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## Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunals

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The matter raised at the meeting with perhaps the most far-reaching potentialities, as concerning the jurisprudence of a country that it is now our conceit to consider fully emancipated, was whether the Supreme Court of Canada should adopt the practice of the Judicial Committee of the Privy Council and deliver only one judgment in each case.<sup>1</sup>

### I

The single-opinion proposal, in the form in which it has been advanced to date—that the Supreme Court of Canada should “follow” the Privy Council—is somewhat loaded. Canada is probably still a little too close to the Privy Council and its works for completely dispassionate consideration to be given to any proposal presented in this form: the extremes of mechanically-atavistic imitation, on the one hand,<sup>2</sup> and Oedipus-like rejection, on the other,<sup>3</sup>

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<sup>1</sup> Bruce, *The 1953 Mid-Winter Meeting of Council* (1953), 31 Can. Bar Rev. 178, at pp. 181-2.

<sup>2</sup> “If this Court is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wis-

can be seen too frequently in the Commonwealth countries outside the United Kingdom for us to believe that arguments from tradition alone will yield a calm solution. The final answer upon the single-opinion proposal, in the case of the Canadian Supreme Court, must turn upon a consideration of the extent to which the proposal would accord with Canada's needs at the present time, bearing in mind the special nature and responsibilities of the Supreme Court and the extent to which it differs in character from final appellate tribunals in other countries.

## II. *Practice of the Privy Council*

The somewhat anomalous nature of the Privy Council's appellate jurisdiction has been discussed, by the Privy Council itself, in *British Coal Corporation v. The King*:<sup>1</sup>

The Judicial Committee is a statutory body established in 1833 by an Act of 3 & 4 Will. IV, c. 41, entitled an Act for the better Administration of Justice in His Majesty's Privy Council. . . . The Act . . . provides for the formation of a Committee of His Majesty's Privy Council, and enacts that 'all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act or of any law, statute or custom may be brought before His Majesty in Council' from the order of any Court or judge should thereafter be referred by His Majesty to, and heard by, the Judicial Committee, as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open Court. . . . It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the

dom is on the side of the court's applying that view to Australian conditions, notwithstanding that the court has already decided the question in the opposite sense. The fact that we still believe in the correctness of our own decision, as I do in the present case, is not in itself an adequate ground for refusing to follow this course." *Per* Dixon J., *Waghorn v. Waghorn* (1941), 65 C.L.R. 289, at p. 297.

"Unless . . . there are good reasons for adopting other customs and conventions, we should follow the customs and conventions around which the constitution of the United Kingdom is built." Clark, *The President's Address* (1952), 30 Can. Bar Rev. 651, at p. 652.

<sup>3</sup> "To imagine that we shall ever get consistent and reasonable judgments from such a casually selected and untrained court [as the Privy Council] is merely silly". Scott, *The Consequences of the Privy Council Decisions* (1937), 15 Can. Bar Rev. 485, at p. 494.

<sup>4</sup> [1935] A.C. 500, at p. 510. And see generally MacDonald, *The Privy Council and the Canadian Constitution* (1951), 29 Can. Bar Rev. 1021, and address of the Right Hon. Lord Morton of Henryton, P.C., M.C. (1949), 32 Proceedings of the Canadian Bar Association 107.

report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the Statute of 1833 all appeals within their purview are referred. . . .

Down to 1833 the judicial work of the Privy Council was performed by such members of the Privy Council as had held high judicial office: by the Act of 1833, however, its judicial work was transferred to the special judicial committee created by the Act, this committee consisting of the Lord President, the Lord Chancellor, and such other members of the council as had held high judicial office. In 1871 four paid members were appointed, but their places have now been taken by the Lords of Appeal in Ordinary, the law lords designated by the Act of 1876 for the judicial work of the House of Lords. In 1887 Scottish and Irish judges, in 1895 certain Dominion judges, and in 1908 certain Indian judges were made eligible to sit in appeals heard by the Judicial Committee. Normally, for the adjudication of cases, the boards of the Judicial Committee have consisted of five members, the actual personnel of the board for each occasion being selected by the Lord Chancellor of the day from the large pool of eligibles.<sup>5</sup>

