

Chapter 1 : General Theoretical Considerations

1.01 The independence of the judiciary is a cherished principle of the legal system and constitutional law of modern states based on the Rule of Law and the protection of human rights. What is judicial independence? An oft-quoted definition is as follows –

I thus define judicial independence as the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.¹

1.02 Another author points out –²

Independence is a critical quality for courts, since the ability to declare authoritatively what the law is hinges on the perception, both of elites and the public, that judges decide impartially. Some argue that virtually no court is truly independent,³ and others see courts as possessing degrees of independence.⁴ Judicial independence is perhaps best defined as a court's having "some degree of freedom from one or more competing branches of government or from centers of private power such as corporations, unions or religious organizations".⁵ Institutional independence is always tied to the qualifier, "some degree", and that degree varies over time and subject.

¹ Sir Guy Green (Chief Justice of Tasmania), "The Rationale and Some Aspects of Judicial Independence" (1985) 59 Australian Law Journal 135 at 135, quoted in *Valente v R* [1985] 2 SCR 673, para 18 (Canadian Supreme Court), and in David Malcolm (Chief Justice of Western Australia), "The Importance of the Independence of the Judiciary", address to the Western Australian Society of Labour Lawyers, 17 September 1998, available at <http://wwwlaw.murdoch.edu.au/icjwa>.

² Mary L Volcansek, *Constitutional Politics in Italy* (London: Macmillan, 2000), p 7.

³ Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981), p 21; and J Mark Ramseyer, "The Puzzling (In)Dependence of Courts: A Comparative Approach" (1994) 23 Journal of Legal Studies 721.

⁴ Theodore L Becker, *Comparative Judicial Politics* (Chicago: Rand McNally, 1972), p 167; William M Landes and Richard A Posner, "The Independent Judiciary in an Interest Group Perspective" (1975) 18 Journal of Law and Economics 875; and Gerald N Rosenberg, "Judicial Independence and the Reality of Political Power" (1992) 54 Review of Politics 372.

⁵ John R Schmidhauser, "Introduction: The Impact of Political Change upon Law, Courts and Judicial Elites" (1992) 13 International Political Science Review 231.

1.03 Judicial independence includes therefore independence from the executive and legislative branches of government as well as independence from other institutions, organisations or forces in society.⁶ Judicial independence enables the court to adjudicate cases in a fair and impartial manner by ascertaining the facts objectively and applying the law properly. One of the points raised by the above quotation is the relationship between judicial independence and impartiality. The distinction between the two concepts has been discussed as follows –⁷

The often fine distinction between independence and impartiality turns mainly, it seems, on that between the status of the tribunal determinable largely by objective tests and the subjective attitudes of its members, lay or legal. Independence is primarily freedom from control by, or subordination to, the executive power in the State; impartiality is rather absence in the members of the tribunal of personal interest in the issues to be determined by it, or of some form of prejudice.

1.04 If, as is pointed out in the second quotation above, judicial independence may be regarded as a matter of degree, how do we measure judicial independence? It has been suggested that there are four possible approaches –⁸

- the “legalist” approach focuses on constitutional provisions for appointment, security of tenure, and remuneration;
- the “behavioralist” approach looks at judicial decision-making and whether it is influenced by the executive or other centres of power;

⁶ As pointed out in Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland Publishing Company, 1976), pp 17-18: “Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial function. ... In modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured.”

⁷ J E S Fawcett, *The Application of the European Convention on Human Rights* (Oxford: Clarendon, 2nd ed 1987), p 171, commenting on the requirement of an “independent and impartial tribunal established by law” in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This quotation was cited by the Supreme Court of Canada in *Valente v R* [1985] 2 SCR 673, para 16. On the requirement of the “independent and impartial tribunal” under the European Convention, see also *Bryan v United Kingdom* (1995) 21 EHRR 342.

