APPEALS TO THE PRIVY COUNCIL— MALAYSIA AND SINGAPORE

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The origin of the so-called appeal to the Privy Council lay originally in the right of a British subject residing in the British dominions outside the United Kingdom to petition the Crown for relief against any injustice he considered he had suffered including any injustice in the local courts. Such petitions were referred to the Privy Council for advice and the convention arose that the Crown invariably acted upon such advice. The petitions were dealt with by a Committee of the Council, which came to be known as the Judicial Committee. The modern form of the appeal process dates from the Judicial Committee Act of 1833. After 1833 the Judicial Committee developed into a Court of Appeal from all the Superior Courts in the British dominions, though in recent years the number of countries from which the appeal lies has been substantially diminished. Though the Judicial Committee is in reality a court of appeal in the true sense of the word the theory of an advisory committee was retained. The jurisdiction is invoked by petition to the Crown and the decision of the Court takes the form of advice to the Crown which is subsequently embodied in an Order in Council addressed to the court whose decision was appealed against.

The right of appeal always existed from the Supreme Court of the Straits Settlements (consisting of Singapore, Penang and Malacca) which was a British dominion. It also existed prior to 1946 from the Courts of the Federated Malay States and of Johore. In the case of these Malay States, however, it existed by reason of treaties with the respective rulers. It also existed in North Borneo (now Sabah) and Sarawak, though there it does not seem to have been often exercised.

In Singapore and in North Borneo and Sarawak the right of appeal in the pre-war form continued down to 1963. In West Malaysia, after the brief episode of the Malayan Union when the position as reflected by the Malayan Union Order in Council was far from clear, the right of appeal was extended to the Supreme Court of the Federation of Malaya by Clause 83 (1) of the Federation of Malaya Agreement 1948 which read as follows:—

> Their Highnesses the Rulers severally hereby request His Majesty to receive appeals to His Majesty in Council from the Supreme Court and do hereby severally, in respect of each of their States, confer upon His Majesty power and jurisdiction so to do, which power and jurisdiction His Majesty hereby accepts.

The question of retaining the appeal after independence was considered by the Reid Constitutional Commission and their recommendation on the subject was as follows (para. 126):—

> The Rulers, the Alliance and the legal profession all expressed a desire that appeals to the Privy Council should continue to be competent . . . .In our opinion there would be great advantages if appeals to the Privy Council were preserved. Not only would it be a valuable link between countries of the

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Commonwealth but in the present position in the Federation it would, we think, be advantageous if the final decision on constitutional questions lay with the tribunal which has experience of other Federal Constitutions.

The arrangement ultimately concluded was that there should be a right of appeal from the Federation Court of Appeal to the Yang di-Pertuan Agong who should refer the appeal to the Judicial Committee of the British Privy Council who should hear it in the same way as they would hear an appeal from a British dominion court to Her Britannic Majesty but should give their advice to the Yang di-Pertuan Agong of Malaysia. This arrangement was embodied in the following instruments:—

United Kingdom Federation of Malaya Independence Act, 1957.[1]
Agreement dated 4th March 1958 between Her Britannic Majesty and the Yang di-Pertuan Agong.
United Kingdom Federation of Malaya (Appeals to the Privy Council) Order in Council, 1958.[2]
Federal Constitution Article 131.
Appeals from the Supreme Court Ordinance (now sections 74-79 of the Courts of Judicature Act, 1964).

With the establishment of Malaysia these instruments have been amended and the arrangements now apply to East Malaysia (Sabah and Sarawak).[3] The Court of Appeal has been replaced by the Federal Court. Of the instruments it is only necessary to quote here Article 131 (1) of the Constitution which now reads as follows:—

The Yang di-Pertuan Agong may make arrangements with Her Majesty for the reference to the Judicial Committee of Her Majesty's Privy Council of appeals from the Federal Court; and subject to the provisions of this Article, an appeal shall lie to the Yang di-Pertuan Agong in any case in which such an appeal is allowed by federal law and in respect of which provision for reference to the said Committee is made by or under the enactments regulating the proceedings of the said Committee.

