RED HERRING FOR JUDICIAL INDEPENDENCE: CONFLICT OF INTERESTS AND POST RETIREMENT APPOINTMENTS

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ABSTRACT

Accountability and Independence is fundamental for the third pillar of the world's largest democracy and hypocritical respect is given to it by many States. In India, justice is portrayed as a lady in flowing robes with the sword in her right hand and a pair of scales in her left hand so that the justice is not succumbed under any 'external pressure'. One form of these 'external pressures' that has not been refuted but which exhibit a particularly powerful consideration for Judges subject to post-retirement to favour the Government's case, is an apprehension of thriving post-retirement employment. Thus, the paper argues whether the lobbying for a post by retired Judges does not jeopardise the independence of judiciary?

'Independence and Integrity' is a reiterative blend found in every human rights treaty, though being incongruous concepts having different legal background. The paper tends to put light on various cases when post-retirement employment of Judges in Government nominated position raises pertinent distress to judicial independence. Tribunalisation of justice has been a point of dialogue for last three and a half decades, hence, what can be done to ascertain the judicial flatterer, when the pro-government pressure under which they have crooked is secret or subconscious, or motivated by the desire or hope for post retirement grant, is the concern of the paper. The paper further focuses on different suggestions given by various Judges, eminent lawyers, commissions etc, and considers whether such suggestions can be applied practically without any doubts in the present scenario. The conflict of interests in such appointments might not have been grasped by public but there are a lot of countries where it is simply a hoax. An analysis has been made of various countries to give a legitimate recommendation for the post-retirement appointments.

INTRODUCTION

"Behind the decision stands the Justices and behind the Justices there hangs a purple curtain. There is perennial question, what is behind the curtain.[1]"

The three pillars of the democracy that is Legislature, Executive and Judiciary perform three indispensable functions of making the rules, their application and adjudication respectively. The intrinsic element behind this conception is separation of powers, which results in accountability, keeps the government bottled up and thus protects our rights and liberties. In reality, the main impelling force behind this is carved on the simple fact that 'power tends to corrupt a man and absolute power corrupts absolutely'[2]. The absolute system of governance is established on the dogma of "Separation of Powers" and hence a considerable part in maintaining the constitutional stability on the functioning of the Government is performed by the judiciary. The Judiciary keeps an account on the working of the other two pillars and certifies that they work within the circumscribing limits of the Constitution[3]. This arrangement of checks and balance leads to constitutionality into the functioning of the elements of the Government and makes them amenable for their work. The Indian Constitution also appreciates certain Fundamental and Constitutional Rights, safeguarding these rights besets on the Judiciary, who are its curator apart from being the guardians of the Constitution[4].

The independence of the Judiciary is an inevitable accessory of the power of judicial review under the Constitution of a democracy. It is also apprehended as a basic feature devising an invincible component of the basic structure of the Constitution agreeable to the decision in Kesavananda Bharti[5]. Though, like every element of the State and every public administrator, the Judiciary as an institution in a democracy and every Judge as a public functionary are answerable to the political supreme i.e. the people. The only distinction is in the form or process of the mechanism needed to execute their accountability. In a nutshell, judicial accountability is a demeanor of the independence of the judiciary and thus this mechanism must also safeguard the independence of the Judiciary. Hence, the independence of the judiciary may be described

[1] GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-63, 11 (Evanston: North Western University Press, 1965).
[2] TOM SHIPPEY, THE ROAD TO MIDDLE-EARTH, 69 (London: Grafton, 1992).
[3] Registrar (Administration), High Court of Orissa v. Sisir Kanta Satapathy, A.I.R. 1999 SC 3265.
[4] Kesavananda Bharati v. State of Kerala and Anr, A.I.R. 1973 SC 1461.
[5] *Ibid.*

as the independence of Judges from any extrinsic factors which interpose with the execution of their functions in an impartial manner[6]. But, it is to be considered that how can individual Judges be held answerable without overthrowing the essential and fundamental notion of judicial independence?

