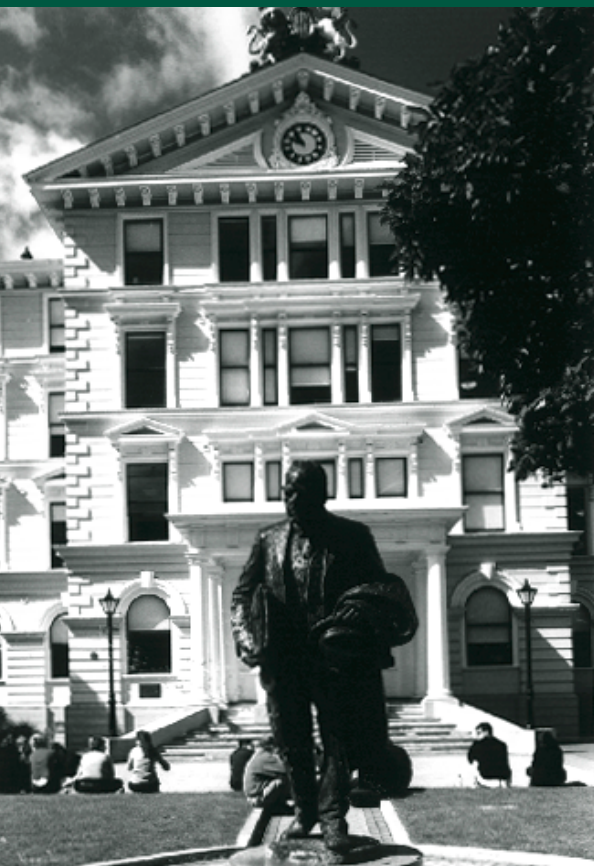


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Final Appeal Courts: Some Comparisons

by Lord Cooke of Thorndon

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FINAL APPEAL COURTS: SOME COMPARISONS

LORD COOKE OF THORNDON*

And now for stage three. You have been spared the first two stages. They occurred respectively at a dinner of the Anglo Australasian Lawyers Society in the Inner Temple in June and at a lunch of the American Academy of Appellate Lawyers in Chicago in September. On both those occasions, the title was the same, and so was the content: up to a point. There are differences of fact and degree. There is an alcohol related analysis. In London the talk was preceded by quantities of wine, port and/or brandy, which made it much easier to take. In Chicago a modest glass at best may have accompanied the steak. In Wellington this audience has to wait until afterwards for Christmas drinks; the talk will therefore plumb a deeper level of gravity.

I ORIGINS

The idea of this talk was born in this very room earlier this year when we had the privilege of hearing Justice Ruth Bader Ginsberg on *Workways of the Supreme Court*. Not long before, I had heard her colleague Justice Scalia lecture at the Inner Temple. Later I heard Justice Sandra Day O'Connor deliver the inaugural Sir David Williams lecture in Cambridge. All three spoke at least in part as apostles of the work of the United States Supreme Court. All three made some comparisons. Some of the observations of Justices Ginsberg and Scalia were astonishing. Justice O'Connor was more circumspect (see [2001] CLJ 493). The thought occurred that an anomalous judicial life has left one in a position to speak, not of course with their weight, but from the point of view of at least having sat in more courts of final appeal than they can have.

* This is an augmented version of the lecture as delivered for the New Zealand Centre for Public Law, Victoria University of Wellington on 12 December 2001.

Certainly the New Zealand Court of Appeal was not quite a final court; but the House of Lords and the Privy Council both are, as is the Hong Kong Court of Final Appeal and a number of Pacific appeal courts where I have served. And at least as a guest on the bench during the hearing of cases, it is possible to add the High Court of Australia, the Supreme Court of India, the former Appellate Division in South Africa, and perhaps the Singapore Court of Appeal (although on that occasion the hospitality was such that I do not remember). The most, though, that I can claim as to the Supreme Court of the United States itself and the Supreme Court of Canada is that I have visited them and enjoyed their hospitality.

II ARGUMENTS

It is fitting to begin some comparisons by mentioning, of the jurisdictions in my experience, the largest. Geographically, it covers some two million square miles. But most of that is water, for Kiribati is spread over 36 islands about the equator. The name must represent that of the former British Gilberts Group. The difference between the spelling and its pronunciation, Kiribas, represents (so the story goes) an old missionary's Remington typewriter which had no letter *s*, so he used *ti* instead. The truth may reside in some local difficulty in pronouncing *ti*. Small though the population is, not much more than 80,000, this jurisdiction appears to have had great international influence. In the Court of Appeal there are time limits on argument, usually 30 minutes a side, and exactly the same have been adopted by the Supreme Courts of the United States and Canada.

In Kiribati the time limits are evidently not resented by the local private bar, neither of whom has been accustomed to longer ordeals of argument; nor have I heard complaints in other Pacific courts where similar limits in most cases are at least conventional. Case loads and the apparently extensive reliance on law clerks made the practice compulsory and manageable in North America. But I confess a strong preference for the practice in the Lords and the Privy Council of requiring counsel to give estimates of the time that they will reasonably require and then holding them to it more or less. Written cases are also required in advance, and partly for that reason argument goes at a brisker pace than is common in New Zealand; but one of the arts of a good presiding Judge - and the present senior Law Lord, Lord Bingham of Cornhill, is a superb president of a court - is to make sure that counsel feel that their arguments have been understood and not unduly curtailed.

