Chapter 3 : The British Experience

3.01 In the Mason Report, the case of Britain is presented as one of the jurisdictions where there is an absolute prohibition against reduction of judicial remuneration.[1] The existing British system of determination of judicial remuneration and the latest review on judicial salaries have also been discussed in the Mason Report. On the issue of reduction of remuneration in the United Kingdom, the following passages are relevant.

> 3.12 In 1760 the Commissions and Salaries of Judges Act[2] made explicit what may have been implicit in the Act of Settlement. It secured the payment of the judges' salaries without reduction so long as the judge's commission continued and remained in force. The Act did not apply to colonial judges.
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> 3.14 More recently, the Courts Act 1971 and the Supreme Court Act 1981, ss 12(1) and (3), have expressly provided that the salaries of Circuit Judges and Supreme Court Judges respectively "may be increased but not reduced".

3.02 The 1760 Act is also referred to in the context of the discussion of the Australian position in the Mason Report –

> 3.28 Section 40 of the *Constitution Act* 1855 (NSW) provided for judicial remuneration but reverted to the earlier wording of the *Commissions and Salaries of Judges Act* 1760 (Imp). It provided that salaries fixed by Act of Parliament shall be paid and payable to every judge for the time being so long as their commissions should continue and remain in force. No express reference was made to the prohibition of the diminution of a judge's salary. ...
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> 3.29 However, in *Cooper v Commissioner of Income Tax for Queensland*[3] the High Court interpreted the equivalent Queensland provision as meaning that a judge's salary may not be diminished during the continuance of a judge's commission. ... Barton J considered the English origins of the provision and

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[1] See, e.g., para 4.13 of the Mason Report: "The prohibition against reduction is absolute."

[2] 1 Geo. III c. 23, s. III which was enacted to further implement the Act of Settlement.

[3] (1907) 4 CLR 1304.

> concluded that it was intended to protect judicial independence and that reduction of judicial salary, by statute, is therefore excluded.

3.03 These passages in the Mason Report may be read in the light of the discussion in this chapter on the historical development of the system of the protection of judicial salaries in Britain. This chapter will also highlight some aspects of the existing system of the determination of judicial remuneration in Britain that are of comparative interest from Hong Kong's perspective.

3.04 The Act of Settlement 1701[4] is often referred to as having laid the foundation for judicial independence in English law and in the legal system of modern Britain. Traditionally, judges were appointed and held office during the King's good pleasure (*durante bene placito*); they could be and were often dismissed for political reasons.[5] The seventh paragraph of section 3 of the Act provided that "Judges Commissions be made *Quamdiu se bene gesserint* [during good behaviour], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." On the question of why it had to be provided that judicial salaries were to be "ascertained and established", Professor Lederman wrote –

> It does not appear that financial pressure in the form of the withholding or reduction of salary had hitherto been used as a means of controlling judges, though, as we have seen, inadequate salaries contributed to the judicial scandals of the later thirteenth century. There were times also when the royal treasury was badly in arrears in paying judicial salaries, though not by design to put pressure on the judges. But apparently those who framed the constitutional settlement at the end of the seventeenth century foresaw the possibility of pressure and attempted to foreclose it. ... In the course of the eighteenth century, Parliament did make definite statutory provision for judicial salaries.[6]

3.05 Following the Act of Settlement, the next major statute that was enacted to offer protection to the English judiciary was the Commissions and Salaries of Judges Act 1760. The main purpose of the Act was to abolish the existing rule that judges (as in the case of all royal appointees) automatically

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[4] 12 & 13 W. III, c. 2. On the extent to which judges' security of tenure was guaranteed by this Act, see Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), pp 486 ff.

[5] See generally Shimon Shetreet, *Judges on Trial* (Amsterdam: North-Holland Publishing Company, 1976); Roberts-Wray (n 4 above), pp 484 ff.

[6] W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769 (part I) and 1139 (part II) at 790.

vacated their offices upon the death of the king.[7] Thus section 1 of the Act provided for the continuance of judicial commissions in spite of a demise of the sovereign. Section 2 reiterated the provisions in the Act of Settlement on the procedure for the removal of judges. Section 3 is directly relevant to the present study –

> And be it enacted by the authority aforesaid, That such salaries as are settled upon judges for the time being, or any of them, by act of parliament, and also such salaries as have been or shall be granted by his Majesty, his heirs, and successors, to any judge or judges, shall, in all time coming, *be paid and payable to* every such judge and judges for the time being, so long as the patent or commissions of them, or any of them respectively, shall continue and remain in force. (emphasis supplied)

3.06 In his *Commentaries on the Laws of England*, published in 1765, Sir William Blackstone wrote of the Act of Settlement and the 1760 Act as follows –

> [I]n order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the [Act of Settlement] that their commissions shall be made (not, as formerly *durante bene placito* [during pleasure], but) *quamdiu bene se gesserint* [as long as they conduct themselves properly], and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of Parliament. And now, by the noble improvements of that law in the [Commissions and Salaries of Judges Act 1760] enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown ..., and their full salaries are absolutely secured to them during the continuance of their commissions; ...[8]

3.07 Did the 1760 Act introduce into British constitutional law a norm that judicial salaries may not be reduced during the continuance of judicial office? The Mason Report suggested that it did, and cited the decision of the Australian High Court in *Cooper*[9] in support of this view. In the course of the present study, I have been able to find further support for this view in American

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[7] See generally ibid at pp 791-2.

