APPEALS TO THE JUDICIAL COMMITTEE —A REPLY

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From time to time there appear in the daily press articles written by those who favour the abolition of appeals to the judicial committee of the Privy Council. They usually follow closely upon the decision of an appeal on some constitutional problem which excites the prejudices of those who understand politics but have had no training in the law. Such articles have little interest for students of the law since the arguments, insofar as they transcend pure prejudice, appeal to the voter and not to the lawyer. The lawyer surely might be expected to make his own contribution to the problem.

And yet when that distinguished lawyer Professor Beasley wrote in a recent number of this journal[1] it was disappointing to find scarcely anything that might not have been written by an intelligent layman with a strong bias in favour of abolishing the appeal.

The present article is an attempt to approach the problem from a purely legal point of view to see whether, apart from political prejudice, there is more to be said for or against the retention of the appeal.

Let us begin by shedding a few misconceptions. One may ignore such question-begging phrases as 'judicial committee interference in Australian constitutional interpretation'. Every lawyer knows that the judicial committee does not 'interfere'—it grants special leave to appeal when the importance of the case seems to justify an appeal. But perhaps not every lawyer knows what proportion of appeals from this country involve any question of interpretation of the Commonwealth Constitution.

An examination of the law reports for the fifty years ending 1956 yields some interesting results. Of 157 reported appeals only eight appear to deal with federal constitutional problems—a rather poor performance for a tribunal bent on 'interfering' with our constitutional development.

These eight cases deserve some further examination. The first was *Webb v. Outtrim*[2]—perhaps the worst decision ever given by an ultimate court of appeal. Of the seven counsel engaged only one practised in this country and he was on the winning side. This does not seem to be unimportant. For if the tribunal is dealing with a system of law which differs markedly from that in which its members have spent their professional life it is of great importance that the arguments should be presented by counsel accustomed to that system. Fortunately, owing largely to the development of air transport since World War II, this lack of assistance from Australian counsel need

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[1] (1956) 7 *Res Judicatae*, 399.
[2] [1907] A.C. 81.

not occur today. The only other thing to be said about *Webb v. Outtrim* is that it cannot happen again.

Little need be said about *A.G. v. Colonial Sugar Refining Co.*[3] – the only case in which the High Court has granted a certificate under section 74 of the Constitution – except that it looks like retaining its unique position.

The boundary dispute between South Australia and Victoria would be thought by many to be exactly the kind of problem to be decided by judges who do not belong to any of the Australian states. In any event it involved a question of a kind which is likely to recur infrequently, if at all.

There remain the five cases on section 92. Now the economic consequences of section 92 generate much heated debate – but in a strictly legal discussion economic consequences may be put aside. And from a strictly legal point of view one could found an argument for the abolition of the High Court if that tribunal could fairly be judged by its decisions on section 92 alone. Whether you like the results or not, the Privy Council has at least been consistent in its treatment of the constitutional guarantee. Indeed lawyers may wonder how any Australian citizen can be found to criticize a tribunal which has consistently emphasized and enforced the freedom which individual Australians are guaranteed from the controls of all-powerful modern governments.

For the present purposes, all that need be said is that constitutional lawyers can hardly point to section 92 as a field in which the High Court has qualified itself as a final court of appeal equal or superior to the judicial committee.

Before leaving the field of federalism, it should be pointed out that the Privy Council has in the last ten years given to section 74 an interpretation wider than that which was the accepted Australian view. As a result, the number of constitutional disputes which can be heard in Downing Street without a certificate from the High Court has appreciably decreased.

Before analysing the 149 appeals in which no federal question at all was involved, a word should be said of one argument sometimes employed by the advocates of abolition. One may state it in Professor Beasley's own words: '. . . where the Committee has upheld the appealed decision its *intervention* has been superfluous and in most cases where it has reversed or varied the appealed decision it could well be argued that the *so-called* lower court has shown a much more intelligible and intelligent approach to the issues at stake than their lordships are wont to do'.[4]

[3] (1913) 17 C.L.R. 644; [1914] A.C. 237.
[4] (1956) 7 *Res Judicatae*, 399, 408-409.

