Quamdiu bene se gesserint: **Reforming The Judicial Pensions and Retirement Act 1993**

Law Reform Essay Competition 2018

Shortly after midnight on 8 December 1941, as part of coordinated attacks which culminated in the bombing of Pearl Harbour, infantrymen of the Empire of Japan landed on the golden beaches of British Malaya. The object of Lieutenant General Yamashita's 25th Army was complete territorial domination. Initially they were unsuccessful. From the sky the Japanese were obstructed by the Royal Australian Air Force, utilising the infamous Lockheed Hudson bomber; and on the ground they came up against impressive coastal defences snagged by the British Indian Army. But by the turn of the new year, most of Malaya was under Japanese occupation.[1]

At the time of Japan's invasion Mr A A'B Terrell was a disgruntled Judge of Appeal for the Supreme Court of Malaya. Mr Terrell was disgruntled, in the first place, by the Army's disposal of his office. But he became even more indignant upon receiving his pension, whose terms were decided upon by the acting British Secretary of State. Mr Terrell launched an action in London for more money. He claimed that his dismissal as a High Court Judge was *ultra vires* and that accordingly he was due payment of his entire salary for the full pensionable term of 15 years. Mr Terrell based this argument on a provision of the Act of Settlement 1701, which had required that the Crown could appoint a High Court Judge only *quamdiu bene se gesserit,* "so long as he behaved well". On this basis a judge held his office freehold; so long as he was not later charged and convicted of abusing

[1] Cheah, Boon Kheng, *Red Star over Malaya: Resistance and Social Conflict during and after the Japanese Occupation, 1941-1946.* Singapore University Press (1983).

his position. In practice this meant that only upon a petition by the Crown, before both Houses of Parliament, could a judge's letters patent be revoked. In failing to follow this procedure, Mr Terrell's argument ran, the Minister had acted beyond his power.

The issue came before the notorious Lord Chief Justice, Lord Goddard (whom Churchill affectionately referred to as "Lord God-damn").[2] In his judgment, reported in *The Times* on 20 June 1953, Lord Goddard concluded that the irremovable status of a judge was not a governing principle of the British Imperial Constitution, "but exist[ed] only where it has been expressly enacted. The Act of Settlement ha[d] not been applied by legislation to Malaya; and, there, legally, the matter ends."[3]

Whilst Mr Terrell's claim faced an abrupt legal end, the tenure of judges has remained a germane issue to the present day. This has occurred most recently against a wider context of recruitment "crisis" in the senior judiciary.[4] The Supreme Court has faced nine vacancies during period 2017 to 2020, including filling the positions of President and Deputy President.[5] The Government has explained in its 2017 *Response to the House of Lords Constitution Committee's Report* that it was therefore considering whether there should be a change to the

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[2] Lord Goddard had an interesting reputation. The first Lord Chief Justice appointed during a Labour government, and also the first to possess a law degree, he obtained the nickname's 'The Tiger', 'Justice in a jiffy'. See Bailey, Victor, "The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945–51." *Law and History Review 18,* No. 2 (2000).

[3] 'Tenure Of A Judge', 20 June 1953, *The Times of London.*

[4] As Lord Thomas wrote, "Significant difficulties remain in recruitment to the judiciary, in particular to the senior levels", Judiciary of England and Wales, *The Lord Chief Justice's Report,* 2017, p 10.

[5] Baroness Hale of Richmond, then Deputy President of the Supreme Court, explained there would be "nine vacancies over the next three years because some of us have the privilege of being able to continue until we are 75 and others are having to retire at 70, even though they are still at the height of their powers, which is a great shame". Annual oral evidence taken by the *House of Lords Constitutional Committee* on 29 March 2017 (Session 2016–17) Q 9 (Baroness Hale of Richmond, Deputy President of the Supreme Court).

mandatory retirement age.[6] The object of this essay is to provide a conspectus to the issue, and proffer several arguments for the necessary reform. This essay will maintain that the House of Lords Constitution Committee's recommendations[7] do not go far enough, and that the current Private Members Bill before the House of Commons should be amended to ameliorate the situation at the earliest juncture.