[8] Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England*, vol 1 (London: Cavendish, 2001), p 203 (pp 267-8 of the 9th ed 1783).

[9] See n 3 above.

and Canadian case law, but not in English case law.[10] The relevant cases will be discussed below, followed by a further examination of the position under English law.

3.08 In *United States v Will*,[11] the Supreme Court of the United States considered the issue of reduction of judicial salaries. The Court commented on the Act of Settlement and the 1760 Act as follows –

> [The Act of Settlement] is the earliest legislative acknowledgment that control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from other forces within government. Later, Parliament passed, and the King assented to, a statute implementing the Act of Settlement providing that a judge's salary *would not be decreased* "so long as the Patents and Commissions of them, or any of them respectively, shall continue and remain in force." 1 Geo. III, ch. 23, s. III (1760) These two statutes were designed "to maintain both the dignity and independence of the judges." 1 W. Blackstone, *Commentaries* 267.[12] (emphasis supplied)

It is therefore apparent that the US Supreme Court shared the Australian High Court's view (in *Cooper*) that the Commissions and Salaries of Judges Act 1760 had the effect of prohibiting any reduction in a judge's salary during the continuance of his or her office.

3.09 In Canada, as mentioned in the Mason Report, the leading case on judicial remuneration is the Supreme Court's decision in *Reference re Remuneration of Judges*.[13] This decision was made after hearing four appeals from lower courts at the same time. One of the appeals was from the decisions of the Court of Queen's Bench of Alberta[14] and the Court of Appeal of Alberta[15] in *R v Campbell*. In this case, McDonald J of the Court of Queen's Bench had taken the view that the principle that judicial salaries could not reduced was a

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[10] In England itself, the 1760 Act was repealed by the Civil Procedure Acts Repeal Act 1879 (42 & 43 Vict. c. 59): see the *Chronological Table of the Statutes* (London: Stationery Office, 2001). The 1879 Act was introduced as a law revision exercise in which enactments were repealed as being spent, having ceased to be in force otherwise than by express repeal, or having become unnecessary by lapse of time and change of circumstances. As discussed below in this chapter, in the course of the 19th century the precise amounts of the salaries of English judges were stipulated in statutes. This was probably why it was considered unnecessary to keep the 1760 Act.

[11] (1980) 449 US 200.

[12] Ibid at 218-9.

[13] [1997] 3 SCR 3.

[14] (1994) 160 AR 81, discussed in paras 50-65 of the Supreme Court's judgment.

[15] (1995) 169 AR 178, discussed in paras 66-69 of the Supreme Court's judgment.

constitutional rule in Britain which had been established by the Act of Settlement 1701 and the Commissions and Salaries of Judges Act of 1760, and which had in turn become part of the Canadian Constitution through the operation of the preamble to the Constitution Act 1867 (originally known as the British North America Act), which states that Canada has a constitution similar in principle to that of the United Kingdom. On appeal, the Supreme Court of Canada did not express any opinion on whether there is a constitutional rule in Britain prohibiting any reduction of judicial salaries, although it held that (subject to the procedural requirements set out in its judgment as discussed in chapter 6 below) there is no such rule in Canada.

3.10 We now turn to the development of the law and practice governing judicial remuneration in Britain since the 1760 Act. It has been pointed out that before the judicial reforms of the 19th century, there were multiple sources of income for judges other than remuneration paid by the Crown. These included a share of the fees paid by litigants, and, in the case of chief justices, income from the sale of the right to become court officials –[16]

> the chief justices in particular enjoyed very valuable patronage, in that they had the disposal of the non-judicial offices of their courts. In other words they were entitled to grant the offices for a price and the grantee was then deemed to have a freehold in the office just as if it were a parcel of land. Certain legislative reforms of the judicature in the earlier years of the nineteenth century put an end to this situation and provide for generous salaries which were to be the sole income of the judges. But, until these changes, interests in fees and patronage were important elements in the financial independence of the judges. Indeed, particularly for the chief justices, the royal or parliamentary salary was at times quite a secondary source of income.[17]

Professor Robert Stevens, a leading scholar in the study of the English judiciary, wrote –

> If we look back to the seventeenth and eighteenth centuries, however, the great offices of state, including the judiciary, were an opportunity to accumulate wealth. Judges, often from modest circumstances, not infrequently

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[16] Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (London: Penguin Books, 8th ed 1998), p 374; Robert Stevens, "Judicial Independence in England: A Loss of Innocence", 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, 2001), chapter 8 (p 155) at p 161.

[17] Lederman (n 6 above), p 789.