Certain general points can be made about the work of the Privy Council when sitting as a final appellate tribunal for cases from the old Dominions. First, it is clear that, in spite of the express provisions allowing representation of Dominion judges on the various boards of the Privy Council (which provisions might reasonably have been taken as envisaging the active employment of Dominion judges, at least in Dominion appeals), cases before the Privy Council have been heard almost exclusively by English or Scottish law lords.<sup>6</sup> Again it is true to say of the Judicial Committee, when

<sup>5</sup> See, generally, Wade and Phillips, *Constitutional Law* (2nd ed., 1935) pp. 462 *et seq.*; Hood Phillips, *The Constitutional Law of Great Britain and the Commonwealth* (1952) pp. 221 *et seq.*; and Lord Morton, *op. cit.*, at p. 114: "There are nine Lords of Appeal and, of the present nine, six had their legal training in England, two in Scotland and one in Northern Ireland. Southern Ireland is of course not represented, having cut herself entirely away from the Privy Council. The nine of us divide our time between sitting in the House of Lords, hearing appeals from England, Scotland, Wales, and Northern Ireland, and sitting in the Judicial Committee. Lords of Appeal who are members of the English Bar have usually, though not invariably, gone through the following stages: first, appointment as King's Counsel; second, selection to be a judge of the High Court; third, selection from all the judges of the High Court to be a member of the Court of Appeal; and lastly, promotion from the Court of Appeal to the House of Lords. I am glad to say that at the present time no consideration of politics enters into the selection at any of those stages, nor does selection at any stage go by seniority. If it did, I think we should all rival Methuselah in age."

<sup>6</sup> For a somewhat idealized picture of the Privy Council at work, see Lord Haldane in *Hull v. McKenna and Others*, [1926] I.R. 402: "The Judicial Committee of the Privy Council is not an English body in any ex-

sitting as a final appellate tribunal in cases from the Dominions, that it has been a court of frequently changing personnel, a factor tending to produce (and most notably in constitutional cases) a board the bulk of whose members have been unfamiliar with the Dominion constitutional law they have been called on to handle. Two important consequences flow from this that are somewhat antithetical in nature. On the one hand, it has meant that those members of the board who have managed to sit on Dominion constitutional cases with some regularity have attained a position of intellectual dominance over their more transient colleagues—Lord Watson, and his disciple Lord Haldane after him, were for this reason able to give a bias to the interpretation of the Canadian constitution that was strongly personalized in nature.<sup>7</sup> On the other hand, rapidly changing personnel, coupled with the pre-eminence over successive periods of different judicial personalities, has meant the development of alternative “lines” in interpretation: the Watson-Haldane (“provincial-rights”) approach to the Canadian constitution<sup>8</sup> is balanced by Lord Sankey’s broad, beneficial constructive 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. There sit among our numbers Privy Councillors who may be learned judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had others, from the other Dominions, Australia, and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location.”

And see Lord Morton, *op. cit.*, at p. 108: “Only about a month ago I was sitting in the Judicial Committee with the Chief Justice of Canada. We all welcomed his presence and help. He is a learned and charming representative of that grand French stock which has given Canada her present Prime Minister.” At p. 113 he continued: “There is one thing which should never be forgotten. The Judicial Committee is not an English or a British Court considering, and sometimes overruling, decisions of the Canadian Courts. It consists of all members of the Privy Council who have held certain high judicial offices, one of which is, of course, the Chief Justice of Canada. It is true that, because the Judicial Committee sits in London, the five or seven men who hear the appeals from Canada are usually British Lords of Appeal, but Canadian members are always welcome. I have already mentioned the recent visit of Chief Justice Rinfret and, as you all know, the Board has often been assisted by the presence of his predecessor, that great judge, Sir Lyman Duff, whom I had the privilege of meeting, in excellent health, last week in Montreal.”

