

PAYING JUDGES: WHY, WHO, WHOM, HOW MUCH?

NEILL LECTURE 2006

*Michael J Beloff QC**

My Lords, Ladies and Gentlemen, it is a great privilege for me to be invited to deliver the 5th Neill Lecture following in the footsteps of such legal giants of our time as Lord Bingham of Cornhill, Lord Woolf of Barnes, Lord Steyn and Lord Hoffman, just as the page followed in the footsteps of Good King Wenceslas in the snowy wastes of Bohemia.¹ After four aces the Fellows of All Souls have clearly opted to play the Joker.

Pat Neill, the honorand, is fit to be ranked with Tom and Harry, not to speak of Johann and Lenny, in the annals of the law although he abstained from taking judicial appointment in this country. Instead, like a modern Pooh Bear, he became Lord High everything else, notably – I make a judicious selection - Warden of All Souls, Vice Chancellor of Oxford University, Chairman of the Press Council, Chairman of the Committee of Standards in Public Life and Treasurer of Gray’s Inn.

My path has crossed with Pat’s at several junctures. We appeared against each other in court, most memorably in a case in the Privy Council *Ng Enterprises v Urban Council*,² which involved an issue of major constitutional importance, namely whether my client could continue to sell “Mister Softie” ice cream in Hong Kong from mobile vans. There were no Mr Softies in the Privy Council and they acceded unanimously to Pat’s argument that regulation of an activity could sometimes, if not always, include its outright prohibition.

When Vice Chancellor of Oxford, Pat invited me to chair a committee which investigated a unique piece of alleged plagiarism in a thesis submitted

* MA (Oxon) FRSA, FICPD, FaSS, Hon D Lit Hum (Fairleigh Dickinson), President of Trinity College, Oxford, Senior Ordinary Appeal Judge of Jersey and Guernsey, Master of the Bench of Gray’s Inn, Vice-Chairman of the Information Tribunal, Member of the Court of Arbitration for Sport, Honorary Fellow Institute of Advanced Legal Studies.

¹ I must thank Lord Justice Thomas, Mr Justice Breyer (USA), Mr Justice Van Zyl (SA), Malcolm Holmes, QC (Australia), Pathma Selvadurai (Singapore), Timothy Castle, (New Zealand), Dr Charles Parkinson (Australia), Joanna Innes (Fellow of Somerville), and John Baker, Chairman of the SSRB for their assistance in obtaining material for this lecture, delivered under the auspices of All Souls College in the Examination Schools at Oxford University on the 27th January 2006.

² 1997 AC 168.

and approved by this University for the degree of doctor of philosophy in the field of public international law. Our report determined that the charge was, alas, made out; but Pat's successor prevailed upon us not to give wide currency to our conclusion since it showed that the system was as potentially vulnerable to fraud as are postal ballots at municipal elections, and opened up vistas of headlines in the *Mail on Sunday* "The dumbing down of the doctorate".

Finally I followed Pat in what is now becoming the Oxford 'head of house' slot in the Appellate Courts of Jersey and Guernsey, if a sequence of two can create a precedent, in the same way as certain places have become reserved to members of particular ethnic groups or genders on the Supreme Court of the United States of America, a tribunal which enjoys a somewhat more extensive jurisdiction.

I should add, before warming to my theme, that I understand that in recognition of Pat's abilities as a pianist, this lecture takes place only on alternate years, the intervening ones being the occasion for a concert. I make no great – or indeed any – claims to the merits of my address, but I can say with a supreme measure of confidence that it will at any rate be better than my performance on the piano.

It is axiomatic, so Halsbury recites, that "the independence of the judiciary is essential to the rule of law and to the continuance of its own authority and legitimacy."³ Some of the mechanisms to ensure this are historic, for example security of tenure: others more modern i.e. prospective appointments by a Judicial Appointments Commission. The principle that judicial salaries may be increased by administrative action, but may not be reduced except, presumably, by Act of Parliament⁴ has its origins in the Act of Settlement 1701 and has been linked with immunity from removal as one of the guarantors of such independence.⁵

In a decision last year in the sensitive area of immigration control *R (on the application of G) v Immigration Appeal Tribunal*, Lord Phillips of Worth Matravers, then Master of the Rolls, and now Lord Chief Justice, said expressly:

³ *Halsbury's Laws* 4th edn Reissue, Vol 8(2) para 303.

⁴ Supreme Court Act 1981, s 12(3); Administration of Justice Act 1973, s 9(1)(3); *Halsbury's Statutes*, Vol 11 1057; Courts Act 1971, s 18(2) *Halsbury's Statutes*, Vol 11, 968; County Courts Act 1984, s 6(1); *Halsbury's Statutes*, Vol 11, 708.

⁵ See also Woodhouse *The Office of Lord Chancellor* (Oxford: Hart, 2001) p 26; S Finer, V Bogdanor, B Rudden *Comparing Constitutions* (Oxford: Clarendon Press, 1995) p 89. Viscount Birkenhead, "Judges and Politics" in *Points of View* Vol II (London: Hodder and Stoughton, 1922) pp 161-2.

“It is the role of the judges to preserve the rule of law. The importance of that role has long been recognised by the Parliament. It is a constitutional norm recognised by statutory provisions that protect the independence of the judiciary such as Sections 11 and 12 of the Supreme Court of 1981.”⁶

which are the recent descendants of the Act of Settlement. The same norm is now enshrined in the Constitutional Reform Act 2005 s 34(4).

A more sonorous reference to the original statute featured in a speech by one of Lord Phillip’s predecessors on a less formal occasion – a provincial Law Society Dinner in Hastings in 1935, when Lord Hewart said:

“It might be useful sometimes to remind persons who have forgotten, or who never knew, that there is still in existence an instrument called the Act of Settlement, and that the independence of judges is the protection of the people.”⁷

That speech incidentally forms part of a collection of ephemera by that less than radical figure entitled “Not Without Prejudice” – an all but unrivalled example of lawyerly meiosis.

The principle that judges’ pay should not be diminished while they hold office is reflected in the constitutions and laws of many jurisdictions, not all of which are based on the common law, such as Brazil,⁸ Egypt⁹ and Japan¹⁰ as well as in common law based jurisdictions, such as the USA,¹¹

⁶ [2005] 2 All ER 165 at 173, para 12.

⁷ Lord Hewart “Her Majesty’s Judges” in *Not Without Prejudice* (London: Hutchinson, 1937) p 240.

⁸ The Constitution of the Federation of the Republic of Brazil 1988 provides at Article 95, III: “Judges enjoy the following guarantees ... III irreducibility of earnings.” On salaries see Professor Celso Agricola Barbi in Professor Shetreet and Jules Deschênes “Judicial Independence: The Contemporary Debate”: (Leiden: Martinus Nijhoff Publishers, 1985) (“SD”) Ch 6 at p 53, and generally M G Ferreira Filho “Fundamental Aspects of the 1988 Constitution” in J Dolinger and K Rosenn (eds) *A Panorama of Brazilian Law* (University of Miami, 1992).

⁹ The independence of the judiciary is constitutionally guaranteed, including special rates as to salary in *The Constitution 1971* (Amended 1980): see chapter 12 at p 198 and 323 “Egypt and its Laws” in N Bernad-Maugison and B Dupret (eds) (Kluwer Law International, 2002).

¹⁰ The Constitution provides at Art 80 para 12: “The judges ... shall receive adequate compensation which shall not be decreased during their term of office.”

¹¹ The US Constitution provides at Art III.I that all judges shall “at stated times receive for their services a compensation which shall not be diminished during their continuance in office.”

Bangladesh,¹² India,¹³ Australia,¹⁴ Canada,¹⁵ Ghana,¹⁶ Ireland,¹⁷ New Zealand,¹⁸ Malta¹⁹ and Singapore²⁰ - indeed generally throughout the new Commonwealth where constitutions retained their original Westminster hallmark.²¹

However, the principle is not universal. In Finland there is no law to that effect; an academic commentator noted: “There are no regulations against decreasing salaries” adding somewhat primly, “but it is out of the question and no one has, perhaps, even thought about it” – and more primly still, “a

¹² The Constitution of Bangladesh provides under Article 147 that there shall be no diminution in salary during term of office, see “Bangladesh Constitution Trends and Issues.” Justice Mustafa Kamal, Dhaka UP p 32. cf. Mubaleb: “Bangladesh” Ch 4: SD p 40.

¹³ The Constitution of India (1949) provides at Article 125:

(1) There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law ...

(2) ... Provided that neither the privileges nor the allowance of a Judge nor his right in respect of ... pension should be varied to this disadvantage after his appointment.

See generally H K Sahoray *The Constitution of India: An Analytical Appraisal* (Eastern Law House, 2nd ed, 1997) pp 353-4, citing analogies from elsewhere.

¹⁴ Commonwealth of Australia Constitution Act 1900 s 72(ii) provides that the Justices of the High Court created by Parliament “shall receive such remuneration as Parliament may fix: but the remuneration shall not be diminished during their continuance in office.”

¹⁵ British North America Act 1807 s 100. The position that salaries be “fixed and provided for” by Parliament “protects the judiciary from executive power to impair judicial independence by reductions or raises of salary”: see Hogg *Constitutional Law of Canada* (Carswell, 4th edn, 1997) p 172. See also W R Lederman “The Independence of the Judiciary” 1956 *Canadian Bar Review* XXXIV 1139 at 1163-1166 (“Lederman”).

¹⁶ Constitution of Ghana 1960 Art 46: “No judge may suffer a diminution in salary while he remains in office.” Bennion *The Constitutional Law of Ghana* (London: Butterworths, 1962). See also Enwah E Kom “Ghana” SD chapter 9 p 76.

¹⁷ In Ireland, Article 35.5 of the Constitution has been held to require that judges should receive salaries and pension benefits which are appropriate “otherwise the independence of judges will be undermined.” (*McMenamin v Ireland* 1994 in the Law Reports Monthly vol 2 p 368 per Geoghan J at p 377).

