F W GUEST MEMORIAL LECTURE

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL: CONSTITUTIONAL BULWARK OR COLONIAL REMNANT?

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The F W Guest Memorial Trust was established to honour the memory of Francis William Guest, MA, LLM, who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

I INTRODUCTION[1]

The significance of the work of the Judicial Committee of the Privy Council in hearing appeals from Britain's overseas Empire and Commonwealth and from English ecclesiastical courts has long been recognised by historians and legal commentators.

New Zealand's association with the Privy Council, which dates back to the first years of settlement, arose as a natural incident of the diaspora of the British people. For a new British community to which the colonists had brought their own legal system, there was no artificiality in a constitutional practice enabling an appeal at the ultimate level from the most distant part of the Empire, back to London as its centre and capital.[2]

Ultimately, the issue of retaining or abolishing appeals to the Privy Council is a political one. But it is not merely a matter of political judgement in terms of popular sentiment because the decision to abolish the right of appeal would have important consequences for the whole judicial system, the constitution of the Court of Appeal being the most significant.[3] Such a decision should therefore not be made without a careful analysis of its implications.

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1 See in general Haslam, "The Judicial Committee — Past Influence and Future Relationships" [1972] NZLJ 542; Holdsworth, *A History of English Law* (1956) Vol I; Howell, *The Judicial Committee of the Privy Council 1833-1876* (1979); Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (1931); MacDonald, "The Privy Council and the Canadian Constitution" (1951) 29 Can Bar Rev 1021; and Normand, "The Judicial Committee of the Privy Council — Retrospect and Prospect" [1950] Current Legal Problems 1.

2 See Haslam, supra n 1 at 542.

3 New Zealand, *Report of Royal Commission on the Courts* (1978) at 79.

II THE ORIGINS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

1 *The Growth of Conciliar Appellate Jurisdiction – The Old Appeal Committee*

While the immediate jurisdictional source of the Judicial Committee of the Privy Council is statutory, it derived originally from custom, stemming from the medieval Curia Regis. Its appellate jurisdiction had its genesis in the theory that the King was the source and dispenser of justice throughout his dominions and was therefore the authority to be resorted to in any case of grievance by error, delay or obstruction in the ordinary courts.[4] The King always exercised jurisdiction in his Council, the Curia Regis, which acted in an advisory capacity.[5] As Parliament developed out of the Council, it became the tribunal for the redress of grievances arising from the courts of the realm, and by the end of the Middle Ages the power of finally declaring the law was normally entrusted to the House of Lords.[6] The most important surviving branches of the Council's jurisdiction in England were swept away in 1641, when the Long Parliament abolished the Court of the Star Chamber, the Council of Wales, the Council of the North, the ecclesiastical Court of High Commission and other prerogative courts.[7]

The Privy Council Act, 1640,[8]and the Ecclesiastical Causes Act, 1640,[9] left the Council, styled the 'Privy Council' from Henry VI's reign, with domestic jurisdiction only in appeals from the county palatine of Chester,[10] the Court of the Lord Warden of the Stannaries of Cornwall (in the absence of a Duke of Cornwall), and in appeals in lunacy from the Lord Chancellors of England and Ireland. Such appeals were very rare.[11] Meanwhile, the King in Council retained appellate jurisdiction in the overseas dominions, and after 1660 the charters granted to individual and corporate American plantation proprietors contained express provision for appeals to the King.[12]

From 1680 the commissions and instructions issued to the governors of the plantations contained rules for regulating appeals which were to be permitted in causes involving property of a specified minimum value and in 1724 it was laid down generally that all appeals from the plantations ought to be heard by the King in Council.[13] In 1726, it was further ordered that whenever a colonial court admitted an appeal to the King in Council, execution of the judgement in question was to be suspended until the final determination of the appeal unless the respondent gave security to restore,

4 See Howell, supra n 1 at 3.

5 Until quite recently this historical advisory role was still played out and reflected in the fact that all Privy Council decisions were notionally unanimous. The first dissent was published in *Mutual Life and Citizens Assurance Co Ltd And Another* v *Evatt* [1971] 1 All ER 150.

6 Howell, supra n 1 at 3.

7 Ibid at 4.

8 16 Car I, c 10 1640.

9 16 Car I, c 11 1640.

10 The right to appeal to the King in Council from the county Palatine of Chester was recognised in 1683: *Jennet* v *Bishop* [1683] 1 Vern 184; 23 ER 403 (ChD).

11 Howell, supra n 1 at 4.

12 Ibid at 5-6.

13 *Fryer* v *Bernard* [1724] 2 P Wms 262; 24 ER 722 at 723 (ChD). See also Holdsworth supra n 1 at 522.

in the event of reversal, all that the appellant had lost in the court below.[14] To hear and report on appeals, the Council appointed a series of short-lived committees but a more stable arrangement was introduced in 1679, when appellate jurisdiction was vested in the Board of Trade, a standing committee possessing entire control of plantation affairs. However, it should be observed that none of these committees had full judicial power. In all cases, their decisions acquired force only through proclamation by Orders in Council, issuing from formal meetings of the Council itself.[15]

In December 1696, the appellate jurisdiction of the Board of Trade was abolished, and it was ordered that all appeals to the King in Council were to be heard and reported on by a committee consisting of all the members of the Council, three to be a quorum. This standing committee, generally referred to as the "old Appeals Committee", remained the body to which appeals were referred until the Judicial Committee was established in 1833.[16]

2 *The Creation of the Judicial Committee: The Judicial Committee Act 1833*[17]

On becoming Lord Chancellor, Brougham introduced his "Bill for the Better Administration of Justice in His Majesty's Privy Council" which received the royal assent on August 14, 1833. The first section of this statute declared that it was expedient to provide 'for the more effectual hearing and reporting on Appeals', and established a new conciliar committee, styled 'The Judicial Committee of the Privy Council'. What was new about this committee was that, save for the Lords President, councillors who were not lawyers by profession were excluded from membership.[18] Nevertheless, the statute did provide that:[19]

> [N]othing herein contained shall prevent His Majesty, if He shall think fit, from summoning any other of the members of His said Privy Council to attend the meetings of the said Committee.

