司法人員薪俸及服務條件常務委員會
Standing Committee on Judicial Salaries and Conditions of Service

25 November 2005

The Honourable Donald Tsang, GBM
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China

Dear Sir,

On behalf of the Standing Committee on Judicial Salaries and Conditions of Service, I have the honour to submit our report on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration. The report also contains our recommendations on whether the Judiciary's proposal based on its consultancy study (i.e. the Mason Report) should be accepted.

Yours sincerely,

(Christopher CHENG Wai-chee)
Chairman
Standing Committee
on Judicial Salaries and Conditions of Service

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STANDING COMMITTEE ON JUDICIAL SALARIES AND CONDITIONS OF SERVICE

Report on the Study on
the Appropriate Institutional Structure,
Mechanism and Methodology for the Determination of
Judicial Remuneration in Hong Kong

November 2005

CONTENTS

Executive Summary

Introduction

1. The Standing Committee on Judicial Salaries and Conditions of Service (Judicial Committee) has been asked by the Chief Executive to undertake a study on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration, and to make recommendations on whether the Judiciary's proposal based on the Mason Report should be accepted.

2. We conducted the study in two phases. The first phase focussed on commenting on the Mason Report. The second phase sought to formulate a framework on the institutional structure, mechanism and methodology for the determination of judicial remuneration. To facilitate our study, we commissioned two consultancy studies by Professor Albert H Y Chen and the Hay Group respectively. In making our recommendations, we have taken into consideration the views and recommendations in the Mason Report and the reports of the two consultancy studies. We have also considered the implications of the recent judgment of the Court of Final Appeal on the civil service pay reductions. Furthermore, we have noted the views of the Legislative Council Panel on Administration of Justice and Legal Services on the Mason Report and the budgetary arrangements for the Judiciary.

Judiciary's Proposal as depicted in the Mason Report

Judicial Independence

3. We fundamentally premise our report on the pivotal importance of judicial independence. The essential conditions of judicial independence include security of tenure, financial security and institutional independence. We see the need for Hong Kong to ensure that we have a system for determining judicial salaries which makes the strongest possible statement of our community's commitment to ensuring the independence of the Judiciary.

4. We have concluded that while theoretically it is doubtful that judicial independence will be perceived to be threatened by a reduction in

judicial salaries which is general and non-discriminatory and is widely perceived in the community as being justified, it has at no time been easy to find a process which is not in any way politicised and that judges are not under any actual or perceived political or community pressure. We therefore **recommend** that judicial pay be frozen at the present level for the time being and be reviewed when the new institutional structure, mechanism and methodology are put in place and new benchmarks established within that structure.

Recommendations in the Mason Report

5. We have carefully considered the recommendations of the Mason Report as listed at **Annex A** and agree with the thrust of Recommendations Two to Nine.

6. As regards Recommendation One that legislation should be enacted prohibiting absolutely any reduction in judicial remuneration, we believe that the Hong Kong Special Administrative Region should seek to promote the principle of not disadvantaging judges in relation to their salaries while in office. However, since pay reduction cannot be implemented without legislation, and the recommendations which we are making will go a long way to confirm the principle of judicial independence, we do not consider it essential to adopt Recommendation One at this point in time. Should there be general support from the community to this recommendation, then it might be appropriate for the Administration to consider whether or not to introduce legislation in the future.

Institutional Structure, Mechanism and Methodology for the Determination of Judicial Remuneration

Institutional Structure

Independent Body

7. We **recommend** that there should be an independent body having a fair and transparent methodology to advise on the determination and adjustment of judicial remuneration. The body should comprise seven non-official members (including two practising lawyers) whose terms of appointment should be staggered. The body should, in due course, be established by statute. The existing Judicial Committee could continue to

operate, with expanded membership and more detailed terms of reference, and be transformed into a statutory body through introducing legislation in due course.

Standing Appropriation

8. An underlying feature of judicial independence is fiscal autonomy. We **recommend** that the Administration should, in due course, consider introducing standing appropriation for judicial pay along the lines of similar arrangements in some other jurisdictions.

9. We further **recommend** that the authority to create judicial posts at directorate level should be vested in the Chief Justice or the Judiciary Administrator subject to rules and limits to be drawn up. The Chief Executive will retain the authority to make judicial appointments on the recommendations of the Judicial Officers Recommendation Commission.

Mechanism

Comparison with the Civil Service

10. Having regard to new developments in the past few years, we are of the opinion that the traditional link between judicial and civil service pay systems is no longer desirable and practical. The opportunity should be taken to de-link or unpeg judicial remuneration from the civil service pay.

Comparison with the Private Sector

11. Whilst it is possible to compare judicial pay with the pay of the private sector legal practitioners, it would be important to understand the differences between the two sectors in their respective responsibilities, working conditions and pay systems before making comparisons.

Balanced Approach

12. We therefore **recommend** a balanced approach taking into account a basket of factors including but not limited to private sector and public sector remuneration. The basket of factors include –

(a) private sector pay levels and trends;

(b) the responsibility, working conditions and workload of judges vis-à-vis those of lawyers in private practice;

(c) the benefits and allowances enjoyed by judges and judicial officers;

(d) the retirement age of judges and judicial officers and their retirement benefits;

(e) recruitment and retention in the Judiciary;

(f) public sector pay as a reference;

(g) cost of living adjustments;

(h) the general economic situation in Hong Kong; and

(i) prohibition against return to private practice in Hong Kong.

13. We further **recommend** that a mechanism be introduced for the collection and analysis of the earnings of private legal practitioners for reference. In this connection, benchmark studies should be conducted every three to five years to check whether the judicial pay is kept broadly in line with the movements of private sector earnings over time. During the intervening years, annual reviews should be conducted to see whether and how the judicial pay should be adjusted.

Methodology

14. We **recommend** that the Judicial Committee, or the independent statutory body to be established in the future, may consider collecting information on private sector earnings in consultation with the Judiciary and the legal profession. Possible methods include conducting surveys and compiling relevant information on the earnings of senior counsel and applicants for judicial appointments.

Way Forward

15. We will proceed with conducting a pilot benchmark survey in the last quarter of 2005.

Chapter 1

Introduction

(This chapter gives an account of the events that have led to the current study on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration in Hong Kong.)

Background

1.1 The Standing Committee on Judicial Salaries and Conditions of Service (Judicial Committee) was established in December 1987 in recognition of the independent status of the Judiciary and the need for the pay and conditions of service for judges and judicial officers to be dealt with separately from those of the civil service. In practice, the Judicial Committee shared the same membership as the Standing Committee on Directorate Salaries and Conditions of Service prior to January 2004. Conventionally, judicial salaries have been pegged to civil service salaries and no benchmark studies have ever been conducted. Annual adjustments to judicial pay have, until October 2002, followed those made to the upper salary band of the civil service.

1.2 The introduction of the new Accountability System in Government in July 2002, the reduction of civil service pay by legislation and the possible introduction of performance pay to the civil service pay system have cast doubt on the propriety of maintaining the close relationship traditionally existed between judicial and civil service remuneration and pay adjustment mechanism.

1.3 In view of the independent status of the Judiciary, the Administration has been in discussion with the Judiciary for some time on the establishment of a new institutional structure, mechanism, as well as the appropriate methodology for the determination and revision of judicial pay and conditions of service. Pending a decision on this new system, it was decided that the pay reductions for the civil service with effect from 1 October 2002, 1 January 2004 and 1 January 2005, should not be applied to judges and judicial officers in the relevant pay reduction legislation. The understanding is that once this new structure is in place, an assessment should be made within that structure as to whether the pay reductions

applicable to the civil service should also be applied to the judicial service, and if so, from what date.

1.4 On 23 April 2003, the Chief Justice submitted to the Chief Executive the Judiciary's proposal for the determination of judicial remuneration, based on a consultancy study (by Sir Anthony Mason) commissioned by the Judiciary. A list of the nine recommendations of the Mason Report is at **Annex A**.

1.5 In late 2003, the Chief Executive decided to reconstitute the Judicial Committee and extend its terms of reference to include the following –

> "To advise and make recommendations to the Chief Executive on matter concerning the system, institutional structure, methodology and mechanism for dealing with judiciary salaries and conditions of service which the Chief Executive may refer to the Committee."

1.6 We were subsequently appointed to the new Committee on 31 December 2003 for a term of two years with effect from 1 January 2004 under a revised set of terms of reference. A list of current membership is at **Annex B**. The original and the revised terms of reference are at **Annex C**. The Committee continues to be supported by the Joint Secretariat for the Advisory Bodies on Civil Service and Judicial Salaries and Conditions of Service.

1.7 On 20 January 2004, the Chief Executive approached the Chairman inviting the Committee to undertake an independent study on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration, and in particular to make recommendations on whether the Judiciary's proposal based on its consultancy study (i.e. the Mason Report) should be accepted. The letter from the Director, Chief Executive's Office is reproduced at **Annex D**.

The Study

1.8 We conducted our study in two phases. The first phase focussed on commenting on the Mason Report. The second phase sought to formulate a framework on the institutional structure, mechanism and methodology for the determination of judicial remuneration.

1.9 During the first phase, we considered it important to review the history and current practices of other jurisdictions, the characteristics of different systems, and their relative merits on the issues raised in the Mason Report so as to better advise the Chief Executive. To this effect, we considered it desirable to commission a consultancy study by an academic with legal background, but who has no direct involvement with the local Bench. The consultant should also be familiar with the local situation and the Basic Law.

1.10 Professor Albert H Y Chen of the Faculty of Law, the University of Hong Kong, a Member of the Law Reform Commission of Hong Kong and the Basic Law Committee, was commissioned on 3 June 2004 to conduct the consultancy study. His brief includes the following –

(a) to review and comment on the Judiciary's proposal based on the Mason Report and its recommendations, including the empirical data, analysis and recommendations therein, and to conduct supplementary research where necessary, having regard to –

(i) the systems and practices for the determination and revision of judicial pay and conditions of service in other jurisdictions;

(ii) the pros and cons of the systems adopted by such other jurisdictions;

(iii) what would be an appropriate system for the determination and revision of judicial remuneration for Hong Kong, bearing in mind the Basic Law implications;

(b) to examine the relevant international norms relating to judicial remuneration, as well as the systems and practices in selected jurisdictions (including those belonging to the civil law family of legal systems and those that have newly established constitutions) not directly covered by the Mason Report; and

(c) to formulate different options for the consideration of the Judicial Committee, addressing the pros and cons of each option.

1.11 Professor Chen's study covered some 70 countries including both Common Law and Civil Law jurisdictions. He submitted his report (see **Annex E**) to us on 19 September 2004. We thank Professor Chen for his wide-ranging and learned research. Professor Chen's researches do indicate that solutions adopted by individual communities invariably derived from their individual constitutional and fiscal systems, and their particular economic, social and political circumstances. Therefore, we have cautioned ourselves that we do not have direct comparisons and must look to the particular circumstances of our own community for solutions.

1.12 We have examined the Judiciary's proposal in the light of the Mason Report and Professor Chen's report. Having considered both the overseas experience and local situation, we have summarised our observations and recommendations in Chapter 2.

1.13 Before proceeding to the second phase of our study, we made known to the Chief Executive our initial findings. In response, the Chief Executive's Office drew our attention to the appeals to the Court of Final Appeal in connection with the propriety of pay reductions for civil servants and other specified public officers, and asked the Committee to consider the implications, if any, of the decision of the Court of Final Appeal before making recommendations to the Administration.

1.14 Working in tandem, we pressed ahead with the second phase of our study and commissioned a human resource consultant, the Hay Group, to offer advice on the design of an appropriate institutional structure, mechanism and methodology for the determination and revision of judicial remuneration, having regard to overseas practices, the Hong Kong situation and other relevant factors. The study was completed in September 2005. In the light of the findings and recommendations in Professor Chen's study and the Hay Group's report, we propose a new institutional structure, mechanism and methodology for the determination of judicial remuneration as set out in Chapter 3.

1.15 In drawing up our recommendations, we have taken into consideration the implications of the judgment of the Court of Final Appeal, which was delivered on 13 July 2005. We have also noted the views of the Legislative Council Panel on Administration of Justice and Legal Services on the Mason Report and the budgetary arrangements for the Judiciary.

Chapter 2

Consideration of the Judiciary's Proposal as Depicted in the Mason Report

(This chapter affirms the Committee's support for judicial independence. It also records Members' views on the recommendations in the Mason Report.)

Judicial Independence

2.1 We fundamentally premise our report on the pivotal importance of judicial independence in any society. It is, as Professor Albert H Y Chen pointed out in his consultancy study, 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.[1] Such independence includes independence from the executive and legislative branches of Government as well as independence from other institutions, organisations or forces in society and enables the court to adjudicate cases in a fair and impartial manner by ascertaining the facts objectively and applying the law properly.[2]

2.2 We believe the Administration, like us, recognise the pivotal importance of judicial independence to our community. It is our shared belief that judicial independence is one of the core values of any modern society. It is an important cornerstone of continuing prosperity and stability of our community. Indeed, the Basic Law incorporates a separation of powers. The principle of judicial independence and the institution of an independent Judiciary are constitutionally entrenched and widely respected in Hong Kong. For Hong Kong to maintain its position as Asia's World City, our judicial system should continue to carry features of best practices adopted by other jurisdictions.

2.3 We also agree with the observation that the essential conditions of judicial independence include security of tenure, financial

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1 Professor Albert H Y Chen, *The Determination and Revision of Judicial Remuneration : Report of a Consultancy Study* ("Chen Report") (September 2004), Chapter 1, para 1.01.

2 Ibid, Chapter 1, para 1.03.

security and the institutional independence of the judiciary with respect to matters of administration bearing directly on the exercise of its judicial function.[3]

2.4 Viewed in this light, the Mason Recommendations are in line with such vital principles. They are fundamentally premised on the need for Hong Kong to make a total commitment to the requirements of judicial independence. We are in total agreement with this premise. We do not think that we need to repeat, nor in summary repetition will we do justice to, the learned expositions of judicial independence in the context of the historical and present day debates attending the subject of judicial remuneration by both the Honourable Justice Mason and Professor Chen. These expositions will, we believe, greatly assist the public discussion which should attend the implementation of the Mason Recommendations. From our point of view, we see the need for Hong Kong to ensure that we have a system for determining judicial salaries which makes the strongest possible statement of our community's commitment to ensuring the independence of the Judiciary.

2.5 On the other hand, we also subscribe to the premise that while in general, judicial remuneration should not be reduced during the continuance of judicial office, this general rule may be subject to exceptions applicable in extreme conditions, for example, when judicial remuneration is reduced during a general economic downturn when other personnel being paid from the public purse are having their salaries reduced. This is in line with the theoretical considerations, international norms and overseas experience as discussed in Professor Chen's report.

2.6 Such reduction could also be a voluntary act that demonstrates the need for members of the public service (including judges) to share the community's burden during hard times. As our learned consultant, Professor Chen, has pointed out, this happened in Australia during the Great Depression and more recently, in Japan and Singapore.[4] We do not know whether subtle pressure (overt political pressure would have been unthinkable in those countries cited) had been put on the judges in those instances, but we would be prepared to assume that the economic conditions in those jurisdictions were adverse and the community expectations were so clear, that it was well possible that the initiative came from the judges.

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[3] See Chapter 1, para 1.10 of the *Chen Report*.

[4] Ibid, Chapter 5, paras 5.04-5.05 and Chapter 7, para 7.15.

2.7 Thus, the more pertinent question is not whether such reductions are inconsistent with the principles of judicial independence, but how they are implemented.

2.8 Judging from the detailed research in Professor Chen's report, we have arrived at the same conclusion that while theoretically it is doubtful that judicial independence will be perceived to be threatened by a reduction in judicial salaries which is general and non-discriminatory and is widely perceived in the community as being justified, it has at no time been easy to find a process which is not in any way politicised and that judges are not under any actual or perceived political or community pressure.

2.9 We have therefore concluded that there are inherent risks associated with a decision to reduce (or ask for voluntary reduction of) judges' salaries in Hong Kong. We **recommend** that judicial pay be frozen at the present level for the time being and be reviewed when the new institutional structure, mechanism and methodology are put in place and new benchmarks established within that structure.

Legislation to Prohibit Reduction of Judicial Remuneration

2.10 In the light of our foregoing conclusions, we now consider the question as to whether or not legislation should be introduced to prohibit absolutely any reduction in judicial remuneration (i.e. **Recommendation One** of the Mason Report).

2.11 We note that the principle that judges should not be disadvantaged in terms of remuneration while in office has been widely accepted in Common Law jurisdictions as a necessary safeguard for judicial independence.[5] This principle has been entrenched in many constitutions[6] and where such principle has not been constitutionally entrenched, this has been accepted as a convention that is fundamental to the protection of judicial independence. However, as with all principles, there would, and did, come a point in time, when extreme circumstances in society tested their limits. We mentioned earlier that even in jurisdictions which have constitutionally entrenched provisions absolutely prohibiting reduction of judicial salaries, dire economic difficulties had resulted in

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[5] See the citation in the *Chen Report* from Roberts-Wray, *Commonwealth and Colonial Law*, Chapter 7, para 7.04.

[6] See Chapter 7 of the *Chen Report* and Chapters 3- 4 of the *Mason Report.*

judicial salaries being cut voluntarily in line with similar cuts that were applied to the public service.

2.12 Where reduction of this kind takes place, we accept Sir Anthony Mason's note of caution that a system which places the onus on judges to agree to a reduction, is open to the exertion of political pressure on the judges. It is one thing for judges to offer a voluntary reduction as has happened in other jurisdictions and quite another to make a public call on judges to offer a reduction.

2.13 The need to avoid any political pressure being put on judges is of pivotal importance. In the case of Canada where there is no constitutionally entrenched prohibition against reduction of judicial salaries, there was extensive jurisprudence on the way to treat judicial salaries when the economic difficulties were so great that the entire public service including judges were expected to bear the community's burden by a reduction of salaries accomplished by legislation which applied to the entire public service. The Canadian Supreme Court, through the leading opinion of Chief Justice Lamer,[7] expressed the view that while it was constitutionally permissible to pass legislation to make a general and non-discriminatory reduction in salaries, the reduction must be accomplished in a way which is calculated to avoid any political pressure being put on the judiciary. The constitutional "sieve" of an independent salaries commission was regarded as a necessary safeguard. Subsequently, not only was the safeguard of independent salaries commissions generally adopted in Canada, but there was also widespread use of the "grandfathering" approach (i.e. changes are only applicable to new appointees after a certain date and the salaries of serving staff are frozen pending positive setoffs in future reviews) in freezing the salaries of existing judges as an indirect means of reducing judicial salaries.[8]

2.14 In addition, Professor Chen has also argued persuasively in Chapter 8 of his report that enacting legislation modelled on the format of the United Kingdom (UK) is neither relevant nor necessary as long as the present position in Hong Kong is maintained.[9]

2.15 We believe that although there is no constitutional entrenchment in the Hong Kong Special Administrative Region (HKSAR) of the principle of not disadvantaging judges in relation to their salaries

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7 See Chapter 6, para 6.08 of the *Chen Report.*

8 Ibid, Chapter 6, para 6.22.

9 Ibid, Chapter 8, para 8.45.

while in office, the principle is so fundamental in safeguarding judicial independence and so universally accepted in Common Law countries, that in all its public actions, the HKSAR should seek to promote the same principle. However, since pay reduction cannot be implemented without legislation, and the recommendations which we are making will go a long way to confirm the principle of judicial independence, we do not consider it essential to adopt Recommendation One at this point in time. We do however note that there is a degree of community support for this recommendation. Should there be general support from the community to this recommendation, then it might be appropriate for the Administration to consider whether or not to introduce legislation in the future.

Standing Appropriation for the Payment of Judicial Remuneration

2.16 Turning to the proposal of establishing a standing appropriation to meet the payment of judicial remuneration (**Recommendation Two** of the Mason Report), we are aware that this is consistent with the practice in many Common Law jurisdictions. The practice can be found both in countries whose constitutions contain a prohibition of reduction of judicial remuneration (e.g. Singapore and Australia), and in those without such a constitutional prohibition (e.g. UK and Canada). This means that standing appropriation, as a means to securing judicial remuneration by law, can be considered for implementation separately from other considerations such as prohibition of reduction of remuneration. It can be regarded as an important institutional guarantee for financial security of the Judiciary.

2.17 Taking UK as an example, we note that the salaries of judges are charged to the Consolidated Fund by statute so that they need not be subject to the annual appropriation vote in Parliament, alongside other estimates of public expenditure. The Supreme Court Act of 1981 establishes the number of judges[10] in the Supreme Court and delegates to the Lord Chancellor the power to adjust salaries with the proviso that these adjustments cannot be less than the salaries payable to judges at the commencement of the Act, such salaries to be charged on and paid out of the Consolidated Fund.[11] This legislation preserves the principle of accrued rights (namely, the right to a salary from a contract of employment shall not be abridged except by another Act of Parliament) as well as the

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[10] Sections 2 and 4 of the 1981 Supreme Court Act.

[11] Ibid, Section 12.

principle that judges should not be disadvantaged in terms of remuneration while in office, and at the same time, makes a standing appropriation for the salaries of judges. However, in relation to other allowances, monies have to be provided by Parliament [12] and pensions must be paid in accordance with the Judicial Pensions Act.[13]

2.18 Fiscal practice is different in Hong Kong. The salaries of judges in Hong Kong are not provided for by legislation. As in the case of civil servants' pay, judicial pay is legally determined as part of the contractual arrangement between the individual judge and the Administration, and adjusted annually through the appropriation processes of the Appropriation Ordinance and the Public Finance Ordinance. The existing funding process is as follows –

(a) judicial posts are funded, together with the supporting staff and general expenses of the Judiciary, under Head 80 of the General Revenue Account, which obtains funding either through the annual appropriation process or the interim process established under Section 8 of the Public Finance Ordinance;

(b) judicial posts are included in the annual Estimates in the first instance and established on an as-needed basis, by the Legislative Council following detailed examination of proposals from the Judiciary Administrator by the Establishment Sub-Committee of its Finance Committee in respect of posts equivalent to civil service posts at the directorate level, and by the Judiciary under delegated authority in respect of those below this level (only a few); and

(c) applicable pay levels and conditions of service are drawn up by the Government on the advice of the Standing Committee on Judicial Salaries and Conditions of Service and the necessary funding, approved by the Legislature as part of the annual or supplementary appropriation process.

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[12] See Section 12(6) of the 1981 Supreme Court Act.

[13] Ibid, Section 12(7).

2.19 We believe that the time has come and there is good justification for a fiscal guarantee for the payment of judicial salaries. Judges are often called upon to determine the legality of legislation and it is not impossible to conceive of people seeking judicial intervention during the legislative process itself. Thus, protecting judicial salaries from the annual appropriation exercise by the legislature is an important advancement in the cause of judicial independence. We therefore recommend that consideration be given to establishing a standing appropriation for judicial remuneration in Hong Kong. In arriving at this decision, we are fully aware that such standing appropriation does not exist in the local fiscal policy, nor in the public finance control system. Expenditure and revenue are normally budgeted for and appropriated through the General Revenue Account. There are also eight funds[14] set up by resolutions passed by the Legislative Council for holding government investments or financing capital expenditure and government loans but none is for meeting recurrent expenditure. Despite this, as standing appropriation is useful in underscoring the importance of the Judiciary and its independence, it is worthy of consideration.

2.20 We note from the overseas experience that standing appropriation only covers salaries and not allowances which are constituents of the total remuneration package. In Hong Kong, as judges are given the choice in receiving some benefits (e.g. housing) in cash or in kind, it is difficult and indeed inappropriate to include the requirement in a standing appropriation.