Relevant Legislation

The nominal judicial retirement age is 70. This rule was introduced under the Judicial Pensions and Retirement Act 1993. Section 26, so far as relevant, provides:

> **" (1)… a person holding any of the offices for the time being specified in Schedule 5 to this Act…shall vacate that office on the day of which he attains the age of 70 or such lower age as may for the time be specified…"**

The act contains two important caveats to this rule. First, any judge appointed prior to the commencement of the relevant provisions on 31 March 1995 is not obliged to retire until 75.[8] As such, the current President of the United Kingdom Supreme Court, Baroness Hale of Richmond, is 73. Second, the 1993 Act also permits a judge to sit ad hoc after their retirement until the age of 75. The Supreme Court describes this as its 'Supplementary Panel'. The late Lord Toulson, for example, sat judicially following his retirement in September 2016 and gave dissenting judgment in the case of *FirstGroup Plc v Paulley*.[9]

Parliament first introduced a compulsory retirement age for judges with the Judicial Pensions Act 1959. It abolished the old rule a judge held his[10] office

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[6] Ministry of Justice, *Government Response to the House of Lord Constitution Committee's 7th Report of Session 2017-19,* December 2017, [22] – [28].
[7] *ibid*, at [45].
[8] Judicial Pensions and Retirement Act 1993 s.26(5).
[9] [2017] UKSC 4; see <http://ukscblog.com/obituary-lord-toulson/> [Last accessed 27 September 2018].
[10] And it was *his* office until Dame Elizabeth Lane's appointment to the County Court in 1962.

quamdiu bene se gesserint, "so long as he behaved well", which Mr Terrell sought to rely upon. In fact the Act of Settlement 1701 was not the pronator of the rule. Judges had ostensibly held their royal warrants *quamdiu bene se gesserint* since Charles I's defeat in the Civil War. Charles I had acted according to an even older rule, that a judge held his office *durante bene placito*, "so long as it pleased the King". The conflict between these rules came to a head 40 years later under James II, in the infamous "Trial of the Seven Bishops".[11] In April 1688 James II ordered that his second *Declaration of Indulgence* should be republished and directed the bishops of the Church of England to facilitate the *Indulgence's* reading from every pulpit in the kingdom. The instrument itself, put broadly, suspended Protestant penal laws and in theory granted greater religious freedoms. But seven bishops, headed by the Primate William Sancroft, refused. They protested that the King's use of dispensation powers was an attempt to promote his minority religion of Catholicism. And on the whole the clergy obeyed their superiors, with the *Indulgence* going unread after Sunday mass. James II retorted by having the bishops put on trial for seditious libel. The decision immediately backfired. Popular opinion was against him. A week before the trial, as the bishops were rowed down the Thames towards the Tower for imprisonment, crowds lined the waterside to cheer them on.

On 15 June 1688 the trial began. Because the charge of seditious libel required answering whether the bishops had made untrue statements about the King's government, the trial shortly became one of the King's policy itself. If the bishops were found not guilty then the public would know their criticism of the

[11] Perhaps the most engaging narrative of these events is contained in G. R. Kesteven's *The Glorious Revolution of 1688*. Chatto & Windus, London, Studies in English History (1966), pp 67-70.

Crown was justified. There was a tense atmosphere generated by the crowds inside and outside the court. Two of the judges openly disagreed with their brethren as to the indictment's merits. Then, after deliberating all night, a verdict of not guilty was returned in the morning for every bishop. James II's fury was palpable. He responded by having two judges from the case, Sir John Powell and Sir Richard Holloway, summarily dismissed. Their successors, as Holdsworth recorded in his *History of English Law,* thereby became "objects of contempt to the nation at large."[12]

The solution borne from these controversies thus lasted many hundreds of years. They were reinforced by George III in 1760 who abolished the ancillary rule that the judiciary was required to vacate their offices *en banc* upon the demise of the Crown.[13] Hence until 1953 a judge held his office freehold. The last judge to retire on this basis, though apocryphally said to be Lord Denning[14], was in fact Lord Diplock who retired three years later in 1985.[15] It is now necessary, therefore, to turn to the substantive analysis of the current statutory scheme that replaced these old rules.