14 Howell, supra n 1 at 6.
15 Ibid.
16 Ibid at 7. It should be noted that the 'Old Appeals Committee', when it sat to hear appeals, was generally a small committee, consisting of the chief legal authorities: the Bishop of London, one or the other of the two Secretaries of State, and such other members of the Council as were interested in the matters in hand. See Holdsworth, supra n 1 at 517.
17 3 & 4 Will 4, c 41 (1833).
18 Ibid s I. The Judicial Committee of the Privy Council consists of the Lord President of the Council, the Lord Chancellor, ex Lord Presidents, the Lords of Appeal in Ordinary and such other members of the Privy Council as from time to time hold or have held high judicial office and two other privy counsellors who may be appointed by the Sovereign by sign manual (Judicial Committee Act 1833 (3 & 4 Will 4, c 41 s I); Appellate Jurisdiction Act 1876 (39 & 40 Vict, c 59 s 6); Appellate Jurisdiction Act 1887 (50 & 51 Vict, c 70 s 3)). In addition to those already mentioned, membership of the Judicial Committee has been extended to include counsellors being or having been Chief Justice or a Justice of the Superior Courts of the Dominions: see *Halsbury's Laws of England* (4th ed) Vol 10 at 355. The principal officer of the Judicial Committee is the Registrar who is appointed under the sign manual: *Judicial Committee Act* 1833 (3 & 4 Will 4, c 41 s 18). His duties are to be defined in his appointment.
19 Supra n 17 s V.

Section III of the Act of 1833 transferred the entire appellate jurisdiction of the King in Council to the Judicial Committee.[20]

3 *Supplementary Legislation: The Judicial Committee Act 1844*

The Judicial Committee Act 1844[21] considerably enlarged the Crown's overseas subjects' right of seeking access to the Judicial Committee. In most of the colonies the regulations governing the subject's appellate rights still restricted conciliar appeals to those from the local Court of Error or Court of Appeal.[22] Wherever such courts existed, they comprised the colony's governor and his executive council. As a consequence, from most colonial supreme courts, which by the 1820s were generally presided over by members of the English bar, a dissatisfied suitor was compelled to appeal to the local executive council, sitting as a court, before he could appeal to the Privy Council.[23] Since its establishment, the Judicial Committee had had no power to entertain petitions from appellants who sought to by-pass the colonial appellate tribunals, because the latter had been established by imperial letters patent, or by royal instructions to the colonial governors.[24] The Judicial Committee Act 1844 provided a remedy for this situation by making it possible for the Committee to advise the Crown to pass Orders in Council granting such power to by-pass the court of last resort. Section 1 read:[25]

> [T]o provide for the admission of any appeal or appeals to Her Majesty in Council, from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of errors or a court of appeal . . .

4 *Practice and Procedure in Commonwealth Appeals*

The practice and procedure of the Judicial Committee is regulated by the Judicial Committee Rules 1982,[26] the appeals being of two kinds: by special leave and as of right.[27]

(a) Appeals by special leave

Appeals are brought in pursuance of leave obtained from the court appealed from or, in the absence of such leave, in pursuance of special leave from the Judicial Committee itself.[28] The grant of leave by the court

20 See also Howell, supra n 1 at 35.

21 7 & 8 Vict, c 69 (1844).

22 Howell, supra n 1 at 55.

23 Ibid

24 *In Re Samuel Cambridge* (1841) 3 Moo PC 175; 13 ER 74 (PC).

25 7 & 8 Vict, c 69 s I. It should be noted that appeals would also lie from places outside the British Empire over which the Crown had jurisdiction if so provided by Order in Council issued under the provisions of the Foreign Jurisdiction Act 1890 (53-4 Vict, c 37). See Holdsworth, supra n 1 at 522.

26 Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, SI 1982 No 1676 These rules came into operation on 7 February 1983.

27 See Hughes, supra n 1 at 20.

28 Judicial Committee Rules 1982 SI 1982 No 1676 r 2.

appealed from is governed by the terms of the statutory provisions regulating appeals from that court.[29]

The need to seek special leave arises when the court below does not possess the power to grant leave in the particular matter or has for some reason refused leave.[30] Special leave may also be sought to avoid having recourse to an intermediate court of appeal, where a question of law is raised. Thus in *Harrison* v *Scott*[31] it was held, as stated in the headnote, that:

> Where there are questions of law, raised by the proceedings, in the inferior Courts in the colonies, this Court will favour an application for leave to appeal, direct to the Queen in Council, under the 7 and 8 Vict., c. 69 without resorting to the intermediate Court of Appeal in the Colony.

Where a suitor, having the choice of appealing to a superior court in the territory concerned or to the Judicial Committee, chooses the former remedy and subsequently seeks special leave to appeal from the judgment of the superior court, the practice is not to grant him special leave to appeal except in a very strong case.[32]

The considerations guiding the Judicial Committee in granting such leave in civil cases have conformed to the general principle that the case has to involve either a far reaching question of law or matters of dominant public importance. Thus in *Prince* v *Gagnon*[33] it was stated that their Lordships were not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal from the Supreme Court of Canada:

> [S]ave where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

However, even if a case does comply with the requisites of public importance or substantial character, the judgment appealed from may appear to the Council to be so clearly right that it will refuse leave.[34]

Special leave will not be granted when the question is hypothetical[35];

29 *Lady Davis* v *Lord Shaughnessy* [1932] AC 106 at 112 (PC).
30 *Halsbury's Laws of England,* supra n 18 at 364.
31 (1846) 5 Moo PC 357; 13 ER 528. See also *Re Barnett* (1844) 4 Moo PC 453 at 457; 13 ER 378 at 379 (PC).
32 *Clergue* v *Murray* [1903] AC 521 at 523 (PC).
33 (1882) 8 AC 103 at 105 (PC), where a petition for special leave to appeal was refused. The case depended on a disputed matter of fact, namely, whether there had been a gift or sale of certain goods of the value of £1000. See also *Albright* v *Hydro Electric Power Commission of Ontario et al* [1923] AC 167 at 169 (PC), where Viscount Haldane held that it was not the practice of the Judicial Committee to grant special leave to appeal from a judgment of the Supreme Court of Canada where the decision was concerned with the mere construction of an agreement which did not raise either a far-reaching question of law or matters of dominant public importance. In *Sun Fire Office* v *Hart* (1889) 14 AC 98 at 105 (PC) special leave was granted on the ground that the matter was of general importance to insurance companies.
34 *La Cite de Montreal* v *Les Ecclesiastiques* (1889) 14 AC 660 at 662 (PC). In *Daily Telegraph* v *McLaughlin* [1904] AC 776 (PC), their Lordships, seeing no reason to doubt the correctness of the Australian High Court's judgment, declined to advise that special leave be granted.
35 *Australian Consolidated Press* v *Uren* [1969] AC 590 at 633 (PC).