<sup>7</sup> See Lord Haldane’s tribute to his mentor: “As a result of a long series of decisions, Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution took a new form. The Provinces were recognised as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems, and produced a new contentment in Canada with the Constitution they had got in 1867. It is difficult to say what the extent of the debt was that Canada owes to Lord Watson.” Haldane, *The Judicial Committee of the Privy Council* (1923), 1 Camb. L.J. 143, at p. 150.

<sup>8</sup> See, for example, Lord Watson’s opinion in *Attorney-General for*

tion of Dominion powers in the depression era,<sup>9</sup> just as the arboreal metaphor developed by Lord Sankey to achieve his end<sup>10</sup> finds its counterpart, in its turn, in Lord Atkin's marine metaphor,<sup>11</sup> which would restrict Dominion legislative powers and correspondingly enlarge those of the provinces.

In theory, since the Judicial Committee, as they themselves noted, only "advise" the Crown, they must present united counsel to the Crown: the Judicial Committee's judgments, therefore, unlike those of the House of Lords, are always unanimous, though the seeming agreement may well cover basic differences of opinion among the personnel of the various boards. I must confess that, whatever the merits of the notion of "advice" to the Crown as an historical basis for the origin of the single-opinion practice, it does not seem an entirely satisfactory explanation for the continuance of that practice in modern times. It is possible to speculate that what was originally a matter only of history was reinforced by policy considerations in the course of the 19th century. This was after all the hey-day of the British colonial empire and the period of the political dominance in the United Kingdom (after the first Reform Bill of 1832) of the manufacturing middle class: the teachings of Austin and the positivist school reinforced the demands of the merchant class, at the height of *laissez-faire*, for clarity and certainty in law. The House of Lords, though not limiting itself to any single-opinion practice, hemmed itself in by an overly strict conception of the binding force of *stare decisis*<sup>12</sup> and by an equally uncompromising insistence that the judicial function was simply "law-finding" (as distinct from "law-making") so that there was no area of discretion left to the judges. In the same way, no doubt,

*Ontario v. Attorney-General for Canada*, [1896] A.C. 348, and also in *Tenant v. Union Bank*, [1894] A.C. 31. These opinions are paralleled and extended by Lord Haldane's opinions in *In re Board of Commerce Act*, [1922] 1 A.C. 191, and *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396.

<sup>9</sup> See, for example, *Edwards v. Attorney-General for Canada*, [1930] A.C. 124.

<sup>10</sup> *Ibid.* at p. 136: "The [B.N.A.] Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. . . . Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation."

<sup>11</sup> In *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, at p. 354: "While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure".

<sup>12</sup> The House of Lords' holding that it is bound by its own decisions was actually delivered at the close of the 19th century: *London Street Tramways v. London County Council*, [1898] A.C. 375.

the continuance only by the Privy Council of the practice of a single opinion might be justified, on policy grounds, by the seemingly universal and all-embracing character of a single opinion, as compared with multiple opinions, and also by the argument that a single opinion offered clarity and certainty to inferior tribunals within the rapidly proliferating colonial empire.

We know little about the internal workings of the Judicial Committee of the Privy Council over the years. Is a simple vote taken and the matter then left to the unfettered discretion of an individual judge appointed by the Lord Chancellor to write the opinion? The more notable Watson-Haldane opinions, for example, bear all the hallmarks of such a procedure. Alternatively, is there anything in the nature of a formal judicial conference, corresponding to the United States Supreme Court's procedure, involving a regularized interchange of ideas among the members of the panel with a view to thrashing out the policy alternatives, followed by circulation of the draft opinion of the court for comment and, if necessary, alteration? Lord Morton's remarks<sup>13</sup> upon the practice of the Privy Council in decision-making and opinion-writing during the period of his own membership of that body would suggest that, at least in recent years, the latter type of approach has been followed by the Privy Council:

In the Judicial Committee, as you know, one judgment goes out as a judgment of the Board. Now how is that achieved?