> ended as significant landowners and members of the aristocracy.[18]

Sir William Holdsworth, leading historian of English law, described the situation in judicial salaries immediately before the reforms of the early 19th century –

> during the latter part of the seventeenth century, £1000 a year seems to have been the salary of the puisne judges, in addition to the fees and allowances, and a number of customary presents from officials of their courts and others. Their salaries were increased by statute in 1759, 1779, 1799, and 1809; and the statute of 1799 also provided for retiring allowances. The Commissioners appointed in 1815 to examine into the duties, salaries, and emoluments of the officers, clerks, and ministers of courts of justice reported that the salary of the chief justice of the King's Bench was £4000 (per annum), that the salaries of the chiefs of the other two courts was £3500, and that the salaries of the puisne judges of all these courts was £2400.[19]

A major reform in the system of judicial remuneration was introduced in 1826, when an Act of Parliament was passed which abolished judges' income from fees and raised their salaries from £2,400 a year to £5,500 (as far as puisne judges in the three common law courts were concerned).[20]

3.11 It is important for the purpose of the present study to point out that since 1826, there were occasions on which judicial salaries were increased by Acts of Parliament, as well as occasions on which they were *reduced*. As pointed out by Viscount Sankey, the Lord Chancellor, in the Parliamentary debate in the House of Lords in 1933 on Viscount Buckmaster's motion that (among other things) judges' salaries should not be diminished during their continuance in office, there had been several adjustments by statute of judicial salaries since

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[18] Stevens (n 16 above), p 161.

[19] William Holdsworth, *A History of English Law, volume 1* (London: Methuen & Co, 7th ed 1956), p 254. Holdsworth also discussed the sources of judicial income other than salaries. For example, as regards the chief justices' income from the sale of non-judicial offices in courts (mentioned above), he pointed out that "this patronage had actually become more lucrative than all the other sources of their income put together." (p 255).

[20] 6 George IV, c. 84. See Holdsworth (ibid), p 255; Robert Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1993), p 50 (which also sets out the higher salaries of the chief justices). The reform of the system of non-judicial offices in courts also took place in the following decades: see Holdsworth (n 19 above), pp 262 ff.

the Act of Settlement, some being increases and some decreases.[21] After judges were put on salary in 1826, a reduction took place in 1832.[22] Between 1832 and 1965, there were apparently only two increases, both by Acts of Parliament, in the salaries of the higher judiciary.[23] As discussed below, since 1965 an Act of Parliament has no longer been necessary for introducing an increase in judicial remuneration.

3.12 The question of the constitutional propriety of a reduction in judicial remuneration was not raised in Britain until 1931. Although the salary of puisne judges was reduced in 1832 from £5,500 to £5,000 per year,[24] there was apparently no great controversy. It has been pointed out that the reduction introduced by the 1832 Act was only "partially retroactive",[25] and that the Government conceded that the Act should not affect "vested interests".[26] Another scholar commented that "Such salaries still enabled judges to compete in wealth with the great landowners. Indeed, economic historians tell us that during the nineteenth century, Britain's economic fortunes meant that £5,000 became worth more, not less."[27]

3.13 According to the historical records, a reduction of the salary of puisne judges down to £4,000 per annum was actually suggested by Prime Minister William Gladstone in 1873. He wrote to the Lord Chancellor that "not only their [the judges'] salaries but also their pensions were extravagantly high".[28] The proposal to reduce judicial salary was subsequently withdrawn as a result of the judges' opposition.

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21 *Parliamentary Debates (House of Lords),* 5th series, vol 90 (1933-34), col 78 (23 Nov 1933), referred to in Lederman (n 6 above), pp 794-5. The context of the debate was the reduction in judicial remuneration together with the remuneration of all others "in the service of His Majesty" by Act of Parliament in 1931. This incident is discussed below.

22 2 & 3 Will. IV, c. 116, s. 1. In 1851, the salary of the Master of the Rolls was reduced by an Act on the Court of Chancery and the Judicial Committee of the Privy Council: 14 & 15 Vict., c. 83, s. 18. Commenting on the two reductions, Shetreet wrote that "Apparently, the Government of the day obtained the consent of the judges concerned." (Shetreet (n 5 above), p 35)

23 Stevens, *The Independence of the Judiciary* (n 20 above), p 135. According to Shetreet (n 5 above), p 33, the increases took place in 1954 and 1965: the Judges' Remuneration Act 1954, 2 & 3 Eliz. II, c. 27 (raising the salary of High Court judges from £5,000 to £8,000); and the Judges' Remuneration Act 1965, c. 61, s. 1(1) and Schedule 1 (raising it to £10,000).

24 See the first Act cited in n 22 above.

25 Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995), p 303. Section I of the Act of 1832 provided that puisne judges appointed before 16 Nov 1828 would continue to receive the salary of £5,500, while the new salary of £5,000 would be payable to puisne judges appointed after that date as well as those appointed after the Act was enacted. The Act also stipulated the salary amounts for other judges including the chief justices.

