

# Lions Under Downing Street: The Judiciary in a Written Constitution

by Sir William Goodhart QC

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The short title of my talk this evening - "Lions under Downing Street?" - recalls, of course, the famous remark of Lord Chancellor Bacon that judges should be "lions, but yet lions under the throne".<sup>1</sup> If one regards the throne as merely a symbol of the authority of the state in its broadest sense, no objection can be taken to that statement. Of course judges are part of the authority of the state. They punish crime, they interpret and enforce legislation, they provide a forum for the peaceful resolution of private disputes.

But Bacon was not saying anything as anodyne as that. He was a protagonist in the battles of the early 17th Century over the royal prerogative, and he was on the side of the crown. He meant that judges should be active upholders of the prerogative. In modern terms, he wanted judges to be supporters of the executive. Lions, that is, no longer under the throne but under 10 Downing Street.

Fortunately, Bacon's side lost the battle. Judges are not an arm of the executive. They may be - they probably are - too conservative (with a small c). But that is a different matter. The independence of the judiciary has been for 300 years a cornerstone of the British Constitution.

Yet that independence is perilously fragile. Under our constitution, a government which has the support of a majority of the House of Commons is virtually all-powerful. Such a government could, if it was prepared to ignore constitutional convention, pass by a simple majority an Act of Parliament removing from office every judge on the bench. It could then appoint its own committed supporters to office in their place.

This is, of course, a most unlikely prospect. None the less, the fragility of the protection of the most vital elements of our constitution, such as judicial independence, is one reason why people are beginning to look with more interest at the question of a written constitution for the UK. There are other reasons why pressure for a written constitution is increasing. One is the desire for a Bill of Rights which is not just incorporated into the law of the U.K. but is entrenched, so that it cannot be repealed or overridden by an ordinary statute. Another reason is the move towards a federal system for the UK. A truly federal system would mean that the Westminster Parliament would have to hand over some of its powers and functions to a Scottish Assembly and other regional governing bodies. It would have to hand over those powers and functions within a framework which would prevent their being restricted or recalled at the will of the Westminster Parliament alone. And that would require a written constitution and a supreme constitutional court.<sup>2</sup>

The prospect of a written constitution cannot, therefore, be dismissed out of hand, as it might have been a few years ago. My political party, the Liberal Democrats, is calling for a written constitution.<sup>3</sup> So is the constitutional pressure group Charter 88. And the Institute for Public Policy Research, a think-tank generally associated with the Labour Party, is about to publish a draft of a written constitution. The IPPR's draft constitution has in fact been a cross-party project as it has borrowed the services of a number of Liberal Democrat lawyers, including myself.

I have been closely involved with the

drafting for the IPPR project of the constitutional provisions dealing with the judiciary. I have certainly found this to be a valuable exercise in concentrating the mind on the question of judicial independence. What are its essential elements, and how can they be protected under a written constitution? I hope that I may be excused, in giving this talk, for borrowing heavily from the work which has been done on the IPPR's draft, a few weeks in advance of publication.

I do not intend to talk about all the provisions in the draft dealing with the courts and the judiciary. I shall concentrate on the provisions relating to judicial independence and matters such as judicial appointments which are inevitably linked with independence.

The three main features of judicial independence are, I believe

- (1) freedom from political influence in the appointment of judges
- (2) the protection of judges from undue political pressure while serving on the bench and
- (3) protection from improper removal from office.

I will deal with these three features in turn, looking first at the current situation and then at the way in which the matter might be dealt with in a written constitution.

The present system of appointment of judges has been the subject of serious criticism. Some, at least, of that criticism is justified. Appointments to the two highest levels of the Bench - The House of Lords and the Court of Appeal - to the office of Master of the Rolls and to the headships of the three divisions of the High Court - are made by the Prime Minister, though inevitably the Lord Chancellor will be asked for his advice. All other judicial appointments, apart from some tribunal posts, are made by the Lord Chancellor.<sup>4</sup> (I am speaking only of courts in England and Wales; the system in Scotland and Northern Ireland though

similar, is not identical. I am also speaking only of the paid judiciary, and not of the very large numbers of lay magistrates).

