Chapter 4 : The American Experience

4.01 The Constitution of the USA is one of the earliest written constitutions in modern legal history, and is also the first constitution to contain a provision prohibiting the reduction of judicial salaries. The theoretical background to the provision, which relates to the constitutional thinking as expounded in the *Federalist Papers*, has been discussed in chapter 1 above. This chapter will first examine the American case law which throws light on the nature and purpose of the constitutional provision on judicial remuneration. It will then review briefly some relevant legislation which is of comparative interest from Hong Kong's perspective. Finally, it will discuss the practical operation of the system, including the dissatisfaction of the judiciary regarding it. Information which has already been set out in the Mason Report will not be repeated here as far as possible. The purpose of this chapter is to describe the American experience from a fresh perspective, so as to supplement the discussion in the Mason Report.

4.02 Section 1 of article III of the American Constitution provides –

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, *which shall not be diminished during their continuance in office*. (emphasis supplied)

It may be seen that this provision attempts to guarantee judicial independence by providing for both the security of tenure and financial security of judges –

> The 1787 Convention decided ... to build around the judiciary the twin protections of tenure in office and undiminishable compensation, in order to safeguard the courts against the actual or threatened encroachments of the political branches. "[I]s it not plain that [the] purpose [of the Tenure and Compensation Clauses] was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance?" 253 U.S. at 252, 40 S.Ct. at 552. The danger which the Framers foresaw, and the focus of the protections they gave to the judiciary, was legislative or executive assault on judicial independence.[1]

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[1] *Atkins v* United *States* (1977) 556 F.2d 1028 at 1043-4 (United States Court of Claims).

The provision on the non-reduction of judicial compensation is known as the "Compensation Clause". The leading cases on the Compensation Clause have been discussed in the Mason Report. I will merely highlight below some of the points made in the case law regarding the historical background, nature and purpose of the Clause.

4.03 Both the provision on security of judges' tenure and the Compensation Clause may be understood in the light of the experience of the American colonists and their dissatisfaction with the status of the courts in the American colonies under British rule. This was alluded to in the American Declaration of Independence (1776) itself as one of the complaints against King George III –

> He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

As pointed out by the American Supreme Court –[2]

> Originally, these same protections [afforded by the Act of Settlement in Britain] applied to colonial judges as well. In 1761, however, the King converted the tenure of colonial judges to service at his pleasure. The interference this change brought to the administration of justice in the Colonies soon became one of the major objections voiced against the Crown. [The Court then cited the paragraph in the Declaration of Independence set out above.]
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> Independence won, the colonists did not forget the reasons that caused them to separate from the Mother County. Thus, when the Framers met in Philadelphia in 1787 to draft our organic law, they made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution and separation.
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> Madison's notes of the Constitutional Convention reveal that the draftsmen first reached a tentative arrangement whereby the Congress could neither increase nor decrease the compensation of judges. Later, Gouverneur Morris succeeded in striking the prohibition on increases; with others, he believed the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a

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[2] *United States v Will* (1980) 449 U.S. 200 at 219-220.

> phenomenon known in that day as it is in ours. Madison opposed the change on the ground judges might tend to defer unduly to the Congress when that body was considering pay increases. ... The Convention finally adopted Morris' motion to allow increases by the Congress, thereby accepting a limited risk of external influence in order to accommodate the need to raise judges' salaries when times changed.

4.04 This discussion is revealing because it reminds us that the power to increase judicial remuneration, just like the power to decrease judicial remuneration, may be exercised in such a way to prejudice the independence and impartiality of judges and to induce them to curry favour with the authority (be it the executive or the legislature) that has the power to determine judicial remuneration.[3]

4.05 As regards the nature and purpose of the Compensation Clause, the following passage[4] has often been cited –

> The prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich. Such being its purpose, it is to be construed, not as a private grant, but as a limitation imposed in the public interest ...