⁸ Todd Foglesong, “The Dynamics of Judicial (In)dependence in Russia”, in Peter H Russell and David M O’Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville: University Press of Virginia), chapter 4 (p 62) at p 68.

- the “culturalist” approach analyses the estimations of independence given by judges themselves and by other participants in the legal system;
- the “careerist” approach focuses on the determinants of appointment and promotion in judicial careers.

1.05 As regards the “legalist” approach mentioned above, it should be noted that in addition to constitutional or statutory provisions, tradition and public opinion are also important elements of judicial independence –⁹

Written law, if not supported by the community and constitutional practice, can be changed to meet political needs, or can be flagrantly disregarded. ... “In Britain”, wrote Professor de Smith, “the independence of the Judiciary rests not on formal constitutional guarantees and prohibitions but on an admixture of statutory and common-law rules, constitutional conventions and parliamentary practice, fortified by professional tradition and public opinion”.¹⁰ Lord Sankey, L.C., said in Parliament –

“The independence and prestige which our judges have enjoyed in their position have rested far more upon the great tradition and long usage with which they have always been surrounded, than upon any Statute. The greatest safeguard of all may be found along these lines for traditions cannot be repealed, but an Act of Parliament can be.”¹¹

1.06 The concept of judicial independence has been analysed as being composed of several elements or dimensions –

- the independence of individual judges, as distinguished from the independence of the judiciary as a whole: the former “is comprised of two essential elements; the substantive independence and the personal independence. Substantive independence means that in the making of

⁹ Shetreet (n 6 above), p 392. The passage was discussed by the Canadian Supreme Court in *Valente v R* [1985] 2 SCR 673, which also pointed out (at para 36): “Tradition, reinforced by public opinion, operating as an effective restraint upon executive or legislative action, is undoubtedly a very important objective condition tending to ensure the independence in fact of a tribunal. That it is not, however, regarded by itself as a sufficient safeguard of judicial independence is indicated by the many calls for specific legislative provisions or constitutional guarantees to ensure that independence in a more ample and secure measure.”

¹⁰ S A de Smith, *Constitutional and Administrative Law* (1st ed 1971), p 367.

¹¹ *Parliamentary Debates (House of Lords)*, vol 95, col 124-125 (28 Nov 1934).

judicial decision and exercising other official duties, individual judges are subject to no other authority but the law. Personal independence means that the judicial terms of office and tenure are adequately secured.”¹² A third possible aspect of the independence of individual judges is internal independence (as distinguished from external independence),¹³ or “the independence of a judge from his judicial superiors and colleagues”.¹⁴

- the independence of the judiciary as a whole, otherwise known as collective independence or institutional independence. “The concept of collective judicial independence requires a greater measure of judicial participation in the central administration of the courts.”¹⁵ The concept has been further elaborated by the Canadian Supreme Court as discussed below.

1.07 The most authoritative and comprehensive judicial statement of what is meant by judicial independence and the institutional conditions that guarantee it is probably that found in the judgment of the Canadian Supreme Court in *Valente v R.*¹⁶ In this case, the court considered the question whether a judge of the Ontario provincial court constituted an “independent and impartial tribunal” for the purpose of section 11(d) of the Canadian Charter of Rights and Freedoms.¹⁷ The court pointed out that –

Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial”, as Howland CJO noted, connotes absence of bias, actual or perceived. The word “independent” in s. 11(d) reflects or embodies the

¹² Shimon Shetreet, “The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration”, in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), chapter 33 (p 393) at 398.

¹³ Luu Tien Dung, *Judicial Independence in Transitional Countries* (Oslo Governance Centre, United Nations Development Programme, January 2003), www.undp.org/oslocentre, at p 11. See also the Bangalore Principles of Judicial Conduct (2002), available at www.transparency.org/building_coalitions/codes.

¹⁴ Shetreet (n 12 above), p 399.

¹⁵ Loc cit.

¹⁶ [1985] 2 SCR 673.

