APPEALS TO THE PRIVY COUNCIL: FIJI

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It is a feature of arguments justifying the Privy Council as a Commonwealth Court of Appeal that they can usually be rephrased to favour its abandonment. The proposition that the Privy Council is a disinterested expert tribunal aloof from political and social pressures in the Commonwealth countries from which its judicial business is drawn can be restated in negative terms to the effect that it is an anachronism, a chance survival from the colonial past, its members generally remote from the peculiar problems of the far-away countries in whose affairs they meddle. The capacity of the Privy Council to redress wrongs and dispense justice to the oppressed in those independent Commonwealth countries which retain it as their ultimate court of appeal is no merit to those who see its intervention as a denial of their sovereignty and independence. What to one is a virtue, is to another repugnant. How then is one to begin the discussion of the possible future role of the Privy Council or its various alternatives as the ultimate Fiji Court of Appeal? A statement of advantages might easily be made to appear a catalogue of defects.

Firstly, one might perhaps glance at its past performance in so far as Fiji is concerned and make some predictions about its judicial policy in the immediate future, should it be retained. However, the colonial record of the Privy Council in Fiji appeals is hardly a justification in itself for its retention after independence. The cases do not seem to have been so numerous or so similar as to induce anything approaching a coherent exposition of any major section of the law of Fiji.

Of the years between the wars, 1936 probably saw the apotheosis of the Privy Council's enlightened paternalism. In that year a Fiji solicitor was held to have misconducted himself,[1] not so much because he borrowed from his trust funds, but because he considered his own interests in preference to those of the beneficiaries of an estate of which he was trustee, in altering the terms of a mortgage to the beneficiaries' detriment. One of the beneficiaries was a Fijian, while the others were of mixed race, and their Lordships stressed the high standard of duty and care owed by a solicitor to clients who were disabled by virtue of membership of a genus comprising natives, half-castes and the ignorant and illiterate.[2]

In the same year, they expressed their disapproval of the Chief Justice of Fiji, who, in a murder trial,[3] would not allow counsel for an accessory to complete his case, and who categorised as improper a request from solicitors acting for the defendants seeking the production of statements made by their clients to policemen. The letter of request was criticised at the trial by the Attorney-General as containing insinuations that the prosecution had suppressed documents. Actually, two

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1 *Grahame* v. *Attorney-General of Fiji*, [1936] 2 All E.R. 992.
2 *Ibid.*, at p. 1002.
3 *Mahadeo* v. *R.*, [1936] 2 All E.R. 813.

statements made by the only witness were not in fact even produced at the trial, though the Attorney-General was unaware of this. The statements only became available at the hearing of the appeal before the Privy Council. Not surprisingly their Lordships could find no impropriety in the letter asking for their production.[4] Ultimately, after a number of other submissions had been considered, the appeal was allowed and the conviction was set aside.

Of the post war Fiji cases, those dealing with land, though no doubt in a minority, have probably greater intrinsic interest than the criminal appeals, in that they illustrate both the limitations of the Judicial Committee's handling of specifically Fijian problems, and the benevolent paternalism of its judicial policies. Examinations of Fiji constitutional problems have been rare and generally unenlightening.[5]

In 1957 the Judicial Committee concerned itself with problems surrounding the payment of compensation moneys, following the compulsory acquisition of Fijian land.[6] These moneys were claimed both by the Native Land Trust Board and the appellant, Ratu Taito Nalukuya, on behalf of himself and the members of his land holding unit, the Tokatoka Nadrau. It was not disputed that the land had been acquired from the Tokatoka Nadrau, but the Native Land Trust Board's claim was derived from its statutory monopoly over the administration of native land as a trustee for the Fijian owners, and the prohibition of its direct alienation by the owners, except to the Crown. Ratu Taito sought immediate control of the proceeds of the acquisition, while the Board wished to invest most, if not all, of the money and distribute the income from these investments.