2.21 We believe that an alternative arrangement can be introduced to bring about early improvements. We see that civil service and judicial pensions are protected by legislation through a charge on the General Revenue.[15] As a result of this protection, although annual expenditure is funded under Head 120 Pensions of the General Revenue Account through the annual appropriation process, the legislature has limited influence on the funding as the requirement represents the estimated cashflow for that year and the funds appropriated is not cash-limited, i.e. depending on the actual need, supplementary provision will be provided during the course of the year. In other words, the legislature is in no position to limit actual spending under this vote on political or savings considerations.

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[14] The eight funds are : Capital Works Reserve Fund, Capital Investment Fund, Disaster Relief Fund, Innovation and Technology Fund, Land Fund, Loan Fund, Lotteries Fund and Civil Service Pension Reserve Fund.

[15] Sections 4 and 5 respectively of the Pensions Ordinance and the Pension Benefits (Judicial Officers) Ordinance.

2.22 We consider that the purpose of a standing appropriation could similarly be accomplished by considering making judicial remuneration a separate charge on the General Revenue. Actual recurrent funding for judicial salaries can continue to be made under the General Revenue Account. As this is essentially an estimate of the likely cashflow for the following year and the provision is not limiting on expenditure in the light of the charge, going through the appropriation process will only be a procedural formality.

2.23 As regards creation of judicial posts equivalent to civil service posts at the directorate level, there may be merits in reviewing the existing practice of seeking approval from the Finance Committee of the Legislative Council. We recommend that, within certain rules and limits to be drawn up, the Chief Justice or the Judiciary Administrator could be delegated with the authority to create and delete judicial posts. He should exercise this authority on the advice of the independent body on judicial salaries and conditions of service. Such an arrangement is not entirely original. Similar practices are being adopted by the Housing Authority (in creating Housing Authority posts as against civil service posts in the Housing Department, its executive arm), the Legislative Council Commission and the Office of the Ombudsman.

Determination of Judicial Remuneration

2.24 **Recommendation Three** of the Mason Report was that judicial remuneration should be fixed by the Executive after considering recommendations by an independent body. To do so would accord the necessary respect for judicial independence and the responsibility of the Administration to draw up and introduce budgets for the expenditure of public money. It also respects the responsibility of the Legislature to examine and approve budgets and public expenditure. Since direct negotiation between the Administration and the Judiciary about judicial remuneration is inconsistent with judicial independence, having an independent body making recommendations to the Chief Executive is desirable.[16]

2.25 We strongly endorse the need for an independent body to advise on judicial remuneration. Such a body should be independent of the Administration or the Legislature. As it is already the existing practice that the Administration draws up and introduces the budget for the Legislature

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[16] See Chapter 6, para 6.15 of the *Mason Report.*

to examine and approve, the Mason Report recommendation should present no practical problem. We support this recommendation.

Statutory Body

2.26 **Recommendation Four** of the Mason Report was that the independent body should be established by statute. It should have the power to commission surveys, reports, job evaluation studies and academic research as it may consider appropriate, and to consult with interested bodies.[17]

2.27 We are of the opinion that an independent body having a fair and transparent methodology to advise on the determination and adjustment of judicial remuneration would best safeguard judicial independence. This body, if established by statute in due course, will highlight the importance the community attaches to judicial independence.

2.28 Whilst endorsing the underlying principles of Recommendation Four, we also note that the existing system of having the Judicial Committee advising on judicial remuneration has functioned well. As pointed out by Professor Chen in his report, the Hong Kong system of judicial remuneration has apparently worked well so far, in comparison with some systems elsewhere which resulted in dissatisfaction, political controversies and even litigation.[18] Therefore, the choice of timing for the introduction of legislation should be left to the Administration.

2.29 Nevertheless, pending the introduction of legislation to transform the existing Judicial Committee into a statutory body, with members' terms of appointment staggered, we believe there is merit in giving prompt consideration to implementing our recommendations in the ensuing paragraphs of this report which are equally applicable to a statutory or non-statutory independent body.

Role of Independent Body

2.30 **Recommendation Five** of the Mason Report stated that the independent body's role should be confined to judicial remuneration exclusively.[19] We agree.

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[17] See Chapter 6, para 6.20 of the *Mason Report.*

[18] See Chapter 8, para 8.06 of the *Chen Report.*

[19] See Chapter 6, para 6.21 of the *Mason Report.*

2.31 While we noted the argument in Professor Chen's report that there are advantages in having a "generalist" body modelled on the UK Review Body on Senior Salaries, the Australian Remuneration Tribunal and the New Zealand Higher Salaries Commission which, apart from dealing with judicial remuneration, also make recommendations on or determine the salaries of senior civil servants, ministers and Members of Parliament, we take the view that the independent body's role should be confined to handling judicial remuneration exclusively. To do otherwise would not further our cause of emphasising judicial independence in Hong Kong. In any event, we do not think the judicial salaries should be pegged to civil service salaries.

Membership of the Independent Body

2.32 **Recommendation Six** of the Mason Report stated that members of the independent body should be appointed by the Executive. The Report recommended a membership of five and that the statute should contain provisions relating to membership such as providing for members from the legal profession and for members possessing certain experience and expertise, those ineligible for membership, terms of office and grounds for removal.[20]

2.33 We discussed in detail the proposed membership, in particular whether practising lawyers should be members. We noted Professor Chen's discourse on Professor Winterton's writing about the constitution of a proposed judicial remuneration tribunal for both federal and state judges in Australia which suggested that practising lawyers working in the courts, whether as barristers or solicitors should preferably be ineligible. The reasons for the exclusion were not articulated by Professor Winterton. Professor Chen's interpretation was that judicial independence or the perception of such might be adversely affected by having practising lawyer members who are in a position to determine the remuneration of judges representing clients and arguing cases before the courts.[21]

2.34 On the other hand, Professor Chen also pointed out that such concerns might be minimised if the size of the independent body was larger.[22] Drawing on the experience of the Judicial Officers

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[20] See Chapter 6, para 6.23 of the *Mason Report.*

[21] See Chapter 8, para 8.36 of the *Chen Report.*

[22] Ibid, Chapter 8, para 8.36.

Recommendation Commission (JORC) which makes recommendations to the Chief Executive on matters relating to the filling of vacancies in judicial offices, representations from judicial officers concerning conditions of service, etc., we can see merits in including practising lawyers although they should not be in the majority. They have been appointed to the JORC through recommendations by the Hong Kong Bar Association and the Law Society of Hong Kong and the arrangement has worked well so far. In addition, a full-time academic may be considered for membership notwithstanding that he or she holds a practising certificate as a lawyer.

2.35 In any case, to allay any unnecessary concern, we recommend that the number of members for the independent body should be increased to seven. The exact length of fixed term of appointment can be decided later, but it is important that appointments be staggered so that fresh inputs can be introduced on a regular basis.

2.36 Finally, we believe that the suggestion in the Mason Report that no member of the independent body should be allowed to serve concurrently as a member of any other body assessing civil service remuneration, would serve the process less well. We agree with Professor Chen's observation that there is nothing in the form of experience of Hong Kong, UK, Australia and New Zealand to indicate that this is an unsatisfactory arrangement. On the contrary, some shared membership encourages "cross-fertilisation" of ideas. Such members tend to have a wealth of business and public service experience that would help in the salary determination process, and vice versa. Common members could therefore serve as the bridge for such ideas. Past experience in Hong Kong has indicated that such members are most likely to be perceived as fair and independent, as guardians of the public interests rather than as advocates of the interests of particular groups of persons paid from the public purse.

Methodology

2.37 **Recommendation Seven** of the Mason Report stated that whilst the prescription of a formula for a methodology to determine judicial remuneration is not practical, some factors should, nevertheless, be specified in the statute. Ten such factors, ranging from the maintenance of judicial independence, judicial standing in the community, to comparisons with public and private sector remunerations were listed.

2.38 We agree with the thrust of this Mason recommendation and recommend that the principles therein contained be adopted as guidelines for the independent body pending the introduction of legislation. However, we would caution against overly detailed definition of the factors. In Chapter 3, we will set out relevant factors to be taken into account in determining judicial remunerations.

Performance Pay and Productivity Bonus

2.39 **Recommendation Eight** of the Mason Report noted that as with the private sector, performance pay and productivity bonuses are becoming increasingly an element in public sector remuneration in many jurisdictions. However, such should not form part of judicial remuneration.

2.40 We have no dispute as to this. We observe that this is one of the initiatives of the Civil Service Reform, but has yet to be implemented in the civil service.

Transparency of Pay Determination Procedure

2.41 Regarding the **Ninth** and final **Recommendation** of the Mason Report that the independent body should adopt a procedure which is transparent and its report containing its recommendations to the Executive should be published; we fully agree with this recommendation, bearing in mind public expectation over transparency in all aspects of public governance and administration of justice in Hong Kong.

Chapter 3

Institutional Structure, Mechanism and Methodology for the Determination of Judicial Remuneration

(This chapter presents our recommendations on the institutional structure, mechanism and methodology for the determination of judicial remuneration.)

3.1 In his letter of 20 January 2004, the Chief Executive asked the Judicial Committee to make recommendations on whether the Judiciary's proposal based on the Mason Report should be accepted. This we have done in the previous chapter. The Chief Executive in the same letter also asked the Judicial Committee to make recommendation to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration. These two issues are intertwined. For completeness, we set out in this chapter our recommendations in full, even at the risk of recapitulating some of the points already covered in earlier parts of this report. In formulating our recommendations, we have considered the overseas experience and the local situation in the light of the findings and recommendations of the studies carried out by Professor Chen and the Hay Group.

Institutional Structure

Independent Body

3.2 Central to our proposed institutional structure is an independent body to advise on judicial remuneration. Our recommendations are set out below –

(a) The independent body should be dedicated to matters relating to the structure, pay and conditions of service of judges and judicial officers. This body should be entitled to make independent judgments having regard to factors that are unique to the Judiciary, and can adopt mechanisms and processes that may not be applicable to other public service jobs.

(b) As mentioned in paragraphs 2.26 to 2.29, the independent body should, in due course, be established by statute. This will not only strengthen the status of the body, but also highlight the importance the community attaches to safeguarding judicial independence in Hong Kong. It can also enhance the transparency of the body through the mechanism enshrined in the statute. But pending the introduction of legislation, all the features pertaining to the independent body as recommended in the Mason Report should, subject to our comments in this report, be adopted.

(c) The body should be advisory in nature. The authority for the determination of judicial remuneration should continue to be vested in the Chief Executive of the Hong Kong Special Administrative Region. The body should carry out its functions and exercise its powers as prescribed by its terms of reference and in due course, by relevant legislation. The advice tendered by this body and the Chief Executive's decision shall be made public.

(d) The independent body should comprise seven non-official members, with one practising solicitor and one practising barrister. To avoid real or perceived conflict of interest, serving or retired judges should not be appointed.

(e) Appointments should be staggered so that fresh inputs can be introduced on a regular basis.

(f) To allow cross-fertilisation of ideas and expertise, it should be permissible for some members of the independent body to serve on other public bodies including JORC and advisory bodies on civil service salaries and conditions of service.

3.3 The above recommendations can be achieved by expanding the existing Judicial Committee and by promulgating more detailed terms of reference in accordance with the recommendations made in this report and transforming the same into a statutory body through introducing legislation in due course.

3.4 The functions of the new independent body should largely follow those of the Judicial Committee. Its primary responsibility is to

ensure that the judicial remuneration is sufficient to attract and retain legal professionals of suitable calibre for the respective ranks in the Judiciary. In tendering its advice to the Administration on issues relating to pay and conditions of service, the body should have regard to the following considerations –

(a) the need to maintain an independent Judiciary of the highest integrity;

(b) the ability to attract and retain people with suitable calibre;

(c) the general economic situation in Hong Kong;

(d) competitiveness with private sector legal professionals' income;

(e) public sector pay as a reference;

(f) differences in remuneration structures, including benefits and allowances, between the Judiciary and the private and public sectors; and

(g) the relative levels of responsibility of judicial offices compared to each other.

3.5 We have also reviewed the secretariat support it needs to facilitate its work and to ensure its independence. We believe that such support may continue to be provided by the Joint Secretariat as it does at the moment in respect of the Judicial Committee. Our experience is that the existing Joint Secretariat has proved to be able to render support services to several related advisory bodies concurrently without compromising the independence and individual characteristics of any one of them.

Standing Appropriation

3.6 An underlying feature of judicial independence is fiscal autonomy. As elaborated in paragraphs 2.16 to 2.23, we **recommend** that, as an additional safeguard of judicial independence, the Administration should, in due course, consider introducing standing appropriation for judicial pay along the lines of similar arrangements in some other jurisdictions such as the United Kingdom. The Administration would need to work closely with the Judiciary in developing appropriate parameters and arrangements agreeable to parties concerned.

3.7 We further **recommend** that the authority to create judicial posts at directorate level should be vested in the Chief Justice or the Judiciary Administrator through further delegation of authority from the legislature subject to rules and limits to be drawn up. This is in line with the fiscal arrangements for some independent bodies such as the Ombudsman. The Judicial Committee or the new independent body may continue to play an advisory role in this regard. It is noteworthy that the Chief Executive will retain the authority to make judicial appointments on the recommendation of JORC.

3.8 Increased autonomy must be accompanied by enhanced accountability. As the Judiciary is publicly funded, it is right for the community to expect the Judiciary to continue to exercise due diligence in ensuring prudent financial management in performing judicial functions. We note that, during the past few years, the Judiciary has contributed to sector-wide efforts to reduce public expenditure without compromising the quality of justice. Similar to the Executive, the Judiciary has endeavoured to cope with the budgetary constraints by re-engineering, organizational restructuring and re-prioritizing. In delegating further authority to the Judiciary regarding the creation of judicial posts, it is for consideration whether additional safeguards should be enshrined in relevant documents to specify the scope of such authority. The Audit Commission will continue to keep a watchful eye on the Judiciary, in the same manner as for other public organizations.

Mechanism

Comparison with the Civil Service

3.9 Chapter 2 of the Mason Report already depicts in some detail the judicial service pay system in Hong Kong. One of the distinct features of the current system is an informal "peg" between the salaries of senior civil servants and judges and judicial officers. This peg is described at length in Chapter 8 of Professor Chen's report, in particular, paragraphs 8.04 to 8.07. There is little to be gained by repeating the background facts here.

3.10 However, three new developments in the past few years, namely, the introduction of the Accountability System in Government in July 2002, the reductions of civil service pay by legislation and the possible introduction of performance pay to the civil service pay system, have cast

doubts on the desirability and practicability in maintaining the traditional link between judicial and civil service pay systems.

3.11 After careful consideration, we have recommended in Chapter 2 that the pay reduction for civil servants should not be applied to judges and judicial officers. In fact, we are of the opinion that the opportunity should be taken to de-link or unpeg judicial remuneration from the civil service pay. A new mechanism for determining judicial remuneration should instead be established with a view to avoiding further disputes on why judicial salaries had not followed the reduction of civil service pay under the existing system.

3.12 In considering the issue of de-linking, we are aware that the proposal might create other problems in relation to the comparisons with the private sector. We shall come back to this point later. We have also debated on the notion that civil service pay points could remain a good reference for determining judicial salaries. In this regard, as Professor Chen has also pointed out in his research, some kind of informal pegging with civil service pay can help depoliticise the issue and judges would not be seen to be discriminated or favoured under the system.

3.13 Notwithstanding the above, we have come to the conclusion that while some reference to civil service pay is beneficial, pegging is not appropriate. De-linking the judicial remuneration from that of the civil service will not only strengthen the perception of judicial independence but also provide the necessary safeguard and reassurance to judges and judicial officers, as far as future movements of judicial remuneration are concerned.

3.14 Our conclusion has also taken into account the fact that the rationale for adopting direct comparison with the civil service is no longer justified because –

(a) judges and judicial officers now largely came from the private sector, unlike previously when many were promoted through the ranks or recruited within the legal sectors of the civil service;

(b) judges do not take part in the collective bargaining process which the Administration has established with the civil service unions and staff associations; and

(c) judges at District Court and High Court have to renounce their right to return to private practice in Hong Kong after leaving the Judiciary. Consent may be given by the Chief

Executive, although in practice this has not been granted. In the case of judges of the Court of Final Appeal, there is in addition a statutory prohibition against return to private practice in Hong Kong which is absolute (i.e. irrespective of consent from the Chief Executive).

3.15 In a more recent development, we have noted the judgment of the Court of Final Appeal, which confirmed that the civil service pay reductions effected by legislation were consistent with the relevant provisions of the Basic Law, including Article 100. It is noteworthy that Article 93 of the Basic Law, which is related to judicial pay, closely mirrors Article 100, which concerns the civil service. It may appear that a reduction of judicial salaries by legislation in line with the civil service pay cuts would not contravene the Basic Law. However, consistent with our view that judicial remuneration should be de-linked from civil service pay, we **recommend** that the pay reductions for civil servants must **not** be automatically applied to judges and judicial officers. We also **recommend** that the judicial pay should be frozen at the current level and that the civil service pay trend in recent years be noted and taken into account, alongside other relevant factors, in reviewing judicial remuneration in the future.

3.16 We have explored whether the freeze should apply to incumbent judges and judicial officers only. Given the small population of serving judges and judicial officers, the limited intake of new blood in recent years and the importance of collegiate spirit within the cadre, we consider it appropriate to retain a single pay scale for all judges at any one time. In other words, new recruits will also be remunerated based on the prevailing pay scale as applicable to serving judges.

Comparison with the Private Sector

3.17 Whilst it is possible to compare judicial pay with the pay of private sector legal practitioners, there are certain problems with this approach. The responsibility and working conditions of judges and judicial officers are different from that of private legal practitioners. Furthermore, unlike the judicial pay system which is founded on the principles of stability and progression, private sector pay varies significantly depending on expertise, fields of practice, the economic climate and demand and supply. At the upper end, the highest earning lawyers would earn significantly higher incomes than judges but their work is in certain respects different from judicial work and hence direct comparison is impossible. Comparisons made at the lower end of private sector pay might not be entirely relevant either as judges and judicial officers are not recruited from this group. Therefore, it would be important to understand

the differences before making comparisons, though, since the Judiciary draws from the private sector, private sector earnings should be one of the relevant factors.

3.18 Leaving aside the relevance and accuracy of the private sector data to be collected, private sector pay tends to be more volatile as it fluctuates in response to market trends, and as such should not be taken as a basis to adjust judicial remuneration. We do not consider that the community would like to see an unstable judicial pay system. Whether in principle or in practice, private sector pay cannot be the sole benchmark for determining judicial pay.

Balanced Approach

3.19 Having considered the strengths and weaknesses outlined above, we **recommend** a balanced approach taking into account a basket of factors including but not limited to private sector and public sector remuneration.

3.20 In recommending a new approach, we are conscious of the fact that the Judiciary has not encountered any apparent recruitment and retention problems in recent years. In fact, the Judiciary has achieved a measure of success in attracting private legal practitioners to join the Bench at senior levels. At present, 30 (or 81%) out of 37 judges serving at Court of First Instance and above joined the Judiciary at District Court level and above. As the current remuneration package is sufficient to enable the Judiciary to recruit and retain legal practitioners of suitable calibre for the respective ranks, we consider it appropriate to take the existing parity as a reference for determining judicial remuneration in the future.

3.21 We **recommend** the following –

(a) In advising on the level of judicial remuneration, the Judicial Committee or its successor should have regard to a basket of factors, including –

(i) private sector pay levels and trends;

(ii) the responsibility, working conditions and workload of judges vis-à-vis those of lawyers in private practice;

(iii) the benefits and allowances enjoyed by judges and judicial officers;

(iv) the retirement age of judges and judicial officers and their retirement benefits;

(v) recruitment and retention in the Judiciary;

(vi) public sector pay as a reference;

(vii) cost of living adjustments;

(viii) the general economic situation in Hong Kong; and

(ix) prohibition against return to private practice in Hong Kong.

(b) A mechanism should be introduced for the collection and analysis of the earnings of private legal practitioners for references with a view to checking whether the judicial pay is kept broadly in line with the movements of private sector earnings over time. In this connection, benchmark studies should be conducted every three to five years. A pilot survey should be carried out as soon as possible to establish the existing relativity with the private sector income, which will form the basis for future pay comparisons. In future benchmark studies, data will be collected to show whether the pay relativities are widening or narrowing over time. The proposed methodology of such surveys will be discussed in paragraphs 3.24 to 3.26.

(c) During the intervening years between two benchmark studies, annual reviews should be conducted to see whether and how the judicial pay should be adjusted. These reviews should make reference to readily available pay trend information from the Government, professional bodies and the private sector.

Pay Relativities within the Judiciary

3.22 The pay relativities among judges and judicial officers reflect their respective status, responsibility and experience level. There is a need to keep the position under review and the Judiciary is best placed to do it.

Fringe Benefits

3.23 Apart from salaries, judges are also entitled to a range of fringe benefits and allowances. We do not see any immediate need for any adjustment, but will keep the situation under review.

Methodology

3.24 With the assistance of our consultant, we have given consideration to alternative approaches to conduct benchmark studies on private sector earnings. We **recommend** that the Judicial Committee, or the independent statutory body to be established in the future, may consider collecting information on private sector earnings in consultation with the Judiciary and the legal profession. Possible methods include conducting surveys and compiling relevant information on the earnings of senior counsel and applicants for judicial appointments.

3.25 The private sector data will indicate the broad range of relativities between the judicial pay and the earnings in the private sector. They will also show the overall trend of private sector earnings. The comparison with private sector earnings will focus on three recruitment ranks in the Judiciary, namely Magistrates, District Judges and the Judges of the Court of First Instance. The pay for other levels of judges and judicial officers will be determined by internal relativities.

3.26 The data on the private sector earnings will not be translated into precise figures for determining the levels of judicial salaries. By conducting benchmark surveys and compiling relevant information on a regular basis, the changes in the pay relativities between selected judicial positions and the corresponding private sector legal positions will be systematically recorded. The data will facilitate the Judicial Committee or its successor in monitoring the private sector pay trends and considering whether and how adjustments to judicial pay should be made.

Way Forward

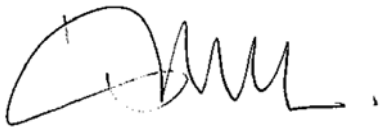
3.27 We will proceed with conducting a pilot benchmark survey in the last quarter of 2005.

Acknowledgements

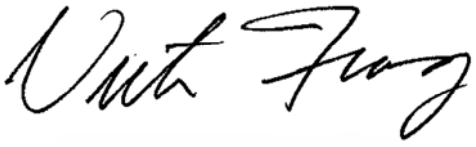
We would like to express our appreciation for all those who have contributed to the study by sharing valuable information or insights. They include Mr Philip Dykes, Chairman of the Hong Kong Bar Association, Mr Peter C L Lo and Mr Patrick Moss, President and Secretary General of The Law Society of Hong Kong respectively, as well as the Inland Revenue Department. We are grateful to Professor Albert H Y Chen of the University of Hong Kong for his well-researched report which provided us with comprehensive information on all aspects of the issues which the Committee was asked to look into.

Although the assignment was conducted independently, we have benefited from the contributions from the Chief Justice and the Judiciary Administrator. The assistance rendered is gratefully acknowledged.

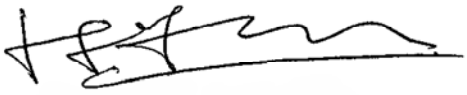
Finally, we would like to express our thanks to Mr Lee Lap-sun (Secretary General until 20 November 2004), Mr William Yuen (Acting Secretary General between 21 November 2004 and 27 February 2005) and Ms Michelle Li (Secretary General since 28 February 2005) of the Joint Secretariat for the Advisory Bodies on Civil Service and Judicial Salaries and Conditions of Service for assisting us in our deliberations and the preparation of this report.