¹⁷ s. 11(d) provides for the right of any person charged with an offence to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.¹⁸

1.08 The court went on to expound the concepts of individual independence and institutional or collective independence –

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government. ... The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal.¹⁹

1.09 The court emphasized the importance of “the objective status or relationship of judicial independence”: “It is the objective status or relationship of judicial independence that is to provide the assurance that the tribunal has the capacity to act in an independent manner and will in fact act in such a manner.”²⁰ Thus the test for judicial independence is formulated as follows –

the test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. ... It is therefore important that a tribunal should be perceived as independent as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact

¹⁸ para 15 of the judgment.

¹⁹ para 20.

²⁰ para 21.

act, regardless of whether it enjoys such conditions or guarantees.²¹

1.10 Finally the court formulated three essential conditions of judicial independence: security of tenure, financial security, and “the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function”.²² The “essence” of financial security “is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the executive in a manner that could affect judicial independence.”²³ The issue of financial security was further elaborated by the Canadian Supreme Court in *Reference re Remuneration of Judges*,²⁴ which has been discussed in the Mason Report.²⁵ In that case, the court affirmed that judicial independence consists of two dimensions (individual independence and institutional or collective dimension) and includes three core characteristics (security of tenure, financial security and administrative independence), and clarified that each core characteristic may have both an individual dimension and a collective or institutional dimension.

1.11 Why is financial security an essential condition for judicial independence? The most famous exposition of this issue, as well as the more general issue of the constitutional position of the courts within a governmental system that is premised on separation of powers, is that by Alexander Hamilton, one of the founding fathers of the American Constitution, in *Federalist Papers Nos 78 and 79*. He pointed out that “the judiciary is beyond comparison the weakest of the three departments of power”, because it has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but mere judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.²⁶ (emphasis in original)

1.12 Hamilton therefore wrote that “all possible care is requisite to enable [the judiciary] to defend itself against” possible “attacks” by the executive or legislative branches of government.²⁷ In particular, he noted that –

In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And

²¹ para 22 of the judgment.

²² para 47.

²³ para 40.

²⁴ [1997] 3 SCR 3.

²⁵ See chapter 3 of the Mason Report.

²⁶ Isaac Kramnick (ed), *The Federalist Papers* (Harmondsworth: Penguin Books, 1987, first published 1788), p 437.

²⁷ Loc cit.

we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. ... The plan of the convention accordingly has provided that the judges of the United States “shall at *stated times* receive for their services a compensation which shall not be *diminished* during their continuance in office. This, all circumstances considered, is the most eligible provision that could have been devised.²⁸ (emphasis in original)

1.13 The importance of the security of judicial remuneration as a prerequisite for judicial independence has been discussed in some recent judgments in the common law world –

The requirement of financial security will not be satisfied if the executive is in a position to reward or punish the conduct of the members and judge advocate at a General Court Martial by granting or withholding benefits in the form of promotions and salary increases or bonuses.²⁹

Judicial independence can be threatened not only by interference by the executive, but also by a judge’s being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the executive.³⁰

Concern that the executive government not be able and not be perceived publicly as being able to influence performance of the judicial function of adjudication is at the root of the requirement for financial security that has long been regarded as essential to maintaining judicial independence.³¹

²⁸ Ibid, p 443.

²⁹ per Lamer CJC, in *R v Ge'ne'reux* [1992] 1 SCR 259; (1992) 88 DLR (4th) 110 at 144-5. In this case the Canadian Supreme Court set aside the conviction of a soldier on a criminal charge by a general court martial on the ground that the court was not an independent and impartial tribunal within the meaning of s 11(d) of the Charter.

³⁰ per Lord Reed, in *Starrs v Ruxton* [2000] SLT 42; [2000] JC 208 at 248. In this case, the Scottish High Court of Justiciary set aside a conviction by a temporary judge on the ground that the trial court was not an independent and impartial tribunal.