¹⁸ Constitution Act 1986 Part IV Section 24: “The salary of a High Court Judge is not to be reduced during the continuance of the commission of the Judge.”

¹⁹ The Constitution of Malta provides that salaries of judges “shall not be reduced”, article 110(3): see J M Ganado “Malta” SD chapter 20 p 237.

²⁰ The Constitution of the Republic of Singapore 1996 s 98(8): “The remuneration and other terms of office (including pension rights) of a Judge of the Supreme Court shall not be altered to his disadvantage after his appointment.”

²¹ S A de Smith *The New Commonwealth and its Constitutions* (Stevens, 1964) p 139.

judicial proceeding is not the way to solve problems relating to salaries.”²² Norway,²³ Italy,²⁴ Portugal,²⁵ Spain,²⁶ Uganda,²⁷ Uruguay,²⁸ France²⁹ and Greece³⁰ supply other examples of the principle’s exclusion. In Israel the Basic Law:³¹ provides that a reduction in judicial salaries may be made only if it does not apply solely to such salaries in the public sector.³² In Germany the Basic Law³³ stipulates that, in the extraordinary event of changes in the structure of Courts, judges may be transferred or removed “provided they retain their full salary”, but in ordinary circumstances judges’ salaries are linked to the annual rate of inflation in the same way as the pay of other civil servants.

In Russia too there is no such guarantee.³⁴ China is another notable exception.³⁵ A standard commentary refers to “the relatively low social and

²² Prof Irma Lager “Finland” SD chapter 7 p 58.

²³ Prof Haakon L Haraldson “Norway” SD chapter 23 p 270.

²⁴ Prof A Pizzorusso “Italy” SD chapter 17 p 199: “There is a fixed system of indexation of judicial salaries. There is no express provision prohibiting decreases in judicial salaries but such an occurrence is virtually unthinkable.”

²⁵ Alexander M Pessoa Vaz “Portugal” SD chapter 24 p 280.

²⁶ Prof A Beltran Pelayo “Spain” SD chapter 26 p 320: “There is no constitutional provision concerned with judicial salaries.”

²⁷ Joseph M N Kakooza “Uganda” SD chapter 28 p 248: “There is no constitutional provision against decreasing judicial salaries, although it is suggested that it is implicit in arrangements for their payment out of the consolidated fund that they should not be.”

²⁸ Prof E Vescovi: “Uruguay” SD chapter 30 p 377.

²⁹ E Grivart de Kerstrat: “France” SD chapter 8 pp 65-6. In France judicial salaries are determined by central administration according to seniority and rank. Hence “a reduction in salaries may be obtained only through judicial proceedings” p 66.

³⁰ Professor D Kerameus “Greece” SD chapter 13 pp 131-2. In Greece, Art 83.II of the Constitution provides “The remuneration of judicial functionaries shall be commensurate with their office. Matters concerning their rank, remuneration and general status shall be regulated by special laws.” This has not availed judges in their claims for higher salaries.

³¹ Adjudication S11 No 1110 (A&Y).

³² Shimon Shetreet *Justice in Israel: A Study of the Israeli Judiciary* (Leiden: Martinus Nijhoff Publishers, 1994) (“Shetreet: Israel”) p 160.

³³ Article 97(2) on the Independence of Judges.

³⁴ The Constitution of Russia says the following only in Art 124: “The financing of the courts shall be effected solely from the federal budget and must ensure the possibility of the full and independent administration of justice in accordance with federal law.”

³⁵ J Minen *Laws in the People’s Republic of China* (Leiden: Martinus Nijhoff, 1982). The PRC Constitution: Section VIII says nothing about salary although Article 126

bureaucratic status and pay of the PRC Judges.”³⁶ Ominously Article 93 of the Basic Law of the Hong Kong SAR confirms only the irreducibility of present pay and allowances for judges who served at the time of the handback. No similar provision is made for subsequent appointees. It has been bleakly observed:

“There is no guarantee that salaries or other benefits of subsequent appointees would not be reduced).”³⁷

In other countries the principle, once applicable, has been abandoned. In Sweden the constitution was modified in 1966 to allow for such reduction.³⁸ likewise in Belgium in 1980.³⁹ In the Netherlands indeed, where law also fixes the salaries of judges, it is expressly provided that “the legislature can reduce judicial salaries”.⁴⁰

Nor is this altogether surprising. The common ground identified in international instruments, such as the IBA Code of Minimum Standards of Judicial Independence, is that judges salaries can be reduced only as part of an overall economic package, not that they cannot be reduced at all.⁴¹ So whereas, in England, we consider the principle of the protection of judicial salaries to be a necessary but not, of course, a sufficient guarantee of judicial independence, in the wider world it is not always seen as necessary.

I wish to explore the prehistory of the domestic principle, its development from the Act of Settlement onwards, its rationale, and the contemporary issues surrounding judicial pay in this country.

The inspiration for any form of judicial payment was rooted in the consideration that judges who were not paid could be bought. Wilfred Prest

states that: “The people’s court shall, in accordance with the law, exercise judicial power independently.”

³⁶ Ibid, at p 97.

³⁷ Yash Ghai *Hong Kong’s New Constitutional Order* (Hong Kong University Press, 1992) p 293.

³⁸ Judge Andres Andersson “Sweden” SD chapter 27 p 341.

³⁹ Professor Storme “Belgium” SD chapter 5 p 43.

⁴⁰ BJ Van Heyst “The Netherlands” SD chapter 21 p 240.

⁴¹ IBA Code of Minimum Standards of Judicial Independence (1982) Article 15(a): “The position of judges, their independence, their security, and their adequate remuneration shall be secured by law.” See also s 15(b): “Judicial salaries cannot be decreased during the judges except as a coherent part of an overall public economic measure” Please also note that to like effect is the Montreal Universal Declaration on the Independence of Justices: article 2.21 (c).

has written “The spectre of judicial corruption haunted the west from classical times onwards.”⁴²

Corruption was certainly a problem in England during the reign of Henry III when, in Holdsworth’s words, all royal officials, judges included, were “both poorly and irregularly paid.”⁴³ The short lived Provisions of Oxford in 1258 were introduced to ensure that the Chief Justiciary:

“Takes nothing unless it be presents of bread and wine, and such things, to wit food and drink, as have been used to be brought to the tables of great men.”⁴⁴

The oath administered to newly appointed justices of the Courts of King Bench, Exchequer and Common Pleas from 1344 onwards included an undertaking to abstain from receipt of gifts “except meat and drink and that of small value” at the same time a promise to “do equal law and execution of right to all ... rich or poor,”⁴⁵ whose value, if not vocabulary, has persisted into modern times.

The history of Judges pay prior to the Act of Settlement has been recounted, amongst other places, with characteristic detail and humour – as befits a Trinity graduate - in an article by Theobald Mathew,⁴⁶ who identified as his chief source of information Sir William Dugdale’s *Origines Juridiciales*. The records begin in the XIth year of Henry III when William Insula and R, Ducket, Kings Justices received “X (ten) marks” (a mark being 13 shillings and 4 pence if I may cross-refer to another obsolete currency) each out of the Exchequer.⁴⁷ The trend was generally upward although there was shrinkage in the reign of Edward III in the salary of the Chief Justice of the Kings Bench Division.⁴⁸

In the reign of Henry VI Judges were required to pay taxes on their income for the first time: Mathew comments “This novel and disagreeable demand was probably the explanation of the subsequent raising of judicial salaries.”⁴⁹ During the reign of Elizabeth I, The Lord Chief Justice in

⁴² Wilfrid Prest “Judicial Corruption in Early Modern England” *Past and Present* No 133, 62.

⁴³ Holdsworth *History of English Law* Vol II pp 294-295.

⁴⁴ Prest p 71.

⁴⁵ *Ibid*.

⁴⁶ Mathew *For Lawyers and Others* (Hodge, 1937), chapter entitled “Judicial Salaries” pp 71-87.

⁴⁷ *Ibid* p 71.

⁴⁸ *Ibid* p 72.

⁴⁹ *Ibid* p 73.

England was paid for Reward and Robes £208.68, Wyne: 2 tonnes at £5 per tonne: £10.00, allowance for being justice of assise: £20.00.⁵⁰

The assessment of the judges for taxation purposes in the reign of Henry VIII shows however that they had sources of income apart from official pay: presents, fees, perquisites⁵¹ under a system “in full swing” as Mathew puts it “during the sixteenth century.”⁵² The right to sell legal office, or to bestow it on some penurious relation was prime among them.

The Lord Chancellor up to time of Lord Eldon in the nineteenth century had a surfeit of sinecures to bestow. Mathew dwells with palpable relish on the exotic nature of these creatures inhabiting the undergrowth of the law in a kind of legal bestiary: the Keeper of Her Majesty’s Hanaper, the Clerk of the Custodies of Lunatics and Idiots, the Prothonotary of the Court of Chancery, Chaffwax, whose duty it was to bring the wax to the proper state of liquefaction when the Government Seal was in use. As Mathew comments wryly:

“These posts were alike in two respects – the emoluments were large and the duties could be performed by a deputy.”⁵³

The offices in the gift of the Chief Justices were fewer, but by no means insignificant.⁵⁴

But even these benefits were perceived as insufficient to make bribes otiose and in sixteenth and early seventeenth century the satire directed at the judiciary increased.⁵⁵ In the middle of the 16th century bishop Hugh Latimer had inveighed against judicial bribe taking.⁵⁶ Curiously, the reputation of Chancery judges was inferior to that of their common law counterparts, as they sat solo and without juries and did not take the common law oath.⁵⁷

As Prest puts it “By the reign of James I the inflation - stricken salaries for judges in the three ancient common law courts hardly provided a significant deterrent to impropriety.”⁵⁸ Bacon’s fall from office as Lord Chancellor in 1621 for accepting gifts from litigants is not the only, if it is the best-known, example of judicial corruption. In 1641 the charges on which Lord Keeper Finch was impeached included two for such corruption, which

⁵⁰ Ibid p 74.