It is possible that the appellant feared that he would lose not only immediate control of the money but also part of the income distributed by the Board, because it proposed to adopt the same formula for the distribution of the moneys in this case as it used in distributing rent payments from its leaseholds to the Fijian owners. This system was based on a lands policy which placed primary emphasis on a larger kinship group than the Tokatoka as the key land holding unit.[7] This larger unit was called the mataqali. It was probable, therefore, Ratu Taito thought that if the Board distributed the moneys in the way it proposed, not all of the moneys would go to the Tokatoka Nadrau but part of them would find their way to leaders of the mataqali within which it was but one Tokatoka.

As it was proposed to treat the income like rents, the appellant could also have reasonably anticipated that the Board would deduct its normal 25% management and agency fee from the annual income before distribution, though in this case I am informed it did not, retaining only a total flat rate of five guineas per annum as its fee.

The Ordinance dealing with the compulsory acquisition of Fijian land[8] was silent as to the distribution of the moneys payable by way of compensation to the dispossessed owners. The Board relied mainly

4 *Ibid.*, at p. 816.
5 e.g., *Thornton* v. *The Police*, [1962] 2 W.L.R. 1141; [1962] A.C. 339.
6 *Nalukuya* v. *Director of Lands, Native Land Trust Board of Fiji, Intervener.* [1957] A.C. 325.
7 The elevation of the mataqali is analysed by Dr Peter France in *The Charter of The Land*, Melbourne, 1969.
8 Crown Acquisition Of Lands Ordinance (Laws of Fiji, 1945, c. 122).

on section 15 of the Native Land Trust Ordinance,[9] which provided, *inter alia,* that

> . . . . the purchase money received in respect of a sale or other disposition of native land shall either be distributed in the manner prescribed[10] or invested and the proceeds so distributed as the board may decide.

It was held that the phrase " . . . other disposition of native land . . . " was, in the circumstances, wide enough to include the proceeds from its compulsory acquisition. Certainly, it would be difficult to construe " . . . other disposition . . . " *eiusdem generis* with a "sale", as the mention of one specific word in a statute cannot normally create a category limiting the construction of general words following it to things within that category.[11]

The Board's difficulty lay rather in identifying its statutory authority to receive the proceeds of the acquisition, as section 15 of the Ordinance only dealt with the distribution of monies after they had been received by it. Nevertheless, while agreeing that the drafting of the legislation was " . . . not as precise as it might be, . . . " their Lordships found it

> . . . difficult to believe that it was intended that the careful provisions safeguarding the proceeds of voluntary sales of native land to the Crown should not equally apply to the compensation payable on compulsory purchase of such land.[12]

There is indeed a possibility that the members of the Judicial Committee shared the assumption of counsel for the respondent Director of Lands that

> . . . it would be wrong that the native owners should be entitled to squander moneys given to them in these circumstances . . . [13]

and were anxious to fill any lacunae in the legislation in favour of the trustee Board.[14]

Be that as it may, the judgment could hardly reassure Fijians that the Judicial Committee was well equipped to deal with problems of conflict between customary law, ordinances and regulations.

In *Chalmers* v. *Pardoe*,[15] in which both parties were what are loosely described in the Pacific as Europeans, the appellant had built a house on the respondent's Fijian leasehold, with his agreement. But the prior approval of the Native Land Trust Board was needed for any alienation or dealing with the leasehold to be lawful. Section 12 of the Native Land Trust Ordinance[16] provided, *inter alia,* that

> . . . it shall not be lawful for any lessee under this Ordinance to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor . . . and any sale . . . or other unlawful alienation or dealing effected without such consent shall be null and void.

Although Pardoe originally agreed to allow Chalmers to have part of his lease, the parties fell out before permission for the dealing had

9 Laws of Fiji, 1945, c. 86.
10 Regulation 3 of the Native Land (Leases and Licences) Regulations.
11 Maxwell on Interpretation of Statutes, 11th edn., p. 327.
12 [1957] A.C. 325, at p. 333, *per* Lord Tucker.
13 *Ibid.*, p. 330.
14 *Ibid.*, p. 333.
15 [1963] 1 W.L.R. 677. This is a linguistic criticism, and not a reflection on the racial purity of the litigants, or either of them.
16 Laws of Fiji, 1955, c. 104.

been formally sought and obtained from the Native Land Trust Board. Ultimately, Chalmers, despairing of obtaining the consent of either Pardoe or the Native Land Trust Board, sought an equitable charge or lien over Pardoe's unsubdivided leasehold for the sum spent on the buildings. It was refused, at first instance, in the Fiji Court of Appeal, and, ultimately, by the Judicial Committee, on the substantial grounds that since the prior consent of the Native Land Trust Board had not been obtained the dealing was unlawful, and therefore equity could not be invoked in Chalmer's aid.

