

# The Business of Judging

## Selected Essays and Speeches

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## PART II:

# JUDGES IN SOCIETY

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In many countries judges have, over the centuries, tended to occupy a privileged position. In the past this owed much to their power, their wealth and, perhaps, their social standing. In modern democratic societies judges continue to occupy a privileged position, but for quite different reasons. Now the privilege springs from public recognition that democratic government and society as a whole can only function fairly and properly within a framework of laws, justly and fairly administered by men and women who have no obligation save to justice itself. Thus judges must not be liable to disciplinary sanctions, or premature retirement, because their decisions do not find favour with the powers that be, or with any powerful vested interest, or with prevailing public opinion. They must be truly independent.

This does not of course mean that judges are licensed to do exactly as they like. Quite the opposite. Because society grants the judges, for the greater good of the public, certain important privileges, it is entitled to, and does, expect of the judges very high standards of propriety, integrity, assiduity and personal conduct.

These papers address these complementary aspects of the judicial role. The first, an inaugural annual lecture to the Judicial Studies Board, seeks to explore what judicial independence (a familiar expression) really means and involves. The second, an address to the Society of Public Teachers of Law, considers the ethical rules by which judicial conduct is, and should be, governed. Both are topics of continuing and, some would say, steadily increasing relevance in a changing world.

## *Judicial Independence\**

It is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence. So many eminent authorities have stated this principle and there has been so little challenge to it, that no extensive citation is called for. It is enough to recall that in 1994 the United Nations Commission on Human Rights recorded that it was:

Convinced that an independent and impartial judiciary and an independent legal profession are essential pre-requisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.<sup>1</sup>

The Commission went on to appoint a Special Rapporteur to monitor and investigate alleged violations of judicial and legal professional independence worldwide, and to study topical questions central to a full understanding of the independence of the judiciary.<sup>2</sup>

In his most recent report of 1 March 1996 the Special Rapporteur summarized the results of his worldwide investigation, and with reference to the United Kingdom wrote:

The Special Rapporteur notes with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the judges did not exercise self-restraint, 'it is inevitable that we shall statutorily have to restrict judicial review'. The controversy continued and reportedly prompted the former Master of the Rolls, Lord Donaldson, who was said to have accused the Government of launching a concerted attack on the independence of [the] judiciary, to have said, 'any government which seeks to make itself immune to an independent review of whether its actions are lawful or unlawful is potentially despotic.' The Special Rapporteur will be monitoring developments in the United Kingdom concerning this controversy. That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe.<sup>3</sup>

The need to guarantee judicial independence is accordingly one which we should treat very seriously, not only for the health of our own country but because of the extent to which our own conduct is still seen by other countries, to an extent which may perhaps surprise us, as a model.

\* Judicial Studies Board Annual Lecture given on 5 November 1996. © Crown Copyright 1996. All rights reserved.

<sup>1</sup> *Commonwealth Law Bulletin* (July 1994), at 957.

<sup>3</sup> At p. 54.

<sup>2</sup> *Ibid.* at 958.



Given the centrality of this constitutional principle, one might expect to find much detailed analysis of what it means, in theory and in practice, in this country. But, as Professor Robert Stevens has written:

While there is widespread consensus on the obvious importance of the independence of the judiciary, the literature on it is meagre, and the concept itself has never been fully unpacked. Unpacking is a process worth engaging in.<sup>4</sup>

There have, very broadly speaking, been two approaches. One concentrates on the independence of individual judges in their day to day work of judging. This approach was well summarized by the present Lord Chancellor, Lord Mackay of Clashfern, in a lecture on 6 March 1991 when, referring to the judges, he said:

Their function is to decide cases and in so doing they must be given full independence of action, free from any influence. But in order to preserve their independence the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process. If judges were not, for example, in control of the listing of cases to be heard in the courts it might be open to an unscrupulous executive to seek to influence the outcome of cases (including those to which public authorities were a party) by ensuring that they were listed before judges thought to be sympathetic to a point of view, or simply by delaying the hearing of the case if that seemed to advantage the public authority concerned.<sup>5</sup>

Thus, on this approach, judges would enjoy full independence in their task of judging, and also in what the Lord Chancellor called 'the administrative penumbra immediately surrounding the judicial process', of which he gave listing as a very good example.

