavior [that] is perceptible in the actions of the Courts. English judges are slowly becoming receptive to criminological theory, and as a consequence are beginning to sense the sociologically essential synonymy of criminal justice and penal sanctions."²¹⁸

Content Analysis: Canadian Illustrations

Canadian writers and commentators have passed judgment on the Canadian courts based on the criteria which have been mentioned. As in other jurisdictions, the assessment of the judicial role is based on the dichotomy of liberal and conservative. The following illustrations relate to the protection of civil liberties, the concept of judicial function (whether activist or restrained) in various areas of law, the attitude toward statutory construction, the approach to changing moral standards, and the responsiveness to academics.

The criterion of protection of civil liberties is frequently used by commentators for the assessment of judicial role. The Supreme Court of Canada has been criticized for inadequate protection of civil liberties. Professor R. D. Gibson wrote in 1975 that it was "very unsympathetic to civil liberties during the 1960's." He found that arguments based on the newly-enacted Canadian *Bill of Rights* were rejected in 6 out of 7 cases.²¹⁹ He concluded that "civil liberties were afforded substantially less protection than in the previous decade." Professor Gibson suggested that these changes seem to be attributable "partly to the replacement of certain key judges by others of a more conservative persuasion and partly to a more conservative attitude being adopted by most of the remaining judges."²²⁰

The protection of civil liberties is equated with activism which, as has been suggested, are not necessarily related. Thus the changes in judicial policy toward the protection of civil liberties is also expressed in terms of judicial activism and self-restraint. Professor Gibson has written that "the

215. In one case, a Judge in convicting the defendants said that he "thought it is a pity that people charged with criminal offences like this [should] obtain free representation, thus having their cases argued persuasively by clever lawyers." See M. Gigg, *The Challenor Case* (1965) 17. Later it was revealed that the police had planted weapons on the accused.

216. "Why the Law needs a Shop Window," concluding an interview with Lord Widgery, Lord Chief Justice, by John Clare, *The Times*, Aug. 8, 1972, at 12, col. 4.

217. *The Times*, Nov. 1, 1977, at 1, col. 8. (Statement before the Royal Commission on Legal Services).

218. *Supra* n. 21, at 281 *et seq.*

219. *Supra* n. 44, at 629.

220. *Id.*, at 637.

rampant activism on behalf of fundamental freedoms that had marked the fifties came to an abrupt halt during the sixties."²²¹

Assessing the supreme Court in the 1970's, Professor Tarnopolsky posed the question, "how civil libertarian was the Supreme Court in interpreting the Canadian Bill of Rights?" and replied: "with few exceptions: hardly at all."²²² This adverse judgment on the Canadian Supreme Court can be explained by the recent case which reflects a restrictive concept of free speech, *Attorney-General of Canada and Dupond v. Montreal*. Mr. Justice Beetz speaking for the majority of the court, expressed the view that "[d]emonstrations are not a form of speech but of collective action,"²²³ and therefore are not protected as an exercise of free speech.

In the area of administrative law, the Supreme Court of Canada was prepared to increase accessibility to the Courts by broadening the scope of standing to sue in *Thorson* and *McNeil*,²²⁴ and by upholding jurisdiction to review administrative action even in the face of legislative attempts to exclude or curtail judicial review.²²⁵ Nevertheless, critics have commented adversely on the Canadian Supreme Court. They observed that it "has not been innovative in its approach to administrative law" and that "the Court too often decides particular cases on narrow points of law without much regard to the broader policy aspects of its work and without really attempting to weave the law into one coherent whole".²²⁶ Another court critic complained of "unimaginative conservatism" that rendered it "a willing prisoner of a poorly drafted statutory provision delimiting the supervisory jurisdiction over federal tribunals."²²⁷ Commenting on *Howarth v. National Parole Board*,²²⁸ one writer suggested that it showed "a barren conceptualism that gave no sign of any awareness of the social context in which the case arose and upon which the decision would undoubtedly have a marked effect."²²⁹

In certain areas such as in criminal law and tort, the Supreme Court of Canada has been assessed by court critics as creative, *i.e.* liberal. In criminal law, the courts in Canada are "ready to refine their doctrines to take account of unusual variation in the situations or even to overturn earlier rules which appear no longer compatible with the overall thrust of the law."²³⁰ The Supreme Court of Canada has been very active in the area of tort law, in some cases disregarding the argument for predictability in the law. Professor Weiler wrote that the judges have perhaps gone too far, lacking expertise and electoral responsibility, and yet formulating totally the law in this area.²³¹

221. *Id.*, at 629.

222. W. S. Tarnopolsky, "The Supreme Court and the Canadian Bill of Rights" (1975), 53 Can. B. Rev. 649, at 671.

223. [1978] 2 S.C.R. 771, at 797.

224. *Thorson v. A.G. of Canada*, [1975] 1 S.C.R. 138. *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265.

225. *Supra* n. 46, at 131-39.

226. *Supra* n. 48, at 4.

227. D. H. Clark, "The Supreme Court of Canada, the House of Lords, the Judicial Committee of the Privy Council, and Administrative Law" (1976), 14 Alta. L. Rev. 5, at 11.

228. (1974) 50 D.L.R. 3d 349 (S.C.C.).

229. *Supra* n. 47, at 11-12.

230. *Supra* n. 46, at 103.

231. *Id.*, at 62.

The attachment to old standards of morality has also been employed as a criterion for assessing the judicial role in Canada. An empirical survey of judicial attitudes toward child custody issues revealed high commitment to old moral standards and a certain bias.²³² The survey found that only 25% of the judges "admitted they were influenced by changing customs and social values when formulating their judgments."²³³ Old judges said that adultery was a very important factor. Others said they attached little weight to it, although 50% of the judges said that continuing adultery was an adverse factor.²³⁴ The study revealed bias against working mothers: 50% of the judges said their preference for the mother would disappear if the mother was working.

The evaluation of the Canadian judiciary on the basis of its responsiveness to academic comment is not decisive. Some Canadian judges highly value the contribution of academic lawyers and refer to academic writings in their decisions. As Chief Justice Bora Laskin once said, "Judges and law teachers, even more than Judges and members of the Bar, are allies in the common cause, the supervision of our legal system, the assessment of the development of doctrine and the improvement of the administration of justice . . ."²³⁵

However, sometimes the Supreme Court totally ignores the critics. Referring to the Supreme Court decision in *Hogan*, following *Wray* which had been strongly criticized by many learned articles, one critic complained that the Court failed "even the courtesy of explaining why the critics are mistaken." He added that this "must make writers wonder who, if anyone, is reading."²³⁶

Social Composition of the Judiciary

Yardsticks of Assessment

The analysis of the social composition of the judiciary has been used as a criterion for assessing the judicial role in society. The judiciary is expected to represent a wide cross section of the social strata. If it fails to meet this standard of being fairly representative of the society that it tries and judges, its judgments may not enjoy that degree of public confidence essential for the discharge of its important function of dispute resolution and constitutional arbitration.

A narrow social background of the judiciary has been employed as an indicator of conservatism. In England, the narrow social background of the Bench at all levels of the judicial hierarchy has been a major source of concern for many years and has been perceived as one of the more significant characteristics of judicial conservatism. A similar problem of non-representative judiciary exists in Canada as well, but has not as yet been a subject of public debate nor of a significant academic analysis.²³⁷

232. A. Bradbrook, "An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario Regarding the Working of the Present Child Custody Adjudication Laws" (1971), 49 Can. B. Rev. 557.

233. *Id.*, at 558.

234. *Id.*, at 564.

235. B. Laskin, "A Judge and his Constituencies" (1976), 7 Man. L.J. 1, at 12.

236. L. Taman, "The Adversary Process on Trial: Full Answer and Defence and the Right to Counsel" (1975), 13 Osgoode Hall L.J. 251, at 275.

237. See text, *Infra*, at n. 306-11.

Statistical analysis of the social composition of the judiciary in England at all levels of the hierarchy shows that the judges are drawn predominantly from the upper and upper middle classes. Analysis of the background of the higher judiciary reveals that most of them attended prestigious fee-paying schools such as Winchester, Eton or Harrow ("private schools" in North-American terminology, "public schools" in British terminology) and have studied at the leading universities — Oxford and Cambridge. It shows that the majority had some war service, that they pursued "country" rather than intellectual recreations, and that many of them belonged to the best known clubs in London.²³⁸

Social Class Background

In numerical terms the social composition of the English judiciary comes out very clearly in numerous surveys. The most revealing and comprehensive survey of social background is offered in the Report of the Justice Sub-Committee on the Judiciary based on an unpublished Master's dissertation by Jenny Brock. The findings were as follows:

Table 1
Social Class Background of the Higher Judiciary²³⁹

Period of Appointment	1820-1875		1876-1920		1921-1950		1951-1968		1820-1968 Total	
	%	No.	%	No.	%	No.	%	No.	%	No.
<i>Social Class</i>										
I. Traditional landed upper classes	17.9	19	16.4	17	15.4	14	10.5	9	15.3	59
II. Professional, commercial & 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

238. Abel-Smith and Stevens, *Supra* n. 43, at 299-300; B. Abel-Smith and R. Stevens, *In Search of Justice* (1968) 174; R. Jackson, *The Machinery of Justice in England* (7th ed. 1977) 473-81; *Supra* n. 21, at 152-75; R. Hood, *Sentencing the Motoring Offender* (1972) 41-53; J. Baldwin, "The Social Composition of the Magistracy" (1976), 16 *Brit. J. of Criminology* 171; M. Zander, *Lawyers and the Public Interest* (1968) 40; *The Judiciary: The Report of a Justice Sub-Committee* (1972) 32-34, App. II, 79-81 (hereinafter referred to as *The Judiciary*); A. Sampson, *The New Anatomy of Britain* (1971) 353-54, 356-57; *Supra* n. 2, at 297-98; Griffith, *Supra* n. 43, at 24-29.