This was not one of those cases, like *Amar Singh* v. *Kulubya,*[17] decided later in 1963, where the Judicial Committee intervened to protect the rights of indigenous land owners by restricting the direct alienation of their lands without the prior approval of the authorities, as required by Ugandan legislation similar to that applying in Fiji, and preventing the occupier from relying on his illegal agreement to lease the land, in the interests of the indigenous land owners as a protected class. In *Chalmers* v. *Pardoe*[18] the land had already been alienated, and Fijian interests did not suffer as a result of the unapproved dealing—rather the reverse, as the Native Land Trust Board raised Pardoe's rent as a result of the erection of Chalmer's building on his land.

In the latter case the Judicial Committee agreed that

> . . . where an owner of land has invited or expressly encouraged another to expend money upon part of his land upon the faith of an assurance or promise that that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended . . . [19]

Having reached this point, one may perhaps be excused for wondering why the Judicial Committee did not decide that equity could be invoked on Chalmer's behalf on the basis that the illegality under section 12 of the Ordinance was prima facie that of the lessee Pardoe, on whom was placed the statutory duty of obtaining the Board's consent to the dealing to which he had originally agreed. Surely it could at least be said that the parties were not *in pari delicto,* leaving the way open for the granting of equitable relief to Chalmers, and, at the same time, the recognition that he could not obtain legal title to the land on which he had built without the Board's approval to the dealing.

Not altogether dissimilar unapproved agreements and dealings have been held to be by no means devoid of legal effect, at least in cases where the interests of a protected class of indigenous land owners are not directly in issue.[20]

Be that as it may, Fijian land holders could no doubt have obtained some solace from the judgment's strict interpretation of the statutory prohibition on dealings with native land without the trustee Board's prior consent. This solace, however, would have been qualified by the much later case of *Kulamma* v. *Manadan.*[21] Here the appellant was a widow,

17 [1963] 3 W.L.R. 513; [1964] A.C. 142.
18 [1963] 1 W.L.R. 677.
19 [1963] 1 W.L.R. 667 at pp. 681-2, *per* Sir Terence Donovan.
20 *Rawson* v. *Hobbs* (1961), 35 A.L.J.R. 342, at p. 350, per Windeyer J.; *Firns* v. *Bird* [1964] P. & N.G.L.R. 110 at p. 116 per Ollerenshaw A.C.J.
21 [1968] 2 W.L.R. 1074; [1968] A.C. 1062.

who wished to avoid the consequences of a share farming agreement made by her late husband Sabhapati, over his ten acre cane farm, which was sublet from the Colonial Sugar Refining Company Ltd., forming part of a much larger area held by the company from the Native Land Trust Board. The share farming agreement does not appear to have been to Sabhapati's great advantage. It provided for all his share of the profits of the farm to be paid to a money lender and, on the satisfaction of this debt, he had agreed to seek and obtain the transfer of the whole sublease to the share farmer. In economic terms, agreements of this type seem essentially unsatisfactory, amounting to a fragmentation, not perhaps of the small holding itself, but of the proceeds to be earned from it. While not amounting to an immediate alienation of the land, it was clear that Sabhapati was required to alienate in the future, and in the meantime was to be in a worse position than if he had already alienated, as the agreement required him to share the expenses of sugar cane production on the farm while the agreement ran its course.

The widow, as his administratix, not surprisingly tried to invoke section 12 of the Native Land Trust Ordinance,[22] and sought a declaration that the agreement was illegal and void. The Supreme Court of Fiji made such a declaration, but its finding was reversed on appeal. The Judicial Committee followed the Fiji Court of Appeal, on the substantial grounds that the share farming agreement was essentially a contract of employment, and while it contemplated a future alienation there was nothing to indicate that the Native Land Trust Board's approval would not be sought and obtained before this actually took place. Their Lordships presumed that the parties contemplated a legal course rather than the reverse, and that they would seek the Board's permission.