The Lord Chancellor is, of course, a politician and a member of the Cabinet. Some Lord Chancellors, like Lord Hailsham or Lord Kilmuir, have come to the office from careers more in politics than in the law, and have previously held Cabinet office in other departments. All recent Chancellors have done their best to be non-partisan in their appointments, but it is surely not ideal that appointments to the judiciary are made by a senior Cabinet Minister.

It is fair to say that direct political considerations now play very little part in the selection of judges. This has not always been the case. For a long time, the House of Commons was regarded as the quickest route to the Bench, at least for members of the governing party. This has now changed - indeed, since Lord Simon of Glaisdale retired as a Lord of Appeal in 1977 no former MP has been a judge of the High Court or an appellate court. This is due partly to a change in the political climate and partly due to other factors, such as the reluctance of modern governments to create by-elections. The last appointment of an MP to a full-time judicial post was that of Tom Williams in 1981. His appointment to the Circuit bench created the Warrington by-election. The increasing difficulty of combining the proper performance of an MP's duties with a substantial practice at the Bar has meant that few MPs are able to maintain the sort of practice which would normally be expected of a candidate for the Bench. Some MPs do, however, sit as Recorders. Again, the convention that the Attorney-General of the day was entitled to claim the office of Lord Chief Justice when it fell vacant fortunately no longer operates. This convention led to one of the most disgraceful episodes in English legal history. In 1921, on the resignation of Lord Reading, the Attorney-General, Gordon Hewart, was anxious to take the office but it was politically inconvenient for him to leave the government at that time. The Prime Minister therefore appointed an elderly and inoffensive judge of the Court of Appeal<sup>5</sup> to

the office on the clear understanding that he would resign whenever Hewart was ready for the job. Hewart asked for it, and got it, less than a year later, and became one of the worst judges ever to hold high office in England. (I recommend a study of Hewart's entry in the D.N.B. as a prime example of posthumous sycophancy, or *de mortuis nil nisi bunkum*).<sup>6</sup> Hewart was succeeded by another politician, Lord Caldecote, but on Caldecote's retirement in 1946 Hartley Shawcross as Attorney-General refused the office on principle and it has remained non-political ever since.

That, I am afraid, was a digression - but not wholly irrelevant, because it shows that until quite modern times political factors have played an important part in the appointment of judges. Even now, it is only by convention that appointments are non-political. Indeed there is widely believed to have been one recent example of a judge's promotion being blocked on political grounds. The present Master of the Rolls is thought to have been refused promotion to the Court of Appeal by the Labour government in the '70's because of Trade Union objections to his role as presiding judge of the National Industrial Relations Court set up by Heath's government earlier in the decade.

Before I get on to the method of appointment, I need to explain the system of courts which will exist under the written constitution. The most important change is that the House of Lords will be replaced by a democratically elected body and will therefore cease to have judicial functions. We propose to replace the Judicial Committee of the House of Lords with a new court which we call "the Supreme Court". This, of course, is not to be confused with the present inaccurate and confusing use of the expression "the Supreme Court" as meaning the Court of Appeal and High Court in England.

Our Supreme Court will have functions broadly similar to those of the present House of Lords. There will be, however, some important changes. For example, the Supreme Court will have power to declare

Acts of Parliament to be unconstitutional. In practice, any written constitution will need to incorporate some special procedure for its own amendment. By "special procedure", I mean that something more than a simple majority of both Houses of Parliament will be needed in order to adopt an amendment to the constitution. If no special procedure is needed for amendments, a written constitution has no special validity and merely becomes a codification of constitutional statutes. There are several reasons why a special procedure is needed. First, it gives the constitution the status which it needs as a fundamental document which is incapable of being altered at the whim of a temporary majority. Second, it enables fundamental human rights to be entrenched and incapable of being overridden by ordinary legislation. And third, in a federal constitution - which is what the IPPR proposes - sovereign power is shared between the national parliament and the state parliaments. This means that the constitutional relationship between the nation and its constituent states cannot be altered without the consent of both.