Analysis Of Reform

There are broadly three classes of arguments which inform the logic of the current statutory scheme. These are (i) infirmity; (ii) judicial experience and diversity; (iii)

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[12] Holdsworth, W.S., *A History of English Law,* Vol VI. p 510; available at <https://archive.org/stream/historyofenglish06holduoft> [Last accessed 27 September 2018].
[13] As Blackstone recorded in his *Commentaries on the Laws of England,* George III "looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects." (ed.) Wilfrid Prest, Vol I, Oxford University Press, (2016). p 172.
[14] See Heward, Edmund, *Lord Denning: A Biography.* Weidenfield and Nicloson, London (1990) pp 196-200, who claims as much.
[15] 'Lord Diplock: Obituary', *The Times of London,* 16 October 1985.

constitutional issues. This essay will now dispose of these in turn, before turning to the proposed reform and its rationale.

(i) The first argument is the particularised concern of infirmity. This issue has obtained disproportionate influence in the present debate caused by the canonization of Lord Denning. For much of his late career Lord Denning expressed the view that he held every Christian virtue save resignation.[16] That these virtues were besmirched by *cause célèbre* remarks regarding black jurors, published in May 1982 in *What Next in the Law*, is well known.[17] It is germane, however, that the question of judicial infirmity did not arise with Denning's foibles. In 1913 a *Royal Commission on Delay in the King's Bench Division* was established to take evidence on the question of whether freehold judges were decelerating the courts in their sage years. The Lord Chief Justice, Lord Alverstone, firmly rejected the *Commission's* remit of enquiry. He could only think of two instances of questionable infirmity, each of whom had amicably retired on his recommendation.[18] This concern has nonetheless benignly persisted to the present day, with the Government's 2017 *Response* reiterating that the current system "avoids the need for a system of individual assessment of health and capacity."[19]

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[16] See Heward, Edmund, (n13), pp 200-202.
[17] 'If Only Lord Denning Had Died at 70', 7 March 1999, *The Independent*, <https://www.independent.co.uk/voices/if-only-lord-denning-had-died-at-seventy-1079046.html> [Last accessed 27 September 2018]
[18] "A Retiring Age For Judges – Views of the Lord Chief Justice" *The Times,* 3 May 1913 <https://www.thetimes.co.uk/archive/article/1913-05-03/5/5>. It was most likely that the delay was a consequence of the lengthy Assizes judges were sent out to travel on: see Foxton, David *The Life of Thomas E. Scrutton* (2013) pp 153-4.
[19] Ministry of Justice, *Government Response to the House of Lord Constitution Committee's 7th Report of Session 2017-19,* December 2017, at [23].

There are two fatal objections to this concern. One is empirical, the other rational. The empirical objection is as follows. The rule as presently formulated is neither a necessary nor sufficient criterion for ensuring the health and performance of a particular judge. Judges, like any other human beings, deteriorate at a plurality of different rates. Individual assessments of health and capacity are always required. 7.1% of all persons over the age of 65 suffer from dementia.[20] There is therefore, on the balance of probabilities, a proportion of those *under* the current retirement age who already suffer from dementia, and a lion's share *over* the age who do not. And whilst an individual's risk of developing dementia does indeed increase by roughly a half between the age of 65 and 80, there is no causal relation between the onset of amnesia and one's age. It follows that the present law cannot be empirically justified.[21]

The logical objection is a corollary of this point. Grant for a moment the premise that barring older candidates is a proportionate means of achieving the legitimate aim of protecting the quality of an institution. It is pertinent to consider why the same should not apply by parity to political or public offices. Churchill retired as an MP at the age of 80. Lord Palmerston first became Prime Minister in 1855 at 70. Gladstone finally retired as Prime Minister at 84. One might respond that the judiciary is unique in having less control over infirm colleagues. But such an argument is a non-sequitur. The old rule of *quamdiu bene se gesserint* had provided control over infirm judges, albeit through a formal and public procedure

[20] Prince, Martin, et al, "Dementia UK: Update Second Edition report produced by King's College London and the London School of Economics for the Alzheimer's Society" (2014).
[21] See *Commission v Hungary* [2012] C-286/12, on a reduction in the retirement age of 70 to 62 breaching EU equality law in this respect.

(i.e. through both Houses). Infirmity is, however, a significantly serious concern, and therefore it was a correlative measure as a last resort.

