SOME OBSERVATIONS ON THE PRIVY COUNCIL*

I am very honoured to have been asked to read a paper in this Series conducted in memory of Tun Abdul Razak and in acknowledgment of his great service to Malaya, and in later years to Malaysia. I knew him personally and with great regard for his work in government and for his personal character.

We had dealings with each other whilst I was a Cabinet Minister in the Australian Government at a time when he was deputy to Tunku Abdul Rahman, then Prime Minister of Malaya, and later as such deputy after the inauguration of Malaysia which I attended as representative of Australia on 16th September, 1963 (in the rain).

Subsequently we met when I was Chief Justice of Australia and he was Prime Minister of Malaysia. Our last meeting was in Port Moresby at the time of the celebration of the independence of Papua-New Guinea.

It therefore gives me great personal pleasure to participate in the recognition of his personal qualities and his splendid public service as a great citizen of Malaysia.

I propose with your indulgence to address you on the work of the Judicial Committee of the Privy Council: You might well think this odd, seeing the great changes which have taken place since the end of the Second World War in the relationship of the Privy Council to many members of the Commonwealth of Nations.

But a review of the methods employed by the Judicial Committee in hearing and deciding Appeals may well furnish material of use in the Appellate jurisdictions of the Commonwealth countries.

I shall remind you of the statutory basis of the Committee and of its unique quality, say something of the physical features of the place in which it sits and of the atmosphere prevailing in a hearing before it, deal briefly with the manner of operation of the Committee, and thereafter offer some general observations on the work of Appellate Courts, prompted by the manner in which the Judicial Committee has functioned.

In the century following its inauguration in 1833, the Judicial Committee is said to have heard Appeals from the Courts of some 150 countries and places widely spaced throughout the world in all manner of cases, civil and criminal. Unlike any Court which has existed anywhere at any time, it has had to consider and apply not merely English law but the laws of a wide diversity of legal systems: Roman Dutch law as in South Africa, British Guiana and Ceylon, Spanish law as in Trinidad, pre-revolutionary law of Paris as in Quebec, the Napoleonic Code as in Mauritius, Old Sardinian law as in Malta, the old Viennese law as in the Ionian Islands, the

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law of mediaeval Normandy as in the Channel Islands, Acts of the Oireachtas as in the Irish Free State, Muslim, Buddhist and Hindu law as in the various parts of the Indian subcontinent, Chinese law as in Canton and Shanghai, the law of the Ottoman Empire in Appeals from Consular Courts in Turkey, Cyprus and Egypt, tribal laws of considerable diversity as in Africa, the Canons of the Council of Trent in Matrimonial and Church Disciplinary matters raised by Roman Catholic Appellants in Gibbraltar, Canada and the British Isles, the Articles of the Church of England and the Constitutions and Canons Ecclesiastical in English Ecclesiastical Appeals. It has had also to become familiar with the variants of English law in the colonies, territories and dominions. To which must be added Constitutional law of various parts of the Empire and Maritime law in Admiralty, Vice Admiralty, and Prize Appeals.

This recital gives some indication of the amazing scope of the Judicial Committe's work and marks it as a unique and most remarkable tribunal.

I ended that century in 1933, because from that date the number of countries from which Appeals were brought began to shrink. The Statutes of Westminster of 1931 opened the way for dominions to terminate Appeals to the Committee. In 1933 the Irish Free State did so. Then Canada and India followed, not so long thereafter.

With the break up of the Empire finally brought about by the Second World War, there has been a sharp decline in the volume of the work of the Committee. As the new nations have attained independence, continued resort to the Judicial Committee has increasingly been seen to be unnecessary or at least undesirable. Various factors, not all common to all the Commonwealth nations, have conjoined to bring this about: Increasing maturity of the local legal profession, anxiety that continuing the Appeal may appear to diminish the full independence of the nation as internationally perceived, the remoteness of the Committee from the local scene, an outspoken nationalism and a not always articulated, but sometimes present, Anglophobia, or at least a desire to distance the nation from British influence. But I think that dissatisfaction with the work of the Committee has played no part, or at most a very small part, in bringing about the termination of such Appeals. However, the Committee still deals with Appeals from a number of countries including some republican members of the Commonwealth, and the States of the Australian Federation as well as from the remaining colonies and territories.

In an Appendix to this paper will be found a list of the countries and territories from which Appeals are still able to be brought to the Judicial Committee.

