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DEWAN RA'AYAT

(HOUSE OF REPRESENTATIVES)

(*Fifth Session*)

REPORT OF THE SELECT COMMITTEE ON JUDICATURE (AMENDMENT) BILL, 1968

DI-CHETAK DI-JABATAN CHETAK KERAJAAN
OLEH THOR BENG CHONG, A.M.N., PENCHETAK KERAJAAN
KUALA LUMPUR
1969


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MALAYSIA

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PARLIMEN
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REPORT OF SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL

INTRODUCTORY

1. The Courts of Judicature (Amendment) Bill was presented to the Dewan Ra'ayat on 6th June, 1968, and was given its first reading on the same day. On 22nd August, 1968, a motion was brought by the Honourable the Minister of Justice to commit the Bill to a Special Select Committee of the House for its consideration. The membership of this Special Select Committee was duly nominated by the Committee of Selection, under the powers vested in it by Standing Order 76, on 10th September, 1968, as follows:

The Honourable the Minister of Justice (Tuan Bahaman bin Samsudin).

The Honourable the Minister for Local Government and Housing (Tuan Khaw Kai Boh, P.J.K.).

The Honourable Tan Sri Nik Ahmad Kamil, D.K., S.P.M.K., S.J.M.K., P.M.N., P.Y.G.P.

The Honourable Tuan Chan Seong Yoon.

The Honourable Dato' Mohd. Asri bin Haji Muda, S.P.M.K.

The Honourable Dato' S. P. Seenivasagam, D.P.M.P., P.M.P., J.P.

2. As the Honourable the Minister for Local Government and Housing was unable to serve because he was proceeding overseas on duty, the Honourable Tuan Hamzah bin Dato' Abu Samah was nominated to take his place by the Committee of Selection.

3. The Committee held, altogether, four meetings. Representations on the subject matter of the Bill were invited from the public and interested persons and bodies by means of an advertisement inserted in the *Malay* and *English* papers and by letter. Memoranda received by the Committee are reproduced in Annexure A to this Report, while the transcript of oral views given before the Committee by the Bar Council, States of Malaya, the Legal and Judicial Service Officers' Association, Malaysia, and Enche' K. L. Devaser, a member of the Malayan Bar, are set out in Annexure B.

TERMS OF REFERENCE OF COMMITTEE

4. In interpreting the scope of the task entrusted to it by the House, the Committee has based itself upon the provisions of Standing Order 83 (4) which states that the terms of reference of a Select Committee appointed on a Bill *shall be the Bill that is committed to it and relevant amendments.* On this point it has also been guided by Erskine May's Parliamentary Practice, where on page 641 of the 17th Edition it is stated:

> "But when a Bill is committed, or referred, to a Select Committee, the Bill is *itself* the order of reference, and the inquiries and deliberations of the Committee *must* be confined to the Bill and amendments relevant to the subject matter thereof."

5. The subject matter of the Bill committed to this Committee by the House is "An Act to amend the Courts of Judicature Act, 1964". The substantive clause of the Bill (Clause 3), however, restricts the generality of the long title by confining the subject matter of amendment to Section 74 of the principal Act, which Section merely lays down the conditions of appeal for appeals to the Yang di-Pertuan Agong. Clause 3 of the Bill seeks to amend the principal Act only insofar as is necessary to provide for the abolition of appeals to the Judicial Committee in respect of:

(*a*) criminal cases; and

(*b*) any case in which the Federation or any State is a party and in which the validity of any law made by Parliament or the legislature of a State is questioned.

6. The fact that the Courts of Judicature (Amendment) Bill has been remitted to this Committee immediately after its first reading by the House has also had to be taken into account by the Committee in deciding on the question of its terms of reference. In the normal course, a bill is committed to a Select Committee only after the House has endorsed it in principle by giving it a second reading. Where this occurs, the Select Committee to which such a Bill is committed may not, under Standing Order 55 (1), "debate the principle of the Bill but only its details." In the view of this Committee, the fact that the Courts of Judicature (Amendment) Bill was committed immediately after it was read a first time was intended to give the Committee a free hand to consider any amendments to it, including even those involving the principle of the Bill.

7. Taking all the foregoing factors into consideration, the Committee concluded that its task is to consider the Courts of Judicature (Amendment) Bill from all aspects, including even points of principle, subject however, the limitations mentioned in paragraphs 4, 5 and 6 above.

REPRESENTATIONS RECEIVED BY THE COMMITTEE

8. The written and oral representations received by the Committee may be conveniently classified under two main categories:

(*a*) those in favour of the Bill; and

(*b*) those against the Bill for any one of the following reasons or a combination of them:

(i) because they were in favour of the total abolition of appeals to the Judicial Committee of the Privy Council; or

(ii) because they were in favour of the replacement of the Judicial Committee of the Privy Council by an indigenous appellate body or by a Regional Court of Appeal comprising senior judges drawn from various Commonwealth countries in this region; or

(iii) because they were in favour of retaining the present arrangements whereby all appeals to the Yang di-Pertuan Agong are transmitted to the Judicial Committee of the Privy Council for its recommendations; or

(iv) because they considered the Bill as drafted objectionable on the ground that, by abolishing appeals to the Judicial Committee only in criminal cases while retaining appeals in civil cases, it appeared to place greater stress on the importance of property than on the life and liberty of the subject.

9. Only two out of the twenty-six memoranda received were in favour of the Bill in its present form; and not one of those who appeared before the Committee to give their views orally was in favour of the Bill in its present form.

RECOMMENDATIONS

10. In the light of the representations received by it, the Committee considered which of the following courses of action should be taken:

(*a*) to accept the Bill; or

(*b*) to accept the Bill with amendments; or

(*c*) to reject the Bill.

11. The first of these courses, to accept the Bill, is out of the question, as even though the individual members of the Committee differed in their grounds of objection to the Bill in its present form, they were unanimous that the Bill as drafted is unacceptable.

12. The Committee then turned to the possibility of amending the Bill in a manner that would make it acceptable, if not to all, at least to a majority of its members. Here, however, the Committee found that the powers possessed by it to propose amendments were in reality very limited. Under the terms of reference of the Committee, the only amendments to the Bill that would be admissible would be only those that are relevant to the subject matter of the Bill—which meant, in this context, only amendments relative and relevant to Section 74 of the Courts of Judicature Act (No. 7 of 1964), i.e., with regard to conditions of appeal to the Judicial Committee. One example will suffice to illustrate the limiting effect of the Committee's terms of reference. Thus, in considering the question of abolishing altogether appeals to the Judicial Committee, the Committee examined the possibility of setting up an alternative body to the Judicial Committee to advise the Yang di-Pertuan Agong, and in this way preserve the inherent legal right of the Malaysian subject to appeal in the last resort to his Sovereign. Under its terms of reference, it is possible for the Committee to recommend an amendment to the Bill which would have the effect of abolishing altogether appeals to the Judicial Committee; but a proposal to set up an alternative body to the Judicial Committee would entail amendments to other sections of the Courts of Judicature which would be outside the scope of the Bill before the Committee and therefore outside its terms of reference.

13. As the Bill in its present form is unacceptable to the Committee, and as the Committee is unable under its present terms of reference to propose amendments which are within the competence of the Committee, there is

therefore but one course of action left to the Committee, and that is to recommend that the Bill be rejected. This the Committee unanimously recommends.

14. As the matter of judicial appeals is one of vital public importance, the Committee is of the considered opinion that the most careful examination should be given to it, so that whatever changes may be proposed in the future, the high public confidence which the Judiciary now enjoys will always be maintained. Accordingly, the Committee would conclude its report by expressing the hope that if it should be decided to remit the matter to any future Government or Parliamentary Committee for consideration, every endeavour should be made to ensure that such Committee is fully empowered to examine and make recommendations on all the relevant and related aspects of the question.

(BAHAMAN BIN SAMSUDIN)
Minister of Justice,
Chairman

(HAMZAH BIN DATO' ABU SAMAH)

(TAN SRI NIK AHMAD KAMIL)

(S. Y. CHAN)

(DATO' MOHD. ASRI BIN HAJI MUDA)

(DATO' S. P. SEENIVASAGAM)

TERJEMAHAN

PENYATA JAWATAN-KUASA PILEHAN KHAS YANG DI-LANTEK BAGI MENIMBANGKAN THE COURTS OF JUDICATURE (AMENDMENT) BILL

KATA PENDAHULUAN

1. The Courts of Judicature (Amendment) Bill telah di-bentangkan dalam Dewan Ra'ayat pada 6hb Jun, 1968, dan telah di-bachakan kali yang pertama pada hari itu juga. Pada 22hb Ogos, 1968, satu usul telah di-bawa oleh Yang Berhormat Menteri Keadilan menyerahkan Rang Undang[2] ini kapada Jawatan-kuasa Pilehan Khas Majlis ini untok pertimbangan-nya. Ahli[2] Jawatan-kuasa Pilehan Khas ini telah di-chalunkan dengan saperti-nya oleh Jawatan-kuasa Pemileh, menurut kuasa[2] yang di-berikan kapada-nya oleh Peratoran Meshuarat 76, pada 10hb September, 1968, saperti berikut:

Yang Berhormat Menteri Keadilan (Tuan Bahaman bin Samsudin).

Yang Berhormat Menteri Kerajaan Tempatan dan Perumahan (Tuan Khaw Kai Boh, P.J.K.).

Yang Berhormat Tan Sri Nik Ahmad Kamil, D.K., S.P.M.P., S.J.M.K., P.M.N., P.Y.G.P.

Yang Berhormat Tuan Chan Seong Yoon.

Yang Berhormat Dato' Mohd. Asri bin Haji Muda, S.P.M.K.

Yang Berhormat Dato' S. P. Seenivasagam, D.P.M.P., P.M.P., J.P.

2. Oleh kerana Yang Berhormat Menteri Kerajaan Tempatan dan Perumahan tidak dapat berkhidmat kerana dia hendak pergi bertugas di-seberang laut, maka Yang Berhormat Tuan Hamzah bin Dato' Abu Samah telah di-chalunkan oleh Jawatan-kuasa Pemileh mengambil tempat-nya.

3. Jawatan-kuasa itu telah mengadakan empat meshuarat kesemua-nya. Shor[2] mengenai maudhu' Rang Undang[2] ini telah di-minta daripada orang ramai dan orang[2] dan badan[2] yang berkepentingan melalui iklan yang di-siarkan dalam suratkhabar[2] Melayu dan Inggeris dan dengan surat. Memorandum[2] yang di-terima oleh Jawatan-kuasa itu ada di-perturunkan dalam Lampiran A pada Laporan ini, sedangkan laporan bertulis bagi pendapat[2] sa-chara lisan yang telah di-kemukakan kapada Jawatan-kuasa itu oleh Majlis Peguam Negeri[2] Tanah Melayu, Persatuan Pegawai[2] Perkhidmatan Perundangan dan Kehakiman, Malaysia dan Enche' K. L. Devaser, ia-itu sa-orang ahli Perundangan Tanah Melayu, ada di-terakan dalam Lampiran B.

TUGAS JAWATAN-KUASA

4. Pada mentafsirkan bidang tugas yang telah di-serahkan kapada-nya oleh Majlis ini, Jawatan-kuasa itu berasaskan sharat[2] Peratoran Meshuarat 83 (4) yang menetapkan bahawa tugas sa-sabuah Jawatan-kuasa Pilehan yang di-lantek bagi menimbang suatu Rang Undang[2] *hendak-lah ia-nya Rang Undang[2] yang di-serahkan kapada-nya dan pindaan[2] yang berkenaan.* Dalam perkara ini, Jawatan-kuasa telah juga di-pandu oleh Parliamentary Practice karangan Erskine May, ia-itu pada muka 641 Chetakan ke-17 buku itu, di-nyatakan:

> "But when a Bill is committed, or referred, to a Select Committee, the Bill is *itself* the order of reference, and the inquiries and deliberations of the Committee *must* be confined to the Bill and amendments relevant to the subject matter thereof."

5. Maudhu' Rang Undang² yang di-serahkan kapada Jawatan-kuasa ini oleh Majlis ia-lah "An Act to amend the Courts of Judicature Act, 1964". Bagaimana pun, fasal pokok dari Rang Undang² itu (Fasal 3), membataskan maksud yang 'am dalam tajok panjang itu dengan menghadkan maudhu' pindaan kapada Sekshen 74 Act yang utama itu, ia-itu Sekshen itu hanya menetapkan sharat² rayuan untok rayuan² kapada Yang di-Pertuan Agong. Fasal 3 Rang Undang² itu bertujuan meinda Act utama itu sa-takat yang perlu sahaja bagi menguntokkan penghapusan rayuan² kapada Jawatan-kuasa Kehakiman berkenaan dengan

(*a*) kes² jenayah; dan

(*b*) mana² kes dalam mana Persekutuan atau mana² Negeri terlibat di-dalam-nya dan sa-barang undang² yang di-buat oleh Parlimen atau dewan undangan sa-sabuah Negeri di-persoalkan.

6. Bahawasa-nya the Courts of Judicature (Amendment) Bill telah di-serahkan kapada Jawatan-kuasa ini sa-baik² sahaja ia di-bachakan kali yang pertama oleh Majlis hendak-lah juga di-pertimbang oleh Jawatan-kuasa itu pada memutuskan soal tugas-nya. Lazim-nya, sesuatu Rang Undang² itu di-serahkan kapada sa-sabuah Jawatan-kuasa Pilehan hanya sa-lepas Majlis mengsahkan-nya pada dasar dengan membacha-nya kali yang kedua. Jika hal ini berlaku, Jawatan-kuasa Pilehan yang menimbang sa-sabuah Rang Undang² yang di-serahkan kapada-nya, tidak boleh, di-bawah Peratoran Meshuarat 55 (1), "membahath dasar Rang Undang² itu tetapi boleh membahath butir²-nya sahaja". Pada pendapat Jawatan-kuasa ini, bahawasa-nya the Courts of Judicature (Amendment) Bill telah di-serahkan sa-lepas sahaja ia di-bachakan kali yang pertama ia-lah bertujuan membiarkan Jawatan-kuasa menimbang apa² pindaan kapada-nya, termasok juga pindaan² yang melibatkan dasar Rang Undang² itu.

7. Dengan menimbangkan semua perkara yang tersebut tadi, Jawatan-kuasa mengambil kesimpulan bahawa tugas-nya ia-lah menimbang the Courts of Judicature (Amendment) Bill dari semua segi termasok juga butir² dasar, tetapi terta'alok kapada pembatasan² yang tersebut dalam perenggan 4, 5 dan 6 di-atas.

SHOR² YANG DI-TERIMA OLEH JAWATAN-KUASA

8. Shor² bertulis dan shor² lisan yang di-terima oleh Jawatan-kuasa ini boleh di-perjenis dengan mudah sahaja kapada dua kumpulan yang besar:

(*a*) yang menyokong Rang Undang² itu; dan

(*b*) yang menentang Rang Undang² itu kerana salah satu sebab atau beberapa sebab yang berikut:

(i) kerana mereka menyokong supaya di-hapuskan sama sa-kali rayuan² kapada Jawatan-kuasa Kehakiman Majlis Privy; atau

(ii) kerana mereka menyokong supaya Jawatan-kuasa Kehakiman Majlis Privy di-ganti dengan sa-buah badan perayu anak negeri atau oleh suatu Mahkamah Rayuan Kerantauan yang terdiri daripada hakim² kanan yang di-ambil dari beberapa negara Commonwealth di-rantau ini; atau

(iii) oleh sebab mereka menyokang supaya peratoran² yang berjalan sekarang ini di-teruskan kerana dengan demikian semua rayuan² kapada Yang di-Pertuan Agong di-serahkan kapada Jawatan-kuasa Kehakiman Majlis Privy untok mendapatkan shor² daripada-nya; atau

(iv) oleh kerana pada timbangan mereka Rang Undang² sa-bagaimana yang telah di-derafkan itu terchela dengan alasan bahawa, dengan memansukhkan rayuan² kapada Jawatan-kuasa Kehakiman dalam kes² jenayah sahaja sedangkan rayuan² dalam kes² mal di-pelihara, maka nampak-nya ini lebeh mementingkan harta benda daripada nyawa dan kebebasan hak ra'ayat.

9. Daripada dua puloh enam memoranda yang di-terima hanya dua sahaja yang menyokong Rang Undang² mengikut bentok-nya sekarang dan tidak sa-orang pun yang datang di-hadapan Jawatan-kuasa untok memberikan pendapat² mereka sa-chara lisan menyokong Rang Undang² mengikut bentok-nya sekarang.

SHOR²

10. Berpandu kapada shor² yang telah di-terima, Jawatan-kuasa telah menimbangkan mana satu daripada langkah² yang berikut patut di-jalankan:

(*a*) untok menerima Rang Undang² itu; atau

(*b*) untok menerima Rang Undang² dengan pindaan², atau pun

(*c*) untok menolak Rang Undang² tersebut.

11. Langkah yang pertama ia-itu menerima Rang Undang² ini tidak-lah mungkin kerana sunggoh pun ahli² persaorangan dalam Jawatan-kuasa berbeza² dalam alasan² bantahan mereka terhadap Rang Undang² ini mengikut bentok-nya sekarang, namun mereka sa-bulat suara berpendapat bahawa Rang Undang² saperti yang telah di-derafkan itu tiada dapat di-terima.

12. Jawatan-kuasa kemudian berpaling kapada kemungkinan meminda Rang Undang² dengan sa-chara-nya supaya boleh di-terima, kalau pun bukan oleh semua ahli², sa-kurang²-nya oleh sa-bilangan besar daripada mereka. Di-sini, walau bagaimana pun, Jawatan-kuasa dapati bahawa kuasa²-nya untok mengeshorkan pindaan² sebenar²-nya sangat terhad. Mengikut tugas² Jawatan-kuasa, pindaan² kapada Rang Undang² yang boleh di-terima hanya-lah pindaan² yang ada kaitan dengan isi Rang Undang²— yang berma'ana, dalam karinah ini, hanya pindaan² yang berkaitan dan berkenaan dengan Sekshen 74, the Courts of Judicature Act (Bil. 7 tahun 1964) ia-itu berhubong dengan sharat² membuat rayuan² kapada Jawatan-kuasa Kehakiman. Satu mithalan sahaja sudah memadai untok menggambarkan tugas Jawatan-kuasa yang terhad kuasa-nya. Jadi, dalam menimbangkan soal memansukhkan sama sa-kali rayuan² kapada Jawatan-kuasa Kehakiman Jawatan-kuasa telah meneliti kemungkinan menubohkan suatu badan mengganti Jawatan-kuasa Kehakiman untok menasehatkan Yang di-Pertuan Agong, dan dengan chara begini memelihara hak dari segi undang² yang sedia ada pada sa-saorang ra'ayat Malaysia untok merayu, sa-bagai langkah terakhir, kapada raja-nya. Mengikut tugas²-nya, Jawatan-kuasa boleh-lah mengeshorkan suatu pindaan kapada Rang Undang² yang boleh mendatangkan kesan memansukhkan sama sa-kali rayuan² kapada Jawatan-kuasa Kehakiman, tetapi suatu shor untok menubohkan sa-buah badan lain mengganti Jawatan-kuasa Kehakiman akan melibatkan pindaan² kapada sekshen² lain dalam the Courts of Judicature yang terkeluar daripada lingkongan Rang Undang² yang ada di-hadapan Jawatan-kuasa dan oleh yang demikian terkeluar daripada tugas²-nya.

13. Oleh kerana Rang Undang² mengikut bentok-nya sekarang tiada dapat di-terima oleh Jawatan-kuasa, dan oleh kerana Jawatan-kuasa mengikut tugas²-nya sekarang, tidak boleh menchadangkan pindaan² supaya Rang

Undang² ini boleh di-terima, ia-itu pindaan² yang ada dalam kesanggupan Jawatan-kuasa, maka tinggal satu sahaja langkah yang ada pada Jawatan-kuasa, ia-lah mengeshorkan supaya Rang Undang² itu di-tolak. Ini-lah yang di-shorkan oleh Jawatan-kuasa dengan sa-bulat suara.

14. Oleh kerana perkara rayuan² kehakiman ada-lah satu perkara kepentingan 'awam yang mustahak, Jawatan-kuasa sa-telah menimbang, berpendapat bahawa pemereksaan yang sa-habis² chermat hendak-lah di-berikan kapadanya supaya apa² perubahan yang mungkin di-shorkan pada masa akan datang, keyakinan penoh dari orang ramai saperti yang di-ni'mati oleh badan Kehakiman sekarang ini sentiasa terpelihara.

Sa-terus-nya, Jawatan-kuasa menamatkan laporan-nya dengan melahirkan harapan bahawa sa-kira-nya di-putuskan hendak menyerahkan perkara ini bagi timbangan mana² Kerajaan yang akan datang atau Jawatan-kuasa Parlimen, sa-tiap usaha hendak-lah di-jalankan bagi menjamin supaya Jawatan-kuasa saperti itu akan mempunyaï kuasa penoh untok memereksa dan membuat shor atas semua aspek² masaalah yang berkaitan dan berkenaan.

ANNEXURE "A"

Memoranda

on the

Courts of Judicature (Amendment) Bill, 1968

NOTE.—Memoranda submitted by the Judges of the Federal and High Courts are not included in this Annexure.


PARLIMEN
MALAYSIA

BAR COUNCIL, STATES OF MALAYA

MEMORANDUM ON THE PRIVY COUNCIL ISSUE—THE COURTS OF JUDICATURE (AMENDMENT) BILL, 1968—FOR SUBMISSION TO THE GOVERNMENT SELECT COMMITTEE

The position today as regards appeals in Criminal, Constitutional and Civil matters is as follows:

CRIMINAL

Any person convicted by any High Court in Malaya in any Criminal matter may first appeal to the Federal Court of Malaysia and, if the Federal Court dismisses his appeal, he may, with special leave, appeal to the Yang di-Pertuan Agong who will act on the recommendation of the Judicial Committee of the Privy Council.

CONSTITUTIONAL

Any cause or matter to which the Federation or any State is a party and in which the validity of any law made by Parliament or the Legislature of a State is questioned, must be first heard by the Federal Court. An appeal would then lie from the Federal Court to the Yang di-Pertuan Agong who will act on the recommendation of the Judicial Committee of the Privy Council.

CIVIL

Any person who is dissatisfied with the decision of the High Court in a Civil matter may appeal to the Federal Court. Any person who is dissatisfied with the final judgment of the Federal Court, may appeal with the leave of the Federal Court to the Yang di-Pertuan Agong (who will act on the recommendation of the Judicial Committee of the Privy Council) where:

1. The matter in dispute in the appeal amounts to or is of the value of $5,000 or upwards; or
2. The appeal involves directly or indirectly some claim or question to or respecting property or some civil right of like amount or value; or
3. The case is from its nature a fit one for appeal.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

As early as the 11th century, the King of England had a small body of advisers composed of his great Ministers of State in whose ability or devotion he had confidence. This body was known as the Royal Council, and was the centre of the Government of England.

In the 16th century, this Council came to be known as the Privy Council or the Council with the King, and one of its functions was to hear appeals from the King's Dominions. With the growth of the Empire in the 17th and 18th century, this part of its function grew enormously in importance

and in 1833 an Act was passed setting up a Committee of the Privy Council to be known as the Judicial Committee of the Privy Council consisting of those Privy Councillors who were in high judicial office. The composition of the Committee has subsequently been extended to include distinguished Chief Justices and Judges of the Superior Courts of countries which form the Commonwealth. Today, it consists of some of the finest judicial brains in the whole Commonwealth.