Of course, as you can well imagine, we have many discussions as to the arguments each day when we adjourn at four o'clock, but nobody makes up his mind finally until the argument is over. Then, when the direction 'Counsel and parties will withdraw' is given, and we are left alone, a very full discussion takes place and we all state our personal views. I do not think that it is a breach of confidence to say that the junior member of the Board is invited to state his views first. The discussion may be prolonged. If it turns out that we are unanimous, we go on to decide who shall draft the judgment and what form it shall take. If, however, for the moment, we are three to two or four to one, further discussions follow either then or at a later stage, at which our various views are fully discussed. It may be that unanimity is thus achieved. If it is not, at least the points of divergence emerge clearly. If we are still divided in opinion, a member of the majority drafts the judgment, but our task is by no means finished at that stage, as you can well appreciate. When the draft judgment has been prepared it is fully considered and freely criticized by the other four members of the Board. That accounts, I think, for what may sometimes seem a long delay before the judgment is finally issued. We are most anxious to ensure, if possible, that no words are used which may be

<sup>13</sup> Morton, *op. cit.* The quotations that follow are from pp. 115-6 and 113, respectively.

misunderstood. The responsibility is great, and infallibility is always rather a burden, since no one is entitled to say, no matter what he may think, that the ultimate decision is wrong. As we are human, I cannot feel that we are never mistaken, but I feel that if five or seven trained minds all concentrate on trying to produce a judgment that is right, they should have a reasonable chance of succeeding.

What happens to those members of the Privy Council who cannot agree with the conclusions of the majority in an instant case? As Lord Morton observes:

... the judgment of the Board takes the form of advice to His Majesty and no dissenting judgments are written. I feel sure on the whole that it is a good plan, although it may sometimes cause mild irritation on the part of members of the Board in a minority, in any case where there is a difference of opinion.

It may be, in this connection, that obscurities in the reasons of occasional opinions of the Privy Council merely cover the fact that the judges have not been as one in their approach and that the opinion has been modified to take account of their differences.

Summing up the record of the Privy Council, it seems clear that although in theory the single-opinion practice, with its accompanying cloak of anonymity, may have given a de-personalized objectivity and certainty to the development of Dominion public law, on the facts this has not prevented the development of individualized approaches or "lines" by various members of the Judicial Committee over the years and the development of alternative sets of precedents allowing of differing or even directly conflicting results, both developments being characteristics more usually observed in the jurisprudence of courts that follow a multiple-opinion, as opposed to a single-opinion, practice.

### III. *Practice in the Commonwealth Countries Generally*

A survey of the work of final appellate tribunals in the Commonwealth countries outside the United Kingdom reveals that in the case of no one of these tribunals is the giving of only a single opinion the rule. The Supreme Court of New Zealand, because the New Zealand constitution is unitary, lacking a bill of rights or other fundamental guarantees, and also flexible, is but little concerned with public-law questions. It is proposed, however, to devote some space to an examination of the work and practice of the High Court of Australia, the Supreme Court of the Union of South Africa, the Supreme Court of the Republic of India, and the Supreme Court of the Republic of Ireland.<sup>14</sup>

<sup>14</sup> Because of its non-representation at the Conference of Common-

The High Court of Australia, from its inception, reveals a practice of individual opinion writing in the public-law field. This may have stemmed from the fact that, since the High Court is a tribunal having private-law as well as public-law responsibilities, the practice in private-law cases (following both the House of Lords and the supreme courts of the various states within the Australian federation) was unconsciously carried over into the public-law field: it may have stemmed also from the fact that since the new Australian constitution borrowed heavily from the United States, the Australian High Court in its turn felt it proper to copy United States practices rather than those of the Privy Council. More likely, however, the practice of individual opinion-writing stems from the fact that the original bench of the High Court (Griffith C.J., Barton and O'Connor JJ.) was a "founding fathers" court, each of the three judges having been most active in the political movement in the 1880's and the 1890's that culminated in the achievement of the Australian federation in 1901, Barton indeed having been the first Prime Minister of the new commonwealth. It might be expected in these circumstances that all three members of the original High Court bench would have strongly individualized views on the new Commonwealth constitution.