Nationalism in Australia has had its place in bringing the Appeal to an end. In 1968 the Parliament terminated Appeals from decisions of the High Court of Australia in cases involving federal law. In 1973 it extended this termination to all decisions of the High Court including its decisions involving only State law.

The States of Australia on the other hand have, for various reasons, felt until recently that they should maintain the Appeal.

But latterly there seems to be an emerging agreement amongst the States that the Appeal should now be terminated. The difficulty in finding a method of doing so, acceptable to local sentiment, has delayed the implementation of any such intention.

However, lately the Australian Parliament, has legislated to provide that all Appeals to the High Court must be by that Court's special leave. There are now no Appeals to the High Court as of right.

This has increased the work of the Judicial Committee in Appeals from State Courts. Litigants can appeal to the Committee as of right in matters exclusively of State law if $1,000 is involved.

Malaysia, upon its attaining independence, found what at the time seemed to be a nationally acceptable compromise in having the Judicial Committee advise the Malaysian Head of State rather than the Queen. But more recently Malaysia, in two stages, 1978 and 1985, has finally ended all Appeals to the Committee.

Other independent States, Singapore for example, although no longer Constitutional Monarchies but Republics, by means of Orders in Council and appropriate local legislation have been enabled to maintain the appeal direct to the Committee though not to the Queen in Council.

I do not propose to discuss decisions of the Judicial Committee nor to attempt any detailed evaluation of its judicial work generally. I have already referred to the remarkable range of its jurisdiction. With the wide spread of its work and the frequently controversial nature of the subject matters with which it has had to deal, it would be unlikely that its decisions always received universal acceptance. Perhaps no final Court of Appeal could expect never to meet criticism: the Committee in this respect has been no exception.

But I think that the Committee has done immense service to the former colonies and to the new nations which have maintained resort to it. It has given general satisfaction and at times has provided an "off shore" tribunal to decide matters, often emotionally charged, on which a resolution by the local judiciary might not have been at the time so publicly acceptable.

It has, in general, given satisfaction to litigants and, in constitutional cases, to the local citizenry. There has been and remains great respect for the Committee's integrity and for the validity of its judgment. With the spread of the systems of law with which it has had to deal and the volume of work it had to do, its record is both remarkable and most creditable. Its influence in creating a degree of certainty and uniformity in the general law has been considerable.

History

As the Sovereign is considered to be the fountain of justice, petitions to the Crown early became the form of the ultimate Appeal particularly, but not exclusively, in litigious processes. The petitions to the Sovereign were referred by Order in Council for hearing, report and recommenda-

tion at first to Special Committees of the Council but later to the whole Privy Council.

But as Parliament emerged, it became the final Court of Appeal in relation to the realm of England. Within the Parliament, the House of Lords acquired the exclusive right to decide such Appeals. Today, the Lords of Appeal in Ordinary, usually ten in number, at times along with the Lord Chancellor, hear and determine Appeals from within Great Britain.

But petitions of Appeal to the Crown in Council from the American Plantations and from the Colonies and external territories of the Crown, including Jersey and Guernsey, from the Courts in British India and from British Courts in Protectorates and other places covered by the Foreign Jurisdiction Act remained in the control of the Sovereign. They were referred to the Privy Council as a whole, although in practice a number of Privy Councillors, not necessarily legally trained, chosen ad hoc, sat to hear and determine these petitions of Appeal.

Prior to 1833, Appeals in Ecclesiastical and Maritime matters were heard by the High Court of Delegates. But in 1832 this jurisdiction was transferred to the Sovereign in Council.

Statutory Basis — 1833

In the years preceding 1833 there was dissatisfaction with the manner in which a board to hear Appeals was constituted and the lack of legal qualifications of many of those who sat. Consequently, in 1833, under the influence of Lord Chancellor Brougham, a major and radical change was made. By 3 and 4 Geo IV Cap. XL1, known as the Judicial Committee Act of 1833, the Judicial Committee was set up. In form it was a Standing Committee of the Privy Council. But in reality it was an independent Court of law. The Sovereign was required by the Act to refer to the Committee for hearing, report and recommendation all petitions of Appeal to the Sovereign in Council. The Committee thus became the Final Court of Appeal from the Courts of the colonies and territories of the Crown, also in Ecclesiastical and Maritime matters, and matters of Admiralty, Vice Admiralty, and Prize. That is to say, the whole of the judicial function of the Sovereign in Council was vested in the Judicial Committee.

The style of this Court was to be the Judicial Committee of the Privy Council but it was completely separate in function from the legislative and administrative functions of the Privy Council itself. None the less lawyers usually refer to it as the Privy Council.