As soon as you get a constitution which can only be altered by a special procedure, you get the possibility that the legislature may pass an Act which is inconsistent with the constitution but which cannot override it because it has not been passed by the special procedure. This leads to conflicts. The inevitable result is that there must be a Supreme Court with power to adjudicate on the conflicts. The Constitution of the United States - the ancestor of all democratic constitutions - does not in fact spell this out, but the Supreme Court of the United States declared that it had power to rule Acts of Congress unconstitutional in the great case of Marbury v Madison<sup>7</sup> - the most important constitutional case of all time. This power is so obviously necessary that Marbury v Madison has, in practice, been almost universally followed elsewhere.

As I said earlier, therefore, the Supreme Court which we propose for the UK will have power to rule ordinary Acts of Parliament unconstitutional. In other respects, the power of the Supreme Court

will be similar to that of the House of Lords, though in one respect it is more limited. Because of the federal nature of the constitution, there must be some federal element in the case before an appeal can be taken to the Supreme Court. Obviously, the interpretation of national legislation, or of EC legislation, or of the Constitution itself, is an appropriate matter for the Supreme Court; but the interpretation of, say, an Act of the Scottish Assembly would not normally be a matter for the Supreme Court. On matters of general law, the Supreme Court would have jurisdiction if - but only if - it concluded that uniformity of law throughout the UK was desirable.

The result is that the Supreme Court will play a much more powerful role in the constitution than the House of Lords does at present. This has particular importance when we get on to the question of judicial appointments. As can be seen from the example of the USA, the power to appoint judges to courts with important constitutional powers can become a controversial political issue. If no changes are made to the present system of appointing judges, the temptation to depart from the recent tradition of impartiality in judicial appointments might become impossible to resist.

The changes in the court system at a lower level under the IPPR draft are far less significant. In effect, the existing court structure and jurisdiction will be retained. The Court of Appeal, the High Court and the Crown Court are specifically written into the Constitution; other courts can be created or abolished by Act of Parliament. For purposes of judicial tenure and appointment, the Courts will be divided into three tiers - superior, intermediate and inferior.

One other constitutional point. The logic of a federal structure suggests that there should be separate court systems for England and for Wales. However, they have shared a common system for some 500 years and we believe that Wales would have more to lose than to gain from severance. For pragmatic rather than logical reasons we therefore propose to retain a single integrated court

system for England and Wales, though there will be a special procedure for the appointment of judges sitting in Wales.

The IPPR draft constitution proposes that judges should be chosen by a Judicial Services Commission. This is made the more necessary because the constitution replaces the quasi-judicial office of Lord Chancellor with the office of Minister of Justice. The Minister of Justice will be a much more overtly political minister who has no judicial function and indeed will not have to be a qualified lawyer. In fact, we propose a separate Judicial Services Commission for each of the three existing legal jurisdictions within the UK - England and Wales (as a single jurisdiction), Scotland and Northern Ireland. Each Commission would be responsible for the nomination of judges within its own jurisdiction. There would also be a joint Commission, with members drawn from the three JSC's, which would nominate the judges of the Supreme Court. The joint Commission would have ten members from the English and Welsh JSC, 4 from the JSC for Scotland, and 2 from the JSC for Northern Ireland. The joint Commission would also nominate the judges of specialised courts whose jurisdiction covers the whole of the UK, such as the Court-Martial Appeals Court and the Restrictive Practices Court.

There is nothing very novel about the idea of a Judicial Services Commission. Many Commonwealth countries have one. There have been several proposals for the creation of a commission in the UK. Where the IPPR draft differs from the norm is that its membership is not predominantly judicial or legal.

The Judicial Services Commission for England and Wales, as proposed by the IPPR, will consist of a lay president, five judges, two senior lawyers, and seven other lay members, at least one of whom must be Welsh and who as a group must be "broadly representative of the community". Such a Commission, of course, always raises the question, "Who will commission the commissioners?" We propose that the judicial members would be elected by the

judges themselves. The other members (including the lawyer members) would be appointed by the Minister of Justice. The Minister would be obliged to consult the Master of the Rolls and the Chief Justice. They would have no veto, but if either of them objected to an appointment the fact of the objection would have to be published, which would provide a reasonably effective safeguard against bias in the appointments.

Members of the Judicial Services Commission will be appointed for fixed terms of not less than five years. They will be subject to removal from office for misconduct in accordance with provisions which ensure that any allegations of misconduct are dealt with by a proper judicial process.