where appeal is sought merely with the view to having an 'abstract point of law' which does not arise in the case, decided by their Lordships,[36] or where the practical issue has been solved by legislation.[37] On the other hand, special leave will probably be granted where the custody of children[38] or the liberty of a subject is at stake[39] and where the determination of the questions in controversy would put an end to further litigation.[40]

As to granting leave to appeal in criminal cases, the governing principle was clearly enunciated in *Re Abraham Mallory Dillet*[41] where it was held that:

> The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

(b) Appeals brought as of right

The appeal as of right is based upon a grant by the sovereign of such right to appeal which can be extended only by means of the royal prerogative either in an Order in Council or in a statute.[42] Where there has been such a grant, the subject is recognised as having the right to appeal without the need for special leave. Usually, the Orders in Council or the other statutory provisions lay down the conditions regulating the admission of the appeals and are mostly to the following effect: appeal lies as of right from any final judgment when the matter in dispute amounts to or is of the value of a fixed term or where the appeal is concerned with a question regarding property or civil rights amounting to or of the like value.[43] It sometimes also lies as of right in other specific matters such as questions regarding the interpretation of a consititution.[44]

III NATURE OF THE COMMITTEE

Section III of the Judicial Committee Act 1833[45] provided that:

> All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or

36 *R* v *Louw* [1904] AC 412 at 414 (PC).
37 *Commissioners of Taxation for New South Wales* v *Baxter et al* [1908] AC 214 (PC)
38 *Camilleri* v *Fleri* (1845) 5 Moo PC 161 at 163; 13 ER 452 at 453 (PC).
39 *Re McDermott* (1866) 1 LR PC 260 (PC).
40 *Salisbury Gold Mining Co Ltd* v *Hathorn et al* [1897] AC 268 at 274 (PC).
41 (1887) 12 AC 459 at 467 (PC). See also *Lanier* v *The King* [1914] AC 221 at 230 (PC)
42 However, in the Canadian case *Mayor of Montreal* v *Brown and Springle* (1876) 2 AC 168 at 184 (PC), a right of appeal was recognised and it was held that: "It must be borne in mind that the rule of law in this country that an appeal does not lie unless given by express legislative enactment, does not prevail in French or Canadian law, where the presumption is in favour of the existence of what one of the judges of the Queen's Bench in Canada terms the 'sacred right of appeal'."
43 See *Halsbury's Laws of England,* supra n 18 at 359 para 775. See also Hong Kong (Appeal to Privy Council) (Amendment) Order 1971 S I 1971 No 1239 as referred to by *Halsbury* supra n 18 at 360 para 775, n 1, whereby the amount has been increased to $50,000.
44 See eg the Jamaica (Constitution) Order in Council 1962, SI 1962 No 1550, Sch 2, s 11 (I)(b), (c) as referred to by *Halsbury,* supra n 18 at 360, para 775 note 2.
45 Supra n 17.

His Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee . . . and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of his Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open court).

This provision has led several commentators to conclude that the Judicial Committee is not a court but a consultative body. Lord Cairns, who was Lord Chancellor in 1868 and again in 1874-80, was the first jurist to enunciate this idea and Lord Selborne, who was Lord Chancellor in 1872-4 and 1880-5, argued that every aspect of the Committee's work received its "sole efficacy from the direct official action of the sovereign", the sovereign being the judge and the Councillors his advisers.[46] However, this view has never prevailed and throughout its history the Judicial Committee has exercised an independent judicial function just like any other court of law. In *British Coal Corporation* v *The King*[47] Viscount Sankey L.C. observed:

It is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law.

Lord Sankey's views were endorsed thirty years later by Viscount Radcliffe n *Ibralebbe* v *The Queen.*[48]

Furthermore, the Act of 1833 empowered the Committee to call witnesses nd examine them viva voce or by written deposition; issue peremptory rders; enforce appearance; administer oaths and affirmations; punish erjurers; direct the trial or retrial in any common law court of particular r feigned issues or questions of fact; compel by subpoena the production f papers; award and arrange for the taxing of costs; and punish all manner f contempts.[49] In giving the new tribunal all these attributes of a court, ie 1833 statute authorised the Committee to exercise them itself, without ference to the King in Council.[50] Thus, from the time of its modern atutory foundation, there can be little doubt about the judicial nature f its functions.

I NATIONAL SOVEREIGNTY AND JUDICIAL AUTONOMY

The Sovereignty of the Dominions

The sovereignty of each of the self-governing states which form the itish Commonwealth of Nations became a judicial fact of domestic con- tutional law and of international law when it was declared by the Imperial onference of 1926[51] that:

See Howell, supra n 1 at 35-6. See also Holdsworth, supra n 1 at 520.
[1935] AC 500 at 511 (PC). See also Crawford, *Australian Courts of Law* (1982) at 13.
[1964] AC 900 at 919 (PC).
See ss VII-XIII of the Judicial Committee Act 1833.
Howell, supra n 1 at 39-40.
Imperial Conference, 1926 — Summary of Proceedings (1926) at 12.

> They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Long before that declaration, they had already acquired the capacity to exercise all the rights of autonomy; indeed, that capacity had, inter se, been admitted by their constitutions. However, as a judicial fact, their sovereignty was recognised after this express declaration not only in national constitutional law and practice, but also by most of the states in the international community.[52]

As to their judicial sovereignty, all the self-governing nations organised their own judicial system, the decisions of their courts being final except in so far as the possibility of appeal to the Royal Prerogative of Justice, exercised by the Crown on the advice of the Judicial Committee of the Privy Council, remained.

2 *Constitutional Barriers to the Abolition of Appeals to the Judicial Committee*

(a) Prior to the Statute of Westminster 1931[53]

Prior to this statute, the major impediments to any action by the colonies to prevent appeals to the Privy Council were:[54]

(i) The Colonial Laws Validity Act 1865[55] which provided that any colonial law which conflicted with any British statute applicable to the colony was void to the extent of that conflict. Since at that time there were Imperial statutes which gave a right of appeal to the Privy Council, it followed that, under the Colonial Laws Validity Act, the Dominions could not validly legislate so as to abolish this right of appeal granted by the Imperial statute.