⁵¹ Ibid p 74.

⁵² Ibid p 74.

⁵³ Ibid p 75.

⁵⁴ Ibid pp 76-78.

⁵⁵ Prest p 74.

⁵⁶ Prest p 79.

⁵⁷ Prest pp 79-81.

⁵⁸ Prest p 77.

dated back to the time when he was Chief Justice of the Court of Common Pleas.⁵⁹

In the same year, 1641, The House of Commons ordered John Pym to include in the Grand Remonstrance a clause attacking the buying and selling of judicial office as “being among the causes and remedies of the evils of this kingdom”. The remedy for judicial corruption was perceived to be adequate pay for judges out of public revenue openly declared.⁶⁰

In September 1645 a massive 500% increase from under £200 to the £1,000 pa in the salaries of the common law judges was effected by Resolution of the House of Commons. In present day values the uplift was from approximately £23,000 to approximately £116,000.⁶¹ Prest suggests that the increase in financial provision after 1645 was of “prime importance” in improving judicial integrity.⁶²

But the restraint on judges supplementing their salaries with fees was expressly abandoned in January 1660, even before the Restoration, “The important if unforeseen result” adds Prest, “was that post 1660 judicial income did not fall quite so far behind those of leading counsel as they might otherwise have done.”⁶³ However, payments remained at the same level until the Judges’ next pay rise in the next century.

The day after the House of Commons resolved that James II had abdicated in 1688, the Parliamentary Committee drew up its agreement to be presented to a new king, which contained provisions for security of tenure and for payment of judges’ salaries out of the public revenue only. These provisions, however, did not appear in the Bill of Rights 1688.⁶⁴ And in 1693 in *Bridgman v Holt* three puisne judges of the Court of Kings’ Bench, faithful to the old ways, upheld the right of their Chief Justice to the very valuable sinecure office of Chief Clerk of the Kings’ Bench.⁶⁵

But in 1701 the Act of Settlement, as I have already indicated, gave judges secure tenure and secure pay. It provided:

⁵⁹ Brooke LJ “Judicial independence – Its history in England and Wales” p 7. Lecture www.judiciary.gov.uk

⁶⁰ Ibid.

⁶¹ Prest p 83.

⁶² The Conversion throughout using the Retailers Index is based on website <http://eh.nat/limit/power>. I have rounded the precise figures up or down to the nearest thousand pounds.

⁶³ Prest p 83.

⁶⁴ Brooke p 6.

⁶⁵ Brooke p 9; *Bridgman v Holt* (1693) Shower P C 111.

“Judges commission to be made *quam diu se bene gesserit* and their salaries ascertained and established.”⁶⁶

Then interpreted to mean that judicial salaries should be fixed by Parliament and not left to the discretion of the executive.⁶⁷

GN Clark notes in his volume in the Oxford History of England:

“It should be simply regarded as the formal termination of that control of judges by the executive which had died with the Stuart system. It removed the possibility of a new attempt to subject judges to Royal control: judicial independence has been a central fact of the constitution from the fall of James II.”⁶⁸

Nonetheless in the early 18th Century judicial salaries still frequently ran up to 3 terms in arrears⁶⁹ and while increasingly stringent ethical sensibilities percolated among the common law judiciary from 1650 onwards, the practices of judicial favouritism, receipt of fees and sale of legal offices persisted long after.⁷⁰

Lord Chancellor Macclesfield increased the honorarium charged by his predecessor for the sale of the Chancery Masterships by so much that the newly appointed Masters felt obliged to recoup the premiums they had had to pay from the litigants who appeared before them. In 1724 the same Lord Chancellor was duly impeached, convicted and fined £30,000.⁷¹

At the end of the seventeenth century the salaries of the puisne judges were £1,000 per year (approximately £118,000 in present day values) complemented by an equivalent amount of fees. Although the salaries were increased in 1714, 1760, - described as “noble improvements” by no less a

⁶⁶ Costin and Watson *The Law and Working of the Constitution* Vol I 1660-1783 (A C Black, 1952) p 92-96. “The Act is part of written constitutional law” in Barendt *An Introduction to Constitutional Law* (Oxford: OUP, 1995).

⁶⁷ Bradley and Ewing *Constitutional and Administrative Law* (London: Longman, 13th edn, 2003) p 371. They are nowadays charged on the Consolidated Fund as among those payments which “for constitutional reasons are considered inappropriate for annual authorisations by Parliament” (p 35).

⁶⁸ Clark *The Later Stuarts* (Oxford: Clarendon Press, 1934) p 184.

⁶⁹ Prest p 87.

⁷⁰ Prest p 92. See also Holdsworth “The Constitutional Position of the Judges” (1936) 48 LQR 25, at 33.

⁷¹ See *From Office Holding to Civil Service: The Genesis of Modern Bureaucracy* by G E Aylmer TRHS 198.

figure than Blackstone⁷² - 1779, 1799 and 1809,⁷³ while the value of money diminished, the problems of extra-curricular remuneration remained.⁷⁴

Two further developments were noteworthy. First the rule was established that, unless Parliament had provided (or promised) a salary no judicial vacancy could be filled.⁷⁵ Secondly, judicial salaries were charged to the consolidated Fund, created in 1767,⁷⁶ so further protecting judges against the vagaries of politicians.

In 1815 puisne judges were paid £2400⁷⁷ (approximately £135,000 in present day values), but still drew much of their income from fees⁷⁸ - something that, according to the former Chief Justice of Australia, Sir Anthony Mason in a throw away line in a judgment concerned with cycling selection procedures for the Sydney Olympic Games, explained the longstanding judicial opposition to arbitration.

“As formally the emoluments of Judges depended mainly or almost entirely upon fees, and they had no fixed salary there was great competition to get as much litigation as possible into Westminster Hall for the division of the spoils. Therefore they saw that the Courts ought not to be ousted from their jurisdiction and that it was contrary to the policy of the old law.”⁷⁹

In 1826 two Chiefs lost the whole of their patronage and fixed, enhanced compensatory, but above all tax-free salaries replaced old method of remuneration,⁸⁰ with a range from the Chief Justice of Kings Bench at £10,000 per annum through to Judges and Barons £5,500⁸¹ - an enviable £346,000 in present day values - notwithstanding the opposition from some, on one flank, who regarded the power to dispose of offices as a necessary

⁷² Blackstone *Commentaries on the Law of England* pp 267-8.

⁷³ “The high costs of living brought about by the war was the ground put forward for the passing of this statute: and the fact that Judges were now subject to a heavy income tax (10%), as well as a land tax was an additional reason for improving their financial positions”: Mathew p 80.

⁷⁴ Brooke pp 9-10, *Holdsworth History of English Law* Vol I pp 253-255.

⁷⁵ See *Buckley v Edwards* 1892 AC 387, at pp 392-393 (a case from New Zealand).

⁷⁶ Lederman p 769, pp 792-793.

⁷⁷ Holdsworth LQR p 33.

⁷⁸ Prest p 87.

⁷⁹ *Raguz v Sulhivan* (2000) 50 NSW 236, at para 47.

⁸⁰ Mathew p 81; Holdsworth LQR p 33.

⁸¹ Mathew pp 82-83.

prerogative of a Chief Justice, and on the other the radical Brougham, but for whose oratory the basic figure would have been £6,000.

This tax free annual salary was trimmed to £5,000 – still no pittance at £338,000 in present day values - in 1832,⁸² the same year in which the Lord Chancellor lost his sinecures⁸³ - but not, for reasons of constitutional propriety, of those already appointed at the higher salary. It remained at that level (astonishingly) for over 100 years.

In 1851 by the Court of Chancery Act the salary of the Master of the Rolls was fixed at £6,000: and those of two new Judges of the Court of Appeal in Chancery at the same sum, but when in 1873 the number of Lord Justices was increased to 5 the salary was lowered to £5,000.⁸⁴ The Judges, consulted on whether the newly titled Lords Justices should be distinguished from mere Puisnes by a further £500 per annum or by a Privy Councillorship, preferred glory over gold.⁸⁵

Gladstone's efforts to cut judicial salaries in his first Administration was resisted by the judges who refused to discuss the forthcoming Judicature Bill while such a threat existed, Chief Justice Bovill of Common Pleas arguing that:

“since judges salaries were fixed, everything especially house rents, servants and horses have become much more expensive.”⁸⁶

Their salaries were, however, confirmed to be subjected to income tax in Judicature Act 1873 following on the Income Tax Act 1842. The Privy Council later opined in a Canadian case in 1937 – with what suppressed reluctance I can only speculate –

“Neither the independence nor any other attribute of the judiciary can be affected by a general income tax which charges their official incomes on the same footing as the incomes of other citizens.”⁸⁷

It is arguable that during 19th Century the real value of the High Court Judges salary did not decline, but it is indisputable that there was a dramatic increase of 250% in the cost of living between 1900-1920 so that, when tax

⁸² Mathew p 84, Holdsworth LQR p 33.

⁸³ Mathew p 84.

⁸⁴ Mathew p 87.

⁸⁵ Mathew p 87.

⁸⁶ Robert Stevens *The English Judge* (Oxford: Hart, 2002) p 81.