26 R F V Heuston, *Lives of the Lord Chancellors 1885-1940* (Oxford: Clarendon Press, 1964), p 518.

27 Stevens, "Judicial Independence in England" (n 16 above), p 161.

28 Stevens, *The Independence of the Judiciary* (n 20 above), p 50, referring to primary sources.

3.14 In 1931, judicial remuneration was actually reduced pursuant to the National Economy Act and the Order in Council made thereunder. The reduction met severe opposition from the judges, and the judges' original salary level was restored in 1935.[29] Professor Friedland commented that "The English experience in the 1930's is complicated, and it is not entirely clear who won."[30] Professor Stevens wrote that "The insurrection was undignified and, in the traditional English way, ended in a compromise."[31] A careful study of the incident[32] is necessary for the purpose of understanding to what extent, if any, reduction in judicial remuneration is permissible or prohibited under modern British constitutional law.

3.15 The world's economic depression that began in 1929 resulted in a financial crisis in Britain. The British Government introduced the National Economy Act which was passed by Parliament in 1931.[33] The Act authorised the monarch (i.e. the executive) to "make such Orders in Council as appear to him to be expedient for the purposes of effecting economies" in public expenditure in respect of "the remuneration of persons in His Majesty's Service".[34] It also provided expressly that such Order may make provision "for the modification or termination of statutory or contractual rights, obligations and restrictions subsisting at the date when the provisions of the Order take effect".[35] Pursuant to the Act, the National Economy (Statutory Salaries) Order 1931 was made.[36] The Order provided, inter alia, as follows –

> 1. (1) Where the amount of the salary to be paid in respect of any office in His Majesty's Service is specified in any enactment there shall, as from the date when this Order takes effect, be made from that amount –
>
> (a) in the case of a salary of £5000 a year or more, an abatement of twenty percent; ...

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29 George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), p 6.

30 Friedland (n 25 above), p 60.

31 Stevens, "Judicial independence in England" (n 16 above), p 167.

32 For the details of the incident (which the following discussion draws on), see generally Stevens, *The Independence of the Judiciary* (n 20 above), pp 52-63; Heuston (n 26 above), pp 513-519; Lederman (n 6 above), pp 793-795; Winterton (n 29 above), pp 6-9. See also E Elms, "The Reduction in Judicial Salaries in England in 1931" (1992) 1 JJA 194. Since the Depression was global in nature, the issue of reduction of judicial remuneration also arose at more or less the same time in Canada and Australia, and their situations at that time will be discussed in chapters 5 and 6 below.

33 21 & 22 Geo. V, c. 48. The relevant provisions of the Act are discussed by Professor E C S Wade in "His Majesty's Judges" (1932) 173 Law Times 246 (part I) and 267 (part II) at 267-8.

34 s. 1(1) of the Act.

35 s. 1(3) of the Act.

36 The full text of the Order was included as an Appendix to W S Holdsworth, "The Constitutional Position of the Judges" (1932) 48 LQR 25 at 34-36.

Lesser reductions were provided for lower salaries.

3.16 The Government applied the salary reductions provided for in the Act and the Order to all public servants including judges. The move was met with strong resistance from the judges. There were some negotiations; the Government insisted that the reduction as applied to judges was lawful. At first the judges' argument was based on their contractual and statutory right to remuneration, but later they shifted their ground and argued that the National Economy Act as properly construed was not applicable to judges because they were not "persons in His Majesty's service". This argument was supported by Sir William Holdsworth, a leading historian of English law at Oxford University,[37] but opposed by Professor E C S Wade of Cambridge University, who was of the view that judges were covered by the 1931 Act.[38] Lord Sankey, Lord Chancellor at the time, wrote about the judges' views in an internal memorandum of 15 January 1932, a few days before he took a deputation of the judges to see the Prime Minister –

> The question here involved is one of very great difficulty. I have had letters from nearly all the judges; I have had private interviews with many of them, ...
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> On the first occasion upon which I saw the deputation, some time before Christmas, their attitude was as follows –
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> They contended that they had a contract of a very solemn kind under which the Government undertook to pay them £5000 a year, and that, moreover, it was a contract which was confirmed by Statute:[39] that any diminution of salary was a breach of contract and a breach of faith, and so forth.
>
> When I saw them on the second occasion, namely, the 14th January, they had entirely changed their ground. There was no longer any contention of breach of contract – just the opposite. They admitted that the Government could lower their stipend by Act of Parliament, but the point relied upon is of a somewhat technical character. It is said that ... constitutionally the judges are not in H.M.'s Service, and that, therefore, there is no Act of Parliament

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[37] Ibid.

[38] Wade (n 33 above). For Holdsworth's reply, see "His Majesty's Judges" (1932) Law Times 336.

[39] [My own footnote:] The Supreme Court of Judicature Act of 1873 fixed the salary of the judges of the High Court and the Court of Appeal at £5,000 a year, with no exemption from tax (36 & 37 Vict. c. 66, ss. 11, 13). The same provision was made by the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. V, c. 49, s. 13).

diminishing their stipend; there is no Order in Council authorizing the Government to diminish their stipend, and that the cuts and reductions are illegal.

I need hardly point out that this is an entire departure from their original contention, and it is due to the fact that the judges have now realized that their first point as to breach of contract is not maintainable, and that they are relying upon the point made in the January number of "The Legal Quarterly" by Professor Holdsworth, ...