(ii) The second constitutional impediment was the legal doctrine of extra-territoriality. That is, colonial legislatures could legislate only with reference to matters within their own geographical territory. Since the prerogative right of appeal to the Privy Council was situated in Great Britain it was beyond the jurisdiction of the colonies to enact laws abolishing it or dealing with it.[56]

(b) After the Statute of Westminster 1931[57]

Section 2(1) of the Statute of Westminster provided that the Colonial Laws Validity Act had no applicability to any law passed after 1930. Furthermore, section 2(2) provided that no law and no provision of any law c

52 Hughes, supra n 1 at 6-7.

53 22 & 23 Geo 5, c 4 (1931).

54 See Wexler, *Abolition of Appeals to the Judicial Committee of the Privy Council* (19 at 8.

55 28 & 29 Vict, c 63.

56 A recent illustration of the doctrine of extraterritoriality is contained in the way in whi the Canadian Constitution was repatriated in 1981. It is, effectively, a schedule to enabling enactment passed by the British Parliament: Canada Act 1982 (UK) ss 1 and

57 Supra n 53.

a Dominion would be void or inoperative on the ground that it was repugnant to the law of England or to any order, rule, or regulation made under any such Act and that the powers of the Parliament of a Dominion would include the power to repeal or amend any such Act, order, rule or regulation in so far as the same was part of the law of the Dominion. Section 3 laid down that the Parliament of a Dominion had full power to make laws having extraterritorial operation and section 4 stated that no Act of Parliament of the United Kingdom passed after the Statute of Westminster would extend or be deemed to extend to a Dominion as part of the law of that Dominion unless it was expressly declared in that Act that the said Dominion had requested and consented to the enactment thereof.

Therefore, since the enactment of the Statute of Westminster 1931, the principle that jurisdiction is derived from the Crown is subject, as far as he appellate jurisdiction of the Privy Council in appeals from courts of he Dominions is concerned, to the power of a Dominion to establish its own appellate court for ultimate and exclusive jurisdiction.[58]

V THE PRIVY COUNCIL'S GENERAL PRINCIPLES GOVERNING APPEALS FROM THE DOMINIONS

In discussing the general jurisdiction of the Privy Council more than 0 years ago, Viscount Haldane held in *Hull* v *M'Kenna*[59]

> [I] need not observe that the growth of the Empire and the growth particularly of the Dominions has led to a very substantial restriction of the exercise of the prerogative by the sovereign on the advice of the Judicial Committee. It is obviously proper that the Dominions should more and more dispose of their own cases.

However, there have been circumstances in which the Judicial Committee as not adhered closely to the policy expressed in *Hull* v *M'Kenna* and as granted leave to appeal where the construction of a purely domestic ct was at stake.[60]

It should also be noted that a distinction has traditionally been made etween unitary and non-unitary constitutions. In the latter cases, leave appeal to the Judicial Committee has been generally freely given on the sis that any extra-Dominion court of appeal had proved to be helpful maintaining the balance between the powers of the federal government d those of the provincial or state governments.[61] In *Hull* v *M'Kenna* the dicial Committee stated that leave to appeal tended to be less freely given th respect to appeals from countries with unitary constitutions.[62] owever, the practice was observed to vary according to the wishes of the rticular Dominion. I need hardly point out that New Zealand is such unitary state.

Hollander, *Colonial Justice* (1961) at 25.
(1926) IR 402 at 404 (PC).
See *Lynham* v *Butler* (1925) 2 IR 231 (IrSC) which turned on the construction of a purely domestic Land Act in the Irish Free State in 1923.
See Hughes, supra n 1 at 28.
Supra n 59 at 405.

VI ABOLITION OF THE APPEALS TO THE PRIVY COUNCIL

1 In General

The authority and jurisdiction of the Judicial Committee to advise as to the exercise of the Royal Prerogative of Justice was the subject of discussion at Imperial Conferences in 1911, 1926 and 1930. Although the questions of principle and expediency were not determined it was declared in 1926 that:[63]

> It was no part of the policy of His Majesty's Government in G. Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected.

Ever since that time objections to the right of the Privy Council to hear and determine appeals from judgments of Dominion courts have been made on the following grounds:

(a) Any appeal from a Dominion court to the Judicial Committee is an infringement on the effective sovereignty of that Dominion and inconsistent with its autonomy.[64] There are at least two ways in which the hearing of Dominion appeals by the Judicial Committee is more than a mere theoretical infringement of the sovereignty of the Dominions.

First, the Judicial Committee is constituted and regulated entirely by only one of the members of the Commonwealth over which the others have no control. It was created and is governed by Acts of the British Parliament and the existence of a court of appeal for the Dominions which not only was created before their autonomy was admitted but also the constitution of which might be altered independently of their will must be viewed as constituting a derogation from their sovereignty. Having regard to the declarations of the Imperial Conferences, it is unlikely that any change would be effected without the consent of the Dominions, but since the declarations have never been implemented, they have not been viewed as affording, at least theoretically, the necessary legal protection for such sovereignty.[65]

Secondly, a diminution of Dominion sovereignty arises because th existence of the Judicial Committee interferes with the powers of th Dominions to regulate their own jurisdiction in their territories.[66]

(b) There are also several utilitarian objections to the retention of th Judicial Committee. The most obvious is that owing to their cost suc appeals give the wealthy an advantage over poor applicants, whose recours may be barred by expense. Delay, too, which is inseparable from appea to successive tribunals, particularly geographically separated tribunal tends to defeat justice. Appeals to the Judicial Committee may also b taken to constitute an implied aspersion upon the ability or integrity c Dominion appeal courts. Another criticism is the geographic and cultur detachment from, or inadequate appreciation of, local Dominion co

63 Imperial Conference of 1926, supra n 51 at 16.
64 Hughes, supra n 1 at 7-8.
65 Ibid.
66 Ibid at 54.

ditions which makes proper consideration of a case highly unlikely. Finally, where the issue is one between a Dominion and the British government or between a Dominion person or corporation and a British person or corporation, the issue of possible partiality in favour of the British suitor cannot be rejected out of hand.[67]

As to the advantages of appeals to the Judicial Committee, the most important point that has been made in their favour is that they have operated to protect minorities. This argument has been made with some force on behalf of the Catholics of Quebec and the Irish Protestants.[68] It has also been argued that it helps to secure the uniform interpretation of the common law.[69] However, it has been suggested that, where uniformity of law is desirable, it is best secured by consultation and co-operation and simultaneous legislative action than by the effort of a merely judicial body.[70] Finally, it has been asserted that the continued existence of appeals to the Judicial Committee does not affect the independent status of the Dominion any more than the status of any international state is affected by the Court of International Justice at the Hague.[71] But such an analysis is unsound, nasmuch as the history of the Judicial Committee clearly reveals that its urisdiction is based on the Royal prerogative and is therefore "a mark of he sovereignty of the Crown".[72]