The alternative approach treats the independence of the judge to decide individual cases free from any extraneous influence, and to exercise control or influence over the administrative penumbra immediately surrounding the judicial process, as no more than a part (albeit an important part) of what judicial independence means. On this approach what matters is not only the independence of individual judges but the independence of the judiciary as a separate arm of government. This is the approach which Lord Browne-Wilkinson, as Vice Chancellor, persuasively advocated in his F. A. Mann Lecture, *The Independence of the Judiciary in the 1980s*.<sup>6</sup> On this approach the judges should, with a large measure of independence, control not only the delivery of the final judicial product (the judgment) but also the administrative infrastructure on which the delivery and enforcement of that product depend. The high watermark of that approach may perhaps be found in an article written by Sir Francis Purchas in September 1994, when he wrote:

<sup>4</sup> *The Independence of the Judiciary. The view from the Lord Chancellor's Office*. Professor Robert Stevens, 1993 at p. 3. This is a very interesting book, to which I am much indebted.

<sup>5</sup> See Purchas, 'What is Happening to Judicial Independence', *New Law Journal* 30 Sept. 1994 at 1306, 1308.

<sup>6</sup> [1988] Public Law 44.

Constitutional independence will not be achieved if the funding of the administration of justice remains subject to the influences of the political market place. Subject to the ultimate supervision of Parliament, the Judiciary should be allowed to advise what is and what is not a necessary expense to ensure that adequate justice is available to the citizen and to protect him from unwarranted intrusion into his liberty by the executive.<sup>7</sup>

Even in countries where the judges enjoy a very much larger measure of administrative control than they do here (one thinks, for instance, of the United States and Australia), I doubt whether this ambitious requirement comes anywhere close to being met. Nor, perhaps, should it. As professional judges we naturally, and rightly, put a very high premium on the provision of an efficient and adequately funded legal system, which we regard as a prerequisite to administering justice. But even we cannot overlook the existence of other pressing claims on finite national resources. We would all recognize the defence of the realm as a vital national priority, but I suspect that we would shrink from giving the chiefs of staff *carte blanche* to demand all the resources which they judged necessary for that end. We would all, probably, recognize the provision of good educational opportunities at all levels as a pressing social necessity, but might even so hesitate to give educational institutions all the money which they sought. We would all regard the health of the people as a vital national concern, but could scarcely contemplate the demands of health service professionals being met in full, without rigorous democratic control. I do not myself find these choices, even in theory, offensive; but in any event they must surely, in the real world, be inevitable. As the Chief Justice of British Columbia put it in a recent paper:

I subscribe to the view that there are other constitutional principles, besides judicial independence, that must be recognized and respected. One principle, possibly equal in importance to judicial independence, is the right of the legislature to decide how public money is to be spent. Thus, I do not support the view that the judiciary should write its own cheque, and I have come to realize that it is, in fact, salutary that the judiciary should not have that power. If mistakes are to be made in budgeting or funding operations, it is better that they be made by someone other than the judiciary.<sup>8</sup>

At least in this country judicial independence cannot be rested on any classical doctrine of the separation of powers. That is not because of the anomalous roles of the Lord Chancellor, the Law Officers and the Law Lords, but for more fundamental reasons. Judges are, after all, appointed by the executive—and even under the American constitution, which enshrines the separation of power doctrine in perhaps its purest form, appointments to the federal judiciary involve both other arms of government. After appointment, judges sit in courts provided by the state, they have offices provided, heated and lighted by the state, they have clerks paid by the state, they use books and computers mostly provided by the

<sup>7</sup> Purchas, op. cit. at 1324.

<sup>8</sup> The Hon. Chief Justice Allan McEachern, *Judicial Independence*, paper delivered to the 11th Commonwealth Law Conference, Vancouver (August 1996).



state, they are themselves paid by the state. In all these respects the position of the judges is not very different from that of any other employee of the state. But plainly the position of the judge is, and certainly should be, categorically different from that of other employees of the government. To pinpoint where those differences lie it may perhaps be most fruitful, in the manner of the common law, to eschew statements of general principle and consider particular incidents of the judicial role.