⁸⁷ The Judges XG of Saskatchewan (1937) 58 LTR 464, at 466.

was taken into account, judges, in the view of that most sapient and learned diagnostician of the judicial condition, the former Master of Pembroke, Robert Stevens “really were suffering serious diminution in status.”⁸⁸

Lord Birkenhead, Lord Chancellor from 1920-1922, himself a notorious over-spender,⁸⁹ was sympathetic to High Court Judges; but the Governments of which he was a member were not persuaded to favour increases since the average earnings of QC’s in 1920-21 were £6,814 whereas judges had not only their £5,000 pa but also an attractive non contributory pension, a knighthood and concomitant prestige.⁹⁰ The 1920’s were indeed a time when High Court Judges did not question their salaries or pension since the cost of living was dropping and the Bar’s prosperity was at best erratic.⁹¹

But the Great Crash at the turn of the next decade reverberated inside, as it did outside, the Courts. The National Economy Act 1931 authorised Crown by Order in Council to make economies in remuneration of persons in the service of the Crown and it reduced by 20% salaries of Judges which had been, I repeat, been static at £5,000 pa since 1832 and were worth in present day values £220,000. By that time the only Judges who received more than £5000 (less income tax) were the Lord Chief Justice (£8,000) the Master of the Rolls (£6,000) and the six Lords of Appeal (£6,000).

Mathew commented sadly:

“It is melancholy to realise that the Judges, with a salary of £5,000 diminished by 20% and the deductions of tax and surtax were worse off than they were in 1799 when they had £3,000 pa “free and clear of all taxes and deductions whatever.”⁹²

A deputation of Judges complained to Lord Chancellor Sankey who in consequence addressed the Cabinet with the following plea:

“I must point out that their (i.e. the Judges) prestige will be lowered. They will be addressed in Court by leaders of the

⁸⁸ Robert Stevens *The Independence of the Judiciary* (Oxford: Clarendon Press, 1993) pp 44-47; on County Court Salaries 1878-1937, p 507. See the classic biography by John Campbell *FE Smith: First Earl of Birkenhead* (London: Jonathan Cape, 1983).

⁸⁹ First Earl of Birkenhead, *ibid*.

⁹⁰ Stevens: *Independence* p 51.

⁹¹ *Ibid* p 52.

⁹² Mathew p 87. Mathew’s figures are discrepant with those of Holdsworth: see Holdsworth LQR p 33.

Bar who sometimes make it 2 or 3 days as much as a judge makes in a year.”⁹³

Plus ca change!

There were threats of resignation, and representations which ranged from the dignified to the extreme such as those of Mr Justice McCardie who spoke of “pecuniary sacrifice to which there is no parallel in the world”; of Mr Justice McNaughten who said that “the judges were now in the power of civil servants and he considered his position was no better than that of an office boy” adding as a final thrust “at the Home Office” and of Mr Justice Maugham who complained that the Judges had been treated “*as if they were policemen or postmen*,”⁹⁴ With few exceptions, the vehemence with which judges expressed their views was in inverse proportion to their judicial reputation.

There was talk of a Petition of Right, raising the interesting issue of the reach of the principle *Nemo iudex in causa sua*. The Government had a defensive bill drawn up by George Schuster, the Lord Chancellor’s Permanent Secretary who wrote to the Parliamentary draftsmen with the cunning of a Machiavelli, even of a Mandelson,

“begin with a recital which should be as long and pompous as possible, asserting the independence and all the rest of it, negating any idea that the Economy Act or Order by Council affected that in any way ... then declare that notwithstanding all this they are affected by the cut.”⁹⁵

Academics entered the fray. Sir William Holdsworth proposed that judges’ salaries be made tax-free but ventured, additionally, the observation that on its true construction, the National Economy Act did not apply to Judges at all who were not “persons in his Majesty’s Service.”⁹⁶ Professor Sir William Wade QC has since expressed a contrary view⁹⁷ shared by his no less eminent namesake Professor E S C Wade. In that clash of the titans I prefer the views of the junior Sir William.⁹⁸ Service takes many forms. Its

⁹³ Stevens: *Independence* pp 52-63. Charles Mowat *Britain Between the Wars* (London: Methuen, 1955) pp 402-406.

⁹⁴ Stevens: *Independence* pp 54-56.

⁹⁵ Stevens: *Judge* p 24.

⁹⁶ Holdsworth pp 25-36.

⁹⁷ Stevens: *Independence* pp 61-2.

⁹⁸ Wade and Forsyth *Administrative Law* (Oxford: OUP, 9th edn, 2004) (“Wade”) pp 67-9. Supported by Professor E S C Wade 173 *Law Times* 246 and 267 Reply by Holdsworth p 336.

meaning in public law differs from that in private law. And to suppose that the Wade analysis threatens their independence is truly to elevate form above substance.

In the end the Judges did not strike - strikes are left to the modern Criminal Bar - and in 1934 the Judges' salaries were quickly restored.⁹⁹ Schuster's biographers have written "Looking back on this convoluted conflict as a piece of legal history, it is clear that Judges who protested were concerned about money rather than constitutional principle."¹⁰⁰

I should add that the Invergordon Mutiny in 1931 resulted in a Government commitment that no salary reductions for servicemen, police or teachers would exceed 10%, proving, if nothing else, that politicians were – and doubtless still are - more fearful of revolt among the British navy than among the British judiciary.¹⁰¹

In the post-world war II years under both Labour and Conservative administrations, issues about the scale of judicial salaries continued to surface, but the time for an increase never seemed ripe: egalitarianism and economics both militated against it. Not until 1954 was there an uplift from £5,000 to £8,000, about £143,000 in present day values. Lord Maugham, the ex Lord Chancellor as the former Mr Justice Maugham had by now become, was as querulous in the fifties as he had been in the thirties, suggesting that for a Judge on the net salary "it is impossible to support a wife and children with dignity and to send his sons to public school" – an observation whose unspoken premises could justify a thesis in itself.

By 1960 the cost of living had risen 400% since 1913/14, High Court salaries by only 60%, and the rate of tax had grow'd like Topsy.¹⁰² In real terms judges' salaries had peaked more than a century and a half earlier, and were on an accelerating downward curve.

To hasten this brief history to its conclusion, the Judicial Remuneration Act 1965 provided that Judges pay could be increased, but not reduced, by Order in Council with concurrence of both Houses of Parliament. It also raised High Court Judges' salaries to £10,000, £126,000 in present day values. The Administration of Justice Act 1973 authorised the Lord Chancellor acting with approval of the Prime Minister to increase judicial salaries in the light of (but not bound by) the recommendation of the Top Salaries Review Board (established in 1971) - to give the Review Body on Senior Salaries its original and strikingly politically incorrect appellation. (I note, however, that similar sentiments have led the New Zealand equivalent, previously the Higher

⁹⁹ Stevens: *Independence* p 63.

¹⁰⁰ Jean Graham Hall and Douglas F Martin *Yes Lord Chancellor, A Biography of Lord Schuster* (Chichester: Barry Rose, 2003) pp 129-139.

¹⁰¹ R Bassett *The Invergordon Mutiny 1931* (London: MacMillan, 1955) pp 234-236.

¹⁰² Stevens: *Independence* chapter 2.

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Salaries Commission, to be re-titled more neutrally the Remuneration Authority).¹⁰³

As a by-product of this new regime, which had switched ultimate control from legislature to executive, in 1972 a High Court Judge salary became £15,570 (worth £134,000 in present day values).

There were pleas in 2005 for further up lift of judicial salaries which had taken place over the intervening three decades more in fits and starts than in smooth curve and now for a High Court Judge amounted to £155,404.¹⁰⁴

¹⁰³ The Remuneration Authority (Members of Parliament) Amendment Act 2002.

¹⁰⁴ Table: High Court Judges:

Year	Recommended Salary	Increase
1972	£15,750	
1973	£16,000	(1.6%)
1974	£16,350	(2.2%)
1975	£21,000	(28.4%)
1976		
1977		
1978	£26,000	(23.8%)
1979	£28,500	(9.6%)
1980	£35,000	(22.8%)
1981		
1982	£45,000	(28.6%)
1983	£48,000	(6.7%)
1984	£51,250	(6.8%)
1985	£60,000	(17.1%)
1986	£63,500	(5.8%)
1987	£65,000	(2.4%)
1988	£68,500	(5.4%)
1989	£72,000	(5.1%)
1990	£77,000	(6.9%)
1991	£84,250	(9.4%)
1992	£100,000	(18.7%)
1993	£90,148	(-9.9%)*
1994	£96,543	(7.1%)
1995	£100,511	2.5% (4.1%)
1996	£106,071	3.9% (5.5%)
1997	£113,770	(7.3%)
1998	£119,600	3.5%
1999	£123,787	3.5%
2000	£127,872	3.3%
2001	£132,603	3.7%
2002	£143,258	8.0%
2003	£147,198	2.75%
2004	£150,878	2.5%
2005	£155,404	3.0%

When it was realised that the Lord Chancellor would inevitably fail to persuade Parliament to enact a Judicial Pensions Bill designed to exempt judges from the legislation in force in April of this year which will impose a lifetime limit of £1.5 million on the tax relief allowed on pension benefits. The Judges asserted that since their pensions position was statutory, they were, in the words of Lord Woolf, the then Lord Chief Justice, “excluded from opportunities available to other professionals to take action to protect themselves against the new legislation”¹⁰⁵ and that the forthcoming cap breached the legitimate expectation that they had entertained in accepting judicial appointment. Moreover, the convention is that Judges cannot (unlike in some other countries) return to the Bar – although it is rumoured that an opinion obtained by a former Lord Chancellor can point to no legal foundation for it - so depriving them of the one post-judicial career for which they are most obviously suited.

The Parliamentary arithmetic suggested that were such a bill, positively discriminatory in favour of the Judges, to be introduced, it would fail to attract sufficient support among Blairites, Camerons, Lib Dems and certainly Old Labour and a quid pro quo of a 20% salary uplift, only obtained twice in the last 30 years could logically be anticipated, to engender similar objections. It was reported that Judges were ready to take legal action and had instructed pension specialist counsel to advise.¹⁰⁶ Some had even (it was rumoured) threatened to resign.¹⁰⁷ The new concordat between executive and judiciary, brokered by Lord Woolf and Lord Falconer seemed fragile.