(Christopher Cheng Wai-chee)
Chairman

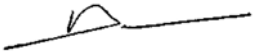


(Victor Fung Kwok-king)
Member



(Henry Fan Hung-ling)
Member

(Anthony Francis Neoh)
Member



(Herbert Tsoi Hak-kong)
Member

ANNEXES

Annex A

Recommendations of the Mason Report

1. Legislation should be enacted prohibiting absolutely any reduction in judicial remuneration.

2. Provision should be made by Ordinance for a standing appropriation to meet the payment of judicial remuneration.

3. Judicial remuneration should be fixed by the Executive after considering recommendations by an independent body.

4. The independent body should be established by statute.

5. The independent body's role should be confined to judicial remuneration exclusively.

6. The members of the independent body should be appointed by the Executive. The statute should contain provisions relating to membership such as providing for members from the legal profession and for members possessing certain experience and expertise, those ineligible for membership, terms of office and grounds for removal.

7. The methodology, that is the factors which should be considered, should be specified in the statute.

8. Performance pay and productivity bonuses should not form part of judicial remuneration.

9. The independent statutory body should adopt a procedure which is transparent and its reports containing its recommendations to the Executive should be published.

Annex B

Membership of the Standing Committee on Judicial Salaries and Conditions of Service

Chairman :

Mr Christopher Cheng Wai-chee, GBS, JP

Members :

Dr Victor Fung Kwok-king, GBS

Mr Henry Fan Hung-ling, SBS, JP

Mr Anthony Francis Neoh, SC, JP

Mr Herbert Tsoi Hak-kong, JP

Original Terms of Reference of the Standing Committee on Judicial Salaries and Conditions of Service (prior to 1 January 2004)

I. To keep under review the structure, i.e. the number of levels, and the pay rates appropriate to each rank of judicial officer together with the other conditions of service of judicial officers, and to make recommendations to the Chief Executive, Hong Kong Special Administrative Region; and

II. To conduct an overall review, when it so determines. In the course of this, the Committee should accept the existing internal structure of the Judiciary and not consider the creation of new judicial officers. If however, the Committee in an overall review discovers anomalies, it may comment upon and refer such matters to the Chief Justice, Court of Final Appeal.

Current Terms of Reference of the Standing Committee on Judicial Salaries and Conditions of Service (with effect from 1 January 2004)

I. The Committee will keep under review the structure, i.e. the number of levels, the pay and conditions of service appropriate to each rank of judicial officer and other matters relating thereto, and will make recommendations to the Chief Executive, Hong Kong Special Administrative Region.

II. The Committee will also, when it so determines, conduct an overall review of the matters referred to in I above. In the course of this, the Committee should accept the existing internal structure of the Judiciary and not consider the creation of new judicial offices. If, however, the Committee in an overall review discovers anomalies, it may comment upon and refer such matters to the Chief Justice, Court of Final Appeal.

III. The Committee will advise and make recommendations to the Chief Executive on matter concerning the system, institutional structure, methodology and mechanism for dealing with judiciary salaries and conditions of service which the Chief Executive may refer to the Committee.

Annex D

20 January 2004

Mr Christopher Cheng Wai Chee
Chairman
Standing Committee on Judicial Salaries and Conditions of Service

Dear Chairman,

The Chief Executive has authorised me to write to you to convey his request for the Standing Committee to undertake a study and to make recommendations to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration. In undertaking this task, we ask that the Standing Committee should look into all aspects of the Judiciary's proposal and to make recommendations on whether the Judiciary's proposal based on their Consultancy Report should be accepted.

A brief summarising the background on the issue, together with a copy of the Chief Executive's letter to the Chief Justice on the subject, are attached for your reference.

(not attached here)

The Chief Executive would like to receive the Standing Committee's recommendations by October this year.

The Secretary General of the Joint Secretariat for the Advisory Bodies on Civil Service and Judicial Salaries and Conditions of Service will be in touch with you to discuss how the Standing Committee's work may be organised.

Yours sincerely,

(W K Lam)
Director
Chief Executive's Office

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Annex E

The Determination and Revision of Judicial Remuneration: Report of a Consultancy Study

Albert H.Y. Chen

September 2004

CONTENTS

Executive Summary

***Chapter 1* :** 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.

Chapter 2 : The concept of an "independent and impartial tribunal" has been referred to in various fundamental instruments of international human rights.[1] However, the meaning of an "independent" tribunal has not been elaborated in these instruments. Since the early 1980's, a number of instruments which attempt to give content to the concept of judicial independence have been adopted by various international bodies. While none of the documents have legally binding force, they have considerable persuasive value. On financial security as one of the institutional guarantees for judicial independence, these instruments generally provide that judicial remuneration (including salaries as well as pensions) should be at an adequate level and commensurate with the status of judges in society, and should be secured by law. Some instruments also suggest that judicial salaries should be periodically reviewed and adjusted so as to adapt to increasing price levels. On the issue of non-reduction of judicial remuneration, 4 of the 10 instruments[2] surveyed in this chapter support a qualified rule against reduction (the qualification being an exception to the general rule against reduction where reduction of judicial remuneration is

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1 They include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms.

2 The 4 instruments are the Syracuse Draft Principles on the Independence of the Judiciary, the International Bar Association Code of Minimum Standards of Judicial Independence, the Universal Declaration on the Independence of Justice, and the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region. The Beijing Statement introduces an additional condition which needs to be simultaneously satisfied if the exception is to apply, which is the judges' consent to the reduction.

introduced as a coherent part of an overall public economic measure to reduce government expenditure). Four other instruments[3] make no reference to the issue of reduction or non-reduction of judicial remuneration. Two other instruments[4] stipulate non-reduction of judicial remuneration without any qualification.

Chapter 3 **:** 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 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.

Chapter 4 **:** 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

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[3] The 4 instruments are the Tokyo Principles on the Independence of the Judiciary, the Basic Principles of the Independence of the Judiciary (endorsed by the UN General Assembly), Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges, and the European Charter on the Statute for Judges.

[4] The 2 instruments are the Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") and the Universal Charter of the Judge.

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 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.

***Chapter 5* :** In Australia, an unqualified rule against the reduction of judicial remuneration exists at the federal (Commonwealth) level and in some of the states. However, the practice has not always coincided with the strict legal position and has been more flexible. During the Great Depression, voluntary reductions of judicial salaries occurred across the country. Other instances of reduction include that in Victoria in 1895 (regarding future appointees), in Queensland in 1903 and 1921 (regarding future Chief Justices), in Western Australia in 1983 (a voluntary reduction at a time of economic stringency), and in Tasmania in 1986 (a temporary (one-year) reduction introduced by legislation for serving Supreme Court judges). Remuneration tribunals now exist both at the federal level and in all the states and territories. The remuneration tribunals at the federal level and in New South Wales, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory are "generalist" bodies that deal with the salaries of judges as well as those of other senior holders of public office (such as senior civil servants, ministers, Members of Parliament and holders of statutory offices), while the remuneration tribunals in Victoria and Queensland are concerned exclusively with judicial remuneration. The system has apparently worked well on the whole, although there have been occasional controversies when a remuneration tribunal's recommendation was not accepted.

***Chapter 6* :** The Canadian Constitution does not contain an express provision on the issue of reduction or non-reduction of judicial remuneration. During the Great Depression, an Act of Parliament was introduced in 1932 to reduce civil service pay, but the Act did not apply to judges. Under public pressure to extend the cut to the judiciary, the Government introduced, shortly after the Act was passed, a special Income Tax Act to levy an additional tax on judicial salaries for one year. In the 1990's, there was litigation on the issue of reduction of judicial remuneration in several Canadian provinces. The Supreme

Court of Canada provided a comprehensive statement of the law on changes to judicial remuneration in *Reference re Remuneration of Judges*.[5] According to this decision, the guiding principle for the construction of a system for the determination of judicial determination is to ensure that the courts are free and are perceived to be free from political interference through economic manipulation by the executive or legislative branches of government, and that the process for the determination of judicial remuneration should be depoliticised. Thus a prominent role must be played in this regard by an independent judicial compensation commission, which should be interposed between, and serve as an institutional sieve between, the judiciary and the other branches of government. Any proposal to reduce, freeze or increase judicial remuneration must be considered by such a commission. The recommendations of the commission need not be made binding, but if the Government decides to depart from the recommendations, it must be prepared to publicly justify its decision, if necessary before a court of law. Since *Reference re Remuneration of Judges* was decided, cases involving judicial review of decisions on judicial remuneration have been litigated before the Canadian courts, with the applicants being successful in some cases. Some commentators doubt whether the original objective of "depoliticising" the issue of judicial remuneration has been achieved, or whether a proper balance has been struck in the Canadian system between the prevention of encroachment on judicial independence on the one hand and the avoidance of "institutional self-dealing" by the judiciary on the other hand. Other features of the Canadian system that are noteworthy include automatic cost-of-living adjustments to judicial salaries, the informal pegging of judicial salaries to those of senior civil servants or deputy ministers, charging judicial salaries to the consolidated revenue fund, the active role of provincial judges' associations, and the use of "grandfathering" arrangements regarding changes in the terms of service of judges.

***Chapter 7* :** In drafting constitutions for British colonies on their way to self-government and eventual independence, it has been a fairly common practice to provide for judicial remuneration (as in the case of the salaries of a number of other senior holders of public office) being charged on the consolidated fund, and to provide that a judge's salary and other terms of office cannot be altered to his or her disadvantage during the tenure of his or her office. Among the 46 Commonwealth countries (excluding the UK) surveyed in this chapter, 19 countries have constitutions that contain an unqualified provision on the non-reduction of judicial remuneration; 4 countries have constitutions that contain a qualified provision on the non-reduction of judicial remuneration (the qualification in 3 countries relating to a reduction that is also applicable to certain other senior holders of public office, and that in one country relating to the judges' consent); 22 countries have no constitutional provisions on the non-reduction of judicial remuneration; and one country (India) is a special case

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[5] [1997] 3 SCR 3.

in which the Constitution does not expressly prohibit the reduction of judicial salaries, but provides expressly that such reduction may be introduced during a financial emergency declared in accordance with the Constitution.

As regards civil law countries (e.g. France, Germany, Italy, Austria, the Netherlands, Belgium, Spain, Portugal, Sweden, Norway and Finland as mentioned in this chapter), the general practice is apparently that the constitution does not address the issue of reduction or non-reduction of judicial remuneration. It seems that in some civil law jurisdictions (such as France, South Korea and Taiwan), reduction of the salary of an individual judge may be used as a sanction administered in the course of disciplinary proceedings conducted in accordance with law. In Germany, where there were instances in which civil servants' salaries were reduced together with those of judges because of budgetary stringency, the Federal Constitutional Court has held that the maintenance of a proper relationship between the judicial salaries and those of civil servants does not contravene judicial independence.

The constitutions of Ireland, South Africa, the Philippines and Japan contain unqualified provisions on the non-reduction of judicial remuneration, although judicial remuneration in Japan was actually reduced by Act of Parliament in 2002 with the judges' consent. (This case is similar to that of Singapore, where a reduction was introduced in 2001 with the judges' consent despite a constitutional provision on non-reduction.) There is no provision on the issue of non-reduction of judicial remuneration in the constitutions of Thailand, Cambodia and East Timor. In Israel, the Basic Law on the judiciary contains a qualified provision on the non-reduction of judicial remuneration. In Russia, the rule on non-reduction of judicial remuneration is not in the Constitution but is in the Judges' Status Law. In the Czech Republic, Slovak Republic and Bulgaria, the constitutions do not provide for non-reduction of judicial remuneration, but issues of judicial remuneration have come before the constitutional courts in all three jurisdictions. Generally speaking, it does not appear that the issue of reduction of judicial remuneration as a threat to judicial independence (as distinguished from the issue of the adequacy of judicial remuneration and the need to raise it) has been a significant concern in the "new democracies", "transitional countries" and developing countries. In our neighbouring jurisdictions of mainland China and Macau, there are no express constitutional or legal provisions on the non-reduction of judicial remuneration.

Chapter 8 **:** Unlike the case in many foreign jurisdictions, the salaries of judges in Hong Kong are not provided for in legislation. As in the case of civil servants' salaries, judicial salaries are legally determined as part of the contractual arrangement between the individual judge and the Government, and the salary scale for judges of different ranks is adjusted annually by the Government. One of the most significant characteristics from a comparative point of view of the Hong Kong system of judicial remuneration as it has evolved is the informal "peg" between the salaries of senior civil servants and judges and judicial officers. In Hong Kong, an independent non-statutory body – the

Standing Committee on Judicial Salaries and Conditions of Service first established in 1987 – advises the Government on judicial remuneration. Before 2002, this body had for many years adopted the approach of recommending annual adjustments to judicial salaries that were identical with the adjustments to the salaries of civil servants who occupied equivalent salary points on the civil service pay scale. Apparently the system worked satisfactorily before 2002. However, two developments since 2002 have presented challenges to the existing system. They are the introduction of the accountability system for principal officials (which means that equivalent points can no longer be established between the civil service pay scale and the judicial service pay scale as far as judges of the Court of Final Appeal and the Court of Appeal are concerned), and the reductions in civil service salaries that have been introduced since 2002, which raise the issue of whether judicial salaries should be reduced in line with the civil service pay cuts. This chapter suggests that whereas the problem raised by the first development is a technical one that can be easily resolved, the issue of whether judicial remuneration should be reduced is more difficult to tackle.

Article 100 of the Basic Law provides that public servants' pay and conditions of service after the handover shall be no less favourable than before, and article 93 contains a similar provision regarding judges and judicial officers. In the case of civil servants, the Government has taken the view that the Basic Law would not be contravened so long as the reduction of civil service pay does not take it below the level where it was at immediately before the handover, and in the cases litigated before the Court of First Instance so far, the civil service pay reduction has been upheld. It might therefore appear that a reduction of judicial salaries in line with the civil service pay cuts would not contravene article 93 of the Basic Law.

The next question is whether such a reduction would violate the principle of judicial independence. As discussed in the preceding chapters of this report, it is difficult to argue that a reduction of judicial salaries threatens judicial independence where it is introduced as an integral part of public economic measures that are generally applicable to all persons paid from the public purse. However, although the objection in principle to a reduction of judicial remuneration in these circumstances may not be a strong one, there are some complications which need to be taken into account in considering the option of such a reduction in Hong Kong. The complications relate to the means by which such a reduction may be achieved.

Given the similarity between the terms of appointment and conditions of service of judges (including judicial officers) and those of civil servants in Hong Kong, and given that the Government has conceded that legislation is necessary in order to effectuate a pay cut for incumbent civil servants, legislation would also be necessary if a reduction of the salaries of incumbent judges and judicial officers is to be introduced in Hong Kong. The legislation to implement the civil service pay cut in 2002 against the will of the civil servants' unions was

politically controversial and has given rise to legal challenges before the courts. It is likely that given the Mason Report and the importance of judicial independence, any bill to reduce judicial remuneration in Hong Kong will be politically controversial as well. Even if the bill is passed, the possibility must be recognised of judges or judicial officers affected bringing an action before the courts challenging the legislation on grounds similar to those that have already been used by civil servants (but not successful before the Court of First Instance) as well as grounds of judicial independence. This would result in the embarrassing situation of judges adjudicating on their own salaries or those of their colleagues. In the light of these considerations, it is not advisable to reduce the salaries of incumbent judges in Hong Kong.

This means that even if the recommendation in the Mason Report that legislation prohibiting absolutely any reduction in judicial remuneration is not accepted, it does not necessarily follow that judicial salaries should be or will be reduced in Hong Kong. In other words, one possible scenario is that neither legislation prohibiting reduction in judicial remuneration nor legislation reducing judicial remuneration is introduced, the practical effect of which is that judicial remuneration will not be reduced.

One possible option which can be considered for the way forward is the preservation of the existing system of the Government determining judicial remuneration upon the advice of the Standing Committee on Judicial Salaries and Conditions of Service. Another option is to turn the committee into a statutory body. A third option is to establish an independent body modelled on the UK Review Body on Senior Salaries, the Australian Commonwealth Remuneration Tribunal, the remuneration tribunals in most Australian states and territories, and the New Zealand Higher Salaries Commission in the sense that its jurisdiction is not confined to judicial salaries but extends to the determination of the salaries of senior civil servants, principal officials and members of the Executive and Legislative Councils. This would in effect mean the combination into one body of the existing Standing Committee on Directorate Salaries and Conditions of Service, the Standing Committee on Judicial Salaries and Conditions of Service and the Independent Commission on Remuneration for the Members of the Executive Council and the Legislature of the Hong Kong SAR.

This chapter suggests that there is much to be said for the third option. However, in the event that this option is considered not feasible at least in the short term, the second option mentioned above of turning the existing Standing Committee on Judicial Salaries and Conditions of Service into a statutory body is worth pursuing. In this context, the recommendations in the Mason Report regarding the establishment of an independent statutory body on judicial remuneration deserve to be supported except the following which need to be further scrutinised as discussed in this chapter –

(a) the recommendation that no member of the independent body should be allowed to serve concurrently as a member of any body assessing civil service remuneration; and

(b) the recommendation that the body must include as its members a barrister and a solicitor appointed in consultation with the governing bodies of the Bar and the Law Society.

This chapter supports the recommendation in the Mason Report regarding a standing appropriation for judicial remuneration, but expresses reservations regarding its proposal to enact legislation "prohibiting any reduction in judicial remuneration". On the other hand, as mentioned above, neither is it considered advisable to introduce legislation to reduce judicial salaries similar to that introduced for the civil service (nor the administrative reduction of judicial salaries which the Government must already have recognised as legally questionable). Thus judicial salaries can remain at their present level for incumbent judges and judicial officers.

Preface and Acknowledgements

This report is the product of a consultancy study commissioned by the Standing Committee on Judicial Salaries and Conditions of Service in the course of its work in examining the Judiciary's proposal (as embodied in the "Mason Report" mentioned below) on the determination and revision of judicial remuneration in Hong Kong and in considering the recommendations in the Mason Report.

The Mason Report, the full title of which is *Consultancy Report: System for the Determination of Judicial Remuneration*, is the result of a consultancy study commissioned by the Judiciary in 2002. It was published in April 2003 as the main body of the Judiciary's proposal to the Government of the Hong Kong Special Administrative Region (HKSAR). The author of the Report is the Honourable Sir Anthony Mason AC KBE, former Chief Justice of Australia and currently a non-permanent member of the Court of Final Appeal of the HKSAR.

The objective of the present study is to review and comment on the Judiciary's proposal based on the Mason Report and its recommendations, having regard to –

(a) what constitutes an appropriate institutional structure, mechanism and methodology for the determination and revision of judicial pay and conditions of service for Hong Kong judges; and

(b) how judges' salaries were set and/or protected in other jurisdictions, and how and to what extent they were affected by the socio-economic situation prevailing at the time.

More specifically, I have been asked to examine and comment on the Mason Report, including the empirical data, analysis and recommendations therein, and to conduct supplementary research where necessary, having regard to –

(a) the systems and practices for the determination and revision of judicial pay and conditions of service in other jurisdictions, including –

(1) the history of and fundamental principles underpinning the pay policies, pay system and pay structure applicable to judges and judicial officers;

(2) the mechanism for determining pay levels and pay adjustments applicable to judges and judicial officers;

(3) the relevant legislation, institutional structure or administrative measures for protecting judicial pay, if any; and

(4) how the setting and protection of judicial pay were affected by the socio-economic situation prevailing at the time.

(b) the pros and cons of the systems adopted by such other jurisdictions, including any evidence of success or otherwise, and the best practices adopted in other jurisdictions that could be adopted in, or otherwise of particular relevance to, Hong Kong, having regard to the history and development of the judicial pay system in Hong Kong; and

(c) what would be an appropriate system for the determination and revision of judicial remuneration for Hong Kong, bearing in mind the Basic Law implications.

I have also been asked to examine the relevant international norms relating to judicial remuneration, as well as the systems and practices in selected jurisdictions (including those belonging to the civil law family of legal systems and those that have newly established constitutions) not directly covered by the Mason Report.

In addition, I have been asked to formulate different options for the consideration of the Standing Committee, addressing the pros and cons of each option, so as to assist its deliberations on the matter.

This Report therefore takes at its point of departure the Mason Report and the recommendations therein. It appears from the press coverage of the discussion of the Mason Report when it was released in April 2003 and from the initial discussion in and submissions to the Legislative Council Panel on Administration of Justice and Legal Services on the subject that some recommendations in the Mason Report (particularly the recommendation on legislation "prohibiting absolutely any reduction in judicial remuneration") may be more controversial than others. Relatively more attention will be devoted in this Report to potentially controversial recommendations or information relevant thereto, although it also attempts to supply relevant information and comments on the other recommendations.

While the objective of the present study is to provide a critical commentary on the Mason Report, it will nevertheless strive to be fair and objective. Additional information (not mentioned in the Mason Report) which I came across in the course of undertaking this study that tends to support the recommendations of the Mason Report will be fully set out in this Report, side by side with information that may be used by those arguing against the recommendations or part of them.

This Report consists of the following chapters –

Executive Summary

Chapter 1: general theoretical considerations relating to judicial independence and judicial remuneration;

Chapter 2: relevant international norms;

Chapter 3: the British experience;

Chapter 4: the American experience;

Chapter 5: the Australian experience;

Chapter 6: the Canadian experience;

Chapter 7: other countries and jurisdictions;

Chapter 8: the way forward for Hong Kong

I would like to acknowledge gratefully the research assistance of Mr Wong Wai Keung William, LLB (2004), in retrieving a wide range of valuable data for this study. I am also grateful to my colleagues at the Main Library and Law Library of the University of Hong Kong for arranging inter-library loans of materials needed for the present study. Last but not least, I am obliged to Mr Lee Lap-sun JP, Secretary General of the Standing Committee on Judicial Salaries and Conditions of Service, and his staff for providing relevant information relating to the civil service, the legislature and the judiciary of Hong Kong.

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.

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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;

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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 –
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> "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

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[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

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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

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[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

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[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]

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[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,

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[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,

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[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*

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[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

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[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.

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[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 Beauregard* [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.

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[45] Francesca Zannotti, "The Judicialization of Judical 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.

Chapter 2 : Relevant International Norms

2.01 The concept of an "independent and impartial tribunal" has been referred to in various fundamental instruments of international human rights. Article 10 of the Universal Declaration of Human Rights provides –

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

A similar provision may be found in article 14(1) of the International Covenant on Civil and Political Rights –

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Reference may also be made to article 6(1) of the European Convention on Human Rights and Fundamental Freedoms –

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

With reference to this provision, the European Court of Human Rights has held that in order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.[1]

2.02 The meaning of an "independent" tribunal has not been defined in the international instruments mentioned above. Since the early 1980's, a number of instruments which attempt to give content to the concept of judicial independence have been adopted by various international bodies. While none of the documents have legally binding force, they have varying degrees of persuasive value depending on the nature and status of the persons or bodies which have adopted them, the circumstances of adoption and the extent to which they have been cited or relied on. In the following, these instruments will be described, with special reference to relevant provisions on judicial remuneration.

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[1] *Bryan v United Kingdom* (1995) 21 EHRR 342 at 358, para 37. See also *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: Interights, 2003).

The instruments will be discussed in chronological order, although the degree to which they are authoritative depends mainly on the factors mentioned above rather than on whether they are older or more recent.

(1) *The Syracuse Draft Principles on the Independence of the Judiciary* –[2]

In May 1980, the Economic and Social Council of the United Nations authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Special Rapporteur Dr L M Singhvi from India the task of preparing a report on the independence of the judiciary and of lawyers. To assist Mr Singhvi in his task, in May 1981 the International Association of Penal Law and the International Commission of Jurists organized a meeting of a Committee of Experts in Syracuse, Italy, to draft principles on the independence of the judiciary. The participants included judges and jurists from African, Asia, America, Eastern and Western Europe. The Syracuse Draft Principles were then submitted to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in August 1981.