Allurement of post-retirement jobs for the Judges bestowed by the executive is another determinant in the independence of the Judges. Amidst other things, the Ex-Attorney General for India has called for abrogating this practice and has in lieu suggested lifting up the age of retirement of the Judges[7]. Similarly, various Judges of Supreme Court of India, among other requests, had asked for financial and functional independence of the courts for their operative and efficient functioning and for swift delivery of justice[8]. If the Judges are allowed to take post-retirement appointments or move into politics, it can be inferred from that considerable experience and legal expertise which previously could have been utilised for the benefit of the country would be lost.[9] It had many spheres, namely, dauntlessness of other power centres, whether economic or political, and freedom from prejudices evolved and nourished by the class to which the Judges belong.[10]

JUDICIAL ACCOUNTABILITY AND INDEPENDENCE

The framers of the Constitution of India, at the time of drafting, were anxious about the kind of judiciary in India. This fuss of the members of the constituent assembly was acknowledged by Dr. B.R. Ambedkar in the following manner:

"There is never a discrepancy in assessment of the House that the judiciary ought to be both independent of the executive and must also be proficient. And the question is how these two objectives can be achieved.[11]"

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[6] CHARLES EVANS HUGHES, ADDRESSES AND PAPERS, GOVERNOR OF NEW YORK, 1906-1908, 139 (New York, G.P. Putnam's Sons, 1908).

[7] S. J. Sorabjee, *Judges Should Not Be Given Post- Retirement Assignments*, HINDUSTAN TIMES, Feb. 7, 1999, 6. See Also, PRATAP KUMAR GHOSH, THE CONSTITUTION OF INDIA: HOW IT HAS BEEN FRAMED, 240 (Calcutta: The World Press Private Ltd., 1966); Law Commission of India, Fourteenth Report: Reforms of Judicial Administration, 1958.

[8] RAJEEV DHAVAN, JUSTICE ON TRIAL: THE SUPREME COURT TODAY, 82 (Allahabad: Wheeler Publishing, 1980).

[9] Nixon M. Joseph v. Union of India, AIR 1998 Ker 385.

[10] S.P. Gupta v. President of India, A.I.R. 1982 SC 149, also known as "First Judges Case".

[11] Atin Kumar Das, *Independence of judiciary in India: A critical analysis,* MULNIVASI ORGANISER, (July 14, 2016, 8:25 AM), http://mulnivasiorganiser.bamcef.org/?p=482.

The dilemma that *prima facie* arises in our mind is that what encouraged the framers of our constitution to be so much anxious about providing to the judiciary separate essence and making it efficient. In order to ensure unruffled functioning of the democratic system prevalent in India, there must be a right amalgamation of the two. One of the obstructions in the smooth functioning of the Judiciary is the pressure imposed on them from outside. This 'external pressure' has not been questioned much till now but it is certainly a powerful attraction for Judges subject to post-retirement to decide in favour of government in any case, thus prospering for post-retirement employment on various government enquiries, tribunals, commissions, arbitration, etc[12]. It is also pointed out that though there are various former Chief Justices of India who did not gave their consent to any post-retirement jobs from the government but it is necessary to throw light upon the fact that there is a need to administer the actions of Judges as pre-retirement judgments are swayed by post-retirement prospects. But it is not confined to one government or one party. This was proffered in the Constituent Assembly by Professor KT Shah who wanted to put forward a new Article 193-A for imposing such a ban[13]. Professor Shibban Lal Saksena, who backed Shah's proposal, elucidated the need for such a ban. However, the proposal was rejected on the ground that the Judiciary would be concerned with the rights of the people themselves in which the government functioning on the day can hardly have any interest at all and thus the probability for the executive to influence the judiciary is minimal, considering it totally unreasonable from disqualifying the Judges to hold other offices after retirement.

But in the present scenario it appears that the Constituent Assembly might have been surprisingly mistaken on this case. It is clear from the history of independent India, the Apex Court and various High Courts often sit on Judgment over executive action. The Upper Courts in India are entrusted with the power to issue writs declaring *ultra vires* executive decisions, and the present government, therefore, has a primary interest in how the judiciary functions. It is also important to put forward that how Article 124(7) of the Constitution of India is being violated in its true sense because of some post-retirement activities of the foregoing Judges of

[12] DEREK O'BRIEN, THE CONSTITUTIONAL SYSTEMS OF THE COMMONWEALTH CARIBBEAN, 200–202 (Oxford: Hart Publishing, 2014).