Let me here say that other lawyers do not take the same view as Professor Holdsworth, but it would be impossible to deny that the point is a doubtful one.[40]

3.17 The position of the judges was formally set out in a confidential memorandum sent to the Prime Minister on 4 December 1931, which was later made public by the Lord Chancellor at the House of Lords.[41] The most significant points made by the judges may be discerned from the following extract –

[Beginning of the memorandum] The judges of His Majesty's Supreme Court of Judicature think it their duty to submit certain considerations in regard to the recent reductions of the salary payable to judges which seem to have escaped notice.

It is, we think, beyond question that the judges are not in the position occupied by civil servants. ... They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. ... It has for over two centuries been considered essential that their security and independence should be maintained inviolate.

[Reference is then made to the Act of Settlement, the Act of 2 & 3 Will. IV, c. 116 whereby judges were exempted from taxes,[42] and article III of the American Constitution which provides that judges' compensation shall not be diminished during their continuance in office.]

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[40] The full text of the memorandum is set out in Heuston (n 26 above), pp 513-4.

[41] The full text of the memorandum has been printed in (1933) 176 Law Times 103-4. See alternatively *Parliamentary Debates (House of Lords),* 5th series, vol 88, col 1208.

[42] This 1832 statute was superseded by the Income Tax Act 1842 under which judges no longer enjoyed exemption from tax (5 & 6 Vict. c. 35, Schedule (E), 3rd paragraph): see Lederman (n 6 above), pp 795-6.

In this matter our country has set an example to the world, and we believe that the respect felt by the people for any English judge has been partly due to his unique position, a feeling which will survive with difficulty if his salary can be reduced as if he were an ordinary salaried servant of the Crown.

[Reference is then made to the practice of judicial remuneration being charged on the Consolidated Fund and to the protection of judges' security of tenure.]

If the salaries of the judges can be reduced almost *sub silentio* by the methods recently employed, the independence of the Judicature is seriously impaired. It cannot be wise to expose judges of the High Court to the suggestion, however malevolent and ill-founded, that if their decisions are favourable to the Crown in revenue and other cases, their salaries may be raised and if unfavourable may be diminished.

We must express our deep regret that no opportunity was given to the judges of offering a voluntary reduction of salaries for an appropriate period; but we recognise that the Government was in a grave difficulty and that the time for consideration was very short.

We may add a single illustration of the peculiarity of the position of judges in our constitution. It is so to be found in the circumstance that if the point, already raised, were pressed that the National Economy Act 1931, and the Order in Council dated the 1st Oct. 1931, did not have the legal effect of reducing the salaries of the judges, because they are not "persons in His Majesty's Service," there is no tribunal in the land before whom such a question could be determined. ...

... if the salary and the prestige of a High Court judge are to remain as at present, those who will succeed us will probably not, as in the past, be drawn from the leaders of the Bar. There is now so little attraction to them to accept a seat upon the Bench that it will be impossible to induce leading members of the Bar to make the necessary sacrifice.

The consequences, in our opinion, will be far-reaching and detrimental to the true interests of the country. [end of the memorandum]

3.18 The following points about the memorandum are noteworthy –

- The judges did not refer to or rely on the Commissions and Salaries of Judges Act 1760 which, as mentioned above, was considered by some as having introduced a fundamental principle that judicial salaries could not reduced during the continuance of the judicial office.[43]

- The judges did not assert that it would be unconstitutional for Parliament to enact a reduction of judicial salaries.[44] However, they questioned whether the National Economy Act 1931, on its true construction, was applicable to judges.

- The judges stressed that they were "not in the position occupied by civil servants", and objected to "the methods recently employed" to reduce judicial remuneration – reducing judges' salaries as if a judge "were an ordinary salaried servant of the Crown".[45]

- The judges were open to the idea of "a voluntary reduction of salaries for an appropriate period".

- One of the judges' arguments against salary reduction was that the reduced salary would make it difficult to recruit leading members of the Bar to the Bench.

3.19 The controversy continued for more than two years. In March 1933, some judges even contemplated suing the Crown by way of petition of right.[46] Since it would not be right for judges to try a case concerning the reduction of their own salary, the Government actually considered the option of the Judicial Committee of the Privy Council hearing the case with retired judges sitting on it.[47] At the same time, the Government started to draft a bill on the issue of reduction of judicial remuneration, and there was some discussion

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43 Neither was the 1760 Act referred to by Holdsworth (n 36 above) in his argument against reduction of judicial remuneration. It should be noted in this regard that the 1760 Act was no longer in the statute book at the time of the controversy of the early 1930's: as pointed out in n 10 above, it had been repealed by the Civil Procedure Acts Repeal Act 1879.

44 Neither was this asserted by Holdsworth (n 36 above).

45 In his letter to Lord Rankeillour in March 1934, Lord Sankey wrote: "all of [the judges] are anxious about the constitutional position, but you know what amour propre is, and what they all feel most is being classed with other people. ... The thing that every one of them cares about most is, as they put it, that they were herded together with Civil Servants, teachers, policemen, and so forth." See the extract from the letter in Stevens, *The Independence of the Judiciary* (n 20 above), p 62.