Until independence was granted to us, all appeals from the Court of Appeal (as the Federal Court was known prior to 1964) were to the Queen of England who acted on the recommendation of the Judical Committee of the Privy Council. After gaining our independence, all appeals from our Court of Appeal (Federal Court) were and are directed to the Yang di-Pertuan Agong who, by agreement with the United Kingdom, has obtained the services of the Judicial Committee of the Privy Council to advise him on such Appeals. The decision of the Judicial Committee does not take the form of a Judgment but of a Report or recommendation to the Yang di-Pertuan Agong who then makes an order giving effect thereto. In Criminal cases, the Judicial Committee will not advise the Yang di-Pertuan Agong to grant leave to appeal unless it appears "prima facie" that the trial has been conducted with such disregard of the forms of legal process or the principles of natural justice as to involve a substantial and grave injustice to the accused. It will not normally interfere with a finding of fact by our Courts.

COURTS OF JUDICATURE (AMENDMENT) BILL, 1965

When a Bill was introduced in Parliament in 1965 to curtail the right of appeal to the Judicial Committee of the Privy Council, the Bar Council and other representative bodies opposed it on various grounds and the Government did not proceed with it.

COURTS OF JUDICATURE (AMENDMENT) BILL, 1968

The Government has now introduced this Bill which purports to abolish Appeals to the Yang di-Pertuan Agong from the Federal Court in:

1. any Criminal cause or matter; or
2. any cause or matter to which the Federation or any State is a party and in which the validity of any law made in Parliament or the Legislature of the State is questioned (hereinafter referred to as Constitutional matters).

Nothing has occurred during the last three years to change the views of the Bar Council, and its objections to the 1965 Bill are equally applicable to the present Bill. The grounds on which the Bar Council oppose this Bill are as follows:

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

3. At the present moment, an accused in a Criminal case and a litigant in a Civil matter may have recourse to three (3) forums (three (3) 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 (2) 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 (3) tier system. India, who have abolished appeals to the Privy Council, still maintains 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 right 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 those 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 the 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 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 of America 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.

Even in our country the number of cases that come before the Federal Court is very small compared with the cases that are heard by the High Court. Again, the number of appeals that are successful in the Privy Council must be very small just as the number of those that are successful in the Federal Court is also small comparatively.

SUBMISSION

We do feel that it is 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 ideal alternative body to advice the Yang di-Pertuan Agong would be a Final Court of Appeal, above the Federal Court, consisting entirely of our own Judges.
6. In another 10 to 15 years, our Judges may well have acquired that degree of experience and stature that would be required of them to man 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 to 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.

We do strongly submit that the Courts of Judicature (Amendment) Bill, 1968 should be withdrawn and nothing be done to alter the present right of appeal to the Yang di-Pertuan Agong until such time as we are ready to set up our own Final Court of Appeal to advise him.

K. A. MENON,
Secretary,
Bar Council, States of Malaya

MEMORANDUM FROM THE MALAYSIAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS ON THE COURTS OF JUDICATURE (AMENDMENT) BILL, 1968

Ever since this Bill was mooted, there has been public debate in professional circles closely associated with the administration of the law and the view has been widely expressed that this Bill was, at the least premature.

Members of the Cabinet, from the Deputy Prime Minister downwards have frequently said in public that such a measure was necessary and that we have a Judiciary who have demonstrated their competence to take over more of the Jurisdiction now exercised by the Privy Council. It is essential therefore to make the point that to call the measure premature, does not necessarily or inevitably import a reflection on the competence of the Judiciary. It would be wise therefore for Government not to emphasise this aspect of it, which tends to bring our Judges into the arena of public debate. Certainly this is not the tradition under which the Judiciary has been brought up in this country.

Other member States in the British Commonwealth have thought of and felt driven, to this "Reform", on the respectable constitutional thesis that any external agency for final judicial determination, amounts to an infraction of the Sovereignty and independence of these states and, it is fortunate that the "Explanatory Statement" accompanying the Bill, while being singularly uninformative, does not however embark on giving any "object" or "reasons" for this amendment.

This vagueness no doubt enables the Government to feel free to trim its sails to the prevailing winds: but at least in one respect, it is patient of the reasoning that a debate on the validity of a Law passed by the Legislature, cannot be determined in an aseptic climate remote from reality, without regard to the prevailing political conditions according to which the elected representatives of the people in whom Sovereignty rests might wish to see a change. There are of course, other views validly capable of being entertained in this sphere, but for the present purpose it is unnecessary to examine them.

With regard to the 2nd aspect referred to in the "Explanatory Statement" viz. the limitation on the right of appeal in criminal matters much may be said and, here one faces the difficult task of controverting non-expressed and unexplained reasons upon which one has to assume a basis for the intended legislation.

Broadly speaking, and in essential terms the Judiciary in any part of the world is structured in a hierarchic system of appeals. Such a system is intended to make provision for human fallibility by permitting appeals from decisions in which the unsuccessful litigant is permitted to challenge and seek a reversal of the decision given against him, but the process is not interminable, and after a permitted number of appeals the claim of finality supervenes, on the principle that there should be a finality to all litigation.

When the continuance of the Privy Council Jurisdiction as a final court of appeal was contemplated on the eve of independence, a procedure was invented by which Constitutional propriety was maintained, without sacrificing the right to recourse to an exceptionally competent though obviously external jurisdiction, having regard to the course of our legal history. This was done by the Judicial Committee not advising Her Britannic Majesty but His Malaysian Majesty.

At the same time, as the right of appeal in criminal matters to the Sovereign, is in principle the undoubted right of the subject and the exercise of the prerogative of the Sovereign, to remedy or undo an essential injustice suffered by his subject, the local Law, i.e. the Courts Ordinance, as it then was, was amended so that the right of the Agong, as the Sovereign, to accept appeals from the subjects for redress may be preserved.

As a result of the Amendment now proposed that right of the subject to seek redress at the hands of his Sovereign is not just being lost on the wayside, but is being deliberately put an end to. This should be looked at, even more as an attempt at the diminution of the prerogative rather than a withdrawal or limitation on the subject's essential right, in respect of the liberty of his person, the most sacred of an individual's rights.

Looked at therefore in its proper perspective the problem does not involve the competence of our Judiciary at all, as politicians tend to make it to be. Judges know that a right of appeal from their decisions is not a reflection on their ability, as the very system under which they work is structured as a provision against fallibility, and that even where the right of appeal terminates, it is because the need for finality is paramount.

The real question is: can the subject afford a diminution of this individual rights of liberty when the trend in modern legislation is to nibble at his rights so persistently and so continuously that the limitations on his freedom have gone over the boundaries of his civil rights, but expanded into obligations for which the sanctions are introduced by way of punishment under the criminal law.

If therefore a right of appeal is to be denied, a beginning should not be made in the field of criminal law. Even in terms of an increasing recognition of the competence of our Judiciary, there *may be* a case to increase the financial limits beyond which alone recourse to Privy Council can be had. Even as a risk this is a permissible risk. A man can lose his property and make good his loss in a variety of ways given the requisite opportunity; if on the other hand he loses his liberty and is made to suffer for it in terms of punishment, the situation is irretrievable.

It is therefore permissible to point out that to claim that a mere eleven years of independence has accelerated the pace of progress of our judicial competence, objectively examined, may be an excessive claim and, the profession—notoriously conservative and traditional—may be entirely right in opposing any radical change in the right of appeal to the Privy Council. This is not, it is worth repeating, a denial of judicial ability. However, if political considerations require—and the explanatory statement is silent as to these—a change in that direction, the first step is to extend and expand the local court's jurisdiction in civil matters and not tamper with the liberty of the subject, which is vastly more important, a field in which, for constitutional reasons the legislature should hesitate long before abridging existing rights.

It is to be repeated that the denial of the right of the subject to have recourse to his Sovereign where the liberty is threatened or infringed, should be a matter of genuine and anxious concern to the citizen. The legal profession as the watchful and vigilant custodian of these rights has the right, and the duty, to draw attention to the inevitable result, whether appreciated or not in appropriate quarters, of qualitative damage to the community as a whole, as a result of such legislation being passed into law.

Ref.: AG/C/40.

STATE ATTORNEY GENERAL'S CHAMBERS,
KUCHING, SARAWAK,
6th November, 1968

Secretary to the Cabinet,
Dewan Ra'ayat,
Bangunan Parlimen,
The House of Representatives,
Parliament Building

SIR,

COURTS OF JUDICATURE (AMENDMENT) BILL, 1968

With reference to your letter above, I forward herewith a joint representations of the practising advocates in Sarawak. As there is no unanimity in their views on the matter under reference the meeting which was presided by the Acting State Attorney General, decided that both the views of the majority and the minority should be forwarded.

2. I apologise for the delay because in view of the notice given it was not at all possible to get all the lawyers to come to the meeting, practising as they are in different and distant parts of Sarawak and also to get the written views of those who could not attend. However, those who were anticipated to be unable to come to the meeting were advised to send their written representations individually to you.

The Majority View

"In opposing the Bill, the majority adopted the views expressed in the Malayan Law Journal of July 1968, at page (i) on the subject under reference. It was pointed out that though everyone talked about appeals to the Privy Council, there is really no provision for appeal to the Privy Council from Malaysia. The appeal is really to His Majesty the Yang di-Pertuan Agong. The King acts on the advice of the Judicial Committee of the Privy Council, that is to say, the Privy Council does not decide on appeals from Malaysia as it does on appeals from other Commonwealth countries.

It was further stated that Malaysia is much respected for her record in the field of rule of law, but Malaysia being a young nation she could do with the help of the Judicial Committee of the Privy Council. As such it is too premature to abolish appeals to the Yang di-Pertuan Agong, as proposed in the Bill.

Criminal cases are no less important. It is strange that human lives are regarded with apparent less regard compared to the value of the matter in dispute allowed under section 74 of the Bill. Human lives are sacrosanct and, therefore, it is illogical to allow civil appeals from the Federal Court to the Yang di-Pertuan Agong and not those where human lives are at stake. Our judges would only welcome the assistance of the Judicial Committee as they are men great enough to appreciate their limitations. Malaysia ought to profit from the learning and experience of the Judicial Committee.

There is no substance in the contention that reference of appeals to the Judicial Committee would mean derogation of sovereignty of Malaysian Parliament. The agreement with Britain by which appeals are referred to the Judicial Committee implies, on the contrary, an affirmation of sovereignty,

because the right of entering into international engagements is an attribute of State sovereignty. Further, the argument based upon sovereignty becomes all the more hollow in view of the fact that only partial abolition of reference to the Judicial Committee is proposed."

The Minority View

"In supporting the Bill, the view is that all appeals to the Privy Council should be abolished instead of confining it to criminal and constitutional cases. Malaysia is an independent nation and should take pride in its own judges and show strong faith and confidence in the ability of its judges. This is an attitude which is consistent with independence. Who could say that members of the Judicial Committee are infallible? It is suggested that in constitutional matters the Federal Constitution should be amended so that constitutional matters may be heard by a full Bench of the Federal Court as in United States of America, India, Australia and New Zealand instead of by a Court of first instance.

Another view is that while it is in favour of an abolition of appeals to Privy Council in view of, and in consistent with our spirit of, independence but there should be established such a Court of last resort which can command the respect and confidence of the people. Until the replacement is considered the time is not ripe for the appeals to the Privy Council to be abolished."

I am, Sir,
Your obedient servant,

(Sgd.) M. JEMURI BIN SERJAN,
for State Attorney General

MEMORANDUM FROM MEMBERS OF THE BAR IN PRIVATE PRACTICE IN SABAH

The Majority of members of the Bar in private practice in the State of Sabah have taken notice of a Memorandum sent to the Malaysian Minister for Justice by the University of Singapore Law Society and we do agree with the views of that Society that the Select Committee should give more careful examination of the Bill before the Bill is passed.

The Bill seeks to abolish criminal appeals and appeals relating to any cause or matter to which the Federation or any State is a party and in which the validity of any law made by Parliament or the Legislature of the State is questioned. We consider that especially in Criminal Cases where the life of a person is at stake, a person found guilty should be given every opportunity in law to exonerate himself through legal means and it would be against the interest of Justice that criminal appeals to the Privy Council should be abolished. If any appeal to the Privy Council is to be abolished, it would seem that civil appeals are to be abolished first instead of criminal appeals. A great number of criminal appeals to the Privy Council have succeeded in the past and by giving a convicted person an extra opportunity to appeal to the Privy Council may be able to prove his innocence and thereby to save his life which is more important than any money matters in civil disputes.

As to the proposed abolition of appeals concerning constitutional matters or where one party is the Federation or any State, we find it difficult to see why there should be any discrimination in respect of civil appeals as between citizen and citizen and as between citizen and government. Such abolition will lead to misunderstanding of the government's motives in depriving the right of a citizen to appeal against the government, the basic rights of citizenship that are enshrined in the constitution will thereby be taken away.

While the majority of us do not suggest that we should adhere to the existing practice that a final appeal should be lodged with the Privy Council, we do suggest that in addition to the appeal to the Federal Court of Appeal, there should be a further appeal to a higher organ which may be either in the form of a Regional Court of Appeal or a higher tribunal to be established in Malaysia as an alternative body and pending the establishment of such a body, it may not be an opportune time to abolish such appeals as proposed in the Bill.

A few of us are in favour of retaining the present status of lodging final appeal to the Privy Council as no fees are chargeable by the Privy Council and that some countries within the British Commonwealth still resort to it.

Some feel that certain difficulties might arise if a Regional Court of Appeal is to be formed, such as whether other countries would agree to its formation, the inconvenience and expenses incurred by reason of change of venue of Court Sessions from time to time which may probably by rotation, members of the body would approach the adjudication of any particular case before it in diverse ways, with minds orientated towards the respective laws and practice of their own countries and if politics would come into play (which should not be so), then chaos would result.

Some members therefore prefer the formation of a Higher Tribunal in Malaysia in lieu of the Privy Council which would seem to be both logical and desirable. The present inadequacy of suitable judges for its membership

is only a snag. If such a tribunal is to be formed, this would encourage elder judges and lawyers to pursue further their learning of law in the hope of being appointed members of such tribunal in due course.

As to other arguments why such appeals should not be abolished, we reiterate once again that the majority of us associate ourselves with the views of the University of Singapore Law Society which have been very ably presented in its Memorandum.

(Sgd.) W. K. Loo,
on behalf of members of the Bar in private practice in Sabah

6th November, 1968

JUDICIAL AND LEGAL SERVICE OFFICERS' ASSOCIATION

ATTORNEY GENERAL'S CHAMBERS,
KUALA LUMPUR

MEMORANDUM ON THE COURTS JUDICATURE (AMENDMENT) BILL, 1968

The Association opposes the Bill on the grounds following:

(*a*) The Bill differentiates between the importance of the liberty of the subject and the right of property;

(*b*) There is no justification to perpetuate the existing practice of appealing to the Privy Council in civil matters.

2. The Association therefore advocates total abolition of the right to appeal to the Privy Council.

3. The Association however is of the view that there shall be an ultimate Court of Appeal and therefore recommends that:

(*a*) The Federal Court shall take over the functions of the Privy Council;

(*b*) The Federal Court shall retain its powers under Articles 128 and 130 of the Constitution in respect of Constitutional matters;

(*c*) There shall be constituted a Court of Appeal in respect of criminal and civil matters to be presided over by the Chief Justice of the High Court wherefrom the appeal is heard. Apart from the Chief Justice the Court of Appeal shall consist of two (2) judges of either High Courts to be nominated by the Chief Justice at each sitting;

(*d*) Such Court of Appeal shall in effect assume the functions of the Federal Court as provided for under Article 121 (2) (*a*).

It is submitted that the existing number of the Federal Court judges is sufficient to carry out the objectives as recommended above and that the existing High Court judges would constitute, without extra public expense, the intermediary Court of Appeal as suggested.

(Sgd.) IBRAHIM BIN SALLEH,
President

13th November, 1968

DEWAN PERNIAGAAN BERSATU MALAYSIA
THE UNITED CHAMBERS OF COMMERCE OF MALAYSIA

Tel. No.: 85493

P.O. BOX 2529,
TINGKAT 4, BILEK 504,
BANGUNAN EAST ASIA,
17 JALAN KLYNE,
KUALA LUMPUR,

4th November, 1968

Setia-usaha Parlimen,
Bangunan Parlimen,
Kuala Lumpur

TUAN,

COURTS OF JUDICATURE (AMENDMENT) BILL, 1968

We appreciate very much the opportunity extended to us in your letter PAR. 49/68 of 18th October, 1968. to submit our views and to appear before the Select Committee but we regret that the notice given is so short.

However, we have considered the matter as best we can in the time available and we are particularly concerned about the second proviso to the proposed amendment to Section 74 (*c*) of the Courts of Judicature Act, 1964. It seems to us that this has far reaching implications affecting commercial law and while not doubting the competency of our own judiciary we feel it would be a retrograde step in these days of growing internationalism of commercial law to forego the undoubted experience of the Privy Council. We feel, however, that this reservation is as far as we can go in this matter and that we should throw our lot in with the Bar Council whose representations will, no doubt, receive careful consideration by the Select Committee. In the circumstances, we do not consider it necessary for a representative of the United Chambers of Commerce to appear before the Select Committee.

Finally, we would add that we presume that the word "and" in the second proviso has its normal meaning as a conjunction.

Yang benar,
The United Chambers of Commerce of Malaysia,
(Sgd.) H. A. M. BUYONG,
Secretary

COURTS OF JUDICATURE (AMENDMENT) BILL, 1968

(Memorandum by K. L. Devaser)

In the year 1965 our Government was contemplating to abolish our right to appeal to the Privy Council. Later it abandoned the idea. When some members of the Bar Council met our Prime Minister, he assured them that he would not curtail this right as long as the Bar desired to keep it.

Once again our Parliament is contemplating to curtail our right to the Privy Council.

I feel very strong about the proposed Bill. Some of us were responsible for the present state of affairs as we suggested to Lord Reid, the Chairman of the Constitution Commission, which drafted our Constitution, that the Bar of the then Federation of Malaya would in the interest of the people of this country prefer the continuation of the Privy Council in such a way that the Sovereignty of Malaya would not be affected. Lord Reid said that the Judicial Committee of the Privy Council was prepared to advise any sovereign of any country in the Commonwealth, if it was requested by the country concerned. That is how the agreement dated the 4th March, 1958, between Her Britannic Majesty and His Majesty the Yang di-Pertuan Agong came to be made, whereby arrangements were made for the reference to the Judicial Committee of Her Britannic Majesty's Privy Council of Appeals from the Supreme Court (as it was then called) of the Federation of Malaya.

Appeals to the Privy Council do not affect our sovereignty. The Malaysian Official Year Book, 1964 at page 1671 under the Heading Appeals states as follows:

> "Appeals from the Federal Court lie to the Yang di-Pertuan Agong. Such appeals are then referred, by arrangement with the British Government to the Judicial Committee of the Privy Council sitting in London, in accordance with the usual procedure regulating appeals to the highest judicial tribunal in the Commonwealth; and on receiving from Her Majesty's Government the report or recommendation of the Judicial Committee. His Majesty will make such order as is necessary to give effect to the report or recommendation. It should be noted that the advice of the Judicial Committee is tendered direct to the Yang di-Pertuan Agong and not of course subject to governmental scrutiny here or in London."

Our Government and Parliamentarians are naturally very keen that every institution in this country should be independent of foreign influence. They think or are made to think that the appeals to Privy Council smack of foreign control or influence.

To allay their fears I would like to refer to an appeal from Ceylon in the case of Aluthge Don Hemapala who was sentenced to death. His appeal was allowed by the Privy Council and a retrial was ordered. The then Chief Justice of Ceylon on 17th October, 1963, refused to proceed with a retrial and contended that after Ceylon became independent the Privy Council had no power to direct a new trial. The matter came up for adjudication in Ibralebbe And Another v. The Queen on December 11, 1963. The Privy Council held that a right of appeal to the Council in a criminal matter from Ceylon still existed. Viscount Radcliffe in giving reasons for the said decision said:

> "It was not as if the Judicial Committee was in essence an English institution or an institution of the United Kingdom. On the contrary, as Lord Haldane said in Alex. Hull & Co. v. M'Kenna (supra) it was 'not a body, strictly speaking, with any location.' 'It is not', he said, 'an English body in any exclusive sense. It is no more an English body

than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body.' If and when a territory having constitutional power to do so, as Ceylon now had, decided to abrogate the appeal to the Judicial Committee from its Local Courts, what it did was to effect an amendment of its own judicial structure."

It is to the credit of our leaders that even after Merdeka they opted to continue with appeals to the Privy Council through our King. They were persuaded to do so as they were satisfied that that was in the interest of our people. Nothing extraordinary has happened since the passing of Appeals from the Supreme Court Ordinance which came into force on July 1, 1958, to warrant the proposed drastic changes. It is just over ten years since that law was passed. It is too early to decide whether appeals to the Privy Council should discontinue. Our country is young. Our local judiciary is new. It is no use comparing ourselves to India or Pakistan where the local judiciary has been in existence for decades. Ceylon became free in 1947. She has not as yet decided to discontinue her appeals to the Privy Council. If we give our existing law and practice with regard to the appeals to the Privy Council another 10 years, it will not be in vain. The recent case of Chiu Nang Hong who was sentenced by our Court to 18 months imprisonment and acquitted by the Privy Council lends weight to the argument that a right of appeal to Privy Council is in the interest of the people of this country so long as the said right does not affect our sovereignty.

In a recent appeal by our Government, the Privy Council is understood to have granted special leave on the question of burden of proof in a corruption case. The Board promised to give reasons later on. I have no doubt their decision and reasons will clarify the question of proof in such a case and will lay down a standard by which we the members of the Board will be guided. Apparently our Federal Court erred in their decision. If there were no appeal to the Privy Council we would be following their erroneous decision for a long time. It appears very clear that the right to appeal to the Privy Council is in the interest of the Government and the people of our country.

It is difficult to understand the reasons for the Government's decision to allow appeals in civil matters and not in criminal and constitutional matters. It cannot be that our Government considers that the liberty and life of the subject is not worth more than $5,000.

From the official statistics available to me I find that since and including the year 1957 up to and including the year 1967 there were 36 criminal appeals and 28 civil appeals to the Privy Council from our country. Among the criminal appeals 2 appeals were allowed and 34 dismissed. Among the civil appeals 15 were allowed and 19 were dismissed. The number of criminal appeals allowed appear to be small but the fact that they were allowed would prove that our Federal Court can go wrong and a person may be wrongly convicted and/or hanged. The number of civil appeals allowed clearly show that the right to appeal to Privy Council is of paramount importance.

Our judiciary is young. Local judges were appointed only after Merdeka or only a year earlier. Most of them are about 10 years on the bench. Some of them are only 2 to 3 years on the bench. Nobody can deny that given the time, our judiciary will develop and eventually replace the Privy Council but that time has not come as yet.