Under the draft constitution, as I have explained, the courts in England and Wales will be divided into three categories - superior, intermediate and inferior. The Court of Appeal and the High Court are, of course, designated as superior courts. The Crown Court does not fit neatly into this category; it is designated in the constitution as a superior court but Crown Court judges, if not also High Court judges, will be treated as judges of intermediate courts for the purposes of the appointments procedure. The intermediate and inferior courts are not identified by name in the constitution but we assume that county courts would be intermediate and magistrates' courts would be inferior courts. Tribunals could be treated as either intermediate or inferior courts, depending on their importance.

Qualification for appointment as a judge of a superior or intermediate court will be the possession of rights of audience in the court to which the appointment is made, or previous service as a judge of another court of the same rank or the next junior rank. Further qualification may be required by ordinary legislation. These rules do not apply to the appointment of lay members of specialised courts such as the Employment Appeals Tribunal. Qualifications for appointment to an inferior court are to be specified by ordinary legislation. The qualification for appointment to the Supreme

Court of the UK will be service as a judge of a superior court in some part of the UK with an additional power to appoint someone who is regarded by the Joint Appointments Commission as having shown outstanding distinction in the practice or teaching of law.

It is proposed that in the case of the superior courts - in England and Wales that would be the High Court and the Court of Appeal - the JSC would nominate two candidates, one of whom would be selected by the Minister of Justice. The Minister would have power to ask for the nominations to be reconsidered. This procedure is similar to that recently adopted for federal judicial appointments in Canada and for the appointment of Bishops of the Church of England. For lower courts, only a single name would be put forward. There would be a subsidiary Welsh Appointments Committee for the appointment of judges to districts wholly within Wales and Regional Appointments Committees for the lowest level of courts in England.

It is a specific obligation of the JSC that it - I quote - "shall adopt procedures for the identification of candidates for judicial office which will ensure, so far as practicable, that adequate numbers of candidates of both sexes and from diverse racial, religious and social backgrounds are considered for appointment".

The obligation, be it noted, is merely to consider - not to nominate. This is intended to ensure that the Commission never has to nominate a less qualified candidate merely to ensure a balance of the sexes or races. Nevertheless, we believe that the lay majority on the JSC and the obligation to look at candidates from a wide range of backgrounds will help to widen membership of the bench. The present system involves excessive reliance on personal recommendations from existing members of the bench. It is perhaps only natural that judges, when asked to recommend new appointments to the bench, tend to recommend people like themselves. The abysmally low proportion of women on the bench is certainly due in part to differential rates of entry to the legal profession 20 or 30

years ago; but a recently published study commissioned by the Law Society<sup>8</sup> suggests that women are still relatively under-represented at the most junior level of appointment, that of Assistant Recorder, where the higher number of women who have entered practice in the last 20 years should be beginning to be reflected in a larger number of appointments. Similarly, there are few signs that under-representation of ethnic minorities is being corrected fast enough. We do not expect that a Judicial Services Commission would produce a bench which looked radically different from today's bench. We believe, however, that the lay membership of the JSC and its specific obligation to consider a wide range of candidates would lead to a more representative bench without damaging the integrity, competence or intellectual standards of the bench.

The procedure for appointment to the new Supreme Court would be similar to that for High Court Judges. Two names would be put forward by the joint appointments commission, but the formal appointment would be made by the Sovereign on the advice of the Prime Minister.

The second essential element in judicial independence is freedom from political pressure while serving on the Bench. The ultimate sanction, of course, is removal from the Bench, but I propose to come to that later in this talk. For the time being, I shall be looking at measures short of removal by which political pressure can be brought to bear.