An appeal therefore lies only when it is allowed by Federal Law. Under the Courts of Judicature Act 1964 there is a right of appeal from the Federal Court to the Yang di-Pertuan Agong with leave of the Federal Court—

(a) from any final judgment or order in any civil matter where
  (i) the matter in dispute in the appeal amounts to or is of the the value of five thousand dollars or upwards; or
  (ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of the like amount or value; or
  (iii) the case is from its nature a fit one for appeal; and
(b) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal; and
(c) from any decision as to the effect of any provision of the Constitution, including any opinion pronounced on a reference under Article 130 thereof.[4]

Application for leave to appeal must be made to the Federal Court within six weeks from the date on which the decision appealed against was given.[5]

1 5 and 6 Eliz. C. 60.
2 S.I. 1958 No. 426; L.N. 199 of 1958.
3 L.N. 30 of 1964.
4 Supreme Court of Judicature Act, 1964, s. 74 (1).
5 *Ibid.*, s. 75.

An appeal also lies from the Federal Court to the Yang di-Pertuan Agong in the following cases where application for special leave to appeal has been made to the Yang di-Pertuan Agong and the Yang di-Pertuan Agong acting on the recommendation of the Judicial Committee has granted special leave to appeal—

(a) in any case mentioned above where leave of the Federal Court has not been obtained; and
(b) in any case arising in a civil matter other than the cases referred to above; and
(c) in any criminal matter.[6]

The decisions of the Judicial Committee are conveyed to the Yang di-Pertuan Agong in the form of recommendations and the Yang di-Pertuan Agong then makes orders to give effect to the recommendations.[7]

When Singapore left Malaysia in 1965 arrangements were made for appeals from the appellate courts in Singapore to be referred to the Judicial Committee of Her Britannic Majesty's Privy Council. The Judicial Committee Act, 1966 sets out the conditions and procedure for appeal, which follow in the main the provisions of the Courts of Judicature Act, 1964, of Malaysia.

Since independence the advantages and disadvantages of the present system of appeals to the Privy Council have been discussed and considered. Among the advantages of the present system is that from the point of view of legal scholarship and intellectual capacity the Privy Council is probably the best court in the world and certainly far beyond anything the country is likely to be able to provide in the foreseeable future. Moreover the system is economical as no costs are borne by the Malaysian Treasury and from the point of view of the litigant, the costs are not high according to local standards, as professional fees in England are not much higher, if at all, than those in Malaysia. The right of appeal to such a court helps to give confidence to foreigners proposing to invest money locally. Finally such a right of appeal may give individual States and Rulers a sense of security against the Federal Government and this perhaps explains the attitude of the Rulers before the Reid Constitutional Commission.

The main objection to the present system is that the appeal appears to be from a local court to a foreign court and as such is inconsistent with national sovereignty. This is largely a matter of appearance because the form of appealing to the Yang di-Pertuan Agong is observed and theoretically all that is given to the Yang di-Pertuan Agong is advice. Moreover the appeal can be abolished by Parliament at any time. On the other hand the "advice" to the Yang di-Pertuan Agong is advice which he is not at liberty to ignore and it is the advice of "foreigners". In any event in political matters appearances can be as important as reality particularly viewed from other countries and the fact that the more "advanced" countries in the Commonwealth have abolished the right of appeal to the Privy Council is a strong political argument for abolishing it from Malaysia.

In the nature of things too considerable delay is involved. This is bad enough in the case of ordinary litigants but for the Government particularly where constitutional questions are involved, or in criminal

6 *Ibid.*, s. 74 (2).
7 Federal Constitution, Article 131 (4).

cases arising out of the emergency the delay in obtaining a final decision may be serious. In the two earlier constitutional cases in which the Government was interested (the *Kanda Singh* Case[8] and the *Lim Lian Geok* case[9]) the periods of time which elapsed between the decision of the local court of appeal and the Privy Council were 16 months and 29 months respectively; but in the recent case of *Kalong Ningkan* the interval was only eight months.