One hesitates to base an argument about the future of the Privy Council for Fiji on these cases. And in any event, predictions about the likely trend of Privy Council decisions in Fiji cases after independence should, perhaps, not so much follow an all too brief analysis of characteristic judgments from the colonial period, as an examination of appeal cases from recently independent countries, particularly appeals involving issues of the kind that may well arise in Fiji in the future, though unknown in the past.

A cursory glance at the constitutional law decisions of the Privy Council in recent years would hardly convince Pacific islands leaders of their Lordships' predictability, but neither should it give the impression of an appeal court anxious to overrule and obstruct the judges and legislatures of newly independent countries. Thus, the members of the Judicial Committee seem most reluctant to declare legislation invalid unless it obviously offends against established—though admittedly British—principles, and sometimes not even then.

A very obvious case of the legislature overreaching itself came on appeal from the Supreme Court of Ceylon in 1965. *Liyanage's* case[23] resulted from legislative exuberance in the punishment of participants in the abortive coup d'etat of January 1962. Unwilling to leave the unsuccessful revolutionaries to the vagaries of the existing criminal law Parliament passed elaborate retrospective legislation dealing exclu-

22 c. 104.
23 *Liyanage* v. *The Queen*, [1967] 1 A.C. 259.

sively with the coup d'etat. It sought to legalise the otherwise unlawful detention without charge of the alleged participants; it created a new offence to meet the circumstances of the coup, involving a minimum period of imprisonment of ten years together with forfeiture of all property; provided for trial without jury; and allowed the admission in evidence of otherwise inadmissible statements and confessions. Finally, all these elaborate provisions were to cease to have effect when the proceedings based on the coup came to an end, making it perfectly clear, as counsel for the detainees submitted, that this legislation

> . . . amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants . . . [24]

This was clearly too much for the members of the Judicial Committee who were, however, faced with the difficulty that the Constitution of Ceylon did not in terms prohibit the legislature from usurping the functions of the judiciary. They were, however, able to conclude that the constitution manifested an intention to leave the judiciary free from political, legislative, and executive control as it had been since the grant of the Charter of Justice in 1833.

Their Lordships considered that

> The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.[25]

There was also the difficulty that the legislature's powers were phrased, in section 29(1) of the Ceylon Constitution, in the traditionally wide formula of a

> . . . power to make laws for the peace order and good government of the Island.[26]

However, their Lordships substantially qualified the scope of this power by professing themselves unable to

> . . . read the words of section 29 (1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature—e.g. by passing an Act of Attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried—if in law such usurpation would otherwise be contrary to the Constitution.[27]

At the same time they were careful to stress the independence and sovereignty of Ceylon and to reject the appellant's alternative submissions that the legislation in question was bad because it was contrary to the fundamental principles of justice.[28]

However, in 1967, two years after the decision in *Liyanage's* case, the Judicial Committee showed the extent of its reluctance to interfere with the Ceylon legislature,[29] in the normal course, by upholding the validity of an Act[30] imposing civic disabilities on politicians found by a statutory Commission of Enquiry to have accepted bribes. The appellant in this case, Kariapper, was disqualified by the Act from voting at elec-

24 *Ibid.*, p. 283.
25 *Ibid.*, pp. 287-8.
26 *Ibid.*, p. 289.
27 *Ibid.*, p. 289.
28 *Ibid.*, pp. 283-6.
29 *Kariapper* v. *Wijesinha*, [1968] A.C. 717.
30 Imposition of Civic Disabilities (Special Provisions) Act, 1965. (No. 14 of 1965).

tions and standing for election for the House of Representatives or of any local authority for a period of seven years.

At first sight this case does seem similar to *Liyanage's*,[31] but the Judicial Committee upheld the Act's validity as an exercise of legislative power, rather than a usurpation of the functions of the judiciary. The decision is somewhat difficult to understand on this point, for though the penalties meted out by the Act were less severe than those devised for the participants in the coup d'etat of 1962, they were inflicted without the intervention of the courts at all, a course not envisaged by the 1962 legislation, which involved the judiciary in the trial of the revolutionaries.