The Syracuse Draft Principles comprise 32 articles, most of which are accompanied by a "note" printed immediately below the article. The article on judicial remuneration reads –

> Art. 26. Judges should receive, at regular intervals, remuneration for their services at a rate which is commensurate with their status, and not diminished during their continuance in office. After retirement they should receive a pension enabling them to live independently and in accordance with their status.
>
> [Note: It is essential for the independence of the judiciary, that salary levels should be such that judges are not exposed to the temptation to seek other sources of income.
>
> An exception to the principle of non-reduction of salaries may be made at a time of economic difficulty if there is a general reduction of public service salaries, and members of the judiciary are treated equally.]

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[2] See Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff Publishers, 1985), chapters 35 (text of the Draft Principles) and 36 (commentary).

(2) *Tokyo Principles on the Independence of the Judiciary in the Lawasia Region –*[3]

In July 1982, the Lawasia Human Rights Standing Committee met in Tokyo to discuss the application of the principle of judicial independence in Asia. The meeting was attended by a number of chief justices, judges, lawyers and professors. As a result the Tokyo Principles were drafted. They include the following provision –

> 12. Relationship with the Executive –
>
> (a) The Committee is aware of instances of threats and pressures made or applied to judges – for example –
>
> (i) judges have been transferred from one court to another, or suspended from office for wrong reasons;
>
> (ii) the remuneration or facilities of a judge have been affected because of decisions given by the judge;
>
> (iii) the value of judicial salaries has not been maintained.
>
> (b) Powers which may affect judges in their office, their remuneration or their facilities, must not be used so as to threaten or bring pressure upon a particular judge or judges.

(3) *International Bar Association Code of Minimum Standards of Judicial Independence –*[4]

In 1980, the International Bar Association (IBA) Project on Minimum Standards of Judicial Independence was initiated. Professor Shimon Shetreet of the Hebrew University of Jerusalem was appointed General Rapporteur of the Project, and Chief Justice Leonard King of South Australia appointed General Coordinator. In the course of drafting the Minimum Standards, reports from

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[3] Ibid, chapter 37.

[4] Ibid, chapters 31 (the IBA project on minimum standards of judicial independence), 32 (text of the minimum standards), 33 (commentary by Shimon Shetreet), 34 (commentary by the Hon. Leonard King, Chief Justice of South Australia). The text of the minimum standards is also available at www.ibanet.org/pdf/HRIMinimumStandards.pdf.

leading jurists from 30 countries were submitted and considered. Several working conferences were held in Lisbon in 1981, in Jerusalem in March 1982 and in New Delhi in October 1982, and were attended by judges, lawyers and scholars from many countries. At the New Delhi conference, the Minimum Standards were finally adopted. The Standards include the following provisions –

> 14. Judicial salaries and pensions shall be adequate, and should be regularly adjusted to account for price increases independently of Executive control.
>
> 15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
>
> (b) Judicial salaries cannot be decreased during the judges' service except as a coherent part of an overall public economic measure.

(4) *Universal Declaration on the Independence of Justice* –[5]

This Universal Declaration, in both its English and French versions, was adopted at the First World Conference on the Independence of Justice held at Montreal in June 1983. The conference was organised under the leadership of Justice Jules Deschenes of Canada and sponsored by seven Canadian organisations (including the Canadian Judicial Council, the Canadian Judges Conference, the Canadian Bar Association, the Canadian section of the International Commission of Jurists, etc). It was attended by representatives of 26 international bodies, including the United Nations, the International Court of Justice at the Hague, the European Court of Human Rights, the International Bar Association, the International Commission of Jurists, Lawasia, Amnesty International, etc. The Universal Declaration contains the following provisions –

> 1.14 The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

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[5] Ibid, chapters 33 (commentary by Shetreet), 38 (introduction by Justice Deschenes), 39 and 40 (English and French texts of the Declaration), 41-42 (commentaries).

2.21 (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.

(c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

(5) *Basic Principles of the Independence of the Judiciary* –[6]

These were adopted at the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders at Milan, Italy, in September 1985. The General Assembly of the UN, in its resolution 40/146 of 13 December 1985, welcomed the Basic Principles and invited governments to respect them. The Economic and Social Council, in its resolution 1986/10 of 21 May 1986, invited member states to inform the Secretary-General every five years of the progress achieved in the implementation of the Basic Principles. The General Assembly welcomed this recommendation by its resolution 41/149 of 4 December 1986 on human rights in the administration of justice. Article 11 of the Basic Principles reads –

> The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

There is no provision on the issue of reduction of judicial remuneration.

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[6] *Basic Principles of the Independence of the Judiciary* (New York: United Nations, Department of Public Information, 1988) (DPI/958), also available at www.unhchr.ch/html/menu3/b/h_comp50.htm.

(6) *Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration")* –[7]

This Draft Universal Declaration was prepared by L M Singhvi, Special Rapporteur entrusted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1980 with the task of preparing a report on the independence and impartiality of the judiciary and the independence of lawyers. An initial draft was submitted to the Sub-Commission in 1985 and circulated to members for comments. A revised draft was submitted to the Sub-Commission in 1988, which referred it to the Commission on Human Rights for further consideration. The Commission in 1989 by resolution 1989/32 invited governments to take into account the principles set forth in the Singhvi Declaration in implementing the UN's Basic Principles on the Independence of the Judiciary. The following provisions in the Declaration touch upon the issue of judicial remuneration –

> 16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.
>
> (b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.
>
> 18. (a) During their terms of office, judges shall receive salaries and after retirement, they receive pensions.
>
> (b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.
>
> (c) Retirement age shall not be altered for judges in office without their consent.

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[7] (1989) 25 CIJL Bulletin (Bulletin of the Center for Independence of Judges and Lawyers which is based in Geneva) pp 38-58.

(7) *Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges –*[8]

This was adopted by the Committee of Ministers on 13 October 1994, and was referred to in the European Charter on the Statute for Judges mentioned below. As far as judicial remuneration is concerned, the Recommendation contains the following provisions –

> The terms of office of judges and their remuneration should be guaranteed by law. (para 2(a)(ii) of Principle I)
>
> Proper conditions should be provided to enable judges to work efficiently and, in particular, by ... (b) ensuring that the status and remuneration of judges is commensurate with the dignity of their profession and burden of responsibilities. (para 1(b) of Principle III)

There is no provision on the issue of reduction of judicial remuneration.

(8) *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA (Law Association of Asia and the Pacific) Region –*[9]

This Statement has been discussed in the Mason Report.[10] It was first adopted at the Biennial Conference of Chief Justices of Asia and the Pacific organised by LAWASIA's Judicial Section and held in Beijing in 1995, and slightly revised at the following conference in Manila in 1997. There are now 32 signatories to the Statement, who are all chief justices in the Asia Pacific region, including the Chief Justice of the Supreme Court of the Russian Federation. Articles 31 and 38 of the Statement provide –

> 31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the

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8 http://cm.coe.int/ta/rec/1994/94r12.htm

9 http://lawasia.asn.au/beijing_statement.htm

10 paras 6.6-6.8.

judges of a relevant court, or a majority of them, have agreed.

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

The principal draftsman of the Beijing Statement is the Honourable David K Malcolm AC, Chief Justice of Western Australia and Chair of the Judicial Section of LAWASIA. In a lecture delivered at the Asian Development Bank Symposium on Judicial Independence in August 2003,[11] he explained his views on judicial remuneration –

> Related to the question of security of tenure, is that of an adequate and secure remuneration. That judicial remuneration should be commensurate with the office of a judge is important, firstly, as it assists to attract suitable people to judicial service. Secondly, it minimises the potential for litigants to exercise financial influence over the decision making process. Thirdly, it helps contribute to, and helps maintain, the status of the Judiciary as an institution.
>
> That remuneration should be secure, in the sense that it cannot be altered to the detriment of a judge during the term of office, is also of particular importance. A judge who faces the possibility of financial disadvantage if his or her decisions displease the Executive is not placed in a position from which it is easy to exercise the judicial function with true impartiality.
>
> A legitimate exception to this principle may be made where the reduction in remuneration is an across-the-board, non-discriminatory reduction in the national economic interest, which is agreed to by the

[11] www.adb.org/Documents/Events/2003/RETA5987/CJ_Malcolm_Keynote_Address.pdf

Judges concerned.[12] Such a reduction has no adverse implications for judicial independence.

(9) *European Charter on the Statute for Judges* –[13]

This was adopted at a multilateral meeting organised by the Council of Europe in July 1998. It is "a formal document intended for all European States" aimed at "raising the level of guarantees in the various European States", in the hope that statutes on judges in various European states will take into account the provisions of the Charter. On the issue of judicial remuneration, the Charter provides as follows –

> 6.1 Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.
>
> 6.2 Remuneration may vary depending on length of service, the nature of the duties which judges are assigned to discharge in a professional capacity, and the importance of the tasks which are imposed on them, assessed under transparent conditions.

(10) *Universal Charter of the Judge* –[14]

This was adopted by the Central Council of the International Association of Judges in November 1999. Its preamble states that "Judges from around the world have worked on the drafting of this Charter. The present Charter is the result of their work and has been approved by the member associations of the International

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[12] [My own footnote:] The provision in the Beijing Statement regarding judges' consent to a reduction in their remuneration has been criticised in the Mason Report (paras 6.7-6.8). It is perhaps possible to rationalise the second sentence of article 31 of the Beijing Statement (set out above) as follows: Where it is proposed to reduce the remuneration of judges as part of a uniform public economic measure, no threat to judicial independence is involved. However, judges' consent to the reduction will still be sought before the reduction is imposed both as a sign of respect for the judiciary, and to ensure that the judiciary will have an opportunity to put forward other legitimate and publicly defensible reasons (i.e. reasons other than the threat to judicial independence) to oppose the reduction, e.g. the difficulty of recruiting and retaining well-qualified judges if the reduction is introduced, or the fact that (as in the USA as discussed in chapter 4 below) judicial salaries have not kept up with past inflation and have remained stagnant or not increased proportionately when the salaries of others paid from the public purse were raised in the past.

[13] www.richterverein.de/j2000/eurstat1.htm#.htm

[14] www.iaj-uim.org/ENG/07.html or www.domstol.dk/html/publikationer/universal/UniChaUk.pdf

Association of Judges as general minimal norms. Member associations have been invited to register their reservations on the text in Annex A." On the issue of judicial remuneration, article 13 of the Charter provides –

> The judge must receive sufficient remuneration to secure true economic independence. The remuneration must not depend on the results of the judges' work and must not be reduced during his or her judicial service.
>
> The judge has a right to retirement with an annuity or pension in accordance with his or her professional category.
>
> After retirement a judge must not be prevented from exercising another legal profession solely because he or she has been a judge.

2.03 ***Summary of this chapter*** **:** The concept of an "independent and impartial tribunal" has been referred to in various fundamental instruments of international human rights.[15] However, the meaning of an "independent" tribunal has not been elaborated in these instruments. Since the early 1980's, a number of instruments which attempt to give content to the concept of judicial independence have been adopted by various international bodies. While none of the documents have legally binding force, they have considerable persuasive value. On financial security as one of the institutional guarantees for judicial independence, these instruments generally provide that judicial remuneration (including salaries as well as pensions) should be at an adequate level and commensurate with the status of judges in society, and should be secured by law. Some instruments also suggest that judicial salaries should be periodically reviewed and adjusted so as to adapt to increasing price levels. On the issue of non-reduction of judicial remuneration, 4 of the 10 instruments[16] surveyed in this chapter support a qualified rule against reduction (the qualification being an exception to the general rule against reduction where reduction of judicial remuneration is introduced as a coherent part of an overall public economic

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[15] They include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights and Fundamental Freedoms.

[16] The 4 instruments are the Syracuse Draft Principles on the Independence of the Judiciary, the International Bar Association Code of Minimum Standards of Judicial Independence, the Universal Declaration on the Independence of Justice, and the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region. The Beijing Statement introduces an additional condition which needs to be simultaneously satisfied if the exception is to apply, which is the judges' consent to the reduction.

measure to reduce government expenditure). Four other instruments[17] make no reference to the issue of reduction or non-reduction of judicial remuneration. Two other instruments[18] stipulate non-reduction of judicial remuneration without any qualification.

[17] The 4 instruments are the Tokyo Principles on the Independence of the Judiciary, the Basic Principles of the Independence of the Judiciary (endorsed by the UN General Assembly), Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges, and the European Charter on the Statute for Judges.

[18] The 2 instruments are the Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") and the Universal Charter of the Judge.

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, ...
>
> On the first occasion upon which I saw the deputation, some time before Christmas, their attitude was as follows –
>
> 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.

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.]
>
> 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.
>
> 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.

Chapter 5 : The Australian Experience

5.01 The Australian system of the protection and determination of judicial remuneration has been discussed in detail in the Mason Report, whose author is himself former Chief Justice of Australia. It suffices for this short chapter to provide some supplementary information which may be of assistance in understanding and putting into comparative perspective the Australian experience in this regard.

5.02 As pointed out in the Mason Report, the salaries of federal judges and some state judges in Australia are protected by constitutions or statutes from reduction. However, it should be noted that the Depression before the Second World War did generate pressure for the reduction of judicial remuneration. This episode in Australian legal history has been described in various sources. The Honourable Leonard King, Chief Justice of South Australia, wrote –

> These clauses [in the International Bar Association Code of Minimum Standards of Judicial Independence (discussed in chapter 2 of the present report)] relating to the personal independence of judges emphasize a very important aspect of judicial independence, namely, that the judges' personal income should be determined in a way which removes any possibility of influence over judicial decision-making. Traditionally, this aspect was cared for in Westminster system countries by statutory provisions, which by convention assume the status of constitutional guarantees, that a judge's salary could not be reduced during his tenure of office. So rigidly was this guarantee observed that in Australia, during the Great Depression, when public service salaries and pensions were reduced as a general economy measure by 10 per cent, the judges' salaries could not be reduced without their consent. They did in fact consent, so far as I am aware, in every jurisdiction.[1]

5.03 Commenting on the experience of the same period, Professor Geoffrey Sawyer of the Australian National University wrote –

> When economic crisis compelled Australian and other British Commonwealth governments to carry out general reductions of wages and salaries in 1930-1, there was a good deal of debate about the constitutional validity and political morality of attempts to apply the reductions to

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[1] Leonard King, "The IBA Standards on Judicial Independence: An Australian Perspective", in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985), chapter 34 (p 403) at p 410.

> judicial salaries. Some judges protected by constitutional restrictions voluntarily returned an appropriate part of the salary; others refused to do so, though in some cases the refusal may have been based on disagreement with the deflationary policy as well as the higher ground of social principle. This writer's estimate of opinion in Australia at the time is that most people did not think the security of judicial tenure was affected at all by a universally applied deflationary measure. Professional opinion among lawyers strongly supported judicial objections to the measure, but this was partly due to the fact that judicial salaries had failed to keep pace with earlier inflations, so that they should not have been made to suffer from deflation as well. The episode made it clear that the high prestige of the judiciary was not inconsistent with a good deal of popular and political indifference to the material claims of judges.[2]

5.04 The early 1930's were not the only period in Australian legal history in which reductions of judicial salaries occurred despite the constitutional and statutory protection. Other episodes were mentioned in the judgment of Drummond J in *North Australian Aboriginal Legal Aid Service Inc v Bradley* –[3]

> Periods of depression and financial stringency have also led, on occasion, to various of the Australian Parliaments acting to reduce judicial salaries; it appears, however, that only the Tasmanian Parliament has legislated (as recently as 1986) to reduce, on a temporary basis, the salaries of serving Supreme Court judges, as opposed to future appointments. See [George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration, 1995)] at pp 21 and 22. As appears from this same passage, economic conditions have also resulted in voluntary reductions in judicial salaries, most recently in Western Australia in 1983.

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[2] Geoffrey Sawyer, *Law in Society* (Oxford: Clarendon Press, 1965), pp 92-3.

[3] (2002) 192 ALR 701 (Federal Court of Australia). 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. Drummond J dissented from the majority on this issue.

5.05 Further empirical details on instances of reduction of judicial remuneration in Australia are provided by Professor Winterton's comprehensive study of judicial remuneration in Australia –[4]

> Victoria reduced judicial salaries in 1895,[5] as did Queensland in 1903 and 1921,[6] and Tasmania in 1986.[7] Moreover, virtually all Australian judges, including justices of the High Court, accepted a voluntary cut in salary during the Great Depression, as did Western Australian judges at a time of economic stringency in 1983.
>
> While a mandatory reduction in salary would obviously contravene s. 72(iii) of the Commonwealth Constitution, State Constitutions offer no such entrenched guarantee, although legislation in some States and Territories contains limited provision against the reduction of judicial salaries. Nevertheless, it is a well-accepted constitutional convention that judicial salaries should not be reduced during a judge's term of office, unless perhaps when necessary on economic grounds and as part of a non-discriminatory measure applying to all "public servants" (in the widest sense), including Members of Parliament. However, even in such circumstances, it is preferable for judges to be requested to accept a voluntary reduction in salary, as did most Australian judges in 1931, and Western Australian judges in 1983.[8]

5.06 It appears from the above that in Australia, there is flexibility in the practice with regard to judicial remuneration, although relevant constitutional and statutory provisions prohibiting the reduction of judicial salaries appear to be rigid or unqualified. Another point to be noted about the Australian experience is that although there is a well-developed system of remuneration tribunals (most of which deal with the salaries of judges as well as holders of other public

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[4] George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), pp 22-23. (In the extract below, some of the lengthier footnotes in the original text have not been reproduced.) Professor Winterton of the University of New South Wales is a leading scholar of Australian constitutional law. His study on judicial remuneration was commissioned by the Australian Institute of Judicial Administration.

[5] The reduction applied only to future appointees.

[6] The reduction applied only to future Chief Justices.

[7] Reduction of Salaries (Members of Parliament and Judges) Act 1986 (Tas.). The reduction was temporary, the maximum period being one year.

[8] [My own footnote:] The author then refers to para 2.21(c) of the Universal Declaration of the Independence of Justice (set out in chapter 2 above of the present report), which provides for the non-reduction of judicial salaries except as a coherent part of an overall public economic measure.

office),[9] sometimes their recommendations are not accepted by the Government, and as a result controversies occasionally occur. As pointed out in the Mason Report, in 1982 legislation was enacted to override the determination of the Statutory and Other Offices Remuneration Tribunal in New South Wales on grounds of economic restraint;[10] the recommendations of the Judicial Remuneration Tribunal in Victoria "were often overridden by the Government, leading to controversy";[11] and in 1988, the Commonwealth Remuneration Tribunal recommended a large increase in judicial remuneration which was rejected by the Government, and "there was significant public controversy about the remuneration of the judiciary".[12]

5.07 Writing about the 1988 incident in 1995, Professor Winterton commented that the Remuneration Tribunal's report of 18 November 1988 had "such detrimental repercussions for the relationship between the Commonwealth Government and the federal judiciary that it is doubtful whether the resulting judicial bitterness has yet dissipated".[13] Giving detailed justifications, the report recommended an 80% increase in the salaries of federal judges. There was strong opposition to the recommendations. Critics pointed out that if implemented, the Chief Justice's salary would exceed that of the Prime Minister by $75,000 (Australian dollars) a year.[14] As recounted by Professor Winterton –[15]

> In May 1989, the Government finally announced that "in the current economic climate" it was "unable to accept the level of increases recommended" by the Tribunal. It then took the questionable – but not unprecedented – step of requesting the members of the Tribunal in their individual capacity to report by June on several matters relating to federal judicial remuneration, the principal being whether the Government was correct in believing that there was an "inequity" between the salary of Federal Court judges and those of the Queensland Supreme Court, the most highly paid State judges. The Government was obviously seeking the legitimizing imprimatur of the Remuneration

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9 At the Commonwealth (federal) level, in the states of New South Wales, Western Australia, South Australia and Tasmania, and in the Australian Capital Territory and the Northern Territory, there exist remuneration tribunals whose jurisdiction extends beyond judges to include other senior holders of public office. On the other hand, remuneration tribunals that deal only with judicial remuneration exist in Victoria and Queensland. See generally Winterton (n 4 above), pp 43-75; www.remtribunal.gov.au and the links it provides to remuneration tribunals in the states.

10 Mason Report, para 4.32.

11 Ibid, para 4.47.

12 Ibid, para 4.19.

13 Winterton (n 4 above), p 46.

14 Ibid, p 49.

15 Ibid, pp 50-51 (with footnotes omitted).

> Tribunal for a decision essentially already taken, namely to raise federal judicial salaries to a level which would give Federal Court judges parity with their most highly paid State colleagues. ... Nevertheless, (the individual members of) the Tribunal accepted the task and, while confirming that their previous assessment regarding the appropriate level of judicial remuneration remained unchanged, reported as expected. They found an "inequity" ... in the relative salaries of Queensland Supreme Court judges and justices of the High Court and the Federal Court.

In order to address the inequity, the members of the Tribunal recommended increases that were more modest than those originally recommended by the 1988 report; their new recommendations were accepted and enacted into law in December 1989.[16]

5.08 A recent controversy regarding judicial remuneration in Victoria is noteworthy.[17] In response to Victoria's Judicial Remuneration Tribunal's proposal of a 13.6% salary increase for state judges, the State Government announced in April 2004 that it was not acceptable because it was "not in line with community expectations". The Government was much influenced by the fact that persons in other occupations, such as teachers and nurses, would only be granted a 3% pay rise. The Government's position was severely criticised by the judges and the legal profession, who argued that the rejection of the recommendation would mean that Victorian judges would be paid significantly less than federal and New South Wales judges, and the prestige of the Victorian courts would suffer. The Chief Justice of Victoria and the Law Council of Australia accused the Government of threatening the independence of the courts. In May 2004 a compromise was reached whereby the judges would receive several smaller pay increases in phases so that in four years' time, their salaries would be brought in line with those of federal judges.

5.09 ***Summary of this chapter*** **:** In Australia, an unqualified rule against the reduction of judicial remuneration exists at the federal (Commonwealth) level and in some of the states. However, the practice has not always coincided with the strict legal position and has been more flexible. During the Great Depression, voluntary reductions of judicial salaries occurred across the country. Other instances of reduction include that in Victoria in 1895 (regarding future appointees), in Queensland in 1903 and 1921 (regarding future Chief Justices), in Western Australia in 1983 (a voluntary reduction at a time of economic stringency), and in Tasmania in 1986 (a temporary (one-year)

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[16] Ibid, p 51.

[17] The following is based on newspaper reports in April and May 2004 in several Australian newspapers, including The Age (Melbourne), Herald Sun (Melbourne), Courier Mail (Queensland), and Australian Financial Review.

reduction introduced by legislation for serving Supreme Court judges). Remuneration tribunals now exist both at the federal level and in all the states and territories. The remuneration tribunals at the federal level and in New South Wales, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory are "generalist" bodies that deal with the salaries of judges as well as those of other senior holders of public office (such as senior civil servants, ministers, Members of Parliament and holders of statutory offices), while the remuneration tribunals in Victoria and Queensland are concerned exclusively with judicial remuneration. The system has apparently worked well on the whole, although there have been occasional controversies when a remuneration tribunal's recommendation was not accepted.