³¹ per Drummond J (dissenting), *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 192 ALR 701. In this case a majority of the Federal Court of Australia upheld the validity of the appointment of a magistrate which was challenged on the ground that there was at the time of his appointment no valid determination of his remuneration as required by the law.

1.14 The concept of financial security includes the requirement that judicial salaries should be adequate, both to attract suitably qualified candidates to the bench and to minimise the temptation of corruption. Another element of financial security is that judicial salaries may not be changed by the executive or legislature in an arbitrary manner. This is to rule out the possibility, either real or perceived, that judges may be induced to make decisions that will please the executive (or the legislature), or to avoid making decisions which it will dislike, in order to obtain better judicial remuneration or to avoid a reduction of judicial remuneration. The constitutional guarantee against reduction in judicial remuneration, as mentioned in the quotation from the *Federalist Papers* above, is designed to ensure that judges in the course of adjudication will never be influenced by the prospect that their remuneration may be reduced if they make decisions unfavourable to the executive or legislature. This, I believe, is why it is asserted in the Mason Report (para 3.4) as follows –

Direct reduction of judicial remuneration is an obvious violation of judicial independence. An indirect reduction of judicial remuneration is also a violation of judicial independence.³²

1.15 The relationship between judicial remuneration and judicial independence has been analysed by Professor Martin Friedland of the University of Toronto, who was commissioned by the Canadian Judicial Council to undertake a study of judicial independence and accountability in Canada –

There is, of course, a close connection between judicial salaries and judicial independence. ... if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our judiciary. If salaries could be arbitrarily raised or lowered in individual cases, or even collectively, the government would have a strong measure of control over the judiciary. ... We should be concerned not only about the process of establishing pay, but also about the level of pay. ... We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. ... A very important reason for good judicial salaries is, of course, to enable the recruitment of excellent candidates to the bench. ... within limits, the greater the financial security, the more independent the judge will be,

³² The Mason Report does not explain the reasoning behind these two propositions. It is apparently suggested that because these propositions seem to underlie the law or are presupposed to be true in some jurisdictions, therefore the propositions must be true. It is part of the objective of this present study to inquire into the rationale for these propositions.

and so, in my view, it is a wise investment for society to err on the more generous side.³³

1.16 Professor Peter Russell, editor of a recent book on the comparative study of judicial independence around the world, wrote on the same issues –

The independence of individual judges can be put seriously in jeopardy if the support they receive is so inadequate that they are readily open to bribery or compromising business ventures. ... The danger in more affluent countries is a system of remuneration (including pensions and other benefits) that subjects either the individual judge or the judiciary collectively to the unfettered discretion of political or judicial authorities. The possibility of undue influence opens up when judicial salaries and benefits are not set in a regularized manner according to established criteria but seen to depend on the whims of the paymaster.³⁴

1.17 On the question of reduction of judicial remuneration, Professor Russell's views are as follows –

Judicial independence should not mean that the level of judicial remuneration is never to be reduced. *Governments elected on platforms calling for fiscal restraint do not jeopardize judicial independence when they apply a program of public sector pay reductions to judges.*³⁵

1.18 This view is apparently shared by Professor Shimon Shetreet of the Hebrew University of Jerusalem, one of the world's leading scholars in the comparative study of judicial systems –³⁶

An important substantive principle for the constitutional protection of judicial independence is the rule prohibiting the application of detrimental changes in the terms of judicial service on judges holding office at the time of introduction of such changes. Thus, reduction of salaries,

³³ Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995), pp 53-54, 56.

³⁴ Peter H Russell, "Toward a General Theory of Judicial Independence", in *Judicial Independence in the Age of Democracy* (n 8 above), chapter 1, at p 18.

³⁵ Loc cit. Emphasis supplied.