Although the Privy Council has shown its readiness to defer to knowledge of local conditions of the local courts, nevertheless the members being the most senior members of the English judicial hierarchy are necessarily influenced by the numerous technicalities and anomalies which still exist in the English Law. The effect of this is bound to impede any development of the English Law to meet local needs and conditions. The continued existence of the right of appeal to what is in effect an English court working in the English language and in the tradition of the English Common Law is bound also to impede the process of the introduction of the national language in the local courts and the adoption of a codified system of law.

The Government in Malaysia has tried to introduce legislative measures to abolish in part the right of appeal to the Privy Council, but these have been frustrated largely through the objections of the legal profession. In 1965 the government introduced a Courts of Judicature (Amendment) Bill which sought (a) to abolish appeals to the Judicial Committee in criminal cases (b) to abolish appeals to the Judicial Committee in cases involving the validity of a law passed by Parliament or the legislature of a State and (c) to raise the limit for appeals in civil cases from $5,000 to $25,000. This Bill met with considerable opposition and was allowed to lapse. In 1968 the Government introduced a modified Courts of Judicature (Amendment) Bill 1968. In order to meet some of the earlier objections the Bill left the position as to appeals in civil cases unchanged but proposed the abolition of appeals to the Privy Council in (a) cases involving the validity of a law passed by Parliament or the legislature of a State and (b) in criminal cases. After the bill was read a first time it was referred to a Select Committee and the Select Committee was therefore able to deal with the principle as well as the details of the Bill. The Bill was opposed by the Bar Council and in their memorandum to the Select Committee[11] the Bar Council set out the grounds on which they opposed the Bill—

> 1. Ours is a small country both in size and population and young in every sense and we are engaged in the process of unifying the various races into one strong united independent nation. The knowledge and belief that our peoples and foreigners living and investing money here can ultimately rely on a body consisting of some of the best judicial brains in the whole of the Commonwealth will help to produce the climate needed to build such a nation and to maintain the confidence of all concerned in the Rule of Law.
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> 2. Many of our judges are young both in age and experience; ten of the twelve judges of the High Court of Malaya and all the judges of the High Court of East Malaysia have been appointed during the course of the last three years only. They are men of high integrity with every expectation of maturing in due course to be of the highest calibre, but the time has not as yet come to throw away the guiding and stabilising hand of the Privy Council

8 (1962) M.L.J. 169.
9 (1964) M.L.J. 158.
10 (1968) 1 M.L.J. 238.
11 Report of the Select Committee on the Judicature (Amendment) Bill 1968, D.R. 2 of 1969, p. 16ff.

whose advice has been of such immense help for decades past in the development of our law.

3. At the present moment, an accused person in a criminal case and a litigant in a civil matter can have recourse to three forums or tiers of courts to seek redress. There is the High Court (the Court of original jurisdiction), then the Federal Court, and finally the Yang di-Pertuan Agong (with the Judicial Committee of the Privy Council to advise him). The Bill seeks to take away the final forum, that is, the appeal to the Yang di-Pertuan Agong in criminal matters which means that the citizen will firstly be deprived of his fundamental right to appeal to his Sovereign and secondly, of one forum, leaving him with only two forums instead of three. We feel that the ultimate right of a citizen to appeal to his Sovereign should never be taken away and that there should always be a body to advise the Yang di-Pertuan Agong on such appeals and thereby maintain the three tier system. India, who have abolished appeals to the Privy Council, still maintain the three tier system.

4. At present in Constitutional matters the citizen has two forums to seek redress. First, the Federal Court which is the court of original jurisdiction and then the Yang di-Pertuan Agong. In seeking to abolish the right of appeal to the Yang di-Pertuan Agong, the Bill would not only deprive the citizen of his fundamental right of final appeal to his Sovereign but also render the Federal Court the one and only court of redress.