The Committee was given no executive power. Its decision has to take the form of advice to the Sovereign. But the report and recommendation are judicial acts and not in any sense administrative in nature. The recommendation had to be implemented by an Order in Council, but the advice and recommendation was bound to be taken by the Sovereign. Though the Order in Council implementing the Committee's advice and recommendation is made in exercise of prerogative power, it is at the same time the performance of the Judicial duty of the Crown to do justice. The Crown is not merely enabled to do justice, it is bound to do so. As Lord Radcliffe

has reminded us: "Justice is owed by the Sovereign and does not rest in favour or discretion."

The Committee at the outset was to consist of:

The Lord President of the Council
The Lord High Chancellor
The Lord Keeper or First Lord Commissioner of the Great Seal
The Lord Chief Justice of the King's Bench
The Master of the Rolls
The Vice Chancellor of Great Britain
The Chief Judges of the other Courts of Record at Westminster
All Privy Councillors who had held any of the aforesaid Offices, plus
Two Privy Councillors whom the Sovereign might appoint under his sign manual (not required to be legally trained).

Further, the Sovereign could ask other Privy Councillors to sit with the Committee. But clearly the majority of the Committee were intended to be lawyers of judicial experience.

By subsequent amendments the Lords of Appeal in Ordinary and Privy Councillors who hold or have held high judicial office are now eligible to be members of a board of the Committee. But the President of the Council and the Lord Chancellor remain members of the Committee. These are the only members of the Government to be qualified to sit in the Committee. However, the Lord President has long since ceased to take any part in the work of the Committee.

Section 3 of the Act of 1833, in providing for the reference to the Committee by the Sovereign of all petitions of Appeal, required the Committee in making its report to follow existing customs. Most importantly it was expressly provided that the nature of the report or recommendation of the Committee be stated in open court. This amounted to a relaxation of the Privy Councillors' Oath of Secrecy as to matters occurring in the Council.

By the fourth section of the Act, the Sovereign was given power to refer any other matter whatsoever to the Committee for hearing, consideration and advice. Under this provision the Committee has been required to report on such matters as: boundary disputes between constituent parts of the Commonwealth; international law in relation to piracy; questions of nationality and the legal rights appertaining thereto; legal liabilities of the Consular Corps; questions of Parliamentary privilege and many others not related to petitions of Appeal.

The quorum of a Board of the Committee was set at four Members present and required a majority of those participating to assent to the report and recommendation. By an Act of 1843 (6 and 7 Victoria Cap. 38) the quorum for hearing matters might be reduced to three by Special Order in Council.

The Committee, by Section 7 of the Act, was given power to examine witnesses orally, both before or after deposition, or by deposition, to direct the Registrar or other nominated person to take evidence on deposition,

such Registrar or other appointed person to have the power in that respect of a Master in Chancery.

By Section 8 the Committee was given power in any matter to direct the examination of a witness, notwithstanding that that person had not given evidence in the Courts below or that no evidence had been given there on the matters on which the witness was directed to be examined.

I am unaware whether these powers have ever been used in an Appeal before the Committee. But I recognise that they might well be useful powers for an Appellate Court to have. For example, where a claim is made that evidence has been wrongly rejected, the Court could examine the substance of the excluded evidence, even perhaps its credibility, and determine whether its rejection really mattered in the proper disposal of the case. Its use might well avoid a new trial which might otherwise have been necessary based not on the knowledge of the value of the rejected evidence but merely upon the fact of its rejection. Also I am unaware whether in any Commonwealth country an Appellate Court has such a power.

Orders in Council made pursuant to the report and recommendation of the Committee are to be enforced by the Courts of the place whence the Appeal has come.

The Act required the Court from which it was sought to appeal to furnish the Committee with the record of the proceedings, duly certified.

Committee Method

In addition, under the Committee's rules, each party is to prepare and file a "case". This shall contain "the circumstances out of which the Appeal arises and the contention to be advanced by the party and the reasons for Appeal." Prolixity is to be avoided.

The parties' cases are prepared without any necessary consultation with each other and are not exchanged until the cases of all parties have been lodged.

This procedure represents an endeavour to have the issues to be decided on Appeal elicited beforehand and for the parties to state their attitudes in respect of them.

The case books may be perused in advance by those members of the Committee who are to form the Board to hear the Appeal.