239. Source: *The Judiciary: The Report of a Justice Subcommittee* (1972) App. II, 79; see also Griffith, *Supra* n. 43, at 25.

According to this survey the upper and upper middle classes account for 75.4% of the judiciary, and in the period from 1951 to 1968 the figure was 76.8%. An analysis of the Law Lords who sat in the House of Lords from 1976 shows that of the 49 (out of a total of 63) judges, 18 were sons of lawyers, 16 were sons of other professional men (doctors, teachers, architects, churchmen, soldiers), 12 had fathers who were in business and 3 farmers who were landowners or farmers.²⁴⁰

At the other end of the judicial ladder, the magistrates (Justices of the Peace), there is also a dominance of the upper and upper middle classes. In 1948, the Royal Commission on Justices of the Peace²⁴¹ found that the magistrates were drawn from an extremely narrow social base.²⁴² The Commission stated that "it is essential that there should be many among the justices who know enough of the lives of the poorest people to understand their outlook and their difficulties."²⁴³ Surveys of the JPs conducted in 1966 by Roger Hood²⁴⁴ of all magistrates, and in 1972 by John Baldwin²⁴⁵ of newly appointed magistrates, suggest that there was no evidence of any significant changes in the social class backgrounds from which the magistrates came in the years between 1946 and 1970. This is clearly demonstrated by the figures set forth in the following table drawn from the studies of Hood and Baldwin:

Table 2
Social Class Background of Magistrates²⁴⁶

<i>Registrar General's Classification</i>	All Magistrates (Hood, 1966)		Recently Appointed Magistrates (Baldwin, 1971-1972)	
	No.	%	No.	%
Social Class I: Professional Occupations	117	21.7	70	27.4
Social Class II: Intermediate Occupations	297	55.2	144	56.5
Social Class III: Skilled Occupations; non-manual	52	9.7	20	7.8
Skilled Occupations: manual	65	12.1	17	6.7
Social Class IV: Partly Skilled Occupations	0	0.0	2	0.8
Social Class V: Unskilled Occupations	0	0.0	0	0.0
Total	538	100.0	255	100.0

240. *Supra* n. 21, at 160-63.

241. Cmd. 7463 (1948).

242. *Id.*, at para. 32.

243. *Id.*, at para. 84.

244. Hood, *Supra* n. 238.

245. Baldwin, *Supra* n. 238.

246. Sources: *Id.*, at 172; Hood, *Supra* n. 238.

Analysis of the occupation structure of the magistracy shows clearly that the professional and higher managerial groups continue to be dominant. But there has been "some increase in the numbers of salaried workers on the bench — most notably among middle-range administrative officers."²⁴⁷

Role of Women

The role of woman in the judiciary is also used as a criterion for assessing the judicial role in society. In the United Kingdom, the role of women in the legal profession in general, and in the judiciary in particular, is very limited.²⁴⁸ As of 1976 there were only two women on the High Court (out of a total of 75) and three women on the Circuit Bench (as against over 200 men). A woman has never sat in the Court of Appeal nor in the House of Lords. Among the magistrates, women comprise more than a third of the total number of lay justices.²⁴⁹ The trend towards a greater role for women JPs is steady and clear. In 1948, the Royal Commission on Justices of the Peace estimated that 22% of the magistrates were women.²⁵⁰ In 1972 a survey showed that the figure was 30%,²⁵¹ and in 1976 the figure was 35.7%.²⁵²

The role of women at the Law Society and the Bar remains limited.²⁵³ As of October 1978 there were 370 women out of 4263 barristers.²⁵⁴ Their number among solicitors is also small. The figure for 1974 was 2,000 women out of 28,500.²⁵⁵

Age

Age is another criterion often employed to assess the judiciary. The average age on appointment is 52 to 53, and it has fallen from the upper 50's before the Second World War.²⁵⁶ The average age of English superior judges sitting on the bench is over 60.²⁵⁷ It should be noted that the average age of judges may become lower due to the introduction of a retirement age (at 75) in 1959, which was applied prospectively.²⁵⁸ Thus judges appointed after 1959 must retire at the age of 75. In this context it is interesting to mention that surveys report "a decrease in the average age of magistrates in recent years, due in part to a lowering of the age of retirement from the bench but also no doubt changes in selection policy."²⁵⁹

Older people tend to, or at least are believed to be, less inclined to accept new ideas and proposals for change, which usually explains the use of age as a yardstick for assessing the judiciary. It seems, however, more

247. Baldwin, *Supra* n. 238, at 174.

248. *Supra* n. 2, at 59-60. For a review of the place of women in the judiciary, see 822 H.L. Deb. 467-68 (Aug. 5, 1971).

249. *Supra* n. 2, at 59 and n. 70.

250. *Supra* n. 241.

251. Hood, *Supra* n. 238, at 52.

252. Baldwin, *Supra* n. 238, at 171.

253. *Supra* n. 2, at 60.

254. Annual Statement of the Senate of the Inns of Court and the Bar (1978-1979) 57.

255. *Supra* n. 2, at 60 and n. 71.

256. *Supra* n. 57, at 76; Griffith, *Supra* n. 43, at 27.

257. In 1970, the average age of the Law Lords was 70, that of Lord Justices of Appeal 65 and that of High Court Judges 60. *Supra* n. 57, at 76. An analysis of judges holding office in August 1976 showed that the average age of Law Lords was 69, Lord Justices of Appeal 67 and High Court Judges 63.

258. *The Judicial Pensions Act 1959*, 1959, c. 9, s. 2. *Supra* n. 2, at 36-39.

259. Baldwin, *Supra* n. 238, at 172.

likely that as in the case of the socio-economic make-up of the judiciary, it is a question of public confidence. The community is not inclined to be judged by people mostly from another generation.

Political Background

Political considerations used to be a significant factor in judicial appointments in England, but nowadays they do not play any role in judicial appointments. Involvement in political activities, including the service as M.P. constitutes neither a barrier nor a stepping-stone for judicial appointment.²⁶¹ There has been a clear decline in the number of judges with political backgrounds. As of January 1975, only five of the 70 (7.4%) High Court judges were listed in *Who's Who* as having been M.P.'s or parliamentary candidates. On the Circuit Bench, 21 out of 260 (8.08%) have been M.P.s or parliamentary candidates; and among Recorders, 18 out of 335 (11.34%) had such political background.²⁶²

Education Background

An important aspect of the analysis of the judiciary is their school and university education. One survey of the higher judiciary²⁶³ for the period 1876-1972 found that, of the 317 superior judges analysed, 33% attended the most prestigious public schools and 70% attended Oxford or Cambridge.²⁶⁴ Other surveys conducted in the 1950's, 1960's and 1970's show that a clear majority of the judges then sitting on the bench attended public schools and studied at Oxford or Cambridge. In numerical terms they represent 75% and over, as Table 3 shows:

260. See *Supra* n. 2, at 67-76; Abel-Smith and Stevens, *Supra* n. 238, at 176.

261. *Supra* n. 2, at 75; Griffith, *Supra* n. 43, at 24.

262. K. Goldstein-Jackson, "The Political Background of Members of the Judiciary and Legal Profession in England and Wales" (1976), 140 *Justice of the Peace* 500. In 1956, 23 of 69 judges had been MPs or candidates, and in 1970, Henry Cecil found from a random group of 117 judges from all levels 10 MPs and 5 candidates. See H. Cecil, *The English Judge* (1970) 26; Griffith, *Supra* n. 43, at 27.

263. This term refers collectively to the High Court, Court of Appeal and House of Lords.

264. C. Neal Tate, "Paths to the Bench in Britain," (1975), 28 *W. Political Q.* 108; Griffith, *Supra* n. 43, at 26.

Table 3
Educational Background²⁶⁵

The Study	Judges Surveyed	Numbers	Period	Attended Public Schools		Attended Oxford & Cambridge	
				No.	%	No.	%
Henry Cecil ²⁶⁶	H.C.	36 ^a	1969	31	86	33	92
	C.A. Cty. Ct. Step. Mag.	69 ^b	1969	52	75	56	81
Economist ²⁶⁷	S.C. (C.A., H.L.)						
	H.L. P.C.	69	1956	52	76	52	76
New Society ²⁶⁸	H.C., C.A., H.L., Cty, Metro-Mgst.	359 ^a	1970	292	81	273	76
Neal Tate ²⁶⁹	H.C.						
	C.A. H.L.	317	1876- 1972	105	33	222	70
Hugo Young ²⁷⁰	H.C. ^c	31	1970- 1975	21	68	23	74
Morrison ²⁷¹	H.L.						
	C.A. H.C.	96	1970	— ^d	majority — ^d	78	81

^arandom; ^brandom, out of 138; ^cnewly appointed; ^dunclear.