Adequate opportunity for oral persuasion is a precious asset of appellate justice. Skilfully used and with the stimulus for both counsel and bench of judicial interrogation and disclosure of how for the time being the Judge's mind is working, it can change preliminary impressions derived from reading the papers. May it never have to be denied in this country.

The value attached to it in England is shown by a recent incident. It was one of the rare occasions on which Lord Irvine of Lairg LC has sat on the Appellate Committee of the House of Lords. The case was estimated to take two days. A message was sent to counsel asking whether they would accept a shortened second day so that the Lord Chancellor could chair another Parliamentary committee. One counsel thereupon successfully objected to the Lord Chancellor's sitting in that case at all.

To return for a moment to Kiribati, I am literally returning there early in 2002¹ in company again with my colleague of New Zealand Court of Appeal days, Sir Gordon Bisson. He and I and Sir Maurice Casey have often renewed in Pacific jurisdictions, chiefly Samoa, our old sitting connection. This time the other member of the Kiribati court is to be another member of the old team, no less than Sir Michael Hardie Boys. This is further evidence of His Excellency's well recognised devotion to public service. That country might not claim to be in the first rank as a tourist attraction; the diet is tuna and the main island, Tarawa, is or was littered with Australian beer cans, all of them empty. Still, I have a fondness for Kiribati, the hearts of its people as warm as its climate. Traditionally the New Zealand judiciary provides help in the Pacific region; and this should be catered for wherever needed. In the islands the appeal courts are mainly composed of a few former or even present New Zealand or Australian judges. I do not think that they are useful precedents for New Zealand in forming our own court of final appeal.

At the risk of being invidious I should say that, with its resorts, Fiji was the most attractive of these jurisdictions. There in the Supreme Court time limits were enthusiastically enforced by Chief Justice Tuivaga, who is a keen golfer, but I have to speak in the past tense. The Supreme Court, having provided on a Presidential reference an interpretation of the 1997 Constitution emphasising power sharing, was purportedly dissolved, at the time of the most recent coup, by military decree.

¹ This visit was to be frustrated, however, by the development of what was euphemistically described as a pothole in the Tarawa runway.

Although Sir Maurice Casey and his colleagues in the Court of Appeal have held that Constitution to be still in force, the Supreme Court has been for a time in de facto abeyance, and I would have no enthusiasm for returning to a land so divided. The political side whose submissions that the Constitution had been superseded were rejected by the Casey court were presumably realistic enough to appreciate that they could not consistently appeal to a Supreme Court whose existence they denied.

III *ATMOSPHERES*

Fiji, Samoa, Kiribati, the Cook Islands, and probably other Pacific courts, have an Australasian air. Counsel and Judges alike tend to have had part of their legal education or experience in New Zealand or Australia. An obvious, if superficial, illustration is that Judges are addressed as Your Honour, which I suppose originally reached this part of the world via the United States. In all the other jurisdictions of which I have had first hand experience, including Canada and South Africa, the English Your Lordship or Your Ladyship is customary in the higher courts. In Hong Kong the similarity with England by no means ends there. The Judges of the Court of Final Appeal and the leading counsel are still largely English trained. The procedure and the division of the branches of the profession is essentially English. Close your eyes in court and you would think that you were listening to an argument in Westminster or The Strand. Cantonese is permitted, however, and once I heard two erstwhile partners in trade, each appearing in person, argue their cases in that dialect. There was an interpreter but her renditions seemed surprisingly laconic. One felt unable to contribute anything to the forensic dialogue.

In the Privy Council there can be difficulty in understanding counsel from the West Indies, who have a good command of English but are not accustomed to the acoustics of the high ceilinged hearing chamber. New Zealand counsel do not have the same difficulty. The best of our leading counsel are as effective advocates as their English counterparts, although naturally there are many more first class counsel at the English bar. The differences lie in pace and style. From comments, and to a limited extent from my own experience, it has to be said, with regret, that New Zealand cases have at times over the years suffered from not being well argued in Downing Street.

Certainly the Privy Council is no place for a practitioner who does not appreciate that appellate advocacy is a demanding specialist art: knowledge of the cases and the statutes is not enough. Also a modicum of felicity of expression, if it will not work wonders, will at least put the Board into a more receptive mood. And it is a mistake in that forum to rely primarily on written submissions.

The proposition that New Zealanders are understood there has admitted of one exception: the Maori speech and singing at the end of my last case there, and my halting Maori words in reply. A colleague asked me afterwards what I had said; it was tempting to deceive him that the fate of the appeal had been revealed. In the event the appeal was dismissed. The Board accepted the argument of Sir Geoffrey Palmer for the respondent Hastings District Council that Parliament cannot have intended the Maori Land Court to be able to intervene in the planning process, as the Resource Management Act itself contained many provisions for the recognition of Maori values and interests. It might have been preferable if some who commented publicly on that judgment, whether from editorial levels of *The Dominion* or even higher, had read the judgment first. One was reminded of Sydney Smith's famous "I never read a book before reviewing it; it prejudices a man so". Justice Brandeis said something in point, which I will quote in a footnote.²

IV *PRE-EMINENCE*

The Court has always been guided by the Latin maxim *boni iudicis est ampliare jurisdictionem* ... It has filled the gaps between statutory legislation and decision making by laying down extensive guidelines, which have the force of law ... A beginning of a new concept of victimology, which entitled victims of administrative wrongs or administrative lawlessness to compensation ... the higher judiciary in the country occupies a position of pre eminence among the three organs of the State...