But the Judicial Committee held that what the appellant claimed was a judicial determination by the legislature was in fact legislation altering the law as it stood, by imposing civic disabilities on those considered by the Bribery Commission to have accepted bribes.[32] Though could it not be said that the 1962 legislation held to be invalid in *Liyanage's* case[33] satisfied the same test of altering the law as it stood? It is also difficult to follow the reasoning behind the finding that the bribery legislation did not condemn the appellant for any action, and that the disabilities imposed on him did not have the character of a punishment for guilt.[34] Surely exclusion from voting and candidature for seven years is punishment to a politician?

One of the considerations saving the legislation in *Kariapper* v. *Wijesinha*[35] was that it just managed to satisfy the minimum conditions for a constitutional amendment, being inconsistent with the existing Constitution, although not expressly purporting to amend it, and having a Certificate endorsed on it to the effect that it had been passed by the necessary two-thirds majority of the members of the legislature required for a constitutional amendment.

This case then, illustrated the Judicial Committee's reluctance to interfere with the legislation of an independent member of the Commonwealth, and, while not overruling *Liyanage's* case,[36] illustrated the limitations of the principle enunciated in it that the judicial power in Ceylon could not be shared by the legislature or executive.

A comparison of the Malaysian appeals, *Devan Nair* v. *Yong Kuan Teik*,[37] and *Ningkan* v. *Government of Malaysia*[38] indicates the tendency of the Judicial Committee to draw the line at interference in the affairs of recently independent nations wherever possible. The former case dealt with a disputed election. The election judge had struck out the petition on the ground that notice of its presentation had not been published in the Gazette within the time prescribed in the rules made under the Election Offences Ordinance.[39] He held that these provisions were mandatory. The case then went on appeal to the Federal Court of Malaysia and thence to the Judicial Committee.

31 [1967] 1 A.C. 259.
32 [1968] A.C. 717 at p. 738.
33 [1967] 1 A.C. 259.
34 [1968] A.C. 717, at p. 734.
35 [1968] A.C. 717.
36 [1967] 1 A.C. 259.
37 [1967] 2 A.C. 31.
38 [1969] 2 W.L.R. 365.
39 This was in lieu of personal service in cases such as the present one where the respondent had no solicitor.

Their Lordships had no difficulty in following the line of authority[40] that appeals do not lie from the final decisions of election judges, who are normally outside the traditional hierarchy of the courts and who must make rapid and final decisions so that the work of the legislature will not be disrupted by uncertainty as to its membership. However, although the election judge struck out the petition, he apparently assumed that he had made thereby an interlocutory decision, rather than a final decision, and their Lordships, somewhat surprisingly, were prepared to make a similar assumption. This assumption had the virtue of allowing them to hear the appeal, as the prohibition on appeals to the Judicial Committee from decisions of election judges is only in respect of their final decisions.[41] Their Lordships then went on to agree with the election judge that the rules in question were mandatory and found that they had not been complied with. As a result, they held that the original proceedings before him were a nullity.

Any inference that their Lordships were not unwilling to interfere in Malaysian political affairs, that may have been drawn from their persistence in going on to hear this election petition case instead of opting for the solution that the decision of the election judge was final and therefore not appellable, is rebutted by *Ningkan's* case.[42]

It concerned the dismissal of the Chief Minister of Sarawak, a member State of the Malaysian Federation, by the Governor of that State, acting under a Federal statute, the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, which was passed following the proclamation under Article 150 of the Federal Constitution that a state of emergency existed throughout Sarawak. This statute allowed the Governor of Sarawak to do that which the courts had held he previously could not do, namely, to dismiss the Chief Minister. In the resulting litigation it was alleged that the proclamation under Article 150 of the Malaysian Constitution which was a necessary prerequisite to the passing of the statute enabling the dismissal of the Chief Minister was

> . . . *in fraudem legis* in that it was made not to deal with grave emergency [sic] whereby the security or economic life of Sarawak was threatened but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak.[43]

Their Lordships were invited to say whether a proclamation made under statutory powers by the Supreme Head of the Federation could be challenged in the courts on any ground, but declined to rule on this point. Rather, they held that the appellant had not discharged the heavy onus placed upon him to prove that the Federal proclamation of a state of emergency was *in fraudem legis*.