The Committee's Location

The Committee occupies a building at the corner of Whitehall and Downing Street erected between 1824-27. It is a plain brick-fronted two storied building known as No. 9 Downing Street. A narrow roadway ending in a cul de sac and a small bordering grass plot separates it from No. 10 Downing Street, the Prime Minister's official residence. The building contrasts markedly with the elaborate buildings on the other side of Downing Street which house certain Ministries, including the Foreign Office.

No curious crowd assembles outside it as people do outside No. 10. No old gentleman on his knees prays for the occupants as he used to do opposite No. 10. Nothing disturbs its tranquillity.

Litigants, Counsel and members of the public enter the building from Downing Street. On the ground floor the staff of the Committee, few in number including the Registrar, are housed.

Hearings take place in what I shall call the "Court" room. This is a large high ceilinged rectangular room of pleasant proportions on the first floor. It has been known as the Privy Council Chamber. It has good natural light from high windows on either side of the room. In other days it had a somewhat spectacular ceiling and marble elaboration to its walls, all the work of Sir John Soane, but the present generation has not seen the room in its former grandeur. The ceiling and marble were removed in 1845.

Behind this room is a small room where the members of the Board assemble. It is reached from a private entrance at the rear of the building by a path off the cul de sac of which I have spoken. On the first floor, there is a library and robing rooms. The library is principally for the use of the Committee, but it is available to Counsel. The Committee also has access to the Library of the House of Lords. Immediately outside the Court room is an assembly area where Counsel and parties wait to be summoned to attend the Committee.

There is a second but smaller Court room adjacent to the main Court room in which a second Board may sit contemporaneously with the Board sitting in the main room on occasions when, in order to handle the volume of business, it is necessary to sit two Boards.

A Board to hear an Appeal is usually composed of five Lords of Appeal in Ordinary. On occasions the Lord Chancellor sits and presides. Sometimes four Law Lords and a Privy Councillor from a Commonwealth country form a Board. Indeed there have been occasions when two Privy Councillors from Australia (that once occurred in a Malaysian Appeal) with three Law Lords, or a Privy Councillor from Australia and one from New Zealand along with three Law Lords, have formed a Board.

Earlier, Privy Councillors who had been Judges of certain Indian Courts were included in the membership of the Committee. Also, for a time, a judicially qualified Privy Councillor from India and one from Ceylon resided in London and sat on Appeals from those countries.

Infrequently a Board consisting of only three Law Lords sits. In the absence of the Lord Chancellor, the senior Law Lord present presided. For sometime, however, a Law Lord has been nominated to regularly preside (Lord Diplock). But more recently arrangements have been made for other Law Lords to preside even when the Law Lord nominated to preside is present.

Counsel, parties and members of the public are not admitted to the Court room until the members of the Board are seated and ready to commence or continue the hearing. The members of the Board wear no regalia. Counsel are robed as in a Westminster court, bewigged and gowned. Senior Counsel do not wear full bottomed wigs as aforetime they did in arguing in the House of Lords. They use the same sergeant's wig as they do in the Westminster Courts. There is very little accommodation for members of the public in the Court room. But citizens in limited numbers are able to be present.

The members of the Board sit around the curved side of a large table, the flat side being against a dividing rail, "the bar", running across the width of the room. Formerly a rectangular table ran the length of the area behind the dividing rail, the Committee members sitting on both sides of the table facing each other during the hearing, a situation which must have been awkward for Counsel arguing an Appeal.

A lectern stands in the middle of the straight side of the table up against the dividing rail, all being on the one floor level. Supporting and opposing Counsel are seated on short benches or pews at right angles to the side of the table on either side of the lectern. Counsel addresses the Board standing at this lectern.

The Registrar sits at a table behind the members of the Board. He announces the case for hearing or judgment and requests the retirement of Counsel, parties and members of the public on adjournment or conclusion of an Appeal.

Behind the place where Counsel stands is a long rectangular table on which law reports to be cited or papers to be referred to are placed. In an Appeal where there are more than two parties to be heard or where numerous Counsel are employed, Counsel may be accommodated at this table.

Notwithstanding the height of the ceiling, the acoustics of the room are fairly good; little noise of road traffic penetrates the room.

The Hearing

Apart from the contents of the parties' cases to which I have referred, the argument of the Appeal is entirely oral. The members of the Board participate, asking questions, seeking information, testing the ambit of the propositions put forward and at times suggesting contrary possibilities for counsel's consideration. The members of the Board usually expose any difficulties they have either with the facts of the case or with the arguments which are being advanced. I have found that the Judicial Committee uses hearing time as work time, its members working towards the solution of the problems presented by the Appeal.