² "*The Herald Tribune's* editorial of today and an attempt to disqualify me are not agreeable to contemplate, but the incident must be regarded as a casualty – like that of being run into by a drunken autoist, or shot by a lunatic." Leonard Baker *Brandeis and Frankfurter, A Dual Biography* (Harper & Row, New York, 1984) 313.

Those are not my own words. A bottle of sparkling wine, methode champenoise, awaits any reader who can identify the country of the author before I do so. In fact he was until 2001, until compulsory retirement at the strangely early age of 65, Chief Justice of what is now probably the most constructive human rights court in the world. I refer to Dr Adarsh Anand, Chief Justice of India. The words that I have just cited are taken from his foreword to *Fifty Years of the Supreme Court of India: Its Grasp and Reach* published in 2000 by the Indian Law Institute.

In the same vein, Anand CJ says “It is common knowledge that judges no longer merely apply the law. They have added new dimensions to various statutory provisions by their liberal interpretation, or by evolving principles of justice, equity and good conscience”. In its early years the Court played primarily the opposite role, upholding vested property rights against land reforms enacted by the legislature. There was a struggle between Mrs Indira Gandhi’s Government and the Parliament on the one hand and the judiciary on the other. In more recent times the Supreme Court has emerged as indeed supreme and with a very different philosophy, undeterred by the catchcry of “judicial activism”, but not unmindful of the need for some judicial restraint.

Dr Anand instances directions for the achievement of human rights of various groups, such as children, women, disabled, scheduled castes, scheduled tribes, bonded labourers, minorities, and socially and economically backward classes. He might have added that the Supreme Court has virtually taken to itself the power of appointing the higher judiciary. A constitutional requirement that the President consult the Chief Justice has been transformed by what has been termed interpretation into a rule that no appointment can be made without the concurrence of the majority of a collegium of the five most senior Supreme Court Judges.

Such frankly large claims may be unique to the Supreme Court of India. Yet the prevailing trappings and incidentals of their hearings remain essentially British. Writing as Master Anand in the Inner Temple Yearbook 2000/2001, the Chief Justice calls India’s independence from British rule in 1947 “perhaps one of the most sublime events of the last century”. Yet something of the raj has been preserved in the manners of bench and bar.

A special relationship with the United Kingdom judiciary and the Inns of Court is fostered by regular reciprocal visits. A bust of Gandhi and a portrait of Nehru are prominent in the Inner Temple. In New Zealand some influential segments of the community would be appalled at the spectre of such judicial power as is wielded in the world's largest democracy. It contrasts favourably, though, with the situation in certain Asian and African jurisdictions which will readily come to mind.

The scale of some Indian problems is hard to comprehend and means that the court system can be no precedent for New Zealand. There is almost an 80% acquittal rate in criminal prosecutions. Dr Anand says that the workload of the Supreme Court has been brought to "quite manageable time limits". What he means by this is that a waiting list of over 100,000 cases in the year 1990 had been reduced to a mere 20,000 in the year 2000. By one means or another, over 34,000 cases were disposed of in 1999. Where India is an example for us may be in the respect which the people in general evidently have for the apex court. My impression - and I hope that it is wrong - is that the media in New Zealand do not see encouraging public confidence in the judicial system as a significant part of their functions.

V RIGHTS

A theme that I have pursued in previous lectures has been the gradual evolution of a common law of the world. This has been most marked in two wide areas of law, human rights and commercial law (with the rise of the new *lex mercatoria*). As to the latter, I have nothing of moment now to add.³ As to the former, it is agreeable to find support from the editors of the Law Reports of the Commonwealth, who in their Editorial Review 2000 write of the Judges of the Commonwealth having come "to share in the development of a new common law". That series and the companion Butterworths Human Rights Cases (which extend to selected European cases also and grew out of a casual conversation over lunch) provide probably the most absorbing reading of any current series of law reports in the English language.

³ Any reader interested in this topic may care to have a reference to: "The Dream of an International Common Law" in *Courts of Final Jurisdiction: The Mason Court in Australia*, edited by Cheryl Saunders (The Federation Press, Sydney, 1996); and an obscure Privy Council judgment: *The Bay Hotel and Resort Ltd v Cavalier Construction Co Ltd* (16 July 2001, Privy Council Appeal No 32 of 2000).

Selected New Zealand decisions find a place in both series. But, in a comparative talk on courts of final appeal, one should not fail to mention the major contributions in this field of two courts, the South African Constitutional Court under the outstanding leadership of President Arthur Chaskalson⁴ and the Canadian Supreme Court, now headed by the equally distinguished Chief Justice Beverley McLachlin, who is the heir of such great Canadian Judges as Dickson, La Forest and Bertha Wilson.

