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

[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.