The data show that generally the figures have not changed. However, there is a slight widening of the educational catchment from which judges are recruited. Thus the *Sunday Times* survey in 1975, which analysed the education of the High Court judges appointed in the preceding five years, showed that 21 out of 31 (68%) went to fee-paying schools and 23 (74%) to Oxford or Cambridge.²⁷² The author of the survey concluded that "compared with 1951-1968 there has been a change: then, 72 per cent of ap-

265. There is a difference between the various studies as to what is considered a prestigious public school. Some of them limited the term to apply to the nine most famous public schools.

266. Cecil, *Supra* n. 262, at 27-28.

267. "Judges Summed Up," *The Economist*, Dec. 15, 1956, at 946-47; see Griffith, *Supra* n. 43, at 26.

268. K. Goldstein-Jackson, "The Judicial Elite" *New Society*, May 14, 1970, at 828; see Griffith, *Ibid*.

269. *Supra* n. 264.

270. "The bench: too quiet for too long," *Sunday Times*, Oct. 5, 1975, at 13.

271. *Supra* n. 57, at 79-80.

272. *Supra* n. 270.

pointees were from 'public school' and 83 per cent came from Oxbridge."²⁷³

It seems, however, that significant changes in education and social class will begin to appear in the background of the judges only five or ten years from now²⁷⁴ Then the results of the opening of higher education for all at public expense will begin to emerge. It will be reflected in more judicial appointments of lawyers who come from the working classes and were able to study law thanks to the newly opened opportunities in higher education.

The Justice Sub-Committee Report on the Judiciary also felt that the social class composition of the judiciary was about to change. It saw the present predominance of the upper middle classes to be a result of the fact that "the Bar [was] so organised that it was difficult for a substantial number of persons from poor backgrounds to make their way in the profession"; but nowadays, "one need not wait very long before making a living at the Bar, and what gap still remains can be bridged by scholarships, lecturing, and other outside work."²⁷⁵

Given the high cost of education in British "public" schools it is generally right to assume that those who attend fee-paying schools come from affluent families. Similarly, until recently, university education was out of reach of the working classes, except for the few who won scholarships or came from families particularly dedicated to the education of their children. Even more important than social class origin is the socialization which the student receives in public schools and the "Oxbridge" universities and the middle class values, standards and beliefs which he acquires during his education.

Professional Background

The professional background of English judges is fairly similar. The career pattern of one English judge before his elevation to the bench is almost the same for all High Court judges. In chronological order, the stages of his career include: studies at a university, call to the Bar, active practice as a barrister, appointment as Queen's Counsel or as Treasury Counsel, appointment as High Court judge. If promoted, he then goes to the Court of Appeal and the House of Lords. Few judges come to the High Court bench from the county court bench or, now, the Circuit Bench.²⁷⁶ Since 1971, solicitors have been qualified for appointment to a higher judicial office (circuit judge) if they have served as Recorders (part-time judges) for 5 years.²⁷⁷

In order to mitigate the effect of the similarity of professional background of English judges, it would be advisable to consider the appointment of prominent academic lawyers to the bench, particularly to appellate courts. This practice has been successful in the United States (Frankfurter, Harlan, Taft), Canada (Bora Laskin, Allen Linden) and Israel (Aaron Barak, Menachem Elon), and could be most beneficial to the

273. *Ibid.*; cf. Griffith, *Supra* n. 43, at 27, who does not admit this change.

274. Cf. Griffith, *Supra* n. 43, at 29; see also *Supra* n. 21, at 158.

275. *The Judiciary*, *Supra* n. 238, at 32.

276. *Supra* n. 2, at 78-81.

277. *Id.*, at 55.

British as well.²⁷⁸ Along the same line it might be advisable to review once again the appointment of solicitors to the High Court bench and to appellate level.²⁷⁹

Process and Standards of Judicial Selection

Elsewhere I have analysed the process of judicial selection and the standards for appointment.²⁸⁰ Briefly, the process of selection is as follows. The Lord Chancellor, who is the central figure in the appointment process, relies on data on potential candidates contained in records maintained by the staff of his office. He also relies on extensive consultations with the senior members of the judiciary (Lord Chief Justice, Master of the Rolls, Heads of Divisions of the High Court and other judges) and the leaders of the Bar. In making the selection many factors are considered, including the professional record of the candidate, his private life, personal character, general views, and the needs of the court. The standards are rather strict and exclude from the judicial appointments persons without the qualities sought in a judge and persons whose conduct in private life gives rise to suspicion, let alone immoral or criminal conduct.²⁸¹

The process and standards for judicial selection no doubt produce judges who are highly skilled and qualified, with high standards of behaviour. At the same time one should not lose sight of an important result of the combination of the standards and process of selection and of the similar professional background. In combination they constitute a very significant and powerful force for peer regulation and conformity.²⁸² As Professor Meador has recently observed, the process of selection produces "a group of like minded judges."²⁸³ Combined with narrow social background and similar educational experience, the set of prerequisites for judicial appointment tends to enforce conformity of values and attitudes. In this context it is important to emphasize that there are very strong and effective social pressures and informal controls at the Bar and among the judges which further enforce peer regulation and conformity.²⁸⁴

Impact on Decision Making

Does all this necessarily imply conformity of judicial decision making? *Prima facie* it would seem that conformity of attitude and qualities will work towards conformity on social, political and legal issues. Although there may be a group consensus on standards of social and professional behaviour without any necessary conformity on social and political issues, I am inclined to believe that such group consensus enhances like-mindedness

278. Cf. D. Meador, "English Appellate Judges from an American Perspective" (1978), 66 Geo. L.J. 1349 at 1390-91; *Supra* n. 2, at 58-59. I am not impressed by the study of John Schmidhauser that suggests there is no appreciable distinction between former judges and former lawyers on the U.S. Supreme Court. *Supra* n. 57, at 77.

279. *Supra* n. 2, at 55-58.

280. *Id.*, at 61-78, 393-99.

281. *Id.*, at 65.

282. Cf. J. Grossman, *Lawyers and Judges* (1965) 201.

283. Meador, *Supra* n. 278, at 1403.

284. See generally, *Supra* n. 2, at 225-50 (the Bar), 250-67 (informal checks).

and similarity of approach on social, political and legal issues.²⁸⁵ This line can even be taken much further. The peer regulation through social pressures and informal controls has sometimes been perceived as an interference with judicial independence of mind. The argument is that judges consciously and unconsciously measure up to the expectations of the senior members of the judiciary, in the hope of good reputation and promotion up the judicial ladder accompanied by the privileges that come with it, such as a life peerage at the top. Professor Griffith,²⁸⁶ who made this point, suggests that the pressure on judges, particularly High Court judges, leads them to refrain from decisions which would give them reputations of holding views opposed to those of the leaders of the judiciary. Thus, he suggests that if a judge acquires a reputation for being "soft" in certain cases where the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls and the Heads of the Divisions of the High Court would prefer a hard line, his prospects of promotion will be damaged. I do not share Professor Griffith's view. I tend to believe that the social pressures and informal controls, in support of judicial impartiality, prevail over the impact of the hope for promotion. The English Bench and Bar are highly committed to independence and impartiality. Social norms and prevailing traditions among judges and lawyers put independence and impartiality, including independence of mind, at a very high priority in the ladder of values. Thus against the hope for promotion and the social pressure to follow the line of the leaders of the judiciary, there is counter pressure to maintain and portance to the impact of the desire for promotion on judicial decision-making.

It would be difficult to deny a certain degree of impact of social background on judicial decision-making. For example, there is some evidence that there is a relationship between the composition of the bench and its sentencing policy.²⁸⁷ This does not mean that judges from a working class background will necessarily show more sympathy for defendants from a similar or poorer background. As the Justice Sub-Committee has observed, an established barrister will have developed, through professional socialization during his years in the legal profession, middle class attitudes whatever his social origin.²⁸⁸ An American study reached a similar conclusion. It found that judges who attended law schools with low tuition were not particularly inclined towards the defence in criminal cases. This was attributed to the judge's feeling that, if he could overcome his social disadvantages, so could the defendants.²⁸⁹ In this context it is also interesting to observe that judges do not always fulfill the expectations of those who appoint them to the bench.²⁹⁰

285. Cf. Meador, *Supra* n. 278, at 1403; Jackson, *Supra* n. 238, at 472-73. See the oft-quoted statement of Lord Justice Scrutton, "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 class." Scrutton, "The Work of the Commercial Courts" (1921), 1 *Camb. L.J.* 6, at 8.

286. Griffith, *Supra* n. 43, at 29-30.

287. J. Hogarth, *Sentencing as a Human Process* (1971) Ch. 13; Hood, *Supra* n. 238, at 138-41; Baldwin, *Supra* n. 238, at 174.