³⁶ Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschenes (n 12 above), chapter 52 (p 590) at pp 622-3. Emphasis (in italics) supplied.

either by detrimental changes of the direct remuneration or of the financial benefits attached to the office (e.g., the amount of the contribution for pension plans), would fall into the ambit of this prohibition and so would a provision changing the retirement age. ... There are always, of course, questions with regard to what constitutes “reduction” of salaries or what is “a detrimental change.” ... *there is a general issue as to what extent can judges claim an exception from overall national economic measures which introduce detrimental changes in the conditions of service of all public officers. On this last question, the international standards do not support the exclusion of judges from such overall measures.* IBA Standards s15(b) and the Montreal Declaration s2.2.(6) allow the reduction of judicial salaries “as coherent part of an overall public economic measure”.

The relevant international norms will be discussed in the following chapter.

1.19 In the study commissioned by the Canadian Judicial Council mentioned above, Professor Friedland wrote –

*Most academic commentators agree that [judicial] salaries can be reduced as part of an overall reduction for persons paid with public funds. Whether it is wise to do so is another matter as it inevitably will lead to a conflict between the judiciary and the executive, which cannot be good for the concept of judicial independence.*³⁷

1.20 The question remains as to what is the rational basis for this school of thought that reduction of judicial remuneration need not be regarded as threatening judicial independence where it is introduced as a coherent part of an overall public economic measure, for example, as part of an across-the-board reduction applicable to all persons paid out of public funds. As pointed out above, the judiciary must not only be independent but must be perceived to be so. As pointed out by the Canadian Supreme Court in *Valente v R*,³⁸ the test for determining whether a particular arrangement is inconsistent with judicial independence is “what would an informed person, viewing the matter realistically and practically”, think about the matter. Thus the test as applied to the problem we are considering is *whether reasonable people – being informed persons viewing the matter realistically and practically – would perceive a reduction of judicial remuneration as part of an overall public economic measure applicable to all persons paid out of public funds to be a threat to judicial*

³⁷ Friedland (n 33 above), pp 60-61. Emphasis supplied.

³⁸ See n 1 above.

independence. More particularly, *would reasonable people believe that judges in their adjudication work would be less independent or more mindful of what the government may feel about their adjudication because of the existence of the possibility of their remuneration being lowered when there is an economic downturn and the salaries of all persons paid out of public funds, including judges, have to be equally cut?* In answering in this question, the views of Professor Wayne Renke are noteworthy –

Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive. Where economic measures apply equally to clerks, secretaries, managers, public sector workers of all grades and departments, as well as judges, how could judges be manipulated? ... if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government.³⁹

1.21 Thus the Canadian Supreme Court commented as follows –

a salary cut for superior court judges which is part of a measure affecting the salaries of all persons paid from the public purse helps to sustain the perception of judicial independence precisely because judges are not being singled out for differential treatment. ... Conversely, if superior court judges alone had their salaries reduced, one could conclude that Parliament was somehow meting out punishment against the judiciary for adjudicating cases in a particular way.⁴⁰

1.22 It is therefore clear that a system that permits a reduction of the remuneration of individual judges (rather than judges as a class) would be

³⁹ Wayne Renke, "Invoking Independence: Judicial Independence as a No-Cut Wage Guarantee", *Points of View No 5* (University of Alberta Centre for Constitutional Studies, 1995), pp 30, 19, cited in *Reference re Remuneration of Judges* [1997] 3 SCR 3, paras 156, 158, and in Friedland (n 33 above), pp 58-59.

⁴⁰ para 156 of the judgment of the majority in *Reference re Remuneration of Judges* (n 39 above).

contrary to the principle of judicial independence.⁴¹ Generally speaking, so would be a system that permits a salary reduction that is applicable only to the judiciary but not to others paid from the public purse.⁴² In these systems, judges may be or may reasonably be perceived to be influenced, when deciding cases, by fear that their remuneration might be reduced if they incur the displeasure of the executive (or the legislature). However, it is doubtful whether a system which permits a reduction of judicial remuneration as an integral part of general economic measures to cut government spending that result in uniform salary reductions for all persons paid from the public purse can be regarded as inconsistent with judicial independence. At least in the course of my research for the present study, I have not come across any reasoned argument in support of such a proposition. This does not mean that there may not be other legitimate reasons to oppose a reduction of judicial remuneration in a particular situation, e.g. the need to attract or retain well-qualified lawyers to serve as judges, or the risk of corruption if judicial remuneration is inadequate.⁴³