46 Stevens, ibid, p 59.

47 Loc cit.

between the Government and the judges on the content of the bill. One of those consulted on the bill was Mr Justice Macnaghten, a King's Bench Judge who intended to present a petition of right against the legality of the salary reduction. Lord Sankey wrote about his meeting with Macnaghten –[48]

> We went through [the draft bill prepared by Mr Justice Avory] very carefully, and Mr Justice Macnaghten appeared then to accept it, but he finally made one objection. He said the result of the draft might be that the public would think that the judges had refused to consent to the cuts, and that therefore they were unpatriotic; that this was not the fact, and he desired that it should be made clear somehow that the judges had always been willing to accept the cuts. I said that I had no doubt that we could come to some satisfactory conclusion on this, which was apparently the only outstanding difficulty. ...

3.20 Further details are provided by Professor Stevens' work –[49]

> With the government legislation being drafted, Sankey and Hailsham met with Luxmoore and Clauson [two other judges who also intended to sue the Crown on the question of salary reduction]. The latter were shown the outline of the Government Bill, which reaffirmed the independence of the judiciary, but included the possibility of salary reductions. The judges preferred one Clauson had drafted saying the judges were not in the service of His Majesty and therefore not covered either by the Act or the Order. Sankey told them that was out of the question. Hailsham had apparently exhausted his earlier sympathy for the judges and was tougher and warned them that the Government was determined, if there were doubts, to pass legislation saying the judges were subject to the cuts. Clauson and Luxmoore then asked for a Bill that would say that the Government could not cut the salary of an existing judge, in return for which the judges would all undertake to accept a voluntary cut. It was pointed out to them that they could not deliver on that promise in respect of all the judges ...

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[48] Heuston (n 26 above), p 517 (quotation from Lord Sankey).

[49] Stevens, *The Independence of the Judiciary* (n 20 above), pp 60-61.

3.21 As events subsequently unfolded, no petition of right was filed, and no bill on the matter was presented by the Government.[50] However, in November 1933, Viscount Buckmaster introduced a motion in the House of Lords that, among other things, in the opinion of the house judges' salaries should not be diminished during their continuance in office. As recounted by Professor Lederman –[51]

> In the debate that followed, Viscount Sankey, the Lord Chancellor, defending the Government's action in 1931, pointed out that there had been several adjustments by statute of judicial salaries since the Act of Settlement, some, he said, being increases and some decreases. He then continued –[52]
>
> "On constitutional grounds the action then taken [in 1931] is not open to challenge on the ground that it strikes at the constitutional position of the judge. But then it is said: 'If you cut off twenty percent of the Judges' salaries you can cut off eighty percent or one hundred, and what then becomes of the Judges' independence?' You can do these things of course. But grave measures taken in grave political emergencies are not to be measured and criticised by such a *reductio ad absurdum*. They must be looked at in common sense and with due sense of proportion. When anyone makes an attempt so to deal with the Judges' salaries that their position is really threatened, these arguments will be open to those who oppose so ill advised and, I make bold to say, so wicked a proposal. They do not touch the action taken by this Government or their predecessors."

3.22 The "last Parliamentary echo of the controversy"[53] was the introduction and passage in the House of Lords of the Judiciary (Safeguarding) Bill 1934, designed to safeguard the tenure and salary of judges of the superior courts. Lord Schuster, Permanent Secretary of the Lord Chancellor's Office, suggested that "all that it says is that no reference in any statute is to affect [the

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50 Ibid, p 62.

51 Lederman (n 6 above), pp 794-5.

52 *Parliamentary Debates (House of Lords)*, 5th series, vol 90, col 80-81 (23 Nov 1933).

53 Heuston (n 26 above), p 519.

judges] unless there is an express reference".[54] The fate of the Bill was described by Professor Stevens –[55]

> The Bill did not proceed to the House of Commons. The squalid incident blew over. It had not reflected well on the judges. They had appeared selfish and out of touch with reality. More importantly in the long run, they had seemed confused about their constitutional role and how to protect it.

3.23 Commenting on the salary reduction incident, Professor Lederman suggested that the best line of defence for the British Government would have been to draw an analogy between the salary reduction in this case and the principle, already accepted at that time, that judges are not exempted from income tax applicable to citizens –

> It is here perhaps that the British government of the day should have rested its case for the cuts effected under the National Economy Act of 1931. That reduction was non-discriminatory in the sense that all salaried public offices of whatever nature were affected on the same terms, and those relying on private incomes also were suffering, under the impact of the economic depression. The principles of general applicability and non-discrimination are essential to keep in mind.[56]

3.24 We now turn to the post-War developments. The first increase in judicial remuneration after the Second World War was granted in 1952 to county court judges, whose salary was raised from £2,000 to £2,800.[57] In 1954, High Court judges received their first salary increase since 1832 from £5,000 to £8,000.[58] This was further raised to £10,000 by the Judges' Remuneration Act 1965. The 1965 Act was also significant because it introduced for the first time

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54 Stevens (n 20 above), p 62. For details of the Bill and the debates in the House of Lords on the Bill, see *Parliamentary Debates (House of Lords)*, 5th series, vol 90, col 1052-1070 (1 March 1934); vol 91, col 212-230 (15 March 1934). The Bill consists only of 3 clauses – an operative clause, a definition clause, and a clause on the title. The operative clause reads as follows: "No reference in any Statute hereafter enacted to the rights, duties, salaries or emoluments of any persons which arise from the service of His Majesty or from the holding of any commission or office shall, unless expressly stated, be deemed to apply in the case of the holders or past holders of judicial office whose salaries are charged on the Consolidated Fund."