It is convenient to begin at the beginning, with appointment of judges. Since these are effectively made by the executive, in the person of either the Lord Chancellor or the Prime Minister, the opportunity plainly exists to pack the judicial bench with appointees of a certain political persuasion or known social views. This would not be regarded as an abuse in some other countries, such as notably the United States, nor would it always have been regarded as an abuse here. But I think there is no doubt that such a policy, if it were now to be adopted here, would be regarded as an abuse, and I cannot think that it would be long before a different appointments procedure were introduced. There is, I would suggest, virtually no evidence of appointments since 1945 made otherwise than on the basis of perceived merit, and at no time has this been truer than during the last decade. If, without intolerable complacency, one is entitled to regard this as a happy and constitutionally acceptable state of affairs, one may reasonably ask how it has been achieved. I would point to three things. The first is the pool from which candidates for judicial office are selected: whether barristers or solicitors, they have been private practitioners reared in a professional tradition which prizes the exercise of an independent individual judgment above all else. I would point, secondly to the greatly increased difficulty of conducting a legal practice so as to achieve a level of success which would qualify the candidate for judicial appointment while at the same time pursuing a parallel career in politics: the result is that appointments from the ranks of active politicians are now a rarity. Thirdly, I would point to the great care which successive Lord Chancellors have shown in, and the integrity with which they have approached, their task of appointing judges. From time to time fears have been expressed that judicial appointments might be, or had in effect been, handed over to the Lord Chancellor's Permanent Secretary. In opposing the proposal that there should be a Ministry of Justice, Lord Hewart in 1929 suggested that this was 'an effort to hand over the appointment of Judges to the Permanent Secretary of the Lord Chancellor's Office'.<sup>9</sup> Stevens indeed suggests that when Sir Claude Schuster was Permanent Secretary 'the views of the Permanent Secretary were inevitably seen by Bench and Bar as close to decisive'.<sup>10</sup> I feel bound to say, on the basis of my own experience, that whatever the position may have been in the past, the Permanent Secretary does not now seek to wield influence of that kind. The role of officials in the department is to collate, not to dictate; to gather and marshal opinions on the merits of

<sup>9</sup> Stevens, *op. cit.* at 31.

<sup>10</sup> *Ibid.* at 42.

possible candidates, but not to decide who should be appointed and who should not.

The key to the successful making of appointments must, I would suggest, lie in an assumption shared by appointor, appointee and the public at large that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality. Impartiality and independence may not, even in this context, be synonyms, but there is a very close blood-tie between them: for a judge who is truly impartial, deciding each case on its merits as they appear to him (or, of course, her), is of necessity independent.

What really matters, of course, is that judges should enjoy complete independence while serving as such. The protection accorded to the judges of the higher courts, that they enjoy office during good behaviour and are removable only by an address of both Houses of Parliament, has over the centuries proved an effective constitutional guarantee, since no English judge has been so removed. This has not in practice meant, at any rate in recent years, that judges who through no fault of their own have become mentally or physically unfit to perform their duties have remained in office. It has proved possible to arrange consensual retirements in such cases. But it has meant that no judge, when giving judgment or deciding what judgment to give, need concern himself with the acceptability of his decision to the powers that be.

An experienced circuit judge has recently argued with some heat that the constitutional protection accorded to judges of the High Court should be extended to circuit judges also.<sup>11</sup> I can see considerable theoretical force in this argument. The jurisdiction of the County Court has been extended to such an extent, and the weight of cases heard by circuit judges in the Crown Court is now often such, that it is hard to justify different treatment of the circuit bench. But the threat to the circuit bench is perhaps more theoretical than real. The only circuit judge known to me to have been dismissed in recent times would plainly have been removed by the Act of Settlement procedure had he been a judge of the High Court and had he not chosen to resign in order to forestall that process. There is no case in which the decisions of a circuit judge have led to dismissal or (so far as I know) threatened dismissal. Lord Chancellors have, as it seems to me, been notably reticent in exercising their powers of dismissal. Whatever the constitutional anomaly, I cannot see the present situation as giving rise to practical grounds for concern. There are, of course, other and subtler ways in which the executive could, if so minded, seek to undermine the independence of individual judges. One would be by denying promotion to any judge whose decisions were thought to be politically unfavourable. In the past this would not have been a problem: the High Court Bench was very small; the Court of Appeal was even smaller; and appointments to the Court of Appeal or the House of Lords were frequently made on