The atmosphere is informal and the relationship of Committee and Bar most friendly, conversational, both courteous and respectfully direct on both sides of the table.

The extent of the involvement of the Members of the Committee in the discussion of the Appeal might be seen in this personal incident.

I was arguing, now more than thirty years ago, for the proposition that to be an injury for the purposes of Workmen's Compensation, the bodily change said to be the injury must be due to some excitement external to the body: in other words, that autogeneous changes of the body could not constitute compensable injuries.

Lord Porter was presiding. Those of you who remember him would recognise him as at times looking somewhat frail. A pot of tea was brought to him at eleven o'clock each day. He then poured himself a cup without interrupting the argument, often handling the cup as he himself made a point.

This day, Lord Reid was the next senior member of the Board. He interrupted my argument to give me an illustrative situation and to ask my suggested explanation of it. He said: "Suppose two men on a tram going to work, one of whom had a weak heart. The other, of a sudden, asked the man with the weak heart, whether he had sent in his income tax return — seemingly then recently due for lodgment. The shock of recollection that he had not done so caused his heart to fail and he died." "Was that an injury?" asked Lord Reid. I said it might possibly be by treating the excitement of the question as an external cause of the result.

Lord Reid then said, "Now suppose that the man with the weak heart had been travelling alone in the tram. As he sat ruminating, he suddenly remembered that he had failed to lodge his income tax return. The shock of recollection killed him. Would that be an injury?" I replied, "No, I could not accept that it was. There was no external stimulus for the result." Lord Reid then said, "So that in your book however slight the excitement, provided it is external, it will make the change an injury." I assented.

As it happened, when this exchange with Lord Reid was taking place, the tray of tea had arrived for Lord Porter, a cup had been poured — none of this, as I have said, was allowed to interrupt the proceedings — and Lord Porter, as Lord Reid perceived, was about to raise the cup of tea to his lips. Lord Reid at that moment said to me, "So if the mere raising of a cup caused a change, perhaps fatal, that would be an injury satisfying your argument." Lord Reid said this with a twinkle in his eye and all, including Lord Porter, were visibly amused, though Lord Porter somewhat wryly.

This incident indicates the intensity of the interest and thought being employed in the hearing, the ease with which an argument can be conducted and the good humour that is just under the surface ready to erupt to lighten the day.

And if time permitted I could give other illustrations of the same.

Usually, no shorthand or otherwise recorded note is taken of Counsel's argument. There have been cases where the parties have organised a record of argument to be made and a transcript to be supplied to the Board, but this is not a usual happening. Each member of the Board has a note book and pencil provided. Its members make notes during the argument, at times indicating to Counsel how they have expressed for themselves in their notes the points he has raised. Other times they write down, as they say at dictation speed, the precise language in which Counsel casts his propositions.

At the conclusion of the hearing, Counsel and the parties, and of course any members of the public present, are asked to withdraw, the members of the Board remaining in their place. They immediately discuss the case and may reach a conclusion. When the Board has decided what it will do, i.e. decide immediately or take time for consideration, Counsel and the parties are recalled, and informed of what the Board has decided to do. But in any case, the discussion between its members may enable one of the members of the Board to commence the preparation of a draft judgment for consideration. This draft is circulated amongst the members,

and may suffer amendment on a number of successive occasions on which it is distributed and further meetings of the Board may take place.

In the case of an Application for Special Leave to Appeal, the Board as a general rule immediately announces its decision. Usually no reasons are given.

When at a later date the members of the Board or a majority of them are satisfied with a final draft, the parties are notified. On an appointed day the decision is publicly announced as required by the statute of 1833. The reasons, printed but still in draft form, are published by the presiding member of the Board then sitting, though not necessarily the same Board which heard the Appeal. The purpose of the draft form of the reasons is to give the parties an opportunity to point out any error of fact which may have crept into them.

Incidentally, the published draft may be numbered, thus giving some indication of the number of times the first draft had suffered amendment.

In the case of Appeals from countries with a Monarchical constitution, the judgment takes the form of a report and its conclusions expressed as advice and recommendations.

In the case of Appeals from a republican member of the Commonwealth, the Committee makes its own decision.

The Committee, as I have said, was set up as an independent Court of law. Although the Committee's advice is bound to be implemented, the retention by the Act of 1833 of what might be called a vestigial fiction, i.e. the Committee being a Committee of the Council, has resulted in the giving of only one set of reasons for the advice tendered whether the decision be unanimous or by majority. In the case of an Appeal to the Committee itself from the Courts of a Republic, the practice of supporting the decision by a single judgment is still followed.