4.06 A detailed discussion of the nature and purpose of the Compensation Clause may be found in the judgment of the United States Court of Claims in *Atkins v United States*.[5] The main issue in this case was whether a diminution of the real value of judicial salaries (as distinguished from a reduction of the nominal amount of dollars payable as judicial salary, which is clearly prohibited), caused by failure to adjust them in response to inflation and by the

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[3] Thus Madison argued at the constitutional convention of 1787 that the judiciary will not be sufficiently independent unless both salary increase and reduction are constitutionally prohibited: "Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter": M. Farrand, *Records of the Federal Convention of 1787*, vol 2 (1966) p 45, quoted in *Atkins* (n 1 above), p 1046. In the constitutional convention on the Australian Constitution, Edmund Barton proposed that the Constitution should prohibit any reduction as well as increase in remuneration during a judge's term of office, but the proposal on the prohibition of increase was not adopted: George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), pp 5, 25.

[4] *Evans v Gore* (1920) 253 U.S. 245 at 253-4.

[5] n 1 above.

Congress vetoing judicial salary increases proposed by the President, would be a violation of the Compensation Clause. The Court held as follows –

> [T]he purpose of the Compensation Clause is to preclude a financially based attack on judicial independence.[6] ... Could not an "indirect, or even evasive" design by Congress to place judges at a severe financial disadvantage as against the remainder of the society, for the purpose of punishing judges as a class or of forcing a number of them to resign, constitute the very assault on independence which the Framers feared from historic experience?[7] ... If discriminatory treatment is aimed at the judiciary by the political branches, to effect what is obviously an attack on the tenure or decisional freedom of the judges, it should not be assumed that article III does not mandate the fashioning of whatever relief is necessary to alleviate the situation.[8] ... To make out a case, plaintiffs need not show a direct diminution of judicial compensation, but the indirect diminution that they complain of must be of a character discriminatory against judges and, paraphrasing Justice Holmes, must work in a manner to attack their independence of judges. Plaintiffs need to demonstrate the existence of a plan fashioned by the political branches, or at least of gross neglect on their part, ineluctably operating to punish the judges *qua* judges, or to drive them from office despite the Constitution's guarantee of tenure in office "during good Behaviour." ... Whether a neglectful administration of the Government has effectively given rise to an assault on the judiciary would have to be determined by looking to all the circumstances, considering such elements as the state of the economy and the conduct of the judges themselves, but not necessarily according controlling weight to any one element.[9]

4.07 The above passage is helpful for the purpose of understanding the purpose of the Compensation Clause, which is to "preclude a financially based attack on judicial independence". It also provides guidance on what are the relevant considerations in assessing whether a particular situation involves such an attack. On the facts of the case, the Court held that the Compensation Clause had not been violated. It should be noted, however, that this case involved what

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6 *Atkins v United States* (1977) 556 F.2d 1028 at p 1048.

7 Ibid, p 1048.

8 Ibid, p 1049.

9 Ibid, p 1054.

is called "indirect" rather than "direct" diminution of judicial remuneration. Given the clear wording of the Compensation Clause, a "direct diminution" (in the form of a reduction of the nominal dollar amount of judicial salaries) is prohibited, and there is in such a case no need to inquire into whether there is a "financially based attack on judicial independence".[10]

4.08 We now turn to the American system for the determination of judicial remuneration. The system has undergone a process of historical evolution,[11] and it is not necessary to review it here. One innovative device developed by the United States in this regard will however be highlighted since it is of comparative significance. This is the device of providing for automatic cost-of-living adjustments to salaries.

4.09 The system of cost-of-living adjustments (COLA) was first introduced by the Executive Salary Cost-of-Living Adjustment Act 1975.[12] The Act provided for annual COLA to the salaries of federal judges, Members of Congress and senior officials of the executive branch of government, the percentage of adjustments being the same as those applicable to other federal employees under the Federal Pay Comparability Act 1970. The adjustments provided for in the Act would automatically come into effect annually, but Congress on a number of occasions adopted statutes to veto the COLA (to salaries of judges, Members of Congress and senior officials) even though other federal employees received their increases. The vetoes (as far as judicial salaries were concerned) were challenged in *United States v Will*,[13] in which the Supreme Court decided that the validity of the vetoes (i.e. whether they violated the Compensation Clause) turned on whether the relevant salary increases had already taken effect (i.e. "vested") at the time of the adoption of the vetoing statute.