(ii) The second challenge is having a "judiciary in tune with the times and capable of meeting [current] challenges".[22] These words of Baron Boateng, delivered whilst he was in the House of Commons as a member of the committee which reported on the 1993 Act, expressed frustration at the Government's rejection of having an even younger judicial retirement age of 65. Boateng viewed this as failing consumer and societal interests. The issue, therefore, is distinct from the parochial question of infirmity because it involves judicial experience and diversity.

The problem with the argument is that it is fallacious. The material evidence demonstrates the antithesis of the assertion, namely that there remains a substantive societal and commercial demand for experienced (not merely nominally healthy) judges. This point is most strongly evinced by the recent return of many judges to the field of arbitration and mediation: inter alia, Lord Mance, Lord Neuberger, Lord Hoffman, Lord Dyson, and Lord Thomas have all returned to chambers following their judicial retirement. If there remains a private demand for these distinguished individuals' services then this is *mutatis mutandis* a loss to the public upon their retirement.

Moreover, this public cost is compounded by two further dimensions. First, judges are forced to dilute the old convention (implied within the *Guide to*

[22] Boateng described the public and consumer interest as "perhaps the most important interest of all in judicial and legal services" *Hansard*, 15 February 1993, Vol 219, cc94-100. <https://api.parliament.uk/historic-hansard/commons/1993/feb/15/minor-and-consequential-amendments#S6CV0219P0_19930215_HOC_412> [Last accessed 27 September 2018]

Judicial Conduct) that English judges should not return to private practice.[23] The logic being that the question of whether a judge's decision was influenced by post-retirement interests should never arise. Judicial independence is thereby preserved. Second, the loss of such experienced judges inflicts a further cost upon the common law as a heterogeneous system. As Coke put it in *Calvin's Case* (1608), the integrity of the common law is the existence of a judge's "artificial reason", whereby we "are but of yesterday (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had no received light and knowledge from our forefathers)".[24] This romantic notion contains an important kernel of truth: as an inductive system the common law's utility is a function of the wisdom and experience of the judges who expound it. The judge's professional skill is to synthesise the complex stock of vicarious experience built upon innumerable human disputes which forms the common law. Premature retirement can thereby do unquantifiable damage to the system's evolution as a result.

One might argue in response that this is overcome by having a wider (rather than deeper) repository of experience, achieved through greater diversity. This would be correct if one could grant the premise that the 1993 Act has increased diversity. But again, the evidence fails to support this notion. As Lord Woolf conceded in 2017, "the hope that the [retirement age] change might increase diversity has not happened."[25] Increasing the retirement age merely serves to

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[23] Courts and Tribunals Judiciary, *Guide to Judicial Conduct,* 2018, p15. <https://www.judiciary.uk/wp-content/uploads/2016/07/judicial-conduct-v2018-final-2.pdf> [Last accessed 27 September 2018].

[24] Coke in Cromartie, Alan, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642.* Cambridge University Press. (2006) p21.

[25] Lord Woolf, Letter to *The Times of London* 'Judicial Retirement Age Should Be Raised to 75' 31 March 2017 . <https://www.thetimes.co.uk/article/judicial-retirement-age-should-be-raised-to-75-6d8z5th8z> [Last accessed 27 September 2018]

increase the rate of judicial turnover itself. It does not address the first-order issues which prevent underrepresented groups from joining the judiciary (such as ingrained prejudice, insufficient child-care support, or a lack of information).

(iii) The third and final class of argument for retention of the 1993 Act has seldom been discussed. Both the House of Lords Constitutional Committee and the Government have failed to consider it. The adjunct position of constitutional issues reflects, most reasonably, a failure to understand the provenance of the 1993 Act. The 1993 Act is frequently viewed as an afterthought to pension reforms. But the causes were more than this. As Lord Mackay of Clashfern, the then Lord Chancellor, explained: "I felt that the system — which required the Lord Chancellor to speak to any judge who was in failing health and ask him or her to retire — was not compatible with judicial independence."[26] Concern over the separation of powers was a reasonable justification for introduction of the 1993 Act.