In summary, when analysing the desirability of abolishing the appeals o the Privy Council, one can properly take the view that during the infancy of the colonies, and during their initiation into the art of parliamentary overnment, it was most fortunate that their courts were subject to review y judges for whom "the supremacy of law, the incorruptibility and im- artiality of the judges and their independence of the executive were rinciples firmly established by ancient tradition".[73] But once these rinciples have been firmly adopted by any of the member countries of ie Commonwealth, the Judicial Committee's task for that country may e regarded as complete and retention of conciliar jurisdiction beyond that oint is difficult to justify.[74]

Canada

There had been several aborted attempts to abolish appeals to the Privy ouncil in Canada prior to 1949 when that result was finally achieved. he first occurred in 1875 at the time the Supreme Court Act[75] was passed tablishing the Supreme Court of Canada. The Bill, as introduced, cluded a clause that would have prevented all such appeals, but a threat the Secretary of State for the Colonies that Her Majesty would be

Ibid at 9.
Ibid at 12.
Ibid at 102.
Ibid.
Ibid at 48.
Ibid.
Howell, supra n 1 at 231.
Ibid.
38 Vict, c 11 (1875).

advised to withhold assent to such a provision led to the replacmement of this clause by one that expressly reserved the right of appeal.[76]

The next attempt took place in 1888 when the federal government amended the Criminal Code to provide that the judgment of the Supreme Court of Canada should be final in all criminal matters.[77] However, in *Nadan* v *The King*[78] the Privy Council declared the amendment invalid in so far as it was repugnant to the Judicial Committee Acts of 1833 and 1844 and therefore void and inoperative by virtue of the Colonial Laws Validity Act.[79]

In 1933 the Canadian government again enacted legislation abolishing the right of appeal in criminal cases.[80] The Act was challenged in 1935 in the case of *British Coal Corporation* v *R,*[81] where the Privy Counci held that the Statute of Westminster had swept away the constitutiona barriers which had frustrated earlier attempts to abolish such appeals.

In 1938 a Bill[82] was introduced to the Canadian House of Common whereby all appeals to the Privy Council would be abolished. It was ir the form of an Act to amend the Supreme Court Act of 1875. On seconc reading the debate was adjourned in order to determine if the Parliamen of Canada had legislative competence to enact the provisions of the Bill The disputed section of the Act gave the Supreme Court of Canad exclusive, final and conclusive appellate jurisdiction in both civil an criminal matters. The matter was referred to the Supreme Court of Canad for judicial determination and in January 1940 that court held that th federal government had the power to bar all appeals to the Privy Council.

The provinces of Ontario, British Columbia and Quebec appealed th decision to the Privy Council where the decision of the Supreme Cou of Canada was upheld.[84] In analysing the matter the Privy Counc formulated some policy arguments. It was stated that it was not consiste with the political conception which is embodied in the British Commo wealth of Nations that one member should be precluded from setting u if it so desired, a Supreme Court of Appeal, having a jurisdiction bo ultimate and exclusive of any other member. It was also held that t regulation of appeals was a prime element of Canadian sovereignty whi would be impaired if, at the will of its citizens, recourse was available a tribunal in the constitution of which it had no voice.[85]

Despite some objections to abolition, mainly by those who felt that t right of appeal to the Privy Council provided a safeguard for the rig

76 See Livingston, "Abolition of Appeals from Canadian Courts to the Privy Coun (1950-51) 64 Harvard Law Review 104 at 105.
77 SC 1888, 51 Vict, c 43.
78 [1926] AC 482 (PC).
79 Ibid at 493. See also Livingston, supra n 76 at 106.
80 Canadian Statute 23 & 24 Geo 5, c 53, s 17.
81 Supra n 47.
82 Bill 9, 4th Sess of the 18th Parliament of Canada; see also Wexler, supra n 54 at
83 *Reference Privy Council Appeals* (1940) 1 DLR 289 (SCC).
84 See *AG Ont et al* v *AG Canada et al* (1947) 1 DLR 801 (PC).
85 Ibid at 814.

of the provinces, on 10 December 1949 all appeals to the Judicial Committee of the Privy Council were abolished and Canada took the final step towards complete judicial autonomy.[86]

3 *Australia*

In June 1982 the Commonwealth of Australia and all state premiers agreed to enact legislation to abolish all surviving avenues for Australian appeals to the Privy Council.[87] It seems to be contemplated that all state parliaments will join with the Commonwealth both in interlocking legislation which satisfies the requirements of section 51 (xxxviii) of the Constitution[88] and in requesting the Parliament of Westminster to enact parallel legislation there.[89]

The one remaining mode of appeal is the appeal direct from a state supreme court in a matter of purely state law.[90] For matters in which the application of a Commonwealth law is or might be involved, appeals were removed by the Gorton government's Privy Council (Limitation of Appeals) Act 1968; all other matters which formerly reached the Judicial Committee from or through the High Court were blocked by the Whitlam government's Privy Council (Appeals from the High Court) Act 1975, which was upheld by the Australian High Court in 1978.[91]

Further, in *Viro* v *R*[92] the High Court of Australia announced that it did not regard itself bound by any past or future decision of the Privy Council and the affirmative aspects of *Viro* have been considered as part of a rapidly burgeoning movement towards the disappearance from Australia of all Privy Council appeals.[93]

At the state level a similar development has taken place in New South Wales by virtue of judicial practice rather than by legislative action.

6 13 Geo VI, c 37; 1949 (Can) (2nd Sess) c 37. See also Wexler, supra n 54 at 22. Complete constitutional autonomy took another 32 years: Canada Act 1982 (UK), ss 1 & 2.

7 See Blackshield, "The Last of England – Farewell to their Lordships Forever" (1982) 56 Law Institute Journal 780. The High Court of Australia in *Attorney-General* v *Finch* set the final seal by unanimously ruling that the Privy Council could no longer grant special leave to appeal from decisions of the High Court of Australia itself: (1984) 10 Commonwealth Law Bulletin 1379.

8 Commonwealth of Australia Constitution Act 1900 (63 & 64 Vict, c 12) amended by Constitution Alteration (Senate Elections) 1906; Constitution Alteration (State Debts) 1909; Constitution Alteration (State Debts) 1928; Constitution Alteration (Social Services) 1946; Constitution Alteration (Aboriginals) 1967; Constitution Alteration (Senate Casual Vacancies) 1977; Constitution Alteration (Retirement of Judges) 1977; Constitution Alteration (Referendums) 1977).