<sup>11</sup> His Honour Judge Harold Wilson, 'The County Court Judge in Limbo', *New Law Journal* 21 Oct. 1994, at 1454.



political grounds. So a judge appointed to the High Court bench would have no lively thought or expectation of proceeding further, and promotions from the County Court bench or the circuit bench to that of the High Court have always been relatively rare. With an increased number of Law Lords and a very greatly enlarged Court of Appeal, the situation has plainly changed. This has led some commentators to suggest that the hope of promotion, or fear of non-promotion, has affected judicial decision-making. Writing in *The Commonwealth Law Bulletin* in October 1994, Professor Antony Allott wrote:

Promotion from the stipendiary bench to the circuit bench is now more frequent. Similarly, one may be promoted either from practice or from a circuit judgeship to the High Court bench. Once a High Court judge, one may hope to receive further promotion to membership of the Court of Appeal or to headship of a Division. The implication offered that, since there is little gain in pay, there is little motivation to seek promotion, is largely false. Honour and standing are at least as effective spurs as cash. As a judge of whatever grade, one can hardly, if ambitious, avoid looking over one's shoulder at the consequences of adopting a particular style or trend of decisions on one's future career as judge.<sup>12</sup>

In similar vein, Stevens has suggested that over the last 30 years or so the myth that there was no career judiciary in England had weakened, and suggested that the prospect of promotion [had] sullied the purity of the relationship between the Judiciary and the executive. . . .<sup>13</sup>

While there were in his view other factors at work, this was also a factor.

If any judge were to trim or tailor his judicial decision in order to ingratiate himself with, or avoid offending, any member of the executive who he thought would be influential in deciding on his future promotion, or even any other member of the judiciary whom he thought might be consulted, I would myself regard such conduct as a flagrant violation of judicial duty and I would be equally critical of anyone knowingly influenced by such conduct. But suggestions of the kind quoted, although easy to make, are very hard, if not impossible, to verify. I can only express the firm belief (coupled, if need be, with the fervent hope) that considerations of this kind simply do not intrude into a judge's process of decision making at all. I can imagine no more conclusive objection to promotion than the suspicion that they might have done.

Most of us, I suspect, can call to mind one instance in which it seems likely that a judge, otherwise obviously fitted for preferment, was denied such preferment because his judicial decisions and pronouncements had excited the hostility of an incoming government. Whether this is so or not cannot be decided with confidence until the 30-year rule has operated and the relevant records made available for public scrutiny. If the suspicion turns out to be well-founded, the

incident must represent a serious blot on the record of those responsible. Our consolation must be that it is very hard to think of any other comparable incident, at any rate in recent times.

Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of parliamentary opinion, or decide cases with a view either to earning parliamentary approbation or avoiding parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever.

Sir Derek Oulton, writing in 1994, suggested that by independence is meant not only independence from improper pressure by the executive, litigants and particular pressure groups but also independence from improper pressure from the media. He wrote:

One of the most dramatic changes that has taken place over the past thirty years or so has been the increasing freedom felt by newspapers, in particular, to attack judges with a vigour (and one could use a much stronger expression) that was formerly quite unknown. The same applies to Members of Parliament, particularly of the House of Commons. There must be a limit to the well-known breadth of judicial backs. The law of contempt used to be employed to prevent this, and Stevens shows interestingly that in 1899 the Privy Council described such use of the law as 'obsolete', only to have it invented, or re-invented, by the Court of Appeal the following year, in order to prevent press criticism of the extrovert Mr Justice Darling. But the judicial committee understandably regarded it as anachronistic even at the turn of the century, and its use has steadily declined since then.<sup>14</sup>

Save perhaps in the case of jury trial, the law of contempt has no significant contribution to make: first, because of the presumption that a judge sitting alone will not be influenced in the decision he makes by comment in the press; secondly, because such comment often follows the decision and therefore cannot affect it; and thirdly, because such comment is often directed as much to what the judge says (not always fully or accurately reported) as to what the judge decides. In any event, the right of the press to comment on matters of public interest is all but sacrosanct. I am not for my part sure that media attacks on the judges have much to do with judicial independence; but one could wish that those who set out to destroy judicial reputations, with the harassment that almost always accompanies such attacks, gave more thought than is evident to the public interest which they are likely to injure.