They declined to hold that a state of emergency necessarily involved actual or threatened violence and, surprisingly, admitted the explanatory statement of the Malaysian Government issued while the impugned Act was a Parliamentary Bill. This statement justified it on the grounds, *inter alia*, that

> In a recent judgment of the High Court in Borneo it was held that the question whether the Chief Minister commands the confidence of a majority of the members of the Council Negri cannot be resolved otherwise than by a vote in the Council itself. It was further held, in the same judgment, that the

40 Briefly summarised in [1967] 2 A.C. at p. 40.
41 [1967] 2 A.C. 31 at p. 42.
42 [1969] 2 W.L.R. 365.
43 *Ibid.*, p. 371.

> State Constitution confers no power on the Governor to dismiss, or by any means to enforce the resignation of, a Chief Minister, even when it has been demonstrated that he has lost the confidence of a majority. This is a serious lacuna in the State Constitution, and one which enables a Chief Minister whose majority has become a minority to flout the democratic convention that the leader of the Government party in the House should resign when he no longer commands the confidence of a majority of the members. The occurrence of such an event, resulting in the breakdown of stable Government and thereby giving rise to the spreading of rumours and alarm throughout the territory, is in the opinion of the Yang di-Pertuan Agong, as expressed in the proclamation of emergency, a threat to the security of Sarawak.[44]

They then went on to hold that it was not for them

> . . . to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak . . . [45]

In view of this careful avoidance of a judicial examination of the motives and actions of the executive, it is surprising that their Lordships subsequently refused to decide whether the proclamation of the state of emergency was justiciable.

Some of the Jamaican appeals reflect similar trends to those noticed in these Ceylonese and Malaysian decisions. In two cases, *Director of Public Prosecutions* v. *Nasralla*,[46] and *King* v. *The Queen*,[47] their Lordships favoured the interests of the executive against those of citizens relying on civil liberties provisions in the Jamaican Constitution. *Nasralla's* case[48] was concerned with a section of the 1965 Jamaican Constitution very similar to section 8(v) of the Fiji Constitution of 1966.[49] The Jamaican provision, section 20(8), stated that

> No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence.

The members of the Judicial Committee were reluctant to interpret this constitutional provision as an innovation or as a statement of fundamental rights and freedoms which broke new ground.

The respondent had been charged with murder, but the trial judge in his summing up quite properly put the issue of manslaughter to the jury as well. There was a verdict of acquittal on the charge of murder, and disagreement on the issue of manslaughter. The respondent had to show that this verdict was not a partial but a general verdict, so as to invoke the doctrine of *autrefois acquit*, for their Lordships considered that the constitutional provision did no more than declare the existing common law principles of *autrefois acquit* and *autrefois convict*.[50] In this the respondent failed, and the principle was affirmed that a successful plea of *autrefois acquit* required proof of acquittal, and not of a situation where the jury might have acquitted but failed to agree.[51]

It is submitted that a literal interpretation of the words of section 20(8) of the Jamaican Constitution tend to favour the respondent. The

44 *Ibid.*, p. 372.
45 *Ibid.*
46 [1967] 2 A.C. 238.
47 [1968] 3 W.L.R. 391.
48 [1967] 2 A.C. 238.
49 The Fiji (Constitution) Order 1966.
50 [1967] 2 A.C. 238, at p. 247.
51 *Ibid.*, at p. 259.

primary charge was murder, and he was acquitted. Now the section provides that he shall not be tried again "for that offence" namely, the murder charge,

> or for any other criminal offence of which he could have been convicted at the trial.

Surely the alternative proposition encompasses a situation on all fours with *Nasralla's* case, namely, where a person could have been convicted of a charge and was not.

Was it not immaterial that the jury in *Nasralla's* case disagreed on the manslaughter issue, once it was established that they could have convicted him and thereby invoked the application of section 20(8) of the Constitution in any subsequent manslaughter trial?