The first volume of the Commonwealth Law Reports, covering the years 1903-1904, contains two major constitutional cases: in each case, though the three judges are unanimous in their decision, they file separate opinions. The first case, *Tasmania v. Commonwealth*,<sup>15</sup> involved a consideration of the principles to be applied in interpretation of the constitution. The second case, *Deakin v. Webb*,<sup>16</sup> raised several important questions—the right of the states to impose income tax on the salaries of federal employees, involving the so-called immunity of instrumentalities doctrine; and, further, certain questions regarding the taking of appeals to the Privy Council over the powers *inter se* of the Commonwealth and State governments under the federal constitution.<sup>17</sup> On the former question in *Deakin v. Webb*, Griffith C.J. filed an opinion for the full

wealth Prime Ministers of April 1949 Ireland cannot any longer be claimed to be a member of the Commonwealth; but in view of Ireland's close historical associations with the Commonwealth, and also of the comprehensive bill of rights in the Constitution of 1937, it is proposed to refer to the work and practice of its Supreme Court in this survey.

<sup>15</sup> (1904), 1 C.L.R. 329.

<sup>16</sup> (1904), 1 C.L.R. 585.

<sup>17</sup> Under s. 74 of the Australian constitution, no appeal can be taken to the Privy Council from a decision of the High Court upon the limits *inter se* of the constitutional powers of the Commonwealth and of the States, except by certificate of the High Court that the question is one which ought to be determined by the Privy Council. The restrictiveness



court, and on the latter, the three High Court judges filed opinions seriatim. Curiously enough, in spite of the strong personalities of the first three High Court justices, the practice of individual opinion-writing did not make for basic disagreement or, in particular, for the development of conflicting lines of approach to the constitution.

Several years passed before a brilliant minority (Isaacs and Higgins JJ.), appointed to the bench in 1906, not merely began to dissent from the majority opinions, but to persist in their dissents and to refuse to recognize previous majority opinions *in pari materia* as binding in subsequent cases. As the original members of the High Court left the bench and new appointments were made, the old minority became the core of the new majority, a fact that was recognized by the decision in the *Engineers* case in 1920,<sup>18</sup> in which, symbolizing the switch in court interpretation, Isaacs J. gave the opinion of the court. The *Engineers* case had a dual importance for Australian constitutional law. Not merely did it mark the elimination of the American immunity of instrumentalities doctrine from Australian constitutional law<sup>19</sup> but it involved the blanket rejection of United States constitutional cases as authorities in Australia. Henceforth American sources and American methods of constitutional interpretation were to be ignored; the constitution was to be approached instead through the dry light of reason and the English rules of statutory construction.

The elimination of recourse to American example did not in any way affect the High Court's practice of individual opinion-writing: it is to-day almost a general rule for the High Court that in major cases the judges should deliver opinions seriatim. In the *Bank Nationalisation* case, in 1948,<sup>20</sup> four of the six judges wrote separate opinions (Latham C.J., Starke, Dixon and McTiernan JJ.) and the remaining two (Rich and Williams JJ.) wrote a joint opinion: as to a portion only of the judgment in the *Bank Nationalisation* case, Latham C.J. and McTiernan J. dissented from the balance of the court, though as to the remainder of the judgment the six of this constitutional provision, so far as appeals to the Privy Council are concerned, has been accentuated by the fact that, by its own decision, the High Court is the final judge of what is an *inter se* question for purposes of appeals to the Privy Council: *Baxter v. Commissioner of Taxation* (1907), 4 C.L.R. 1087.

<sup>18</sup> *Amalgamated Society of Engineers v. Adelaide Steamship Company* (1920), 28 C.L.R. 129. The opinion of the court (Knox C.J., Isaacs, Rich and Starke JJ.) was delivered by Isaacs J.; Higgins J. concurring specially; Gavan Duffy J. dissenting.