5. The Bill seeks to abolish the right of appeal in criminal and constitutional matters and not in civil matters. We feel that the rights of the individual in criminal and constitutional matters are far more important and fundamental than those in civil matters, for not only is a citizen's life, liberty and freedom involved but also his constitutional rights, which are the very foundation of our society and nation.

6. It is true that some countries like India and Pakistan no longer go to the Privy Council. But India and Pakistan are very large countries with very large populations and have had their own Judges for half a century or more. Our Judges have not had the necessary time and opportunity to acquire the experience and stature of their Judges. Nor do these countries face the many complexities that a small country with a multi-racial society like ours encounters.

7. It has been said by some that recourse to the Privy Council, a foreign body, does in some way infringe upon our sovereignty. But the fact is that the Privy Council has not been thrust upon us by anybody. The right of appeal to that august body is there simply because we want it to be there. The true test of our independence is that we can do away with appeals to the Privy Council whenever we choose to do so. Countries like Australia, New Zealand, Ceylon and the West Indian Islands do still retain the right of appeal to the Privy Council and it cannot be said that they are any the less independent or sovereign than Ghana and the other countries which have cut the tie with the Privy Council. Further we must not forget that our appeal is not to a foreign body but to our Yang di-Pertuan Agong.

8. It has been said by some that only a small number of cases go to the Privy Council and only a still smaller number are successful. That is not surprising. In any country the number of cases that go before the final court is small. In the United States the number of cases that go before the Supreme Court of America, the highest court in that country, is very small compared with the number of cases that come before its courts of original jurisdiction.

On the above grounds the Bar Council opposed the Bill and in their submissions[12] they stated that they felt it was essential that—

1. The three tier system of our judicial process in criminal and civil matters be retained.
2. The two tier system in constitutional matters be retained.
3. That the right of appeal to the Yang di-Pertuan Agong be retained.
4. Until a suitable alternative body is established to advise the Yang di-Pertuan Agong on such appeals, the services of the Judicial Committee of the Privy Council be retained.
5. The most suitable and alternative body to advise the Yang di-Pertuan Agong would be a Final Court of Appeal, above the Federal Court, consisting entirely of our own Judges.

12 *Ibid.*, p. 18.

6. In another 10-15 years, our Judges may well have acquired the degree of experience and stature that would be required of them to run our own Final Court of Appeal and to take over the functions of the Judicial Committee of the Privy Council.
7. If for any reason, it is not possible to establish our own final court of appeal within the next 10-15 years, the next best alternative is a Regional Court of Appeal, that is a Final Court of Appeal for some of the countries of this region, such as Singapore, Ceylon, New Zealand, Australia and Malaysia.

The Bar Council therefore strongly recommended that the Courts of Judicature (Amendment) Bill, 1968, be withdrawn and nothing be done to alter the present right of appeal to the Yang di-Pertuan Agong until Malaysia is ready to set up her own final court of appeal to advise him.

The Judicial and Legal Service Officers' Association in their memorandum to the Select Committee took a different stand.[13] They too opposed the Bill but on the grounds (a) that the Bill differentiated between the importance of the liberty of the subject and the right of property and (b) there was no justification to perpetuate the existing practice of appealing to the Privy Council in civil matters. They therefore advocated the total abolition of the right to appeal to the Privy Council. In addition they recommended that—

(a) The Federal Court should take over the functions of the Privy Council;
(b) The Federal Court should retain its powers under Articles 128 and 130 of the Constitution in respect of constitutional matters;
(c) There should be constituted a Court of Appeal in respect of criminal and civil matters to be presided by the Chief Justice of the High Court wherefrom the appeal is heard. Apart from the Chief Justice the Court of Appeal should consist of two Judges of either High Court to be nominated by the Chief Justice at each sitting;
(d) Such Court of Appeal should in effect assume the functions of the Federal Court as provided for under Article 121 (2) (a) of the Constitution.