1.23 It may be questioned whether this chapter relies too much on the Canadian jurisprudence, at least as far as the case law is concerned. The reason for this is that as far as I am aware, the issues of what are the ingredients of judicial independence, and whether a reduction in judicial remuneration is inconsistent with the principle of judicial independence, have not been the subject of detailed judicial statement in other jurisdictions, such as the USA, Britain, Australia and New Zealand. As the issues have actually arisen before the Canadian courts in the 1980's and 1990's, it is perhaps natural that Canadian jurisprudence is of more assistance than that of other countries on this particular matter.⁴⁴ However, the relevant experience and jurisprudence of other countries will still be examined in the chapters below.

⁴¹ An exception to this proposition exists in some civil law countries where the constitution or the law allows the reduction of an individual judge's salary as a sanction administered in disciplinary proceedings conducted in accordance with law. See chapter 7 below.

⁴² A possible exception exists as in the case of Canada, where a reduction applied only to judges as a class may still be valid if it is recommended by an independent judicial compensation commission in accordance with objective criteria or introduced by the government or the legislature in pursuance of a decision that can withstand judicial review on the basis of a "simple rationality" test. See chapter 6 below.

⁴³ Salary reduction *per se* and salary reduction resulting in the salary being below an adequate level should be distinguished. The latter increases the likelihood of judges taking bribes or results in the perception that they might do so. Reduction *per se* (without bringing the salary down to an inadequate level) does not raise the issue of corruption, but does raise the issue of whether judges in the course of adjudication will be (or will be perceived to be) induced to curry favour with or avoid the ill will of the paymaster who has the power to reduce judicial remuneration.

⁴⁴ Canadian cases such as *Valente v R* [1985] 2 SCR 673 and *R v Beaugard* [1986] 2 SCR 56 have also been extensively cited in the leading work on judicial remuneration in Australia: George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), particularly chapter 1.

1.24 Finally, it should be pointed out that in practice, the question of the increase of judicial remuneration to catch up with inflation has been a more pressing one for the judiciary in many countries than the question of reduction of judicial remuneration, which has arisen less frequently. “[T]he problem of protecting or increasing judges’ pay – even if it is only a matter of guaranteeing the amount established at the moment of recruitment from erosion by inflation – still remains an unsolved problem that must be faced periodically.”⁴⁵

1.25 ***Summary of this chapter*** : Judicial independence needs to be secured by objective conditions or institutional guarantees, so that judges are not only impartial and independent in their decision-making but are perceived to be so. The essential conditions for judicial independence include security of tenure, financial security and the institutional independence of the judiciary with respect to matters of administration bearing directly on the exercise of its judicial function. Financial security is important because “a power over a man’s subsistence amounts to a power over his will”. Financial security requires that judicial remuneration should not be at the whims of the executive or/and the legislature; the executive or/and the legislature must not have an unfettered discretion to change judicial remuneration arbitrarily. Furthermore, judicial remuneration should be adequate so as to facilitate the recruitment of well-qualified candidates to the Bench and to minimise the temptation to engage in corruption. Generally speaking, judicial remuneration should not be reduced during the continuance of judicial office. This general rule may however be subject to an exception, which is where judicial remuneration is reduced as an integral part of overall public economic measures involving similar salary reductions for all persons paid from the public purse. In such a situation, it is doubtful that judicial independence will be or will be reasonably perceived to be threatened.

⁴⁵ Francesca Zannotti, “The Judicialization of Judicial Salary Policy in Italy and the United States”, in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), chapter 11 (p 181) at pp 184-5.