Blackshield, supra n 87 at 780.

See *Southern Centre of Theosophy Inc* v *South Australia* (1979) 27 ALR 59 at 62-8 (Aust HC), where the majority of the High Court summairily rejected arguments against the continuing validity of the Privy Council appeal from state courts in state matters. But the Australian courts continue to impose limits on the cases that can proceed; (1984) 10 Commonwealth Law Bulletin 1379.

Attorney General of the Commonwealth v *T & G Mutual Life Soc Ltd* (1978) 19 ALR 385 (Aust HC). See also Blackshield, *The Abolition of Privy Council Appeals* (1978) Adelaide Law Review Research Paper No 1 at 1.

(1978) 18 ALR 257 (Aust HC). See also Crawford, supra n 47 at 174.

Blackshield, supra n 91 at 1.

In 1978 a specially constituted five-judge bench of the New South Wales Court of Appeal announced, for all judges in New South Wales, four new rules of judicial policy, which provided the following:[94]

(1) As between conflicting decisions of High Court and Privy Council, the decision of the High Court would always be preferred;

(2) For that reason leave to appeal from the Supreme Court of New South Wales to the Privy Council for the purpose of inviting their Lordships to review a High Court decision would henceforth not be granted, since any such review would be futile;

(3) That, alternatively, no such leave would be granted since the object of the application, namely to create a conflict between High Court and Privy Council, was not one of which it could ever be said that leave 'ought' to be granted; and

(4) That, in any event, no leave to appeal to the Privy Council would henceforth be granted in any case since it can never be said of *any* issue that it is one which affirmatively 'ought' to be determined by the Privy Council rather than the High Court of Australia.

In the view of an Australian commentator, Blackshield, the abolition of Privy Council appeals from the states is now possible, whether it is occasioned by joint state and Commonwealth action, or by Commonwealth or states alone,[95] the constitutional position being briefly as follows:

(1) Section 51 (xxxviii) of the Constitution[96] empowers the Commonwealth 'at the request or with the concurrence of the Parliament of all the states directly concerned' to make laws with respect to the exercise of 'any power which can at the establishment of this constitution be exercised only by the Parliament of the United Kingdom'. Thus, section 51 (xxxviii) seem to offer a clear constitutional basis for action. It does so, however, onl where the sole alternative is Imperial legislation, that is, only where neithe a state alone nor the Commonwealth alone has constitutional power t act.[97]

(2) Unilateral Commonwealth action could validly abolish appeals fro all states, whether a particular state consented to the abolition or not. Th impact of the surviving appeals on Australian sovereignty and on relatio with the United Kingdom might conceivably attract the Commonwealth power under section 51 (xxix) with respect to 'external affairs'. The sam factors might also attract the inherent 'national affairs' power.[98] Furthe section 73 of the Constitution gives the High Court explicit judicial pow 'to hear and determine appeals from all judgments' of the state Supre Courts, and gives Parliament explicit legislative power to regulate t exercise of the jurisdiction thus conferred.

Blackshield is also of the opinion that legislation to make the Hi Court's appellate jurisdiction exclusive would probably fall within the po

94 Ibid.
95 Ibid at 113. See also Crawford, supra n 47 at 177.
96 Supra n 88.
97 Blackshield, supra n 87 at 782.
98 Ibid at 782.

to regulate that jurisdiction conferred by section 73 itself. If not, it would certainly fall within the express incidental power conferred by section 51 (xxxix) to make laws 'incidental to' the High Court's exercise of its appellate functions.[99]

(3) The only question affecting a possible abolition by the Australian states is the third proposition laid down by the Privy Council in the Canadian case *Nadan*[1] that local attempts to abolish Privy Council appeals must fail on the ground of repugnancy to Imperial statutes and as to which that court in the *British Coal* case[2] found it necessary to invoke the provisions of the Statute of Westminster. In Blackshield's view this is not a problem in Australia since in *Commonwealth* v *Limerick Co Ltd*[3] prior to the Statute of Westminster the High Court upheld the Commonwealth power to exclude Privy Council appeals from states in matters of federal law. On the *Limerick* reasoning, 'repugnancy' does not seem to be an issue so far as Privy Council appeals are concerned, and a state Act abolishing Privy Council appeals from state courts would appear to be valid.[4]

(4) Since it is clear that Privy Council appeals can be abolished within Australia, the proposed legislation does not need to include enabling legislation to be enacted by the United Kingdom Parliament.[5]

4 *New Zealand*

(a) Generally

The hierarchy of New Zealand courts consists of the Judicial Committee of the Privy Council, the Court of Appeal, the High Court and District Courts.[6] The High Court and the District Courts are the courts of first instance, although both have appellate functions.[7] They also exercise an equitable jurisdiction.[8]

Appeals to the Privy Council are governed by Orders in Council, made in Britain in 1910 and 1972.[9] Appeal may be by leave of the court appealed from, or by special leave of the Privy Council itself. Leave is granted as

99 Ibid.
1 Supra n 78.
2 Supra n 47.
3 (1924) 35 CLR 69 (Aust HC).
4 Blackshield, supra n 87 at 782. Crawford, supra n 47 at 176, argues that since in the *Southern Centre of Theosophy* case, supra n 90 at 64-5, it was emphasised that the effect of the Imperial Acts of 1833 and 1844 was not merely to regulate but also to give statutory force to the prerogative appeal, state legislation purporting to exclude Privy Council appeals would not be valid.
5 Blackshield, supra n 87 at 783. See also Crawford, supra n 47 at 177.
6 Judicature Act 1908 as amended by the Judicature Amendment Act 1979 and Magistrates' Courts Act 1947 as amended by the District Courts Amendment Act 1979.
7 The major aspect of the High Court's appellate jurisdiction is to hear and determine criminal, civil, and domestic appeals from the District Court. Both courts are appellate bodies under a variety of statutes: *Report of Royal Commission on the Courts,* supra p 503, n 3 at 21.
8 *Report of Royal Commission on the Courts,* supra p 503, n 3 at 18.
9 SR & O 1910 No 70 as amended by the New Zealand (Appeals to Privy Council) (Amendment) Order 1972, No 1994 (UK).

of right from any final judgment of the Court of Appeal where the matter in dispute amounts to the value of $5,000 or more or involves directly or indirectly some claim to, or question respecting, property or some civil right of, or exceeding, that value. Leave may be granted at the discretion of the Court of Appeal from any judgment, whether final or interlocutory, if the court considers it proper to do so because of the great general or public importance of the appeal, or otherwise. If the High Court decides its final judgment should be considered by the Privy Council because of great general or public importance, or because of the magnitude of the interests affected, or for any other reason, then leave may also be given to appeal direct to the Privy Council.[10]

With regard to criminal cases, there is no legislative provision for appeals but historically the Privy Council has regarded itself as entitled under the prerogative power to grant special leave. The Judicial Committee exercises its discretionary power to grant special leave sparingly. The New Zealand Court of Appeal has held that it is competent under powers conferred by local legislation to grant leave to appeal to the Judicial Committee in a criminal matter although, since the Judicial Committee entertains appeals in criminal matters only by special leave, it could not legally be obliged to hear the appeal in question.[11]

(b) Should New Zealand abolish appeals to the Privy Council?