[13] June 7, 1949, while draft of the Constitution was being discussed corresponding to present article, two members, Prof. Shibban Lal Saksena and Prof. K.T. Shah, who represented the United Provinces of Bihar suggested the following: *"Article 193-A — No person who has been a Judge of the Supreme Court, or of the Federal Court or of any high court — shall be appointed to any executive office under the Government of India or the government of any state under the Union."*

the Supreme Court of India. This provision restrains a person who has been the Judge of the Supreme Court previously from litigating or acting in any court or before any authority. Retired Judges authorised to hold Constitutional/Statutory posts as Chairpersons/Members of various Commissions take up arbitration work in contravention of ingrained legal and ethical rules. Such type of practice does injustice to both the highest offices they have held and the posts or bodies to which they have been appointed. Thus, the question that appears is that whether the lobbying for a post by retired Judges does not create threat for the independence of the Judiciary?

In its Fourteenth Report[14], the first Law Commission deliberated the issue of the Supreme Court and High Court Judges taking up employment under the Union government or the State government in furtherance to their retirement. The Commission was of the view that it was expedient to safeguard the independence of the Judges of the Apex Court Judges by enacting a law limiting their further employment except as impromptu Judges of the Supreme Court under Article 128 of the Constitution of India. A lot of Judges get post-retirement appointments under quasi-judicial or constitutional bodies in the country. This is because the Statute or Act under which the Tribunals or Quasi-Judicial bodies are instituted directs that those heading the posts must perpetually be a sitting or former Judge of the High Court or Supreme Court.

VARIOUS INSTANCES OF JUDICIAL APPOINTMENTS IN INDIA

The Judges of the Supreme Court exercise unsurpassed powers under the Constitution. Their decisions can have very afflictive impact on the Government of the day or on the specific Minister or on the Prime Minister himself. The very essence of the rule of law can be flustered if the Supreme Court hesitates. This being the situation, it is rather astonishing that there are no limitations positioned in the Constitution on the future employment of the Judges of the Supreme Court under the Government after their retirement.

Justice V.R. Krishna Iyer, on post-retirement employment of Judges observed:

[14] Law Commission of India- Fourteenth Report: Reform of Judicial Administration, September 20, 1958 (Vol. I, Ch. 5, 45- 46).

"Judicial afternoons and evenings are tense phases, the inhabitant being bothered about post-retirement expectancy. The Executive plays upon this deficiency to corner the integrity or buy the partiality of the aged brethren."[15]

There have been considerable occasions when retired Judges of the Supreme Court have been given post-retirement appointments, but generally such appointments were restricted to tribunals and commissions, etc., and were most of the times related to the field of law. Governor of a State is considered to be an entirely different field. It is a complete political position. The manners, in which Governors are replaced merely after a change of Government, and the way they are selected on the basis of political affiliations have never been in an enigma. Conceivably, the framers of the Constitution placed confidence on the fact that the persons holding the position of Judges of the Supreme Court shall be persons of highest probity, shall be beyond any type of dominance by any person, and shall not get appointed after the retirement in order to uphold the highest standards of integrity in life. Nonetheless, if this was the apprehension of the framers of the Constitution of India, then it is relatively ironical that they have placed certain other limitations on the subsequent law practice by former Judges of the Supreme Court in clause (7) of Article 124, as mentioned above. Despite the fact that some of these former Judges have done paramount work in their period of time, experts and expositors had put forward that most of these appointments are nothing more than post-retirement pushover. In few cases, the retired Judges have offered their services for years or decades with bodies that are still to give their final decision on matters or disputes they were asked to adjudge. To a certain extent, a dozen Union and State level Commissions and Tribunals are presently administered by or are having retired Judges as their members. A majority of these Judges are from the Apex Court. As a matter of fact, out of the 21 Judges of the Apex Court who retired between the span from January 2008 to July 2012, approximately 18 of them got post-retirement appointments in various government Commissions and Tribunals[16].