It may be that the members of the Committee may not choose to give a single judgment if not under this constraint. The Law Lords who sit as members of a Board of the Committee at times deliver separate judgments — in the form of Speeches in the House of Lords. Indeed, some Law Lords may prefer to sit in the House rather than on the Committee because of the necessity for a single judgment.

Quite clearly a majority decision of the Board is contemplated by the Act of 1833. It provides for it. Because of a Privy Counsellor's Oath of Secrecy, whether or not the judgment was reached unanimously or by majority, and, if so, who formed that majority, had not earlier been publicly known. There was, however, always an opportunity for a dissenting member of a Board to have his dissent stated in the unpublished records of the Committee. But in 1966, during the Chancellorship of Lord Gardiner, an Order in Council was made which allowed a member of a Board to publish his dissent from the decision of the Board and his reasons therefor. This privilege is understood to extend to the reasons for judgment as well as to the result expresed in the advice. If dissent is published, obviously it becomes publicly known that the matter was decided by majority. But, even so, the identity of those forming the majority is not

necessarily known. There may have been more than one dissentient though only one of them made public his dissent. But generally if there is published dissent, the identity of those forming the majority may be inferred.

But although published dissent is now possible there have been only 57 occasions during almost twenty years on which a member of a Board has published dissent. Also the annual number of such dissents has markedly declined during the last ten or twelve years. The Members of the Board evidently regard the publication of dissent to be a relatively rare event confined to occasions where matters of considerable principle are involved.

Generally, the decisions of the Committee exhibit brevity in expression. Possibly, resort to a single judgment contributes to this. Reasons do not range beyond what is essential for the disposal of the appeal and, perhaps because of the finality of its decisions, exhibit a minimum of citation of decided cases. Also, I think an overview of the Committee's decisions over time would demonstrate the regard for the practical consequences for the parties and, indeed, the community, of what is decided.

I think the Committee remembers that the paramount duty of Courts is to resolve the dispute between the parties. It does not regard itself as an arm of a law reform commission. Such change in the accepted law which may result from its decision is, in a sense, accidental, no more than a necessary consequence of the resolution of the parties' dispute according to law.

As a rule, the result of an Appeal and the reasons for judgment are publicised within a fairly short time after the conclusion of the argument.

The elements of the Committee's method may be summarised as:

a. Preparatory cases prepared by the parties to adduce the issues on Appeal and the parties' propositions relevant thereto.
b. An oral hearing in which there is judicial participation.
c. The making of personal notes of argument.
d. The use of the hearing to work towards a solution and the expression of a single judgment.
e. Promptitude in decision.
f. Brevity in expression of reasons for judgment in a single judgment placed on the narrowest available ground to resolve the parties' dispute.

Now permit me to make a few brief comments.

Few, if any, Appellate Courts in the Commonwealth of Nations insist on the issues to arise in the hearing of an Appeal being worked out by the parties before setting down the Appeal and before making up the record to be used on the hearing. They have their Appeal books which contain mainly the record of the proceedings and a notice containing grounds of Appeal.

The idea of making the parties identify the issues on appeal in their own time and not during the hearing is a good one. But probably a more rigorous discipline than that imposed by the Committee's rules is desirable. No lack of frankness or resort to generality should be accepted, particularity as

well as brevity should be required. The identification of the questions, which being answered will resolve the parties' dispute, is most important in two respects.

First, if properly done it should reduce the time of the hearing and make the discussion there more concentrated and constructive. Secondly, it should enable the record of the proceedings to be provided for the Court to be restricted to material which remains relevant to the resolution of those issues. A great deal of money and time is wasted in the printing and perusal of a record which contains much that is no longer essential to the disposal of the Appeal. Appellate Courts are already burdened with heavy and in some places almost unmanageable lists. To reduce the Appeal to its essentials and to reduce the amount of material presented for consideration ought to assist in alleviating the pressure of the lists.

It should never be overlooked that the paramount duty of a court of law is to settle the dispute between the parties and to do so according to law. The justice the Court must seek to do is justice according to law. It cannot be justice according to the whim or personal view of the Judge or Court. To condone the latter course is to forfeit the possibility of certainty in the administration of the law, and to admit of personal idiosyncrasy. Such personal but often divergent views are doubtless at times attractive, but in the long term bring into jeopardy the certainty of justice according to law.