Of these, the most important is probably the withholding of promotion. It is to be noted that the case which I have already mentioned in which an appointment is believed to have been rejected on political grounds was, in fact, a promotion and not an original appointment. For most judges, ambition does not end when they are appointed to the Bench. High Court judges hope for promotion to the Court of Appeal, and Lord Justices hope to become Law Lords. Although appointment to the Circuit bench is usually terminal, there are occasional promotions from circuit judge to

High Court judge - perhaps one a year. This number may increase if the Circuit bench is seen as a route by which former solicitors, and perhaps women barristers, are likely to progress to the High Court bench. A judge who wants to be promoted to a higher level may be reluctant to give a decision which may alienate the authorities who are responsible for promotion. This problem is perhaps most serious in the case of the part-time judicial appointments of Assistant Recorder and Recorder. Appointment as an Assistant Recorder or Recorder is not often desired for its own sake; the appointment does not carry great prestige and involves inconvenient interruptions in ordinary practice. Most people who apply for such appointments probably do so only because they are now a necessary step on the way to full-time appointment. On balance, I think it is right that prospective judges should be tested with temporary part-time appointments so that those who do not have the right judicial qualities can be weeded out. It must be, however, that temporary judges on probation for a permanent post are particularly likely to want to avoid sticking their necks out by reaching bold or challenging decisions.

For this reason, it is clearly appropriate that promotions as well as original appointments should be handled by the Judicial Services Commission.

There are, of course, other ways in which pressure can be put on judges. One method - though it is rather a blunt instrument - would be to reduce judicial salaries. This was, in fact, once attempted, though not for the purpose of putting political pressure on the judiciary. In the financial crisis of the 1930's the government decided to impose a salary cut of 10 per cent on all holders of public office. The judges, mindful as ever of their constitutional duties to the public, refused to accept the pay cut - thereby, no doubt, giving up the pleasure they would have obtained from sharing equally in the sacrifices of others. It is now expressly provided by statute that judicial salaries cannot be reduced.<sup>9</sup> Many Commonwealth countries have incorporated such a provision into their constitutions. The IPPR draft does

so, and we have also provided that there shall be no adverse changes in the other conditions of service of an appointed judge.

I now come to the question of tenure and removal from office. At present, appointments fall broadly into three groups. The first group is full-time judges, who at least in the case of the ordinary courts (as opposed to tribunals) have tenure until they reach the retiring age. This is 75 in the case of judges of the High Court and above<sup>10</sup> and 72 for most other judges<sup>11</sup>, though it is 70 for stipendiary magistrates<sup>12</sup>. The second group is part-time judges holding appointments for a fixed term. This group includes Recorders and most tribunal appointments. Such appointments are not renewable as of right, though in practice Recorderships are renewed up to the age of 72 unless the Recorder's performance is regarded by the Lord Chancellor as unsatisfactory<sup>13</sup>. The final group consists of temporary part-time judges, who sit as and when needed to meet the demands of the courts. The main element in this group are Assistant Recorders, but the group also includes Deputy High Court Judges (who in practice will usually be Recorders) and retired judges. As judges in this group are called on only as and when needed the question of formal renewal does not arise. If the Lord Chancellor is not satisfied with the performance of a temporary judge the latter is simply not called on to sit. Assistant Recorderships are normally regarded as stepping-stones to a full appointment as a Recorder and an Assistant Recorder who is not regarded as suitable for promotion will not as a rule be asked to continue as an Assistant Recorder<sup>14</sup>.

We propose, in general, to retain these three groups, though we are making a couple of significant changes. One is that the retiring age for all judges will be reduced to 70. Until 1959, there was no retiring age at all for judges of the High Court or the Appellate Court, and even then it did not apply to judges appointed before 1959<sup>15</sup>. Lord Denning, had he wished it, could still be Master of the Rolls instead of retiring to stir up litigation over footpaths in Hampshire. Of course, some judges, like

Lord Reid, were excellent judges when over 80, but too many others were not. The only way of removing a senescent judge was by a quiet word from the Lord Chancellor and this did not always work. I remember a judge who sat on the Chancery Bench when I was starting practice and was quite incapable of handling more than the simplest of cases. It was said that after a quiet chat he had written to the Lord Chancellor to say: "Dear Lord Chancellor, I think you are quite right in saying that at my time of life I should take things more easily. You may, therefore, take this as my resignation as Chairman of Bedfordshire Quarter Sessions". We believe that 75, or even 72, is still too high an age. By that time a significant number of judges are functioning less efficiently than they were. We have, however, given the Judicial Services Commission power to authorise retired judges to sit as temporary judges, so that a judge who is still fit for work when past 70 can remain available to be called on when needed. The other significant alteration which we have made is that judges of superior or intermediate courts holding fixed-term renewable appointments are entitled to have their appointments renewed unless the Judicial Services Commission decides otherwise and gives its reasons. The reason does not have to be related to the performance of the judge's functions - it is possible, for example, that an appointment might not be renewed because of a decline in the business of the court, which has reduced the number of judges needed. However, the fact that reasons have to be given opens up non-renewal to the possibility of judicial review. Reasons would not have to be given for not continuing to employ someone in a temporary appointment such as that of Assistant Recorder.