The rule that judges must be politically neutral is not only, as I would suggest,

<sup>12</sup> Independence of the Judiciary in Commonwealth Countries: Problems and Provisions, *The Commonwealth Law Bulletin* (Oct. 1994), at 1435.

<sup>13</sup> Stevens, *op. cit.* at 169.

<sup>14</sup> *Journal of Law and Society*, vol. 21, no. 4, Dec. 1994 at 569.



an aspect, and a very important aspect, of their duty to be and appear to be impartial; it is also part of the price of their independence. The point was very well put by Sir Hartley Shawcross as Attorney General in 1950 when he declared that it was:

a most important principle of our constitutional practice that judges do not comment on the policy of Parliament, but administer the law, good or bad, as they find it. It is a traditional doctrine on which the independence of the judiciary rests. If once that doctrine were departed from, and judges permitted themselves to ventilate from the Bench the views they might hold on the policy of the legislature, it would be quite impossible to maintain the rule that the conduct of judges is not open to criticism or question.<sup>15</sup>

Another author has made a rather similar point but in a more hostile way:

The British judiciary prides itself on its independence . . . But this independence has been part of a tacit agreement between judges and politicians. Politicians normally do not meddle with the judiciary even when they could. Ministers do not pressure the Lord Chancellor to award judgeships to the party faithful. Party leaders never remove judges and only alter any statute dealing with the courts after extensive consultations. For their part the judges restrict their scope of authority to private law matters, avoiding the 'political thicket'. Most judges have seemed aware that treading too closely to questions of public policy could propel them into an unwinnable battle with the majority at Westminster. English judges traded range of authority for degree of authority in a narrow field, independence for a reduced role on the public stage.<sup>16</sup>

It is indeed obvious that if judges were to ventilate personal criticisms of government policy unnecessary for the decision of the case before them, it would only be a matter of time (and not a very long time) before those who were the subject of criticism replied in kind. It is undesirable, and plainly damaging to the independence of the judges, if they become protagonists in a debate in which they have no constitutional right to participate. This duty of restraint does not in any way inhibit the duty which occasionally falls on judges to quash decisions made by ministers or officials as unlawful, nor from giving their reasons for such decisions. Nor has this duty of self restraint been understood to prevent some senior judges from giving expression to their views, or the views of the judiciary, on questions directly pertaining to the administration of justice. It would be absurd if those judges who are members of the Upper House were precluded from offering the benefits of their wisdom and experience on issues directly related to their professional expertise. Valuable though the contributions of retired judges often are, it would be a loss if those still active in the practice of the law were denied the opportunity to contribute. It should not in practice prove too difficult to discern where legitimate observations on the administration of justice end and political controversy begins. Lord Denning's Hamlyn lectures *Freedom under the*

<sup>15</sup> See Stevens, *op. cit.* at 79 fn 4.

<sup>16</sup> J. T. Waltman, *The Courts of England in The Political Role of Law Courts in Modern Democracies* (1988) at 117-18.

*Law*, although the subject of objection by Lord Jowitt,<sup>17</sup> and Lord Taylor's recent observations on sentencing practice, fell on the right side of the line; letters written by Mr Justice Stephen criticising the Government's policy on India,<sup>18</sup> Lord Hewart's famous book *The New Despotism* and the letter written to *The Times* by Mr Justice Lloyd-Jacob about the hydrogen bomb, one might feel, fell on the wrong side of the line.

Although the Lord Chancellor has no power to penalize judges of the Supreme Court in any way, and no power to penalize judges of the lower courts save by dismissal, Lord Chancellors have on occasion taken it upon themselves to rebuke and reprimand judges whose extra-judicial conduct has given ground for complaint. I imagine Lord Chancellors do this in their role as the formal head of the judiciary rather than in their role as a member of the executive. As it now operates, the practice seems to me unobjectionable provided—and I regard the proviso as fundamental—that such rebuke or reprimand does not relate in any way to a judge's decisions made as such. It would seem to me to subvert the independence which judges are entitled to enjoy if the Lord Chancellor, save when sitting in an appellate capacity, were to base any personal criticism of a judge on the decisions which he had given. I think that this is an area in which, perhaps, the rules have become somewhat clearer. It would, I think, be surprising to find a modern Lord Chancellor writing to a Law Lord asking him to amend the proposed terms of a dissenting speech in a case to which the Lord Chancellor was not himself a party, as Lord Simon did to Lord Atkin in relation to *Liversidge v Anderson*.<sup>19</sup> I would also (although in this case no question of a rebuke was involved) be very surprised to receive from the Lord Chancellor a letter in terms such as those of a letter written by Lord Jowitt to Lord Goddard as Lord Chief Justice in 1947:

I do sincerely hope that the judges will not be lenient to these bandits [who] carry arms [to] shoot at the police. . . . I may be written down as a Colonel Blimp, but you know I do take the view, which I think you share, that we have got rather soft and woolly when dealing with really serious crime.<sup>20</sup>

As Stevens points out, this was two years before sentence was passed and carried out on Derek Bentley. It must be a consolation to modern judges to learn that Lord Goddard and his Queen's Bench colleagues after the War were regarded by the administration of the day as soft and woolly in dealing with really serious crime.

In many countries, the participation of serving judges in commissions, enquiries and committees not devoted to law reform or the administration of justice is regarded as inconsistent with the independence of the judiciary. In this

<sup>17</sup> See Stevens, *op. cit.* at 93.

<sup>18</sup> See K. J. M. Smith, *James Fitzjames Stephen* (1988), 145.

<sup>19</sup> See Heuston, *Lives of the Lord Chancellors, 1940-70* (1987), at 59.

<sup>20</sup> See Stevens, *op. cit.* at 95.



country a different view has been taken; a judge or a senior silk has more often than not been thought the most suitable person to lead or chair such exercises, at any rate where they do not relate to the legal system or the legal profession. A broadly similar view has been taken in New Zealand. Lord Cooke of Thorndon has written:

In some quarters it has been said that after the recent controversies Judges may not be willing to accept appointment to commissions of inquiry. There are even suggestions that to do so is inconsistent with the judicial role. I must beg to differ. Wherever judicial qualities are called for—that is to say, typically a calm and objective factual judgment of evidence—in my opinion a Judge should be willing to serve. The essential corollary is a judicial approach.<sup>21</sup>

We have tended in this country to take the same view for the same reasons. So long as the final report when delivered is accepted by the government, it is hard to see how any threat to the independence of the judiciary is involved, at any rate where the report commands broad public acceptance also. The situation plainly becomes more difficult when a report is rejected by the government, as the Macmillan Government rejected Mr Justice Devlin's report on Central Africa, or when a report is the subject of acute political controversy and hostile publicity before publication, as was the case with Sir Richard Scott's recent report on Arms to Iraq, or when a major recommendation is instantly rejected, like Lord Cullen's recommendation on handguns, or when a report is regarded as unpersuasive by significant sections of opinion, as proved to be the case with Lord Widgery's report on 'Bloody Sunday'. To date, I think that the standing of the judges involved and the quality of the reports produced have almost always won for such reports a degree of acceptance denied to those who reject or criticise them. But I think that this is an area in which great caution is needed. The reputation which judges generally enjoy for impartiality and skill in arriving at the truth is a priceless asset, not to be lightly squandered. As Lord Devlin himself observed:

In our own country the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it.<sup>22</sup>

Stevens also has suggested that, in the new climate of today, judges should be far less willing to accept extra-judicial chores.<sup>23</sup>

The connection between judicial salaries and judicial independence may not be immediately obvious. But Robert Stevens in his valuable book on *The Independence of the Judiciary*<sup>24</sup> devotes considerable space to recording exchanges between the judges and the Lord Chancellor's Office on this subject,

<sup>21</sup> *The Courts and Public Controversy* Sir Robin Cooke, *Otago Law Review* [1983] vol. 5, no. 3, 357, at 365.

<sup>22</sup> Patrick Devlin, *The Judge*, 9.

<sup>23</sup> Hardwicke Lecture, 21 May 1966, *Judges, Politics, Politicians and the Confusing Role of the Judiciary*.

<sup>24</sup> *Op. cit.*

presumably because he sees the subjects as linked. The Commonwealth Secretariat has recently appointed a working group to study the comparative level of remuneration received by members of the judiciary vis-à-vis other national holders of public office, the method of determination of that remuneration, and the process of adjustment of the level so determined over time.