The Select Committee, after its deliberations, decided that "they could not accept the Bill in its present form" and the Bill was allowed to lapse. The trend of opinion in the Select Committee was that "if we were to abolish, we might as well abolish the whole lot; if not don't do it at all". The Select Committee appeared to be in favour of retaining the appeal to the Yang di-Pertuan Agong but decided that it was beyond their power to recommend what body should take the place of the Judicial Committee of the Privy Council to advise the Yang di-Pertuan Agong on such appeal. The general opinion was that such a body should be constituted and one member suggested that "a special body of persons that will have nothing to do with the Privy Council, should be empanelled to advise the Yang di-Pertuan Agong in such matters".[14]

The Government and the Bar in Malaysia have for some time been interested in an alternative method of dealing with appeals from the appellate courts in Malaysia. In 1965 the matter of setting up a Commonwealth Court was raised by the Prime Minister of Malaysia, Tengku Abdul Rahman, at the Commonwealth Prime Ministers' Conference in

13 *Ibid.*, p. 25.
14 *Ibid.*, p. 7.

London. The substitution of a Commonwealth Court of Appeal for the Judicial Committee Privy Council had been raised by William Burge as long ago as 1841 in his book "Commentaries on Colonial and Foreign Laws". The idea was however first advanced in the British Parliament by Mr Graham Page during a House of Commons debate on 29th June 1956. He said that there was a feeling in the Colonies and the Commonwealth that the Judicial Committee was an imperial court imposed on them by the United Kingdom. There was therefore little wonder that India, South Africa, Canada and Pakistan had broken away from the appellate jurisdiction of the Privy Council. He therefore suggested that the Judicial Committee be made a truly Commonwealth Court on which the United Kingdom, Commonwealth and Colonial Judges would sit together. At the Commonwealth Prime Ministers' Conference in 1960 Senator Cooray of Ceylon raised the question of a final court of appeal for those members of the Commonwealth who then referred their appeals to the Judicial Committee of the Privy Council. Such a court could also act as a court of reference in disputes between members of the Commonwealth for adjudication or opinion. He suggested that it may take the form of an ad hoc court with powers to hold divisional sessions in Commonwealth capitals. In 1965 the Minister for Justice, Tun Dr Ismail, mentioned the matter at the Commonwealth Law Ministers' Conference in London and an informal meeting was held among the representatives of the Commonwealth countries interested and it was agreed that the matter be raised at the Commonwealth Prime Ministers' Conference. When the Prime Minister of Malaysia raised it at the conference he suggested the formation of a Commonwealth Court which would comprise certain members of the Judicial Committee of the Privy Council sitting conjointly with judges from the independent countries of the region, namely, Australia, Ceylon, New Zealand, Malaysia and Singapore. He suggested that the court could be constituted either as an ad hoc Court or as Commonwealth Courts on a Regional basis. In either case it would be desirable to have local judges who are qualified to sit thereon, bearing in mind the need of assistance of judicial minds experienced in the local scene. There would be the further advantage in that local lawyers practising in the region would be able to appear in appeals from their courts. The Commonwealth Prime Ministers decided at their conference that it would be for the Malaysian Prime Minister to consider whether to raise the matter at the Commonwealth Law Conference in Australia.

The matter was given further thought in Malaysia and a number of principles were formulated. The Court should be the final court of appeal for the courts of such countries as have accepted the jurisdiction. The Court should consist of Judges appointed by each of the countries accepting its jurisdiction, the members of such judges in the case of each country to be a matter for discussion later. The court should sit at regular intervals in each of the countries accepting its jurisdiction for the purpose of hearing appeals arising within that country. The right of appeal should be subject to limitations, similar to those affecting the existing right of appeal to the Privy Council.

It was felt that the establishment of such a court would bring with it many advantages. The greatest advantage would be the psychological one of getting rid of the embarrassment of what appears to be an appeal to a foreign country. Given reasonable efficiency in organisation there should be less delay than at present in disposing of appeals. The fact that

the court sat within the country from whose courts it was hearing appeals would attract confidence and give a sense of justice appearing to be done as well as being done. Finally local lawyers would have greater opportunity than at present in participating in the work of the court.