These two courts, respectively of eleven and nine Judges, are large by New Zealand standards, mainly because of perceived needs in their countries for widespread representation. The South African Appellate Division (now the Supreme Court of Appeal), of which alone I have first hand experience, had an unhappy record of former support for apartheid (though latterly much corrected under Chief Justice Michael Corbett) and possibly has less to teach us. The Constitutional Court has been notably successful in often speaking with a united voice. On the other hand, the Canadian Supreme Court shares with the High Court of Australia a reputation for shades and divergences of opinion. Since the days of Sir Owen Dixon the High Court has enjoyed particularly high respect for analysis, while Sir Anthony Mason and others came to add liberalism, a degree of creativity, and a new appreciation of aboriginal land rights. But Australia is now somewhat isolated judicially, having no juridically enforceable bill of rights. The best the High Court has been able to do in that direction is to discover in the Constitution, after nearly a hundred years, a hitherto unsuspected implied right - a right to defame politicians, subject to limited qualifications. It has been reported that the current Prime Minister had adopted an avowedly political approach to appointments to the High Court ("Conservatives with a capital C"). Much as the High Court commands respect, all in all it is perhaps scarcely a model for New Zealand.

4 Now Chief Justice of South Africa.

VI AMERICANA

A recent cartoon in an English newspaper during a rail strike depicted a Judge in wig and gown asking a barrister similarly dressed “And pray what is the Tube?” Efforts have to be made to avoid this stereotype, to show that the Judge is one of the people. Ruth Bader Ginsberg understands this. Those who heard her lecture will remember that very early on she introduced human interest. She spoke of what the Justices of the Supreme Court have for refreshments, using a fund to which they all contribute. “The Chief generally selects a standard brand, resistible coffee cake. Once or twice a year Justice O’Connor livens the fare. She brings in a spicy dried beef treat, called beef jerky, prepared by her brother Alan Day, who ran the family’s Lazy B ranch in Arizona”. Would that I could match this item by saying that once or twice a year Lord Slynn of Hadley enlivens morning tea in the House of Lords or the Privy Council by bringing in strawberries from his country seat, Egginton House, or that the Lord Chancellor provides haggis (as he did at his reception following the last State Opening of Parliament). But the fact is that in judicial hearings there is no morning break, just 2 1/2 hours continuous sitting, towards the end of which the span of concentration is severely tested. Imagine what it would be like if you had to listen to the present lecturer for that period.

But in truth Justice Ginsberg was engaged in a subtle softening up exercise. Speaking in the aftermath of the five four split in *Bush v Gore* (on which a perceptive lecture was delivered in this room last week by Professor Kenneth Karst), she was anxious to dispel any impression of a political division in the Supreme Court. She did so first by painting a picture of cordiality. She referred to the custom of “shaking hands, each justice with every other, before we go on the bench and before each conference”. She said that it added to the high level of collegiality that prevails among them. Height is a relative term. It has been said that the Supreme Court was “designed as the Agincourt of the mind”.⁵ At Westminster, if you proposed a diurnal shaking of hands, you would be thought to have taken leave of your senses. And, while I do not know what goes on now in Molesworth Street, there is no reason to suppose that overt demonstrations of fraternity have become a feature.

Her second example was even more striking "... our unanimity rate is high, hovering around 40 per cent for the last three or four terms." That did not seem at all high; and it was not unexpected to ascertain that from 1 January 1999 to 7 June 2001 there were in the Lords 151 appeals in which judgment was delivered, during which period 37 dissenting opinions were given. So the unanimity rate is more like 75%. As a matter of impression, the rate in the New Zealand Court of Appeal would have not been below that in my time; the Hong Kong rate might be about the same or higher; and I do not recall any dissenting judgments at all in the Supreme Court of Fiji or the Courts of Appeal of Samoa, the Cook Islands and Kiribati. The latter happy position may testify to either the ruthlessness or the accommodating nature of the President for the time being of those courts, according to your point of view. The Australians say that they do not routinely maintain statistics in this respect, but that on last analysis it was found that there were dissenting judgments on most occasions. The Supreme Court of Canada, however, reports its percentage of unanimous judgments as 72.

Justice Antonin Scalia is well known as the leader of the right wing of the Supreme Court, so that tenor of his Millennium lecture was unsurprising. What was quite startling was the declared extremity of some of his positions. Thus he admitted that he and like thinkers were originalists, seeking to interpret the Constitution in the light of the practices of society not of today but of 1791. He "rejoices" that the United States has not made international human rights guarantees part of domestic law. It is hard to imagine even the most conservative Law Lord asserting that Magna Carta should bear the meaning it had in 1215. Magna Carta is commonly associated with habeas corpus, but the writ was not then invented. In his *History of English Law*, Sir William Holdsworth tells us that it was long after its invention that it was first applied to protect the liberty of the subject. He says "Lawyers, historians and politicians of every period of our history have interpreted it [the Charter] from the standpoint of every period of that history". (HEL, vol 2, 209). And in both the Lords and the Privy Council human rights law as it has originated internationally is almost daily fare. Conventionally the world's two most influential English speaking courts are thought to be the United States Supreme Court and the House of Lords. Comparison brings out a paradox. In the United States formal obeisance is given