The view that a link exists is, it appears, one shared by the Law Society, which in 1992 made a submission summarized in these terms:

The question of salaries constitutes one of the Society's major concerns so far as judicial independence is concerned. The opening up of a 'dispiriting chasm' between the relatively low salaries of those seated on the nation's benches and the much more remunerative incomes of the leading practitioners on court floors below them has been the chief subject of apprehension. The disparity of the incomes of those who judge and those whose arguments are judged by them has become shameful, the Society submits.<sup>25</sup>

If that quotation occasions any surprise, I should allay it by making clear that the Law Society in question was that of New South Wales. The point, however, must be the same. In Ireland the constitution has been held to require that judges should receive salaries and pension benefits which are appropriate quite apart from any recruitment considerations:

Otherwise, the essential independence of judges would be undermined.<sup>26</sup>

In India the level of judicial remuneration is specified in the Constitution and the level of allowances cannot be varied to the disadvantage of the judge after appointment.<sup>27</sup> Under Article III of the Constitution of the United States judicial compensation cannot be reduced while a judge remains in office. Professor Friedland was surely right when he wrote:

There is of course, a close connection between judicial salaries and judicial independence ... if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our judiciary. If salaries could be arbitrarily raised or lowered in individual cases, or even collectively, the government would have a strong measure of control over the judiciary. As Alexander Hamilton stated: 'In the general course of human nature, a power over a man's subsistence amounts to a power over his will.'<sup>28</sup>

There is also, perhaps, another and subtler link between independence and remuneration. In most societies, and subject to obvious exceptions, there is some perceived relationship between what someone earns and the status or prestige which he enjoys. Financial rewards are not, of course, everything, but nor are they nothing. Unless, therefore, the rewards of judicial office (with or without other benefits) are sufficient to attract the ablest candidates to accept appointment,

<sup>25</sup> *Commonwealth Law Bulletin*, (July 1992), 1043.

<sup>26</sup> *McMenamin v Ireland* [1994] 21 LRM 368, at 377.

<sup>27</sup> Article 125, Constitution of India.

<sup>28</sup> *A Place Apart: Judicial Independence and Accountability in Canada* May 1995, at 53.



albeit with some financial sacrifice, the ranks of the judiciary must be filled by the second best, those who (under our system) have failed to make it in private practice, and there would be an inevitable lowering in the standing and reputation of the judiciary and a sea change in the relationship between advocate and judge. There would also, I suggest, be a loss of those qualities of confidence and courage on which the assertion of true independence not infrequently depends, because these qualities tend to be the product of professional success, not the hallmark of professional mediocrity. This is not mere speculation: one need only look at some other countries with a career judiciary, in which those opting for a judicial career are by and large the weaker candidates, to see that the judiciary which results lacks the authority and standing which we very largely take for granted.

I think that our history since the early nineteenth century bears out this analysis. It is true that the salary of £5,500 awarded to High Court judges in 1825 was reduced in 1832 to £5,000. But this was, by the standards of the day, an enormous salary, equivalent in modern terms to about £250,000 and not of course subject to taxation at modern rates. By the time this salary was eventually increased in 1954, after remaining at the same level for 122 years, it had ceased to be a princely and had indeed become an inadequate salary. Since then, however, salaries have been raised at fairly regular intervals, and have been maintained at a level roughly comparable with that of the most senior public servants. Stevens points out that in 1992 Law Lords were paid appreciably more than justices of the Supreme Court of the United States.<sup>29</sup> This is plainly a somewhat misleading comparison, since I assume it takes no account of benefits (such as the provision of legal assistance and transport) enjoyed by Supreme Court justices but not by all Law Lords. It nonetheless suggests that maintenance of a strong and independent judiciary is recognised to depend, at least to some extent, on the payment of a reasonable salary; and I believe it to be true that British judges are on the whole more generously rewarded than their European counterparts (except in Germany). Different countries of course have different traditions. Our own tradition does, however, depend on the willingness of the most successful practitioners, at the height of their careers, to accept appointment to the judicial bench, and I gravely doubt whether that tradition can be maintained if what the New South Wales Law Society called a 'dispiriting chasm' becomes too deep.

At a Conference held at Victoria Falls in August 1994, the Magistrates and Judges of the Commonwealth adopted a proclamation of which Article 3 was to the following effect:

Provision of formal and informal instruction for judges and magistrates in the performance of their duties, in their responsibilities as independent adjudicators, and in the laws and procedures which they are required to apply is an essential element in a modern and fair legal system.<sup>30</sup>

<sup>29</sup> Stevens, *op. cit.* at 167.