Chapter 6 : The Canadian Experience

6.01 In the Mason Report, there is the following comment on the Canadian system, particularly on its lack of an absolute constitutional prohibition of reduction in judicial remuneration –

> [T]he Canadian position is inconsistent with the widely accepted safeguard of an absolute prohibition against reduction for the protection of judicial independence in many jurisdictions.[1] ... [T]he Canadian view that, subject to prior recourse to an independent body, judicial salaries can be reduced unilaterally as part of an overall economic measure affecting the salaries of officials paid from public finds no support in the United States, the United Kingdom, Australia, New Zealand and Singapore where the prohibition against reduction of judicial remuneration is absolute.[2]

6.02 As discussed in chapter 3 of this report, it is highly doubtful whether there exists in the UK any absolute prohibition against reduction of judicial remuneration by Act of Parliament (as distinguished from reduction by the executive). The situations in the United States and Australia have also been discussed in chapters 4 and 5. The reason for the difference between the Canadian position and that in jurisdictions like the United States and Australia lies in the respective wording of their written constitutions. The Constitution of the USA (1787) and the Australian Constitution (the Commonwealth of Australia Constitution 1900) both contain express and unqualified provisions prohibiting the reduction of the remuneration of the federal judiciary. Since the issue was already settled by the written constitution, there has not been any need for the American and Australian courts to engage in any jurisprudential exploration of whether there are circumstances in which a (direct as distinguished from indirect) reduction of judicial remuneration may be justified and can be reconciled with the principle of judicial independence. Precisely because the Canadian Constitution (1867) does not provide for the issue in an unambiguous manner,[3] it has been left to the Canadian courts, particularly in the course of the 1980's and 1990's, to engage in systematic reflections on the relationship between judicial independence and financial security for judges, and to formulate principles in this regard that are defensible in the legal world of the late 20th century or 21st century. It is for this reason that the Canadian jurisprudence on judicial salaries is worth examining in this report.

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1 Mason Report, para 6.5.

2 Ibid, para 3.54.

3 Section 100 of the British North America Act 1867 (now known as the Constitution Act 1867) provides: "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts ... shall be fixed and provided by the Parliament of Canada."

6.03 Before turning to the developments since the 1980's, an episode in Canadian legal history which finds parallels in Britain and Australia at the same historical moment may be mentioned. To quote from the report on judicial independence in Canada prepared for the Canadian Judicial Council by Professor Martin Friedland –[4]

> [After referring to the reduction of judicial salary in Britain pursuant to the National Economy Act 1931:] In Canada, the Bennett government in 1932 proposed a 10% reduction for civil service salaries, but they specifically exempted the judges. This caused a furor in the House of Commons, as members argued that judges should be made to bear some of the nation's hardship. Prime Minister Bennett referred to some of the arguments against a decrease made in England the previous year and said: "There are, however, other methods by which the matter may be dealt with." Several months later, the government imposed by legislation a 10% tax on judges for one year under the Income Tax Bill.[5]

6.04 A comprehensive statement of the currently applicable principles governing the adjustment of judicial determination in Canada is the Canadian Supreme Court's decision in *Reference re Remuneration of Judges*.[6] Since the discussion of this case is relatively brief in the Mason Report, more details will be provided here to throw light on how the Court approached the issues and its train of thought.

6.05 The questions which the Court tackled in this case included, among others, the following –[7]

> The first question is what kinds of salary reductions are consistent with judicial independence – only those which apply to all citizens equally, or also those which only apply to persons paid from the public purse, or those which just apply to judges. The second question is whether the same principles which apply to salary reductions also govern salary increases and salary freezes.

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4 Martin L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Canadian Judicial Council, 1995), p 60.

5 [My own note:] See also W R Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769 (part I) and 1139 (part II) at 1164, where he commented that this special taxing statute was probably *ultra vires* the Canadian Parliament because it imposed a discriminatory tax applicable only to judges. On the other hand, "A general income tax of ten per cent on all public salaries might have been valid to effect the total object, including the judicial salaries." (loc cit)

6 [1997] 3 SCR 3.

7 Ibid, para 5 of the judgment.

6.06 The case involved appeals from the courts of Prince Edward Island, Alberta and Manitoba. In all three provinces, the salaries of provincial judges had been reduced by legislation as part of an overall economic measure together with the salaries of all others paid from public funds. In Prince Edward Island and Alberta, unlike the case in some other provinces of Canada, there were at the time no independent commissions to make recommendations on judicial salaries. In Manitoba, a commission existed but was bypassed in the present case. In Alberta and Manitoba, the courts had struck down the reductions as they were not part of overall economic measures which affected all citizens (a general income tax would satisfy this test of affecting all citizens, but not a reduction of the salaries of all paid from public funds). In Prince Edward Island, the court below had upheld the reduction since it was part of an overall public economic measure applicable to all who held public office, did not remove the basic degree of financial security for judges, and was not an arbitrary interference with the judiciary in the sense that it was being enacted for an improper or colourable purpose, or that it discriminated against judges vis-à-vis other citizens.[8]

6.07 The Supreme Court of Canada approached this case as one raising the fundamental issue of what kind of financial security for judges is required by the principle of judicial independence, which the Court believed is guaranteed both by the express provisions of the Constitution[9] and by the "deeper set of unwritten understandings" [10] that underlie the Constitution. The Court reaffirmed the view it had expressed in *Valente v R*[11] that financial security is one of the core characteristics of judicial independence (the others being security of tenure and administrative independence).[12] It then explained that financial security, like the other core characteristics of judicial independence, has both an individual dimension and an institutional or collective dimension,[13] and the present case involved mainly this second dimension, which concerns "the proper constitutional relationship between the judiciary, the executive, and the legislature".[14]

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8 The tests of "enactment for an improper or colourable purpose" and "discriminatory treatment of judges vis-à-vis other citizens" were derived from the Canadian Supreme Court's decision in *Beauregard v Canada* [1986] 2 SCR 56.

9 Particularly ss. 96-100 of the Constitution Act 1867 and s. 11(d) of the Canadian Charter of Rights and Freedoms (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).

10 para 89 of the judgment. The Court grounded these unwritten understandings in the preamble to the Constitution Act 1867, which states that the Canadian Constitution is similar in principle to that of the United Kingdom.

11 [1985] 2 SCR 673.

12 paras 114-117 of the judgment.

13 paras 118-122.

14 para 122.

6.08 Chief Justice Lamer then wrote –[15]

> Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security? To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized. ... this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.
>
> I begin by stating these components in summary fashion.
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> First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. ...
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> Second, under no circumstances is it permissible for the judiciary – not only collectively through representative organizations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. ...
>
> Third, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. ...

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[15] paras 131-137 of the judgment.

6.09 As regards the first of the three components above, the Court held that "Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective"[16] for the purpose of considering any reduction or increase to, or freeze in, judicial remuneration. "Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional."[17] The Court held that such an independent body, which can be called a judicial compensation commission, should "be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration."[18] The body serves as "an institutional sieve between the judiciary and the other branches of government"[19] "which protects the courts from political interference through economic manipulation".[20] In particular, it serves "to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary".[21] Moreover, "the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table."[22]

6.10 The Court provided some guidelines regarding the establishment and operation of the judicial compensation commissions. First, the Court suggested that "it would be helpful" if the executive and the legislature "consulted the provincial judiciary prior to creating these bodies".[23] Secondly, the commissions must be independent.[24] Thus "the appointments [should] not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other."[25] The members should be given "some kind of security of tenure".[26] Thirdly, "in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means

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16 para 287 of the judgment.

17 Loc cit.

18 para 147. See also para 166.

19 para 185.

20 para 189.

21 para 170.

22 Loc cit.

23 para 167.

24 para 170.

25 para 172. The Court also said that "Although the independence of these commissions would be better served by ensuring that their membership stood apart from the three branches of government, as is the case in Ontario (Courts of Justice Act, Schedule, para 11), this is not required by the Constitution" (para 171).

26 para 171.

of economic manipulation",[27] the commission must convene every three to five years.[28] Fourthly, "the salary commissions must be objective", and "make recommendations on judges' remuneration by reference to objective criteria, not political expediencies".[29] Thus it would be desirable to include "in the enabling legislation or regulations a list of relevant factors to guide the commission's deliberations".[30] Fifthly, the Court recommended that the commissions should "receive and consider submissions from the judiciary, the executive, and the legislature".[31]

6.11 Sixthly, the Court stressed that the work of the commissions must be effective.[32] The Court referred to different possible ways of giving effect to the commissions' recommendations, examples of which could already be found in some Canadian provinces.[33] One is to make the recommendations binding. Another is the "negative resolution procedure", whereby the commission's report is laid before the legislature and its recommendations will be implemented unless the legislature by resolution votes to reject or amend them. Yet another way is the "affirmative resolution procedure", whereby the report is laid before the legislature but will not be implemented unless the legislature adopts its recommendations by resolution.

6.12 The Court held that the Constitution does not require that the commissions' recommendations be binding, "because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive".[34] However, to ensure that "the reports of the commission must have a meaningful effect on the determination of judicial salaries"[35] and that its recommendations "should not be set aside lightly",[36] the Court held that "if the executive or legislature chooses to depart from [the commission's] recommendations, it has to justify its decision according to a standard of simple rationality – if need be, in a court of law".[37] "An unjustified decision could potentially lead to a finding of unconstitutionality."[38]

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27 para 174 of the judgment.

28 Loc cit.

29 para 173.

30 Loc cit.

31 Loc cit.

32 para 174.

33 para 175.

34 para 176. However, the Court also said that the provincial legislatures may, if they so wish, establish a system whereby the commissions' recommendations are binding: loc cit.

35 para 175. See also para 178.

36 para 133.

37 para 287.

38 para 180.

6.13 How will a court review a decision to depart from the recommendations of the judicial compensation commission? The Chief Justice wrote –

> First, it [referring to the standard of justification used by the court] screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Secondly, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government ...[39]

> Although the test of justification – one of simple rationality – must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. *Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are prima facie rational. For example, an across-the-board reduction in salaries that includes judges will typically be designated to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest.* By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.[40] ... In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purpose.[41]

6.14 Finally, it is noteworthy that the Court also made the following comments in explaining its rulings that it is not permissible for the judiciary to engage in negotiations over remuneration with the government and that judicial salaries may not fall below a minimum level (i.e. the second and third

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[39] para 183 of the judgment.

[40] para 184. Emphasis supplied.

[41] para 158.

components of the institutional dimension of the financial security for the judiciary mentioned above) –

> The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.[42] ...
>
> ... the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.[43]

6.15 Applying the jurisprudence it enunciated to the facts of the case, the Canadian Supreme Court overturned the salary reductions in the three provinces concerned because they were all enacted either in the absence of an independent judicial compensation commission or by bypassing the existing compensation commission. After the decision in *Reference re Remuneration of Judges*, judicial compensation commissions have been established in provinces which did not have them before, and a new Judicial Compensation and Benefits Commission has also been established at the federal level.[44] In *Mackin v New Brunswick*,[45] the Supreme Court extended the mandatory requirement of consideration by a judicial compensation commission to changes in the terms of service of judges other than those regarding salaries and pensions.[46]

6.16 Since *Reference re Remuneration of Judges* opened the door for judicial review of decisions of the legislature or executive that depart from the recommendations of judicial compensation commissions, several actions for such

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[42] para 190 of the judgment.

[43] para 196.

[44] See generally the Judges Act (R.S. 1985, c. J1), s. 26.

[45] (2002) 91 Canadian Rights Reporter (2d) 1.

[46] More precisely, the case concerned the abolition of the existing system of supernumerary judges in New Brunswick.

judicial review have actually been brought.[47] Judges had to hear cases brought by their own colleagues on the amount of judicial remuneration. Thus one commentator[48] doubts whether the Supreme Court's stated objective in *Reference re Remuneration* of depoliticizing the issue of determination of judicial remuneration has been achieved. Another commentator[49] argues that there is an inherent contradiction between the concepts of "simple rationality" (which in his view embodies the "process model" of judicial review) and "legitimate reasons" (which in his view embodies the "correctness model" of judicial review), both of which figure in the judicial review of decisions on judicial remuneration. It may also be doubted whether the Canadian Supreme Court in *Reference re Remuneration* has struck the right balance between the need to prevent "institutional encroachment" by the executive or legislature on judicial independence on the one hand and the opposite need to prevent "institutional self-dealing" by the judiciary (i.e. the judiciary furthering its own interests) on the other hand.[50]

6.17 Apart from the institution of judicial compensation commissions, several other features of the Canadian system of judicial remuneration are also noteworthy. The first is the technique of automatic annual adjustment of

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47 e.g. *Re British Columbia Legislative Assembly Resolution on Judicial Compensation* (1998) 160 DLR (4th) 477 (BCCA); *Alberta Provincial Judges' Association v Alberta* [1999] AJ No 47 (Alta QB) (QL); *Alberta Provincial Judges' Association v Alberta* (1999) 177 DLR (4th) 418 (Alta CA); *Re Ontario Federation of Justices of the Peace Association v Ontario (Attorney General)* (1999) 171 DLR (4th) 337 (Ont Div Ct); *Conference des Juges du Quebec v Quebec (Procureure General)* (2000) 196 DLR (4th) 533 (Qc CA); *Newfoundland Association of Provincial Court Judges v Newfoundland* [2000] NJ No 258 (Nfld CA) (QL); *Manitoba Provincial Judges Association v Manitoba (Minister of Justice)* (2001) 2002 DLR (4th) 698 (Man QB); *Newfoundland Association of Provincial Court Judges v Newfoundland* [2003] NJ No 196; 2003 NL.C. Lexis 335.

48 Robert G Richards, "Provincial Court Judges Decision: Case Comment" (1998) 61 Saskatchewan Law Review 575.

49 Tsvi Kahana, "The Constitution as a Collective Agreement: Remuneration of Provincial Court Judges in Canada" (2004) 29 Queen's Law Journal 445. The author points out that the Supreme Court in *Reference re Remuneration* intended to give the judicial compensation commissions the role of "effective consultants" – "their recommendations would not be binding on the government, but would not be as easily rejected as conventional recommendations" (pp 452-3). The recommendations "are not to be treated simply as recommendations but as something between recommendations and decisions" (p 471). The author's own view is that the "process model" of traditional administrative law should be applied where the decision on salaries does not involve any "singling out" of judges in the sense that they are discriminated against and treated differently as compared to other employees paid from the public purse. He also alluded to the "potential judicial bias embedded in judicial review of judicial salaries" (p 467). He concluded that "the invocation of judicial independence in order to gain better terms of employment for the judiciary is at the origin of the many problems I have described, and ... it is an inappropriate use of the Constitution as a 'collective agreement'." (p 482)

50 According to Adrian Vermeule, "The Constitutional Law of Official Compensation" (2002) 102 Columbia Law Review 501, "Because salaries for any given institution will be set either by that institution or by rival institutions (jointly or exclusively), constitutional design faces an unavoidable tradeoff between the risk of institutional self-dealing and the risk of institutional encroachment or aggrandizement." (p 503) "The problem of compensation in particular is that the aim of preventing conflicts of interest or official self-dealing trades off against the aim of preventing interbranch encroachments." (p 505)

judicial remuneration on the basis of changes in the cost of living or the average wage,[51] which exists side by side with the system of review of judicial remuneration every few years by an independent commission. The purpose of the automatic adjustment is "to enhance the independence of the judiciary by removing judicial compensation from the give-and-take of the political process".[52] Examples are provided by relevant provisions in the Judges Act,[53] which applies to federally appointed judges, and the Courts of Justice Act[54] of Ontario, which applies to the provincial court judges of Ontario.

6.18 According to the Judges Act,[55] the annual adjustment is based on the change in the "Industrial Aggregate" or a 7% rise, whichever is the less. The Industrial Aggregate is "the average weekly wages and salaries of the Industrial Aggregate in Canada for that year as published by Statistics Canada".[56] Since the average wage may rise or decline, it has been pointed out that "[i]n theory, the [judges'] salaries can go down as well as up".[57] However, the same is not true for provincial judges in Ontario. Under the Courts of Justice Act of Ontario,[58] there is also an automatic annual adjustment of judicial salaries on the basis of changes in the Industrial Aggregate subject to a maximum of a 7% pay rise for judges. However, it is also provided that in the event of a drop in the Industrial Aggregate, the judges' salaries will remain unchanged.[59] Although the law provides for automatic annual adjustments, there have been occasions on which the Government decided not to allow them and introduced counteracting legislative measures. Thus Professor Friedland wrote in 1995 –[60]

> The federal government did not roll back wages in the recent recession. Instead, it prevented the previously discussed automatic cost-of-living pay increases that are

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51 This technique has also been used in the USA and in Australia. The relevant practice in the USA has been mentioned in chapter 4 above. For the relevant practice in Australia, see George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), pp 26, 39-40.

52 Friedland (n 4 above), p 58 (quoting from the Senate proceedings).

53 R.S. 1985, c. J-1.

54 R.S.O. 1990, c. C.43.

55 s. 25.

56 s. 25(3)(b).

57 Friedland (n 4 above), p 57.

58 See paragraph 45 of the "Framework Agreement" between the Government and the Judges (represented by 3 judges' associations in the province) which forms part of the Act (see s. 51.13(3)) and is set out in its Schedule.

59 para 45(5). Paragraph 25(e) provides, as one of the criteria to be considered by the Provincial Judges' Remuneration Commission, that "the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence". It should be noted that unlike the case of the federal Judicial Compensation and Benefits Commission, the recommendations of the Provincial Judges' Remuneration Commission in Ontario have binding force: see the Framework Agreement, paras 2-3, 27-29.

60 Friedland (n 4 above), p 61. The footnotes in the original text are not included here.

> set out in the Judges Act. It was announced in 1992 that judges, like others paid out of government funds, would have a pay freeze for the years 1993 and 1994. This was subsequently extended for another two years to 1997. Chief Justice Lamer protested that the judges should have been consulted before the freeze was ordered. The judges threatened ... that they were considering legal action, but the threat was not acted upon, ...

Professor Friedland also pointed out that the provincial court judges in Ontario had agreed to a voluntary form of reduction in 1993.[61]

6.19 A second feature of the Canadian system that is noteworthy is the arrangement used in some provinces of "pegging salaries to external standards" –[62]

> New Brunswick informally links provincial court compensation to that of the highest level of deputy minister. Newfoundland links the pay to the salary of the Deputy Minister of Justice. Prince Edward Island had linked the salary to the average of those of all the other provincial benches, but recently changed it to match the average of the other Atlantic provinces' provincial benches. The federal government's latest Triennial Commission ... links salaries to the mid-range of the DM-3 [DM refers to Deputy Minister] category.[63] ... In 1875, when the Supreme Court of Canada was established, its judges were paid the same as cabinet ministers. Some link [of judicial salaries] with salaries of very senior civil servants is clear in Canada ... The real issue is what level of civil service should be used as a comparison. Should it be all deputy ministers? Or should it be the very top deputy ministers, that is, those in Canada at or above the midge-range of the DM-3 category, at present consisting of 14 deputy ministers?[64]

6.20 Thirdly, although it is a common practice in Canada to charge judicial salaries to the consolidated revenue fund so that they would not be subject to the annual appropriation vote of the legislature, this does not mean that *changes* in judicial salaries need not go before the legislature. This is because

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[61] Loc cit.

[62] Friedland (n 4 above), p 57.

[63] Ibid, p 57 (with footnotes omitted).

[64] Ibid, p 66 (with footnotes omitted).

the exact amounts of judicial salaries are usually set out in statutes,[65] which need to be amended by the legislature if the amounts are to be changed.[66] As regards the practice of charging judicial salaries to the consolidated fund, the Supreme Court of Canada has held that this practice, though "theoretically preferable",[67] is not an essential ingredient of the financial security for judges or of judicial independence. Le dain J, delivering giving the judgment of the Court, said –[68]

> Making judicial salaries a charge of the consolidated revenue fund instead of having to include them in annual appropriations is, I suppose, theoretically a measure of greater security, but practically it is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole.

6.21 Fourthly, it may be noted that in Canada, provincial judges' associations are well-organised and are active in protecting the interests of judges in better remuneration and terms of service. They have also been involved in launching litigation on such issues, as is apparent from the content of this chapter. In Ontario, the Ontario Judges Association, Ontario Family Law Judges Association and Ontario Provincial Court (Civil Division) Judges Association have concluded a "Framework Agreement" with the Government, which is given legal force by and incorporated as part of the Courts of Justice Act –

> The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the [Provincial Judges Remuneration] Commission shall contribute to securing and maintaining the independence of the Provincial Judges.[69]

6.22 Finally, it should be noted that the issue of "grandfather clauses" has come before the Canadian courts. For present purposes, such clauses may be understood as involving qualifications to new legislative provisions which change the terms of service of judges, the qualification being that the changes are

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[65] e.g. ss. 9-24 of the Judges Act as far as federally appointed judges are concerned.

[66] This point has been made in Kitty Lam, *Budgetary Arrangements for Overseas Judiciaries* (Hong Kong Legislative Council Secretariat, Research and Library Services Division, 20 November 2003), para 5.5.4 (available on the LegCo website, www.legco.gov.hk).

[67] *Valente v R* [1985] 2 SCR 673, at para 43.

[68] Loc cit.

[69] para 2 of the Framework Agreement as set out in the Schedule to the Courts of Justice Act (Ontario).

not applicable to existing judges, and are therefore only applicable to judges appointed after the change has been introduced. In *Beauregard v Canada*,[70] the relevant change was from a non-contributory retirement benefit for judges to a new system in which the judge had to make contributions to the retirement scheme. The new system was not applicable to judges appointed before the bill for the change was introduced. One of the plaintiff's argument was that the principle of equality before the law in the Canadian Charter of Rights[71] prohibited different treatment of judges for the purpose of their retirement benefits.[72] The Supreme Court of Canada held by a majority that such "grandfathering" of incumbent judges in order to protect their settled expectations was justified and was not unconstitutional.[73]

6.23 ***Summary of this chapter*** **:** The Canadian Constitution does not contain an express provision on the issue of reduction or non-reduction of judicial remuneration. During the Great Depression, an Act of Parliament was introduced in 1932 to reduce civil service pay, but the Act did not apply to judges. Under public pressure to extend the cut to the judiciary, the Government introduced, shortly after the Act was passed, a special Income Tax Act to levy an additional tax on judicial salaries for one year. In the 1990's, there was litigation on the issue of reduction of judicial remuneration in several Canadian provinces. The Supreme Court of Canada provided a comprehensive statement of the law on changes to judicial remuneration in *Reference re Remuneration of Judges*.[74] According to this decision, the guiding principle for the construction of a system for the determination of judicial determination is to ensure that the courts are free and are perceived to be free from political interference through economic manipulation by the executive or legislative branches of government, and that the process for the determination of judicial remuneration should be depoliticised. Thus a prominent role must be played in this regard by an independent judicial compensation commission, which should be interposed between, and serve as an institutional sieve between, the judiciary and the other branches of government. Any proposal to reduce, freeze or increase judicial remuneration must be considered by such a commission. The recommendations of the commission need not be made binding, but if the Government decides to depart from the recommendations, it must be prepared to publicly justify its decision, if necessary before a court of law. Since *Reference re Remuneration of Judges* was decided, cases involving judicial review of decisions on judicial remuneration have been litigated before the Canadian courts, with the applicants being successful in some cases. Some commentators doubt whether the original objective of "depoliticising" the issue of judicial remuneration has been achieved, or whether a proper balance has been struck in the Canadian system between the

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70 [1986] 2 SCR 56.

71 s. 1(b).

72 See para 59 of judgment of the majority of the Supreme Court of Canada.

73 Ibid, paras 69-71.

74 [1997] 3 SCR 3.

prevention of encroachment on judicial independence on the one hand and the avoidance of "institutional self-dealing" by the judiciary on the other hand. Other features of the Canadian system that are noteworthy include automatic cost-of-living adjustments to judicial salaries, the informal pegging of judicial salaries to those of senior civil servants or deputy ministers, charging judicial salaries to the consolidated revenue fund, the active role of provincial judges' associations, and the use of "grandfathering" arrangements regarding changes in the terms of service of judges.