*The salaries vary from the actual salaries in payment due to the staging of awards – either mid-year as in 1977 and 1988 or over a number of years, as in 2002. The salary position between 1991 and 1993 followed the Government’s rejection of the SSRB’s recommendations in 1992 CM 2015 (July 1992) para 137. The actual salaries paid were as follows:

1 April 1991	£82,800
1 December 1991	£84,250
1 April 1992	£87,620
1 April 1993	£90,148

Source: SSRB Reports. Table provided to me through the good offices of Andrea Prophet, SSRB Secretariat. This contrasts incidentally with a Median pre appointment income = £166,200 (April 1991) and Mean pre appointment income = £227,300 (April 1991).

¹⁰⁵ Interview with Frances Gibb in “Judges threaten to resign over pensions losses” *The Times* October 6th 2005.

¹⁰⁶ Francis Gibb *The Times* November 7th 2005, based on a story in *The Lawyer*.

¹⁰⁷ Frances Gibb “Judges Threaten to Resign over Pension losses” *The Times* October 6th 2005.

And then on 15 December 2005 Lord Chancellor, donning the seasonal garb of Santa Claus, announced that he would spend an extra £9 million a year on judges' pay and pensions¹⁰⁸ in a complex package whose provisions, announced in Parliament and on the website without the usual illuminating concomitant explanatory statement or interview, were capable of being understood, save for the concept of a long service award for Judges nearing retirement, only by revenue specialists, as illustrated by the diverse descriptions of its elements in the serious press.¹⁰⁹ This was government not too much by spin as by stealth, but as in 1931, so in 2005, by an act of political legerdemain, a constitutional crisis was averted.

But England is not the only country where controversy has erupted over judicial pay. In Israel there have been several skirmishes. During the mandate period the Courts Ordinance 1940 had authorised the High Commissioner to fix judicial salaries. After the establishment of the State of Israel this power was transferred under The Law and Administration Ordinance to government as a whole. The first Minister of Justice D P Rosen had promised that salaries of judges should equate to those of ministers, but salaries were low and: "The final insult came when one minister demanded that the judges salaries be made to 10 Lira less per month than that of the ministers in order to symbolise the executive's superiority over the judiciary."¹¹⁰ This proposal was defeated and in 1950 it was decided that judicial salaries were to be determined by the Knesset (or Parliament) rather than the executive.¹¹¹

Nonetheless, in 1978 Israeli judges were primed to go on collective vacation to protest over the linkage of their salaries, together with those all other government employees to the cost of living index. It was somewhat imaginatively claimed on their behalf that this gesture evidenced their independence. Proceedings were commenced by a dissenting but bold lawyer¹¹² to restrain the judges: an injunction was refused. The President of the Supreme Court, to whom an approach was made, negotiated a solution.

¹⁰⁸ This honoured substantially if not completely (i.e. by primary legislation), the assurance given by him to the judiciary and recorded in *Review Body on Senior Salaries*, Report No 59 27th Report. Chairman John Baker Cm 6451 para 4.11. Compare "Falconer sneaks out changes to Judges Pensions" *The Daily Telegraph* December 16th 2005 p 24 with the version in the Times of the same day.

¹⁰⁹ Shimon Shetreet *Justice in Israel A Study of the Israeli Judiciary* (Leiden: Martinus Nijhoff, 1994) ("Shetreet: Israel").

¹¹⁰ Shetreet: Israel p 72.

¹¹¹ Shetreet: Israel p 73.

¹¹² *D Hooper v Judges of the Magistrates and District Courts* – DC CA Tel Aviv 582/78.

Henceforth judges' salaries were linked to the average wage rather than on the cost of living.¹¹³

But in 1985 emergency regulations were introduced to combat inflation and all wages in public sector including those of the Judges were frozen contrary to the provisions of the Basic Law Adjudication of 1984. The dispute was resolved by awarding an increase to the judiciary of 20%, the rest of the public sector gained by contrast nothing.¹¹⁴

In Canada during the Depression the same issue arose as in contemporary England.¹¹⁵ A Canadian constitutional lawyer has witheringly described the argument then advanced on the Judges behalf that even non-discriminatory reductions affected judicial independence as "fantastic".¹¹⁶

Half a century later in the same Dominion a contributory pension scheme was introduced for federally appointed judges and applied retroactively to judges who were appointed on the day the bill was introduced. In *Beauregard v Canada*¹¹⁷ in 1986 a challenge to the legislation failed. While it was recognised that it is a condition of judicial independence that a judge's right to salary or pension should not be subject to arbitrary interference by the executive, only laws which were indeed "arbitrary", "colourable" or "discriminatory" would be vulnerable to attack. And in *Re Public Sector Pay Reduction Act*¹¹⁸ in 1996, it was held that there was no threat to judicial independence when provincial judges salaries shared in a pay cut in common with other public officials.

In Ireland a novel point was taken in *O'Bryne v Minister of Finance* when the widow of a deceased judge claimed that taxation payments deducted from his salary while he was in office were breaches of the conventional constitutional guarantee. A minority of the Supreme Court actually agreed, but Maguire CJ said sensibly: "The purpose of the Article is to safeguard the independence of judges. To require a judge, to pay taxes on his income on the same basis as other citizens and thus to contribute to the expenses of Government cannot be said to be an attack on his independence."¹¹⁹

In the USA the authors of the Declaration of Independence complained of George III who had "made judges dependent on his will alone for the amount and payment of their salaries" but the boundaries of the consequent constitutional guarantee to protect the salaries of judges in office have

¹¹³ Shetreet: Israel p 145-6.

¹¹⁴ Shetreet: Israel p 146-7.

¹¹⁵ Lederman p 769.

¹¹⁶ Hogg above n 15, p 172.

¹¹⁷ (1986) 2 SCR 56.

¹¹⁸ (1996) 20 DLR 449.

¹¹⁹ The Irish Reports 1959 p 38: I R Brian Doolan *Constitutional Law and Constitutional Rights in Ireland* (Gill and MacMillan, 1983) p 75.

frequently been tested in the court themselves. In broad terms the outcome has been that direct interference (that is to say outright reduction) is unconstitutional: indirect interference (that is erosion) is unconstitutional only if two criteria are satisfied: that the erosion is discriminatory; and that it amounts to an attack on independence of the judiciary:¹²⁰ In the *Federalist*, Alexander Hamilton, a founding father, stated: “Next to permanency in office, nothing can contribute more to independence of the judges than a fixed provision of their support.”¹²¹ Mr Justice Breyer a serving Justice has said by reference to these historic statements “The framers also understood that steady judicial compensation would help to secure that necessary independence.”¹²²

The issue was most recently revisited in *Williams v USA*¹²³ in 2002. It had as its backdrop the Reform Act 1989, which applied to federal judges and had two objectives.

First a strict limitation in the amount of outside income that any judge could earn leaving only writing books or teaching as an alternative source, together with a strict cap on the latter.

But second, by way of quid pro quo the maintenance of the judicial compensation at a nearly constant level, with the right to automatic annual adjustments in judicial pay to take account of inflation.

In each of the relevant fiscal years – 1995, 1996, 1997 and 1999 - Congress legislated to prevent those adjustments taking effect for that year. A minority of the Supreme Court (Justices Breyer, Kennedy and Scalia) held that this to be unconstitutional, arguing that the special nature of the judicial enterprise should immunise them from cuts in the salaries of other branches of government. They proclaimed “Independence of conscience, freedom from subservience to other government authorities, is necessary to the enterprise.”¹²⁴

In 1981 the Prime Minister of Australia requested the “Justices of the High Court to accept a reduction in their salaries because of the economic situation. The judges refused although they made separate individual arrangements.”¹²⁵

¹²⁰ *Atkins v US* 556 Fed Rep 20 1028 (1977), *Will v US* 478 F. Supp 621 (1979). Judges fought with partial success Congressional Legislation providing for freezes on judicial salaries (1980). Shetreet queries the logic of inclusion of the second if the first is satisfied. Shetreet: Israel pp 217-218.

¹²¹ No 79 at p 562 ed C Rossiter (New York, 1961).

¹²² The Statement of Mr Justice Stephen G Breyer, National Commission on the Public Service, July 15th 2002 (“Breyer”).

¹²³ 535 US (2002).

¹²⁴ Dissenting judgment, at 13.

¹²⁵ Mr Justice Kirby “Australia” SD chapter 2 p 11.

Judges internationally have not been shy to contest in court any perceived diminution in salaries including a decrease in real value. There are examples from Brazil, Greece and Spain as well as those I have already cited.¹²⁶

Before turning to more contemporary and domestic issues I should now belatedly declare an interest. I served as Chairman of the Judicial Sub Committee of the Review Body on Senior Salaries from 2001-2003 before Nolanisation compelled me to surrender my seat on the Senior Salaries Review Board (SSRB) and hence on its subsidiary body. I recall that when I mentioned my role to an audience of Indian Judges and lawyers in Chennai - Madras as it then was - they expressed astonishment that a practising QC should enjoy a status, which would, as they saw it, confer such a forensic advantage in court. I am bound to say that I never noticed any particularly restrained treatment of my submissions by the Judges, and was more conscious of the loss of income sustained by performing an unpaid service to the State at the expense of my practice!

This service, however, gave me a particular perspective on the matter under consideration as well, of course, as a particular fascination with the subject.

I turn first to the question of method. There are various possibilities as to who should decide how judges are paid.

Firstly, it could be the Judiciary itself. But there would surely be principled objections to judges determining how much they themselves should be paid.

Secondly it could be Court users. But since the legal system provides a vital public service, it ought to be substantially financed by state budget, and not by payments of those requiring its services.¹²⁷

Thirdly it could be the legislature as is the case in Brazil, Australia, Belgium and Greece.¹²⁸ But this, while it has the advantage that the process is in the hands of a democratic body, has the concomitant disadvantage of cumbersomeness.