The present position concerning removal of a judge from office is complicated. Under s.11(3) of the Supreme Court Act, it is provided that a judge of the High Court or the Court of Appeal "shall hold that office during good behaviour, subject to a power of removal by Her Majesty on an address presented to her by both Houses of Parliament". This echoes wording which

first appeared in the Act of Settlement of 1701.

The meaning of these words is obscure. Is the address by both Houses simply the means by which a judge who has misbehaved is removed from office? Or is there a power to remove from office for misconduct by impeachment or some other procedure, and a separate power to remove by an address of both Houses? Fortunately, the question has never arisen in England, though an Irish judge, Sir Jonah Barrington, was removed from office in 1830.<sup>16</sup> There is also a separate power for the Lord Chancellor, on medical advice, to vacate the office of a judge who is so incapacitated as to be unable to resign.<sup>17</sup> In the case of judges below High Court level, the Lord Chancellor has statutory powers to remove a judge for incapacity or misbehaviour; see, for example, s.17 of the Courts Act 1971. This power has been exercised on a few occasions. The most recent case, I think, was that of a circuit judge who was removed following a conviction for trying to smuggle a large quantity of whisky into the country in a motor boat which he owned jointly with a well-known professional criminal. There is no statutory procedure entitling a judge to a hearing before removal, though it has been argued that such a right is implicit.

It is clear that, under a written constitution, the procedure for removing a judge would need to be rationalised and a right to a hearing given. We have provided that a judge can only be removed on one of the following grounds:

- incapacity
- serious judicial misconduct
- failure in the due execution of office or
- having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office.

This last head would, of course, cover cases such as that of the circuit judge I mentioned where the misconduct is personal rather than judicial.

An entirely new procedure is set up for dealing with judicial misconduct. This procedure in fact forms part of a general procedure for dealing with complaints against the judiciary, which is intended to cover relatively minor matters such as personal rudeness in court as well as potentially serious allegations. At present, there is no means of dealing with minor complaints other than the Lord Chancellor's quiet chat. We propose that the Judicial Services Commission should set up a complaints procedure. This would not be an appellate procedure, so no complaint that a decision was incorrect would be entertained. Minor complaints, if proved, would result in the matter being formally drawn to the attention of the judge. Serious complaints would be referred to a separate Judicial Conduct Tribunal, which would have power to recommend the removal of the judge from office or, if the misconduct was not serious enough to justify removal, to draw the matter to the attention of the judge. Where removal from office was ordered on a ground other than incapacity, the Tribunal could also recommend loss or reduction of pension rights. The decision of the Tribunal would be subject to judicial review but not to appeal. Removal, in the case of judges of the High Court or above, would be implemented by a resolution passed by both Houses of Parliament. For other judges, the Tribunal's recommendation would be implemented directly by the Minister of Justice. Formal procedures for dealing with complaints against judges, and a tribunal for dealing with serious complaints, are now found in the constitutions of many Commonwealth countries including Canada and Australia.<sup>18</sup> We propose that a Judicial Conduct Tribunal should have a judge of a superior court as its president, at least two other judicial members and at least two lay members.

Finally, let me mention one important matter on which we decided not to adopt the radical solution proposed by some writers. It has been suggested that real judicial independence cannot be achieved unless the judiciary themselves run the court system and are responsible for its budget. Judicial independence, it is said, can be

compromised by the powers which the government has to control the finance and administration of the courts. Some English judges, including the present Vice-Chancellor,<sup>19</sup> have expressed sympathy with this view. However, while the IPPR team also had sympathy with this approach, we decided in the end not to adopt it. We could see serious objections, practical as well as theoretical, to the judiciary being given a power to fix a budget themselves and precept the Treasury, and equally serious objections to the judges being required to negotiate with the Treasury the amount of the yearly court's budget. We thought that the financing and administrative management of the courts should therefore be left with the Ministry of Justice. We believe, however, that the judges have at least a right to be consulted on these matters. We have therefore proposed that a body known as the Judicial Council should be created as a means by which the view of the judiciary on questions of administration and resources could be made known to the Minister of Justice.