Setting aside questions of constitutional competence the issue is: should appeals to the Privy Council be retained by New Zealand? The policies at stake were examined by the Royal Commission on the Courts which brought down its report in 1978. It should surprise no one that the issues were struck in terms of assertion and denial in the following way:

(i) Arguments in favour of the right of appeal to the Privy Council:[12]

(1) The right of appeal to the Judicial Committee enables New Zealand to maintain a two-tier appellate system which New Zealand would not itself be able to establish.

(2) The existence of the right of appeal to the Judicial Committee makes available to New Zealand litigants a court of the highest calibre, at no cost to the New Zealand taxpayer.

(3) The existence of the right of appeal acts as a check upon the New Zealand Court of Appeal.

(4) The judges of the Judicial Committee, because they are removed from the local scene and local pressures, are likely to provide a greater measure of detachment, whereas New Zealand is a small nation with a small population so it may on occasions be difficult for judges to divorce themselves from local issues.

(5) There is also the suggestion that the practice whereby New Zealand judges sit from time to time on the Judicial Committee provides the local

10 *Report of Royal Commission on the Courts,* supra p 503, n 3 at 21.
11 *Woolworth (New Zealand) Ltd* v *Wynne* [1952] NZLR 496 (CA).
12 *Report of Royal Commission on the Courts,* supra p 503, n 3 at 79-80.

judiciary with the benefit of associating with other judges of the highest ability.

(6) The cost of taking an appeal to the Judicial Committee, while high, does not necessarily greatly exceed the cost of taking an appeal to the Court of Appeal.

(ii) Arguments against the right of appeal to the Privy Council:[13]

(1) The existence of the right of appeal to the Judicial Committee has inhibited the growth of New Zealand law. There is a body of opinion which holds that until the New Zealand Court of Appeal is free to act in a completely autonomous manner, it cannot in all cases effectively develop New Zealand law for New Zealand conditions.

(2) While acknowledging that it may not be practicable in the New Zealand context to provide a two-tier appellate system, opponents of the right of appeal take the view that, by the time most cases involving an important legal principle reach the level of the Court of Appeal, there are two equally valid sides, with the decision in many cases really being a matter of social policy or judicial philosophy. It is suggested that, in such circumstances, the final decision should preferably be made by a New Zealand court. It is said that since a single appeal has been accepted in criminal cases, it is difficult to contend that there should be two appeals in a civil case.

(3) In relation to the quality of judicial talent, opponents of the right of appeal to the Judicial Committee tend to point out that judgments of the New Zealand Court of Appeal are of the highest standards and that scrutiny in the Judicial Committee should be unnecessary.

(4) In relation to detachment from local pressure, opponents of the appeal to the Judicial Committee claim this to be a disadvantage, rather than a merit, and suggest that the very question of aloofness and inability to understand the New Zealand scene is one of the real criticisms of the Judicial Committee, which is not remedied by sending a New Zealand judge to London from time to time.

(5) Those who oppose retention of the right of appeal particularly stress the disadvantages of cost and delay. It is suggested that the cost of an appeal prices the great majority of New Zealanders out of the market and that only the Crown, substantial corporations, or wealthy litigants can sustain such an appeal. It has been suggested that there are specific instances where litigants have been forced to compromise in the face of the threat of an appeal to the Judicial Committee.

The 1978 Royal Commission Report on the Courts made the following recommendations:[14]

(1) The right of appeal to the Judicial Committee should not lightly be abolished. The sole criterion must be whether the abolition of such appeals will be beneficial to the New Zealand judicial system.

(2) In any event, the right of appeal to the Judicial Committee should

13 Ibid at 80.
14 Ibid at 89.

not be abolished until an enlarged appellate court of at least five judges, together with the Chief Justice ex officio, is working effectively in New Zealand with the confidence of the legal profession and the general public.

(3) Bearing in mind that the time may come when appeals to the Judicial Committee cease, any intervening period should be used to structure the court system to enable the best possible appellate system to be implemented in due course. Regarding the constitution of the Court of Appeal in the event that it becomes the final appellate tribunal for New Zealand, the recommendations were the following:[15]

(a) For cases originating in the High Court it is impracticable to create a two-tier appellate system.

(b) Wherever practicable, endeavours should be made to enable a two-tier system to operate.

(c) For important or difficult cases it is essential that the Court of Appeal should consist of five judges, which will render it necessary to have a complement of seven judges of the court together with the Chief Justice ex officio.

VII CONCLUSION

The Report of the Royal Commission on the Courts 1978[16] was of the view that the issue whether or not the right of appeal to the Privy Council should be abolished:[17]

> [S]hould not be regarded simply as a political one, for a decision to abolish the right of appeal to the Judicial Committee will have very important consequences for the whole of our judicial system and will not merely affect the constitution of the Court of Appeal.

If the Royal Commission had gone on to delineate the "very important consequences" one could judge them on their own merits. Since this was not done we must infer them from the rest of the text.

These effects seem to be based on judicial quality and judicial objectivity, apart from the obvious one of having a two-tier system for appeals.

The argument based on adverse impact in terms of judicial quality is one that should be rejected very quickly. The only real distinguishing characteristic between New Zealand and British judges is the size of the pool of legal experience from which they are drawn. To an external observer the theory and the fact of relative judicial excellence vis-a-vis New Zealand and Britain is not obviously tipped in favour of Britain. At worst it reveals that the quality control in New Zealand is so tight that judicial decisions, particularly in the Court of Appeal, are as sound as those of equivalent British tribunals. It seems to me that the assertion based on judicial quality is just not capable of demonstration.