<sup>19</sup> See, though, *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, for a qualified revival of that doctrine.

<sup>20</sup> *Bank of New South Wales v. Commonwealth* (1948), 76 C.L.R. 1.

judges were unanimous. In *Australian Communist Party v. Commonwealth*,<sup>21</sup> all seven judges sitting on the case wrote separate opinions, Latham C.J.'s opinion being a dissent, in fact the only dissent.

The elimination of recourse to American practice and experience may, however, have profoundly influenced the High Court in other respects. With the concomitant insistence by the High Court that its rôle is only "law-finding", and not "law-making", and that it has no regard to policy factors,<sup>22</sup> the retreat of the High Court from a world of political, social and economic facts into a "heaven of juristic concepts" has become more and more marked.<sup>23</sup> The opinions alone in the *Bank Nationalisation* case (as reported in the Commonwealth Law Reports) cover 252 pages of tight, Australian reasoning; in the *Communist Party* case, 157 pages. And this cult of prolixity in the opinion-writing of members of the court has its effect on the conduct of cases and on the attitude of counsel too—oral argument by counsel before the High Court in the *Bank Nationalisation* case occupied thirty-nine days of the court's time (between February 9th and April 15th, 1948); the same case, before the Privy Council, was argued, orally, by counsel for thirty-six days (between March 14th and June 1st, 1949), a "record for length of time" before the Privy Council, as the official report of the case in the Law Reports tersely records.<sup>24</sup> In the *Communist Party* case, oral argument before the High Court of Australia occupied twenty-four days.

Only a few comments will be made for the moment on this aspect of the High Court's work. Would the High Court gain, in

<sup>21</sup> (1951), 83 C.L.R. 1.

<sup>22</sup> "The controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliament and the people." *Per* Latham C.J. in *South Australia v. Commonwealth* (1942), 65 C.L.R. 373, at p. 409.

<sup>23</sup> "It is not sufficiently recognised that the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure. Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism." Remarks by Sir Owen Dixon on the occasion of his being sworn in as Chief Justice of the High Court, as reported in (1952), 26 Aust. L.J. 2, at p. 4.

<sup>24</sup> [1950] A.C. 235, at p. 240: six members of the seven-member board of the Privy Council that originally sat to hear the case, Lord Uthwatt and Lord Du Parc, died during the hearing.

the ultimate clarity and force of its decisions, by attempting to dam the torrent of verbal argument before it? Would, for example, the customary one-hour of oral argument permitted each side by the United States Supreme Court,<sup>25</sup> coupled with a more comprehensive brief, have made for more lucid presentation of the issues in the *Bank Nationalisation* case than the exhaustive (and no doubt exhausting) argument the High Court actually permitted? Without question, I think it can be said that the verbose, seriatim opinions of the various High Court judges in the *Bank Nationalisation* case suffer badly, in terms of clarity and analysis of the basic issues involved, by comparison with the short opinion<sup>26</sup> that Lord Porter ultimately delivered for the Privy Council on appeal from the High Court.

The Appellate Division of the Supreme Court of South Africa, except in the last five years, when the impact of Prime Minister Malan's apartheid programme has produced a certain amount of litigation, has been but little concerned with public-law matters, the South African constitution being unitary in character and having no bill of rights or other system of fundamental limitations on legislative power, apart from the provisions safeguarding the voting rights of "coloured voters" in the Cape Province and the provisions on equality of the English and Dutch languages—the so-called "entrenched clauses". An examination of the work of the Appellate Division in South Africa indicates that there is no general practice of having a single opinion for the whole court; though there is some tendency towards an "opinion of the court", with dissents, only, being recorded separately.