288. Cf. *The Judiciary*, *Supra* n. 238, at 32.

289. S. Nagel, *Improving the Legal Process* (1975) 244-45, 247.

290. See text *Infra*, at n. 323-27, for examples from the American scene.

The state of research on the impact of social background characteristics on judicial decision making does not provide a definite judgment nor a conclusive answer on this issue. On the one hand, there are numerous studies which have demonstrated relationships between various items of social backgrounds and the judge's decisions. The various studies have shown that there is a relationship between judicial behavior and political affiliation, religion, age, ethnic background, social background and prior professional experience.²⁹¹

On the other hand, these studies have been criticised on many grounds.²⁹² First, it was suggested that they are methodically deficient as they excluded from analysis the unanimous decisions which comprise the largest group of cases and thus unduly emphasize the differences among judges. Second, the studies on social background characteristics have been criticised on the ground that the analysis of judicial decision making in relation to a single item or variable from the background of a judge to the exclusion of other variables which influence his behaviour, leads to an overly simplistic view of the sources and motivations of judicial behavior.²⁹³ Third, as judges perceive the facts differently it is not possible to assess the judicial process in terms of a simple stimulus-response model, as the studies have done. Finally, it has been argued that the studies have not satisfactorily answered the problem of how the past experience and background influence the present.

Thus the nature, extent and manner of the relationship between social background characteristics and judicial decision making remains unsettled. But beyond the requirement of statistical evidence for establishing such relationship, there is the widely shared general impression which cannot be easily cast aside. The general impression is that the set of values of the judge has a significant impact on his decision making, and that the composition of the bench significantly affects the outcome of cases. Thus most students of judges and the judicial process observe that changes in judicial decision making and judge made law were partly or mainly a result of a change in the composition of the court.²⁹⁴

This analysis must lead to the conclusion that the backgrounds of the candidates for judicial appointment should be carefully considered in the process of selection. To support this conclusion we need not go so far as did Professor John Hart Ely of Harvard Law School who suggested that a consensus approach to "constitutional adjudication is unlikely to end up amounting to much more than a conscious or unconscious cover for the

291. S. Ulmer, "Public Office in the Social Backgrounds of Supreme Court Justices" (1962), 57 Am. J. Econ. Soc. 57; S. Ulmer, "The Political Party Variable in the Michigan Supreme Court" (1962), 11 J. Pub. L. 352; S. Nagel, "Political Party Affiliation and Judges' Decisions" (1961), 55 Am. Pol. Sci. Rev. 843; U. Torgenson, "The Role of the Supreme Court in the Norwegian Political System" in G. Schubert (ed.), *Judicial Decision-Making* (1963) 221-42; J. Schmidhauser, "Stare Decisis, Dissent and the Background of the Justices of the Supreme Court of the United States" (1962), 14 U. of Toronto L.J. 194; see also Hogarth, *Supra* n. 287, at 51 and the references therein; H. Glick, *Supreme Courts in State Politics* (1971) 3 and 19-20 n. 1.

292. For a comprehensive critical assessment, see J. Grossman, "Social Backgrounds and Judicial Decision-Making" (1966), 79 Harv. L. Rev. 1551, see also Hogarth, *Supra* n. 287, at 51-52.

293. L. Fuller, "An Afterword: Science and the Judicial Process" (1966), 79 Harv. L. Rev. 1604.

294. See e.g., *Supra* n. 20, at 523 and n. 56; *Supra* n. 21, at 262; Abraham, *Supra* n. 140, 348-49; *Supra* n. 49, at 181. Cf. Justice Douglas in *Usner v. Luckenback Overseas Corp.* (1971), 400 U.S. 494, at 502: "Changes in membership do change decisions."

judge's own values."²⁹⁵ I think that like Professor Griffith in his *Politics of the Judiciary*, he overstated the impact of personal values and attitudes on judicial decision making, and underestimated the balancing effect which other factors have. Personal values and attitudes are checked by various institutional controls and system factors²⁹⁶ and are constrained by such checks as judicial doctrine, legal tradition, social consensus, reason and predicted progress which Professor Ely²⁹⁷ discusses at length and rejects. Personal values and views are also controlled by the institutional characteristics of the court and by social pressures and informal professional peer control.²⁹⁸ Mr. Justice Frankfurter has expressed very well the balancing force of the factors which override the judge's private views:

There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.²⁹⁹

But even if we reject the line of argument which unduly emphasizes personal values and remain content with the balanced proposition that adjudication involves a certain degree of imposition of the judge's own values, it must lead to a well-supported claim for a representative judiciary. The process and standards of judicial selection must insure fair representation of all social classes, ethnic and religious groups, ideological inclinations and, where appropriate,³⁰⁰ geographical regions. Needless to say, the representation should be fair, and not numerical or accurately proportional.

It is important to clarify that there is nothing necessarily inequitable in a situation where members of one social group, or one race administer justice to members of another social group or another race. Nor is it offensive to conscience or justice that a judge tries people of another sex, of different age or of opposite ideological inclinations.³⁰¹ Neither law nor judicial tradition and custom call for disqualification of a judge on any of the grounds mentioned. But from the point of view of public confidence in the courts which is one of the fundamental values underlying the administration of justice in any society,³⁰² it is essential that the judiciary be fairly representative.

The idea of a representative judiciary also applies to the composition of panels in particular cases. They should be balanced and people with strong

295. J. Ely, "Foreword: On Discovering Fundamental Values" (1978), 92 Harv. L. Rev. 5, at 52.

296. *Supra* n. 1. The detailed analysis of these factors is beyond the scope of this paper. See also P. Kurland, "The Appointment and Disappointment of Supreme Court Justices," [1972] Law and Soc. Order 183, at 217. For an example of the impact of legal values, professional socialization and the institutional impact on a judge, see Glick, *Supra* n. 291, at 81-82 (a judge against liberal decisions in criminal procedures rules for the defendant).

297. *Supra* n. 295.

298. See Laskin, *Supra* n. 1.

299. Justice Frankfurter in *Public Utilities Commission v. Pollak* (1952), 343 U.S. 451, at 466. It is interesting to note that even an outspoken court critic such as Professor Griffith, writing in 1968, admitted that "[judges] have a more or less well-developed capacity to eliminate their prejudices from the consideration of cases." Griffith, "Judges in Politics: England," *Supra* n. 197, at 485.

300. As in big countries or federal systems, e.g., Canada, see text, *Infra*, at n. 308-09.

301. In sensitive cases, disqualification is called for. See e.g., the announcement in 1972 that former Lord Chancellors would not sit in the *Dock Workers'* case. *Supra* n. 2, at 313-14.

302. See S. Shetreet, "The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts" (1979), 13 U.B.C. L. Rev. 52.

convictions should refrain from sitting in cases where the public might question their total neutrality.³⁰³ This is particularly significant in controversial cases which attract intensive public attention.³⁰⁴ This is again called for by the vital need to maintain public confidence in the judiciary and in the judicial process. Impartial justice must be seen to be done.³⁰⁵

Canadian Scene

Public confidence in the courts is enhanced by a wide representation on the judiciary of all social strata, ethnic groups, ideological inclinations and geographical regions in any given country. Recent studies on the social background of the Canadian judiciary clearly indicate that it is not fairly representative of the Canadian society.

An examination of the backgrounds of the Judges of the Supreme Court of Canada appointed from 1875 to 1968 has clearly shown that the court has not been representative of Canadian society, neither on the basis of ethnic origin, nor on the basis of social class.³⁰⁶ Judges' fathers were overwhelmingly upper or middle class. Information was available on 31 of the 50 judges appointed. Of the 31, 18 of their fathers were professionals,³⁰⁷ 8 were politicians, 2 were businessmen and 3 were landowners-farmers. Unlike the case in England, the narrow social background of the judiciary has not as yet been the subject of wide public debate nor of a significant academic discussion.

It should be added, however, that regional representation in the Supreme Court of Canada is carefully secured. By virtue of the *Supreme Court Act*,³⁰⁸ three judges come from Quebec. By convention, three judges come from Ontario, two from the Western Provinces and one from the Atlantic Provinces.³⁰⁹

Studies of the Canadian judiciary below the level of the Supreme Court have similarly shown that the judiciary is not representative of the society as a whole. An examination by Professor Bouthillier of the social backgrounds of the Quebec judiciary revealed that two-thirds of the 161 Superior Court judges appointed between 1946 and 1974 came from upper-middle class families and only 10% were employees of workers.³¹⁰ A similar picture emerged from Professor Hogarth's analysis of 70 Ontario magistrates. Hogarth found that over 50% of the magistrates were from professional families and only 1.4% were the sons of unskilled workers.³¹¹

United States Experience

In the United States, unlike England, political considerations play a significant role in judicial appointments at the federal and state levels. As to

303. *Supra* n. 2, at 313.

304. *Ibid.*

305. *Cf. Supra* n. 21, at 169.

306. See G. Adams and P. Cavalluzzo, "The Supreme Court of Canada: A Biographical Study" (1969), 7 Osgoode Hall L.J. 61, at 84, Table x.

307. 6 clergymen, 5 lawyers, 2 judges, 2 doctors, 1 ship's captain, 1 druggist, and 1 architect. *Ibid.*

308. R.S.C. 1970, c. S-19, s. 6.

309. See P. Russell, *The Supreme Court of Canada as a Bilingual Institution* (1969) 63-66; *Supra* n. 46, at 17; *Supra* n. 306, at 68-70.