On 11th June, 1965, Mr E. T. Pleasants, Vice-President of Auckland Law Society and Member of the Council of the New Zealand Law Society, stated in the *London Times* as follows:

"The lawyers in New Zealand have every confidence in our judges, who are appointed from the leaders of the Bar but New Zealand is a small country and judges are human and occasionally the pressure of

the local social and political conditions or the current of local opinion and the close proximity of our judges to every phase of New Zealand life leads them to base their interpretation of the law on wrong premises.

"For that reason the distance between the Judicial Committee and our local problems renders an appeal to the Committee (of the Privy Council) of the utmost value and the appellants' rights can be examined there free from any surrounding circumstances. I was personally concerned some 30 years ago in an appeal to the Judicial Committee on behalf of a plaintiff from whom our New Zealand Court of Appeal consisting of five Senior Judges had unanimously taken away a jury verdict in a running down case. The Judicial Committee restored the verdict in a short decision which referred to no precedents, but simply applied the proper principle to the facts.

"Every Barrister in New Zealand who practised before civil juries knew at once that the Judicial Committee was right, and in fact the Court of Appeal decision if it had not been reversed must in the course of years, in the delightful way Judges have of disposing of bad decisions they cannot overrule, have been "distinguished" into oblivion. But it would until that day arrived have caused much difficulty. There was at the time in New Zealand a general opinion that juries were giving damages far too easily in running down cases, and I have no doubt that this opinion, which the Judges of the Court of Appeal doubtless also held influenced their interpretation of the law quite unconsciously.

"There have been other cases of a similar nature, and I have one in mind dealing with Workers' Compensation about five years ago.

"Justice, we all know, is not perfect, and justice under law, particularly perhaps statute law, can at times be morally unjust, but the essential aim of any Court of Law dealing with the rights of parties (except where there is a discretion which is entirely another matter) must be to decide on those rights by application of the law to the facts, irrespective of all other considerations, whether social, political, or otherwise. If I did not believe that this was the position under our legal system, I certainly would not be practising Law, and I doubt that I would want to be a Commonwealth citizen".

In my view the above letter expresses the apprehension of the Malaysian Bar. The judicial situation in New Zealand is similar to that of Malaysia as both are small countries. Position in Malaysia may be worse as local Members of the judiciary were recruited recently whereas in New Zealand they have been recruited from the Bar for a long time.

At the third Commonwealth and Empire Law Conference held in Sydney in 1965, Sir Robert Menzies, the Prime Minister of Australia, while opening it said that the Rule of Law was a vital element in any high civilisation and implied that the Commonwealth was such a civilisation. At the same Conference Lord Gardiner the British Lord Chancellor supported a Commonwealth Court of Appeal staffed by the best legal brains in the Commonwealth.

One would not be wrong in stating that the Privy Council is staffed by the best legal brains in the Commonwealth. I understand that the opinion tendered by the Privy Council to our King is at no cost to our country. Until a Commonwealth Court of Appeal is established or until our judiciary is given a few more years, say 10 more years, in my view it will not be in the interest of our country to do away with the services of the Privy Council.

If we do so we will be depriving ourselves of the valuable assistance from very experienced and able legal brains as the Judicial Committee of the Privy Council consists of the President, and ex-Presidents of the Privy Council,

the Lord Chancellor, the Lords of Appeal in the Ordinary, several other members of the Privy Council who have been or are Lords of Appeal in Ordinary, Judges of the Supreme Court of Session in Scotland and the Judges or ex-Judges of the Superior Courts of the Dominions or of any other British possession fixed by Order in Council who are Privy Councillors.

The Committee sits in the Council Chamber at Whitehall, London. Appeals are argued before it as they are before a Court. But the Committee is not a Court. It makes a "report" to the Sovereign advising that the appeal should be allowed or disallowed as the case may be.

I understand that the Committee will be prepared to sit in any part of the Commonwealth if so required.

It may be in our interest to make arrangements with the British Government that our Lord President or any other Senior Judge may sit in the Committee and gain experience so that in due course we need not go to the Privy Council for our appeals but dispose them here in our Federal Court.

I have full faith and confidence in our Judges but I am convinced that the present arrangements with the Privy Council should continue for a further period so that the Rule of Law that we have established in our country may continue uninterrupted.

This Memorandum is in my individual capacity.

I shall be prepared to appear before the Select Committee, if allowed, and elaborate further on the views expressed herein.

Dated this 21st day of November, 1968.

(Sd.) K. L. DEVASER

SYED KECHIK & CO.

Advocates & Solicitors—Peguam² Bela & Peguam² Chara
Commissioner for Oaths—Pesurohjaya Sumpah

Tel. No. 2001,
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KOTA KINABALU.

82, GAYA STREET
(1ST FLOOR),
P.O. BOX NO. 1520,
KOTA KINABALU,
SABAH, MALAYSIA,
Date: 21st October, 1968

Setia-usaha Parlimen dan
Setia-usaha Dewan Ra'ayat,
The House of Representatives,
Parliament Building.
Kuala Lumpur

TUAN,

COURTS OF JUDICATURE (AMENDMENT) BILL, 1968

I have the honour to inform you that I have received a copy of your letter dated 15th October, 1968, addressed to the Chairman, Bar Council Sabah. Kota Kinabalu and also a copy of the Bill (An Act to amend the Courts of Judicature Act, 1964).

I respectfully wish to state that I agree entirely with the proposed Courts of Judicature (Amendment) Bill, 1968 which will give our Judges more power to decide on criminal and constitutional matters which I feel is essential to make our independence as a sovereign Nation complete.

Thank you.

Yours faithfully,
(Sd.) SYED KECHIK BIN SYED MOHAMED

2, JALAN NEGARA ZOO,
ULU KLANG,
SELANGOR.
12th November, 1968

DEAR SIR.

I write to oppose the passing of the Courts of Judicature (Amendment) Bill 1968 on the grounds that it is imperative for this country to have a final Court of Appeal outside the country and therefore completely devoid from all influence which could possibly be applied to it by the Central Government in this country. The Central Government here has shown itself, especially in regard to freedom of religion, to be unwilling to uphold certain articles in the Constitution and even when instances of the breaking of these articles by State Government are brought to its notice refuse to take action. Because of such cases it is important that the man in the street has full confidence in the ability of the Courts to implement justice without fear of reprisals against them by the Central Government. As an example of where a conflict of interest may arise due to religion and the attitude of the Central Government I give below my own experience of religious persecution by State Officials which the Central Government has condoned by its refusal to take action against those responsible.

I am a non-Muslim male married to a Muslim and at one time was employed by a quasi-government organisation. While so employed I was approached by Officials of the State Religious Affairs Department with a demand that I became a Muslim convert. On hearing my refusal they immediately threatened to arrest my wife for khalwat and to obtain my dismissal from the job which I held. Despite these threats I persisted in my refusal to be converted and as promised, the State Religious Affairs Department Officials organised my dismissal from the post I held a few months later. I am now unemployed. Despite my bringing this matter to the attention of the Central Government both during and after the above mentioned incidence I have received no satisfaction.

Yours faithfully,
(Sd.) S. J. P. FERON

ANNEXURE "B"

Minutes and Verbatim Evidence


PARLIMEN
MALAYSIA

CONFIDENTIAL

MINUTES OF FIRST MEETING OF THE SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL 1968, HELD AT 10.00 A.M. ON 10TH OCTOBER, 1968

PRESENT:

The Honourable the Minister of Justice (Tuan Bahaman bin Samsudin).

„ the Assistant Minister of Home Affairs (Tuan Hamzah bin Dato' Abu Samah).

„ Tuan S. Y. Chan.

ABSENT:

The Honourable Tan Sri Nik Ahmad Kamil.

„ Dato' Asri bin Haji Muda.

„ Dato' S. P. Seenivasagam.

SECRETARY:

Tuan Jaafar bin Mohamed Taha. Setia-usaha Parlimen dan Setia-usaha Dewan Ra'ayat.

IN ATTENDANCE:

The Attorney-General (Tan Sri Abdul Kadir bin Yusof).

Tuan Hashim bin Y. A. Sani (Attorney-General's Department).

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1. *Election of Chairman*—On the motion of Tuan S. Y. Chan, seconded by Tuan Hamzah bin Dato' Abu Samah, Tuan Bahaman bin Samsudin was elected Chairman of the Committee.

2. *Language of Committee*—The meeting agreed that as the text of the Bill and of the principal legislation is in the English language, English should be used in the deliberations of the Committee, and that leave of the Speaker be obtained to enable this to be done. It was also agreed that the report of the Committee should be translated into the National Language.

3. *Public Representations*—The meeting agreed that members of the public and all interested bodies should be afforded the fullest opportunity to present their views on the Courts of Judicature (Amendment) Bill, and directed the Secretary:

(*a*) to arrange for the necessary advertisement to be published in the local press inviting members of the public to submit their views on the Bill in writing before 5th November, 1968, and/or inform the Clerk before 5th November of their desire to appear and give evidence orally before the Committee;

(*b*) to write to—

The Honourable the Lord President.

The Honourable the Chief Justice, East Malaysia.

The Bar Council, West Malaysia.

The Bar Councils, East Malaysia.

The Association of Judicial and Legal Officers.

The Malaysian Branch of the International Commission of Jurists.

The Lawasia.

4. *Record of Proceedings of Committee and Hearings*—The meeting decided that a verbatim record of all its proceedings and hearings of public representations should be kept.

The Committee adjourned at 10.40 a.m.

MINUTES OF THE SECOND MEETING OF THE SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL HELD AT 10 A.M. ON 26TH NOVEMBER, 1968

PRESENT:

The Honourable the Minister of Justice (Tuan Bahaman bin Samsudin).
" the Assistant Minister of Home Affairs (Tuan Hamzah bin Dato' Abu Samah).
" Tan Sri Nik Ahmad Kamil.
" Tuan S. Y. Chan.

ABSENT:

The Honourable Dato' Asri bin Haji Muda.
" Dato' S. P. Seenivasagam.

SECRETARY:

Tuan Jaafar bin Mohamed Taha, Setia-usaha Parlimen dan Setia-usaha Dewan Ra'ayat.

IN ATTENDANCE:

The Attorney-General (Tan Sri Abdul Kadir bin Yusof).
Tuan Hashim bin Yeop Sani (Attorney-General's Department).

Written Representations Received: The Committee noted that written representations had been received from the following:

(*a*) Members of the Federal Court/High Court, East Malaysia.
(*b*) The Bar Council, States of Malaya.
(*c*) Members of the Bar, Sarawak.
(*d*) Members of the Bar, Sabah.
(*e*) The Legal and Judicial Service Officers' Association of Malaya.
(*f*) The United Chambers of Commerce of Malaysia.
(*g*) Tuan Syed Kechik bin Syed Mohamed.
(*h*) Enche' K. L. Devaser.
(*i*) Mr S. J. P. Feron.

Oral Representations: The Committee noted that out of those listed above, only the following had asked to be allowed to appear before the Committee:

(1) The Bar Council, States of Malaya.
(2) The Legal and Judicial Service Officers Association of Malaysia.
(3) Enche' K. L. Devaser.

The Committee agreed that they should be invited to appear before the Committee on 5th December, 1968. It also agreed that further consideration of the written representations be deferred till the hearing of the oral submissions had been completed.

The meeting adjourned at 10.30 a.m.

PARLIMEN
MALAYSIA

MINUTES OF THE THIRD MEETING OF THE SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL HELD AT 10 A.M. ON 5TH DECEMBER, 1968

PRESENT:

The Honourable the Minister of Justice (Tuan Bahaman bin Samsudin) as Chairman.
„ the Assistant Minister of Home Affairs (Tuan Hamzah bin Dato' Abu Samah).
„ Tan Sri Nik Ahmad Kamil.
„ Dato' Asri bin Haji Muda.
„ Dato' S. P. Seenivasagam.
„ Tuan S. Y. Chan.

SECRETARY:

Tuan Jaafar bin Mohamed Taha, Setia-usaha Parlimen dan Setia-usaha Dewan Ra'ayat.

IN ATTENDANCE:

The Attorney-General (Tan Sri Abdul Kadir bin Yusof).
Tuan Hashim bin Yeop Sani (Attorney-General's Department).

The following persons appeared before the Committee to give their representations:

(1) Enche' R. R. Chelliah and Enche' K. A. Menon, representing the Bar Council, States of Malaya.

(2) Enche' K. L. Devaser.

(3) Enche' Harun bin Dato' M. Hashim and Enche' Mohd. Yusof bin Abd. Rashid, representing the Legal and Judicial Service Officers Association of Malaysia.

The Committee decided not to entertain any more written or oral representations from the public and to hold its next meeting on 17th December, 1968.

The meeting ended at 1 p.m.

(VERBATIM EVIDENCE OF SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL MEETING HELD ON 5TH DECEMBER, 1968)

(Witnesses: Enche' R. R. Chelliah, Chairman, Bar Council, States of Malaya.
Enche' K. A. Menon, Secretary, Bar Council, States of Malaya accompanied.)

Mr Chairman: You have sent us your Memorandum and you have stated that you are prepared to make oral representation before the Committee here. So we would like to hear what you have to say.

Enche' R. R. Chelliah (Chairman, Bar Council, States of Malaya): Thank you. Sir. My learned friend Mr K. A. Menon and I, as you know, Sir, are here on behalf of the Bar Council. We have already sent you a Memorandum from which you would note that we have strongly objected to this Bill on various grounds. I do not propose to repeat the grounds here. That would be a waste of time. The real purpose of our being here is to elaborate a little on the Memorandum and to answer any questions that any of you, Sir, may have to clarify any doubts you may have as to the stand the Bar Council is taking.

The crux of our objection is that we feel that we are not ready yet to break away from the Privy Council—that is the crux of the thing. Two of the paramount reasons for it are: firstly, we feel that it is the right of every citizen to be able to appeal to his Sovereign, His Majesty the Yang di-Pertuan Agong, as the ultimate court for the final decision on any point. After all, the Yang di-Pertuan Agong, the Sovereign, is supposed to be the fountain of justice and no citizen should be deprived of his right to go to his Sovereign as a last resort. If you accept that as a right principle, then obviously the Yang di-Pertuan Agong himself cannot hear these appeals. He has not got the time to begin with and, secondly, he may not necessarily be a man qualified in law to hear arguments of this nature. Sir, in other words, there must always be a body to advise him on these appeals.

When independence was granted to this country we came to an arrangement with the British Government to make use of the body that advises the British Sovereign to advise our Yang di-Pertuan Agong in such appeals. The Privy Council now advises our Agong not because anybody else has pushed it down our throats but because we thought that it was a good idea to keep them to advise our Yang di-Pertuan Agong. The Privy Council has done an excellent job in the past years, nobody can deny that, and it still does an excellent job, and many of us feel that that body should be allowed to continue to do this job as long as it serves our purpose. There are a lot of advantages to be had in having a body situated, as the Privy Council is situated, some distance away from us. We have touched upon it in our Memorandum—many other countries have felt the same way—not because of anything else, not because of any lack of confidence in ourselves or any of our institutions but because of our own size—we are small country, we are a small population—we are so closely knit that the Government, the Judges and the people are in so close contact with each other, which is not there in a bigger or larger country in size or population. This is one of the reasons, I am told, that when the Australian Government was seeking a site for its Supreme Court—or the High Court as they call it—why they did not want to site it in Canberra because Canberra was the seat of Government and they thought that the High Court, should not be too close to the Parliament there (*Laughter*)—that is why their High Court is not in Canberra now and it is elsewhere. That sort of consideration does come in.

The objection to the Privy Council remaining to advise the Yang di-Pertuan Agong seems to have sprung largely from the conception that because it is essentially a body established by the Queen of England, now, and is stationed in England it is a foreign body and that to have it to advise our Yang di-Pertuan Agong meant some sort of infringement on our sovereignty. That seems to be the basic ground on which the objection has sprung. Our belief is that both these conceptions are not correct. They are false grounds—I am using the word "false" not with any malice but to me they are not correct grounds. First of all, the Privy Council is not English by character; it is a Commonwealth body because the Judges sitting in the Privy Council are not merely English Judges. There are Australian Judges; there is a West Indian Judge—the Chief Justice of Trinidad, Sir Hugh Wooding; and until recently

there was a Judge from Ceylon, Mr Silva. I believe that from time to time when vacancies do occur in the Privy Council, Judges from various other parts of the world are considered and if they are found suitable they will be appointed to this body. So it is not strictly correct to say that this is an English institution—it is not an English institution.

Secondly, there is also the concept or belief that having this body does in some way infringe on our sovereignty. It does not infringe on our sovereignty. It is not there because somebody else wants it to be there. It is there because we ourselves wanted it to be there and the very fact that today we are discussing this Bill, that we are able to introduce a Bill of this nature to cut our ties away from the Privy Council and that we can, if you decide to go on with this Bill, cut off our ties with the Privy Council itself is sufficient testimony of our independence, because we are free to throw away this institution whenever we please to do so. There may be a national infringement and that national infringement is the one that is causing trouble. This could be argued in many ways. Merely because we have advice from a body of this sort, it does not mean that we have lost our independence in the slightest degree.

We feel that if we feel unhappy about retaining the Privy Council for any reason, then we must first find a suitable alternative body to take its place before we think of cutting it away, because there must be a body to advice the Yang di-Pertuan Agong always on appeals made to him by his subjects.

This Bill proposes to cut away ties of appeal as far as criminal and constitutional matters are concerned, but does not provide for an alternative body to take its place, which means that it will leave a vacuum whereby there is no more appeal from the Court of Appeal to the Yang di-Pertuan Agong; and that means that the citizen will be deprived of his fundamental right to appeal to his Sovereign.

When we come to consider a suitable alternative body to take the place of the Privy Council, we run into some difficulties. Obviously, the best alternative body would be a body of advisers consisting entirely of our own Malaysian judges. You can call that body, if you like, "the Judicial Committee of the Yang di-Pertuan Agong" instead of the "Privy Council", or by any other name. But we must face the fact that we have not got the necessary judges with the required maturity and experience to form this body just now.

Sir, I would like to make this clear at this stage. In making this observation, I do not intend to and I do not wish to cast any doubt on the integrity of any of our judges or the potential ability of our judges. There have been misconceptions outside because of the stand taken by the Bar—it has been alleged that we have no confidence in our judges—and all sorts of allegations have been made. But that is not true. It is not the question of not having confidence in our judges, but it is just a question of looking at the things objectively and seeing whether we are ready to take on our shoulders this responsibility. I must say that in any country, whether it be Malaysia, Australia, America or England, there are good judges and not so good judges. That is inevitable. But taking our judges as a whole, they are good men of high integrity and with a lot of potential capability. In other words, they have got the material, we have got the material, which, given time, will mature into first-class judges who will probably be as good as anybody you find in the Privy Council. But we must not forget, when we talk about the Privy Council, that the judges who are sitting in the Privy Council today are by any standard a class by themselves even in England actually; and they have got to this position now as judges of the Privy Council after very many years of experience on the Bench as judges in

England and elsewhere. They have not been there promoted after a few years on the Bench in any country. On the average, they have been on the Bench for something like twenty years or so before they can even think of getting into the Privy Council. In view of that, it will be unfair on our part to expect our judges to reach that status after being only a few years on our own Bench. We cannot close our eyes and be afraid to point out that none of our judges in this country have had more than ten years' experience on the Bench. The oldest judge was appointed in 1958. We cannot also shut our eyes to the fact that except for four or five, all the other judges have got less than five years' experience on the Bench. They have all been appointed since 1963. Now, however good a man may be, it is impossible for anybody to acquire that degree of maturity and experience in such a short time; and in saying so, I am not in any way detracting from the ability of any of our judges. They are good judges and given time they will prove their mettle. It is very difficult for ourselves to put a water-tight estimate as to how long it will take for our judges to mature into this required quality, but we guess it will take about ten to fifteen years from now. We may be pessimistic in our view—it may be that they may mature a little earlier than we think, in which case we will be only too glad to accept our error of judgment. On the other hand, we may not be pessimistic, we may be optimistic: it might take a little longer than that. That has to be seen.

Sir, as far as establishing our own body of advisers, a body which I would like to refer to as the Judicial Committee of the Yang di-Pertuan Agong, the time is not ripe yet and, therefore, we cannot at the moment establish such a body.

The other alternative which one might consider is what has been referred to as the Commonwealth Court of Appeal. This means a final Court of Appeal for all the countries that form the Commonwealth. I am told that there are about 28 or 30 countries—I am not sure what the actual number is—and they can have a final Court of Appeal to all of them, so that nobody can say, "This is not our institution" because all of us will be part of the Commonwealth. But the snag there is that some of the bigger countries like India, Pakistan and Canada are against such a Court. There again I do feel that if we do establish a Commonwealth Court of Appeal, it is not necessary to have all the countries in the Commonwealth taking part in this. If there are, say, 28 members of the Commonwealth and if eight or ten of them do not want a final Court of Appeal and the remaining eighteen want to have one, we could still go ahead and form a Commonwealth Court of Appeal for those countries who desire to have one. There is also another snag about it and that is that the Commonwealth is spread over such a wide area from the West Indies up in the West, down here in the East to Fijian Islands and Hong Kong and we may have trouble in sorting out the sittings and the travelling side. That is a snag as far as a Commonwealth Court of Appeal is concerned.

Then we have a third alternative, and it is the Regional Court of Appeal. The Regional Court of Appeal means a final Court of Appeal to which a group of countries grouped together because of their proximity, region, who would accept this final Court as their final Court of Appeal. In order to have this grouping, you must pick those countries which have got a similar basic legal system. For instance, we cannot have a final Court of Appeal for Thailand, Malaysia and Indonesia, because Thailand has laws based on the French legal system, while ours is based on the English legal system and the Indonesian law is largely Dutch. So, it is impossible to have a final Court for these countries. But there are countries like us with the English legal background, and it is possible, for instance, to group together the countries which now are engaged in the defence talks—I heard it over the Radio two days

ago—and that is Britain, Australia, New Zealand, Singapore and Malaysia; they are grouped together for the purpose of defence, and there is no reason why these five countries should not join together and have a common Court of Appeal. If you find that Britain is too far from here, we can drop Britain off and take someone else. For instance, we can have another grouping like Australia, New Zealand, Singapore, Ceylon and Malaysia. Mauritius also has given an indication that they would like to join the grouping with Australia and New Zealand. Here again, the Attorney General would have probably told you that in 1965 when some of us attended the third Commonwealth Law Conference in Sydney, the question of a Commonwealth Court of Appeal was debated in some detail and different countries gave different views. While the majority of the smaller countries were in favour of a Commonwealth Court of Appeal, the larger countries like India and Pakistan were not in favour; Britain was in favour, and Australia was non-committal. We left it at that stage. But the Regional Court of Appeal was not pressed very far because the subject was the Commonwealth Court of Appeal. Subsequent to that, I attended the Commonwealth Law Conference in London this year in July for all the Commonwealth countries for the formation of a Legal Secretariat and I found that the attitudes of the Australians and New Zealanders have changed during the last three years or so and they are anxious now to get nearer to Asia. They feel that they are better off by associating with the Asians rather than with some of the other countries that they have been keen to associate, and there is a desire among the Australians and the New Zealanders to come in with us. When I spoke to them about a Regional Court of Appeal for Australia, New Zealand, Malaysia, Singapore, Ceylon—and Mauritius said that they would like to be considered—I found that there was a lot of fertile ground for us to work upon. And this, I feel, should be exploited if we do want a Regional Court of Appeal.