4.10 The system of COLA was revised by the Ethics Reform Act 1989.[14] The 1989 Act is more precise than the previous Act in defining how the annual COLA for judges, Members of Congress and senior officials would be determined. The adjustment is based on the Employment Cost Index (a measurement of change in private sector salaries published by the Bureau of

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[10] The leading case on direct diminution is *United States v Will* (n 2 above). As regards indirect diminution, another relevant authority is *United States v Hatter* (2001) 532 U.S. 557. In this case, a social security tax that was applied to judges who already held office before the tax was imposed was struck down by the US Supreme Court on the ground that it "singles out judges for specially unfavorable treatment" (p 561). The Court held that in this situation there was no need for evidence "that Congress singled out judges for special treatment in order to intimidate, influence, or punish them" (p 577).

[11] For details, see American Bar Association and Federal Bar Association, *Federal Judicial Pay: An Update on the Urgent Need for Action* (May 2003, www.abanet.org/poladv/2003judpay.html); and Mason Report, paras 3.15-3.25, 4.83-4.92.

[12] See *Federal Judicial Pay* (n 11 above), pp 7-8.

[13] n 2 above.

[14] Federal Judicial Pay (n 11 above), p 9.

Labor Statistics).[15] It is provided that the adjustment shall take place annually and automatically whenever there is a similar adjustment in the salary of federal civil servants. As was the case under the 1975 Act, Congress vetoed (by specific wording in the appropriations legislation) the COLA for judges, Members of Congress and senior officials on a number of occasions (although on other occasions the COLA did take place) when other federal civil servants received their COLA. The vetoes were challenged again in court, but the challenge failed before the Court of Appeals.[16]

4.11 Thus the COLA system has not worked to protect judicial salaries from inflation because of frequent Congressional actions to veto COLA for the fiscal year concerned. It seems that the main reason for the Congressional actions has been the reluctance of Members of Congress to grant salary increases to themselves for fear that this would be unpopular in the eyes of the electorate. Since the salaries of federal judges have been linked to those of Members of Congress and other senior officials, federal judges also suffer when a COLA or any kind of pay rise for Congressmen is rejected by Congress.[17]

4.12 Another unsatisfactory aspect of the salary system from the point of view of the federal judges is that the Citizens' Commission on Public Service and Compensation provided for in the Ethics Reform Act 1989 has not actually been set up.[18] The Commission was intended to perform the function of periodic review of the salaries of federal judges, Members of Congress and senior officials.[19]

4.13 In recent years there have been increasing complaints about the depreciation of the real value of the salaries of federal judges. It has been estimated that since 1969, such value in terms of purchasing power has declined by 23.5% in the case of district court and circuit court judges, and the decline is

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[15] The "most recent percentage change in the Employment Cost Index" is defined in such a way that it will never be less than zero (even if there is a decline in private sector salaries) or greater than 5%: see section 704(a) of the Ethics Reform Act (PL 101-194). Thus COLA will not result in a downward adjustment of salaries.

[16] *Williams v United States* (2001) 240 F.3d 1019. The US Supreme Court (with 3 judges dissenting) declined to hear the appeal: (2002) 535 U.S. 911. For a similar dispute involving COLAs for judges at the state level, see *Jorgensen v Blagojevich* (2004) Ill. Lexis 680, where the Supreme Court of Illinois held that the Governor's vetoes of COLAs for judges were unconstitutional. The Illinois Constitution contains a provision similar to the Compensation Clause of the US Constitution.

[17] See generally "President's Page: Federal Judicial Pay" (2003) 82 Michigan Bar Journal 12; Christopher E Smith, *Judicial Self-Interest: Federal Judges and Court Administration* (Westport: Praeger, 1995), p 47: "Thus judicial salaries suffered the consequences of adverse public reactions to pay increases for legislators."

[18] *Federal Judicial Pay* (n 11 above), p 10.

[19] The Commission was supposed to replace the Commission on Executive, Legislative and Judicial Salaries (commonly known as the "Quadrennial Commission") set up under the Federal Salary Act 1967 which reviewed salaries and made recommendations every 4 years. The Commission was duly convened every 4 years from 1968-1988. See *Federal Judicial Pay* (n 11 above), p 7.

even more for judges of the US Supreme Court.[20] In the meantime, salaries for many other occupations and professions have risen much more than judicial salaries. First-year associates at large and prestigious law firms now receive starting base salaries (not including bonuses) which rival the salaries of federal district and circuit judges.[21] It has been pointed out that –