Furthermore, it is clearly desirable that judges should retain control over the listing of cases and their allocation to different members of the Bench. In a controversial case the choice of the judge who is to hear it may be of crucial importance. Take, for example, the 'Spycatcher' case.<sup>20</sup> The judiciary were deeply divided on the issues which it raised. It would have been possible to make a pretty accurate guess, in advance, as to the side of the fence on which many of the judges involved were likely to come down.<sup>21</sup> In any such case, the power to allocate a case to a particular judge or judges may therefore effectively decide its outcome. A discretionary power of allocation must exist, and cases cannot be allocated by some mechanical formula. It would clearly conflict with judicial independence if the power of allocation were to be exercised by an official of the Ministry of Justice. In fact, the IPPR draft at present does not contain any clause reserving to member of the judiciary the powers of listing and allocating cases. Arguably, this is an inherent power of any court. However, I think on reflection that we ought to spell out clearly that the

responsibility for listing and allocation of cases is a responsibility of the judiciary. The point is sufficiently important to justify enshrining the principle, though not the detail, in the Constitution itself.

We see a written constitution as something much more than a codification of existing practice. We see it as a means of making a series of important reforms in the administration of justice. We want to make the administration of justice more efficient by creating a Ministry of Justice to end the present irrational and damaging division of responsibility for the courts between the Home Office and the Lord Chancellor's Department. We want to increase the independence of the judiciary by transferring responsibility for appointment and promotion to an independent Judicial Services Commission. At the same time, we want to widen the background of the bench and make it more responsive to the feelings of litigants by including a powerful lay element in the Judicial Services Commission and by creating a formal complaint procedure. Judges are not, after all, the most self-critical group in society. I recall the story of the meeting of judges to draft an address to Queen Victoria on the occasion of the opening of the Law Courts in the Strand in the 1880's. The draft contained the words "Conscious as we are of our shortcomings.....". At which point Lord Justice Bowen interjected "Surely that should be, conscious as we are of each other's shortcomings.....".<sup>22</sup>

In this talk, I have not been primarily concerned to argue the case for a written constitution. Nevertheless, as I said at the beginning, I think there is growing dissatisfaction with the idea that the absolute sovereignty of Parliament is the sole principle of the Constitution. The IPPR project is the first effort, so far as I am aware, to provide a full-scale draft of a working constitution for the UK. Other drafts such as that recently published as a Parliamentary Bill by Tony Benn,<sup>23</sup> are designed to stimulate discussion rather than as realistic models of an actual constitution. So far, only the Bill of Rights section of the IPPR draft has been published. When it is

published in full, I am sure that it will have great impact on the campaign for constitutional reform.

One inevitable result of moving to a written constitution, if we do so, will be to increase the powers of the judiciary. Some people will regard that as a reason for objecting to the whole idea of a written constitution. That is not a view which I share. But under a written constitution, the independence of the judiciary will be even more important than it is at present. We need to ensure, as near as we can get to it, impartiality in the appointment of judges. We need to ensure that judges are as free as possible from political pressure while on the bench. And we hope that judges will respond to the increase in their powers by showing both

independence of mind and a broad understanding of our society. Independence, means, of course, independence from the fads of public opinion as well as independence from the executive. I have to say, however, that I do not see undue trendiness as a threat to the bench. We have yet to see the Nigel Kennedy of the High Court bench - pulling off his wig to reveal spikes of green-tinted hair underneath. The lure of the Establishment is more subtle and more dangerous. A written constitution can help to protect the independence of the judiciary. But it is up to the judges themselves to make good use of that independence. They must be lions - but they must roar at 10 Downing Street and not on its behalf.