However, the present situation is far removed. Section 7 of the Constitutional Reform Act 2005 transferred the headship of the judiciary of England and Wales from the Lord Chancellor to the Lord Chief Justice. It follows that Parliament should not, as a matter of principle, legislate ad hoc on the issue. Foremostly this is for the normative reason that it violates the separation of powers if the legislature is intermittently interfering with the judicial retirement age (for a recent example of why this is undesirable see the Law and Justice Party's reforms

[26] Letter, 'Judicial Retirement Age "Should Be Raised to 75"', 31 March 2017, *The Times of London*, <https://www.thetimes.co.uk/article/judicial-retirement-age-should-be-raised-to-75-6d8z5th8z> [Last accessed: 27 September 2018].

of Poland's judiciary[27]). The Act of Settlement confronted this tension by giving discretion to the individual judge. Reflecting on this Montesquieu wrote in 1748 in *De L'esprit des Loix,* England was the "one nation in the world whose constitution has political liberty for its direct purpose". His Majesty's courts accordingly demanded a "*sang-froid*" of impartiality.[28] The 1959 and 1993 Acts were therefore an aberration in our constitution's long history, obviating one of the hallmarks of judicial independence.

One might argue in response that this will "politicise" judicial retirements, which is certainly a partisan issue in the United States. But, in the first place, the constitutional context is most distinct (judges have no *ultra vires* power to strike down an Act of Parliament)[29]; and, secondly, recent academic studies of judicial careers in the Supreme Court of Canada and House of Lords over 200 years evince that "judges either choose to stay as long as possible or retire for personal reasons."[30] Politicisation in the US is principally an issue of <u>appointments</u> not retirement. Any reform should realise this, to which this essay now turns.

Proposal For Reform

It follows from the preceding analysis that the current statutory scheme is neither practical, desirable nor useful. This raises the question as to what should replace it. My threefold suggestion is as follows. Parliament should amend Mr Chope's Judicial Appointments and Retirements (Age Limits) Bill[31] to provide:

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[27] "Poland's top court steps up its challenge to judges being 'purged'" 2 August 2018, *Financial Times,*<https://www.ft.com/content/7965ad18-9658-11e8-b67b-b8205561c3fe> [Last accessed: 27 September 2018].
[28] Book VI, 3.
[29] See *Mortensen v Peters* [1906] 8 F (J) 93.
[30] Tajuana Massie, Kirk A. Randazzo and Donald R. Songer, "The Politics of Judicial Retirement in Canada and the United Kingdom", *Journal of Law and Courts*, Vol. 2, No. 2 (2014), pp 273-299.
[31] Due to receive its second reading in the House of Commons on 26 October 2018.

(i) Repeal of the relevant provisions of the 1993 Act;

(ii) Raising of the statutory retirement age for first-instance judges to the age of 75 years; and

(iii) Repeal of the statutory retirement age for appellate judges entirely.

There are several cogent reasons why this approach is superior to the current scheme. First, it overcomes the three objections detailed above (infirmity, experience, and constitutional). Second, it recognises the present crisis of recruitment within the senior judiciary[32] and avoids merely shifting this issue to other ranks. Thirdly, it confronts the institutional differences between different strata of the judiciary: appellate judges sit in minimum panels of three; first-instance judges deal with a higher volume of cases which involve members of the public, such as directing juries, or observing the cross-examination of witnesses. Fourth, such an act would bolster the incentives within the judiciary by granting greater privileges to the higher tiers. Fifth, this proposal builds upon the proposal of the House of Lord's Constitutional Committee (raise retirement to 75), and is superior to the current provisions of Mr Chope's Bill (abolish the mandatory rule carte blanche). The proposed amendments therefore strike the necessary balance in this instance.

As such, whilst it is too late to amend the British Imperial Constitution to aid Mr Terrell, contemporary reform in this area should be forthrightly advanced. A short amendment would be practical, useful and desirable. As Titus exclaims in Shakespeare's *Titus Andronicus:*

> **"Give me a staff of honour for mine age,**
> **But not a sceptre to control the world".** [33]

[32] Judiciary of England and Wales, *The Lord Chief Justice's Report* 2017, p 10.
[33] Act 1, Scene 1, Verse 7

The above proposed reform is not a sceptre for judges to control the world. It would, on the contrary, restore the staff of honour that was once deserving of their office.

2997 Words (excluding footnotes)