Appointing the retired Chief Justice of India, Justice P. Sathasivam, in Kerala as a Governor by the Central Government marks a new practice in politicisation of Judiciary. Despite the fact, it be assumed that there is no equivalent substitute for this appointment, it is apparently to insufflate for similar other appointments in the course of time, by way of allurement to others,

[15] JUSTICE V.R. KRISHNA IYER, OUR COURTS ON TRIAL, 136 (New Delhi: B.R Publishing, 1987).
[16] Maneesh Chibber, *21 SC Judges retired since'08, 18 in Government Panels*, THE INDIAN EXPRESS, July 30, 2012, at 3.

few of them may then be due to some sort of *quid pro quo*, thus putting at stake the independence and integrity of the Judiciary. Various experts, observers and politicians have been quick to condemn his appointment as a question on the independence and integrity of the judicial system. An essential requirement of the rule of law is that 'justice should not only be done but it must manifestly and undoubtedly also seen to be done[17]'. Thus, the questioned that can be raised is that can Justice be 'seen to be done' if the same Judge who gave clearance to a Minister is tomorrow giving his assent for a post retirement benefit from the Government?

Retired Chief Justice of India, Justice M. Hidayatullah was the Vice President of India from 1979-1984, after having been elected with the unanimous decision of all parties. Even Justice Ranganath Mishra who is also a retired Chief Justice of India, was appointed as a nominated member of the Upper House in 1998 and completed his tenure in 2004. Justice K.S. Hegde, a former Judge of the Apex Court, was elected to the Lower House from Bangalore in the year 1997, and has been the Speaker of the Lok Sabha from 1977 to 1980. However, it is *ad rem* to put light on the fact that before being elevated as a Judge to the Supreme Court, Justice Hegde was elected to the Upper House in the year 1952 and continued to be its member till 1957. Moreover, Justice Fathima Beevi, the first woman Judge of the Apex Court, was appointed in Tamil Nadu as a Governor in the year 1997 and served in Tamil Nadu her service as such till 2001. After such instances, it can be argued that whether joining of a political party by the retired Judges of various courts not raising doubts on the conscientiousness of various individual Judges?

SITUATION IN OTHER COUNTRIES

The other branches of government are comprised of political audience and the political formulation more extensively. Constitutional Courts are certainly regarded as political actors. The interrelation between Constitutional Judges and the political audience is not fully appreciated, but intellectuals have a tendency to depend on various assumptions about judicial behaviour. Some presupposes that Judges look to explore to advance the desire of the persons who appointed them, and others perceive Judges as predominantly anxious about their future once their tenure in the court is over.[18] Apparently, the Judges are considered political agents,

[17] R. v. Sussex Justices, *Ex parte* McCarthy, (1924) 1 KB 256.
[18] BATHUKA VENKATESWARA RAO, CRISIS IN INDIAN JUDICIARY, 150 (Hyderabad: Legal Aid Centre, 2001).

in part, as the appointment structure is generally politicized and has sometimes eventuated in balanced *de facto* allocation for persuasive political parties.

According to a study in 2006, in the European Union Court of Justice four of the then 25 Judges had formerly worked in the Strasbourg Court and that two earlier my Lord's and one former provisional Judge had been nominated to the International Criminal Court.[19] Furthermore, reviewing the consequent employment and positions of some retired Judges, it can be asserted that out of 30 lately retired Judges (all from various states), a number of figures cropped such as three Judges were assigned to positions at international organisations such as the United Nations and six were elected to various international Courts or Tribunals, ten were appointed to be Judges on national courts or to serve as ombudsman and eight worked in their national government , for instance, as advisors and few of them even became MPs and Ministers. Regardless of this fact, a number of retired Judges have faced hardship in finding employment.

In United States, there is a mention of Canon 3 in "The American Bar Association Model Code of Judicial Conduct" that comprehends a condition that the Judge's personal and extrajudicial activities shall be conducted in such a manner so as to curtail the risk of conflict with the responsibilities of judicial office[20]. The rules consist of comparatively strict restrictions against judicial conduct in non-judicial affairs[21].