310. G. Bouthillier, "Profil de Juge de la Cour Supérieure de Québec" (1977), 55 Can. B. Rev. 436, at 448-56.

311. Hogarth, *Supra* n. 287, at 52-54.

the federal bench, Presidents choose overwhelmingly from their own party. Thus during the Truman administration only 10% of the appointees were of the opposing party, in the Eisenhower administration the figure was 5%, in the Kennedy administration it was 8%,³¹² and during the Johnson administration only 6% of the appointees were from the Republican party.³¹³

The method of selecting federal judicial nominees is in transition. President Carter has introduced the mechanism of nominating commissions for appellate judges, and there is also a rapid growth of district judge nominating commissions.³¹⁴ The nominating commissions which recommend judges on the basis of merit may limit the role of political considerations in the process of judicial selection.

The selection of federal judges is made from a relatively small pool of the available legal talent. While a legal education is taken as a basic prerequisite for appointment to the bench and while there is a leaning toward graduates of the prestigious law schools, activity in the political arena seems to be an important factor in a lawyer's preparation for appointment on the federal level. All but a few of the present judges have been politically active.³¹⁵

In the American system, judicial selection guided by political imperatives might lessen some of the problems of the tendency toward social elitism. Such a system may also generate judges with ideological inclinations more consonant with the electorate as mirrored by their elected representatives. But such a system would not necessarily lead to a socially, ethnically or geographically representative judiciary except as it is called for by political interests.

Over the last three decades, federal judges appear to have come largely from the same social class. A socio-economic study of Eisenhower and Kennedy appointees revealed that the appointees tended to come from middle-class backgrounds. Moreover, there does not appear to be any support for contending that there is any occupational or educational elite. The only discernible difference in the pattern of appointments is that, on the basis of education and occupation of the appointees at the time of appointment, the Eisenhower appointees tended to be of a higher socio-economic status. This minor difference can be attributed to the different political commitments of the Republican and Democratic parties.³¹⁶ These ideological differences and the change in social attitudes may also account for the fact that, though federal judges are generally of the Protestant faith, the number of Catholics and Jews on the federal bench rose during the Kennedy and Johnson administrations.³¹⁷ Of 130 appointments, Kennedy, for example, appointed 20 Catholics, 11 Jews, 5 Blacks and 5 foreign born citizens.³¹⁸ It should be noted however, that while Catholics, Jews and a

312. H. Chase, *Federal Judges* (1972) 112.

313. *Id.*, at 179.

314. Meador, *Supra* n. 278, at 1396-97; see Exec. Order No. 11, 972, 42 Fed. Reg. 9659 (1977), am. by Exec. Order No. 12,059, 43 Fed. Reg. 20, 949 (1978).

315. *Supra* n. 312, at 197. The Supreme Court, for example, has numbered one ex-President, one Presidential hopeful, at least 13 Cabinet officers, 21 sub-Cabinet officers, 13 Senators, 15 Congressmen, 15 mayors, 45 governors, prosecutors and executives, and 7 ambassadors and ministers. See Kurland, *Supra* n. 296, at 198.

316. *Supra* n. 312, at 113-14.

317. *Id.*, at 179.

318. *Id.*, at 78.

Black have served on the Supreme Court, no woman has ever been appointed. Although there cannot be said to be an educational elite, there is a certain leaning toward Ivy League schools in federal appointments.³¹⁹

The Supreme Court of the United States has been geographically imbalanced through a large part of its history and the evidence suggests that geographical representation has not been an important criterion in the selection of Justices. In fact, as of 1972, 20 states had never had one of their citizens serving on the Supreme Court.³²⁰ Ever since Justices ceased riding circuit, the nature of the Supreme Court's functions did not necessitate regional representation, and, more often than not, regional diversity served as an excuse rather than as a criterion for appointment. Certain federal judgeships are, however, traditionally distributed geographically or ethnically.³²¹ In such cases it is often considered politic to continue the tradition in order to avoid an erosion of public confidence in political leaders, but such parochial motives can lead to a demeaning of the appointments to the courts.³²²

It is often argued that Justices bring with them regional and religious attitudes, an argument belied by even a cursory examination of the history of the Supreme Court Justices. Rather, those factors are more important to the politics of selection and the maintenance of public confidence in the courts than to judicial performance. An appointee's political affiliation and his previous professional performance are utilised as indicators of his future decision-making tendencies on the bench. Though the President hopes to select persons of ideological inclination similar to his own, the requirement for consent of the Legislature and the pressures of public opinion counterbalance the tendency to appoint persons likely to be overly influenced by the President.³²³

Ultimately, the selection of a Justice must be made in light of those issues deemed to be dominant by the President. In seeking a favourable attitude toward those issues, the President may rely on personal knowledge of the candidate as well as various other assessments, but in selecting a person likely to accord with his own views on the key issues, it is often necessary to sacrifice total agreement on the many other issues that may appear before the Court. This uncertainty is further compounded by the impossibility of foreseeing all the possible questions that may arise, some of which may ultimately prove more important than those deemed crucial to the selection process.³²⁴ Thus, even when the appointment is based on wholly reliable data, the nature of a changing society often yields disappointment.³²⁵ Changing societal attitudes and imperatives may even result in unexpected decisions from an appointee who may have ruled as expected had all things remained constant. Thus, although appointees often behave as expected, nevertheless the behaviour of Justices appointed in the light of presumed

319. Among District judges, 21% of the Eisenhower appointees, 18% of Kennedy's and 23% of Johnson's. On the Appeal Court level, the figures were 29%, 19%, and 30%, respectively. See *Id.*, at 180.

320. Kurland, *Supra* n. 296, at 196.

321. *Supra* n. 312, at 33.

322. Kurland, *Supra* n. 296, at 197.

323. *Id.*, at 214.

324. *Id.*, at 199.

325. *Id.*, at 216.

ideological inclinations cannot be taken for granted and the expectations have often proven unfounded. This is, perhaps, the explanation for the unexpected behavior of Franklin D. Roosevelt's appointees, who performed as expected while the foreseen problems continued in existence, behaved quite differently when the nature of the problems changed.³²⁶

Justices respond to the demands of their office and the recognition of the special nature of that office may greatly alter their approach to the law. Unexpected behaviour has led to several attempts to check the Court through the impeachment process in order to keep the Court in harmony with Congress and the Executive. This practice dates back to the successful removal of John Pickering from the U.S. District Court and the unsuccessful attempt to unseat Justice Samuel Chase for alleged bias in prosecuting Republicans under the Sedition Laws. Most recently such attempts have reappeared in the efforts to impeach Justice William O. Douglas. Other attempts have been made to unseat Justices through other methods, most notably in the Fortas affair.³²⁷

Trial experience is also deemed an important qualification for appointment. President Eisenhower deemed judicial experience a virtue³²⁸ and the American Bar Association's Standing Committee on Federal Judiciary regards at least 15 years of significant legal experience as essential to qualification for appointment to the federal judiciary.³²⁹ The majority of appointees to the appellate courts have had at least some judicial experience on the federal or state level.³³⁰ As to the appointment to the highest appellate court prior judicial experience should not be *sine qua non*. As Professor Kurland has shown, "prior judicial experience is no basis for assuming capacity to do the extraordinary work of the Supreme Court."³³¹ Indeed Justice Frankfurter, who examined the first 75 Justices of the United States Supreme Court, found 16 of them as pre-eminent, of whom 10 came to the Supreme Court without previous judicial experience.³³²

Patterns and Standards of Conduct

The assessment of the judiciary has often been based on the evaluation of patterns and standards of judicial conduct on and off the bench. The judges' attitude toward, and their treatment of, ordinary persons in court, their willingness to demonstrate flexibility in procedural matters, their insistence on formal dress in court and their resort to the contempt power have all been employed as measuring sticks of the judicial role in society. Likewise, the judges' approach toward judicial education, their support for law reform, and their apparent isolation and remoteness from the community have also served as criteria for assessing them.

Judges are often assessed on the basis of the criteria mentioned above in terms of conservative-liberal. Thus a conservative judge is one who off the bench opposes law reform or at least takes no part in encouraging it. He may

326. *Ibid.*

327. *Id.*, at 220.

328. *Supra* n. 312, at 110.

329. *Id.*, at 155.

330. *Id.*, at 179.

331. Kurland, *Supra* n. 296, at 195.

332. *See Id.*, at 194.

not be interested in reforming judicial organisations and judicial institutions, may see little point in extending programs of judicial education and will continue to endorse rigorous standards of extra-judicial conduct. Likewise, a conservative judge will support the formalism of legal procedure, and will be slow to tolerate any deviations from the accepted legal process. He will insist on formal dress in court and will be reluctant to adopt any unusual procedure in cases, whatever their importance. Conversely, a judge with the opposite attributes will be viewed a liberal. Needless to say, in reality judges do not necessarily have attributes in the same direction, and they may be conservative on some of the points, and liberal on others.

Judicial Conduct in Court

Certain patterns of judicial conduct in court have been used for assessment of judges. Hostile comments on legal aid, statements in support of law and order, unsympathetic approach to people from lower classes, or people wearing informal dress in court have been perceived as manifestations of conservatism. Likewise, adverse comments or remarks showing bias toward persons in court on grounds of occupation, race, sex, or social origin are perceived as indications of conservatism. Remarks indicating failure to understand the ordinary man in the street or ignorance of well known film actors and pop stars are also considered an expression of conservatism.