to the doctrine of the separation of powers. The model loyal citizen carries in his pocket an edition of the Constitution issued in 1987 by the Commission on the Bicentennial of the United States Constitution. In his foreword the chairman, Chief Justice Warren Burger, wrote: "In the last quarter of the 18th Century, no nation in the world was governed with separated and divided powers providing checks and balances on the exercise of authority by those who governed. A first step towards such a result was taken with the Declaration of Independence in 1776, which was followed ..." and so on. In reality, it would seem, there is no modern democracy where the links between politics and the judiciary are so strong. By contrast, in the United Kingdom the senior court is a committee of the legislature and housed in the same structure. Yet I do not even know what are the politics of most of my judicial colleagues there; and the Labour Lord Chancellor, Lord Irvine of Lairg, is in many ways more conservative than his Tory predecessor, Lord Mackay of Clashfern, but still has made or played a dominant part in the appointments as Senior Law Lord and Lord Chief Justice respectively of Lord Bingham of Cornhill and Lord Woolf, both of them in varying degrees probably more liberal than the Lord Chancellor himself in their judicial approach.

Changes to a more formal separation of powers have been put forward for discussion in the United Kingdom, notably in a publication of University College London's Constitution Unit *The Future of the United Kingdom's Highest Courts*, of which a New Zealander, Richard Cornes, is a joint author. The future of the hybrid office of Lord Chancellor is particularly controversial. I am myself attracted to the idea of a separate constitutional court, on the ground in short that applying a bill of rights calls for different qualities from interpreting a bill of lading. But that could be achieved by evolving a constitutional wing of the Appellate Committee and the Judicial Committee of the Privy Council. Experience has persuaded me nonetheless that some involvement in the legislative work of the House does lead, as Lord Wilberforce says, "to a greater understanding of the problems of the legislator, of social trends, of the proper limits of judicial innovation". That great Judge has gone further; he sees "not the beginning of a case for separating off the Law Lords from the House of Lords". By convention the Law Lords are cross benchers and do not engage in matters where there is a strong element of party political controversy. Subject to that, I have come to realise in the English context that there are reciprocal educational and public benefits in the link between the Appellate Committee and the whole House.

No more would I do without the bishops.

It will be appreciated that I am saying that, despite theoretical grounds for supposing the contrary, the Law Lords may be freer of political allegiance or subconscious influence than the Justices of the Supreme Court. Partly it is a matter of differences in tradition and ethos.⁶ Whatever form may be taken in New Zealand by a localised final court of appeal, it will be vital to ensure, as far as humanly possible, that politics do not obtrude into appointments.

VII THE LORDS

Collectively, then, the Appellate Committee of the House of Lords is independent minded. Individually the members are at present fruitfully diverse. The Lords of Appeal comprise the Lord Chancellor, the Lords of Appeal in Ordinary, and any peer of Parliament who holds or has held any high judicial office (a defined term). The latter miscellaneous group includes among others the Lord Chief Justice, who is invariably a peer, the Master of the Rolls, who often is, and retired Lords of Appeal in Ordinary. The Lords of Appeal in Ordinary are salaried as such and form the day to day core of the Committee, but other members are called on not infrequently - and (I am glad to say) remunerated, albeit as piece workers.

By convention the Lords of Appeal in Ordinary include representatives of various sectors of the United Kingdom judiciary. Thus there are at least two Scotsmen (in my time Lords Hope of Craighead and Clyde), usually a member from Northern Ireland (Lord Hutton), three or four former Queen's Bench Judges (Lord Bingham, Lord Steyn, Lord Saville of Newdigate and Lord Hobhouse of Woodborough) and a similar quota of Judges who have come up on the Chancery side (Lord Nicholls of Birkenhead, Lord Hoffmann, Lord Millett and Lord Scott of Foscote). Further, Lord Slynn has a background of service in (*inter alia*) the Court of Justice of the European Communities.

⁶ Consider Cardozo's "I often say that one [a Judge writing a judicial opinion] must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement." Quoted in: Richard A. Posner *Cardozo, A Study in Reputation* (University of Chicago Press, Chicago, 1990) 43. It is hard to imagine that any English Judge would profess this concept of judicial duty.

This distribution in itself is aimed at producing some diversity, but I am inclined to think that recently the Lords of Appeal have been a less homogeneous group than was the case, say, ten years ago. In part this has been due to an increase in the number of Lords of Appeal in Ordinary from 10 to 12, but a major factor has been South African. Lord Steyn was a senior counsel at the South African bar before settling in England. Lord Hoffmann's initial legal education and practice were in South Africa. Lord Scott was at school there. Very different in their judicial approaches, one other thing which Lords Steyn and Hoffmann have in common is that they were both Rhodes scholars; whereas Lord Scott is a Cambridge man. I have sat on five member panels of the House of Lords or the Privy Council where there has been either no member of English origin or only one.

On the whole, this variety is good for the jurisprudence of a final Court of Appeal. An arguable disadvantage in London is that, even more than is common in courts everywhere, much may turn on the composition of the panel for the particular case. Fortunately, however, differences in legal philosophy need not impair harmonious working relationships. They certainly do not do so at Westminster. The stimulation of a wide range of work and a constellation of different but always cordial colleagues, coupled with the absence of administrative responsibility, made my five years of judicial work there life enhancing.