Here again, as far as the Bar is concerned, we are prepared to try and create the right atmosphere and support among the various Bar Association in these countries concerned, viz., the Australian Bar, the New Zealand Bar, the Ceylon Bar, etc., but you would no doubt appreciate, Sir, that we cannot go any further than that because if a Regional Court of Appeal is to be established, then it must be done by the Governments concerned. The Bar Associations cannot establish it. So, ultimately, it will be the work for the governments to take the necessary steps, and we feel that since we cannot at the moment set up a body of our own to advise the Yang di-Pertuan Agong, the Government should take immediate steps not only to explore the possibility of setting up a Regional Court of Appeal but to actively "sell" to the other people the idea of the Regional Court because unless the Government takes an interest, the work done by the Bar will come to nothing at all.

Sir, I think I have elaborated as much as I could without knowing exactly what your problems are. If you would like me to make further clarifications on behalf of the Bar, I will be only too happy to answer or deal with them.

Mr Chairman: Thank you very much, Mr Chelliah. Does any Member wish to raise any questions?

Tan Sri Nik Ahmad Kamil: Could I, through you, Sir, ask Mr Chelliah one are two questions? The right of appeal by the subjects now to the Ruler is a right which I would personally support—we must have the privilege or the opportunity to appeal to the Highest Court in the land, i.e., to the Sovereign. You rightly said just now, Mr Chelliah, that if the ra'ayat or the subject appeals to the Yang di-Pertuan Agong, the Yang di-Pertuan Agong naturally will have to seek the advice of the people who are learned in law and so on and so forth, and such people at present happen to form the body called the Judicial Committee of the Privy Council. You have expressed the

view that at the moment you do not see any other alternative to that except and unless we can build up our own body consisting of our own people. You also have given the reasons why we cannot at the moment build up a body of our people. What would be your view, Mr Chelliah, if we build a body as an alternative to the Judicial Committee of the Privy Council consisting of eminent jurists equally experienced and knowledgeable in the law and practice, drawn from, say, several part of the Commonwealth countries or, say, drawn from the countries, which you just mentioned, in the region such as Singapore, Ceylon, Australia and New Zealand, to form the body to advise His Majesty the Yang di-Pertuan Agong instead of what is now called the Judicial Committee of the Privy Council?

Enche' R. R. Chelliah: The answer to that is two-fold. One is by creating a body of our own with, if I may use the word, foreigners sitting in the body, and not our own people sitting in the body, we are not really getting away from the objection which seems to have sprung up, "We do not want foreigners to advise the Yang di-Pertuan Agong, whether they come as contract officers or whether they are doing it gratis". The Privy Council is doing exactly what you are suggesting, where we have got a body of eminent people drawn from various countries and instead of sitting in Kuala Lumpur they are sitting in London and are hearing appeals on our behalf. I think they are doing it cheaper for us than if we have to engage our own jurists, because we have to pay a lot more to these people and probably we will not get the right calibre to come out here, sit and do this thing. That is the difficulty.

Tan Sri Nik Ahmad Kamil: The question of costs apart, what if within this body we have a few of our own learned judges, meaning to say that we have one, two or three of our own people, or, rather I should say let us have a panel or a body of persons consisting of our own people plus eminent jurists from the other parts of the Commonwealth?

Enche' R. R. Chelliah: I would suggest a different approach. In fact, you would note from our Memorandum that as an alternative for our own body, for which we are not ready yet, we have suggested a Regional Court of Appeal and not a Commonwealth Court of Appeal. The reason is that if we have a Regional Court of Appeal, there is a chance of one or two of our judges sitting in the Regional Court of Appeal—this is a smaller grouping—and gaining some sort of experience by sitting with other judges or eminent persons in other countries, so that it will help to develop our own potential capacity and can quicken our judges to mature and will also enable us to set up our own body in a shorter period. If we can set up a Regional Court of Appeal, it will be better to take and let those people not only sit in our final Court but also to sit as judges in the final Courts of other countries and gain that sort of experience, which would be more helpful to us rather than to have our own set of judges only to sit on appeals from cases from our Courts alone.

Tan Sri Nik Ahmad Kamil: That, Mr Chelliah, may be ideal as far as the establishment of a Regional Court of Appeal is concerned. However, the establishment of a Regional Court of Appeal may take some time because, as you rightly said just now, we have got to get the agreement of four or five Governments. But as the first step towards the acceptance of a Regional Court of Appeal, what will be your view if we initiate a body or a panel of persons, who would be advising His Majesty the Yang di-Pertuan Agong on appeals submitted to him by his subjects? I said cost apart.

Enche' R. R. Chelliah: We will forget the cost. If I might be a little more frank about it, one of the reasons which we have given in our Memorandum is this: that we are in the process of building up a united nation from a

multi-racial society and creating the feeling of oneness. In order to do that, a suitable climate has to be maintained in this country in the sense of the confidence of the people that their rights will not be taken away without a proper final Court of Appeal to go to. The Privy Council consists of people far removed from the internal complexities. As I said earlier on, we being a small country with a small population, the Government, the judges and the people are so closely knit that sometimes quite wrongly the man in the street gets the impression that the body of people sitting away from the country in the U.K., those judges, may be better able to look at any particular issue more objectively, dispassionately, than any of us and, therefore, that creates a sense of confidence in the people. If I may give you an instance, when the appeal case of Dato' Ningkan from Sarawak came up and the Court of Appeal dismissed the appeal, there were certain people still doubting whether that was a correct decision, but once the Privy Council said that they were right and that the appeal should be dismissed, everybody is saisfied because they cannot find fault. Here is a body of people sitting away in London who say, "That is the right decision and the right decision comes out and everybody has to accept it," and they accepted it. But if you get somebody to come and sit here with us, although they may be foreigners, they are under our pay and the suspicion is always there. I am not for a moment suggesting that the suspicion is well-founded and, in fact, I will go to the extent of saying that it is not well-founded, but we have to think of the reaction of the ra'ayat in thinking of these matters. If we get disadvantaged by cutting away from the Privy Council and establishing this body and if it is going to create other repercussions which are not favourable, then we should avoid doing that and may as well keep our Privy Council until such time as we are in a position to have our own Court of Appeal. I am a little more frank on this, because we cannot forget the fact that there are certain people in the country still who sometimes doubt the genuineness or the correctness of the decisions of our Court, but when it comes from the Privy Council they shut up and say that it must be right.

Tan Sri Nik Ahmad Kamil: All right, Mr Chelliah. Taking up your point, when do we really then start to begin to have our Final Court of Appeal to give meaning and purpose to our sovereignty and independence?

Enche' R. R. Chelliah: There are two questions you have asked me there. The first one is about giving meaning and purpose to our independence. I do not subscribe to the fact that although we have the Privy Council, we are in any way less independent. The other point is that I do feel that in ten or fifteen years time the climatic conditions in this country would have changed sufficiently to do away with this factor which I have just mentioned and that would also at the same time give the time for our judges to mature to the necessary point.

Tan Sri Nik Ahmad Kamil: There are certain retiring ages provided for the judges such as 65 years and so on. You said just now that there are only a few judges appointed in 1958 and a good many have been appointed in the last few years. Of course, those who were appointed in 1958 will retire very soon. So, we are going round in circles.

Enche' R. R. Chelliah: I might as well point this out that the majority of these judges when they were appointed were in their early 40's and some of them in their 30's. In fact, the judge who was last appointed was only 37. So, the majority of them have got something like 20 years to go before they retire. In fact, the learned Attorney General has often pointed out in his welcome speeches that some of them have got 26 to 27 years before they retire. So, we are rather fortunate in that some of our younger judges who have been appointed should have sufficient time to make first-class judges and form the nucleus of our first Judicial Committee of His Majesty.

Tan Sri Nik Ahmad Kamil: That is about all that I have to ask Mr Chelliah.

Mr Chairman: Dato' S. P. Seenivasagam and Mr Chan, have you any questions to ask?

Dato' S. P. Seenivasagam: I have nothing to ask.

Tuan Chan Seong Yoon: I have no questions.

Tuan Hamzah bin Dato' Abu Samah: I have just one or two questions to ask Mr Chelliah. I think you are fully aware that out of so many cases that have gone to the Privy Council, as far as I could remember, only one or two cases have been successful. Does this not show that our judges are mature enough to judge all the important cases here itself?

Enche' R. R. Chelliah: No, Sir. We have touched on it briefly in our Memorandum . . . . .

Tuan Hamzah bin Dato' Abu Samah: I know that. The only case that succeeded on appeal was a rape case among the criminal cases.

Enche' R. R. Chelliah: Also the Indonesian case.

Tuan Hamzah bin Dato' Abu Samah: That is a different matter altogether.

Enche' R. R. Chelliah: But it did affect the men's life actually.

Tuan Hamzah bin Dato' Abu Samah: But do you not agree that out of, say, 300 cases only two or three were successful on appeal? Does it not show therefore that our judges, though young and inexperienced, as you said, are capable and mature enough to sit on such cases?

Enche' R. R. Chelliah: Not necessarily, Sir, because it merely means that the majority of the cases might have been decided on a question of fact rather than law. Secondly, the number of these cases that go up and succeed in the final Court in any country is small actually; but that does not necessarily mean that we are mature enough to sit on the top. In fact, I do believe very strongly, and I think some of our judges will also bear me out, that the very fact that there is a body like the Privy Council to which appeals from their decisions go, where it is either confirmed or dismissed as the case may be and if it is confirmed, then it gives the judges the extra confidence in building up their own experience, and they feel. "This is a judgment which has been confirmed by five or seven people from England who are supposed to be eminent judges" and it encourages them to go on further. On the other hand, if it is corrected or criticised somewhere, they are only too happy because those are eminent men actually. I think it will be better to give them a longer time to mature than to rush them, and if we do rush them, it might even stultify the development of our law in this country. You must have a broader sphere, and I think the judges themselves, especially the younger ones, will agree with me that they will be only too happy to be allowed to remain and learn from the judgements of the Privy Council. The actual number that succeeds is not the criterion; it is the type of judgements that they arrive at that counts. I think the day when one or two of our judges are selected because of their maturity to sit with the Privy Council judges, is the day when we should crow and say, "Look, we have matured into the type of judges we want" and that is the day when you turn round and say, "We are just as good as anybody else and we will have our own body". If we can get tomorrow one of our judges to sit on the Privy Council on merit—that will be the true test; and I do not think any of our judges will say that, today as things stand, they have got the slightest chance of sitting in the Privy Council in the next few years or so.

Tuan Hamzah bin Dato' Abu Samah: Another question, Mr Chelliah. Do you not agree that many of these countries which gained independence broke off their ties with the Privy Council in so far as the appeals are concerned?

Enche' R. R. Chelliah: Some of them, not many.

Tuan Hamzah bin Dato' Abu Samah: I know that a number of countries in Africa like Ghana, Nigeria and so on have broken off their ties.

Enche' R. R. Chelliah: I think the majority of the smaller countries that broke off—I am not talking about India and Pakistan which are bigger countries—are the African countries and I do not want to make it stronger—we do not want to copy their legal system because some of their legal system have made the rest of the world laugh and we certainly do not want to follow somebody who perhaps in every respect is inferior to our own Courts. We want to set up the best standards that we possibly can have, and I believe that some of the African States are not examples that we should follow. I think in one particular African country the Chief Justice was sacked because he gave a judgement against the Government, and I am quite sure that our Government will never dream of doing that.

Tuan Hamzah bin Dato' Abu Samah: That might be one country out of many that practised that and you cannot take that particular country as an example for continuing appeals to the Privy Council.

Enche' R. R. Chelliah: But you can also take into consideration the number of revolutions and changes of Governments that have taken place in these African countries. I do strongly believe that, to some extent, it is due to the badly organised legal systems there. We are rather fortunate that we have a stable Government and we probably will have a stable Government for many years to come. However, in the majority of the African countries you find them changing their Governments by violent means because the law does not provide for the change.

Dato' S. P. Seenivasagam: Many of them are military dictatorships and they just do not bother about anything else: without a second thought they just do what they like and they are not primarily concerned with the purity of justice.

Enche' R. R. Chelliah: Justice is one of the factors we are very proud of in this country. Whatever we do we still respect our law. We have a good legal system here and we are maintaining the standard set up by the British Government. Those countries that were cut off from the British system have declined. I personally feel that there is some connection between these revolutions and dictatorships and the lack of proper judicial systems in these countries.

Tan Sri Abdul Kadir bin Yusof: Sir, Mr Chelliah was mentioning about the infringement of our sovereignty. The question of our sovereignty really came up during the last confrontation period. What is more important is the delay in appeal cases that concern us. You just imagine, for example, the delay in hearing cases, such as criminal cases, which take as long as two years or more. Also equally important is the delay in constitutional matters. This worries the people and the Government. Take, for instance, a matter of a very important constitutional nature; it is being decided here and it suddenly goes for appeal to the Privy Council and it may take probably six months to one year. The delay may affect the administration of the country. Take, for example, the case in respect of the formation of Malaysia. Suppose there was an injunction, when then could Malaysia be formed? We might have had to wait for the decision of the Privy Council. This is the important thing.

Now, the Bar's contention is that we should not abolish appeals to the Privy Council. The Government is not going to abolish appeals to the Privy Council, but to curtail them. Take for example Canada. Before it decided on total abolishment, it curtailed, step by step, the appeals to suit the circumstances of the country and the ability of their judges to hear the cases—and so also did New Zealand and Austraila; they too carried out the process slowly until only the very important matters are left as qualified for appeal to the Privy Council. However as regards India and Pakistan, the very special circumstances of these countries enabled appeals to the Privy Council to be abolished straightaway. What I am saying here is, the Government has a certain voice and so do the people. So if you agree that we should not abolish appeals to the Privy Council *in all matters* it may be possible. Well, even if the Government agrees with your contention that we should allow for appeal as regards criminal matters, what about constitutional matters? The main reason in this is the delay. That is why I am now asking the views of the Bar Council. Now, if you do not agree, let us leave the matter as it is.

Another matter which I must point out is, when you want to appeal to the Privy Council you apply for leave to the Federal Court. Now if you fail to get leave from our Federal Court you can still appeal to the Privy Council to get leave for appeal. Now, I think Australia has abolished that: she has ruled that you must get leave from the Federal Court there before you can appeal to the Privy Council.

Section 74 (1) says:

> "Subject to any enactment or rule regulating the procedure of the Privy Council . . . . . an appeal shall lie from the Federal Court to the Yang di-Pertuan Agong with the leave of the Court."

Now (2) says:

> "An appeal shall also lie from the Federal Court to the Yang di-Pertuan Agong to the Privy Council, in any case mentioned in sub-section (i) of Section (1) . . . . . ."

That means, he appeals to get leave. Now, do you agree with the first step, that leave will have to be given by the Federal Court before he can appeal? That is the first little thing that I am asking you—the first step.

The other one is the increase of the amount in civil matters. Another point I am asking you is whether you would agree that we should at least curtail constitutional matters, leaving out the criminal and civil matters. Thus it is not total abolishment.

Enche' R. R. Chelliah: To begin with, Sir, this Bill deals, amongst other things, only with constitutional and criminal matters and not civil matters, and that is why our concentration was on these two matters because it does not touch on civil matters at all.

However, to begin with, the first thing you said, Sir, is the delay of appeals going to the Privy Council. Admittedly, there is the delay, but surely justice delayed is better than justice denied. Now even in constitutional matters, like the Kelantan Case for example, they do not come up every year, every time, maybe once in a blue moon. But the fact that there is an appeal to the Privy Council, whether it goes there or not, gives the subject confidence that his right is there, that justice has not been denied to him. The moment you take that right of appeal away from him he has the feeling that justice has been denied.

Tan Sri Abdul Kadir bin Yusof: There is mention in page 5 of your Memorandum regarding a suitable alternative body to advise the Yang di-Pertuan Agong on such appeals. We may have a body of seven Judges here on constitutional matters.

Enche' R. R. Chelliah: But that will come into existence, as I answered Tan Sri Nik Ahmad Kamil just now, in ten to fifteen years time when the political and "climatic" condition in this country it is hoped will have changed a lot, that the people will accept our Court's final judgement without any doubt in their minds. However at the moment the "climatic" condition is such that the moment you make the Court of Appeal the one and only Court of Appeal where constitutional matters can be heard, then there will be a feeling created among the ra'ayat that justice has been denied, and it is of paramount importance that whatever we do that feeling should not be created among our people at this stage of our development when we are trying so hard to unite the country into one solid nation. That is the important thing.

Tan Sri Abdul Kadir bin Yusof: Even if it affects the administration of the country . . . . . .

Enche' R. R. Chelliah: It is all right for us who are educated, learned and intelligent enought to see the consequences if there is a delay of two years and the administration is stopped. But the man-in-the-street is not going to understand; he wants the practical knowledge. He says, "The Kelantan Government applied for this; three Judges denied the appeal, but if we had gone to the Privy Council we would have won it and this is a denial of justice and we had been played out of our right". That sort of feeling should never be created in anybody's mind. He must have the mental satisfaction, whether it is real or notional, that he has got the chance to go to the highest court, that his case has been upheld or rejected as the case may be. That is more important than the time factor to which you have referred to, Sir.

One of the reasons why civil cases should not be touched at the moment is this: Although the right of appeal to the Privy Council is given as a matter of right to anybody where the subject matter is $5,000 or more without leave of the Court, very few cases go to the Privy Council around that limit. Usually they are far higher than that. This again, as I said earlier, has not been discussed by us, but this is the feeling which we have got during the course of discussion on other matters. At the moment we are anxious to get foreign investors to invest money in our country. We are clamouring, we are doing everything we can to get foreign investors to invest money in this country, and anybody who is going to invest money in this country will first study the legal system here and say, "If I am going to put $25,000 in this country and if I am played out of this $25,000 what are my legal rights, where can I go, what is my final Court of Appeal? The existence of the Privy Council does give a lot of Westerners added "Dutch courage" and that is very important, because we want foreign capital now, and the knowledge they can ultimately go to the Privy Council is of great importance as far as these investors are concerned.

Another thing is this: it is true that under the present law if the sum is less than $5,000 you have to get special leave from the Court of Appeal, and if it is more than $5,000 they can go as a matter of right. Although they have got the right, not many of them go for that small sum. However, the existence of that right gives them the extra confidence and they know that their money is safe. There again I am not for a moment suggesting that our Judges are prejudiced in anyway or that their integrity is to be questioned.

I am putting it as the view of the Bar as far as the integrity and the position of our Judges are concerned. We have to think of the others who have not got the advantage of their knowledge and their education and their intelligence.

Tan Sri Abdul Kadir bin Yusof: I mentioned $5,000 because ten years ago it was $5,000 and now it is still $5,000. There are others who say "Why $5,000? Why not increase it to $25,000?", because with $5,000 what can you buy? Not even a car. This is the point I am asking.

Enche' R. R. Chelliah: What you say is about the quantum. There may be a case to raise that quantum a little, but it depends on by how much we can raise it. However, I must emphasise that the right to go above that quantum must be automatic. If it is subject to the leave of the Court, there again there is the suspicion that if the Court of Appeal does not grant the leave, if a foreign investor invests some money here and he has to get the leave of the Court before he can go to the Privy Council, it is just as well to say there is no appeal to the Privy Council at all. Whatever limit we put, above that limit there must be an automatic right of appeal. There may be a slight increase in the minimum scale but not to say all appeals must be subject to leave. In fact this is not part of the Bill. As you said just now, this $5,000 was put in 1958. However if you look at the Criminal Procedure Code, the C.P.C. provides for an appeal from the Sessions Court and the Magistrates' Court in criminal matters to the High Court and there is no further appeal from the High Court, except with the leave of the Judge of the High Court or, with the Attorney-General's sanction, if the D.P.P. wants to appeal. Now, this rule was introduced some 20-25 years ago. Since then the jurisdiction of the President and the Magistrate has increased manifold. When the C.P.C. was first introduced the President of the Sessions Court could sentence a man to a maximum sentence of three years but now he can sentence up to seven years and there is intention even to increase it. Yet the right of appeal is limited only to one Judge. In view of the fact that most of our Judges who sit and hear appeals have less han five years' experience and are very young Judges, one has to consider whether we should give the accused a second right of appeal to a Court of three Judges, because more and more work is being passed on to the President and his right of sending a man to jail for a very long period is then without corresponding increase in the right of the accused person to appeal.

Tan Sri Abdul Kadir bin Yusof: So you do not agree with my asking you whether at this stage we can curtail it in anyway?

Enche' R. R. Chelliah: Well, Sir, the curtailment that you put in, sort of raising $5,000 to $10,000, is not really going to affect the set-up, and if we are going to set up a Regional Court of Appeal in ten to fifteen years' time I would rather see the whole lot being done together because the increase of this jurisdiction little by little is not going to help mature our Judges in anyway. The corresponding benefit is so small that there is no practical advantage of going through the exercise of amending our laws, just to increase it a little. We would rather wait another ten to fifteen years' time or sooner if we can find a Regional Court of Appeal and bring a complete change from one system to another.

Tan Sri Abdul Kadir bin Yusof: I will be very frank regarding the Regional Court of Appeal. I had been corresponding on this matter and there is no hope. They just do not agree. It is very difficult. You cannot form that even after ten years because each country is jealous of its own rights, and even if you had that with one or two Judges from the Privy Council to sit there it is still cumbersome and expensive.

Enche' R. R. Chelliah: Is this recent correspondence?

Tan Sri Abdul Kadir bin Yusof: I made an enquiry with Australia and they were interested probably in their own full Court of Appeal. However they are slowly curtailing appeals.

Enche' R. R. Chelliah: If you have not had correspondence with them since July/August I would suggest that you try again, because the impression I got in the Conference at end of July was that they are slowly shifting their stand and I was told that their Chief Justice, Sir Garfield Barwick, is also inclined in that way.

Tan Sri Abdul Kadir bin Yusof: Just imagine, Australia is much, much more matured than our country probably in their legal system and if we combine with them and they have our Judges to sit in their Court of Appeal to decide a case it would be a big concession on the part of a big Commonwealth country like them. They have to consider whether one of our Judges who will be sitting is matured enough to hear appeal cases.

Enche' R. R. Chelliah: Well, Sir, that in a way answers Enche' Hamzah who asked me whether our Judges are matured or not. You have however put it more bluntly than I would have liked to put it when I answered the question.

Mr Chairman: Any more questions? (*No further questions*) (*To representatives of Bar Council*). Well, thank you very much for coming.

(Enche' R. R. Chelliah and Enche' K. A. Menon withdrew).

(Witness: Enche' K. L. Devaser).

Mr Chairman: We have received your Memorandum. Would you like to elaborate on it?

Enche' K. L. Devaser: I am submitting that the proposed Bill is premature. We have not had sufficient time to develop our Judiciary—it is only about 10 years since our independence. Until 1958 the previous law continued and appeals to the Privy Council continued as a matter of right. I have gone through our Privy Council practice which started from 1912. It continued from 1912 to 1958. Until 1958 we can say it was imposed on us as we were a protectorate and by a *Gazette* Notification in 1911 or 1912 we accepted the Privy Council; however in 1958 we opted, as an independent sovereign State, to go to the Privy Council and requested the Privy Council to give us advice, not to give a decision, not to give a judgement, but to give advice to the King. Now I am submitting that we have not had enough time to find out whether we can suspend appeals to the Privy Council so soon. It is only ten years since 1958. In my submission, Sir, a generation is supposed to be about 25 years, and I am submitting that at least 10 more years should be given to our present practice.