Chapter 7 : Other Countries and Jurisdictions

7.01 Having reviewed above the relevant experience of the countries discussed in the Mason Report, we will now move on to examine briefly a number of other countries or jurisdictions that are not covered in the Mason Report but which may be significant from a comparative or global perspective. They include –

(1) Commonwealth countries;
(2) civil law countries (selected examples);
(3) other countries (selected examples); and
(4) our neighbouring jurisdictions of Macau, mainland China and Taiwan.

Commonwealth countries

7.02 For the purpose of this study, the constitutions[1] of 46 countries (excluding the United Kingdom itself) of the British Commonwealth listed in Sir William Dale's treatise on *The Modern Commonwealth*[2] have been surveyed. Before setting out the results, the works of two leading authorities on Commonwealth constitutional law will first be referred to by way of introduction.

7.03 Referring to the constitutions enacted in Britain for colonies in preparation for their self-government and eventual independence, Professor S.A. de Smith wrote –

> The constitution will lay down the conditions under which money may be withdrawn from public funds; it will prescribe the legislative procedure for the authorisation of public expenditure, providing for votes on the estimates, the appropriation of supply, and unforeseen contingencies; it will charge upon the public revenues the salaries of officers whom it is important to screen from political pressure – superior judges, members of the service commissions, the D.P.P. [Director of Public Prosecutions] and so on – and perhaps provide that their emoluments shall not be reduced during their tenure of office. Among those whose salary will be thus protected will be an independent Auditor-General or Director of Audit, who may, like the D.P.P., be appointed by the Public Service Commission but removable only on prescribed grounds

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1 The texts of most of the constitutions referred to in this chapter are those provided by A P Blaustein and G H Flanz (eds), *Constitutions of the Countries of the World* (Dobbs Ferry, NY: Oceana Publications, loose-leaf edition).

2 William Dale, *The Modern Commonwealth* (London: Butterworths, 1983).

> after due inquiry.[3] ... Under all the constitutions the salaries of judges are a charge on the Consolidated Fund, so that they cannot become the subject of debate on the annual estimates; and it is further provided that a judge's salary and terms of office cannot be altered to his disadvantage during the tenure of his appointment.[4]

7.04 On the issue of judicial remuneration, Sir Kenneth Roberts-Wray also pointed out –

> In some [Commonwealth] countries, conditions of service are safeguarded. The Judge's remuneration may be charged on Government funds, and thereby removed from the arena of debate on annual estimates. Disadvantageous alteration of a Judge's remuneration or other terms of service may be prohibited during his tenure of office.[5]

7.05 To what extent it is a common practice in constitutions of Commonwealth countries (and thus common law jurisdictions) to provide that judicial remuneration may not be reduced during the judge's tenure of office? From the survey of 46 Commonwealth countries mentioned above, the answer is as follows –

No. of countries with unqualified provisions prohibiting reduction[6]	:	19
No. of countries with qualified provisions prohibiting reduction[7]	:	4
No. of countries with no provisions prohibiting reduction[8]	:	22
Special case (India)	:	1

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3 S A de Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964), p 75.

4 Ibid, p 139.

5 Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966), p 477.

6 The countries are, in alphabetical order: Australia, Bangladesh, Barbados, Belize, Fiji, Gambia, Ghana, Jamaica, Malaysia, Malta, New Zealand, Seychelles, Sierra Leone, Singapore, Sri Lanka, Swaziland, Tonga, Uganda, Zimbabwe.

7 The countries are: Malawi, Samoa, Solomon Islands, Tuvalu.

8 The countries are, in alphabetical order: Antigua and Barbuda, Bahamas, Botswana, Canada, Cyprus, Dominica, Grenada, Guyana, Kenya, Kiribati, Lesotho, Maldives, Mauritius, Nauru, Nigeria, Papua New Guinea, St Lucia, St Vincent, Tanzania, Trinidad and Tobago, Vanuatu, Zambia.

7.06 Some representative samples of unqualified provisions prohibiting reduction of judicial remuneration may be set out here, starting from the simplest and moving on to the more elaborate –

> The salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission. (s. 24, Constitution Act 1986, New Zealand)
>
> The remuneration of judges must not be reduced during their terms of office. (s. 136, Constitution (1997), Fiji)
>
> The salary payable to, and the pension entitlement of, a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment. (s. 108(2), Constitution (1978), Sri Lanka)
>
> The salary and allowances payable to [the Chief Justice, a judge of the Supreme Court, Judge President of the High Court or a judge of the High Court] shall not be reduced during the period he holds the office concerned or acts as holder thereof. (s. 88(2), Constitution (1979), Zimbabwe)
>
> The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment. (art. 125(7), Constitution (1957), Malaysia)[9]
>
> The salary prescribed in pursuance of this section in respect of the holder of any office to which this section applies [which includes Supreme Court judges] and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment. (s. 118(3), Constitution (1981), Belize)
>
> The salary, allowances, privileges and rights in respect of leave of absence, gratuity, pension and other conditions of service of a Justice of the Supreme Court or any judicial officer or other persons exercising judicial power, shall not be varied to his disadvantage. (s. 127(5), Constitution (1993), Ghana)

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[9] The relevant provision in Singapore's Constitution (1965) is identical (see art. 98(8)).

> Subject to article 134 [on the removal of judges from office], the salary, allowances or gratuity payable to and the term and other conditions of service of a Justice of Appeal or Judge shall not be altered to the disadvantage of the Justice of Appeal or Judge after appointment. (art. 133(2), Constitution (1993), Seychelles)

7.07 The existence of these "unqualified" provisions prohibiting the reduction of judicial remuneration and unfavourable alterations of terms of service does not necessarily mean that in practice judicial salaries are never reduced. The incidents of voluntary reductions in Australia have been mentioned in chapter 6. And, as mentioned in the Mason Report, in October 2001 judges in Singapore also agreed to a salary reduction that was line with salary reductions in the public sector despite the relevant provision in the Singaporean Constitution.[10]

7.08 We now turn to the "qualified" provisions on reduction of judicial remuneration. In one case, the qualification concerns the consent of the judges. In the other three cases, the qualification concerns a salary reduction applicable not only to judges but also to other holders of public office designated by the Constitution. The provisions are as follows –

> The salary and any allowance of a holder of judicial office shall not without his or her consent be reduced during his or her period of office and shall be increased at intervals so as to retain its original value and shall be a charge upon the Consolidated Fund. (s. 114(2), Constitution (1994), Malawi)

> The remuneration prescribed in pursuance of this section in respect of the holder of any such office and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage[11] after his appointment except as part of any alteration generally applicable to holders of offices specified in this section [which include the offices of Governor-General, any judge of the High Court or the Court of Appeal, Speaker, Ombudsman, Director of Public Prosecutions, Public Solicitor, Auditor-General, Commissioner of Police, and member of any Commission established by this

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[10] Mason Report, para 4.102. See also the case of Japan discussed below.

[11] See also subsection (4) of this section, which provides that "Where a person's remuneration or other terms of service depend upon his option, the remuneration or terms for which he opts shall ... be deemed to be more advantageous to him than any others for which he might have opted."

Constitution]. (s. 107(3), Constitution (1978), Solomon Islands)[12]

7.09 India is classified above as a special case because the Constitution only provides that "neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment".[13] The Constitution does not expressly provide for non-reduction of judicial salaries, but instead provides that such salaries will be determined by Parliament by law.[14] It also expressly provides that during a financial emergency proclaimed in accordance with the Constitution, the President may "issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts".[15]

Civil law countries (selected examples)

7.10 As observed above, constitutional provisions on non-reduction of judicial remuneration is indeed fairly widespread, albeit far from universal, among common law jurisdictions. On the other hand, such provisions do not exist in the major legal systems of the civil law family. European countries in which such provisions are absent include, for example, France, Germany, Italy, Austria, the Netherlands, Belgium, Spain, Portugal, Sweden, Norway and Finland. There is also no provision on the non-reduction of salaries in the case of the judges of the Court of Justice of the European Communities,[16] nor, as discussed in chapter 2 above, in the European Charter on the Statute for Judges (1998).

7.11 In the case of Belgium, a constitutional amendment was passed in 1981 to reduce pensions for judges in the context of general economic measures to cope with an economic crisis.[17]

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[12] There are similar provisions in art. 69 of the Constitution of Samoa (1962) and s. 169(4) and (5), Constitution of Tuvalu (1986).

[13] See articles 125(2) and 221(2) of the Indian Constitution (1949), applicable to judges of the Supreme Court and the High Courts respectively.

[14] Ibid, arts. 125(1) and 221(1). The salaries of Supreme Court and High Court judges are set out in part D of the Second Schedule to the Constitution. In 1986 the Schedule was amended to give effect to salary increases.

[15] Art. 360(4)(b) of the Constitution. So far no financial emergency has been declared. See Mahendra P Singh, *V N Shukla's Constitution of India* (Lucknow: Eastern Book Co, 10th ed 2001, 2003 reprint), pp 417, 866-7; M P Singh, "Securing the Independence of the Judiciary – The Indian Experience" (2000) 10 Indiana International & Comparative Law Review 245.

[16] Simone Rozes, "Independence of Judges of the Court of Justice of the European Communities", in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985), chapter 46 (p 501) at p 505.

[17] Marcel Storme, "Belgium", ibid, chapter 5 (p 43), at p 43.

7.12 In Germany, judicial salaries are adjusted in accordance with the annual rate of inflation, as is the case for civil servants. There were instances in which civil servants' salaries were reduced together with those of judges because of budgetary stringency.[18] "Quite generally, the Federal Constitutional Court has been adhering to the principle that, although a proper relation should be maintained between the judges' salaries and those of other civil servants, this does not affect the independence of the judges."[19]

7.13 As regards Italy, there is available in English a case study of the politics of judicial remuneration.[20] In Italy, judges' associations are active in fighting for better judicial salaries; issues of judicial remuneration have also been litigated before the courts themselves. As pointed out by Professor Francesca Zannotti –[21]

> To obtain raises, the associations of the various categories of magistrates, behaving like a real pressure group in Parliament, have traditionally adopted two different strategies, shifting from one to the other. The first consisted of taking advantage of the civil servants' trade union's negotiations, since the trade unions represented so many more people; this allowed them to protect their image of independence by avoiding awkward direct negotiations with the executive and the Parliament. The second strategy consisted of separating themselves from the higher civil servants, claiming their uniqueness and the superiority of their functions. This occurred especially in negative economic circumstances, when it was much easier for a body composed of a relatively limited number of members (approximately 8,000) to be dealt with separately.

7.14 There are now two principal mechanisms of adjustment of judicial salaries (apart from career progression during an individual's judicial career, which is important because in a civil law system senior judges are not, as in the case of common law jurisdictions, recruited directly from the Bar but are promoted from lower ranking positions where law graduates begin their careers as judges) which operate simultaneously. First, like other civil servants, judges are entitled to cost-of-living allowances which are based on the inflation rate.

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[18] Peter Schlosser and Walther Habscheid, "Federal Republic of Germany", ibid, chapter 10 (p 78) at p 88.

[19] Loc cit.

[20] 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), which the following discussion draws on. See also A. Pizzorusso, "Italy", in Shetreet and Deschenes (n 16 above), chapter 17 (p 196).

[21] Zannotti (n 20 above), pp 187-8.

Secondly, there is another mechanism for automatic adjustment which operates every three years "on the basis of the average percentage increase achieved cumulatively by all categories of civil servants in the previous three years. From 1981 to 1991 this mechanism led to a 105% real increase in the magistrates' salaries."[22]

Other countries (selected examples)

7.15 We now move on to consider several other countries that are of special interest. They include a few countries influenced by the Anglo-American common law tradition which have not yet been included in the discussion above, and several "new democracies" or "transitional countries" which are in the process of transition from authoritarianism to liberal constitutional democracy.

Ireland: The Irish Constitution (1937) provides that "The remuneration of a judge shall not be reduced during his continuance in office". (art. 35(5))

South Africa: The new South African Constitution (1996) provides that "The salaries, allowances and benefits of judges may not be reduced." (art. 176(3))

Israel: Israel does not have a single written constitution; its constitution consists of several basic laws. Section 10 of the Basic Law on the Judicature (1984) provides that judicial salaries shall be prescribed by law or by the decision of the Knesset (Parliament) or of a Knesset committee empowered by the Knesset, and "No decision shall be passed reducing the salaries of judges alone." (s. 10(b)) This is a qualified prohibition on the reduction of judicial salaries, and means that "judges' pay may only be cut if the wages of another sector of officers or workers are also reduced"[23] or if there is "an across-the board pay cut of civil service employees".[24]

Japan: The Japanese Constitution (1947) provides that judges "shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their term of office".[25] It should be noted that, as in the case of Singapore (where there was a voluntary reduction in October 2001 despite a constitutional provision on non-reduction), a 2.1% reduction in judicial salaries was enacted by the Diet (Parliament) in November 2002. This was the first such reduction

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[22] Ibid, p 188.

[23] Shimon Shetreet, "The Critical Challenge of Judicial Independence in Israel", in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy* (Charlottesville: University Press of Virginia, 2001), chapter 12 (p 233) at p 246.

[24] Ibid, p 243. The provision has been criticised as "it leaves open the possibility of reducing judges' pay for reasons that have nothing to do with economics, provided that another group is also subjected to a wage reduction" (ibid, pp 246-7).

[25] Arts. 79 (with regard to judges of the Supreme Court) and 80 (with regard to judges of the inferior courts).

since the Constitution came into force in 1947. Salary cuts were also applied to prosecutors, national government employees and members of the Diet. It was reported that "justices of the Supreme Court backed the pay-cut proposal despite clauses in the Constitution prohibiting such a move, saying it would not undermine the independence of the judiciary or endanger the livelihood of judges".[26]

South Korea: The South Korean Constitution (1988) provides that "No judge shall be removed from office except by impeachment or a sentence of imprisonment or heavier punishment, nor shall he be suspended from office, have his salary reduced or suffer any other unfavorable treatment except by disciplinary action" (art. 106(1)). It appears that the principle that the salary of an individual judge may be reduced as a sanction imposed in disciplinary proceedings is generally accepted in civil law systems.[27]

The Philippines: The Constitution (1986) of the Republic of the Philippines provides that "The salary of the Chief Justice and of the Associate Justices of the Supreme Court, and of judges of lower courts shall be fixed by law. During their continuance in office, their salary shall not be decreased." (art. VIII, s. 10)

Thailand: No relevant provision in the Constitution of 1991.

Cambodia: No relevant provision in the Constitution of 1993.

East Timor: No relevant provision in the Constitution of 2002.

Russia: The Russian Constitution (1993) does not contain any provision on the non-reduction of judicial remuneration. However, the Judges' Status Law (1992) provides that judicial salaries cannot be diminished "by any other act" (section 8, article 4).[28]

The Czech Republic: The Constitution (1992) does not contain any provision on the non-reduction of judicial remuneration. In 1995, the Act on Remuneration of Constitutional Functionaries was passed. "The judges' salaries not only grew, but were also directly related to the salaries of other constitutional functionaries, for example members of the Chamber of Deputies, and this interrelatedness

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[26] "Diet enacts pay-cut law revisions", The Japan Times, 21 November 2002; "Judges, prosecutors face pay cut", The Japan Times, 20 November 2002 (both available at www.japantimes.co.jp).

[27] See eg F. Grivart de Kerstrat, "France", in Shetreet and Deschenes (n 16 above), chapter 8 (p 62), p 66: "a reduction of salary or retirement rights may be obtained only through disciplinary proceedings".

[28] The text of the Law is available at www.supcourt.ru/EN/jstatus.htm. See also Todd Foglesong, "The Dynamics of Judicial (In)dependence in Russia", Russell and O'Brien (n 23 above), chapter 4 (p 62), p 67.

created an institutional guarantee against their manipulation by Parliament."[29] Since 1997, the Parliament has on several occasions passed legislation taking away the "fourteenth salary"[30] for the year concerned from constitutional functionaries, including judges. The Constitutional Court declared the relevant law unconstitutional in 1999, but upheld a similar law in 2000. The two decisions are inconsistent with each other.[31]

Slovakia (the Slovak Republic): The Constitution (1992) does not contain any provision on the non-reduction of judicial remuneration. In 2000, the Constitutional Court heard a case in which a law effectively freezing judicial salaries from April to December 1999 was challenged (by 34 members of Parliament) for violating the principles of the rule of law and judicial independence enshrined in the Constitution. The challenge was dismissed by the Constitutional Court.[32] While affirming the importance of judicial independence, the Court held that the "Constitution does not exclude the possibility that salaries of the judiciary may reflect the economic and budgetary policy of the state"; "the Constitution of the Slovak Republic does not prevent the interdependence of judicial salaries and economic circumstances, neither precluding a decrease in judicial salaries once in office, nor providing any other constitutional guarantee securing judicial salaries".[33] During the subsequent discussion on the amendment of the Constitution, a proposal to provide in the Constitution for the non-reduction of judicial remuneration was raised but rejected as other amendments were adopted in 2001.[34]

Bulgaria: The Constitution (1991) does not contain any provision on the non-reduction of judicial remuneration. The only recent case which I have been able to discover in the present study in which there was an attack on the judiciary in the form of reduction of judicial remuneration is provided by the Bulgarian experience in the 1990's. The incident was recounted by Professor Dick Howard was follows –

> ... [the legislators'] attack on the regular judiciary seemed to shift to the Constitutional Court. As is often the case, rather than removal, the external pressure exerted on the Constitutional Court concerned its budget. The ruling

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29 Eliska Wagnerova, "Position of Judges in the Czech Republic", in Jiri Priban, Pauline Roberts and James Young (eds), *Systems of Justice in Transition: Central European Experiences since 1989*, chapter 10 (p 163), p 170.

30 The constitutional functionaries were originally entitled to 14 payments of salary every year, including 12 monthly payments and 2 extra payments before the summer and before Christmas respectively. The 14th salary was the pre-Christmas payment. See ibid, p 170.

31 Ibid, p 171.

32 Alexander Brostl, "At the Crossroads on the Way to an Independent Slovak Judiciary", ibid, chapter 9 (p 141), p 151.

33 Ibid, p 151.

34 Ibid, p 152.

> majority in Bulgaria first attempted to amend the Act on the Constitutional Court to cut justices' salaries and abolish their right to retire with pensions. Later, in response to the court's refusal to dismiss a case against the Communist Party, the executive branch reduced the court's budget allocations by cutting benefits and compensating investigative magistrates from the budget of the Ministry of Justice rather than from that of the Ministry of the Interior. In addition, the prime minister attempted to evict the court from its office building. Contrary to their intentions, these blatant attacks on the judiciary actually seemed to solidify the court's position in Bulgaria. In ruling these various attempts unconstitutional, the court's public stature was enhanced, as it was seen as the "last bulwark against an ominous, large-scale campaign of re-communization."[35]

7. 16 *Other new democracies or transitional countries*: In order to understand more about financial security as an element of judicial independence in "new democracies" or "transitional countries", I have also consulted several reports on judicial independence and judicial reforms in developing countries in the course of the present study.[36] None of the reports raises the issue of reduction or threatened reduction of judicial remuneration for the purpose of putting pressure on the judiciary as an important concern in the new democracies or transitional countries. Instead, the main issues relating to financial security for judges concern the adequacy of their remuneration, the importance of increasing it, attracting suitable candidates to the bench and preventing corruption among judges.

7.17 *Macau, Mainland China and Taiwan*

Macau: As in the case of Hong Kong, there is nothing in the Basic Law of the Macau Special Administrative Region which prohibits the reduction of judicial remuneration as a general rule. However, article 93 of the Hong Kong Basic

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[35] A E Dick Howard, "Judicial Independence in Post-Communist Central and Eastern Europe", ibid, chapter 5 (p 89), p 97 (footnotes in the original text not reproduced).

[36] The reports are: Office of Democracy and Governance, U.S. Agency for International Development, *Guidance for Promoting Judicial Independence and Impartiality* (revised edition, January 2002, PN-ACM-007), www.ifes.org/rule_of_law/judicial_independence.pdf, or www.usaid.gov/democracy; Luu Tien Dung, *Judicial Independence in Transitional Countries* (Oslo Governance Centre, United Nations Development Programme, January 2003), www.undp.org/oslocentre; Mark K Dietrich, *Legal and Judicial Reform in Central Europe and the Former Soviet Union: Voices from Five Countries* (Washington, DC: The World Bank, 2000), www4.worldbank.org/legal; Keith Henderson and Violaine Autheman, *A Model State of the Judiciary Report: A Strategic Tool for Promoting, Monitoring and Reporting on Judicial Integrity Reforms* (IFES, summer 2003 (revised)), www.ifes.org/rule_of_law (IFES, originally known as the International Foundation for Election Systems, is an international NGO which supports the building of democratic societies).

Law ensures that the pay, allowances, benefits and conditions of service of Hong Kong judges will be "no less favourable than before" the establishment of the Hong Kong SAR. There is no corresponding provision in the Macau Basic Law.

The Judicial Officers Law[37] enacted by the legislature of the Macau SAR in 1999 provides that the salaries of judicial officers (which include judges as well as prosecutors) shall be determined by law. The relevant law is the Law on the Salary System of Judicial Officers[38] enacted in 2000. The Law stipulates the salaries of judicial officers at various levels as particular percentages of the salary of the Chief Executive of the Macau SAR.[39] For example, the salaries of the Chief Justice of the Court of Final Appeal and the Chief Judge of the Intermediate Court are respectively 80% and 70% of the salary of the Chief Executive. The salary of a judge of the Court of Final Appeal (other than the Chief Justice) is 75% of the Chief Executive's salary.

Mainland China: There is no provision on the non-reduction of judicial remuneration in the Constitution of the People's Republic of China. The Law on Judges provides for the rights and obligations of judges and the conditions of their work. It is provided that judges have the right to remuneration for their work.[40] The system and criteria of judicial salaries are to be determined by the State in accordance with the characteristics of adjudication work.[41] A system of periodic wage increase is applicable to judges.[42]

Taiwan: The Constitution of the Republic of China (1947) provides for the security of tenure of judges by stipulating the grounds for removal from office.[43] It also stipulates that no judge shall be suspended, transferred or have his or her salary reduced except in accordance with law.[44] The Regulations on Judicial Officers (1989) refer to reduction of salary as a disciplinary sanction.[45] This seems to be consistent with the practice in civil law countries mentioned above

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37 Law No 10/1999. See art. 34 of the Law. The laws of Macau referred to here are available in *Collection of the Laws of the Macau Special Administrative Region* (澳門特別行政區法律匯編), vol 2 (Beijing: Chinese Social Science Press, 2000), pp 3141 ff (in Chinese).

38 Law No 2/2000.

39 The salaries of the Chief Executive and other principal officials are in turn stipulated in the Law on the Salary System for the Chief Executive and Principal Officials of the Macau Special Administrative Region, Law No 1/2000.

40 Art. 8(4).

41 Art. 34.

42 Art. 35. The periodic increase refers mainly to increases along the salary scale as an individual judge progresses in his or her career, but can also refer to the periodic increase of the salary level of judges as a class in accordance with rising costs of living: see Zhou Daoluan (ed), *Lectures on the Law on Judges* (法官法講義) (Beijing: People's Court Press, 1995), pp 227-8.

43 Art. 81.

44 Loc cit.

45 Art. 37 of the Regulations (司法人員人事條例).

(see the discussion on South Korea) that reduction of salary may be applied to an individual judge in disciplinary proceedings.

7.18 ***Summary of this chapter*** **:** In drafting constitutions for British colonies on their way to self-government and eventual independence, it has been a fairly common practice to provide for judicial remuneration (as in the case of the salaries of a number of other senior holders of public office) being charged on the consolidated fund, and to provide that a judge's salary and other terms of office cannot be altered to his or her disadvantage during the tenure of his or her office. Among the 46 Commonwealth countries (excluding the UK) surveyed in this chapter, 19 countries have constitutions that contain an unqualified provision on the non-reduction of judicial remuneration; 4 countries have constitutions that contain a qualified provision on the non-reduction of judicial remuneration (the qualification in 3 countries relating to a reduction that is also applicable to certain other senior holders of public office, and that in one country relating to the judges' consent); 22 countries have no constitutional provisions on the non-reduction of judicial remuneration; and one country (India) is a special case in which the Constitution does not expressly prohibit the reduction of judicial salaries, but provides expressly that such reduction may be introduced during a financial emergency declared in accordance with the Constitution.