The atmosphere in an English court is rather formal. The judge and counsel are robed and wear wigs. The judge insists on formal dress on the part of persons in court. While the standards have been relaxed,³³³ the insistence on formal dress has from time to time given rise to comments in the press.³³⁴

The courts have in recent years shown sensitivity to public sentiments in cases with social implications. They have adopted unusual procedures and considered the wider implications of their decisions³³⁵ in cases such as the Dock Workers case,³³⁶ the Welsh Students Case,³³⁷ the Oz Trial,³³⁸ and others.³³⁹ A more recent example of the court's willingness to deviate from the standard procedure is *Secretary of State for Education v. Tameside*.³⁴⁰ The case involved the question whether the Secretary of State had exceeded his powers in ordering the Tameside Council to adopt a system of comprehensive education in their area. Leaving aside the question of the court's willingness to interfere with ministerial discretion, what may be noted here is the speed with which the Lords of Appeal acted. The decision was bound to affect many children who stood to begin the new academic year in a few weeks. Accordingly, the Lords of Appeal for the first time in history sat over the weekend, and gave judgment on Monday.

333. See Cecil, *Supra* n. 262, at 108; *contra* J. Byles quoted in "In a Medlee Cote" (1974), 124 New L.J. 537, at 538.

334. See Letter to *The Times*, June 8, 1974; see also M. Jones, "I Spy Trousers" (1977), 141 *Justice of the Peace* 153.

335. See *Supra* n. 8, at 335; *Supra* n. 2, at 320-22.

336. *Supra* n. 4.

337. *Morris and others v. Crown Office* [1970] 2 Q.B. 114 (C.A.) (contempt for demonstration in a courtroom).

338. *Supra* n. 2.

339. See e.g., *Heatons Transport (St. Helens) Ltd. v. Transport and General Workers' Union* [1973] A.C. 15 (H.L.); A. Paterson, "Judges: Political Elite?" (1974), 1 *Brit. J. of L. & Soc.* 118, 126-31; *R. v. Pauline Jones* (1971), 56 *Cr. App. R.* 212 (C.A.); *Supra* n. 2, at 198-200, 320-22.

340. *Supra* n. 41.

English judges nowadays rarely use the power of contempt of court.³⁴¹ In recent years they have used it in isolated cases.³⁴² The *sub judice* rule was, however, given an unduly wide interpretation.³⁴³ Unlike their English brethren Canadian judges do not demonstrate self-restraint in exercising the power of contempt of court.³⁴⁴

Strict Standards of Conduct and Judicial Remoteness: Perceptions and Facts

Many judicial traditions and practices have been established and maintained to keep judges away from controversy and exclude them from involvement in unseemly matters which are considered to be injurious to the reputation and status of the judiciary.³⁴⁵ These traditions no doubt promote judicial prestige, dignity and integrity and insure public confidence in the courts, but at the same time they tend to divorce the judges from the community. Court critics have often suggested that these strict rules of extra-judicial conduct are indications of conservatism.³⁴⁶

Remoteness and isolation of judges renders them insufficiently sensitive to the sentiments of the community, which in turn has impact on their judicial decision-making. Thus Professor Stevens has observed that the courts demonstrated political insensitivity in the trade union cases, and in such cases as *Shaw* and *Smith*.³⁴⁷

Professor Lord Lloyd commented on the judges' "rather sheltered lives which do not bring them into close contact with the feelings and attitudes of large sections of our society."³⁴⁸ Professor Dworkin also criticised the insulation of judges in England, and their disassociation from life which is shown in their decisions, such as in sentences which are out of tune with community feelings.³⁴⁹

I believe that lawyers, including the academic lawyers, and the general public perceive judges to be more isolated than they are in fact and perceive them as maintaining stricter standards of conduct than they do in fact. Sir Winston Churchill reflected this perception when he said in Parliament that "the judges have to maintain. . . a far more rigorous standard than is required from any other class that I know of in the realm."³⁵⁰

341. Scandalising the court and contempt in face of the court.

342. *Supra* n. 337; see also B. Levin, "Two Fingers and Long Arm of the Law," *The Times*, May 24, 1973, at 18, col. 3 (contempt for making an offensive gesture with fingers toward a judge's ear); *Supra* n. 8, at 335.

343. *A.G. v. Times Newspapers Ltd.*, *Supra* n. 163. This case was ruled to be in violation of the European Convention on Human Rights, *Supra* n. 176. See also *R. v. Socialist Worker*, [1975] Q.B. 637 (contempt for publishing names in violation of a judge's order).

344. *Supra* n. 302, at 66 and *Supra* n. 43-45.

345. *E.g.*, British judges do not engage in political controversy, *Supra* n. 2, at 237; they do not reply to press criticism even when misinterpreted and, except for the Chief Justice and Master of the Rolls, do not give press interviews, *Id.*, at 319-20; judges are limited in business and social activities, *Id.*, at 333-37, 363-67. For detailed analysis of judicial standards of conduct on and off the Bench, see *Id.*, at 293-379.

346. L. Blom-Cooper, "The Judiciary in an Era of Law Reform" (1966), 37 *Pol. Q.* 378, at 380.

347. *Supra* n. 20, at 529 n. 86.

348. *Supra* n. 18, at 125.

349. "The Case Against the Judges — Professor Dworkin's Summing Up," *The Listener*, Sept. 4, 1975, at 295. (Interview by Olive Hunkin).

350. 525 H.C. Deb. 1062-63 (Mar. 23, 1954).

The expectations for strict standards of conduct from judges appeared very clearly in the course of interviews conducted in 1972 by this author.³⁵¹ On the whole, non-lawyers and members of the legal profession, including leading counsel who in a year or two may sit on the bench, held stricter views on standards of judicial conduct than do the judges themselves. Thus non-lawyers and lawyers would exclude judges from public houses and would not allow solicitation for charitable institutions, whereas judges thought that, within certain limitations, these activities are not objectionable.³⁵²

In a society where judges are believed to live in "a private chauffeured, cosseted judicial world,"³⁵³ the use of public transport by a judge³⁵⁴ or his having a cup of tea and reading a sports paper in a cafe, is recorded as an event of news value. In fact, among judges neither the use of public transport³⁵⁵ nor having a cup of tea in a cafe is considered unusual.

Relaxed Standards and Greater Touch with the Community

The last quarter of a century and particularly the last decade have witnessed a continuous process of relaxation of standards of judicial conduct. This is reflected in relaxed standards for judicial appointment and promotions and greater willingness for judicial involvement in activities which had once been considered objectionable.³⁵⁶ Thus divorced people were once excluded from the bench but nowadays, unless scandalous, divorce will not hamper one's judicial career.³⁵⁷ Likewise, convictions for driving under the influence of drink would have once excluded a judge from promotion, or delay it for a number of years, as in the case of one senior judge.³⁵⁸ Yet a High Court Judge was promoted to the Court of Appeal less than 8 months after his conviction of driving under the influence of drink.³⁵⁹ Along this more liberal line one should also mention the appointment to the bench in 1960 of a barrister who had been prosecuted for an income tax offence in 1953, and after his trial was stopped, found not guilty.³⁶⁰

Judges are nowadays more willing to be involved in civic and community activities and more willing to share the burden of social service and public work. This recent trend has been well expressed by Lord Kilbrandon who in a letter to this writer stated: "When a man accepts judicial office, he does not cease to be a citizen. As a citizen he must take his share of the burden of translating compassion into action as do his non-judicial neighbours."³⁶¹

351. About 80 people were interviewed including judges, lawyers, journalists and law professors. See *Supra* n. 2, at xix, xxi — xxii.

352. *Id.*, at 323.

353. Nicholas de Jonge, *The Guardian*, Jan. 7, 1977.

354. *Supra* n. 18, at 125.

355. *Supra* n. 2, at 373.

356. *Supra* n. 2, at 336-37. Labour Lord Chancellors supported a measured relaxation of standards of conduct. See *Supra* n. 8, at 341.

357. *Id.*, at 62.

358. *Id.*, at 368-69 (Lord Russell).

359. *Sunday Times*, Mar. 6, 1977, at 32, col. 7 (Mr. Justice Cumming-Bruce).

360. *Supra* n. 2, at 63.

361. This letter was written in support of Lord Kilbrandon's participation in a radio appeal for contributions to "Shelter," a non-profit association to help the homeless.

The traditions in England governing relations of judges with the press are becoming more flexible. In the early 1970's, the Lord Chief Justice and the Master of the Rolls began giving interviews to the newspapers, and judges are willing to appear on radio programs dealing with legal problems. Judges also write articles for the general press and in important cases they write letters to the editor.³⁶²

Judges are much closer to everyday life.³⁶³ As the Report of the Committee on Defamation stated, "The idea that judges live in an ivory tower is wholly outdated. They go by train and bus, they look at television and they hear, in matrimonial, criminal, accident and other cases every kind of expression which the ordinary man uses, and they learnt how he lives."³⁶⁴

The process of bringing the judges in greater touch with the community has been reinforced by two distinct developments: (1) the substantial decrease in judicial salaries in real terms and (2) the change in status of judges toward a less elevated position in society.