I also submit here, Sir, that we are not only a sovereign State, but a small young nation. We are like Ceylon and New Zealand—a small nation. We did not have enough time to develop and we cannot have independent and trained Judges so soon. Both Ceylon and New Zealand are continuing with the Privy Council practice. I do not have the facts and figures on Ceylon, but I would submit, with due respect to the Chair if I am wrong, that the Judiciary of Ceylon and New Zealand—and when I mean "Judiciary" I mean the "Judges"; I do not mean the "Magistrates" were formed some thirty or forty years ago. If I am correct, New Zealand became independent in 1931 and they were having their own Judges. Ceylon has had its own Chief Justice for many decades.

I have with me a short list of appointments of Judges here. I am not saying that recent appointments do not produce good Judges. We may have a genius who needs only two years and he can be a Chief Justice or even a Lord President. I am not saying that. This can happen in exceptional cases. I am only judging people from my own standards. (*Laughter*).

Well, Sir, coming back to this list I was referring to: there was a Judge appointed on 1st February, 1968, one on 1st January, 1968, and even the present Lord President, Tan Sri Azmi, was appointed, I think, in 1959, just after Merdeka.

I was told that the Bar Council was afraid to put down—I do not know why—that distance does give a dispassionate approach to legal problems. I have submitted to you a letter from the Vice-Chairman of the Law Society of New Zealand. This gentleman I mentioned here in my Memorandum is Mr E. T. Pleasants, Vice-President of Auckland Law Society and Member of the Council of the New Zealand Law Society.

On 11th June, 1965, he stated this in the *London Times:*

> "The Lawyers in New Zealand have every confidence in our judges, who are appointed from the leaders of the Bar but New Zealand is a small country and judges are human and occasionally the pressure of local opinion and the close proximity of our judges to every phase of New Zealand life leads them to base their interpretation of the law on wrong premises.
>
> For that reason the distance between the Judicial Committee and our local problems renders an appeal to the Committee (of the Privy Council) of the utmost value and the appellants' right can be examined there free from any surrounding circumstances. I was personally concerned some 30 years ago in an appeal to the Judicial Committee on behalf of a plaintiff from whom our New Zealand Court of Appeal consisting of five Senior Judges had unanimously taken away a jury verdict in a running down case. The Judicial Committee restored the verdict in a short decision which referred to no precedents, but simply applied the proper principle to the facts.
>
> Every Barrister in New Zealand who practised before civil juries knew at once that the Judicial Committee was right and in fact the Court of Appeal decision if it had not been reversed must in the course of years, in the delightful way Judges have of disposing of bad decisions they cannot overrule, have been "distinguished" into oblivion. But it would until that day arrived have caused much difficulty. There was at the time in New Zealand a general opinion that juries were giving damages far too easily in running down cases, and I have no doubt that this opinion, which the judges of the Court of Appeal doubtless also held influenced their interpretation of the law quite unconsciously."

I am submitting, Sir, that this Bill is premature. I do not say that this should be for ever. We cannot obviously do that; every sovereign country must have its own highest tribunal—it is an accepted principle. I am only suggesting that this measure should be taken in about 10 years.

I have got one more matter which I have not put in my Memorandum which is my own personal matter. I had a case from Pahang. A Kathi appointed by the Government was dismissed by the State of Pahang on reasons which we stated were wrong. I filed a suit before the High Court Judge. It was dismissed and then I brought the case before the Federal Court. After a long time one Judge gave a very long reasoned judgement in my favour; one Judge gave a long reasoned judgement

against me. The judgements were running about 15 to 20 pages each. The third Judge—I would not mention his name, I have come here as an individual, I am not representing any institution—did not even consider the points.

Tan Sri Nik Ahmad Kamil: So what was the outcome of the case?

Enche' K. L. Devaser: I lost the case. (*Laughter*). My complaint is that the third Judge did not go into the matter deeply and did not consider the matter properly. Had he gone through it and if he had given a reasoned judgement against me, I would not grumble. He simply said "I have read through my brother Judges' judgments, both are poles apart, but I agree with the trial Judge." That is all, and my appeal was dismissed. I think this is a bit unpleasant to litigants. My client could not raise £5,000, but if he could, then he would have been able to go to the Privy Council and say that this Judge who had been sleeping should have gone into the matter deeply and given the litigant his judicial right—a decision. We do not want a decision in our favour but we want a reasoned decision; the Judge can allow the matter or dismiss it but he must go through the matter.

Tuan Chan Seong Yoon: But I have seen a lot of judgements from English Courts of Appeal where the Judge merely said, "I concur".

Enche' K. L. Devaser: Well, the Judge in this case did not say, " I concur with A or B". What he said was, "Two of my brother Judges have given long judgements, they are poles apart." Then don't say "I concur". If I concur, I keep my mouth shut. (*Laughter*). But in this case he said, "I agree with the trial Judge".

Tuan Chan Seong Yoon: Without any reasons at all?

Enche' K. L. Devaser: My complaint is that he did not go deeply into the matter.

I have also stated that the personnel of the Privy Council—we have here men like Lord Reid—are so highly qualified and so highly experienced. As I understand it, Sir, this service is given to us free. I am subject to correction, but my understanding is that it does not cost any money to our taxpayers or the Government. My respectful submission is that if we do away this it would be depriving our people of an opportunity to be heard by great men like Ex Presidents of the Privy Council, the Lord Chancellor, Lords of Appeal and other Senior Judges of the High Courts of the Commonwealth.

Sir, I find from this book which I found in the Supreme Court, Kuala Lumpur, that the Privy Council has been hearing cases from all over the Empire and even from those countries which are no more a part of the Empire and part of the Commonwealth, and I submit with great respect that their experience and learning should not be dispensed with, for a short period at least. That is all I am asking. I do not say for ever—I am not of a slavish mind.

Mr Chairman: 10 years in your opinion?

Enche' K. L. Devaser: I have submitted 10 years in my Memorandum. I also request that if possible we make some administrative arrangement to send one of our Judges, the Chief Justice or the Lord President, to sit in some of the proceedings of the Judicial Committee so that he will be trained and will gain experience. Then he can come back and hold some meetings or seminars and transmit his knowledge to the others.

I had a cutting this morning which says that the Privy Council is not worried on small technical points of law; the Privy Council is worried about the main principles of law and if they have not been followed then it will allow the appeals. With great respect, I think we have not reached the stage where our judges will say, "We are appointed by the Government, but we are Judges and we give our judgements as we like".

Lastly, I do not pretend to be representing any institution, nor do I pretend to be a very senior member of the Bar. But I was very concerned about this matter and you were so kind to give me the opportunity to appear before this Committee. I do not mean to suggest that I am very clever or that I am infallible, but I felt these views strongly and I submit to the Honourable Members of this Committee that you should do your best to see that these appeals are not suspended for the next 10 years. If not 10 years, 5 years.

Mr Chairman: You are asking for a shorter period now.

Enche' K. L. Devaser: Sir. I understand that you will be having before you some representatives of the Judicial and Legal Service Officers' Association and I am told, subject to correction, that they are going to submit that if you do not suspend the Privy Council and appoint our Judges to do the job, then when will this start and that they should have the experience now. I think that is sort of a narrow argument because you do not have to get experience straightaway with regard to the Privy Council; you do not appoint a man to be the Lord President to gain experience as Lord President. You make him first a High Court Judge, a Federal Court Judge, then Chief Justice or Lord President. I think it is a fallacious argument that we suspend the Privy Council to give our Judge a chance to gain experience at the expense of the litigants. I submit, Sir, that we have not reached the stage when we can say that we are fully developed and we can do away with the Privy Council. We will do so one day, but not now. That is all I wish to say, unless you want to ask any questions. Thank you very much. I am sorry if I have not expressed myself very clearly or if I have been rude to anybody.

Mr Chairman: Would members of the Committee like to ask any questions?

Tan Sri Nik Ahmad Kamil: Mr Chairman, I have got one or two questions which, if I may, I shall ask Mr Devaser through you.

Mr Devaser, you have stated in your Memorandum that you thought that arrangements might be made with the British Government for our Lord President or any other Senior Judge to sit in the Judicial Committee of the Privy Council. Now, what exactly is in your mind—to sit as one of the Judges or just to sit there to see how they work?

Enche' K. L. Devaser: My submission was that he should sit there as a member.

Tan Sri Nik Ahmad Kamil: As a member of the Court?

Enche' K. L. Devaser: With great respect, Sir, the Privy Council is not a Court; they do not wear black coat, they wear only a neck-tie just as any one of us. It is very informal.

Tan Sri Nik Ahmad Kamil: So by making that suggestion I think you accept that there are a few of our Senior Judges who have the experience and the merits to sit in the Privy Council.

Enche' K. L. Devaser: With respect, Sir, my mind did not work that far. My mind worked this far: that our Lord President, our Chief Justice, our Senior Judges should sit there and gain experience. Of course, they are well qualified but they will not be so well qualified as some of the other Judges sitting there for the past 15 years. We are not green horns, we have had our Judges for the past 10 to 15 years, but I do not accept your contention that they are experienced enough to sit in the Privy Council to give judgement. My submission was for them to sit there and gain experience.

Tan Sri Nik Ahmad Kamil: The second question I have is this: you talked earlier on about the question of distance and you quoted some cases earlier. Now, if we are to talk about the distance from the scene of events, where do we begin or where do we end? You said that in 10 years time, i.e. in the fullness of time, our own Judges will be experienced enough to form our final Court of Appeal here to advise His Majesty the Yang di-Pertuan Agong. But where do we begin or end if we are frightened of the distance from the scene of events?

Enche' K. L. Devaser: My suggestion is a compromise. If I am given the chance as a lawyer, I would continue with the Privy Council for a long time, but since the Government and our Parliament have been thinking about this—this is the second time they have been thinking about it; it looks to me that the third time that they will start thinking about it is when they have passed the Bill (*Laughter*)—this is a compromise.

Tan Sri Nik Ahmad Kamil: I know it is a compromise that you agree that we could have our own final Court of Appeal in five or ten years. But if one is frightened of distance, my question is: where do we begin or we end? When we have our own Court, our own Court will have to sit in our own country, we have to mix socially, we have to read newspapers and hear the proceedings.

Enche' K. L. Devaser: I should think that my contention was that when you become older you are bound to become more impartial, more judicious and more God-fearing (*Laughter*). In the beginning, when a Judge is appointed, he looks to the Government for favours and thinks that the Government is Almighty and he refuses to give judgement against the Government. But as you grow older I think you are wiser.

Tan Sri Nik Ahmad Kamil: . . . . . less pliable.

Enche' K. L. Devaser: Yes, less pliable. That is my submission. And in Privy Council we have also found that the distance works in their favour. Sir, these are our personal practical experiences.

Tan Sri Nik Ahmad Kamil: The final question I would like to ask is. we know that appeals are made to His Majesty the Yang di-Pertuan Agong and the Yang di-Pertuan Agong in his turn, not being trained in the law and so on, seeks the advice of this body called the Judicial Committee of the Privy Council. My question is, supposing we can empanel a totally separate body consisting of equally eminent persons as those who are sitting in the Privy Council, would you see any objection?

Enche' K. L. Devaser: With respect, Sir, we do not have them in this country.

Tan Sri Nik Ahmad Kamil: No, I do not mean in this country.

Enche' K. L. Devaser: We do not have them in this country unless we recruit them from outside. So my answer would be, why recruit somebody at taxpayers' expense when we have got somebody available to us, whose services are available free to us?

Tan Sri Nik Ahmad Kamil: Do you not agree with me that where justice is concerned cost should not be the prime consideration?

Enche' K. L. Devaser: I agree with you. If you can get another Tribunal of equally eminent brains, I have no objection. But my respectful submission is that not only is our Judiciary inexperienced but I must say, with respect to some members of the Bar here, that the Bar is now weaker. We are younger, it is no disrespect to anybody, the top men have gone away. I cannot say I am a very senior man; I cannot say I can attend to all legal and constitutional matters. So our Bar is also weaker. With respect, Sir, I do not think we have got eminent men here in the country. We can say, "We will do it". What the Bar will do today is that they will get the brief and get legal opinion from England paying £20 or £30 or getting a Q.C. to argue the case. If a lawyer cannot appear before a strong Judge or if he is afraid of the Judge he will get a Q.C. to do the same thing what he will do himself.

Tuan Hamzah bin Dato' Abu Samah: Do you not think it is a secret, Mr Devaser? (*Laughter*).

Enche' K. L. Devaser: I am sorry—I am putting my case. These are our problems, Sir.

The Secretary (*Enche' Jaafar M. Taha*): You suggest that the present practice should continue for another 10 years. Then, after that, what do you suggest should substitute the present arrangement?

Enche' K. L. Devaser: If you want to have a local Tribunal then you have got to have a Federal Court of more Judges—8, 10 or 15 Judges. I accept the contention that we cannot always be relying upon the Privy Council. The time for change must come. It is only a question of when. The time must come when the highest Tribunal must be here because the people will not accept it otherwise. However, today I do not think so, as the people are so suspicious. I have not written it in my Memorandum but I have the courage to tell this Committee that today we are quite prepared to accept foreign aid in defence and we are not worried that our sovereignty is affected. But we are so concerned about law. I am sure that military officers may be more trained than our Judges are trained. I hope I am not hurting anybody's sentiments, Sir. I am only trying to put forward my points as best as I can.

Mr Chairman: Does any other member of the Committee wish to ask question?

Dato' S. P. Seenivasagam: As the Bill stands now, it abolishes the right of appeal to the Privy Council in criminal matters. In India—I am not very familiar—what are the safeguards for a person who is convicted in a lower court? From there where does he go to?

Enche' K. L. Devaser: In India you have got two appeals. One is to the High Court of the Province and the second appeal is to the Federal Court. I am not sure about the third appeal, but definitely there are two appeals—one to the High Court of the Province and later to the Federal Court.

Dato' S. P. Seenivasagam: Another point is that in your Memorandum, first page, eight lines from the bottom, you have stated—

> "The Privy Council held that a right of appeal to the Council in a criminal matter from Ceylon still existed"...

Does that mean that there are no civil appeals from Ceylon to the Privy Council?

Enche' K. L. Devaser: No, Sir. I think the Privy Council was only giving its decision on that particular point. The appeal, as I understand it, exists both in civil and criminal matters.

Dato' S. P. Seenivasagam: I have nothing more to ask.

Enche' K. L. Devaser: I may say one thing more to my Honourable friend about the safeguards in India. There is greater safeguard in India and that is the whole burden of my Memorandum. The Judiciary there was appointed more than 30 years ago. I remember that as a small boy of five or ten years old I had heard that we had an Indian Chief Justice of Punjab and the Federal Court Judges have for a long time been Indians. The Judiciary there is so strong that lately Honourable Members will remember that they have given judgement declaring that the Parliament of India has no right to amend the fundamental rights. They have gone to that extent. What the Government will do, I am not aware (*Laughter*), but they have gone to that extent. And in some of the detention cases we have read about, Sir, they have given very strong, mighty judgements. They do not seem to be afraid of the Government. Those are safeguards. But they have had a longer time.

One other point I made, and I hope I have made it clear, is that it does not enter my head how the Government can say, "Go to the Privy Council in civil matters but not in criminal matters". I should have thought that criminal matters, where the life and liberty of the subject is concerned, are more important. Why should you say you hang a man and he cannot appeal, but if a man loses $5,000 or $10,000 he can appeal.

Tan Sri Abdul Kadir bin Yusof (Peguam Negara): May I explain that? The reason why we proposed it is this: we found from the records of appeals that of the civil cases that go to the Privy Council more than 50 per cent were upset. but in the case of the criminal cases we found out that out of, say, 100 cases only two or three were allowed.

We had thought of abolishing the whole thing, but if we are ever going to abolish the appeals we have to make a start and so we thought in civil cases the time is not yet ripe for abolishing appeals but that we may make a start with criminal cases. That is the reason why we have suggested this measure. So you can see the point.

Enche' K. L. Devaser: No, with respect, I do not see the point, Sir. I should have thought that if one appeal is allowed, if one life is saved, it is good enough to retain the appeals. If I were the Head of the Government I would be sorry to execute wrongly even one man among ten. I think the principle is the important factor—not the number. Even if only one appeal is allowed instead of 20, the principle is established and one life is saved. That is how civilisation is made.

Tan Sri Abdul Kadir bin Yusof: Do you mean to say that if there is no appeal to the Privy Council, then there is no justice?

Enche' K. L. Devaser: What I am saying is this: that two appeals were allowed out of 36 shows that our Federal Court can go wrong. I do not say, Sir, that the Privy Council cannot go wrong, but it does show that our Federal Court can go wrong and it does show that you can hang a man wrongly. That is sufficient to retain the present right of appeal.

Tan Sri Abdul Kadir bin Yusof: Suppose we abolish appeals to the Privy Council ten years later. Even then the same problems will crop up.

Enche' K. L. Devaser: But you will be giving our Judges greater time to develop. That is the only point I am making. Surely any Judge who is 55 today is presumed to have better brains in law by the age of, say, 61. He may go the other way round, of course (*Laughter*).

Tan Sri Abdul Kadir bin Yusof: As I told you just now, out of 100 criminal cases only one or two are affected and that is why we proposed to abolish appeals to the Privy Council in criminal cases. This shows that our Judges are quite mature. If you want 100 per cent, it is impossible.

Dato' S. P. Seenivasagam: Is it also possible that as a result of that one decision many subsequent lives have been saved? For example, a piece of evidence has been held inadmissible. If there was no appeal and that decision had not been given, that man would have been hung and by excluding that piece of evidence, as in the *Sambasivam* case, dozens of others could have been hanged subsequently. So that one decision which the Privy Council gave, although it affected only one case, applies also to hundreds of subsequent cases.

Tan Sri Abdul Kadir bin Yusof: It is quite true, Sir, because when I appealed, the first time ever in the history against a decision of our Federal Court, in the Indonesian case, we won that case and that becomes a decision of the Commonwealth. It had never been decided before.

Enche' K. L. Devaser: Sir, there was one more case where you went to the Privy Council, which was a corruption case, where our Federal Court said that the burden of proof in corruption cases cannot be less than in ordinary cases but the Privy Council had stood by you. That is a decision which affects the whole country and it will be helpful to the Government. Otherwise your corruption cases may be thrown out.

Tan Sri Abdul Kadir bin Yusof: The decision of the Federal Court was that a man who is not a citizen of this country does not owe any loyalty to this country.

Enche' K. L. Devaser: Sir, may I quote an English proverb, which says, "It is better to acquit nine guilty men than to convict one innocent man".

Mr Chairman: We all know that.

Enche' K. L. Devaser: I hope it will be put into practice.

Tan Sri Abdul Kadir bin Yusof: There is another reason why the Government proposed this, because it took two years to decide that case.

Enche' K. L. Devaser: The answer is not to suspend appeals, but the answer is to ask the Privy Council to move faster.

Gentlemen, I am very grateful to you for allowing me to appear before this Committee. I hope I have not hurt anybody. This is my way of speaking, Sir.

(Enche' K. L. Devaser withdrew).

(Witnesses: Enche' Harun bin Dato' M. Hashim, Executive Committee Member, Judicial and Legal Service Officers' Association.

Enche' Mohd. Yusof bin A. Rashid, Secretary, Judicial and Legal Service Officers' Association).

Mr Chairman: Your Association has submitted a Memorandum to this Committee dated 13th November, 1968. Do you wish to amplify on the Memorandum?

Enche' Harun bin Dato' M. Hashim: Yes, Sir. The Bill seeks to abolish not only appeals to the Privy Council in criminal and constitutional matters but also the right of the subject to appeal to his Ruler. The Association supports the proposal to abolish appeals to the Privy Council but opposes the retention of appeals to the Privy Council in civil cases and also opposes the abolition of the right of appeal to a Superior Court.

Mr Chairman, Sir, I crave your indulgence to quote from *Wade and Phillips' Constitutional Law, Seventh Edition,* on what they have to say about the Privy Council:

> "The Judicial Committee of the Privy Council exercises in respect of appeals from the courts of colonies and also from the courts set up by the Crown in protectorates and trust territories the ancient jurisdiction of the King in Council which has been confirmed by statute to hear appeals from the Overseas Dependencies. In respect of appeals from the courts of States of the Commonwealth this jurisdiction of the Judicial Committee has been abolished or limited according to the wish of the particular member state concerned. The Judicial Committee is also the final Court of Appeal from the Channel Islands and the Isle of Man, and from Prize Courts in the United Kingdom and Colonies.
>
> "The appellate jurisdiction of the Privy Council is based on 'the inherent prerogative right, and on all proper occasions, the duty of the King in Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally'."

Now, Sir, this inherent right appears only for export because in England for their own people the right of appeal goes to the House of Lords and not to the Queen automatically. Sir, the Privy Council is only for export for the colonies and trust territories. In conclusion, the author has this to say:

> "The jurisdiction of the Judicial Committee to hear appeals from the overseas territories still subsists in the Commonwealth of Australia subject to the expressed terms of the Constitution which gives power to impose limitations as to the right of appeal from the decision of the High Court of Australia and in New Zealand, Ceylon, Sierra Leone, Jamaica, Trinidad and Tobago and lastly Malaysia. (So we are in the company of Trinidad and Tobago and Sierra Leone). In the latter case jurisdiction may be conferred by Order in Council to give effect to any arrangements made between the Queen and the Head of the Federation which is an independent Monarchy. The right of appeal in criminal cases was abolished in the Dominion of Canada in 1933 and in civil matters in 1949 by legislation enacted locally. Appeals had been abolished in the case of South Africa and Ireland in 1933 before either had left the Commonwealth by India in 1949 and Pakistan in 1950. The Republican members of the Commonwealth—Ghana, Negeria, Tanganyika, Uganda—have all abolished the right of appeal. It seems probable that the same will result after the grant of independence to Kenya (this book was written before independence was granted to Kenya). Appeals to the Privy Council from Cyprus was abolished by the Cyprus Act, 1960 on Cyprus becoming independent".

I think we became independent before Cyprus and yet Cyprus promptly abolished appeals to Privy Council when they became independent.

His final passing remark on this Privy Council is as follows:

> "The British Commonwealth has now reached the state at which the link through the provisions of appeals to the Judicial Committee sitting in London has worn thin. Whatever jurisdiction may remain,

it will no longer fall to the Committee to act as the final interpreter of federal constitutions, in which task it has been the counterpart of the Supreme Court of the United States, in exercising jurisdiction on appeal from the Supreme Court of Canada and up to a point from Australian and Indian courts. The results have been on occasions freely criticised, especially on account of the composition of the Committee on which judges of the United Kingdom unversed in the complexities of federal organisation have normally been the main, if not the exclusive, element."

. . . . "Much of its jurisdiction has been outside the common law in hearing appeals from countries where Hindu or Mohammedan Roman-Dutch law is in force. For the future its jurisdiction will mainly be restricted to appeals from a few small colonial territories. If so, its history can now be written."

So, even they have given up the idea themselves. So, we submit, we do not see any reason why we should go and wake up a dying horse.