The other argument based on judicial objectivity is equally puzzling. British Columbia has a population of less than three million and I have

15 Ibid at 90.
16 Ibid at 79.
17 Idem.

never heard it said that the courts at all levels are not detached from the issues before them. Detachment is not a fact of isolation but rather one of integrity and professionalism. And detachment surely cannot refer to the culture and society itself. To postulate a virtue of aloofness is to assume that appellate tribunals have no law-creating functions of the sort usually described as "social engineering". This is just not the case, as the recent Privy Council decision in *Lesa* v *Attorney-General for New Zealand*[18] clearly demonstrates. Perhaps the most potent factor in ensuring the integrity of judicial decision-making is public reaction to the decision itself. Geographic detachment renders this sanctioning force ineffective.

In any event, arguments based on the quality of New Zealand judicial decision-making are based on assumptions that are not capable of demonstration or reflect a residual colonial mind-set that ignores the constitutional changes that have emerged from the Statute of Westminster 1931.

In his retirement address a former President of the Court of Appeal, Sir Thaddeus McCarthy, concluded in 1976 that even then it was "only a matter of time when the link with the Privy Council will go".[19] While acknowledging the benefits of a second tier of appeal, unsupported by New Zealand tax dollars and administered by judges of the highest quality, he noted that at least one eminent commentator regarded it as "demeaning of our sovereignty" and that:[20]

> [T]here are the difficulties their Lordships have in understanding the backgrounds to New Zealand cases, our social philosophies, our ways of life generally, sometimes even our language. Lastly there is what I think is the most important aspect of all – the heart of the matter – and that is the inhibitions which, in my experience of over 13 years in this Court, this right of appeal to the Board places on the capacity of this Court to develop our case law in a way which best suits New Zealand and the New Zealand way of life. This effect is strikingly apparent when the Board deals with statutes which have no counterparts in England and around which settled practices have developed in this country over a period of years. But it is by no means confined to these. Don't believe if you are told that this is not so.

Sir Thaddeus McCarthy is clearly of the opinion that the Privy Council has, at least in part, an adverse impact on the administration of justice in New Zealand in the way he set out. His views also raise the matter of

18 [1982] 1 NZLR 165. See, too, the reaction to the earlier Privy Council decision in *Wallis* v *Solicitor-General for New Zealand* [1903] AC 173 (PC), noted by Normand, supra p 503, n 1 at 6-8. For a contrary view on the question of geographic isolation and political detachment see Campbell, *The NZ Listener*, 6 August 1983, at 79.

9 [1976] NZLJ 376 at 380. These are not, however, a reflection of all judicial views; see Haslam J, supra p 503, n 1. A strong professional voice in favour of retaining Privy Council appeals is found in Baragwanath, "The Privy Council" [1983] NZ Recent Law 414, who seems to base his major rationale on the assumed constitutional entrenchment in Britain of judicial independence. On the assumption that such a value is not nearly so well appreciated in New Zealand, the writer appears to argue that it can be reinforced by a sort of "trickle-down" effect if appeals are retained. Currently, New Zealand Law Society views favour retention: an undated press release by Mr B Slane (1983). On the other hand a robustly critical view of retention has been expressed by a former Attorney-General of New Zealand, the Honourable A M Finlay QC: [1974] NZLJ 493. The same year Dr Finlay, as Minister of Justice, indicated to the New Zealand Parliament that no immediate steps to remove the Privy Council appeal would be taken: [1974] NZLJ 514.

0 Ibid.

this country's constitutional sovereignty. In a paper published this year Sir Charles Bright, the Chancellor of Flinders University, Australia,[21] claims that "[s]overeignty exists where political power is successfully asserted".[22] He then dealt with the notion of colonialism in the following way:[23]

> Colonialism is an attitude of mind . . . . I cannot here analyse in detail the nature of colonial ties. In my opinion they tend to cause people in the colony to downgrade their own attributes (except the attribute of unquestioning loyalty to the mother-land) and to look at the rest of the world through the eyes not of persons in Australia [New Zealand] but of persons living in England. The colonials were and are in a cultural sense adjectival. Let me take an example with which lawyers will be familiar. *Ex hypothesi,* to a colonialist, English judges are better than Australian [New Zealand] judges. So some Australian [New Zealand] judges find that the opinion of an undistinguished English judge is a powerful support for their judgment on a somewhat related topic. Let me not be thought to condemn English judges: many of them are as good as most Australian [New Zealand] judges and some are better. But the colonialist view would attribute to them superiority merely because of the label.

I would contend that proponents of the retention of the Privy Council appeal are manifesting the colonialist view when they base their argument on judicial quality. Sovereignty is an assertion of and the capacity to implement political will and this country cannot claim to be fully sovereign until it abolishes appeals to the powerful symbol of colonialism that is the Judicial Committee of the Privy Council.

Sir Thaddeus McCarthy[24] regarded this result as merely a matter of time; it is implicit in the conclusions contained in the *Report of the Royal Commission on the Courts 1978*;[25] in Australia it is about to be implemented. As one English judge, Lord Normand, has said:[26]

> There is also the question whether the loss of dominion appeals is an evil to be deplored, or whether we may not even regard it as a sign of the fulfilment of the purpose for which the appeal jurisdiction has always existed.

Of the old Commonwealth only New Zealand hesitates; cultural sentiment and colonial mind-sets are still powerful forces here. But the result is inevitable; only the political will is lacking, and until the day the Court of Appeal of this country is finally recognised as the ultimate court of this land, that remaining vestige of colonialism will continue to frustrate the creation of a truly New Zealand judicial culture.[27]

21 "Primavera: A Study of Sovereignty, Federalism and Colonialism in Conflict" (1983) 9 Adelaide L Rev 79.
22 Ibid.
23 Ibid at 86.
24 Supra p 521, n 19.
25 "Bearing in mind that, taken over all, the existence of the right of Appeal to the Judicial Committee has been of real value to development of New Zealand jurisprudence, we are of the opinion that this right should not lightly be abolished . . . .": supra p 503, n 3 at 82
26 Supra p 503, n 1 at 2.
27 There are other judicial appellate constructs that may meet New Zealand's needs in terms of sovereignty, efficiency and costs. They include, for example, a regional privy council; resort to the Australian High Court; and the creation of a trans-Tasman commercial court. They are analysed in detail by the Honourable M D Kirby, President of the New South Wales Court of Appeal, in his recent paper, "Closer Economic and Legal Relations between Australia and New Zealand" (1984) 58 ALJ 383 at 395-400.