In *Ndlwana v. Hofmeyr*,<sup>27</sup> the leading case on the South African constitution up to the time of the current constitutional controversy, the opinion of the court was given by Acting-Chief Justice Stratford, and it is recorded in the official report of the case that De Villiers, De Wet and Watermeyer J.J.A. concurred in it: likewise, in *Harris v. Minister of the Interior*, in 1952,<sup>28</sup> the case which overruled *Ndlwana v. Hofmeyr*, there is a single "opinion of the court" given by Chief Justice Centlivres, the report of the case stating that Justices Greenberg, Schreiner, Van Den Heever and Hoexter concurred. *Harris v. Minister of the Interior* represents the formal opening of the struggle between the Malan government and the

<sup>25</sup> See, generally, Hughes, *The Supreme Court of the United States* (1928) p. 60.

<sup>26</sup> 25 pages in the *Commonwealth Law Reports* (1949), 79 C.L.R. 497, 618-642; 26 pages in the *Appeal Cases*, [1950] A.C. 235, 288-313.

<sup>27</sup> [1937] A.D. 229.

<sup>28</sup> [1952] 2 S.A.L.R. 428.

Supreme Court over the apartheid programme: after the Malan government had, as a counter-move, set up a special High Court of Parliament to over-ride the Supreme Court's decision in *Harris v. Minister of the Interior*, the Supreme Court ruled the move invalid.<sup>29</sup> It is of interest to note that in this second *Harris* case, in marked contrast to the first, all five judges sitting in the Appellate Division of the Supreme Court (Centlivres C.J., Greenberg, Schreiner, Van Den Heever, and Hoexter JJ.A.) filed individual opinions. Perhaps they did so as a gesture of solidarity in face of the criticism heaped by the Malan government on Chief Justice Centlivres' opinion in the first *Harris* case: in any event, I think it is clear that the multiplication of opinion-writing in the second case, and especially Mr. Justice Van Den Heever's opinion, politically strengthened the Chief Justice's original stand by supplying Roman-Dutch legal arguments in support, where the Chief Justice himself, in both the first and the second cases, had relied exclusively on English legal precedents. It is to be noted, in connection with the apartheid cases that have come to the Supreme Court of South Africa, that Chief Justice Centlivres has generally taken the lead for the Appellate Division, the opinions of the court being normally his work, even in the period before his promotion from associate justice to chief justice.<sup>30</sup>

The members of the Appellate Division of the Supreme Court of South Africa would appear to eschew any notion of persistent ("educational") dissenting, once the views of a majority of the court have been laid down on a particular point. Thus *Sachs v. Dönges*,<sup>31</sup> the first of the recent cases over the issue of passports, was a three-to-two decision (Watermeyer C.J. for the court, with Greenberg and Schreiner JJ.A. each concurring specially; Centlivres and Van Den Heever JJ.A. each dissenting specially) denying the right of the South African government to deprive a subject of a passport by executive revocation. The same basic question was presented once more for decision by the court, during the same term, in *Dönges N.O. v. Dadoo*,<sup>32</sup> the opinion of the Appellate Division being given by Centlivres J.A. and involving the direct application of the decision in *Sachs v. Dönges*, to which Centlivres himself had dissented. In *Dönges N.O. v. Dadoo*, Watermeyer C.J., Greenberg and Schreiner JJ.A., concurred in Centlivres J.A.'s opin-

<sup>29</sup> *Minister of the Interior v. Harris*, [1952] 4 S.A.L.R. 769.

<sup>30</sup> See, for example, *Dönges v. Dadoo*, [1950] 2 S.A.L.R. 321, and *Rex v. Abdurahman*, [1950] 3 S.A.L.R. 136, for opinions for the court written by Centlivres while still an associate justice.

<sup>31</sup> [1950] 2 S.A.L.R. 265.

<sup>32</sup> [1950] 2 S.A.L.R. 321.

ion, though without writing individual opinions, and Van den Heever J.A., who had also, like Centlivres J.A., dissented in *Sachs v. Dönges*, concurred specially.