The composition of the Privy Council in effect is usually similar to that of the House of Lords and the only difference, of course, is that in the House of Lords we have the advantage of getting the views of all the judges, the judgment of every judge sitting in the House of Lords. But in the Privy Council because it is an advisory body to the Queen, the Queen can only get one advice, or in our case the King can only get one advice. If there is a dissenting view in the Privy Council, we do not hear of it because only one view is presented and so we do not get the advantage of knowing what really happened in the Privy Council.

I would now like to quote one appeal case "Joyce *v.* Director of Public Prosecutions" in 1946. This case is better known as the case of "Lord Haw-Haw". I draw attention to this case because the members who sit on the Judicial Committee of the Privy Council are practically the same Judges in the House of Lords. In this particular case those who sat were Lord Jowitt, Lord Chancellor, Lord Macmillan, Lord Porter, Lord Wright and Lord Simonds and the decision of the House of Lords was that they confirmed the conviction of the Lower Court. It is now freely admitted in legal circles that the decision of the House of Lords in this case by these eminent judges was actually judicial murder and the reason for that is this: that the case was heard in 1946 immediately after the War, that the Court bowed to public opinion and not to the rule of law. So, there is nothing sacrosanct about the Privy Council or the House of Lords. That is the point we are trying to make.

Now, the only reason as far as we can see which is advanced to retain the Privy Council is that our Judges have not acquired sufficient experience at least in civil matters. It is our submission that if our judges had been asked to review the decisions of the Federal Court, they would have come to the same conclusion as the Privy Council. As you know, Sir, the decisions are passed on from one High Court judge to the three-member Federal Court, and then they go to the Privy Council which is normally a board of five persons. If five of our own judges had been asked to review what these three had said, then they would most probably come to the same conclusion as that of the Privy Council. One of the reasons for it, we maintain, is that the Privy Council has very often upheld the decision of the Judge in the first instance. They have agreed with the Judge in the High Court though the Federal Court has upset them. Before going to the Privy Council, the counsels or the lawyers themselves must ask their clients whether it is worth going to the Privy Council or not because of the large amount of expenditure involved. At least they would know that what was decided by

the three people was wrong or at least in their opinion was wrong and so they can say that there is a point in going to the Privy Council. We do not need a superintellect to discover that a decision is right or wrong. We already have it here. The only point is that we have not made the best use of it.

When talking about experience, we submit that experience cannot be gained just by waiting until you grow older and older. The only way to gain experience is to gain it by practice. Some have suggested a waiting period of say, five or ten years for our judges to get experience. It is our humble submission that if we wait for ten years, then the judges who had gained experience by then would have already retired, and then new judges will come in and we have to give them another five years for them to gain experience, but by the time they get experience, they would be due for retirement. Thus this can go on indefinitely. So, it is our submission that they must be made to do the work. never mind about a few mistakes they may make but let them carry on with their work. The danger of a real fatal error is very, very remote.

The next point we would like to make is about the provision of Article 5 of our Constitution which provides that no person shall be deprived of his life or personal liberty save in accordance with law. Then if we look at Article 13 (1), we can see that it provides that no person shall be deprived of property save in accordance with law. You will note, Sir, that in both cases the Constitution uses the same word to protect one's liberty as well as one's property. In our submission, the liberty or the life of a person is more important than his property. If we have already seen fit to abolish appeals in criminal matters to the Privy Council we see no reason why we should not also abolish appeals in civil matters.

It is our submission, therefore, that we are in favour of total abolition. The Association submits that there should be a second Court of Appeal. We are of the opinion that the Federal Court, as at present constituted, should remain the highest Court of the land and we propose that there should be an intermediate Court of Appeal. We propose that this Court should be presided over by the Chief Justice of the High Court where from an appeal is heard. Basically, we propose that we maintain the Federal Court as it is but between the High Court and the Federal Court we interpose the Court of Appeal. At present in practice—of course, the law is there—what happens is that the Chief Justice is only an administrative head of the High Court and sits on appeal only in the Federal Court. There has been a new change, but then he hears appeals from the Magistrate's Court. His experience and knowledge as Chief Justice should be better utilised by making him to preside over his own Court; and what better way is there of doing this than by reviewing the judgments of his own High Court Judges? Now, the Chief Justice does not review the judgements of a High Court judge until it gets into the Federal Court and there he sits only as a member. We propose, therefore, that the Court of Appeal be presided over by the Chief Justice and assisted by two judges of the High Court preferably one from West Malaysia and one from East Malaysia to bring the two territories closer together. This suggested composition of the Court of Appeal was in fact in existence in Malaya before Malaysia, where the Chief Justice presided in the Court of Appeal. After Malaysia, we re-named it Federal Court and added a few more people to it. In fact the proposed Court of Appeal is already in existence. So, if you have the Chief Justice to preside over the Court of Appeal and every time he has to hear an appeal from the High Court, he will call in two other judges either by rotation or on an *ad hoc* basis—it was in fact the practice before. By doing so, it will give added experience to our High

Court judges to sit on appeal cases, so that these judges will eventually become Federal Court judges. At present these judges do not get the opportunity of sitting on appeals in a full Bench because the Federal Court is there and we have so many judges there—it consists of three judges, plus two Chief Justices and one additional judge, making a total of six altogether. So, the Federal Court is quite strong now. Because of the number, they are doing all the work and are not giving the opportunity to the High Court judges to sit on appeals. I would suggest that if this Court of Appeal is set up, then it will give them opportunity. This is not a new idea, and it has been in existence in our country before and also this set-up is similarly constituted in England. In England, you have the High Court and you can appeal against the decision of one judge from the High Court to the Court of Criminal Appeal in criminal matters or to the Court of Appeal in civil matters. From there you appeal to the House of Lords. So, we propose that the Court of Appeal, if it is agreed to, can take over the functions of the Federal Court as provided for in Article 121 (2) (*a*) which says that exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof . . . . . ." That means that it can in fact hear appeals from the High Court in criminal and civil cases. We propose, however, that the Federal Court shall retain its powers under Articles 128 and 130 in respect of constitutional matters. You will note here that provisions of Articles 128 and 130 are the same as the powers given to the Supreme Court of India. As far as constitutional matters of India are concerned they go straight up to the Supreme Court as I have just now read from BASU on page 94. So, we do not disturb that. In addition, the Federal Court will hear appeals from the Court of Appeal, that is to take over the functions now conferred on the Privy Council as provided for in Article 131. Here we have no strong views, but it is a matter of choice for the Government to decide whether the appeal should be to the Yang di-Pertuan Agong who would refer it to the Federal Court as provided for in Article 131 where His Majesty now refers to the Privy Council. Here if you accept our proposals of an intermediate Court of Appeal, then the reference will be to the Federal Court or we should follow the English practice of allowing appeals from the Court of Criminal Appeals or the Court of Civil Appeals to go to the House of Lords. In India, appeals go to the Supreme Court of India and not the President. That is a matter of choice of the Federal Government. What we are concerned is that it will be heard by the Federal Court.

Now, the results of our proposals, therefore, are:

The total abolition of appeals to the Privy Council; the constitution of a Court of Appeal which shall be presided over by the Chief Justice and which will give greater meaning to that office; the Federal Court to be the Supreme Court of the land; no extra public expenditure is required—and this might interest the Treasury—as the Chief Justice and the High Court judges are already there; the Constitution of the Court of Appeal, if I may use the term, is only a paper transaction and no extra judges need be appointed; the Federal Court has sufficient judges to take over the functions of the Privy Council.

Article 122 (1) of our Constitution says as follows:

"The Federal Court shall consist of a President of the Court, of the Chief Justice of the High Courts (2 of them) and of four other judges and such additional judges as may be appointed". So, there is no limit.

Usually the quorum of a Federal Court or Privy Council is five. Even as it is now we have enough quorum in the Federal Court. If it is desired to retain experienced judges, they may be appointed as additional judges under the provisions of the Constitution. In fact, we have already one in Tan Sri McIntyre even though he is over 65. Here the age is of no concern and all

we need is experience and we can go on from there and we do not have to amend the Constitution on that. You can still retain the very experienced judges on the Bench. The Chief Justices will sit in the Federal Court only when constitutional matters are heard. When constitutional matters are heard, you have the Lord President, the two Chief Justices on his right and left and two Federal judges, whereby you have a very strong and powerful Court for constitutional matters. However, for other matters, they will be hearing appeals from the Chief Justices who will not sit in the Federal Court in the normal course of events except on Constitutional matters.

This proposal has also the added advantage whereby the Federal Court judges can be freely appointed as Chairmen of the Royal Commissions. As you know, Sir, the judges in the High Courts one after another have been appointed to Commissions and some of them have been absent for periods of two years and over. So, if we have this intermediate Court to do the actual work of dispensing justice, then you have the Federal Court always standing by for constitutional matters or matters of importance referred to by the Yang di-Pertuan Agong; they will not be that fully employed there but we need them. We submit that to keep these judges busy, we can safely pass on all works of Commissions to the Federal judges. They have the experience, they have the time and they are not under any pressure to hurry up. At present when a Commission is appointed, the Chief Justice will every now and then ask these judges as to when they are going to finish the report and will ask them to hurry up the report; thus, the Government cannot get a very good report, because the judges are under pressure and are asked to hurry up the reports. If our proposal is agreed to, the Federal judges can take their own sweet time to produce good reports of Royal Commissions; and it will also relieve the work of the judges in being lost to Commissions from time to time and they can concentrate on their work without upsetting their normal schedule of work.

Lastly, we propose that the Court of Appeal follow the present practice of going from State to State or at least area to area to hear appeals but that the Federal Court should remain stationary in Kuala Lumpur. Justice will go to you as far as the Court of Appeal, but if you appeal to the Ruler, then you must come to the Ruler and you must come to Kuala Lumpur to the Federal Court. That is all, Sir.

Mr Chairman: Dato' Mohd. Asri!

Dato' Haji Mohd. Asri bin Haji Muda: Satu perkara, Tuan Pengerusi, saya hendak bertanya sadikit, kena apa untok membicharakan soal Perlembagaan (Constitutional matters) perlu kapada 5 Judge termasok 2 Chief Justice, satu daripada Malaysia Timor dan satu daripada Malaysia Barat, sedangkan perkara criminal 3 orang Hakim ia-itu satu daripada-nya ia-lah Chief Justice dan 2 daripada Federal Judge. Ada-kah kita pandang perkara criminal itu bagitu lebeh kechil daripada perkara Perlembagaan?

Enche' Harun bin Dato' M. Hashim: Tuan Pengerusi, perkara Perlembagaan kita dapati lebeh berat daripada nyawa sa-suatu manusia atau pun harta. Perlembagaan itu untok meliputi semua ra'ayat dan negara—jadi memang lebeh berat. Dan lagi untok tafsiran Perlembagaan, yang kita chadangkan itu Hakim Besar kedua[2] negeri oleh kerana dia itu ada pengalaman, satu daripada Malaysia Barat dan satu lagi daripada Malaysia Timor, pengalaman dia itu macham mana kita hendak tafsirkan Undang[2] jadi mengkukohkan lagi—Makhamah Persekutuan.

Dato' Haji Mohd. Asri bin Haji Muda: Ya, betul-lah itu, tetapi tidak-kah kita fikir bahawa soal jaminan keselamatan nyawa bagi sa-saorang itu bergantong kapada . . . . . oleh yang demikian memerlukan kapada 5 orang Hakim saperti Perlembagaan.

Enche' Harun bin Dato' M. Hashim: Ya, ya. Jikalau chadangan kita di-terima, mula[2] satu Hakim jatoh hukum, kata-lah case bunoh, Hakim dengan Jury jatoh hukum bunoh dan dia tidak puas hati dia merayu kapada yang kita panggil Court of Appeal atau pun Mahkamah Ulang Bichara—itu 3 bichara di-situ, Hakim Besar dan 2 orang Hakim lagi. Dia tidak puas hati dia merayu kapada Yang di-Pertuan Agong. Bila sampai kapada Yang di-Pertuan Agong, Agong hantar kapada Federal Court.

Dato' Haji Mohd. Asri bin Haji Muda: 5 Hakim.

Enche' Harun bin Dato' M. Hashim: 5 Hakim juga, chuma yang saya sebut bersabit dengan Perlembagaan itu masa hendak bichara case Perlembagaan itu minta-lah kedua[2] Hakim Besar berada di-situ.

Dato' Haji Mohd. Asri bin Haji Muda: Ya, ya.

Enche' Harun bin Dato' Hashim: Dan lagi case Perlembagaan tidak sampai kapada Hakim Besar dia pergi terus kapada Federal Court. Jadi jikalau dia tidak pakai dia, dia tidak ada peluang hendak mendengar case Perlembagaan, tetapi kalau case macham jenayah dan case mal dia memang sudah putus dah.

Tuan Bahaman bin Samsudin: Thank you. Any other members wish to ask questions?

Tan Sri Nik Ahmad Kamil: Sir, I have got one or two questions to put to the representative of the Judicial Officers' Association. In your written statement here, you have stated that the Federal Court should take over the functions of the Privy Council. Does this mean that (although you did qualify yourself earlier this morning by saying that you do not mind whether it goes to His Majesty or direct), when you submitted the Memorandum, that this Court should be the Court where the ra'ayat could go direct without going through the Yang di-Pertuan Agong to your proposed second tier, i.e., the Court of Appeal? Now you have said that those who want to go can go through the Yang di-Pertuan Agong, which means that the ra'ayat can go to his Sovereign?

Enche' Harun bin Dato' M. Hashim: We leave that open.

Tan Sri Nik Ahmad Kamil: Would this then be true that in all cases you did qualify that they should retain the powers under Articles 128 and 130? That means to say that in regard to constitutional matters, they can take their own initiative to go to the Federal Court.

Enche' Harun bin Dato' M. Hashim: Yes. We preserve Articles 128 and 130.

Tan Sri Nik Ahmad Kamil: But for other matters you see no objection to the ra'ayat going to the Yang di-Pertuan Agong?

Enche' Harun bin Dato' M. Hashim: Yes, especially on matters involving sentence of death, where the man appeals to the Yang di-Pertuan Agong who in turn refers it back to the Federal Court just as he would refer to the Privy Council.

Tan Sri Nik Ahmad Kamil: I should like to ask a second question of you. We note that under the present procedure an appeal goes not to the Judicial Committee of the Privy Council but to the Yang di-Pertuan Agong who in turn, not being a person learned in law, seeks the advice of the body of persons learned in law and full of experience called the Judicial Committee of the Privy Council. Assuming, for various reasons, that we do away with this reference to the Judicial Committee of the Privy Council and that we

still want to preserve the right of the ra'ayat to go to the Ruler for final judgement in getting redress, what would be your view if the Yang di-Pertuan Agong refers it to a panel or a body of persons equally eminent and learned in law and experience, to advise him?

Enche' Harun bin Dato' M. Hashim: A panel from where?

Tan Sri Nik Ahmad Kamil: A panel of person drawn locally plus from abroad—I should make that clear. A final body of learned persons from this country plus also drawn from the other Commonwealth countries such as India, Pakistan, New Zealand and so on.

Enche' Harun bin Dato' M. Hashim: We feel that we should not import any more because it will be a retrograde step. We have been trying to get rid of them. So by drawing in foreigners, we will shake the confidence of the people, if I may say so, politically and it may not be wise. People might think that we are not doing the right way if we still import people to come in. In fact, the judges in this country have given us this confidence that they are capable of doing the job. If we try to import again, I think it will shake the whole set-up.

Tan Sri Nik Ahmad Kamil: Your view would be then, as I understand it, that although we do away with the Privy Council, the panel or the body of persons, eminent jurists and so on, drawn from abroad would be regarded politically the same as still retaining the concept of advice to the Yang di-Pertuan Agong by the Privy Council.

Enche' Harun bin Dato' M. Hashim: Yes and, in fact, it will cost us much more and we will not get any benefit at all.

Dato' S. P. Seenivasagam: Sir, I have got a few questions and I hope Enche' Harun does not take offence. Would you, Enche' Harun, agree from what you have said, that it would appear that you are of the view that the interests of justice should be subordinated to the national sentiment?

Enche' Harun bin Dato' M. Hashim: No, it is not that.

Dato' S. P. Seenivasagam: Is it partly at least?

Enche' Harun bin Dato' M. Hashim: In fact, we did say in our quotation that we do not want to be associated with Tobago or Barbados and the Isle of Man. That did play a part in our thinking, but what we were really concerned was that if we do not make a start now, we will never make a start and we can never give our judges the experience. So, let them make the decisions now, let them make mistakes—it does not matter. Countries like Cyprus and all the African countries have done away with it and why should we, who profess to be much more advanced than some of these countries, be still clinging on to the apron strings of the "mother" country?

Dato' S. P. Seenivasagam: Would you look at this memorandum by Mr Devaser where the last paragraph on page 1 reads as follows and it is a quotation from Viscount Radcliffe:

"Viscount Radcliffe in giving reasons for the said decision said—

> 'It was not as if the Judicial Committee was in essence an English institution or an institution of the United Kingdom. On the contrary, as Lord Haldane said in Alex Hull & Co. v. M'Kenna (supra) it was 'not a body, strictly speaking, with any location'. 'It is not' he said, 'an

English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body'."

Do you agree with those views?

Enche' Harun bin Dato' M. Hashim: No, I do not agree with those views. Even Wade and Phillips, an authority on constitutional law, does not agree with that either. It says here:

"Membership of the Privy Council from Judges from Australia, New Zealand, Ceylon and Nigeria . . . . . ."

That is all. At one time they had from India Lord Sinha. What they do is: if it is a Ceylon matter, a Ceylon man will be there—Mr de Silva.

Tan Sri Nik Ahmad Kamil: On Malaysian matters?

Enche' Harun bin Dato' M. Hashim: If it is Malaysian matter nobody goes in. Wade and Phillips admitted that the judgements of the Privy Council had been open to severe criticisms because those people were unaware of our set-up, because they have had no local knowledge. People like Hickling and Sheridan in their books have advocated the retention of the Privy Council on the ground that these people sitting in England are so completely detached. They can give a really independent judgement. Now, according to Wade and Phillips, that had actually worked against our interest, because they were so detached that they gave judgement irrelevant to our conditions of life here.

Dato' S. P. Seenivasagam: Have you come across such unrealistic judgements in relation to Malaya?

Enche' Harun bin Dato' M. Hashim: I cannot recall offhand. In any case it might sound too personal if I mention the case of Chiu Nang Hong. The Chiu Nang Hong Case would have been different if the Judges concerned had more local knowledge.

Dato' S. P. Seenivasagam: That was the case of what amounted to corroboration of an accomplice's evidence.

Enche' Harun bin Dato' M. Hashim: They were too detached. Our ideas of society are different.

Dato' S. P. Seenivasagam: We are still advised by the opinions of English Judges in our daily legal practice. Everyday we are citing English authorities in our courts and adopting the views of English Judges. How would you reconcile this?

Enche' Harun bin Dato' M. Hashim: Yes, we are doing that. But we are also citing quite a lot of Indian cases. We are doing that because we do not give our Judges the opportunity to decide. If we had given our Judges the opportunity to decide, then we would quote our own Judges, not foreign Judges.

Dato' S. P. Seenivasagam: You referred to the abolition of Privy Council appeal in Canada and the African countries. But do you know the legal development that took place in those areas before appeals to the Privy Council were abolished? In Malaysia we have Judges perhaps appointed less than three years ago, and certainly there are none more than eleven years.

Enche' Harun bin Dato' M. Hashim: Yes, but it is not their fault. It is an accident of history. In Cyprus it is much more recent.

Dato' S. P. Seenivasagam: You said that if we do not start now the Judges will all grow too old and will eventually retire. But are you not overlooking the fact that many of our present Judges are still young—e.g. Justice Hamid—and in another ten years' time they will still be below the retiring age?

Enche' Harun bin Dato' M. Hashim: Not all our present Judges are young, except for the particular Judge you mentioned—he is about the youngest of the lot.

Dato' S. P. Seenivasagam: If within ten years we could get Judges with adequate experience, don't you think it would be in the national interest to postpone the date than to proceed with the set-up immediately?

Enche' Harun bin Dato' M. Hashim: I think if we want to take that step we may as well take it right now; otherwise we will find another excuse why we should postpone it again.

Tuan Chan Seong Yoon: It has been suggested by the Bar Council that the ra'ayat perhaps would have more confidence in a body that is away from the country and that in a small closely-knit society like ours the Judges are always in contact with the various communities in the country and that this would undermine the confidence of the ra'ayat. You quoted the case of D.P.P. *v.* Joyce where the House of Lords actually committed judicial murder and that they were influenced by national sentiments and public opinion. Now don't you think that the case you just quoted supports the contention that it is much better to have a body to advise the King situated away from the country and not in contact with the society all the time?

Enche' Harun bin Dato' Hashim: We must look it the other way because justice is a very personal matter. If your children misbehave you should be in a better position as a father to punish them than your neighbour. I would imagine that a Ruler should be treated like a father and the ra'ayat as his children. You look after your own children, you punish them; you do not ask your neighbours to look after your children.

Tuan Chan Seong Yoon: But Judges are human and if they live in the same area they might be easily influenced by newspaper reports, public opinion and what not.

Enche' Harun bin Dato' M. Hashim: But the major safeguard is that in the Federal Court there are five Judges and to influence five Judges is a difficult task; we find it even difficult to persuade one judge.

Tuan Chan Seong Yoon: Perhaps well educated people like you and me may easily understand that, but this is about the confidence of the ra'ayat in their resort of appeal.

Enche' Harun bin Dato' M. Hashim: The only time the ordinary ra'ayat is really concerned about justice is when he is sentenced to death. He is taken to the Pudu Prison or to the Taiping Prison waiting to be executed. There he hears stories such as "You sign this document because it is going to the Privy Council, because somebody can save your life." He hears imaginary stories in the prison from the Prison Warden; actually he does not know what is going on. As far as he is concerned the last time he appeared was before the judge and before the Jury and there he was sentenced to death: taken from the prison he was straightaway produced in the dock and he witnessed two lawyers arguing in a language that was foreign to him and he was told to go back to prison; a date was fixed for another attempt to save his life. So, as far as he is concerned, he does not care who decides. I think the contention that some foreign people should decide is not practicable.

The other people who are concerned are of course the business people—about their properties. But I think such people who have millions of dollars should be intelligent enough to know that we can give them justice here as much the same, if not better, than somebody in England.

Tan Sri Nik Ahmad Kamil: We were given an example that even eminent members of the House of Lords could go wrong. This morning we heard that distance could probably make for better justice.

Tan Sri Abdul Kadir bin Yusof: Mr Chairman, here it says:

> "The Federal Court shall have jurisdiction to determine on constitutional matters."

So according to what you suggest, there will be only one hearing on constitutional matters. Don't you think that on a constitutional matter there should be two hearings. It may necessitate an amendment to the Constitution. In the first instance it shall be heard by three Judges of the High Court and then it goes to the Federal Court, or we say by the Federal Court and then it goes to the Appeal Court consisting 5 Federal Judges. At present if we do not amend the Constitution in this regard then there is going to be only one hearing. That, I consider, is one of the defects.

Tan Sri Nik Ahmad Kamil: The original jurisdiction of the Federal Court?

Tan Sri Abdul Kadir bin Yusof: The Federal Court has the sole right to hear constitutional matters.