The gradual erosion of the elevated financial status of the judiciary has been tremendous. In 1851, the salaries of the judges of the Common Law courts were fixed at a level which gave them "an extremely exalted position in relation to other sectors of the community."³⁶⁵ Yet from that date, their salaries were to remain the same for almost a century, a peculiarity which led to a narrowing of the differential between them and other sectors. An examination of judicial salaries since the beginning of the century as compared to taxation and the cost of living may serve to illustrate this point. In 1900, the Lord Chief Justice received £8,000, the Master of the Rolls £6,000 and the Court of Appeal and High Court Justices £5,000. The standard rate of tax at that time was 3½%, and there was no surtax. In 1975, the Lord Chief Justice received £19,100, the Master of the Rolls £17,850 and High Court Justices £16,350. Thus the salary of the Lord Chief Justice had increased to just under 250% of the 1900 level; of the Master of the Rolls to slightly less than 300%, and of the High Court Judges to under 330%. In the meantime, the cost of living was over 1000% of its 1900 value, standard taxation had gone up to 33%, and all three salaries were subject to surtax rising to a level of 50%.³⁶⁶

It is thus clear that the "real" salaries of the judiciary dropped drastically during the course of the century. Of course, the judiciary are allowed various allowances and other expenses; nevertheless, their standard of living has become far closer to the average.

The second development is the decrease of the relative importance of the judge in society. The social position and prestige of an office depends on the size of the elite and on the number of other high positions. Unlike earlier periods, today the number of judges has dramatically increased and at the same time there are far more persons in high positions in public life, such as

362. *Supra* n. 2, at 319-20; *Supra* n. 8, at 336-37.

363. Cecil, *Supra* n. 262, at 107; *The Judiciary*, *Supra* n. 238, at 33.

364. *Report of the Committee on Defamation* (1975) Cmnd. 5909, 135 (Chairman, Mr. Justice Faulks).

365. See Review Board on Top Salaries, *Report on Top Salaries* (1974) Cmnd. 5846.

366. See *Supra* n. 2; for more recent increases, see Review Body on Top Salaries, Rept. No. 10, *Second Report on Top Salaries* (1978) Cmnd. 7253 on tax rates, surtax, and the cost of living, see P. Wilsher, *The Pound in Your Pocket 1870-1970* (1970) 28 *et seq.*; B. Mitchell and P. Deane, *Abstract of British Historical Statistics* (1962), 343-45, 428-29; A. Sillitoe, *Britain in Figures: A Handbook of Social Statistics* (1971) 144-49; *The British Economy, Key Statistics 1900-1970*, 11, 260.

senior public servants, chairmen of public boards and nationalized industries. The result is a decline in the public importance of judicial office.³⁶⁷

Canadian judges follow standards of conduct similar to those maintained by their English brethren. In Canada, too, one observes a tendency toward a relaxation of standards of judicial conduct. This may be illustrated by a television interview given by Chief Justice Bora Laskin on his private life.³⁶⁸

In the United States, the standards of judicial conduct in all areas are more flexible, and allow for greater judicial involvement in social and public activities. In recent years, however, the standards have become stricter. This was a result of public controversies on judicial conduct such as in the cases of Judge Haynsworth, Justice Fortas, and Justice Douglas.³⁶⁹

Attitude toward Law Reform

Few would dispute that in the not too far past the English judiciary off the bench showed lack of support for law reform and on many occasions even opposed reforms. The judiciary have failed to take any initiative although means for promoting reforms existed. *The Judicature Act, 1873*³⁷⁰ provided that a Council of judges should be held at least once a year, to consider defects and propose reforms in the procedural system or in the administration of the law. But in over fifty years, the judiciary as a body has not made a single suggestion for change.³⁷¹

The judicial record in the area of criminal law and punishment substantiates the charges of judges' opposition to penal reform and their reluctance to use the knowledge and experience offered by the modern sciences of criminology and penology. An exhaustive examination of judicial attitudes toward penal reform clearly shows that judges have in the past almost unanimously opposed humanitarian reforms in methods of punishment and other reforms aimed at improving the administration of criminal justice.³⁷² The examination conducted by Gerald (later Lord) Gardiner and N. Curtis-Raleigh shows that famous judges who are generally regarded as "masters of common law" and eminent figures in judicial history,³⁷³ supported harsh penal laws such as the death penalty for sheep stealing and hanging 12-year-old offenders. They were against establishing a court of criminal appeal, against providing the accused with counsel, and against reforming the law of evidence.

367. Cf. Jackson, *Supra* n. 238, at 479.

368. Canadian Broadcasting Corp., July 30, 1977. This still remains an exception. Appearance of a judge on television on other occasions has given rise to critical comment from the Bench.

369. Judge Haynsworth was nominated for the United States Supreme Court but was rejected for breaching the rule relating to self-disqualification in cases in which one had an interest. R. McKay, "The Judiciary and Nonjudicial Activities" (1970), 35 Law and Contemp. Prob. 9, at 35; J. P. Frank, "Disqualification of Judges: In Support of the Bayh Bill" (1970), 35 Law and Contemp. Prob. 43, at 52-60. Justice Fortas had to resign from the Supreme Court when, in the course of the public debate on his nomination for Chief Justice he was charged with objectionable extra-judicial conduct. See McKay, *id.*, at 35; Justice Douglas was also charged with improper extra-judicial conduct and there was an attempt to institute impeachment proceedings against him, I. Brant, *Impeachment: Trials and Errors* (1972) 5, 88-89; McKay, *id.*, 27-36.

370. *Supreme Court of Judicature Act*, 36 & 37 Vict., c. 66, s. 75 (U.K.). Now, the *Supreme Court of Judicature (Consolidation) Act 1925*, 15 & 16 Geo. 5, c. 49, s. 210 (U.K.).

371. See Jackson, *Supra* n. 238; G. Gardiner, "The Machinery of Law Reform in England" (1953), 69 L. Q. Rev. 46, at 55; H. Laski, *Supra* n. 197, at 369.

372. G. Gardiner and N. Curtis-Raleigh, "The Judicial Attitude to Penal Reform" (1949), 65 L. Q. Rev. 196.

373. Lords Ellenborough, Eldon, Hardwicke, Tenderden, Gifford, Lyndhurst, Mansfield, and Sir James Stephen were all quoted as opposing humanitarian penal reforms. Lords Cranworth, Bramwell, Martin and Wensleydale were against the establishment of the Court of Criminal Appeal, later established in 1907, over the opposition of Lords Halsbury and Alverstone.

The opposition of the judiciary to the abolition of corporeal and capital punishment in the 1950's led many critics to believe that judges were following the tradition of their predecessors, although the latter had certainly been more successful in obstructing penal reforms. The outspoken opposition of Lord Goddard to the abolition of the death penalty and corporeal punishment attracted strong criticism.³⁷⁴

The tendency of judges and lawyers support to the *status quo* is evident across the Atlantic. Glendon Schubert suggested that the conservatism of the legal profession (*i.e.*, their opposition to change) is a result of the Common Law tradition which looks backwards to past precedents for resolving problems of the present. Lawyers perceive law as a stabilizing force rather than an instrument of change. Schubert observed that "lawyers typically associate with . . . the business sector of the community."³⁷⁵ Tradition has been a limit on law reform. Lawyers often side with the traditional concepts. Thus as Edward Wise reports, the American Bar Association opposed the federal no-fault insurance legislation on the ground that it would "infringe the traditional practice of state regulation of their insurance systems."³⁷⁶ The earlier record of the American Bar Association is tainted with unseemly intolerance to minority groups and unjustified opposition to legal reform.³⁷⁷

In recent years, English judges have demonstrated willingness to adopt new ideas. The times, which are not long gone, when judges defended their reluctance to adopt new ideas³⁷⁸ seem to be changing. Today, apart from offering rebuttal in speeches and addresses,³⁷⁹ judges also take steps to adapt the machinery of justice to changing social needs and to see to it that judges will use the tools and experience offered by modern science. The judiciary has made an honest effort to educate judges and to make modern scientific tools available to them in the performance of their judicial duties. Beginning in 1964, seminars and conferences of judges have been held where lectures are delivered; the judges also participate in sentencing exercises, and in group discussions with representatives of the Home Office, the Prison Department and the Probation and After-Care service, and with medical and psychiatric experts. The programs also include visits to prison service establishments, during which the judges and prisoners are sometimes enabled to have free, frank and unsupervised discussions with one another.³⁸⁰ For some time such judicial conferences had been confined to the problems of sentencing, but later similar types of conferences have been held by judges in other fields, such as the conference on the problems of divorce and child welfare. Since 1964, all the new Justices of the Peace are given

374. *Supra* n. 372, at 218.

375. *Supra* n. 49, at 185.

376. E. Wise, "Legal Tradition as a Limitation on Law Reform" (1978), 26 *Am. J. Comp. L. (Supp.)*, Law in the U.S.A. in the Bicentennial Era 1, at 13.