<sup>30</sup> *Commonwealth Law Bulletin* (Oct. 1994), at 1365.

The Conference went on to refer to a new body, the Commonwealth Judicial Education Institute, one of whose purposes was to promote the independence of the judiciary in the Commonwealth through the provision of appropriate judicial education at all levels. There is nothing here which would, or certainly which should, provoke any reservation in the mind of an English judge and we have given our full support to the Institute, which performs an indispensable role, particularly in relation to the smaller and poorer members of the Commonwealth. But judicial education is not only for others. Although it is not very long since the need for judicial education and training in this country came to be recognized, I doubt whether anyone now questions the potential benefits to be gained. Such programmes no longer need to be disguised as 'judicial studies' to make them acceptable. Indeed, one of the most potent concerns provoked by Lord Woolf's proposals is whether adequate funds will be forthcoming to provide the training for which the new procedures will call. It is, however, as I would suggest, essential, if judicial education is to promote the end of judicial independence, that control of the content and form of such education should rest squarely in the hands of the judges themselves, and such agencies as they may employ, as it now does. It is obvious that if control of the education and training of judges did not rest in the hands of the judges themselves, but in those of the executive, it would become possible for judicial independence to be subverted and not promoted. It would, in short, become possible for the state to instruct judges how they should decide cases, a result which would be entirely unacceptable. Concerns along these lines were expressed in the debates on the Police and Magistrates' Court Act 1994, and appropriate amendments made. The Judicial Studies Board discharges an ever more important function; but it has no function more important than the protection of judicial autonomy in this field. I hope that the recent appointment of the Lord Chief Justice as patron of the Board will be seen as a small but symbolic way of recognizing that principle.

For better or worse, British judges do not control the financing and administration of the court system. If there were ever a chance of their doing so, which I doubt, it was lost when the Courts Act 1971 converted the Lord Chancellor's Department from a small secretariat into a department of state employing some 10,000 civil servants. It cannot be suggested that the relationship between the administration and the judges over the last quarter century has been in all respects an easy one. Many judges have resented what they perceived as an administration breathing down their necks, treating them as pawns on a bureaucratic chess board. Decisions directly bearing on the performance of judicial functions and the efficiency of court administration have on occasions been made without consultation and for ill-conceived reasons. While high standards of public administration are as necessary in this field as in any other, management concepts quite inappropriate to the unique function of administering justice have been wrongly allowed to intrude. There has been difficulty and dispute on the frontier, not alleviated by doubt about where the frontier is or should be. It would be utopian to suppose that



these tensions will disappear. They may even increase. But there are two hopeful signs. The first is a written instruction given by the Lord Chancellor to the Chief Executive of the Court Service Agency in November 1994 headed 'Consultation with the Judiciary'. In his second paragraph he wrote:

I consider it particularly important that you should continue to foster good relations with all members of the judiciary. I shall require you to ensure that both you and your staff work closely with the Lord Chief Justice and the other Heads of Division, the Senior Presiding Judge, Presiding Judges and representatives of the Circuit and District Benches and other judicial officers, as appropriate, to ensure that all parties are enabled to carry out their responsibilities in the management of the courts and the administration of justice.

He went on to require the Chief Executive to discuss with the judiciary his plans for dealing with any major in-year change in resource allocation which might materially affect the performance of the Court Service before putting his plans to the Lord Chancellor. This is the second hopeful sign. The Judges' Council has established a sub-committee on resources under the chairmanship of the Senior Presiding Judge and with a membership comprising both judges and administrators (including the Chief Executive) to act as the forum for effective and continuing consultation. I very much doubt if any comparable machinery has ever before existed.

It seems on the whole unlikely that any challenge to judicial independence in this country will be by way of frontal assault. The principle is too widely accepted, too scrupulously observed, too long-established for that. The threat is more likely to be of insidious erosion, of gradual (almost imperceptible) encroachment. Such a process we must be vigilant to detect and vigorous, if need be, to resist. But my own, perhaps unduly complacent, view is that we can at present give reassurance to the United Nations' Special Rapporteur. In the country which cradled judicial independence the infant is alive, and well, and even—on occasion—kicking.