VIII THE BOARD

Since it is a claim based not on merit but merely lapse of time, it is not boastful to say that when obliged to cease sitting on the Judicial Committee of the Privy Council on reaching the age of 75 in 2001, I was the longest serving member of that Committee, having sat there intermittently since 1977. Colleagues latterly sometimes teased me about this length of tooth, by asking such questions as What was it like sitting with Lord Halsbury? To which the appropriate reply was that he was a bit of a lightweight. I have an affection for the Judicial Committee and all the loyalty that goes with continuing membership of the Privy Council itself. That has not blinded me, though, to sharing the perception that the New Zealand appeal to the Privy Council has become an anachronism. But first some facts about the Judicial Committee.

All the major client countries of the Privy Council have now left. South Africa of course long ago; rather more recently Canada (some commentators allege that Lord Atkin destroyed the constitutional power of the Canadian federal Parliament), Malaysia, Australia, Singapore, Zimbabwe, Bangladesh, Hong Kong; also Sri Lanka (Ceylon) and Malta, both former considerable sources of appeals. (The last Australian Judge appointed a member is, incidentally, Sir Ninian Stephen, and he was born and initially educated in Scotland. His appointment dates from 1979; at the age of 78 he is no longer eligible to sit.) The jurisdictions, apart from New Zealand, from which an appeal still lies to the Privy Council are mainly West Indian, but the bulk of their appeals come from Caribbean Community (Caricom) states, who have agreed to establish a new Caribbean Court of Justice to replace the Privy Council. This project is generally considered to have been inspired by the local unpopularity of some of the Judicial Committee's rulings against undue delay in carrying out death sentences. Finances, membership and other arrangements for the replacement court remain to be agreed; the process may not be short.

Otherwise there are a few independent states, such as The Bahamas and Mauritius which provide some work; certain small British Overseas Territories, headed by Bermuda, which between them have provided a total of 18 appeals in the last four years; and very occasional appeals from the Channel Islands, sometimes involving ancient Norman French derived doctrines. There have been a raft of appeals in medical, dental and other health professional disciplinary cases, but these are expected to be transferred to some tribunal at a different level.

On the other hand, the Judicial Committee is being given a new lease of life in the form of devolution cases, chiefly from Scotland. Three were heard in 2000, ten were pending. That is a specially constituted Committee. Scottish membership is to be increased. Judges from parts of the Commonwealth outside the United Kingdom are already excluded. Unkindly it might be said that Scottish Judges have been seen as competent to determine constitutional cases from other Commonwealth countries, but that the converse evidently does not apply.

The special case of Scotland aside, of the countries retaining the Privy Council appeal New Zealand has by far the largest population. Among the others Jamaica, a Caricom state, has an estimated population of 2.59 million, Mauritius just over 1 million and all the others very much less, down to Pitcairn, last published figure 46. The number of appeals from Pitcairn and some of the other countries of very small population is nil. Inevitably the population factor is reflected in the standard of administration of justice. Cases reaching the House of Lords almost invariably raise issues of substance and difficulty, commonly turning on legal or statutory policy more than deduction from precedent, and usually there have been judgments of quality in the courts below. Similar generalisations cannot be made about Privy Council appeals. In rugby terms, the work tends to be more second or third division material. A patriot might see something incongruous in New Zealand playing in this league.

Another contrast with the House of Lords is the membership of the Privy Council, but this contrast is more formal than actual. More than 60 Judges are qualified to sit on the Judicial Committee, though many of them never do so while they have other commitments. In addition to the Law Lords all the Lords Justices and Lady Justices of the English Court of Appeal (nearly 40 in total) are Privy Counsellors; it has been customary to appoint likewise the members of the New Zealand Court of Appeal; and there have been a few appointments from the West Indies. In practice visiting members sit from time to time, and it is common for recently retired members of the English Court of Appeal to be called upon. In the latter category, Judges with whom I have had the pleasure of sitting over the years include Sir David Cairns, Sir John Balcombe, Sir Ralph Gibson, Sir John May, Sir Philip Otton, Sir Patrick Russell, Sir Murray Stuart Smith, Sir Andrew Leggatt, Sir Anthony Evans and Sir Christopher Slade. It should be remembered that members of the Court of Appeal in England well qualified for advancement to the House of Lords do not always have that opportunity; a vacancy for a common law or Chancery Lord of Appeal in Ordinary may not occur at the right time. Or for various reasons a member of the Court of Appeal may prefer to retire early from full time judicial work. (The English retiring age is now 70.) So there is a pool of first class appellate talent available for service at home or (perhaps more significantly for us) abroad.

If the unanimity rate in the House of Lords is high, that in the Privy Council is even more so. At one time no dissenting judgments were allowed there, on the theory that advice to the Sovereign should be unanimous. It was possible, however, to record a dissent somehow in an unpublic way - perhaps the monarch had a sort of complaints book. Lord Denning did so in *Perkowski v Wellington City Corporation* [1959] NZLR 1. Before Australia abandoned appeals to the Privy Council, Sir Garfield Barwick CJ secured a change in the practice. Dissenting judgments are now permitted, and I have dissented occasionally, but it is probably more common for a member of the Board who does not share the majority opinion simply to acquiesce in it.