#### Footnotes:

- 1 The quotation is from Essay No. 56, "of Judicature". The full quotation is: "Let judges also remember, that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne: being circumspect, that they do not check or oppose any points of sovereignty."
- 2 The scheme of devolution under the Scotland Act 1978 and the Wales Act 1978 (which never came into force because of failure to get the necessary votes in the respective referendums) did not create a true federal system because the devolved powers remained recallable by the Westminster Parliament. Special judicial procedures for deciding on "devolution issues" were created by Sched. 12 to the Scotland Act but there were no corresponding provisions in the Wales Act.
- 3 See the Liberal Democrat policy paper "We, the People...." published August 1990. This includes a draft constitution written by John Macdonald QC.
- 4 Appointments to the House of Lords are formally made by the Sovereign by letters patent under s.6 of the Appellate Jurisdiction Act 1876. Appointments to the High Court and the Court of Appeal are formally made by the Sovereign by letter patent under s.10 of the Supreme Court Act 1981. The division of responsibility for advice between the Prime Minister and the Lord Chancellor is a matter of convention. Circuit judges and recorders are formally appointed by the Sovereign on the advice of the Lord Chancellor: Courts Act 1971 ss.16,21. Deputy judges, assistant recorders, High Court Masters and Registrars, and district judges are appointed by the Lord Chancellor: Courts Act 1971, s.24; County Courts Act 1984, s.6; Supreme Courts Act 1981, ss.9,89.
- 5 Lord Justice A T Lawrence, born 1843, appointed Lord Chief Justice April 1921; created Lord Trevethin, August 1921; resigned, March 1922.
- 6 D.N.B. 1941-50, p.382 (H G Hanbury). Lord Hewart is described in Jackson, the Machinery of Justice in England, 7th Edn., p.475 as "the worst English judge within living memory".
- 7 (1803) 1 Cranch 103.
- 8 See the Law Society's Gazette, Vol. 88/19, p.9 (22 May 1991).
- 9 Courts Act 1971 s.18(2); Supreme Court Act 1981 s.12(3).
- 10 Judicial Pensions Act 1959 s.2; Supreme Court Act 1981 s.11.

- 11 Courts Act 1971 ss.17,21; County Courts Act 1974, s.11.
- 12 Justices of the Peace Act 1979 s.14.
- 13 See the booklet "Judicial Appointments" issued by the Lord Chancellor's Department.
- 14 See Endnote 13.
- 15 Judicial Pensions Act 1959 ss.2,3.
- 16 Barrington's case (1830) 85 Commons Journals 196.
- 17 Supreme Court Act 1981 s.11.
- 18 See, for example, the Judicial Officers Act 1986 in New South Wales.
- 19 "The Independence of the Judiciary in the 1980's" (the 1987 Francis Mann Lecture), reprinted in [1988] Public Law p.44.
- 20 Attorney-General v Guardian Newspapers [1987] 1 WLR;  
Attorney-General v Guardian Newspapers [1990] 1 AC 109.
- 21 The line-up can be summarised as follows:  
supporting restraint on publication: Lords Brandon, Templeman, Ackner and Griffiths; Sir John Donaldson MR (twice);  
Ralph Gibson and Russell LJ. Opposing restraint: Lords Bridge, Oliver, Keith, Brightman, Goff and Jauncey; Dillon  
and Bingham LJ; Browne-Wilkinson V-C and Scott J. It is possible that some judges who were in favour of restraint  
in Round 1 might have been in favour of allowing publication in Round 2, and that some in favour of publication in  
Round 2 might have supported restraint in Round 1.
- 22 See Megarry, *Miscellany at Law*, p.9.
- 23 The Commonwealth of Britain Bill.

## Administration of Justice

The Institute of Advanced Legal Studies is organising, with the Lord Chancellor's Department, a series of informal afternoon seminars on a selection of issues within the Department's remit. Only a handful of academics and officials will be involved in each meeting, but Professor Daintith, the Director of the Institute, would be glad to hear from anyone who, by reason of current or recent research or other activity on the chosen themes, may have a valuable contribution to make. Themes tentatively selected for discussion in 1992 are alternative dispute resolution (January), civil enforcement procedures (May) and comparative administration of courts and tribunals (autumn).

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