55 Ibid, p 63.

56 Lederman (n 6 above), pp 796.

57 Stevens (n 20 above), p 125; Judicial Offices (Salaries) Act 1952. In 1957, there was a further increase to £3,750 under the Judicial Offices (Salaries and Pensions) Act. The Act also gave the government the power to raise county court salaries by delegated legislation, subject to parliamentary resolution.

58 Stevens, ibid, pp 131-2; Judges' Remuneration Act 1954.

a procedure for increasing the salary of High Court judges by delegated legislation (in the form of an Order in Council, subject to an affirmative resolution in each House of Parliament) rather than by Act of Parliament.[59] A similar procedure had already been introduced for the increase of the salary of county court judges in 1957.[60]

3.25 Three orders in council were adopted to raise the salary of High Court judges in 1970 and 1972.[61] In the meantime, the Top Salaries Review Body was established in 1971.[62] Further reforms of the procedure for the adjustment judicial salaries were introduced by the Courts Act 1971[63] (with regard to Circuit judges (country court judges)) and the Administration of Justice Act 1973[64] (with regard to Supreme Court judges). Under the new procedure, judicial salaries may be increased (but not decreased) by the Lord Chancellor with the consent of the Minister for the Civil Service.[65] This contrasts with the earlier position under which any increase in judicial salaries need to be provided for by Order in Council and approved by both Houses of Parliament.

3.26 The introduction of the new procedure has been described as a "remarkable change".[66] Attorney-General Sir Elwyn Jones (subsequently Lord Chancellor) referred to its "historical importance" –[67]

> Since the Act of Settlement, salaries of the judges have been determinable only by Parliament, not by the executive. The principle behind that procedure and that doctrine was to preserve the independence of the judiciary, which is an important part of our constitution and of our liberties.

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59 Shetreet (n 5 above), p 33; Stevens (n 20 above), pp 132-3.

60 See n 57 above.

61 The Judges' Remuneration Order 1970, S.I. No 822; Judges' Remuneration (No 2) Order 1970, S.I. 1970 No 1950; and Judges' Remuneration Order 1972, S.I. 1972 No 1104, all referred to in Shetreet (n 5 above), p 33.

62 Stevens (n 20 above), p 134.

63 s. 18(2) of the Act.

64 s. 9(3) of the Act.

65 Stevens (n 20 above), pp 134-5. It should be noted that the functions of the Minister for the Civil Service in relation to salaries have now been transferred to the Treasury: see *Halsbury's Statutes of England*, vol 11, p 969 (Administration of Justice Act 1973).

66 Stevens (n 20 above), p 135.

67 Loc cit, quoting from the Parliamentary Debates.

> But the requirement that Parliament alone could deal with changes in judicial salaries produced difficulties in practice. It resulted in delays and created the risk of unhappy conflict between Parliament and the Judiciary.[68]

He suggested that the new procedure introduced by the Act

> marks a watershed in the relations between Parliament and the judiciary, for it brings to an end all direct control by Parliament over the salaries and pensions of the higher judiciary.[69]

3.27 The relevant statutory provisions on the determination of the salary of Supreme Court judges have subsequently been re-enacted in the Supreme Court Act 1981. Section 12 provides as follows –

> (1) Subject to subsections (2) and (3), there shall be paid to judges of the Supreme Court, other than the Lord Chancellor, such salaries as may be determined by the Lord Chancellor with the concurrence of the Minister for the Civil Service.
>
> (2) Until otherwise determined under this section, there shall be paid to the judges mentioned in subsection (1) the same salaries as at the commencement of this Act.
>
> (3) Any salary payable under this section may be increased, but not reduced, by a determination or further determination under this section.
>
> (4) [now repealed]
>
> (5) Salaries payable under this section shall be charged on and paid out of the Consolidated Fund.
>
> [Subsections (6) and (7) deal with allowances and pensions respectively.]

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68 *Parliamentary Debates (House of Commons)*, 5th series, vol 851, col 1928-9, quoted in Stevens (n 20 above), p 135.

69 Loc cit. Professor Stevens commented that the Attorney-General "omitted to note that henceforth the control was in the hands of the executive" (loc cit).