In *King's* case,[52] the Jamaican constitutional provision protecting the subject against search of his person or property was considered. Section 19(1)[53] stated that

> Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

Section 7(1) of the Fiji Constitution of 1966[54] is in exactly the same words. Sub-section 2 of section 19 of the Jamaican Constitution, however, added the qualification that

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required . . . for the purpose of preventing or detecting crime . . .

The Fiji Constitution contains the same prohibition against search and entry without consent, coupled with provisos which do not assist the executive to the same extent as those in the Jamaican Constitution.[55]

In *King's* case,[56] the appellant had been charged with being in possession of dangerous drugs. The Dangerous Drugs Law[57] allowed searches of premises and persons to be made, but subject to certain safeguards, including the requirement that a person suspected of having drugs in his possession had to be searched in the presence of a justice. The appellant was searched, but not before a justice. Nor was he named in the warrant relied on by the police.

He was convicted by a Magistrate, and the conviction was upheld in the Court of Appeal of Jamaica. Appealing again, he fared no better in the Privy Council, for their Lordships held that although the search of the appellant was not justified either by the warrant or the law of Jamaica, nevertheless the court had a discretion to admit evidence obtained as a result of an illegal search, and this discretion had not been taken away by the constitutional provisions prohibiting unlawful searches of persons and property. Their Lordships considered that

> This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.[58]

52 [1968] 3 W.L.R. 391.
53 Of the Jamaica (Constitution) Order in Council, 1962, Schedule 2.
54 The Fiji (Constitution) Order 1966.
55 *Ibid.*, Schedule 2, Section 7 (2).
56 [1968] 3 W.L.R. 391.
57 C. 90, s. 21 (2).
58 [1968] 3 W.L.R. 391 at p. 401, *per* Lord Hodson.

Once again, members of the Judicial Committee were not prepared to read anything more into a constitutional provision saving civil liberties than a declaration of existing common law principles.

Having contrasted its enlightened paternalism in colonial appeals from Fiji with its conservatism in cases coming from recently independent countries, one is led to conclude that the retention of the Judicial Committee after independence should not be an altogether unattractive or potentially embarrassing proposition for the leaders of Fiji,[59] unless there is insistence on the constitutional point that the retention of the Judicial Committee is a qualification on the sovereignty and the independence of Fiji. Now, this point must be conceded in its broadest sense, while at the same time, it may be asked whether it has any real practical significance, and whether there is likely to be any interference with the independent government's policies as a result of keeping the Judicial Committee.

It should also be clear that once a nation adopts a written Constitution its Parliament can never be as sovereign as is the Parliament at Westminster, since, according to modern practice, there must be some body, almost invariably a court, outside the legislature interpreting the validity of its enactments in terms of the Constitution. Now, admittedly, there is a distinction between siting this constitutional court inside Fiji and having it in London, but this distinction is less significant than the distinction between the Parliament which is controlled by the courts by means of constitutional interpretation and the Parliament which is not.

Of course, the trend of this argument is towards testing the merits of the Privy Council primarily as a constitutional court of last resort. But to place the argument on any other basis would hardly make the case for its retention the more formidable, to put it at its highest.

The nature of its past interventions in fields largely dominated by the statute law applicable in Fiji has not been such as to justify, of itself, the retention of the Judicial Committee.[60] Nor can any argument seeking the retention of the Judicial Committee as the ultimate Court of Appeal in Fiji be based on the criticism that the present appellate structure of the courts within Fiji is inadequate. This is well illustrated by the case of *Comptroller of Customs* v. *Western Lectric Co. Ltd.*,[61] which eventually reached the Judicial Committee in 1965 after a series of hearings and appeals before a magistrate, a Supreme Court Judge and three members of the Fiji Court of Appeal.

Similarly, it is difficult to justify retention of the Judicial Committee in the interests of maintaining a single body of Commonwealth common law, if it is accepted that the non-statutory part of the law of each Commonwealth country should not exist *in vacuo* as an independent and isolated system unaffected by the peculiar conditions and requirements of each particular society.[62] Naturally, these vary from one Common-

59 On the other hand, opposition groups and dissident individuals should not hold out great hopes that the Judicial Committee will be enthusiastic in intervening on their behalf.