Perhaps one may pharaphrase it thus. 'When you agree with me you are right. When you disagree with me you are generally less intelligible or intelligent than I am.' Addressed to lawyers who still believe that logic has some part to play in the law, this is not an impressive argument for abolition of the appeal.

Let us return to the facts. Out of 149 cases above referred to, seventy-four were appeals from the High Court and seventy-five were appeals from State Supreme Courts. The decision of the court appealed from was reversed or substantially varied in seventy cases – of which thirty-five came from the High Court. Lord Atkin once said that one appeal in three to the Court of Appeal was successful and one appeal in three to the House of Lords was also successful. And His Lordship added that if a further appellate court were established probably the proportion of successful appeals from the House of Lords would be about the same. Do the statistics mean any more than that in complex and difficult cases men of the highest attainments will differ in opinion?

The statistics do show that appeals direct from the Supreme Courts to the Privy Council have fallen off sharply in the last twenty years and are now very rare. This probably reflects a growing confidence in the High Court. For in the early days of the Commonwealth there was a widespread belief among the profession that the Supreme Courts of Victoria and New South Wales contained abler lawyers than the original judges of the High Court. This is perhaps reinforced by the fact that, as the statistics show, the proportion of successful appeals from the High Court has diminished in the last twenty years.

Yet, when one is proposing to abolish the appeal by legislative action, how far is one justified in taking into account the temporary strength or weakness of one tribunal or another? There is, of course, one great difference between the composition of the High Court and that of the Judicial Committee. In the High Court the same limited number of judges sits in almost every case. An appeal to the Privy Council may be heard by a board of three, five or seven judges of whom not all may be past or present Lords of Appeal. Accordingly early in this century appeals were sometimes heard by what might be described as a somewhat scratch team. But that too has changed. Australian appeals are now in practice heard by a board which in composition is indistinguishable from the House of Lords sitting in its judicial capacity. This means in effect that the ultimate court of appeal for Australia is composed of the same men as the ultimate court of appeal for the United Kingdom.

This has a bearing on the argument that the appeal should be retained so as to secure uniformity in judge-made law between Australia and England. The diversity and confusion which prevails in

the United States of America where there has been no ultimate court of appeal with power to lay down a uniform system of law for the numerous states may contain a warning for us.

This argument for uniformity has much more force for Australia and New Zealand than it had for South Africa or Canada or India or than it will have in the newer Dominions which are not purely common law countries. Yet uniformity can be bought too dearly; and perhaps the strongest argument against the continuance of the appeal is that it costs too much.

Bound up with the question of expense is a technical question. How many appeals should be allowed in any system of law? *Interest rei publicae ut sit finis litium* contains more wisdom than most of the Latin maxims which we retain in our legal jargon. If an action is commenced in the High Court it does not seem inherently wrong that there should be an appeal to some higher tribunal. On the other hand, if an action is commenced in the Supreme Court of a State, an appeal to the Full Court followed by an appeal to the High Court and a further appeal to the Privy Council strikes one instinctively as too much of a good thing.

But does it follow that it is better to abolish the appeal to the Privy Council than to abolish one of the intermediate appeals? Is there not a stronger case for abolishing the appeal to the State Full Court? There is no disrespect involved in pointing out that this is technically an appeal not to a court of appeal but to a divisional court composed of judges not specially appointed for appellate work. Such a change would involve conferring, by legislative amendment, a right of appeal in every case from the decision of the Supreme Court to the Hight Court. It may be said, of course, that an appeal to the Privy Council is invariably more expensive than an appeal to the Full Court. The question remains whether the additional cost is worth paying. It might be somewhat diminished if, by constitutional amendment, a right of appeal to the Privy Council from the High Court were created in those cases in which there is now a right of appeal from the Supreme Court to the Privy Council.

If it were only necessary to obtain the leave of the High Court there would be an end of the necessity of sending counsel to London on an application for special leave which is disposed of in a few hours or at most a few days.

It is not the purpose of the present article to advocate any particular policy. Its aim has been to stimulate among lawyers discussion of an important question along professional lines. For the question is one upon which the legal profession is entitled to be heard and it will be regrettable if changes are made without any real appreciation of the technical problems involved.