> Since his elevation from Associate Justice in 1986, Chief Justice Rehnquist has publicly commented on what he perceives as the inadequate compensation of federal judges, which he repeatedly has asserted is "the single greatest problem facing the judicial branch". Since 1997, he has raised this point in each of his Year-End Reports on the Federal Judiciary, ... In his testimony before the Volcker Commission, Justice Breyer displayed a graph showing that salaries of federal chief judges in the United States, when compared with their counterparts in Canada and England, had – by far – the lowest increase in salary over the past eight years, even though the increase in the cost of living in the United States was greater than or equal to that of the other countries.[22]

4.14 In 2003, the National Commission on the Public Service (the Volcker Commission) commented as follows –

> Judicial salaries are the most egregious example of the failure of Federal compensation policies. ... The lag in judicial salaries has gone on too long, and the potential for diminished quality in American jurisprudence is now too large. ... Unless this is revised soon, the American people will pay a high price for the low salaries we impose on the men and women in whom we invest responsibility for the dispensation of justice.[23]

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[20] Ibid, Executive Summary, p i.

[21] Albert Yoon, "Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: 1945-2000" (2003) 91 California Law Review 1029 at 1034. The article provides tables setting out comparative salary figures. Relevant figures are also provided in Ronald D Rotunda, "A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries" (2000) 12 ABA Professional Lawyer 1 at 1.

[22] Yoon (n 21 above), at 1035 and footnote 97.

[23] Quotation from the Commission's Report in *Federal Judicial Pay* (n 11 above), p 2.

4.15 In the statement made on 28 May 2003 by Chief Justice Rehnquist on his receipt of the White Paper on Judicial Pay[24] prepared by the American Bar Association and the Federal Bar Association, he said –[25]

> As I have said many times recently, I consider the need to increase judicial salaries to be the most pressing issue facing the federal judiciary today. The longer it takes to raise salaries, the more serious the problem becomes. In order to continue to provide the nation a capable and effective judicial system we must be able to attract and retain highly qualified and diverse men and women to serve as federal judges. We must provide these judges – whom we ask and expect to remain for life – adequate compensation, and the bills pending in the Senate and House would go a long way toward doing just that.

4.16 The principal bill which the Chief Justice referred to is Senate Bill S.1023 introduced by Senators Hatch and Leahy in May 2003, which provides for a 16.5% increase in salaries for federal judges. The bill has not yet been passed at the time of writing of this report (August 2004).[26]

4.17 ***Summary of this chapter*** **:** The American Constitution, in what is known as the Compensation Clause, provides expressly that judicial compensation shall not be reduced during the continuance of judicial office. At the time of the drafting of the Constitution, James Madison proposed that in order to safeguard judicial independence, the Constitution should also prohibit any increase of judicial compensation during the continuance of a judge's office, but the proposal was finally rejected. There exists a body of case law in the USA on the Compensation Clause. Given the plain wording of the Compensation Clause, a reduction of the nominal dollar amount of judicial salary is prohibited irrespective of the circumstances of the reduction. However, failure to adjust judicial salaries in response to inflation does not in itself contravene the Compensation Clause, the purpose of which has been interpreted as to preclude a financially based attack on judicial independence. Since 1975, legislation on cost-of-living adjustments (COLA) for the salaries of federal judges, senior officials and Members of Congress has been in existence. However, Congress frequently disallowed the adjustments when Members of Congress considered it unpopular in the eyes of the electorate to increase their own salaries, and the federal judiciary suffered because of the link of their COLA to that of Congressmen. Although the Ethics Reform Act 1989 provided for a

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[24] See n 11 above.

[25] www.supremecourtus.gov/publicinfo/speeches/sp_05-28-03.html

[26] See www.congress.gov or www.senate.gov. Some scholars are skeptical about the need to raise the salaries of federal judges significantly. See e.g. Michael J Frank, "Judge Not, Lest Yee be Judged Unworthy of a Pay Rise: An Examination of the Federal Judicial Salary 'Crisis'" (2003) 87 Marquette Law Review 55; Smith (n 17 above), chapter 3 ("Judicial Salaries").

commission to review the salaries of federal judges, senior officials and Members of Congress, the commission has not actually been established. There is apparently a high degree of dissatisfaction among federal judges in the USA about their salary level as well as the system for the determination and adjustment of their salaries.