7.19 As regards civil law countries (e.g. France, Germany, Italy, Austria, the Netherlands, Belgium, Spain, Portugal, Sweden, Norway and Finland as mentioned in this chapter), the general practice is apparently that the constitution does not address the issue of reduction or non-reduction of judicial remuneration. It seems that in some civil law jurisdictions (such as France, South Korea and Taiwan), reduction of the salary of an individual judge may be used as a sanction administered in the course of disciplinary proceedings conducted in accordance with law. In Germany, where there were instances in which civil servants' salaries were reduced together with those of judges because of budgetary stringency, the Federal Constitutional Court has held that the maintenance of a proper relationship between the judicial salaries and those of civil servants does not contravene judicial independence.

7.20 The constitutions of Ireland, South Africa, the Philippines and Japan contain unqualified provisions on the non-reduction of judicial remuneration, although judicial remuneration in Japan was actually reduced by Act of Parliament in 2002 with the judges' consent. (This case is similar to that of Singapore, where a reduction was introduced in 2001 with the judges' consent despite a constitutional provision on non-reduction.) There is no provision on the issue of non-reduction of judicial remuneration in the constitutions of Thailand, Cambodia and East Timor. In Israel, the Basic Law on the judiciary contains a qualified provision on the non-reduction of judicial remuneration. In Russia, the rule on non-reduction of judicial remuneration is not in the Constitution but is in the Judges' Status Law. In the Czech Republic, Slovak Republic and Bulgaria, the constitutions do not provide for non-reduction of judicial remuneration, but issues of judicial remuneration have come before the

constitutional courts in all three jurisdictions. Generally speaking, it does not appear that the issue of reduction of judicial remuneration as a threat to judicial independence (as distinguished from the issue of the adequacy of judicial remuneration and the need to raise it) has been a significant concern in the "new democracies", "transitional countries" and developing countries. In our neighbouring jurisdictions of mainland China and Macau, there are no express constitutional or legal provisions on the non-reduction of judicial remuneration.

Chapter 8 : The Way Forward for Hong Kong

8.01 The theoretical considerations, international norms and comparative experience relevant to a system for the determination and adjustment of judicial remuneration have already been considered in the preceding chapters, and account has also been taken of the relevant materials in the Mason Report. In this final chapter, the relevant issues and possible alternatives in the development of Hong Kong's system in this regard will be considered, bearing in mind the recommendations in the Mason Report where relevant.

8.02 The point of departure for our analysis must be the existing system and its historical evolution up to the present. This has been well covered in chapter 2 of the Mason Report, and it is unnecessary to repeat the information provided therein. It will suffice to highlight some salient features of the Hong Kong system for the determination of judicial remuneration, particularly features that are significant in the light of the overseas experience discussed in this Report.

8.03 Unlike the case in many foreign jurisdictions, the salaries of judges in Hong Kong are not provided for in legislation. As in the case of civil servants' salaries, judicial salaries are legally determined as part of the contractual arrangement between the individual judge and the Government, and the salary scale for judges of different ranks is adjusted annually by the Government. Funding for judicial salaries forms part of the overall budget of the Judiciary, which in turn forms part of the overall budget of the Government which is approved annually by the legislature in appropriation legislation. Since the establishment of the Standing Committee on Judicial Salaries and Conditions of Service ("the Judicial Committee") in 1987, the annual adjustments have been made by the Government upon the advice of the Judicial Committee. The Judicial Committee has existed side by side with the three independent bodies that advise the Government on the salaries and conditions of service of civil servants – the Standing Committee on Directorate Salaries and Conditions of Service, the Standing Commission on Civil Service Salaries and Conditions of Service, and the Standing Committee on Disciplined Services Salaries and Conditions of Service. The four bodies are served by a common secretariat staffed by civil servants. Until recently, the Standing Committee on Directorate Salaries and Conditions of Service and the Judicial Committee shared the same membership.

8.04 One of the most significant characteristics from a comparative point of view of the Hong Kong system of judicial remuneration as it has evolved is the informal "peg" between the salaries of senior civil servants and judges and judicial officers. Before 1988, judges and judicial officers were paid on the Directorate Pay Scale or the Master Pay Scale of the civil service depending on their rank. In 1988, the Judicial Officers Salary Scale (JOSS) was established, and the scale was retitled the Judicial Service Pay Scale (JSPS) in 1999. From

1989 to 2001 (i.e. before the civil service pay reduction in 2002), the JOSS or JSPS was adjusted annually in line with adjustments to the civil service pay scales. In other words, a judge or judicial officer received the same pay adjustment (usually pay rises, and no pay cut) every year during this period as that received by a civil servant on the same salary as the judge or judicial officer. Until the introduction of the new "accountability system" for principal officials in 2002, corresponding points (or roughly equivalent points) could be found as between the JOSS or JSPS and the civil service pay scales for a judge or judicial officer of each rank. Since the introduction of the accountability system (under which principal officials are no longer civil servants and receive a remuneration package structured differently from that in the civil service (e.g. remuneration substantially in cash with few fringe benefits)), there are no points in the civil service scale equivalent to those in the JSPS occupied by judges above the judges of the Court of First Instance (whose salary point is equivalent to that of Permanent Secretary).[1]

8.05 It has also been pointed out that –[2]

> According to its terms of reference, the Judicial Committee established in December 1987 is to review the pay and conditions of service of judges and judicial officers and to conduct an overall review when it considers it necessary. But so far, it has only considered proposals initiated by either the Administration or the Judiciary on an ad hoc basis. ... in practice, since 1989, on the advice of the Judicial Committee, annual adjustments to judicial salaries have followed adjustments made to the upper salary band of civil servants ...

8.06 The picture that emerges is therefore roughly as follows. In Hong Kong we have an independent non-statutory body (i.e. the Judicial Committee) that advises the Government on judicial remuneration. Before 2002, this body had for many years adopted the approach of recommending annual adjustments to judicial salaries that were identical with the adjustments to the salaries of civil servants who occupied equivalent salary points on the civil service pay scale. Apparently the system worked satisfactorily before 2002. By comparison with the situations in the USA, Canada and Australia described in this report, the Hong Kong system had certainly worked well before 2002 in the sense that there was almost no controversy, dispute or complaint about judicial salaries.

8.07 However, two developments since 2002 have presented challenges to the existing system. First, the introduction of the accountability system meant that equivalent points can no longer be established between the civil

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[1] Mason Report, para 2.28.

[2] Ibid, paras 2.14-2.15.

service pay scale and the JSPS as far as judges of the Court of Final Appeal and the Court of Appeal are concerned. Secondly, and this is a more serious problem than the first, the issue has to be faced of whether judicial salaries should be reduced in line with the reductions in civil service salaries that have been introduced since 2002. A related issue is whether the previous practice of informally pegging judicial salaries to civil service salaries should be abandoned, or whether adjustments (including increases) to judicial salaries in future should continue to be in line with the annual adjustments to civil service pay.

8.08 As far as the first issue is concerned, the solution is not difficult. It seems that the new remuneration package for principal officials is similar to the previous remuneration of principal officers (who were civil servants) in terms of total cost.[3] It is therefore not impossible – if it is considered desirable – to continue a system of informal peg between judicial salaries and the salaries of senior officials. For example, the salary of the Court of First Instance Judge can continue to be pegged to that of the Permanent Secretary (note that in Britain the salaries of High Court judges and of Permanent Secretaries have also been close), and the salaries of more senior judges can be kept equivalent to those of principal officials in terms of "total cost". Even if a system of performance pay and productivity bonuses (which, as pointed out in the Mason Report and by reports in Britain and Australia, are not appropriate for judges) is to be introduced for senior officials in future, it would still be possible to

> equat[e] the function, for example, of a High Court Judge with that of a category of senior officials so that each should be regarded as receiving the same basic remuneration, while adding to the basic remuneration of the High Court Judge the median performance pay received by the senior official category.[4]

8.09 We now turn to the more difficult issue – that of the reduction or non-reduction of judicial remuneration in Hong Kong. Should judicial salaries be subject to the same reductions as those applied to civil servants since 2002? There are several relevant considerations in this regard.

8.10 First, it should be noted that the Basic Law contains provisions regarding the pay and terms of service of both civil servants and judges (including judicial officers). In the case of the former, article 100 enables public servants serving in Hong Kong before the establishment of the Hong Kong SAR to "remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before". Article 103 provides for the maintenance after the handover of "Hong Kong's previous system of recruitment, employment, assessment, discipline, training and

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[3] Ibid, para 2.25.

[4] Mason Report, para 6.32.

management for the public service, including special bodies for their appointment, pay and conditions of service". Article 160, which has also been referred to in the context of the dispute about civil service pay reduction, provides, among others, that contracts, rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognised and protected by the Hong Kong SAR provided that they do not contravene the Basic Law.

8.11 As regards judges and judicial officers, article 93 of the Basic Law contains a provision similar to article 100. If they served in Hong Kong immediately before the handover, they "may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before". Their right to pensions is also protected.[5]

8.12 At the same time, the Basic Law also provides for the maintenance of Hong Kong's existing judicial system[6] and of judicial independence. Article 85 provides that the courts of the Hong Kong SAR "shall exercise judicial power independently, free from any interference." Article 39 provides, among others, for the continued application of the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR, implemented in Hong Kong by article 10 of the Hong Kong Bill of Rights in the Hong Kong Bill of Rights Ordinance, provides that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". As mentioned earlier in this report, a similar provision in the Canadian Charter of Rights and Freedoms has been held to provide the basis in Canadian constitutional law for judicial independence, including the guarantee of financial security for judges.

8.13 The reductions[7] that have been applied to the salaries of civil servants do not reduce their salaries below the relevant salary levels of 30 June 1997. Indeed, when the last reduction comes into effect on 1 January 2005, civil service salaries (for existing civil servants) would be reduced to the relevant levels of 30 June 1997. Thus article 100 would not be violated. The point has been litigated with regard to the Public Officers Pay Adjustment Ordinance. It was argued that even if the actual salary of a civil servant was not reduced below its 1997 level, the mere introduction of legislation to reduce pay and thus to vary the terms of the existing contract of employment would be a violation of article

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5 Art. 93(2) of the Basic Law. See also the similar provision for civil servants in art. 102.

6 Art. 81.

7 They are provided for in the Public Officers Pay Adjustment Ordinance (Cap 574) and the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap 580). The former provides for a reduction which took effect on 1 October 2002. The latter provides for 2 reductions taking effect on 1 January 2004 and 1 January 2005 respectively.

100 and/or article 103. The argument has however been rejected by the Court of First Instance of the High Court.[8]

8.14 It can be argued that just as civil service pay reduction to a level not below that of 30 June 1997 would not violate article 100 of the Basic Law, a similar reduction of judicial salaries would not violate article 93 of the Basic Law. The next question is whether such a reduction would violate the principle of judicial independence.

8.15 As discussed in chapter 1 of this report, it is difficult to argue that a reduction of judicial salaries threatens judicial independence where it is introduced as an integral part of public economic measures that are generally applicable to all persons paid from the public purse. As discussed in chapter 2, a number of international instruments which affirm the general principle of non-reduction of judicial remuneration recognise that a reduction in such circumstances constitutes an exception to the general rule and is permissible. The review of overseas experience in other chapters of this report suggests that such a reduction is not generally considered to be objectionable from the perspective of judicial independence, and even in jurisdictions where the constitution contains an absolute or unqualified prohibition of judicial remuneration, it is not uncommon for the judiciary to accept a voluntary reduction in order to share the burden of economic difficulties experienced by the population as a whole.

8.16 Although the objection in principle to a reduction of judicial remuneration in the circumstances mentioned above may not be a strong one, there are some complications which need to be taken into account in considering the option of such a reduction. The complications relate to the means by which such a reduction may be achieved.

8.17 For the purpose of this study, I have been provided with specimen documents relating to the appointment or employment of judges and judicial officers in Hong Kong and their terms of service. They are in fact similar to those relating to the employment of civil servants. As in the case of a civil servant, a judge or judicial officer is employed by the issue of a letter of appointment which refers to an accompanying memorandum on conditions of service. As in the case of the civil service, the memorandum on conditions of service for judges and judicial officers contains, among others, the following terms. (Slight variations in the wording exist depending on whether the appointee was appointed before or after the handover.)

> The judge [or "officer" in the case of a magistrate] is subject to Executive Orders issued from time to time by

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[8] *Lau Kwok Fai Bernard v Secretary for Justice* [2003] HKEC 711, 2003 HKCU LEXIS 902 (HCAL 177/2002; Hartmann J, 10 June 2003); *Scott v Government of the HKSAR* [2004] HKEC 1325 (HCAL 188/2002; Hartmann J, 7 Nov 2003).

> the Chief Executive for the administration of the Judiciary and to regulations and directions made under these Orders [before the handover, the reference was to "Colonial Regulations" instead]; and also subject to Government Regulations and Circulars, Departmental Instructions, and to any Ordinances or Regulations which apply to the office to which he is appointed or to the Judiciary.
>
> A judge [this provision does not apply to judicial officers such as magistrates] requires the prior consent of the Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China before returning to practise as a barrister or solicitor in the Hong Kong Special Administrative Region. To this effect, an undertaking is to be signed by the judge before his appointment.
>
> [The undertaking reads:
>
> "To: The Chief Executive of the HKSAR
>
> I hereby undertake that I will not, without the consent of the Chief Executive of the HKSAR of the People's Republic of China, practise as a barrister or a solicitor in the HKSAR."]
>
> Subject to the Basic Law, notwithstanding anything contained in this Memorandum or in the covering letter of offer of appointment, the Government reserves the right to alter any of the judge's terms of appointment, and/or conditions of service set out in this Memorandum or the said covering letter should the Government at any time consider this to be necessary.

8.18 The last clause set out above also appears in various versions of the Memorandum on Conditions of Service for civil servants. After June 2000, a new version of the clause was inserted in the Memorandum providing expressly that adjustments of pay may include a pay increase, pay freeze or pay reduction.[9] "The Executive has accepted that in respect of public officers employed prior to June 2000 the general power to alter terms and conditions contained in the memoranda may not extend to the power to unilaterally alter a fundamental condition such as terms of remuneration."[10] This view would be applicable to judges and judicial officers as well.

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[9] See the discussion in *Lau Kwok Fai Bernard v Secretary for Justice* (ibid), paras 38-40.

[10] Ibid, para 41.

8.19 Given the similarity between the terms and conditions of employment of civil servants and those of judges (including judicial officers), it would appear that the considerations regarding the means to introduce a pay reduction for civil servants are equally applicable to any pay reduction for judges. More particularly, as the Government has taken the view that it is legally risky to cut civil servants' pay without introducing legislation for this purpose, legislation would also be needed to effectuate a reduction in judicial salaries.

8.20 When the Public Officers Pay Adjustment Bill was introduced in the Legislative Council in 2002, the civil servants' unions and some legislators opposed the bill. Some of the arguments against the bill were legal arguments, and they were subsequently made before the court after the bill was enacted into law.[11] The main legal argument was that it is unconstitutional for the legislature to pass legislation to vary the terms of the contracts between civil servants and the Government, particularly a fundamental term relating to salary, and to deprive civil servants affected of the right to sue for compensation. It is foreseeable that if a bill to reduce judicial salaries were to be introduced in the legislature, it would be opposed by similar arguments, in addition to arguments about judicial independence and about overseas practice regarding the non-reduction of judicial remuneration. Furthermore, insofar as the bill would be solely on the reduction of the salaries of judges and judicial officers and would not also reduce the pay of others paid from the public purse at the same time, it may be criticised as discriminatory and as an attack on the judiciary.

8.21 As mentioned above, in the case of the civil service pay reduction, some civil servants have taken the matter to court and argued that the legislation to reduce their pay was unconstitutional and invalid. Although their challenges have been unsuccessful before the Court of First Instance, some of the legal and constitutional issues are indeed arguable. If legislation is introduced to reduce judicial salaries, the possibility that it will be challenged by individual judges or magistrates before the courts cannot be ruled out. This would mean that the Hong Kong judiciary would, like the judges of some of the jurisdictions discussed in this report, be put into the embarrassing position of adjudicating on their own salaries or those of their colleagues. There is also the possibility of the Standing Committee of the National People's Congress making an interpretation of the relevant provisions in the Basic Law.

8.22 It appears from the above discussion that even if the reduction of judicial remuneration as part of an overall public economic measure is not inconsistent with principle of judicial independence, such a reduction in the present circumstances of Hong Kong is likely to be controversial (unless it receives the unanimous support of and is introduced with the prior consent of the judiciary itself). This means that even if the recommendation in the Mason Report that legislation prohibiting absolutely any reduction in judicial

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[11] See the cases cited in n 8 above.

remuneration is not accepted (the recommendation will be discussed later), it does not necessarily follow that judicial salaries should be or will be reduced in Hong Kong. In other words, one possible scenario is that neither legislation prohibiting reduction in judicial remuneration nor legislation reducing judicial remuneration is introduced, the practical effect of which is that judicial remuneration will not be reduced.

8.23 Thus one possible option which can be considered is the preservation of the existing system of the Government determining judicial remuneration upon the advice of the Standing Committee on Judicial Salaries and Conditions of Service (the Judicial Committee). The Judicial Committee can consider advising Government not to introduce legislation to reduce judicial pay in the light of the considerations mentioned above. This would mean that the traditional informal peg between civil service salaries and judicial salaries will (at least) be suspended (since civil service pay has been reduced since 2002). In the meantime, the Judicial Committee can consider whether it would be desirable to restore the peg some time in the future when the economy improves, the deficit problem is resolved and civil service pay rises again. If it decides in favour of the peg as a long-term strategy, it can still take into account the suspension of the peg in deciding how the peg is to be restored. For example, when the first increase of civil service pay next occurs, the Judicial Committee can consider not recommending an identical increase for the judiciary in view of the fact that they have not been subjected to the civil service pay cuts that preceded the latest civil service pay increase. An approach of this nature (though not involving any peg to civil service pay) has been mentioned by the Judiciary Administrator in his letter of 10 June 2003 to the LegCo Panel on Administration of Justice and Legal Services in response to the Panel's inquiry –

> Deflation and inflation would be external economic factors which would be relevant for the independent body to consider when making recommendations on judicial remuneration (see Recommendation 7 [of the Mason Report]). While any reduction of judicial remuneration, (including reduction to account for the effects of deflation), would be in breach of the absolute prohibition against reduction (see Recommendation 1), the independent body could take past deflation into account in deciding on its recommendations when there is inflation, including whether judicial remuneration should be increased at a particular time and at what rate.

8.24 The next set of issues to be considered concerns the establishment of an independent statutory body recommended by the Mason Report. At present, the Judicial Committee is not a statutory body. Should it be transformed into a statutory body? In what ways should the new statutory body be different from the existing Judicial Committee?

8.25 Although the Mason Report recommends the establishment of a new statutory body to advise the Government on matters of judicial remuneration, it has not discussed whether the existing system of Judicial Committee has worked in a satisfactory manner. As discussed above, the Hong Kong system of judicial remuneration has apparently worked well so far, particularly when assessed in the light of relevant experience elsewhere which often indicates dissatisfaction with judicial remuneration, political controversies and even litigation on issues of judicial remuneration.

8.26 Among the overseas models considered in the Mason Report and this report, it seems that the British, Australian and New Zealand systems have worked reasonably well. It should be noted that in these three countries, the independent body that recommends changes to judicial remuneration is not one whose role is "confined to judicial remuneration exclusively" as recommended by the Mason Report.[12] In the United Kingdom, the non-statutory Review Body on Senior Salaries advises the Government on the salaries of its three "remit groups" – senior civil servants, judges and senior members of the armed forces. It may also advise on the salaries of ministers and Members of Parliament. At present it consists of eleven members appointed by the Government, three of whom form the Judicial Sub-Committee of the Review Body.[13] The recommendations on judicial salaries are made by the Review Body itself after considering the Judicial Sub-Committee's report.

8.27 In Australia (at the federal level) and in New Zealand, the independent bodies that advise on judicial remuneration are, unlike that in Britain, established by statutes. However, like that in Britain, their jurisdiction is also not confined to judicial remuneration. The Australian Commonwealth Remuneration Tribunal, consisting of three members appointed by the Governor-General, makes determinations (subject to disallowance by Parliament) of the remuneration of Members of Parliament, Ministers, senior public servants, other public office holders and federal judges.[14] In New South Wales, there is a similar Statutory and Other Offices Remuneration Tribunal which makes determinations (subject to disallowance by the legislature) of the salaries of senior public servants, holders of statutory positions and judges.[15] As mentioned in chapter 5 above, similar remuneration tribunals with a broad jurisdiction extending beyond judicial salaries also exist in Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. This contrasts with the situation in Victoria and Queensland, where the judicial remuneration tribunals – like the Canadian judicial compensation commissions discussed in chapter 6 above – specialise in setting the remuneration of judicial

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[12] Mason Report, para 6.20 (Recommendation 5).

[13] See Mason Report, para 4.6.

[14] Ibid, para 4.22.

[15] Ibid, para 4.35.

office holders.[16] In New Zealand, the Higher Salaries Commission, consisting of three members appointed by the Governor-General, is, like the UK Review Body and the Remuneration Tribunal of Australia, a "generalist" body in the sense that it determines the salaries not only of judges but also of senior public servants, Members of the House of Representatives, senior local authority officers, senior university officials, and doctors and dentists employed by the Health Service.

8.28 The Mason Report (Recommendation 5) prefers a body that specialises in matters of judicial remuneration to a "generalist" body like the UK Review Body on Senior Salaries, the Australian Commonwealth Remuneration Tribunal, the remuneration tribunals in most Australian states and territories, and the New Zealand Higher Salaries Commission. Three reasons are given for this preference in the Mason Report –[17]

(1) a specialist body will have the skills and experience appropriate to assessing that class of remuneration;

(2) judges are a discrete class and the methodology by which their remuneration is to be assessed necessarily differs from that applicable to others in the public sector; and

(3) factors such as performance bonus pay and productivity bonuses which may be taken into account in fixing public sector remuneration have no place in the assessment of judicial remuneration (see Recommendation 8).

The Mason Report also recommends that "no member of the independent body should serve concurrently as a member of any body assessing civil service remuneration".[18]

8.29 On the other hand, the Mason Report has not discussed the advantages of the "generalist" bodies in the UK, Australia and New Zealand.[19] With respect, it may be doubted whether the three reasons mentioned above in support of a "specialist" body are convincing. As regards reason (3), once it is agreed that performance pay should not be used in the case of judges (and this can be easily agreed upon in view of foreign experience), there is little difference between a "specialist" body and a "generalist" one as far as the issue of

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16 Ibid, para 4.50 and chapter 5 of the present report, n 9.

17 Ibid, para 6.21.

18 Ibid, para 6.23.

19 It has been pointed out in Australia that "Opinion is divided on the question whether judicial remuneration should be determined by a tribunal established solely for that task, or by a tribunal which determines the remuneration of a wider range of public officials, including statutory officers, senior public servants and, perhaps, Ministers and Members of Parliament": George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), p 78.

performance pay is concerned. As regards reasons (1) and (2), it may be noted that almost all of the factors which the Mason Report (para 6.28) recommends that the remuneration body should consider in the course of its work are either factors relevant to the determination of the remuneration of holders of any post paid from the public purse, or factors which can be easily understood even by members of a "generalist" committee. Indeed, it is doubtful whether any person can be regarded as a specialist in assessing the remuneration of judges alone. Furthermore, it is perfectly viable for a "generalist" committee to include as its members persons from the legal profession, or even to establish, as in the United Kingdom, a sub-committee that looks into judicial remuneration.