The Courts of the Commonwealth hear oral argument. Few, if any, put time limits on the advocates. Nor do I think there should be such constraints. The Presiding Judge should be able to confine Counsel to relevance, to reduce if not eliminate repetition and trim his eloquence to brevity. With all its risks I favour oral argument. I do not believe that matters in Appellate Courts can be adequately resolved upon written arguments. These tend to prolixity, to generality and often to obfuscating expression. Nothing in my view is so conducive to a sound result as an oral presentation of argument by parties pressing their own interests with lively judicial participation in discussion with Counsel.

Time spent in an oral hearing should never be regarded as wasted time. Given the capacity to decide, it provides an opportunity to work out the solution of the parties' problem.

In some places we have become accustomed to the recording and transcription of argument as a regular practice. A transcript of argument as a means of checking recollection is one thing: it is another to use it as a substitute for critical attention and participation during the hearing. Even in that respect, the Judge's own recorded impressions may prove more valuable. The availability of a transcript of argument ought not to lead to passivity on the part of the Judge nor to the postponement of consideration and to the inevitability of a reserved judgment.

When Court time is not regarded as work time, a reserved decision does become inevitable. The result is delay and often a long postponed result. Whilst no doubt many problems need research and contemplation, there remain many which can be immediately disposed of. But to reserve all decisions is doubtful as a regular practice. Reservation may be necessary in

particularly difficult cases. Given a capacity to decide, there is no reason to suspect the validity of a prompt decision when there has been full argument and lively participation by the judiciary. Lord Eldon, who is said always to have reserved his decision, on occasions taking up to three years to finalise and publish it, is also said never to have decided the case in a different sense or for a different reason to the opinion he held at the conclusion of the hearing. The same may be true of other Appellate Judges of more recent times.

As I have said, the Committee delivers a single judgment under the constraint of the fiction that it is but giving advice. But, whilst opinions as to its desirability may be divided, a single judgment makes for brevity in expression and certainty in result. Supporting reasons tend to be confined to the necessities of the case.

A single judgment by an Appellate Court consisting of a number of Judges is no doubt difficult to achieve. If the Court is composed of only three members, it is more likely. In the case of a Court of five, it is more difficult. In a Court of more than five, I should think a rare possibility. But it can scarce be denied that a single judgment is more likely to lead to certainty in the law than do the many and often varied reasons for judgment not uncommonly experienced. To make the target a single judgment rather than a reserved judgment with individual expressions of opinion is, I think, a good judicial discipline, even if the target is not always attained.

Courts lower down in the judicial hierarchy who must conform to precedents set by the higher courts, may have difficulty in some cases where multiple judgments are delivered in determining what was the majority view which supported the result. Because of the diversity of the separate views, there may indeed be no single reason agreed to by a majority for supporting the decision.

An ultimate Court of Appeal is a court of authority. Its expressed views become both authoritative and definitive. It has little if any need to justify itself by reference to recorded cases. The accommodation of divergent recorded cases may need to be made. But, generally, the logic and clarity of the Court's own exposition should be enough. Thus brevity is attainable. If expressed in a single judgment, certainty should also be attained.

The price to the community of what is sometimes no more than personal indulgence in the publication of separate judgments is high. A judgment founded on reconcilable views though separately expressed may provide certainty. Yet there may be doubt as to whether the individual differences are intended to introduce substantial diversity. But if the individual judgments express diverse views, uncertainty is likely.

There is of course a place for the expression of dissent. Great advantage has come to the law from clearly expressed dissenting judgments. In what I have said about severally expressed reasons for the same ultimate result is not meant to suggest any limitation, except of course of brevity, on the expression of dissent.

Discursive individual judgments often stem from a refusal to accept the discipline of the search for common ground. Apart from the confusion and uncertainty which multiple and perhaps diverse reasons for judgment

create, they add greatly to the bulk of the recorded material and thus contribute significantly to cost and delay in litigation.

A feature of our times is the quite phenomenal growth of legal literature. The decisions of courts of law in almost all the English speaking countries are readily available in most places. As well, academic writing has increased, its product being available in a range of publications. The available array of material is daunting, both for bench and for bar. Too often, too little selection is made by publishers of what is included in the bulk of this material. Single instance decisions, no more than particular applications of well documented principles, are included.

I fear that the arrival of the computer with increase in the availability of this mass of material may well exacerbate the situation. The judiciary may be offered a vast amount of reference material, which must be sorted through to eliminate the chaff and attempt to discover some grain. Also, the availability of such a vast amount of material may, in the end, displace clear thinking and preclude resort to fundamentals. What may pass for research, but is little more than the mechanical aggregation of references, may do little more than add to cost and delay and do nothing for the certainty of the law.