When the matter of the Commonwealth court was raised in Sydney and at Canberra it was not received with much enthusiasm by the larger countries of the Commonwealth—only Malaysia, Singapore and Ceylon were in favour of the idea. The general view was that the details of the proposals might be pursued by those countries interested. In 1966 the Commonwealth Office put forward some proposals for the Commonwealth Court. It proposed that the Judges of the Court be (i) ex officio, all members of the Judicial Committee of the Privy Council and (ii) appointed members who would be persons holding or having held high judicial office in a Commonwealth country, one such member to be appointed by the Minister of Justice of each country joining in the court (but not necessarily a national of the country appointing him). The president of the court would be a member of the Judicial Committee nominated as President from time to time by the Lord Chancellor in consultation with the Ministers of Justice of countries joining in the court. The court would normally be comprised of the President and two other members, one being a judge from the country from which the appeal comes and the other being a judge preferably from a country not that of the President. The jurisdiction of the court in respect of each country would be laid down by the legislation of that country.

These proposals were considered in Malaysia and were not well received. It was felt that as Australia and New Zealand were not joining in the scheme the court would be only for the small Commonwealth countries. The appeal would still be to a court not fully staffed by Malaysian judges. Politically it would be regarded as an appeal to an outside appeal court and this court would have less reputation and prestige than the Judicial Committee. Should an appeal raise an important constitutional or legal issue which is related to a political matter, it would appear preferable that the matter be referred to a completely independent body like the Privy Council, rather than to a court of three judges, one of whom might be from Singapore. If Malaysia joined in the scheme it would be difficult for it later to withdraw, if this was found necessary. The setting up of the court would raise administrative difficulties and entail expense and delay. For these reasons it was felt that it would be preferable to continue for the time being the present system of appeals to the Privy Council.

Recent official opinion in Malaysia and Singapore appears to have swung in favour of retaining, at least for a time in the case of Malaysia, the reference of appeals to the Judicial Committee of the Privy Council. This has been largely because the recent opinions expressed by the Judicial Committee in appeals have found favour in Malaysia and Singapore. In the Emergency cases where Indonesian supporters had infiltrated into Singapore and Malaysia and caused loss and damage to life and property or co-operated with the Indonesian military forces, the Privy Council have upheld the convictions in the courts of Malaysia.[15] In the case of *Stephen Kalong Ningkan* v. *Government of the Federa-*

15 ***P.P.*** **v.** ***Oie Hee Koi & Others*** **(1968) 1 M.L.J. 148;** ***Osman and another*** **v.** ***P.P.*** **(1968) 2 M.L.J. 137.**

tion the Privy Council upheld the validity of the actions of the Federal Government in dealing with the emergency situation in Sarawak.[16] The Privy Council have also in a few recent civil cases restored the judgment of the trial judge in Malaysia and held that the Federal Court in Malaysia were wrong in upsetting the decision of the trial judge—and such decisions have generally been well-received in Malaysia.

As far as Singapore is concerned, where the arrangement is that appeals from the appellate courts in Singapore go direct to the Judicial Committee of the Privy Council, the Prime Minister, Mr Lee Kuan Yew, has stated officially that it will never be possible for Singapore to do without an external Court of Appeal.

There is still a desire in Malaysia and to a lesser extent in Singapore to find an alternative body to deal with appeals from the local appellate courts. The idea of a Commonwealth or a Regional Court has not been abandoned, but it is recognised that there are difficulties in persuading other Commonwealth countries to join in the Court. A Regional Commonwealth Court, which would cater for the needs of the smaller countries in the Commonwealth and in which Australia and New Zealand do not participate will not perhaps be acceptable in Malaysia. Unless therefore a common scheme for a Commonwealth court is adopted by the countries in the Commonwealth, it would appear that Malaysia might eventually have to set up her own final court of appeal, perhaps on the lines of the Federal Courts in India and Pakistan or the High Court in Australia.

16 (1968) 1 M.L.J. 238.