Dato' Haji Mohd. Asri bin Haji Muda: Perkara sekarang ini dia mempunyai dua perkara.

Tan Sri Abdul Kadir bin Yusof: Another point I want to ask you is: do you agree, if ever we have a court of last resort here, there will be more chances for the people to appeal to that court rather than to England, because I think the cost involved will be definitely more.

Enche' Harun bin Dato' M. Hashim: In fact, I would add that it not only gives the advantage to the ra'ayat to appear before our own Court but it also gives the opportunity for members of the Bar to argue such cases; at the moment they have no opportunity to do so although they can go to England to assist the Q.C.s in the Privy Council, but till this day only 4 had gone there so far and they too had been to England for holidays and thereby took the opportunity to appear in the Privy Council.

Tan Sri Nik Ahmad Kamil: Just on a point of clarification—Only the Q.C.s can appear in the Privy Council?

Enche' Harun bin Dato' M. Hashim: But they (members of the Bar) can assist as juniors but they cannot argue in the Privy Council as Q.C.s can. Article 131 of the Indian Constitution states:

> "Subject to revision of this Constitution, the Supreme Court shall, to the exclusion to any other court, have original jurisdiction in any dispute between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States."

Tan Sri Abdul Kadir bin Yusof: They give exclusive right to the Supreme Court in India just because they have original jurisdiction and there is no appeal to any other court.

Dato' S. P. Seenivasagam: But the Indian Constitution only relates to disputes between States or between States and the Federal Government. But what about if it is between an individual and the Government—on a constitutional matters?

Enche' Harun bin Dato' M. Hashim: That goes to their own High Court first and then it goes further to their Court of Appeal.

Tan Sri Abdul Kadir bin Yusof: If there is no two-tier system, then there must be not less than 5 Federal Court Judges sitting.

Enche' Harun bin Dato' M. Hashim: By convention we always have 5 Judges sitting in the Federal Court—on constitutional matters.

Tuan Chan Seong Yoon: What is our present strength now?

Enche' Harun bin Dato' M. Hashim: We have 1 Lord President, 2 Chief Justices, 2 Federal Court Judges.

Tuan Chan Seong Yoon: We have to appoint more Judges because the Chief Justice cannot sit in that Court of Appeal and there may be one or two other Judges going on leave during a case.

Enche' Harun bin Dato' M. Hashim: There was recently one vacancy created because Justice Tan Sri Ong was promoted to Chief Justice. Our Constitution allows for the appointment of 4 Federal Judges and any number of additional judges. However, the money will be quite well spent because we can make use of these judges in the Royal Commissions. The Government is getting quite fashionable nowadays in appointing one Commission after another.

Mr Chairman: Are there any more question? (*No further questions*) Well, thank you very much, gentlemen.

(Enche' Harun and Enche' Mohd. Yusuf withdrew).


PARLIMEN
MALAYSIA

MINUTES OF THE FOURTH MEETING OF THE SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL HELD AT 10.30 A.M. ON 17TH DECEMBER, 1968

PRESENT:

The Honourable the Minister of Justice (Tuan Bahaman bin Samsudin) as Chairman.
" Assistant Minister of Home Affairs (Tuan Hamzah bin Dato' Abu Samah).
" Tan Sri Nik Ahmad Kamil.
" Dato' Asri bin Haji Muda.
" Dato' S. P. Seenivasagam.
" Tuan S. Y. Chan.

SECRETARY:

Tuan Jaafar bin Mohamed Taha, Setia-usaha Parlimen dan Setia-usaha Dewan Ra'ayat.

IN ATTENDANCE:

The Attorney General (Tan Sri Abdul Kadir bin Yusof).
Tuan Hashim bin Yeop Sani (Attorney General's Department).

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1. *Confirmation of Minutes of First, Second and Third Meetings*—The Minutes of the First, Second and Third Meetings of the Committee were confirmed without amendment.

2. *Consideration of Memoranda and Representations Received*—The Committee deliberated. It agreed that the Bill is not acceptable in its present form and that this fact should be reported back to the House.

It was also agreed that the draft report should be circulated to members for their approval.

The meeting adjourned at 12.05 p.m.

(NOTE—Verbatim notes of Committee's discussion attached to these Minutes).

VERBATIM PROCEEDINGS OF SPECIAL SELECT COMMITTEE ON THE COURTS OF JUDICATURE (AMENDMENT) BILL MEETING HELD ON 17TH DECEMBER, 1968

Mr Chairman: I take it that you have all received the evidence taken at the last meeting. Shall we now proceed to deliberate?

Tan Sri Nik Ahmad Kamil: First of all, I personally should like to be advised of the procedure. I have been trying to read the Standing Rules and Orders. This is the first time that I have been put on a Select Committee of the House. Now, we have been appointed to this Select Committee by the Committee of Selection to go into this Bill to amend the Courts of Judicature Act; there was no special terms of reference as to what we are supposed to do.

Enche' Lim Joo Keng (Deputy Clerk of Parliament): Mr Chairman, the Courts of Judicature (Amendment) Bill was committed to this Select Committee immediately after its first reading and under Parliamentary practice if a Bill is committed to a Committee after its first reading the Bill is in fact the terms of reference.

Tan Sri Nik Ahmad Kamil: So the Committee can consider the Bill as a whole, including its principle and make amendments to it or even throw it out. So, after our deliberations, it will be our duty to report back to the House.

Enche' Lim Joo Keng: Yes, the Select Committee will report back to the House and then the House will debate the Report of the Committee. The Select Committee can, if it so wishes, attach to its Report a copy of the Bill with any amendments suggested by it.

Tan Sri Nik Ahmad Kamil: But if there is a minority report?

Enche' Lim Joo Keng: There will be no minority report under our practice.

Tan Sri Nik Ahmad Kamil: I was thinking of the old Legislative Council practice.

Dato' S. P. Seenivasagam: I am not anticipating any minority report, but what is the procedure if a member disagrees?

Enche' Lim Joo Keng: He can enter his reservations in the body of the report.

Dato' S. P. Seenivasagam: Is that under the Standing Orders?

Enche' Lim Joo Keng: No, it is in line with Parliamentary practice.

Tan Sri Abdul Kadir bin Yusof: It will be disclosed in the Report itself whether or not the majority agrees with the principle; likewise it will show the number who may not agree. Even if it be rejected or postponed, all these things will be indicated in the report. Then the House will understand how strong is the approval or disapproval.

Mr Chairman: I suggest that you read pages 106 and 107 of the Standing Orders of the House where the procedure relating to reports from Select Committees is given. Any division taken will be recorded in the minutes. Shall I now invite members' views?

Dato' S. P. Seenivasagam: Mr Chairman, I think that as a Committee it is our duty to make up our mind only after giving due consideration to all the Memoranda received and all the views expressed before us.

Having regard to the Bill as a whole, it would appear that not one single person, either Judges or others, has accepted the Bill in its present form.

Out of a total of 19 Judges, none are in favour of accepting this Bill in its present form. I think their views must be considered because they are the people who, if at all, will have to take over the duties of the present Privy Council. If they are not satisfied with the Bill, I do not see how we can push the Bill through.

There appears to be a general agreement that the ultimate objective is the replacement of the Privy Council by some other organisation—on that there seems to be a fairly unanimous view. However, the general view is that the stage is now premature for the various reasons that have been given and they, I would submit, are very cogent reasons. It is not necessary for me to repeat those reasons here, and at this stage I would ask my fellow Members of this Committee to dismiss the suggestion stressed by the representative of the Judicial and Legal Service Officers' Association where, unfortunately, Enche'

Harun said that their views were tinted by the thought that if necessary the interests of justice should be subordinated to nationalism—he said that that was in their minds when they submitted their memorandum. I think he went on to say, "Well, let the judges learn by their mistakes", which I think is a wrong attitude to adopt when, according to the unanimous view of all those who have appeared here, they expressed, "If we are given another period of five to ten years, we could, perhaps, with a greater measure of confidence, introduce a Bill even to totally abolish the right of appeal to the Privy Council". In this respect, I would commend to the attention of the Committee the views expressed by Raja Azlan Shah. I think there is a very constructive suggestion in his Memorandum and one which, if accepted, would meet with the approval of everybody concerned. Raja Azlan Shah says here:

> "When the time comes, I would suggest the setting up a Federal Supreme Court as the final Court of Appeal in respect of both civil and criminal matters (on the lines of India) with its own Supreme Court Judges. Each High Court would have its own Chief Justice and other High Court Judges".

I do not think anybody could take exception to the proposal put up by Raja Azlan Shah, and I think that would be ideal as a future means of administration of justice in this country.

If we concede that nobody agrees with the Bill in its present form, then, of course, the only other thing we have to consider is whether we put in a report saying that it is premature and let Parliament consider the matter at a subsequent stage. Or, are we now going to propose amendments to this Bill in respect of criminal matters, civil matters, matters involving how many dollars should go to the Privy Council and of how many dollars should not go to the Privy Council; or should we say that for a transitional period of five to ten years let things remain as they are? After all, nobody is going to suffer anything very seriously about it unless we are going to concede to this wrong conception that in some way we are compromising our sovereignty and independence, which is wrong because under the Constitution an appeal is not to the Privy Council. Everybody still appeals to the Yang di-Pertuan Agong. It is a body to which the matter is referred by His Majesty for their expert opinion and nobody appeals to the Privy Council. There is no such thing as an appeal to the Privy Council. So, it should be stressed and emphasised that the people are appealing to their Supreme Ruler who at the moment is relying or taking the advice of a certain set of expert judges, whose pronouncements are still the law in this country, because most of those judges have given written judgements which are being cited in the courts of this country every day. So, where do we lose our dignity, integrity or anything of that sort, if we get their personal opinion instead of relying on written judgements reproduced in print? I think once that point is stressed and explained in our report, then there will be no adverse comment because our report will merely say: Let us hold on for another five to ten years and then review the matter and draw up a comprehensive Bill setting up a two or three-tier system of justice—instead of, I would submit with respect, trying to make a sort of "makeshift" legislation of this nature amending part of a section and so on. I would ask the Committee to consider carefully whether or not we should shelve this proposal for a period of five to ten years.

Tuan S. Y. Chan: Mr Chairman, Sir, this Bill seeks to do away with criminal appeals to the Privy Council but still retains civil appeals involving five thousand dollars and above.

I tend to agree with what Dato' S. P. Seenivasagam has said. The crux of his comments is that this Bill in its present form is not acceptable. In fact, we have heard many suggestions from the various witnesses. One of the

suggestions is that there should be an alternative body to replace the Privy Council if the Privy Council is to be done away with. A lot of emphasis is placed on the fact that people value their liberty and life more than their property and the important aspect of this criminal appeal is that the Privy Council is going to be done away with without having a second tier. I myself feel that this would be taking away the fundamental rights of the subjects to appeal to the Yang di-Pertuan Agong, which means indirectly an appeal to the Privy Council, because the Privy Council merely acts as an advisory body to the Yang di-Pertuan Agong and of course, it is up to the Yang di-Pertuan Agong either to accept or even to refuse whatever decisions the Privy Council may make. This is actually an appeal from our Courts not to a foreign body but to the Yang di-Pertuan Agong, and I see no objection in that.

The other point is this. I think what was suggested by the Attorney General is quite right where he said that one of the reasons against appeals to the Privy Council is that there may be delays in the appeals. However, I think that justice delayed is better than justice denied. I am of the opinion that, unless there is another suitable alternative body like a Regional Court as suggested by the representative of the Bar Council or another body of eminent legal brains as suggested by Tan Sri Nik Ahmad Kamil, to replace the Privy Council, then, as Dato' Seenivasagam has suggested, nothing should be done about it for an intermediary period of five to ten years until we can have a more suitable alternative. Thank you.

Tan Sri Nik Ahmad Kamil: Mr Chairman, Sir, I would certainly agree with the views expressed by both my friends, Dato' S. P. Seenivasagam and Tuan S. Y. Chan that on reading the Memoranda submitted by the various persons it is clear that none of them agree with the Bill in its present form. I think we can accept that as a fact.

I have been giving some very considerable thought to this Bill. My thought, ever since this Bill was published, ran parallel in two channels. The first channel is in relation to our position as an independent and sovereign nation, relying on the advice of a body of persons learned in law and so on in matters on which the subjects of Malaysia go to their sovereign Ruler for final appeal. The second line of my thought was the line of how best we could ensure that our subjects get a fair trial on whatever complaints or problems they may have. It is clear at least to us, who are in the know, although it may not be so to the people as a whole, that the appeal is not to a foreign body, which is now called the Privy Council, but really it is an appeal to our Sovereign Ruler who in his turn seeks the advice of persons learned in law to advice him how best he should deal such an appeal. I think we all realise that, but I do not know whether many people in the country do so because they merely talk about "appeal to the Privy Council" "appeal to the Privy Council" but not "appeal to His Majesty the Yang di-Pertuan Agong". Perhaps, the Members of the Committee here may have realised that from the form of my questioning of a few of the witnesses who appeared before us how my thoughts were running.

First of all, I personally, as a member of the Committee, would not support the Bill in its present form. Instead of the abolition of appeal in one particular case, that is the criminal case, and then retaining the appeal in the other cases, and as expressed in general terms by some of the people who submitted their evidence, "If we want to abolish, we might as well abolish the whole lot; if not we do not abolish it at all", I think myself that the time has come for us really to give some serious thought to this and not merely to take the line of least resistance such as, "If we abolish, we abolish all; if not, don't do it at all". There must be a stage where we as an independent nation have got to begin some time and somewhere. The question is: when is the time? Now,

the representative of the Bar Council thought that—we can see that they imply—after some time we have to carry on on our own but that the time is not yet ripe, and they have suggested a period of five to ten years—as Dato' S. P. Seenivasagam said just now, that probably one day we may have to go on our own but that the time is not yet ripe. It is really very difficult for us, being a new nation, to decide—and we can see from the list of our judges that has been kindly supplied to us by the learned Attorney General—when we should start or as to how long we should wait, because judges come and judges go. The judges are appointed young and when they get old, they retire, and this circle goes on and on. Whilst due respect is given to our judges and no aspersion is cast as to their ability and so on, I think the general feeling expressed here is that, if I may use the words—it may be my own and I cannot remember whether somebody else stated it—"our judges are not yet quite mature". How do you define the word "mature"? Can anybody in this room, can members of the Bar Council, can anybody define the word "mature" as far as our people are concerned? We have got to learn the start somewhere.

So, holding these views in mind, I thought, that a possible solution—first of all, to meet the political objection that has been expressed to me personally by a few of my political friends that we should not continue to hang on to the tail of the U.K. by going for the advice of the Privy Council—is to empanel a body of persons equally eminent together with our own people sitting on this panel. For example, we can draw these eminent and learned judges or ex-judges even from the U.K. itself or from India, Pakistan, New Zealand, Australia and so on. I believe it was one of the suggestions made by somebody—and I forgot his name—that we should make arrangements for our own people to sit in the Privy Council. I think it was suggested by Mr Devaser. Whether such an arrangement can be made or not, I do not know. I doubt it myself because the Judicial Committee members are made up of the members of the Privy Council. They are the Judicial Committee of the Privy Council to the Queen. So, I rather doubt whether any of our judges have got the right or the privilege to be members of the Privy Council. So, that is one of the solutions that I feel can take the place of a reference to the Privy Council or the Judicial Committee of the Privy Council and that the reference should be made to a body of persons empanelled by our own Sovereign Ruler to advise him on legal questions; and this body of persons can be partly our own people, can be ex-learned judges, who had been on the Bench for so many number of years and so on, together with other judges drawn, say, from India, Ceylon, Pakistan, New Zealand or even from the U.K. itself. But certain views have been expressed here where they feel that we should really forget about importing outsiders, that we should have our own people and restore the old Court of Appeal making it the second tier and then re-form the present Federal Court into a third and final tier for final appeals; and this third tier could be used as either a direct Court of Appeal to whom the subjects will go or can be used by His Majesty the Yang di-Pertuan Agong as an advisory body to advise him on appeals made to him. So, in my own mind, we have got these three problems: whether we abolish reference to the Privy Council or not; and if we do, whether we should have any importation of legal minds from abroad or let us do it ourselves; and if we do it ourselves whether we should revive the old Court of Appeal to make it as the second tier of a body of jurists.

So, that is what has been exercising my mind so far, and I personally would say, first of all, that I cannot accept this Bill in its present form, as a member of the Committee, and I would myself support, if we can find an alternative, doing away with reference to the Privy Council. If we still feel that our own people are not yet "matured" to have this second tier

and third tier, then I say myself—although it is going to be costly—that this matter will have to be considered very carefully and that we should empanel a special body of persons, that will have nothing to do with the Privy Council, to advise His Majesty the Yang di-Pertuan Agong on appeals to him in both civil and criminal matters. I am not going into the details of the civil part of it now, because it is not directly involved in our discussions at the moment. I think we have got to start some time. If we do not start now, we will never start at all. We have been placed in such a position being a newly emergent nation.

Mr Chairman: It is the question of when.

Tan Sri Nik Ahmad Kamil: Yes. We have got to start now . . . . .

Mr Chairman: The suggestion here is a period of five to ten years.

Tan Sri Nik Ahmad Kamil: If you wait for another five years, the old judges we have got now will retire and new judges will come in, and this circle will go on and on. We want to ensure that our subjects will get the best possible justice as far as we can humanly provide for. These are my preliminary views, Sir.

Dato' Haji Mohd. Asri bin Haji Muda: Tuan Pengerusi, nampak-nya perbinchangan kita dalam perkara ini dia beredar pada dua masaalah sahaja. yaani sama ada kita hendak menyempurnakan sa-chara langsong atas menjaga kedaulatan, kemerdekaan negara kita dalam semua sudut yaani mewujudkan sifat² merdeka yang tulin bagi negara kita memutuskan sa-barang perhubongan sa-chara langsong atau tidak langsong dengan mana² pehak kuasa luar ia-itu dalam perkara kehakiman ini nyata benar-lah bahawa suara² gulongan yang mempunyai semangat kebangsaan yang kuat menghendaki supaya perhubongan dengan Privy Council itu di-putuskan. Di-samping itu soal yang kedua-nya ia-lah keyakinan, keperchayaan kita kapada kemampuan dan kebolehan para hakim kita dalam melakukan atau menjalankan peranan-nya dalam bidang kehakiman ini. Ini-lah dua soal yang beredar sekarang.

Dalam sidang yang baharu lepas kita telah mendengar pandangan daripada Chairman of Bar Council, Enche' Chelliah, mendengar pandangan daripada Enche' K. L. Devaser, malah kita telah dengar juga Enche' Harun bin Dato' Mohamed Hashim yang mewakili daripada Persekutuan Pegawai² Perkhid-matan Undang² dan Kehakiman. Kedua² perkara ini, saya sifatkan ini terbahagi kapada dua perkara-lah. Pehak yang pertama sunggoh pun dalam pandangan yang mengandongi unsor² rasa kebangsaan itu, tetapi maseh meletakkan keraguan tentang kebolehan dan kemampuan hakim² kita dalam menjalankan peranan kehakiman-nya dan satu pehak lagi, pehak yang meng-hendaki supaya kita berani menghadapi kenyataan supaya kita dapat memegang pimpinan sa-chara langsong.

Sabenar-nya, Tuan Pengerusi, keperchayaan kalangan kita terhadap kebolehan hakim atau kemampuan hakim lebeh banyak di-titek-beratkan dari segi sifat² keadilan daripada sifat² ilmiah atau kebolehan ilmu. Saya tidak tahu pandangan daripada ahli² yang terpelajar dalam bahagian undang² ini begitu juga, tetapi apa yang dapat saya beri pandangan ada-lah keperchayaan orang ramai sekarang ini terhadap pada kehakiman kita, begitu-lah. Ini berdasarkan mentaliti yang di-warisi daripada zaman penjajah dahulu dan malang-nya sudah sa-puloh sa-belas tahun kita merdeka ini, usaha² yang benar² sunggoh untok melenyapkan penyakit yang kita warisi daripada zaman penjajahan itu belum kita lakukan dengan sunggoh².

Jadi dari sudut ini, saya rasa apa yang boleh kita buat ia-lah chuba menyatukan antara dua pendapat. Sa-belum daripada itu, saya terlebeh dahulu hendak menyatakan-lah di-sini perasaan penghargaan saya kapada sa-orang

ahli peguam muda kita ia-itu Enche' Harun yang telah menyampaikan pandangan bagi pehak Persatuan-nya itu, ia-itu pandangan yang bagitu berani; satu pandangan yang saya rasa benar[2] berarti dan bertanggong-jawab. Saperti pandangan dia dan saperti pandangan Yang Berhormat Tan Sri Nik Kamil, saya juga berpendapat bahawa Rang Undang[2] yang kita binchangkan sekarang ini ta' dapat kita terima dengan bagitu sahaja, sebab kalau-lah Rang Undang[2] ini hendak kita sifatkan sa-bagai Rang Undang[2], hendak mengimplementasikan rasa kebangsaan kita, maka nyata-lah Rang Undang[2] ini tidak memenohi kehendak itu. Sebab maseh lagi meletakkan satu segi dari segi kehakiman, dari segi mal atau civil tundok di-bawah benda yang kita ta' mahu tetapi kalau hendak di-katakan Rang Undang[2] ini satu Rang Undang[2] yang hendak melaksanakan atau hendak menunjokkan bahawa hakim[2] kita telah chukup mempunyaï kebolehan dan kelayakan dalam menjalankan peranan kehakiman-nya, maka itu pun tidak tepat. Kalau hakim[2] kita benar[2] sudah chukup mempunyaï kelayakan dalam menjalankan peranan kehakiman-nya maka kenapa bahagian mal itu di-tolak sa-belah, tidak di-letakkan keperchayaan, ia-itu lima ribu ringgit ka-atas, atau sa-puloh ribu ringgit ka-atas. Itu-lah masaalah.