Fourthly, as is typical in some states in the USA, it could be by a court system responsible for its own budget, within the limits of a sum of money allocated to it by the legislature:¹²⁹ - a notion which attracted the former

¹²⁶ USA: Judges at local level: Shetreet "Judicial Independence" SD chapter 52 p 61. Professor Celso Agricola Barbio "Brazil" SD chapter 6 p 53. For Greece and Spain, see Shetreet SD chapter 52 p 673 n 160. I have had myself to advise the Senior Judiciary of Trinidad and Tobago in relation to a threat to their housing allowance.

¹²⁷ Shetreet: Israel p 143.

¹²⁸ Shetreet: SD chapter 52 p 672, n 153.

¹²⁹ This is partially imitated in British Columbia in Canada and in the High Court in Australia. The Honourable Leonard King: "The IBA Standard" SD chapter 34 p 406. In Japan the Supreme Court prepares a budget when the Cabinet proposes to the Diet;

Senior Law Lord, then Vice-Chancellor, Sir Nicholas Browne Wilkinson. But this is inconsistent with British constitutional practice¹³⁰ as he recognised.

Fifthly, it could be the Executive without third party intervention as in Spain and Sweden. But since the Government is often party to the litigation this could compromise the independence of the process.¹³¹ As D Pannick QC, Fellow of this College, put it succinctly: “Pay rates for an independent judiciary should not be set by the executive, the most frequent clients of the courts.”¹³²

And on this issue LSE is at one with Oxford. Kate Malleon wrote:

“The way in which judges are ... paid ... provide the potential means for punishing or rewarding judges for their decisions.”¹³³

Sixthly, there could be automatic adjustment of salaries by reference to the price index as in California and some Australian states, or to the average wage as in Israel.¹³⁴ But, while this would have the virtue of certainty it would have the concomitant vice of inflexibility.

The British compromise, imitated incidentally in New Zealand¹³⁵ and South Africa¹³⁶ is in my view the best solution.¹³⁷ It seems to me a sensible method of reinforcing the constitutional guarantee to distance the Government *as far as possible* from the determinations of judicial salaries, while also allowing a measure of judicial and outside input. An analogous philosophy is belatedly mirrored in the concept of the Judicial Appointments Commission.¹³⁸

in the case of dispute between Court and Cabinet the Diet decides. Professor Yasnhe Taniguchi “Japan” SD chapter 18 p 207.

¹³⁰ Sir Nicholas Browne-Wilkinson “The Independence of the Judiciary in the 1980s” (1988) 44 *Public Law*, at 44.

¹³¹ Shetreet: Israel pp 143-44.

¹³² *The Times* September 8th 1992.

¹³³ Kate Malleon “The New Judiciary” (Aldershot: Ashgate, 1999) (“Malleon”) p 67. She notes at p 67 however that “in practice ... there does not appear to have been any serious suggestion that the government has sought to influence the judges either collectively or individually in this way.”

¹³⁴ Shetreet: Israel p 44.

¹³⁵ From 1982, the Remuneration Authority deals with judicial salaries: Remuneration Authority Act 1977 (as amended).

¹³⁶ Judges Remuneration and Conditions of Employment Act No 42 2001, s 2(a) (i).

¹³⁷ There are overseas analogues. Shetreet “Judicial Independence: New Conceptual Dimensions and Challenges” SD chapter 52, pp 628-629 and p 672 n 155 (Austria, Belgium).

¹³⁸ Constitutional Reform Act 2005, ss 23-31.

I say as “*far as possible*” advisedly, since it must be for the Government of the day to enjoy the last word, always within the constraints of the constitutional guarantee, on what may be affordable at any particular time. Lord Williams of Mostyn QC (then Chairman of Bar Council, later a poacher turned game keeper as Attorney General and finally, before his premature death, Leader of the House of Lords), called it “dangerous to have an allegedly independent body which is then overruled by politicians.”¹³⁹ As a matter of record Governments have rarely declined to take the SSRB’s advice, if from time to time they have decided only to stage the increases proposed.

I have, however, always thought it incongruous that the SSRB’s terms of reference include an obligation to have regard to the funds available to departments as set out in the departmental expenditure limits. This blurs the boundary between the role of the adviser and the advised. But since the obligation is only to ‘*have regard to*’ rather than to be bound by such consideration, this may be of less significance than at first sight appears. And it does remind the SSRB that their function is not simply to accept judges’ estimation of their own value.

The customary processes of consultation are (or were during my time on the body) well established. An advance guard of senior civil servants from what was then the Lord Chancellors Department (now renamed the Department for Constitutional Affairs) would come and explain the Government’s view to the sub-committee. At a later plenary meeting the Lord Chancellor would arrive in all his glory accompanied by his Permanent Secretary. Either between or after, depending on the respective party’s schedules, the Lord Chief Justice would have audience as spokesman for the Judiciary, accompanied by one other Judge, usually Sir Andrew Morritt, now Chancellor, - shop steward and shepherd. After exchange of the usual courtesies, more elaborate in the last two meetings than in the first, carriage of the debate was left largely to the Judicial Sub Committee, three in number, all then lawyers, as the judiciary had originally insisted as the price for their participation in the process.

In a little noted change, after my retirement from the Chairmanship there was a temporary purge of lawyers; although now the body has been afforded by Sir Peter North QC, Lord Neill’s successor as Vice Chancellor of Oxford. How and why this happened will have to await revelations in political memoirs or (less likely) in response to a precisely targeted request under the Freedom of Information Act 2000.

For several years I enjoyed some brief encounters of the forensic kind with Lord Irvine on the one hand and Lords Bingham and Woolf on the other. The Lord Chancellor would plead poverty; the Judges need. We would

¹³⁹ 28 September 1992 (Bar Conference).

formulate proposals for our parent body, and recommendations would go forth to the Prime Minister in due course in immaculate civil service prose with my more rhetorical flourishes sternly sub-edited out. Never underestimate the power as well as the skill of the accomplished civil service draftsman!

For the future under the new constitutional settlement the amount of salary in point of law “is to be determined by the Lord Chancellor with the agreement of the Treasury,”¹⁴⁰ the one with responsibility for the rule of law, the other for the wealth of the nation. The SSRB’s role will continue to be to square the circle.

I turn to the question of criteria. There is no definitive way of measuring what judges should be paid.¹⁴¹ To claim that they are worth such and such a figure is to make a judgment more appropriate to the divine than to the human. Justice Breyer of the United States Supreme Court wisely said making a case for an uplift in judicial pay to the National Commission on Public Service:

“In this world I can find no pay scale that measures an individual’s just desserts.”¹⁴²

No such inhibition, incidentally, affected the Judge sitting in Clarksville Tennessee, where the Court transcript records the following dialogue.

“Judge: All right. I sure would feel better if you had a lawyer. You can afford one, can’t you?”

Defendant: No, I can’t, Your Honour. I cannot afford an attorney.

Judge: Are you drawing your salary from the fire department?

Defendant: Yes, I am.

Judge: That is a pretty good salary, isn’t it? I mean by that, firemen get paid pretty well.

Defendant: Well, it is not comparable to yours.

¹⁴⁰ Constitutional Reform Act 2005 s 34 (2).

¹⁴¹ M. Kuijer “The Blindfold of Lady Justice” (E M Meijers Institute, 2004) pp 255-6.

¹⁴² Breyer p 5.

Judge: Well, it ought not to be comparable to mine. I mean, after all, we are the highest in the State. We are God!”¹⁴³

Axiomatically the Constitutional guarantee must be respected: it sets a floor, not a ceiling. It may be thought by some invidious to protect judges against financial risks to which others in the community are vulnerable, but I cannot regard it as anachronistic or anomalous. Where the administration of justice is concerned, perception is important. Judges must not only be independent, but must be seen to be independent.

It has been argued that there is a need to avoid reduction not only in formal but in real terms. Otherwise Judges independence can be compromised by a side wind. Shetreet writes:

“Withholding salary increase may be an indirect method of interfering with independence at times of higher rates of inflation.”¹⁴⁴

If so, the pass has long since been sold. The constitutional guarantee cannot be so benevolently interpreted. More realistically there is a need to ensure increase in judicial salaries equivalent at any rate to that elsewhere in public sector. The SSRB have indeed to bear “broad linkage” in mind.

But how much – that is the key? There are several points to be made.

Firstly Judges cannot seriously complain that they are under paid in absolute terms – although that has not prevented them from making serial complaints. Lord Justice Parker commented in his retirement speech in 1992: “If you pay peanuts, you get monkeys”.¹⁴⁵ While as a general proposition that may have the ring of truth, it surely does not apply to Her Majesty’s judges.

Nor do the concerns which Lord Denning MR ventilated in a debate on the Lord Chancellors’ salary in 1985 tug too tightly at the heartstrings. He said:

“Many of the judges were aggrieved. The younger judges were disappointed they could not provide properly for the education of their children, for their holidays and the like.”

adding:

“A salary increase made them reasonably satisfied.”¹⁴⁶

¹⁴³ I owe this reference to Julian Dare, Trinity, Oxford 1958-1959.

¹⁴⁴ Shetreet: Israel pp 144-5.

¹⁴⁵ On 2nd August 1992.

¹⁴⁶ On 29th July 1985 Hansard 467 HL 88.

Later concerns were articulated that not only could Judges not pay for their holidays; might have less holidays to pay for. In a Working Party chaired by Kennedy LJ in 1995 on a proposal that the long vacation should be abbreviated the authors wrote:

“Such a prospect would be unlikely to find much favour with the judiciary who, having recently been awarded a pay increase below the rate of inflation and far below the level recommended by the TSRB, are bound to regard the vacations as one of the few remaining attractions of the job.”¹⁴⁷

David Pannick QC has wisely said “any judicial stress would not be caused by worries of low pay”,¹⁴⁸ not least because of the benefits of stability associated with the transition from barrister’s chambers (or solicitor’s office) to bench. One Judge, Sir Peter Bristow, candidly wrote in a memoir:

“You would fairly be said to be relieved of financial worry with your bottom placed firmly on the consolidated fund. To those who all their working lives had to pay their taxes in arrears, PAYE came as an enormous blessing.”¹⁴⁹

The QC enjoys the hurly-burly of the chaise longue, the Judge the peaceful tranquillity of the marriage bed – metaphorically speaking of course.