One occasion of dissent may be worth mentioning, partly because it illustrates an agonising type of decision which Judges sitting in this country are spared but which confronts the Privy Council all too often. I refer to death row appeals from the Caribbean. In the countries concerned the death penalty is constitutional but unacceptable delays in carrying it out seems to be endemic. In *Pratt v Attorney General for Jamaica* [1994] 2 AC 1, the Privy Council held that a delay for more than five years after sentence could not be tolerated and that the sentence must be commuted to life imprisonment. In *Higgs v Minister of National Security* [2000] 2 AC 228, from The Bahamas, two men properly convicted of murder had been held in prison in appalling conditions only marginally removed from solitary confinement for more than five and more than six years respectively. In one case systemic delays in the trial process had exacerbated the delay (a failure of a committing magistrate to certify the record of evidence; excessive interruptions by the trial judge, necessitating a second trial). But the inhuman confinement had begun on arrest, not on conviction. The five years had not quite run from the convictions. The main issue was whether that made all the difference. Lord Hoffmann and Lord Hobhouse thought that it did; Lord Steyn and I thought otherwise. It turned out that we were in the minority. I am sorry to have to say that the fifth member of the Board felt impelled by his legal conscience to support execution. He was a respected New Zealand Court of Appeal Judge, now retired, who shall be nameless.

When it became clear that such would be the result, I said to Lord Steyn that I would join in his dissenting judgment. He suggested that it might be more effective if I were to write separately. I said that I had not understood that two dissenting judgments were permissible. He replied that he was in the chair and would recognise no such rule. At the end of the second dissenting judgment, I risked the proposition that the less rigorous view would ultimately prevail.

And so it surely will - ultimately. Immediately it did not. One of the men was hanged; the other saved the hangman the trouble by committing suicide. But in another way there has been a breakthrough. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, a differently constituted Board (the majority consisted of Lord Slynn, Lord Nicholls, Lord Steyn and Lord Hutton), revisiting the question of atrocious death row conditions and treatment, have accepted that prolonged confinement in such circumstances could indeed make an ultimate execution unconstitutional: cumulatively the punishment may be ruled out as inhuman and degrading. A way of bringing this out is that, while allowing capital punishment, the Constitution also prohibits inhuman and degrading treatment. A sentence of five years extremely rigorous imprisonment to be followed by execution could not be accepted as civilised. The majority judgment is also important as recognising both a right to natural justice when the prerogative of mercy is being considered and the bearing of international norms and treaty obligations on the requirements of natural justice. These rights, norms and obligations are relevant even when not expressly incorporated in domestic law. Lord Hoffmann, adhering to his former view, was a lone and caustic dissenter. Despite all the horrors of the present day world, I believe that progress towards universal human rights does very slowly take place.

IX THE NEW ZEALAND QUESTION

The hard part comes last: whether this kind of comparison of final courts of appeal furnishes any lesson that may be useful in designing New Zealand's judicial structure.

Since 1987 I have been and remain converted to the view that the development of our legal system requires replacing the Privy Council, without failing to acknowledge that it played a valuable role in the colonial and to some extent the dominion eras. The view is now widely accepted, and the reasons for it need not be rehearsed at length.

In short, New Zealand is now an independent member state of the Commonwealth, a separate realm of the Queen. It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that country and primarily versed in the laws of that country. Most New Zealand law has become markedly different from English law - the major statute law almost entirely so, the common law so to a significant extent. Judges in the United Kingdom, however eminent and enlightened, can have only a superficial acquaintance with New Zealand conditions and problems. No one suggests that New Zealand should be ruled by the British Government or its enacted law made by the Parliament at Westminster. Why should the third element of the state, the judicial arm, be seen differently? Supporters of retention of the Privy Council appeal must logically fall into one of two categories. Either they subconsciously yearn for colonial days when New Zealand was ruled ultimately from Britain, or they wish to limit the judicial role *in New Zealand* to an extent not paralleled in any other fully developed democratic state. The latter aspiration, a form of *laissez faire* philosophy, may move some business interests.

Many see the question as reducing to one of replacement. An appeal within the Court of Appeal, from a division to a full court, seems unsatisfactory and difficult to work, for sufficiently obvious reasons - just as in the end the old system of the then Supreme Court Judges making up the Court of Appeal by sitting in groups proved unsatisfactory and unworkable. For some time I used to think that a fourth tier, above the District Courts, the High Court and the Court of Appeal, could simply be dispensed with. But mature nations do commonly have, in one form or another, a second tier appeal after a first instance trial in a "superior" court; New Zealand has always had such a system; and in the legal profession there appears to be a consensus that this is necessary (with leave) for a minority of cases of special importance or difficulty.

So it is, with change in the air and in the light of the different perspective given by working for five years entirely in other jurisdictions, I came to suggest in a paper for the *Building the Constitution* conference in Wellington last year a New Zealand replacement for the Privy Council appeal. This was and is a suggested Supreme Court of New Zealand consisting of a few permanent local judges and one or two overseas judges.