377. See text and notes, *Supra* n. 50-51.

378. Lord Evershed said in 1961, that the conservatism of the law and the judiciary was not "a bad thing; for it must tend to promote a sense of stability in a rapidly changing world." Lord Evershed, "The Judicial Process in Twentieth Century England" (1961), 61 *Colum. L. Rev.* 761, at 773-74.

379. See 257 *H.L. Deb.* 1071-72 (Apr. 30, 1964); Lord Parker, "The Judicial Function and Penal Reform" (1967), 9 *Crim. L. Q.* 400; Lord Wilberforce, *Supra* n. 207.

380. "Lord Chancellor's Judicial Seminar" (1971), 121 *New L.J.* 865.

elementary training,³⁸¹ and regional conferences are also held for them.³⁸²

Judicial education has received further attention in England in the Report of the Justice Sub-Committee on the Judiciary (1972) and in a Report of a Working Party on Judicial Education (1976).³⁸³ In this context, a sabbatical year for judges was suggested more than once.³⁸⁴ The programs of judicial education in the United States are much more advanced³⁸⁵ and should set an example for those responsible for the administration of justice in England and elsewhere.

In Canada the Canada Judicial Council offers seminars for judges for discussion of a variety of legal subjects of current interest. As of the end of 1977, nine such seminars were held for superior judges and five such seminars were held for other judges.

Conclusion

The judiciary as an institution, and individual judges in England, Canada and elsewhere have been subjected to increased public criticism in recent years.³⁸⁶ In England there have been numerous cases which attracted intense public attention and outspoken criticism and judges have, on many occasions, been strongly criticized by the general press and political leaders. A large share of the criticism and adverse comments has been directed at Lord Denning.³⁸⁷ A significant phenomenon which emerged in recent years is the marked increase of parliamentary motions against judges.³⁸⁸ The increasing popular pressure on judges creates continuous tension between judicial independence and impartiality and public accountability of judges in a democracy.³⁸⁹ Excessive popular pressure on judges like too facile procedure and too malleable standards for judicial removal and discipline might have the effect of chilling judicial independence.³⁹⁰

The tension between public accountability and judicial independence should be resolved by a careful exercise of judgment in order that the proper balance between these very important values be maintained.³⁹¹ Political leaders, academic critics and press writers should be aware of the dangers which excessive public pressure pose to judicial independence and impartiality. Moreover, awareness should mainly lead to restrained style but not

381. See *The Training of Justices of the Peace in England and Wales* (1965) Cmnd. 2856.

382. See (1971), 115 Sol. J. 333.

383. *The Judiciary*, *Supra* n. 238, at 41-44; see *The Times*, June 30, 1975, at 2, col. 6 (J. Watkinson, M.P.); Working Party on Judicial Training and Information, *Consultative Working Paper* (Aug. 1976); *Supra* n. 8, at 340.

384. *The Judiciary*, *Supra* n. 238, at 42, Lord Wilberforce, *Supra* n. 207, at 263; R. Megarry, *Lawyer and Litigant in England* (1962) 163-64.

385. B. Franklin, *State Judicial Training Profile* (1976). See M. Rosenberg, "Judging Goes to College" (1966), 52 A.B.A.J. 342; D. Gutman, "An Experiment in Judicial Education" (1969), 52 *Judicature* 366; Am. Bar Assn. Commission on Standards of Judicial Administration, *Standards Relating to Court Organization* (1973) 56.

386. See the public debate instigated in the United States after the publication of the controversial book on the Supreme Court. B. Woodward and S. Armstrong, *The Brethren: Inside the Supreme Court* (1979). In Australia a major public controversy arose over the apparent association of the Chief Justice Sir Garfield Barwick with business transactions. See *Parl. Deb.*, Sen. (Aust.), April 29, 1980, pp. 1897-1943.

387. *Supra* n. 13-16 and text.

388. See n. 31-40 and text.

389. P. Nejeleski, "Judging in a Democracy: The Tension of Popular Participation" (1977), 61 *Judicature* 166.

390. See Judge Irving Kaufman, "Chilling Judicial Independence" (1979), 88 *Yale L.J.* 681. See also Lord Hailsham, "The Independence of the Judicial Process" (1978), 13 *Israel L. Rev.* 1. See also Lord Hailsham's statement in his Riddell lecture: "If [judges] are constantly subjected to pressure. . . they will not be able to perform their duties impartially." *The Times*, May 25, 1978, at 2, col. 4.

391. See S. Shetreet, "The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts" (1979), 13 *U.B.C. L. Rev.* 52, at 67.

to chilling the effectiveness of public scrutiny of judges and courts. I believe that public pressure on judges, even at a relatively intense level, is to be welcome. Past judicial record (particularly in England) suggests a high degree of isolation and insufficient responsiveness to social change. Continued public pressure will counter-balance this still prevalent tendency among judges. The social price which society may have to pay as a result of a chilling effect on judicial independence and impartiality is marginal and will be balanced by the social benefit which will accrue from a judiciary which is more responsive to social change and which will enjoy the confidence of all sections of the public. Moreover, one may dispute whether the exposure of judges to public opinion through the normal means of communication such as press articles, demonstrations or parliamentary questions and debates can at all be viewed with a hostile eye in terms of social cost-benefit analysis or value assessment.

Public criticism should be directed at all aspects of the administration of justice including judicial decision-making, judicial conduct, judicial appointment, court procedure and court management.

The public criticism of courts is part of the general trend of increased public pressure on all social and government institutions in an open society. Still the public has more confidence in the courts than in other government institutions.³⁹² This is illustrated, inter alia, by the resort to courts to solve social problems which other institutions have failed or refused to solve. The increasing recourse to the law has given rise to some concern due to the law explosion and to the delay and congestion in the courts. But from the point of view of public confidence in the courts, this recourse to the law for resolving important questions is indicative of the high degree of confidence that the courts enjoy in society.³⁹³ This observation is true in England, Canada and the United States.

The assessment of the role of judges, courts and judicial decisions is often expressed by the employment of the twin terms "conservative" and "liberal". The assessment of the role of judges, courts and judicial decisions along these lines of categorization is based on a multitude of distinct groups of criteria. It is based on the assessment of patterns of judicial decision-making employing both result analysis³⁹⁴ and content analysis which in turn may focus on the process of judicial decision-making or on the substance of the decisions.³⁹⁵ It is also based on the assessment of patterns and standards of conduct in judicial and extra-judicial activities³⁹⁶ and of the social composition of the judiciary.³⁹⁷

Decision categorization and assessment based solely on results or statistical analysis of results raises difficulties³⁹⁸ and may produce an incomplete, inconsistent or even misleading picture. But statistical analysis of

392. See Judge Aldisert, "An American View of the Judicial Function", in H.W. Jones (ed.), *Legal Institutions Today* (1977) 31, at 54. For a statistical national survey on public attitudes towards courts, see "The Public Image of Court", in T. J. Fetter (ed.), *State Courts: A Blue Print for the Future* (1976), 1, at 31. The Supreme Court (36%) and Federal Courts (29%) ranked higher than the Executive Branch (27%) and Congress (23%); but State Courts ranked lower (23%).

393. See Aldisert, *ibid.*

394. See Result Analysis and Judicial Decisions, *Supra.*

395. See Content Analysis of Judicial Decisions, *Supra.*

396. See Patterns and Standard of Conduct, *Supra.*

397. See Social Composition of the Judiciary, *Supra.*

398. See Result Analysis and Judicial Decisions, *Supra.*

judges' voting patterns, if carefully conducted, can generally be very useful and can reveal a fairly reliable record of judicial performance. In order to give a full picture of judicial reasoning and judicial performance it is imperative that result-oriented categorization and statistical analysis be complemented by content analysis of decisions.

Judged against the above-mentioned criteria it seems fair to conclude that the English judiciary is in the process of moving away from the numerous attributes of "conservatism" in all categories of assessment though not at the same pace in all categories. I shall not here summarize or repeat the changes which have been set forth in the article, but wish to point out that, while the English judiciary has made definite steps to relinquish the "conservative" attributes, it still needs to go a long way before an objective observer may justly categorize it as "liberal". This applies to judicial decision-making, to patterns and standards of conduct on and off the bench and to social composition of the judiciary.

I would like to conclude with a note on social composition of the bench. I believe that a representative judiciary is an imperative factor for maintaining the important value of public confidence in the courts. I do not share the school of thought which unduly emphasizes the impact of personal values on judicial decision-making and disregard the balancing effect of social controls, system factors and institutional controls.³⁹⁹ But even the balanced proposition to which I adhere, that adjudication involves a certain degree of imposition of the judges' own values, must lead to a well supported claim for a representative judiciary. The process and standards of judicial selection must ensure fair representation of all social classes, ethnic and religious groups, ideological inclinations and, where appropriate, geographical regions. The representation should be fair and not numerical or accurately proportional. Likewise, the compliance with this principle of a representative judiciary is subject to the vital need to maintain high standards of professional quality and the moral integrity of the judiciary.

The concept of a representative judiciary should also apply to the composition of panels in particular cases. Panels should be either neutral or balanced. Judges with strong convictions or past experience which strongly identifies them with one side should refrain from sitting in cases where the public might question their total neutrality.⁴⁰⁰

399. *Supra* n. 299 and text.

400. *Supra* n. 303 and text.