Jadi bagi pandangan saya sendiri-lah, segi pandangan saya buat masa ini, saya tidak setuju Bil itu di-kemukakan dengan bentok yang sa-demikian. Kalau kita benar[2] hendak menjadikan bentok negara kita ini atau pun semangat negara kita ini sebagai sa-buah negara yang merdeka dan berdaulat yang tidak mahu tundok di-bawah pandangan[2] dan fikiran[2] luar saperti yang di-katakan oleh Tan Sri Nik Kamil tadi lebeh baik kita terima pandangan daripada Enche' Harun yang mewakili Persatuan-nya. Putuskan, hapuskan semua sekali perhubongan kita dengan Privy Council, hapuskan sama sekali dan kita wujudkan satu struktor (structure) mahkamah kita yang benar[2] merdeka dan berdaulat yang dapat memberikan keperchayaan kapada orang ramai tentang kebolehan hakim kita, wa-ima dari segi ilmu-nya dan dari segi peranan-nya serta dari segi keadilan yang wujud dalam sifat[2] kehakiman, baru dapat. Jika tidak, ta' usah lagi buat macham yang dalam Bill itu dan kalau hendak ada zaman peralehan saperti yang di-sebutkan oleh Yang Berhormat Dato' S. P. Seenivasagam dan Yang Berhormat Tuan S. Y. Chan. Saya rasa itu pun perlukan kapada suatu bentok juga. Kalau hendak tunggu lima tahun, atau 10 tahun tidak-lah berarti penungguan itu dengan bentok yang sekarang. Mesti di-kemukakan sa-suatu yang dapat menjamin atau memberikan satu sifat bahawa sa-nya sifat kedudokan kehakiman sekarang ini, sifat peralehan menunggu lima atau sa-puloh tahun. Walau bagaimana sekali pun hati kechil saya, saya lebeh chenderong kapada sifat merdeka, kita bebas, kita jalan sendiri, tetapi kita bentok struktor kehakiman kita dengan bentok kehakiman kita sendiri yang boleh menjamin dua perkara. Pertama-nya keadilan yang berjalan dengan terator dan sempurna dan menarek keperchayaan ra'ayat dan orang ramai terhadap keadilan yang di-jalankan kehakiman kita. Dalam hal ini biar-lah saya pergi kapada perkara detail sadikit, ia-itu perkara yang di-beri pandangan oleh Enche' Harun tempoh hari berkenaan dengan apabila kita setuju menghapuskan semua sekali perhubongan kita dengan Privy Council, maka perkara kes Perlembagaan, jenayah dan mal tidak lagi pergi ka-Privy Council. Dengan demikian dia menchadangkan supaya di-wujudkan satu Mahkamah Ulang Bichara di-tengah[2] antara Mahkamah Persekutuan atau Federal Court di-tambah dua lagi hakim menjadikan jumlah lima. Itu pada dasar-nya boleh-lah kita terima sa-bagai suatu asas pengkajian.

Ada pun berkenaan dengan perkara Perlembagaan ini, atau perkara civil dan sa-bagai-nya sunggoh perkara[2] detail, tetapi kalau setuju menerima penghapusan langsong antara kita dengan Privy Council itu saya suka-lah sebutkan dahulu kita ada dua tingkatan perbicharaan ia-itu pertama sekali kes itu pergi ka-Federal Court bila sa-suatu perkara tak puas hati kita rayukan kapada

Yang di-Pertuan Agong dan Yang di-Pertuan Agong minta pandangan daripada Jawatan-kuasa Kehakiman, Jawatan-kuasa Privy Council yang di-bawah Queen. Apabila hal itu sudah tiada, arti-nya kita tinggal satu sahaja lagi, kes[2] Perlembagaan menuju Federal Court atau Mahkamah Persekutuan. Keputusan itu mu'tamad. Keputusan itu telah menjadi keputusan yang mutlak.

Ini satu perkara yang saya rasa akan melemahkan keperchayaan orang ramai terhadap keadilan, kechuali jika kita dapat mewujudkan satu court lagi di-samping itu sama ada court itu court yang bermula dengan di-tamatkan oleh Mahkamah Persekutuan atau Mahkamah Persekutuan menjadi mahkamah permulaan dalam perkara Constitution ini dan ada satu Jawatan-kuasa lagi yang di-lantek oleh Yang di-Pertuan Agong bagi menimbangkan rayuan yang telah di-kemukakan atau keputusan Mahkamah Persekutuan itu. Kedua[2] itu tidak kira-lah sama ada Mahkamah Persekutuan menjadi mahkamah terakhir, atau pun menjadi mahkamah permulaan, tetapi perlu di-wujudkan satu lagi court, atau pun satu badan bagi menimbangkan rayuan atas Constitution dan dengan chara bagini, saya rasa dapat kita menarekkan keperchayaan orang ramai terhadap keadilan. Sekarang ini Federal Court sahaja, bila ta' puas hati pergi kapada Yang di-Pertuan Agong untok mendapat pandangan daripada Privy Council. Apabila itu kita hapuskan berma'ana-lah tinggal satu. Kalau dalam bahagian jenayah dan bahagian mal kita telah berani menambahkan satu lagi dan hendak menambahkan satu lagi oleh kerana terbuang satu, daripada tiga terbuang satu jadi dua, maka di-tambahkan satu, tiga balek, kenapa dalam perkara Constitution ini kita tidak mahu menambahkan satu lagi supaya kembali saperti wujud-nya saperti asal, chuma struktor-nya sahaja yang berubah. Itu-lah sahaja, Tuan Pengerusi, pandangan saya dalam perkara ini. Itu ma'ana-nya pandangan saya, kalau kita hendak tunjokkan kita ini berani sunggoh.

Ada pun soal pengalaman para hakim saperti kata Tan Sri Nik Kamil tadi, hendak tunggukan hakim itu menjadi berpengalaman sampai berubah puteh dalam bahagian kehakiman-nya, sampai masa umor bersara, dia bersara datang orang baharu, muda pula. Sa-benar-nya soal pengalaman dalam perkara kehakiman ini tidak akan kita dapati kalau tidak kita berikan tugas pada-nya. Sampai bila pun dia tidak akan dapat pengalaman kalau tidak di-berikan tugas. Sunggoh pun bagitu tugas yang hendak di-berikan itu kena-lah pula di-letakkan kapada orang yang benar[2] berkebolehan dan berkeperchayaan dalam perkara ini. Jadi buat masa sekarang ini sa-kadar itu sahaja-lah pandangan saya.

Tuan Hamzah bin Dato' Abu Samah: Mr Chairman, I would like to endorse the views of Tan Sri Nik Ahmad Kamil and Dato' Mohamed Asri bin Haji Muda that, if we want to start, we have to make a start now, or we will never make a start. This excuse of our Judges not being "matured", I think, is not a good excuse because, as you know, Mr Chairman, it takes two persons in the Court or more than the Judges to decide on a case. The other one we have to take into consideration is the lawyer who argues the case. The lawyers in court are the ones that feed the Judges with all the facts and all the laws, and I am sure we have enough eminent lawyers in this country who are in a position to argue cases as well as lawyers do in the Privy Council; and even though I concede to the fact that a number of judges are still young and they have just been appointed, I am confident that we have a number of experienced and eminent lawyers who are able and who are willing to argue cases in the highest Tribunal in the country which is equivalent to the Privy Council if it were to be set up here. I fully support Tan Sri Nik Ahmad Kamil and Dato' Mohamed Asri bin Haji Muda in their views that if you want to make the "maturity" or "immaturity" of our Judges as an excuse, I am pretty sure, pretty certain that this also will be the excuse in ten years' time, if it is

agreed that we should postpone the setting up of a Tribunal higher than the Federal Court. Sir, I am in full support of the idea as posed by the two other members just now that if we want to start, we better start now.

I also like to say here that in most countries which were before either protectorates or colonies as soon as they achieved independence, they would always discard their ties with the Privy Council. We have this instance in Nigeria, in Ghana and most of the African countries, and I do not see why we, being now an independent country, should continue our tie with the Privy Council. The arguments and the contentions put before this Committee would appear to show that a number of the members probably are of the opinion that Judges of the Privy Council are infallible. I think this is a wrong impression to have. No human being is infallible. No Court is infallible. Human beings are not infallible. I am sure that if there is going to be another higher Tribunal than the Privy Council a number of decisions of the Privy Council would have been reversed by a Court which is a higher Tribunal than the Privy Council. I am of the opinion that there should be a Tribunal higher than the Federal Court which should be of the same status as the Privy Council.

Now, the Bill, in my view, clearly provides that there is not going to be a total abolition of appeals to the Privy Council. Appeals will still go to the Privy Council. This, I believe, is as a result of the awareness on the part of whoever put up the Bill that civil cases are more complex, more technical, more involved legally than criminal ones. It is right, in my view, that appeals should still go to the Privy Council in regard to civil cases. Even then, it is my view that appeals in regard to civil cases should only go to the Privy Council, say, for a period of three years—not more than three years. After we have acquired enough experience and our Judges have enough experience in complex, technical, civil cases, then appeals in respect of civil cases should not be sent to the Privy Council. That, Mr Chairman, is my view on this matter.

Tan Sri Nik Ahmad Kamil: Mr Chairman, I should like to raise one point: The Bar Council would appear to agree with this thought expressed by Mr Chelliah,—that a regional court of appeal or whatever name you may give it could take the place of the Privy Council. You will remember the evidence of that day. Now, the difficulty comes in in forming this regional court of appeal when getting the agreement of the countries concerned. I believe Tan Sri Abdul Kadir bin Yusof is aware of this difficulty himself. Due to certain constitutional provisions in Australia and so on, they cannot just say, "We agree" or "We do not agree". They have got to go to the people and ask them for referendum and so forth. My point was, when I raised the matter of empanelling a body of persons, if we still feel that our own people, at least not all of our people, are "mature". I have just discovered the words—"mature to the necessary point"—that were the words used by Mr Chelliah. My question is: Who can define the word "mature to the necessary point?" What is the definition of this? And if we cannot produce enough of our own people "mature to the necessary point", then my proposal was that we can put on to this body of persons a few of our people whom we consider "mature to the necessary point" to sit with other expert and eminent jurists from other Commonwealth countries. I give the examples like India, Australia, Singapore, New Zealand and so on and so forth. Sir, I should like to make that point clear—that the regional court would appear, at least to the Bar Council to be an acceptable alternative, but we know that there is difficulty in forming this regional court of appeal; my point was that of having our own sort of body of persons having nothing to do with any other state, any other nation, that is, if we cannot and we do not feel confident in our own mind that we still have not got the right persons to sit in the highest tier which might be called the Federal Court, or whatever name we give it.

Dato' S. P. Seenivasagam: I think what Mr Chelliah meant by "mature" was sort of being brought up in an atmosphere for a prolonged period; that is, our Judges have been Judges perhaps for 3, 4, 5 years—sort of like maturing whisky and brandy, putting it in a cask and letting it remain there in order to get the feel of it.

I think he related it back to India where it was not question of Judges being appointed after independence, but Judges were appointed long before independence, so that there grew up a tradition of Indian Judges long, long before independence was even forthcoming, and so when independence was there, there were Judges already with a tradition behind them and they could just step in. Here, we are just starting off—I have just looked through this—and we will need at least 1975 before we can get about 8 or 9 Judges with ten years experience, leaving those already with ten years of experience now. That is why they say that there will be 7 years (between 5-10 years) so that at least we have people with not less than 7 years, who have the feel of being Judges.

May I also be permitted to make some observation on what the Assistant Minister has said. With respect to him, he seems to be, if I may say, rather inconsistent in what he appears to concede. First, he says that we have got eminent lawyers to feed the law to the Judges and therefore the Judges should have no difficulty in making up their mind. But the point is that we have an eminent lawyer who will appear for one side and another eminent lawyer who will appear for the other side. These two eminent lawyers will feed two different points of views to the Judges and it is for the Judges to interpret the law and decide which of the eminent lawyers is right. So, it is not a question of just accepting what, let us say, Mr Marshall says in preference to what Mr X says because Mr Marshall may perhaps be more eminent than Mr X. It would not resolve itself so simply as that. Secondly, the Assistant Minister referred to African countries, which I am sure nobody wants to follow in this part of the world, where there is scant respect for law and order and where Judges are treated very often with utter contempt. I do not think that is the sort of atmosphere we want to introduce in this country. He concedes that where civil cases involve points of law, it might be difficult for our Judges to resolve those points; but once you concede that, I think he should also concede that there could be very intricate problems in criminal law; it may not arise very often, but occasionally it could arise.

Tuan Hamzah bin Dato' Abu Samah: I know of one case allowed.

Dato' S. P. Seenivasagam: If you look at the whole history of Indian appeals, there would have been thousands of them but only a few allowed, and it is those few appeals allowed which had set the law for centuries to come. For that reason, I think, it is so important that the Privy Council is replaced by a Bench of the stature of, for example, the Supreme Court of India and we would be able to do that, and we certainly want to do that. We do not want to be running up to London every time. Nobody, either the Opposition, Government, lawyer, Bar Council, says it must last forever, but we say, give us another seven years and we can accept such a suggestion with full confidence.

Tan Sri Nik Ahmad Kamil: Mr Chairman, I should like to continue discussion over this "maturity". Dato' S. P. Seenivasagam has now mentioned such as wine matured in a cask, so we have lawyers matured in the atmosphere of legal practice on the Bench and at the Bar and so on and he goes on to refer to India. Well, India, of course, was built up by the British very many more years than they built Malaya, and they did give Indian nationals a chance to be trained in the legal profession much earlier

than our people, and even for our own people, you remember, how many of us were trained as lawyers? I believe during the British Administration, in the beginning we had one lawyer appointed to the Bench—Raa Musa—and then after that, who, before independence, were on the Bench? Nobody. Am I right?

Dato' S. P. Seenivasagam: Nobody.

Tan Sri Nik Ahmad Kamil: Apart from Raja Musa (Raja Ayoub's brother) who was sent to Singapore as Professor of Law in Singapore, after all the years there was nobody. The British never gave us a chance. They did give the chance to the Indians and I must admit to Dato' S. P. Seenivasagam that I admire the Indian legal experts. I mean we read our law from their textbooks and so on. The British gave them a chance but they never gave our people a chance.

Tan Sri Abdul Kadir bin Yusof: I am not a member of this Committee, but I am here to give clarifications and legal advice. I would like to clarify two points. One is regarding the two-tier system in the case of Constitutional matters. It was in my mind and I was thinking hard about it. Assuming that we agree to abolish appeals to the Privy Council in connection with Constitutional matters and secondly, the types of courts, well, it can be done, for example, without amending the Constitution at all, because we mentioned the Federal Court; at the first hearing there will be a Chief Justice and two Judges. Then there is appeal to the Court of Appeal, the Federal Court, there will be the Lord President, another Chief Justice, and three other Judges, making up five. So, from three Judges hearing a case in the first instance, this is appealable to Federal Court where there is another one with five or more Judges, nothing less. This can be done.

Then, I would like to clarify what Tan Sri Nik Ahmad Kamil mentioned regarding the replacement of the Privy Council by another higher Court—it is impossible to have a regional Court; I know it is very difficult; some of the countries would not like our Judges to sit on it; we would not mind sitting in a regional court because we are much lower or something like that; it is very difficult. Suppose we have a higher court, where we think of getting two or three other eminent Judges of our Commonwealth countries, say, India, Ceylon, Australia to sit on it—having studied the Constitution of Federal Court, it says here: "The Federal Court shall consist of a President of the Court . . . . . ., of the Chief Justices of the High Courts and, until Parliament otherwise provides, of four other judges"—that means 3 plus 4, you get 7 Federal Judges.

Tan Sri Nik Ahmad Kamil: May I ask which Article?

Tan Sri Abdul Kadir bin Yusof: Article 122. So, we can appoint 4 other Federal Judges plus 3—that is, 2 Chief Justices and one Lord President—making up seven. Then, again, it is stated "and such additional judges as may be appointed pursuant to Clause (2)". Clause (1A) says, "Notwithstanding anything in this Constitution contained, the Yang di-Pertuan Agong acting on the advice of the Lord President of the Federal Court may appoint for such purposes"— I mean for any one case—"or for such period"—maybe for a period of 2 years or 1 year like Justice Tan Sri MacIntyre, who is well over 65, and he has been appointed for two years as additional Judge—"for such period of time as he may specify any person who has held high judicial office in Malaysia to be an additional judge of the Federal Court".

So, we can have 7 Federal Judges and the Government may appoint again 5 more Federal Judges from the most able members of the Bar. However, the trouble here is that it says, "who has held high judicial office in Malaysia". Therefore, we cannot appoint, for example, for two years or three years a

prominent retired Chief Justice of India or Ceylon to come here because he has not held high judicial office in Malaysia. So, here again we may have to make an amendment to the Constitution. Probably, the solution, as Tan Sri Nik Ahmad Kamil has mentioned, is to have another Court of Appeal with 7, 8 or 10 Judges, and the full Court will be comprising 7 of our prominent Judges here, plus 3 appointed for three years from eminent Judges of the Commonwealth countries. If that suggestion is to be adopted, it still necessitates an amendment—the words "in Malaysia" to be left out in respect of the additional Judges. These are the provisions.

Dato' S. P. Seenivasagam: Could it not be achieved by another method? At present, appeals from the Federal Court are to his Majesty the Yang di-Pertuan Agong, who may act on the advice of the Privy Council. But can we substitute for the words "Privy Council" some other name?

Tuan Chan Seong Yoon: With regard to the suggestion from Tan Sri Nik Ahmad Kamil, these people could be called a Special Judicial Advisory Committee to the Yang di-Pertuan Agong.

Dato' S. P. Seenivasagam: Privy Councillors to his Majesty the Yang di-Pertuan Agong.

Tuan Chan Seong Yoon: That would not come within the Constitution in respect of the appointment of Judges, because these people would not be appointed as Judges. They would be a special panel and would probably come under the Judicature Act.

Tan Sri Abdul Kadir bin Yusof: Could we call it a Supreme Court of Appeal?

Dato' S. P. Seenivasagam: Not necessarily: for the words "Privy Council" we substitute something else.

Tan Sri Abdul Kadir bin Yusof: In India and Pakistan, they have got a Supreme Court and why follow the British again?

Dato' S. P. Seenivasagam: I was just answering the point raised by the Attorney General in that it could not be done without amending the Constitution. It can be done. If we do not appoint Supreme Court Judges but merely as an advisory body to the Yang di-Pertuan Agong, then we do not have to amend the Constitution.

Tan Sri Nik Ahmad Kamil: I do accept the Attorney General's advice that if one were to accept the proposal enunciated, that of necessity an amendment to the Constitution will have to be made, but my proposal in its present stage take the form of a body of persons to advise His Majesty the Yang di-Pertuan Agong—not trying or venturing to suggest whatever name it may be given, or whether it may yet be a part of the judicial structure of the country. However, if we are going to make the final Tribunal to whom the ra'ayat, our own people, can appeal, then I would prefer the suggestion of the Judicial and Legal Service Officers' Association recommendation that we revive the old Court of Appeal which would be the second tier. Then, you will have the High Court, the Court of Appeal, and the Federal Court. I think that was my point. I think the Attorney General has got my point.

Tan Sri Abdul Kadir bin Yusof: Yes.

Tan Sri Nik Ahmad Kamil: But I say that if we still feel that we have not got the right number of persons who are "mature enough to the necessary point", then, I say empanel this body of persons which has nothing to do with the Privy Council; do not call it even a Court; call it the legal experts or the legal advisers to His Majesty the Yang di-Pertuan Agong.

Tan Sri Abdul Kadir bin Yusof: Another point which I would like to clarify regarding Judges: in 5 years more, if we agree to postpone the matter (looking at the list here), only five will go out while the rest will remain, because we find here 1906, 1908, 1905, 1908 and including Mr MacIntyre 1903—these five people will go and the rest will stay as they will still be fairly young—Justice Suffian, the most senior Federal Judge was born in 1917; in five years' time, he will be 56; and with 9 years more, he will be 65 while the rest are very young. But, looking at the list here, from No. 3 downwards, they were appointed after I assumed office.

Dato' S. P. Seenivasagam: If I may ask one more point—assuming there are two things which this Committee can do, one is that we recommend that the Bill is premature and that it should be shelved for a period of time; second, is to propose amendments. If amendments are proposed, I suppose, they will have to be incorporated in a sort of draft Bill and so on.

Tan Sri Abdul Kadir bin Yusof: Yes, if you agree: one is either to reject this Bill *in toto* saying that it is premature and it is not time yet, but that we may consider it after two years or more; secondly, we will agree to use it, we accept the Bill in principle with amendment. The amendment is either to curtail the Bill, leaving one only (constitutional matter) or amend it to abolish the whole thing. It is for you to decide to replace this with new provisions or to abolish the whole thing which is easier. Mr Chairman, I do not think that there will be sufficient time for us to prepare any amended Bill in time for the coming meeting of Parliament.

Tan Sri Nik Ahmad Kamil: We have to present our Report during the coming meeting of the House and if I remember the olden days the modified Bill will have to be attached to the Committee's Report.

Tan Sri Abdul Kadir bin Yusof: If the amendments are small ones it may be possible for us to get it ready in time, but if they are big ones I am afraid we are fully tied up. There are already 15 Bills and we are still tackling a few more. There are in fact 22 Bills already and some more are coming up.

Enche' Lim Joo Keng: Mr Chairman, if I may interrupt on this point. If any of the suggested amendments to the proposed Bill involve an amendmen to the Constitution, then you cannot proceed any further. In fact, you cannot make any amendments to the proposed Bill if there are outside the Constitution because you cannot proceed with them. You can make suggestions.

Tan Sri Nik Ahmad Kamil: That is quite true if the Constitution is affected. But as far as this Committee is concerned we will have completed our duties if we present our Report to the coming meeting of the Dewan Ra'ayat. The Standing Rules and Orders say that we must present our Report to the House that appointed us, or ask leave not to make a Report. I do not think we can ask for leave, of extension, can we?

Tan Sri Abdul Kadir bin Yusof: You can, but that means you are allowing it to lapse.

Tuan Chan Seong Yoon: I think this is the last year of this Parliament.

Dao' S. P. Seenivasagam: We may not be here next time.

Dato' Haji Mohd. Asri bin Haji Muda: Tuan Pengerusi, pada pandangan saya-lah, boleh dalam masa Parliamen akan datang ini di-kemukakan report atas apa yang di-binchangkan. Sebab pada dasar-nya bagini: sama ada pehak Dato' atau sa-belah sini kedua[2] ini satu sahaja pendapat-nya. Bil ini ta' boleh di-kemukakan.

Tuan Pengerusi: Kalau hendak di-pinda[2] ada di-sebutkan di-situ . . . .

Dato' Haji Mohd. Asri bin Haji Muda: Tidak berbangkit perkara di-pinda. Sebab kalau kita bersetuju . . . . . Kalau kita kemukakan satu pandangan lain, pehak Kerajaan patut menyediakan satu Bill yang lain.

Mr Chairman: That can be taken by administrative action.

Tan Sri Abdul Kadir bin Yusof: Mr Chairman, I am not a member of this Committee but I am giving my views as an adviser. It is a very big and important matter, where the issue really affects the life and death of everyone in this country and it also affects the Government of the country and the Judiciary. So any views expressed by the House will be very useful for the future.

Mr Chairman: Is there anything more which members of the Committee wish to say? (*Members indicate "No"*). Then we all agree that this Bill cannot be accepted in its present form.

Tan Sri Nik Ahmad Kamil: Do we now suggest alternatives without necessarily having a draft Bill?

Dato' S. P. Seenivasagam: The point is that there are so many suggestions and recommendations. If you want to consider the merits of each one, each one will involve discussions over a period of time. For example, the proposed Regional Court, empanelling of a special body, setting up of a third tier, reviving the Court of Appeal. How are we going to discuss all these in the limited time available?

Mr Chairman: These points can be considered in the Ministry of Justice.

Tan Sri Nik Ahmad Kamil: That will be in the Annexures to the Minutes and so on. To make the story short, as Dato' Asri said if a Report is to be presented we should make it short and simple. We might say, "We have considered the Bill, heard evidence and so forth, but we consider that we cannot accept the Bill in its present form."

Enche' Lim Joo Keng: Do you want a further meeting to approve the report, or shall we circulate it?

Tan Sri Nik Ahmad Kamil: Do the Standing Rules and Orders say that we cannot sit while Parliament is in session? I was wondering whether the Report should be circulated first and then we meet to consider it.

Tuan Hamzah bin Dato' Abu Samah: We cannot sit while Parliament is in session.

Mr Chairman: I think the Committee agrees to circulate the Report. That is all. Thank you, gentlemen.

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