Secondly it is difficult to argue that the amount paid *per se* can compromise their independence. Kate Malleon comments:

“The standards of justice may be poorer in terms of such matters as delay and standards of legal advice if less resources are available but that need not affect the independence of the judges. Impartial judges can dispense justice under the proverbial palm tree.”¹⁵⁰

¹⁴⁷ Review of HCJ Work, Deployment and Numbers para 56. Note too that staging, as in 2002, causes “unanimous disapproval and even resentment” Cm 5718 SSRB Ch 4 para 4.5.

¹⁴⁸ *Judges* (Oxford: OUP, 1987) p 20.

¹⁴⁹ Peter Bristow *Judge for Yourself* (William Kimber, 1986) p 25.

¹⁵⁰ Malleon p 56.

Thirdly high salaries are surely not necessary nowadays to avoid corruption in our courts and the original justification for paying Judges has in practice evaporated. As Rodney Brazier has sensibly asked:

“If a person were susceptible to corruption would he not be so almost regardless of income?”¹⁵¹

In the words of Lord Justice Brooke:

“And finally, we are paid large enough salaries to render us free from the sort of financial worries which might **in theory** fuel the risk of judicial corruption.”¹⁵²

the key phrase being “*in theory*”.

At a Judicial Accountability Commonwealth Lawyers Association Conference in Kuala Lumpur in 2003, I recall the Chairman, the distinguished Australian High Court Judge, Michael Kirby, looking around the table at lawyers from Malaysia, Sri Lanka, India, Scotland, England, as well as the USA – included pro. tem. for the good and sufficient reason that they were, part funding the conference, and saying that in none of our countries had the scourge of judicial corruption been erased. When I mildly inquired whether he would provide any example of corruption from England in the last two hundred years, he rebuked me for being chauvinistic: Chauvinistic possibly: accurate certainly!

Fourthly, while Lord Bingham has referred to “subtle link” based on the “perceived relationship between what someone earns and the status and prestige which he enjoys”,¹⁵³ not even in a materialistic society can it fairly be said that the prestige of a position reflects exactly the sum paid to its occupant. Judges may occasionally – in my respectful view unwisely – speak of footballers as role models,¹⁵⁴ but do we really admire a master of the goals more than the Master of the Rolls because one earns £75,000 per week and the other closer to £7,500?

¹⁵¹ Brazier *Constitutional Practice* (Oxford: OUP, 3rd edn, 1999) p 275.

¹⁵² Brooke p 12. However the connection between inadequate pay and judicial corruption remains live elsewhere, see J Clifford Wallace “Resolving Judicial Corruption” in cd Cyrus Das and K. Chandra *Judges and Judicial Accountability* (CLR, 2003) pp 86-101.

¹⁵³ See Brazier op cit p 275: “Enhance the dignity of judicial office.” The Tokyo Principles also suggest that remuneration judges should be commensurable with the dignity of their profession and burden of responsibilities (Recommendation R(94) 12.

¹⁵⁴ *A v B* (2003) QB 195 at 217.

The SSRB's assessment for proper pay is based on an elusive concept of job weight, referable more to the quality of what is done than its content.¹⁵⁵ Whereas in the other two groups (senior civil servants¹⁵⁶ and senior officers of the armed forces) performance related pay has infiltrated the calculation; the 1997 fundamental review roundly rejected it in these words:

“It would involve systems of management and appraisal whose authority and efficiency would be controversial and which could be seen to challenge the principle of judicial independence. The view was also expressed that performance related pay might lead to a perception that a judges actions could be influenced by considerations of personal gain and loss.”¹⁵⁷

Performance related pay was, however, the subject of internal discussion¹⁵⁸ and I betray no state secret in identifying the non-lawyers on the Body as being less hostile than the lawyers to the notion. I do not, of course, consider that assessment would be impossible. Although the quality of performance of a Judge may not be as easily measured as that of a Senior Civil Servant, the Lord Chancellor has hitherto been able to distinguish between those whose careers reach their pinnacle on the High Court bench, those who are fit to ascend to the rarified atmosphere of the Court of Appeal and those who can soar into the stratosphere of the House of Lords – without using such crude analytical tools as the ratio of judgments appealed and reversed to those appealed and upheld, or throughput in numbers of cases dealt with per sitting.

But in this age of transparency, who would judge the judges, and by reference to what standards? For my part I consider that even evaluation by an independent commission would not entirely dispel the impression, false though it would surely be, that judges might tailor their judgments to fatten their pay packets and might be less robustly oblivious to politician's criticisms than they manifestly are today. More important still, to distinguish in terms of

¹⁵⁵ See The European Charter on the Statute for Judges which mentions length of service, nature of duties and importance of tasks as relevant criteria.

¹⁵⁶ One concern is the fact that, contrary to the historic position, the salary of the LCJ has fallen substantially behind that of the Cabinet Secretary: Cm 5718 Report No 54 chapter 4 para 4.15.

¹⁵⁷ Cm 3451 1997 para 22. The 2002 Fundamental Review, which I chaired, did not even raise the issue.

¹⁵⁸ See “Neither Cloistered nor Virtuous: Judicial Independence in the Twentieth Century” M J Beloff QC, Atkin Lecture Reform Club 1999, reprinted in (2000) *Denning Law Journal* 153 at 164.

pay between one High Court Judge and another would lead to the conclusion that one dispensed a purer justice than the other. It may be a fiction that all judges at the same level are equal; some are clearly more equal than others; but that inequality should be reflected in their promotion, not their pay.

Mr Justice Breyer compiled a melancholy catalogue of the consequences of false economy¹⁵⁹ causing “major financial insecurity among judges” many, if not all, of which can be transposed across the Atlantic - premature resignations, diminished attraction of judicial office to well qualified lawyers outside the judicial system, repetitive promotion from within the system with consequent risk of bureaucratization and lower morale. Judging, he added, might become seen as a temporary assignment, a threat that the odd Fisher or Laddie apart, is less resonant in England and Wales, unless schemes are implemented to allow for judges to return to the profession.

He concluded:

“In this way the cuts contribute to diminished institutional reforms which in turn promotes public disenchantment and lack of trust in a government, less able to get the job done well and a lack of interest in participating in the work of that government.”¹⁶⁰

contending that sufficient pay:

“must have and does have everything to do with the nature of the institution and the value of the strong, well functioning, truly independent judicial system for all Americans.”¹⁶¹

Nor was this a self-serving statement on the fringe of mainstream thinking. In 1989 the report of the American Commission on Executive, Legislative and Judicial salaries entitled. “Fairness for our Public Servants” said that reducing the real level of judicial salaries in the USA was “threatening to diminish the quality of justice in this country.”¹⁶²

So we reach the heart of the matter. While Lord Bingham has modestly written.¹⁶³

¹⁵⁹ Breyer p 6.

¹⁶⁰ Breyer p 8.

¹⁶¹ Breyer pp 5-6.

¹⁶² Report at p 27.

¹⁶³ Lord Bingham of Cornhill “Judicial independence” at JSB annual lecture in 1996, reprinted in Lord Bingham *The Business of Judging* (Oxford: OUP, 2000) p 64.

“The connection between judicial salaries and judicial independence may not be immediately obvious,”

he surely was stating the obvious in continuing:

“Our own tradition does depend on the willingness of the most successful practitioner at the height of their careers to accept appointment to the judicial bench, and I gravely doubt whether that tradition can be maintained.”¹⁶⁴

The real issue is surely one of recruitment and retention or staying the course, until Judges become, in Lord Bridge’s melancholy phrase “officially geriatric”.¹⁶⁵ The SSRB’s - own terms of reference – admittedly to be applied to various sectors of public service - specify “the need to recruit, retain and motivate suitably able and qualified people to exercise their different responsibilities”.¹⁶⁶ If the ablest eligible candidates – I put on one side the controversial claims of diversity – either refuse the invitation to the bench (or decline to apply to advertisement) or, once appointed, serve only for so long as entitles them to a full judicial pension, if that, the standard of justice will inevitably, if imperceptibly, be impoverished. And in an age when the judiciary, armoured with new weapons in the form of paramount community law and the domesticated European Convention on Human Rights, and imbued with an activist spirit which has not been a constant in post war times, play an increasingly significant role in the governance of the nation, any lowering of even high standards would be a cause for legitimate concern. To quote Holdsworth:

“....a good thing is never cheap: and to pay sufficient to get a good thing is often the best economy for thereby expensive disasters are avoided.”¹⁶⁷

¹⁶⁴ Ibid p 66.

¹⁶⁵ In *Ruxley Electronics and Construction Ltd v Forsyth House of Lords* (1996) AC 344, Lord Bridge concluded his speech elegiacally: “My Lords, since the populist image of the geriatric judge, out of touch with the real world, is now reflected in the statutory presumption of judicial incompetence at the age of 75, this is the last time I shall speak judicially in your Lordships’ House. I am happy that the occasion is one when I can agree with your Lordships still in the prime of judicial life who demonstrate so convincingly that common sense and the common law here go hand in hand”, at 364.

¹⁶⁶ cf Remuneration Authority Act (New Zealand) 1977 (Section 18 (i) (c)) which refers to “the need to recruit and retain competent persons.”

¹⁶⁷ Holdsworth LQR p 33.