If the resort to Appellate Courts becomes costly or tardy, inequality of resources of the litigants may rob equality before the law of any reality. There is therefore a considerable obligation to practise brevity, absence of duplication and restraint in going beyond the necessities of resolving the parties' dispute.

Our Courts lack the compulsion to decide with a single judgment which motivates the Committee. But the ability of the Committee over time to resolve so many disputes by a single judgment does suggest that judicial discipline, and a willingness to work for a single expression of judicial opinion, may produce considerable benefit for our legal systems.

The methods of this unique Court of law, tested over more than a century with a very wide spread of activity, therefore have relevance for our Courts of Appeal, particularly for our final Courts of Appeal who now shoulder much of the burden formerly carried by the Judicial Committee of the Privy Council.

The law's delays and the cost of its administration are ever with us, a standing reproach to our ability to administer the law. Perhaps, bearing in mind the increasing resort of citizens to the Courts about more and different aspects of community life, some degree of delay in the processes of the Courts is bound to occur. But it seems to me that wherever there is any possibility of curtailing the time required to reach finality, the Courts should explore it. The example of the Judicial Committee is therefore well worthy of consideration.

The Rt. Hon. Sir Garfield Barwick

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
Jurisdiction as at 1st May 1985

Commonwealth Jurisdiction

A. APPEALS TO HER MAJESTY IN COUNCIL

Australia

Appeals from the Supreme Courts of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia.

(1) By leave of Supreme Court. This leave is granted "as of right" from final judgments in civil disputes where the value of the dispute is more than a stated amount. Leave may also be granted at the discretion of the court in interlocutory matters or matters of great public importance.

(2) By special leave of Her Majesty in Council. (Applications for special leave usually occur in criminal cases or where the appellant has for some reason failed to properly apply to the local court in a civil case.)

Territory	Basis
Antigua and Barbuda Bahamas Barbados Belize Brunei Fiji Jamaica Mauritius New Zealand St. Christopher and Nevis Saint Lucia Saint Vincent and the Grenadines Tuvalu The Sovereign Base Area of Akrotiri (in Cyprus) *The Dependent Territories	By leave granted in the local court according to provisions similar to those governing the Australian States (see above) or by special leave of Her Majesty in Council. Also "as of right" in appeals in constitutional matters from most independent territories with written constitutions granted in recent years.

*The Dependent Territories include —

Anguilla
Bermuda
British Antarctic Territory
British India Ocean Territory
British Virgin Islands
Cayman Islands
Falkland Islands
Gibraltar
Hong Kong
Montserrat
St. Helena
Turks and Caicos Islands

B. APPEALS TO LOCAL HEAD OF STATE

Malaysia

Appeals lie from the Federal Court to the Yang di-Pertuan Agong. By agreement between Her Majesty and the Yang di-Pertuan Agong these appeals, which relate to civil cases only, are heard by the Judicial Committee who report their opinions to him instead of to Her Majesty. The appeal is by leave of the Federal Court which is granted "as of right" where the value of the dispute is more than a stated amount or in certain circumstances at the discretion of the Federal Court. An appeal will also lie by special leave of the Yang di-Pertuan Agong made on a report from the Board. As from 1st January 1978 the right of appeal in criminal and constitutional cases ceased. The right of appeal in civil cases ceased as from 1st January 1985.

C. APPEALS TO THE JUDICIAL COMMITTEE

1. The Republic of Trinidad and Tobago
2. The Republic of Singapore
3. The Republic of the Gambia
4. The Commonwealth of Dominica
5. Kiribati

The appeal lies direct to the Judicial Committee which makes its own Order without advising Her Majesty in Council or the local Head of State. There are provisions for Singapore, Trinidad and Tobago, The Gambia and Dominica governing the grant of leave by local courts on similar lines to the Australian States (see A above) and the Board may grant special leave to appeal. For Kiribati the appeal lies only in constitutional cases affecting a Banaban.

REFERENCES

1. Dr Peter Howell: "9 Downing Street". 1973.
2. Privy Council (Limitation of Appeals) Act 1968 (Commonwealth))
   Privy Council (Appeals from the High Court) Act 1975
3. *M.B. Ibrahebbe alias Rusa Wattan & Anor* v *The Queen* [1964] A.C. 900
4. Ibid at p. 919
5. Rules 60 and 63 of Judicial Committee Rules
   Bentwich — Privy Council Practice 5th Ed. Generally and at p. 160