In contradiction to India, age at which the Judges of the Apex Court of the United States of America retires is not specified and they can perform their duties until death, nonetheless Judges retire at an age of their preference like Justice Blackmun who retired at an age of 85 years and similarly Justice Souter retired at 69 years. On an approximate scale, the age at which the Judges of the Apex Court of the United States of America retires is found to be 78 years. It is only in India and Pakistan that Judges of the Supreme Court have to retire at an age of 65 years. In Australia, judicial independence is assured by the provisions similar to those in India but with one alteration that upper age limit for retirement is kept as 70 years in order to ensure that the Judges are no longer responsive to allurement by post retirement offers by that age. Thus, it can be put into consideration that whether increasing the retirement age of Judges of

[19] E. Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, *International Organisation*, Vol. LXI, 669-701 (2007).
[20] American Bar Association Model Code of Judicial Conduct, Canon 3, (2011).
[21] Leslie B. Dubeck, *Understanding "Judicial Lockjaw": The Debate Over Extrajudicial Activity*, N.Y.U. L. 82, no. 2, 569-589 (2007).

the Supreme Court and High Courts of India can put a limitation on post-retirement appointment of Judges?

In Bangladesh, contemporary governments have been indulged in several apparent and shrewd actions to dominate or exercise political pressures on the Judiciary. These constitutes purporting of political concentration into judicial selection system, the misuse of seeking advice of the Chief Justice while assigning the additional Judges, or when affirming their service and the post retirement employment of Judges to different Constitutional and evidently quasi judicial position such as that of Chairman of a Commission, a process that faintly puts down Judges involvement.

ANALYSIS OF VARIOUS SOLUTIONS

As recorded by the analyst Granville Austin who documented the drafting of the Indian Constitution, "At an instant glimpse, the deliberation in the Constitutional Assembly on the provisions of the judiciary seems to have been immensely concerned with the administrative appearance of the judicial system." But the intensive dialogues on these apparently conventional issues concerning Judges' tenure, salaries, pension and so forth were suggested, as Austin marked, "by the desire to isolate the courts from attempted intimidation by forces included in or outside the government.[22]"

It is clear from the facts that a frailty in the Constitution left without qualms or ignorantly or innocently by the framers of the Constitution, has given some room for the politicians to exploit the cracks in the judiciary. Various colours in the form of powers given to a Supreme Court Judge, and given the consequences that may result for the Government (or for the higher functionaries of the Government) from an inimical exercise of such powers, it is but natural that the Government of the day always tries to entice the Judges with post-retirement employment benefits. It is a harsh fact that while most of the Judges would never sacrifice with their obligations as sitting Judges of the Supreme Court regardless of the expectations of post-retirement employment options offered to them, there might be reasonably some who may not have such firmness to abstain from the allurement or the pressure or the predominance. This issue is complicated further when a Judge, as the case may be, gets partial towards a party to a

[22] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION, 218 (22nd ed. Oxford: Oxford University Press, 2014).

dispute, while carrying out his duties, as a *quid pro quo* or relatively with a prospect to not to dissatisfy the powers that can be useful to procure post-retirement employment. Hence, the post-retirement appointment benefits may apply grease to his decision to the prejudice of the independence of judicial system.

In the past, a lot of questions have been put forward about the retirement age of Supreme Court and High Courts Judges. Moreover, various statutes quest to take full advantage of the early retirement of Judges of the Apex Court at 65 years and at that of High Court Judges at 62 years. Hence, by maintaining at least three years of service in addition to such age, the statutes accentuate that Judges are proficient enough for performing an essential public duties above the age at which they are considered appropriate for judicial office. To find a desirable solution, two motions are fundamental. First, it is suitable that the retirement age of Judges of Supreme Court be also erected above 65 years. The Venkatachalliah Committee[23] which was formed to analyze the working of the Constitution recommended that the retirement age of Judges of Supreme Court be raised to 68 years. Thus, it can be opined that this will give the Judges term longer than the current four-six years. Such a requirement, if realized, may also help Judges avoid the post-retirement positions from the government. Second, an amendment to the statutes making provisions for establishing Tribunals and Commissions and administering them with a professional framework of Tribunal Judges or *ad hoc* members of the higher judiciary on delegation must be undoubtedly given due consideration. If these essentials are realized, a bar on post-retirement appointment of Judges in various Tribunals and Commissions that is the prevalent cause of dilemma regarding judicial independence can be dealt legitimately. The age of retirement is likely to be politically disagreeable and will have to look for a legislative vehicle, notwithstanding, the government is in readiness to run with it.