In England, the discrepancy between earnings at the Bar and on the Bench is notorious.¹⁶⁸ It features in the biographies and memoirs of famous members of both professions. It was a reason why George Carman QC did not go to the Bench – admittedly in Hong Kong.¹⁶⁹ In his autobiography Sir Neville Faulks described his options in this way. “I wanted to be “local boy made good”, but I wanted to keep my children in bread and boots for as long as I could, and the appointment would mean a substantial drop in income”.¹⁷⁰ Sir Michael Kerr wrote of the agony of his decision to quit Bar for Bench “Above all there was the question of money. I was earning about £38,000 a year near the top of the Bar, and I think that a Judge’s salary was then £11,500.”¹⁷¹

This lawyers’ dilemma is no mere contemporary phenomenon. Norman Birkett’s clerk wrote:

“When Norman Birkett went to the Bench he made a very heavy financial sacrifice and so did I when I decided to go with him.”¹⁷²

The clerk’s sacrifice was appreciated by Birkett,¹⁷³ and his own presumably tolerated.

As with Birkett, so with Atkin. Geoffrey Lewis, his biographer, wrote

“For almost the whole of his career, Atkin was troubled by anxiety about money ... By the time he was established as a leading commercial silk he was earning some £11,000 a year but this relative affluence was short lived, and, as has always been the case in England, his appointment to the High Court Bench brought with it a sharp reduction in income. He returned more than once to the idea of leaving the profession in order to earn more, first as a teacher, later for a post in the City and even when a judge, to return to the Bar.”¹⁷⁴

¹⁶⁸ Not only in England; For India see Dr Anand Prakash “India” SD chapter 15 p 163.

¹⁶⁹ Dominic Carman *No Ordinary Man – A Life of George Carman* (London: Hodder and Stoughton, 2002) p 110. Carman was not an example of that caricature figure “FILTH”: Failed in London, Try Hong Kong: see the novel by Jane Gardam “*Old Filth*” (Penguin, 2005).

¹⁷⁰ Sir Neville Faulks *A Law Unto Myself* (William Kimber, 1978) chapter 6.

¹⁷¹ Michael Kerr *As Far as I Remember* (Oxford: Hart, 2002) p 271.

¹⁷² A E Bowker *A Lifetime with the Law* (W H Allen, 1961) p 189.

¹⁷³ H Montgomery Hyde *Norman Birkett* (Hamish Hamilton, 1964) p 475.

¹⁷⁴ Geoffrey Lewis *Lord Atkin* (London: Butterworths, 1983) p 19.

As in the United Kingdom, so in the United States of America.¹⁷⁵
As Breyer put it:

“The real pay of federal judges has diminished substantially in the past three decades. The gulf that separates judicial pay from compensation in a non-profit sector, academia, and the private sector grows larger and larger. The result, in my view, threatens irreparable harm both to the institution and in to public that it serves.”¹⁷⁶

Breyer compared increases in judicial pay, which had exceeded, the cost of living in Canada and the UK with the reverse position in the United States. Interestingly, it appears that where - as in England the order of size of income would be first practising lawyers, second judges, third law academics, in America law academics can outstrip judges – a dispiriting observation for the majority of this audience!

In Germany by contrast in recent times judges, previously less well paid than academics, have now overtaken them – reflecting changed perceptions of their relative contributions to the law’s development.¹⁷⁷

In 1988 the Top Salaries Review Body (TSRB) themselves said (echoing Sir Peter Bristow) that drop in income could be mitigated:

“in the light of the status and security of judicial office with its prospect of continuing in paid, rewarding and pensionable employment to a later age than is possible in most walks of life.”¹⁷⁸

But this sanguine statement was made before the Judicial Pensions and Retirement Act 1993 which (amending the Judicial Pensions Act 1959) raised the period of service for a full pension from 15 to 20 years and lowered the retirement age to 70 prospectively – a double financial whammy, bearing in mind that, as the European Court of Justice has reminded us, pensions are deferred pay.¹⁷⁹ The TRSB anyhow added materially “the discount has now become too great.”

¹⁷⁵ Breyer *passim*.

¹⁷⁶ Breyer p 8.

¹⁷⁷ Information from Professor Stefan Vogenauer, Professor of Comparative Law, University of Oxford and Trinity Oxford alumnus.

¹⁷⁸ Cmn 1988 para 45.

¹⁷⁹ *Barber v Guardian Royal Exchange Assurance Group Ltd* 262/88 [1991] 1 QB 344 ECJ.

It may well be that as Joshua Rozenberg has written:

“The real problem is not that judges earn too little but that lawyers earn too much.”¹⁸⁰

but unless (unthinkably) there is legislation to cap counsel’s private fees the problem is a problem is a problem. In 2005 thirty barristers earned more than £1 million and a select few more than £2 million.¹⁸¹

The recently retired Lord Chief Justice cast a wistful eye East when he reflected:

“I have recently returned from Singapore and there the Chief Justice ... transformed recruitment and the quality of the judiciary by obtaining a doubling of judicial salaries.”¹⁸²

I am reliably informed that the Singaporean Judges Remuneration (Annual Pensionable Salaries) Order:

“does not deal with the bonuses, car allowances and other perks paid to them which bring the total annual emoluments of judges to 1 million Singapore dollars.”¹⁸³

Ex Asia semper aliquid novi

How real are these concerns of a diminution in the numbers of those willing to accept High Court appointments preferring city, campus or a conventional courtroom practice? Official statistics obscure rather than illuminate. As is common knowledge among the cognoscenti, they resemble in terms of accuracy - to use a modern metaphor borrowed from the Shadow Chancellor of the Exchequer - the figures for Soviet tractor production, a point appreciated by the SSRB.¹⁸⁴ When High Court judges were appointed by invitation only and not through advertisement, the Lord Chancellors department could optimistically, but unrealistically claim that no one counted

¹⁸⁰ Joshua Rozenberg *The Search for Justice* (Hodder & Stoughton, 1994) p 92.

¹⁸¹ *The Times* September 5th 2005 (figures from the *Lawyer Magazine*).

¹⁸² Inner Temple Millemmium Lecture 2001.

¹⁸³ Private information from a prominent local lawyer and former Parliamentarian.

¹⁸⁴ Noting, in 2005, The Lord Chief Justice’s concerns that “the official recruitment data masked a more serious problem at the informal approach stage;” Cm 6451 *Review Body on Senior Salaries* para 4.6.

as a loss to the Bench who had not actually declined face to face by that sometime refutation of the separation of powers.

Nonetheless even a decade or so ago it was accepted that some asked for deferment described by Rozenberg as “the start of an alarming trend.”¹⁸⁵ And while in 1988 – 1991 there were no refusals. In 1991 – 1992 – 1 declined. In 1992 – 1993 – 6 declined.

Similarly in April 2000-2001 19 High Court appointments were made (seven as a result of advertisement, the others the traditional “tap on the shoulder”). But six people refused appointment. As we put it in our sub-committee report in 2002:

“This significant figure almost a third of the number of those appointed – calls into question whether there was an increasing pattern of refusals which indicates future difficulties in attracting appropriate appointees.”¹⁸⁶

The full body were a trifle more cautious:

“In general, we are satisfied that there are no major problems at present in recruiting judges of the required calibre at all levels. However, we agree with the sub-committee that the refusal of a proportion of those offered appointment to the High Court gives grounds for concern. While judicial pay is only one factor, and not necessarily the predominant factor, in the refusal of appointment it must not be allowed to diverge so far from the pay of the group from which judges are mainly recruited that it deters the most able, with the result that an increasing proportion of good potential candidates will be lost to the judiciary.”¹⁸⁷

And I am sceptical whether the position has truly improved even over the last three years.¹⁸⁸ I could immediately name – though respect for their

¹⁸⁵ Rozenberg op cit p 93. The Lord Chief Justice’s concerns that “the official recruitment data masked a more serious problem at the informal approach stugi was noted in 2005; Cm 6451 para 4.6.

¹⁸⁶ *Report of the Review Body of Senior Salaries in 2002* Cm 5389-11 para 4.26. Discussed in Frances Gibb “Low Point for High Court Appointments” *The Times* 5th March 2002.

¹⁸⁷ Cm 5389-I from paras 31-33.

¹⁸⁸ Although for 2002-03 the Lord Chancellor reported only one refusal and that a request for deferment: *Report of the Review Body of Senior Salaries in 2003* Cm 5718 para 4.18; for 2003-04 three refusals were reported by the Lord Chancellor: but the

privacy restrains me – at least 10 senior silks who have resisted the temptations of office. In 2004 the average drop in earnings on appointment of a High Court Judge was 53%.¹⁸⁹ While pay is not the only factor, that militates against acceptance of such judicial appointment,¹⁹⁰ the implications of these figures can be assessed by someone of lesser intellect than a senior wrangler.

Three principles of judicial pay may be said to be part of our modern constitutional settlement: It is unconstitutional to cut the salary of an individual judge of a superior court during the currency of his (or her) commission. It is unconstitutional for Parliament to reduce the judicial salary scale overall to the extent that it threatens judges' independence. And no judge can be appointed unless provision is made for his or her salary. These are guarantors of independence, but they are not, by themselves, guarantors of excellence.

In 1933 Holdsworth wrote:

“The remuneration of the judges is not sufficient to induce the ablest lawyers in the prime of life to accept judicial office. If that state of affairs is allowed to continue it must have serious effect upon the administration of the law. It will impair those intellectual standards which have made our English legal system a great legal system; it will tend to impair that law-abiding instinct which is the condition precedent for the maintenance of a high standard of civilisation, and it will weaken the chief remaining guarantee for the prosecution of the liberties of that subject.”¹⁹¹

More than seven decades on, we should still heed his warning.

SSRB noted the divergence between official and unofficial refusals: Cm 6099 para 5.33.

¹⁸⁹ SSRB Judicial Sub-Committee Consultation Document para 5.5 p 15.

¹⁹⁰ Other factors are a distaste for going out on circuit, increasing control by the civil service, a sense that in terms and prestige “fings ain’t what they used to be”, and constraints on lifestyle.

¹⁹¹ Holdsworth LQR p 33. See, eg, Ramon Mullerat OBE “The Judges Independence from his own Convictions” in *The Indian Advocate: Journal of the Bar Association of India*: Vol XXXII 2004 p 88.