Similar provisions exist in section 9 of the Administration of Justice Act 1973 with regard to the Lords of Appeal in Ordinary and stipendiary magistrates, and in section 18 of the Courts Act 1971 with regard to Circuit judges.[70]

3.28 The current position under English law is that the salaries of the judges concerned may be increased but not reduced by the Lord Chancellor with the concurrence of the Treasury (which now performs the functions of the Secretary for the Civil Service in relation to salaries).[71] Apparently this does not mean that there is a fundamental rule of constitutional law that judicial salaries may only be increased but not reduced. As discussed above and as mentioned in the Mason Report,[72] before 1965, judicial salaries needed to be determined by Acts of Parliament. Between 1965 and 1973, the authority to adjust judicial remuneration (as far as increases were concerned) had been *delegated* to the Crown acting by Order in Council subject to the affirmative resolution procedure in Parliament. The purpose of the relevant provisions of the Administration of Justice Act 1973 was to *further delegate* the authority to adjust judicial remuneration to the Lord Chancellor as far as salary increases are concerned. Thus Parliament retains the legal authority to reduce judicial remuneration if and when it considers it necessary, for example, when economic circumstances like those of the early 1930s recur. This analysis is confirmed by *Halsbury's Laws of England* –

> Judicial salaries may be increased by administrative action, but may not be reduced *except by Act of Parliament*.[73]

Similarly, in Professor Shetreet's treatise on the history and present system of judicial independence and accountability in England, he states –[74]

> Salaries of the higher judiciary can be decreased only by statute. Unlike removal of a judge by address, which requires a resolution of both Houses of Parliament, reduction of judicial salaries by any amount may be done by the House of Commons alone invoking the money bill procedure under the Parliament Act 1911. Some writers have found this unsatisfactory.[75]

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[70] For district judges, see the County Courts Act 1984, s. 6.

[71] See n 65 above.

[72] para 4.4.

[73] *Halsbury's Laws of England* (4th ed), vol 8(2) (1996 reissue), p 223, para 303. Emphasis supplied.

[74] Shetreet (n 5 above), p 34.

[75] [footnote in the original:] See Wade and Phillips, *Constitutional Law*, 330 (8th ed. by E C S Wade and A W Bradley, 1970).

3.29 We now turn to consider the existing system for the determination for judicial remuneration in Britain, the details of which have already been set out in the Mason Report. As mentioned above, the Review Body on Top Salaries was established in 1971. Since 1993, the body has been known as the Review Body on Senior Salaries.[76] It seems that the British system of the determination of judicial remuneration by the executive upon the non-binding recommendations of the non-statutory but independent Review Body (which also makes recommendations on the salaries of senior civil servants and senior members of the armed forces)[77] has worked well over the years, and has apparently achieved a better result in practice than the American system (as discussed in the following chapter) and the Canadian system (discussed in chapter 6 below). The Review Body has been described as "the protector of judicial salaries – and thus of independence".[78] "The Top Salaries Review Body meant that judges' salaries kept pace with inflation, and *de facto* were on a par with those of Permanent Secretaries. ... in 1992 law lords were paid appreciably more than Justices of the Supreme Court of the United States."[79] The recommendations of the Review Body were usually accepted by the Government, and such acceptance of its advice has almost become a convention.[80] A notable exception to this practice occurred in 1992, when the Review Body's recommendation of a 19% increase in judicial remuneration was rejected by the Government, which awarded only a 4% increase.[81]

3.30 ***Summary of this chapter*** **:** The constitutional history of the protection of judicial independence in England is usually traced back to the Act of Settlement 1701 and the Commissions and Salaries of Judges Act 1760. While the former Act provided for judges' security of tenure by protecting them against arbitrary removal, the latter Act has been interpreted by some as providing for the non-reduction of judicial remuneration. However, after the precise amounts of judicial salaries became specified by statute in the course of the 19th century, the 1760 Act was no longer considered necessary and was repealed as part of a law revision exercise in 1879. During the Great Depression, Parliament enacted the National Economy Act 1931 in pursuance of which the Government reduced judicial remuneration by the same proportion as the reduction applied to other public servants. The judges protested against this measure, and their salaries were restored to the original level in 1935. Since

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76 Mason Report, para 4.5.

77 The maintenance of a broad linkage between the remuneration of the 3 remit groups is an important factor borne in mind by the Review Body. See generally Review Body on Senior Salaries, *Report No 51: Twenty-Fourth Report on Senior Salaries*, vol 1 (Cm 5389-1, 2002), www.mod.uk/linked_files/ssrb_2002.pdf; Shetreet (n 5 above), pp 29-30; Stevens, *The Independence of the Judiciary* (n 20 above), p 136. The Review Body may also render advice on the salaries of ministers and Members of Parliament.

78 Stevens (n 20 above), pp 135-6.

79 Ibid, p 167.

80 Stevens, "Judicial Independence in England" (n 16 above), p 161.

81 Stevens, *The Independence of the Judiciary* (n 20 above), p 168.

1965, Parliament began to delegate its authority to set judicial remuneration (by Act of Parliament) to the executive. Between 1965 and 1973, judicial remuneration was set by Order in Council (subject to the affirmative resolution procedure in Parliament), and after 1973, by the Lord Chancellor (with the consent of the Minister for the Civil Service (subsequently the Treasury)), who has been authorised by the relevant legislation to increase but not reduce judicial remuneration. However, *Halsbury's Laws of England* states that judicial salaries may still be reduced by Act of Parliament. Since the establishment of the Review Body on Top Salaries (subsequently renamed the Review Body on Senior Salaries) in 1971, the British system for the determination of judicial remuneration has worked reasonably well.