As proposed by various retired Judges of the Supreme Court of India that a justifiable "cooling off" period of around two to four years should be there after which a retired Judge can be again appointed and it should be done by some independent body or judicial council. Arbitration may stand on a different footing but a little caveat is necessary. Post-retirement allowance is now a cardinal preoccupancy. A Judge who after his retirement does not want to continue with his practice, for the reason that he thinks it is incongruous with his assent to judicial appointment,

[23] National Commission to review the working of the Constitution also known as "Justice Venkatachaliah Commission", Feb. 22, 2000.

may have no other option. Judges advancing towards retirement, at the present statutory age, in the case of both Supreme Court and High Court are apprehensive to found out what type of work can they foresee to get through government appointments. Low pensions are additional threat to judicial independence, especially in Asian countries as most of the Judges are in anticipation of post-retirement positions. Hence, there is a need of an institutionalised structure for regular revision in payroll of Judges by setting up a different Pay Commission for the judiciary. Another option that can be looked upon is that various appointments of the Judge for post-retirement jobs should be recommended by the present collegium system that is prevalent in the country.

CONCLUSION AND SUGGESTIONS

The perception of Independence and Accountability of Judiciary, in the ambit of a democracy, absolutely bolsters each other. Usually it is believed, independence is not provided to give advantage to an individual Judge, or even to the Judiciary as a separate body but it is provided to secure justice for people. Moreover, even if with the best Constitutional and basic independence, the Judges who compose judiciary are not loyal to their oaths, at all stages and in every situation do not secures equivalent justice for all persons and perform the duties and obligations of the office according to the law with their knowledge and ability without any pressure, benefit or sympathy, then the judicial arm of the Government cannot be kept aside. Due to the pressure on Judges to reserve post-retirement appointments to Tribunals and various Commissions, they tend to remain in the good books of those who might provide such appointment, notably, the present day Government, thus contrary to judicial independence.

Judges are considered to be eminently proficient individuals who have an abundance of experience and learning to offer. Undoubtedly, various Governments time and again seek to take benefit of that experience and knowledge by, for instance, appointing retired Judges on separate Tribunals, Commissions and related inquiries. It is certain that the current Tribunals or Commissions requires that it should be administered by persons of known righteousness and proficiency in whom the people have confidence. Indeed, at such a situation, a former Judge would be needed. But if the Government strives to make use of their skills for the advantage of people, then there cannot be any apparent objection to it, if it is done with full integrity and transparency. The objections would be raised only when any attempt is made to influence or negotiate terms with a Judge on the subject of post retirement benefits. Thus, the question that

needs to be answered is that whether the post-retirement appointment of Judges is for the benefit of people or against the independence of the judiciary?

This is an indispensable problem that is to be contemplated by those managing in the Parliament, appraising the recommendations given by the stakeholders, setting aside any political prejudice and actions. Judges are considered analogous to Gods of Justice, commanding over the conflicts, any purview of disputing their legitimacy would have adverse results on the faith that a man places on the Judiciary. Although, there cannot be any clear evidence of decisions being swayed by such allurements, but the Judges in which most of them are reported to have, by their actions and conduct, not exhibited themselves to be absolutely independent from the Executive or most of the times have played the tune of the Executive, must understand that justice should not only be done but it must manifestly also seen to be done. Increasing the retirement age and pension of the Judges of the Supreme Court and High Courts, recommendations for the post-retirement appointments made by the collegium system, etc., all can be considered as a reasonable way out but the only question that needs to be answered is that whether the Executive is willing to cut down it's judicial arm?

If the judiciary is considered simply as a stepping stone in a person's walk of life, there is some possibility that judicial independence would be encroached because of a problem that people are, hence, making choices which are encouraging to their future career expectations in trade, in commerce, as politicians, etc[24]. The process of appointment and the structure for securing judicial independence with judicial accountability from every corner are substantial to frustrate the imminent risk to judicial independence. As articulated by Montesquieu, that constant experience has made it apparent that every man provided with power is apt to abuse it, and to carry his authority until he is resisted with limits. This can be taken as a suitable need to ensure judicial independence.

[24] Senate Select Committee on Superannuation-Twenty Fifth Report: The Parliamentary Contributory Superannuation Scheme & the Judges' Pension Scheme, May 1, 1997.