8.30 Even if it is decided to adopt the recommendation in the Mason Report to establish a statutory body that specialises in judicial recommendation, the recommendation in the Mason Report that "no member of the independent body should serve concurrently as a member of any body assessing civil service remuneration"[20] may be questioned. The Mason Report has not referred to any overseas jurisdictions that have adopted such a rule. On the contrary, the experience of the UK, Australia and New Zealand leans towards the "generalist" body that makes recommendations on the salaries of judges and senior public servants, or even ministers and Members of Parliament at the same time. In Hong Kong, the membership of the Judicial Committee has (since its establishment in 1987) until January 2004 been identical with the membership of the Standing Committee on Directorate Salaries and Conditions of Service, and there is nothing to indicate that this was an unsatisfactory arrangement. Even now, there is overlapping membership as between the Judicial Committee and the Standing Committee on Directorate Salaries and Conditions of Service.

8.31 There are some advantages in having a "generalist" body modelled on UK Review Body on Senior Salaries, the Australian Remuneration Tribunal and the New Zealand Higher Salaries Commission. Since they make recommendations or determinations on the salaries of senior civil servants, judges, ministers and Members of Parliament at the same time, they will have to take an overall view of the financial picture in the remuneration of the most senior people paid from the public purse. They are also more likely to be perceived as fair and independent, as guardians of the public interest rather than as advocates of the interests of particular groups of persons paid from the public purse. This is probably an important factor contributing to their success.

8.32 In Hong Kong at present, there is no "generalist" body of this kind. The three committees that advise on civil service salaries have been mentioned at the beginning of this chapter. As regards the remuneration and allowances for members of the Legislative Council and the Executive Council, there exists an Independent Commission on Remuneration for the Members of the Executive Council and the Legislature of the Hong Kong SAR appointed by the Chief

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[20] Loc cit.

Executive. Whether the separate committees that currently exist should be re-organised and a new body or new bodies created to deal with the remuneration of persons paid from the public purse in Hong Kong is a larger question than what is covered by the current review of the mechanism for the determination and adjustment of judicial remuneration. I believe that it would be appropriate for the Judicial Committee to bring this issue to the Government's attention in the course of the present exercise. In particular, consideration should be given to whether a new non-statutory or statutory body along the lines of the "generalist" bodies in the UK, Australia and New Zealand mentioned above should be created to advise the Government on the remuneration of judges, senior civil servants and members of the Executive and Legislative Councils. This would mean in practice the merger of several existing committees in this regard.

8.33 Assuming that this "generalist" body is not to be established at least in the near future, and assuming that it is considered appropriate to have a body that specialises in the determination of judicial remuneration (even though, as suggested above, its membership may overlap with the membership of the Standing Committee on Directorate Salaries and Conditions of Service), I proceed to comment on the recommendations in the Mason Report on the establishment of a statutory body on judicial remuneration.

8.34 As implied in the discussion above, a policy choice has to be made between the continuation of the present arrangement of the non-statutory Judicial Committee and the creation of a new statutory body along the lines recommended by the Mason Report. The Mason Report has made a good case for the establishment of a statutory body (Recommendation 4).[21] In particular, a statutory requirement that the reports of the body will be published will increase its transparency (Recommendation 9).[22] The recommendations in the Mason Report on the advisory role of the body (Recommendation 3), its appointment (part of Recommendation 6) and the factors it should take into account (Recommendation 7) are also reasonable and deserve to be supported. The recommendation (Recommendation 8) that performance pay and productivity bonuses should not form part of judicial remuneration is also sound and well-supported by overseas experience.

8.35 As regards the composition of the proposed body, the recommendations of the Mason Report deserve more detailed examination. The Mason Report (para 6.23) proposes that the body would consist of five members, including a barrister and a solicitor appointed by the Government upon consultation with the governing bodies of the Bar and the Law Society. In this regard, the following views of Professor Winterton's, writing about the

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[21] Mason Report, para 6.19.

[22] Ibid, para 6.33. See also Peter Wesley-Smith, "Injudicious pay cuts?" (1999) 29 Hong Kong Law Journal 2.

constitution of a proposed judicial remuneration tribunal for both federal and state (or territory) judges in Australia, are noteworthy –[23]

> Persons suitable for appointment to the Tribunal would include former independent statutory officers, such as Auditors-General, former public servants, former heads of private corporations, *non-practising lawyers*, and academics (not necessarily lawyers) with knowledge of the role and work of the judiciary. Anyone personally interested in the Tribunal's determinations, such as judges and former judges (affected through their pensions) would obviously be ineligible for appointment. *Practising lawyers working in the courts, whether as barristers or solicitors, should likewise be ineligible*, as should anyone subject to governmental (or other) direction, such as public servants. The Tribunal should include both men and women, and ought to include non-lawyers if possible. Determining judicial remuneration requires an appreciation of the position and work of the judiciary as well as wider economic considerations, none of which requires technical legal expertise. [emphasis supplied]

8.36 Professor Winterton did not articulate precisely the reasons why he believed that practising lawyers should not serve as members of the judicial remuneration tribunal, but the reasons relate probably to considerations both of judicial independence and of the independence of the remuneration tribunal. On the one hand, judicial independence or the perception thereof might be adversely affected by having lawyers who are in a position to determine (or participate in determining) the remuneration of judges representing clients and arguing cases before the courts. On the other hand, the independence or perceived independence of the tribunal might also be adversely affected by its having as members practising lawyers who may have professional contact with judges and who may be perceived as having an interest in avoiding judges' ill will or in being well regarded by judges. Such concerns about independence may however have less weight where practising lawyers form only a small minority of the membership of the independent body, as in the case of the Judicial Officers Recommendation Commission in Hong Kong, where the practising barrister and solicitor are only two members among a 9-member commission (the other members being the Chief Justice (chairman), two other judges, the Secretary for Justice, and three other members who are not connected with the practice of law).[24]

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[23] Winterton (n 19 above), p 82.

[24] See the Judicial Officers Recommendation Ordinance (Cap 92, LHK).

8.37 In the case of the independent body proposed by the Mason Report, the barrister and solicitor are two members of a 5-member committee. In the light of the discussion above, it may be doubted whether this is an ideal arrangement. It should also be noted that none of the overseas remuneration bodies examined in the Mason Report and in the present report involves any statutory requirement that the body should include as its members practising lawyers (whether appointed with or without consultation with the professional body of lawyers). As mentioned in this chapter, the remuneration bodies in the UK, Australia and New Zealand are mostly "generalist" bodies which deal with judicial salaries as well as the salaries of other senior holders of public office, and it is to be expected that there is no statutory requirement that members of the legal profession should be included as members. However, even in the case of the two remuneration tribunals at state level in Australia that specialise in setting judicial salaries (i.e. in Victoria and Queensland), the relevant statutes also do not stipulate that the membership of the tribunals should include lawyers.[25]

8.38 It remains for me to consider Recommendations 1 and 2 of the Mason Report. Recommendation 2 is that legislation should be introduced to provide for a standing appropriation to meet the payment of judicial remuneration. This is consistent with the practice in many common law jurisdictions of charging the salaries of judges on the consolidated revenue fund so that they need not be subject to the annual appropriation vote in Parliament. The practice can be traced back to England where a Consolidated Fund was established as early as 1787. In 1799 "the salaries of most of the Judges were fixed and charged wholly upon the Consolidated Fund";[26] by 1830 the "total salary" of judges was placed upon the Consolidated Fund.[27] The significance of this arrangement, which distinguishes judges from civil servants and reflects the former's constitutional status, was explained by Lord Rankeillour –

> Parliament, by various Acts at different times, has given [judges] the special protection of segregating them from civil servants and commissioned officers, and so on, of the Crown, by placing their salaries on the Consolidated Fund: the effect of which is that their salaries cannot be reduced in the ordinary course in a debate on Estimates in the House of Commons.[28]

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[25] Neither do they expressly disqualify practising lawyers from serving on the tribunals. See the Judicial Remuneration Tribunal Act 1995 (Victoria) and the Judges (Salaries and Allowances) Act 1967 (Queensland), available at www.austlii.org.

[26] *Parliamentary Debates (House of Lords)*, 5th series, vol 90, col 78 (Viscount Sankey, Lord Chancellor; 23 Nov 1933).

[27] Ibid, col 79.

[28] Ibid, col 1055-1056 (1 March 1934).

8.39 The practice of charging judicial salaries on a consolidated fund so as to create a standing appropriation guaranteeing the payment of such salaries can be found both in countries whose constitutions contain a prohibition of reduction of judicial remuneration, and in countries without such a constitutional prohibition. Examples of the former are Singapore[29] and the Solomon Islands. Examples of the latter are the United Kingdom[30] and Canada.[31]

8.40 Some scholars believe that such a standing appropriation represents part of the minimum standard of institutional guarantee of financial security as a condition for judicial independence –

> As an absolute minimum, judicial salaries must be payable automatically, and not at the whim of the executive. In other words, they must be a permanent charge on the Consolidated Revenue Fund. ... Of course, merely charging judicial salaries upon the Consolidated Revenue Fund offers minimal guarantee of independence, since the amount of such salary will be determined by Parliament (or its delegate) and thus, in practical terms, the executive, with obvious implications for judicial independence.[32]

8.41 It may also be noted in this regard that a number of international instruments on judicial independence (discussed in chapter 2 above) require that judicial salaries be "secured by law". For example, the Basic Principles of the Independence of the Judiciary endorsed by the General Assembly of the United Nations in 1985 provide that the remuneration of judges "shall be adequately

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[29] Article 98(6) of the Constitution (1965) of Singapore (which contains an absolute prohibition of reduction of judicial remuneration in article 98(8)) provides: "Parliament shall by law provide for the remuneration of the Judges of the Supreme Court and the remuneration so provided shall be charged on the Consolidated Fund." Section 107(2) of the Constitution (1978) of the Solomon Islands (which contains a qualified prohibition of reduction of judicial remuneration and the reduction of the salaries of holders of certain other offices) in section 107(3)) provides: "The remuneration and allowances payable to the holders of those offices [i.e. Governor-General, judges of the High Court and the Court of Appeal, Speaker, Ombudsman, Director of Public Prosecutions, Public Solicitor, Auditor-General, Commissioner of Police, and member of any Commission established by this Constitution] are hereby charged on and shall be paid out of the Consolidated Fund."

[30] For example, section 12(5) of the Supreme Court Act 1981 provides: "Salaries payable under this section [to judges of the Supreme Court other than the Lord Chancellor] shall be charged on and paid out of the Consolidated Fund."

[31] Section 53(1) of Canada's Judges Act 1985 (applicable to federal judges) provides: "The salaries, allowances and annuities payable under this Act ... shall be paid out of the Consolidated Revenue Fund."

[32] Winterton (n 19 above), pp 20-21.

secured by law".[33] A law creating a standing appropriation for judicial remuneration will thus represent a fulfilment of this requirement.

8.42 Although it is arguable[34] that the practical significance of a standing appropriation might be limited because it is unlikely that the legislature in Hong Kong will bring about a situation in which all persons paid from public funds or judges as a class will cease to receive their salaries, the arrangement is useful for the purpose of underscoring the importance of the judiciary and its independence (which includes the guarantee of financial security as discussed earlier in this report) in Hong Kong. Furthermore, it will also enable Hong Kong to raise the level of its institutional protection of financial security as an element of judicial independence by following the examples of various common law jurisdictions as mentioned above, and implementing the requirement in various international instruments that judicial remuneration should be secured by law. Recommendation 2 (on the standing appropriation) in the Mason Report therefore deserves to be supported.

8.43 However, it should be noted that in the Commonwealth countries which have this arrangement, the standing appropriation is not limited to the judiciary but also extends to certain other designated holders of public office, particular holders of public office (such as the Attorney General, the Director of Public Prosecutions, the Director of Audit, the ombudsman, etc) whose independence needs to be guaranteed. If, therefore, judicial salaries are to be protected by a standing appropriation in Hong Kong, consideration should also be given to whether a standing appropriation should also be made for the salaries of other holders of public office who are similarly protected in other common law jurisdictions.

8.44 I turn finally to Recommendation 1, which is that "Legislation should be enacted prohibiting absolutely any reduction in judicial remuneration." It should first be pointed out that the precise scope of the proposed legislation is not completely clear from the Mason Report. Is it to be modelled on the relevant UK legislation, which, as explained in chapter 3 of this report, only provides that the executive branch of government acting administratively may increase but not decrease judicial salaries, leaving open the question whether Parliament may reduce judicial salaries by an Act of Parliament? Or is it to be modelled on the American, Australian or New Zealand constitutions, or those constitutions mentioned in chapter 7 of this report that contain a provision on the non-reduction of judicial remuneration and alteration of other terms of service?

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[33] Article 11 of the Basic Principles (the full text of the article has been set out in chapter 2 above). As is apparent from chapter 2, the other international instruments containing similar provisions are the International Bar Association Code of Minimum Standards of Judicial Independence, the Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration"), and Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges (for details, see chapter 2 above).

[34] See eg para 6.20 above.

8.45 If it is the former (i.e. the UK model), it may be doubted whether such a move is necessary. The similarity between the terms of employment of judges (and judicial officers) and civil servants in Hong Kong has already been discussed above. Just as the Government believes that legislation need to be introduced in order to effectuate a civil service pay cut, it is inconceivable that judicial salaries will be reduced administratively without going through the legislative process. Thus the UK model is irrelevant to Hong Kong. In the UK, originally only Parliament had the power to set judicial salaries. The relevant legislation (containing the provision on non-reduction of judicial remuneration) was enacted for the purpose of delegating the authority to set judicial salaries from Parliament to the executive, and as a condition of the delegation it is provided that the executive may not use the delegated power to reduce judicial salaries. In the case of Hong Kong, the salaries of judges have been determined by contract rather than by legislation, and can apparently only be reduced by legislation in the absence of a consensual variation of the contract. As long as this present position is maintained and the understanding continues to exist that the Government acting administratively has no power to reduce the salaries of incumbent judges, legislation along the lines of the UK model would not be necessary.

8.46 I now turn to examine the second of the two possible versions of the legislation protecting judicial remuneration identified above, i.e. legislation along the lines, not of the UK model, but of the American, Australian or New Zealand constitutions. Technically it is possible to introduce legislation in Hong Kong providing, as in New Zealand, that the salary of a judge shall not be reduced during the continuance of the judge's commission. This would at least have the effect of prohibiting the Government acting administratively from reducing judicial salaries. However, insofar as the provision on the non-reduction of judicial remuneration is not in the Basic Law itself, it will not have the effect of binding the legislature of the Hong Kong SAR for the future. In other words, it would in theory be possible for a future Legislative Council to pass a bill introduced by a future Administration in the SAR to repeal this provision and to provide for a particular reduction in judicial remuneration. This does not mean, however, that such a provision would be meaningless with regard to a future legislature. Once such a provision is introduced into Hong Kong law, any future move to repeal it is likely to meet with strong resistance, given that the purpose of the provision would be to safeguard judicial independence in Hong Kong. In any event, such a provision, if adopted, will have symbolic value in highlighting the importance of the judiciary and its independence in Hong Kong.

8.47 We now return to the original and most fundamental question, which is whether Recommendation 1 of the Mason Report, in either of the two possible forms mentioned above (i.e. the UK model and the American/Australian/New Zealand model) is worthy of support. It should be apparent from this report that financial security is an essential condition for and guarantee of judicial independence, and that as a general rule financial security

requires that the salary of a judge should not be reduced during the continuance of his or her office. However, on the basis of the theoretical considerations, international norms and overseas experience discussed in this report, it appears that there is considerable support for the view that an exception to the general rule of non-reduction of judicial remuneration exists where a reduction is introduced as an integral part of an overall economic measure that is applicable generally to all persons paid from the public purse. The contrary view that judicial independence requires an absolute prohibition against reduction irrespective of the circumstances seems to me less defensible. This is however an issue on which reasonable people may differ.

8.48 Nevertheless, if the foreign experience recounted in this report contains any lesson for us here in Hong Kong today, I believe it is that issues of judicial remuneration, like other issues of remuneration from the public purse, have the potential to become politically controversial and to divide the community. While those who support a stronger degree of protection for judicial remuneration will inevitably resort to arguments from judicial independence and the rule of law, there will always be others who question the moral rightness of judges being exempted from the obligation to shoulder, with the rest of the community and in particular with all those paid from the public purse, the burdens of difficult economic times and severe budget deficits. The net effect on the judiciary of a controversy on judicial remuneration may well be negative in terms of its standing in the eyes of the community. Indeed, immediately after the publication of the Mason Report, one public opinion poll[35] reported that nearly 90% of those polled believed that the judges should share the burden with citizens by reducing salaries; 65% believed that reduced pay would not have a detrimental effect on judicial qualities; more than 50% believed that the incident showed that "judges were only concerned about their own interests"; and more than 70% believed that "the request for legislative protection of judicial salaries would have an influence on the public perception of judges in Hong Kong". I am not relying on this survey result as an authoritative one, but I think it is useful in illustrating the kind of feelings which may exist in the community on the matter. To quote again the passage from the judgment of the Supreme Court of Canada which was first quoted in chapter 6 of this report –

> Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.[36]

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[35] Oriental Daily News, 25 April 2003 (in Chinese).

[36] *Reference re Remuneration of Judges* [1997] 3 SCR 3, para 196 (per Chief Justice Lamer).

8.49 It seems therefore that little is to be gained, and much would be put at risk, if the Government were to introduce a bill in the present circumstances along the lines recommended by Recommendation 1 of the Mason Report. However, as suggested earlier in this chapter, neither is it advisable to introduce legislation to reduce judicial salaries similar to that introduced for the civil service (nor the administrative reduction of judicial salaries which the Government must already have recognised as legally questionable). Thus judicial salaries can remain at their present level for incumbent judges and judicial officers.

8.50 ***Summary of this chapter :*** Unlike the case in many foreign jurisdictions, the salaries of judges in Hong Kong are not provided for in legislation. As in the case of civil servants' salaries, judicial salaries are legally determined as part of the contractual arrangement between the individual judge and the Government, and the salary scale for judges of different ranks is adjusted annually by the Government. One of the most significant characteristics from a comparative point of view of the Hong Kong system of judicial remuneration as it has evolved is the informal "peg" between the salaries of senior civil servants and judges and judicial officers. In Hong Kong, an independent non-statutory body – the Standing Committee on Judicial Salaries and Conditions of Service first established in 1987 – advises the Government on judicial remuneration. Before 2002, this body had for many years adopted the approach of recommending annual adjustments to judicial salaries that were identical with the adjustments to the salaries of civil servants who occupied equivalent salary points on the civil service pay scale. Apparently the system worked satisfactorily before 2002. However, two developments since 2002 have presented challenges to the existing system. They are the introduction of the accountability system for principal officials (which means that equivalent points can no longer be established between the civil service pay scale and the judicial service pay scale as far as judges of the Court of Final Appeal and the Court of Appeal are concerned), and the reductions in civil service salaries that have been introduced since 2002, which raise the issue of whether judicial salaries should be reduced in line with the civil service pay cuts. This chapter suggests that whereas the problem raised by the first development is a technical one that can be easily resolved, the issue of whether judicial remuneration should be reduced is more difficult to tackle.

8.51 Article 100 of the Basic Law provides that public servants' pay and conditions of service after the handover shall be no less favourable than before, and article 93 contains a similar provision regarding judges and judicial officers. In the case of civil servants, the Government has taken the view that the Basic Law would not be contravened so long as the reduction of civil service pay does not take it below the level where it was at immediately before the handover, and in the cases litigated before the Court of First Instance so far, the civil service pay reduction has been upheld. It might therefore appear that a reduction of judicial salaries in line with the civil service pay cuts would not contravene article 93 of the Basic Law.

8.52 The next question is whether such a reduction would violate the principle of judicial independence. As discussed in the preceding chapters of this report, it is difficult to argue that a reduction of judicial salaries threatens judicial independence where it is introduced as an integral part of public economic measures that are generally applicable to all persons paid from the public purse. However, although the objection in principle to a reduction of judicial remuneration in these circumstances may not be a strong one, there are some complications which need to be taken into account in considering the option of such a reduction in Hong Kong. The complications relate to the means by which such a reduction may be achieved.

8.53 Given the similarity between the terms of appointment and conditions of service of judges (including judicial officers) and those of civil servants in Hong Kong, and given that the Government has conceded that legislation is necessary in order to effectuate a pay cut for incumbent civil servants, legislation would also be necessary if a reduction of the salaries of incumbent judges and judicial officers is to be introduced in Hong Kong. The legislation to implement the civil service pay cut in 2002 against the will of the civil servants' unions was politically controversial and has given rise to legal challenges before the courts. It is likely that given the Mason Report and the importance of judicial independence, any bill to reduce judicial remuneration in Hong Kong will be politically controversial as well. Even if the bill is passed, the possibility must be recognised of judges or judicial officers affected bringing an action before the courts challenging the legislation on grounds similar to those that have already been used by civil servants (but not successful before the Court of First Instance) as well as grounds of judicial independence. This would result in the embarrassing situation of judges adjudicating on their own salaries or those of their colleagues. In the light of these considerations, it is not advisable to reduce the salaries of incumbent judges in Hong Kong.

8.54 This means that even if the recommendation in the Mason Report that legislation prohibiting absolutely any reduction in judicial remuneration is not accepted, it does not necessarily follow that judicial salaries should be or will be reduced in Hong Kong. In other words, one possible scenario is that neither legislation prohibiting reduction in judicial remuneration nor legislation reducing judicial remuneration is introduced, the practical effect of which is that judicial remuneration will not be reduced.

8.55 One possible option which can be considered for the way forward is the preservation of the existing system of the Government determining judicial remuneration upon the advice of the Standing Committee on Judicial Salaries and Conditions of Service. Another option is to turn the committee into a statutory body. A third option is to establish an independent body modelled on the UK Review Body on Senior Salaries, the Australian Commonwealth Remuneration Tribunal, the remuneration tribunals in most Australian states and territories, and the New Zealand Higher Salaries Commission in the sense that its jurisdiction is not confined to judicial salaries but extends to the determination of the salaries of

senior civil servants, principal officials and members of the Executive and Legislative Councils. This would in effect mean the combination into one body of the existing Standing Committee on Directorate Salaries and Conditions of Service, the Standing Committee on Judicial Salaries and Conditions of Service and the Independent Commission on Remuneration for the Members of the Executive Council and the Legislature of the Hong Kong SAR.

8.56 This chapter suggests that there is much to be said for the third option. However, in the event that this option is considered not feasible at least in the short term, the second option mentioned above of turning the existing Standing Committee on Judicial Salaries and Conditions of Service into a statutory body is worth pursuing. In this context, the recommendations in the Mason Report regarding the establishment of an independent statutory body on judicial remuneration deserve to be supported except the following which need to be further scrutinised as discussed in this chapter –

(1) the recommendation that no member of the independent body should be allowed to serve concurrently as a member of any body assessing civil service remuneration; and

(2) the recommendation that the body must include as its members a barrister and a solicitor appointed in consultation with the governing bodies of the Bar and the Law Society.

8.57 This chapter supports the recommendation in the Mason Report regarding a standing appropriation for judicial remuneration, but expresses reservations regarding its proposal to enact legislation "prohibiting any reduction in judicial remuneration". On the other hand, as mentioned above, neither is it considered advisable to introduce legislation to reduce judicial salaries similar to that introduced for the civil service (nor the administrative reduction of judicial salaries which the Government must already have recognised as legally questionable). Thus judicial salaries can remain at their present level for incumbent judges and judicial officers.