60 Despite, it is submitted, the judgments in the two customs cases, *Comptroller of Customs* v. *Western Lectric Co. Ltd.*, [1965] 3 W.L.R. 1229, and *Patel* v. *Comptroller of Customs*, [1965] 3 W.L.R. 1221.

61 [1965] 3 W.L.R. 1229.

62 At this point, deferential reference should be made to the much-quoted judgment of Denning L.J., as he then was, in *Nyali Ld.* v. *Attorney-General*, [1956] 1 Q.B.1, at pp. 16-7.

wealth country to another, and national courts, with their presumed knowledge of local conditions and needs, are in the best position to develop the common law to suit the specific needs of their respective countries, while making use of relevant case law from other common law jurisdictions.

It is submitted that the Privy Council must stand or fall as the ultimate court of appeal from Fiji and other Pacific island countries mainly insofar as its constitutional law functions are concerned, defining these as broadly as possible to include not only constitutional interpretation, but the whole gamut of the law relating to civil liberties and the status of the individual in relation to the state and its various manifestations. It is likely that advocates of the retention of the Privy Council would be generally happier to justify their position in respect of less contentious areas of the law, and there is no doubt that the political rather than the purely legal criteria may become dominant once the discussion is put on the basis of justifying the Privy Council essentially in terms of its constitutional law function.

The moment one refers to the expertise and experience and detachment of the Judicial Committee in dealing with Commonwealth public law problems, one is in danger of antagonising the politician who sees it as a fetter on his country's independence, and more specifically, on the powers of his party, which may well be beset with all the usual difficulties of nation building and the establishment of a strong central government in the face of racial, communal and tribal pressures tending towards political fragmentation. The leader seeking strong central government may be unimpressed with arguments directed to the retention of an uncontrollable judiciary in London whose decisions, though legally impeccable, could conceivably be politically and in other respects extremely inconvenient.

Nevertheless, an examination of the advice given by the Judicial Committee in recent years in appeals from independent Commonwealth countries suggests that it tends towards the preservation and the upholding of the powers of central governments and ruling parties as against the rights of citizens even when these are enshrined in the Constitution of the country concerned. It is submitted that politicians advocating strong central government have little or nothing to fear from the Privy Council in this respect. It could indeed be argued that the Privy Council has been, in recent years, an effective buttress of centralism in Commonwealth countries. Legislators need not feel that the Privy Council will presume they are exceeding their powers and acting arbitrarily and unconstitutionally.

As far as Fiji is concerned, there would seem to be little real advantage in abandoning the Judicial Committee in favour of a regional court of appeal, if it is agreed that Fiji's legal problems after independence are likely to be more akin to those of other recently independent countries outside the Western Pacific region, than to those of its neighbours in that area, be they older Commonwealth members or countries which can expect to obtain their independence well after Fiji obtains hers. Of course, much turns on the area embraced by a regional court of appeal, and if Malaysia were included then there would be real advantage for Fiji, for the legal problems of the two multi-racial societies are likely to be in some ways analogous.

But a regional court would be subject to most of the criticisms that can be made of the Privy Council, and, at the same time, would lack

the prestige associated with that ancient institution. Like the Privy Council, the presence of the regional court of appeal would be a qualification on the sovereignty of Fiji, nor could its members be expected to have the same degree of awareness of local needs and problems as the Fiji judiciary. For the time being, it could hardly be said to be the judicial expression of any regional grouping of real consequence to the ordinary people of Fiji. The Judicial Committee, of, say, the South Pacific Commission, would hardly be a meaningful focus of loyalty and respect for Fijians. It would be otherwise, when and if regional groupings in the south-west Pacific become of real significance.

The nature and location of Fiji's final court of appeal has not been the most burning issue in Fiji politics in the past, and may not become so in the near future. *Ibralebbe* v. *The Queen*[63] is authority for the proposition that a grant of independence within the monarchical wing of the Commonwealth involves no change, of itself, in the prerogative of the Judicial Committee to hear appeals from the newly independent country. For there to be a change, specific constitutional arrangements have to be made. If *Ibralebbe's* case remains good law, there seems little need for Fiji's leaders to rush to judgment on the Privy Council, in the absence of a viable alternative or of strong pressure to have Fiji's final court of appeal on Fijian soil.

63 [1964] A.C. 900.