The overseas constituent is perhaps the most debatable point. The reason for proposing it is diversity. As already mentioned, I have been impressed by the value of diversity in the present day Law Lords. As well the lesson has been driven home by experience in Hong Kong. With a population approaching seven million, Hong Kong outnumbers New Zealand but is comparable. Although it is a Special Administrative Region of the People's Republic of China (which gives rise to some unique problems of constitutional law), in the senior courts and the legal profession the tradition remains, as I have said, essentially English. The Court of Final Appeal was established to replace the Privy Council when the former Crown colony was returned to Chinese sovereignty.

To ensure that the common law continues for at least fifty years, the Basic Law, hammered out between the Chinese and British negotiators, provides for some overseas members. There are four permanent local Judges (PJ) and in practice for all final appeals the panel is augmented by one member from another common law jurisdiction (NPJ). There is a panel of NPJ's, now totalling nine, of whom three are New Zealanders. (The other two New Zealanders are Sir Edward Somers and Sir Thomas Eichelbaum.) Another reserve panel consists mainly of former Hong Kong Judges; they are called on when a PJ is unable to sit.

On the whole the system has worked well. Such difficulties as have arisen are associated with the special constitutional relationship between Hong Kong and mainland China. They would have no New Zealand counterpart. Unanimity has proved the rule rather than the exception. I can recall no case where the overseas Judge has been the only dissenter. But - and this is a cardinal reason for my New Zealand suggestion - I can recall some cases where the overseas Judge has had a decisive influence on the ultimate decision. And that basically because he (so far we are all men, though that will not last) has brought a wider perspective, derived from a wider experience than the purely local one. It is not, let me underline, a matter of legal acumen: there is plenty of that in Hong Kong, as in New Zealand. It is a matter of breadth of outlook and antecedents, of avoiding the danger of excessive local conformity and habits of thought, a danger which can be present in any court but is most likely with smaller populations and professions. At the same time it will be appreciated that I am far from suggesting a predominance of overseas Judges: only a tempering and enriching presence.

Recruitment of such Judges should not be a problem. Presently working Lords of Appeal in Ordinary or members of other national courts might well not always be available as desired; but it is not difficult to identify other senior appellate judges now retired or sitting only part time in various parts of the Commonwealth who are still of age and energy to make a valuable contribution and would be interested.

The permanent majority in the Supreme Court should be local. Here again the Hong Kong analogy might be helpful. Appointments from the existing bench should of course be made, but they need not be exclusive. In Hong Kong three of the four in the new final Court were from the Court of Appeal (which still exists) and one was a current leader of the Bar. The latter was the new Chief Justice, Andrew Li, then aged 49. New Zealand already has a Chief Justice of closely similar age, well qualified to take the helm, so that is not a precise precedent. Of the others one was a vastly experienced all round advocate, Charles Ching, who had been made a Judge of the Court of Appeal only a year or two before the handover – and possibly in anticipation of it. He was of older vintage and is now deceased. Henry Litton was in his sixties and is now retired, while Kemal Bokhary is only about a year older than Chief Justice Li. The merit of having relatively young permanent members is that a court may build up, not only vitality, but continuity and consistency.

The strongest argument against creating a new court of final appeal in our country has been the likely workload. There has been doubt about whether the Court would have enough to do. That doubt was more justifiable when only a handful of cases went to London from Wellington annually. The picture has changed. In 1999, according to *The Future of the United Kingdom's Highest Courts*, 14 appeals from New Zealand were heard by the Privy Council. In 2001, according to figures supplied by the Privy Council Office, the number for the year had already risen to 13 by November and eight were outstanding. The precise figures are less important than the fact that there is a steady stream of New Zealand appeals. The demand for the tier is undoubtedly there, as representatives of the New Zealand profession have urged. All appeals to a new Supreme Court should be by leave, normally as with most final courts by leave of the Supreme Court itself. Hearing leave applications would add to the work. The easier availability and lower cost of a final appeal in New Zealand would not only increase the work somewhat but also make for a system more equitable to less affluent parties.

The Hong Kong Court of Final Appeal disposed of 30 substantive appeals in 1999; the numbers are said to have fallen slightly since, apparently reflecting economic circumstances. Together with the leave applications, that Court is kept respectably busy. Moreover, one of the very purposes of constituting a court of final appeal is to enable the judges to have sufficient non sitting time for wide reading and reflection. One of my suppressed grumbles in the New Zealand Court of Appeal was that there was never enough time. Indeed throughout my judicial life, to this day, there has never been enough time; but the pressure has just been removed enough to result in quite a long paper.

In Hong Kong the Judges of the Court of Final Appeal, including the Chief Justice, sit only in that Court. The High Court, which is divided into the Court of Appeal and the Court of First Instance, has its own Chief Judge, who presides in the Court of Appeal. It is unnecessary to suggest that we follow that system precisely. At least the Chief Justice should be free, if she wishes, to sit in lower courts from time to time. The Court of Appeal would still need its own President. Conversely, the Supreme Court should be able to co opt the services of individual Judges from other courts when appropriate, as when some special experience would be helpful.

I have essayed an outline rather than a detailed blueprint, nor is the outline hard and fast. It is the general idea that matters and that I respectfully commend for consideration by the responsible powers. The essence is that New Zealand is now sufficiently mature to take responsibility for its own legal destiny and to have a true replacement ultimate court of its own. And the courthouse is already there, waiting next door, although a little dusting off will be needed.