The work of the Supreme Court of Ireland, in the period since the adoption of the new republican constitution of 1937, indicates that the court, at least in the private-law sphere, has not followed any single-opinion practice. In the public-law sphere, the position deserves some further examination. While Timothy Sullivan was chief justice, from 1936 to 1946, the opinions of the court in constitutional cases were invariably unanimous, possibly owing in part to the dominance of the chief justice, who seems successfully to have insisted on giving the court's judgment in constitutional cases in person.<sup>33</sup> Under Chief Justice Maguire, who succeeded Chief Justice Sullivan in 1946, the practice is less invariable, in this respect at least; though there is still an opinion of the court in constitutional cases, the opinion-writing is shared among the chief justice and other members of the court, notably Justices Murnaghan and O'Byrne.<sup>34</sup> The chief justice or in his absence the senior justice sitting on the case, when he is not personally giving the opinion of the court, normally opens with a formal announcement as to the member of the court who will deliver the judgment of the court.<sup>35</sup>

There seems to be only one major constitutional case since 1937, however, in which the pattern of a single opinion of the court, without any recorded dissents, has been departed from by the members of the Irish Supreme Court—*In the matter of Tilson, Infants*.<sup>36</sup> In this case the opinion of the court was given by Murnaghan J. (Maguire C.J., O'Byrne and Lavery JJ. concurring without opinion), while Black J. dissented at some length. This case began as a private-law matter involving the validity of an ante-nuptial agreement by the husband that any issue of the marriage should be

<sup>33</sup> See for example, *In re Article 26 of the Constitution and the Offences against the State (Amendment) Bill*, 1940, [1940] I.R. 470; *In re McGrath and Harte*, [1941] I.R. 74; *The State (Walsh and Others) v. Lennon and Others*, [1942] I.R. 124; *In the matter of Article 26 of the Constitution and in the matter of the School Attendance Bill*, 1942, [1943] I.R. 334.

<sup>34</sup> *National Union of Railwaymen and Others v. Sullivan and Others*, [1947] I.R. 91 (opinion of the court delivered by Murnaghan J.); *Fisher v. Irish Land Commission and Attorney-General*, [1948] I.R. 19 (Maguire C.J.); *Buckley and Others (Sinn Fein) v. Attorney-General and Another*, [1950] I.R. 71 (O'Byrne J.); *Comyn v. Attorney-General*, [1950] I.R. 161 (Maguire C.J.); *In re Philip Clarke*, [1950] I.R. 239 (O'Byrne J.); *In the matter of Tilson, Infants*, [1951] I.R. 23 (opinion of the court by Murnaghan J.; Black J. dissenting).

<sup>35</sup> See, for example, *Buckley and Others (Sinn Fein) v. Attorney-General and Another*, [1950] I.R. 71; *In re Philip Clarke*, [1950] I.R. 239.

<sup>36</sup> [1951] I.R. 23.

brought up in the Roman Catholic religion, the husband being Protestant and the wife Roman Catholic. The question for the court was whether the normal common-law rule giving the father primacy in determining the religious education of the children of his marriage, even where an ante-nuptial agreement made specific provision on the point, was displaced or modified by the provisions of the constitution of 1937.<sup>37</sup> The court majority held that under the constitution of 1937 both parents had a joint power and duty in respect of the religious education of their children and that if they together made a decision and put it into practice (as by an ante-nuptial agreement) it was not in the power of either parent to revoke the decision against the will of the other.

It might be observed in passing that in the *Tilson* case, in both the majority "opinion of the court" and the dissenting opinion, policy factors tend to be canvassed much more frankly and openly than in the other Irish constitutional cases surveyed, where there is only a single opinion without any recorded dissents. Perhaps the reason for this is simply the explosive nature (in an Irish context) of the religious education issue involved in the *Tilson* case: it may be also that the challenge of open disagreement on the court contributed its part to the crispness of the opinions actually filed there.

In India, since the abolition of appeals to the Privy Council in October 1949,<sup>38</sup> and the coming into force of the new republican constitution on January 26th, 1950, the Indian Supreme Court has followed no practice of giving a single opinion whether in public or private-law cases. In fact, in the short time since its attainment of final appellate status, the Indian Supreme Court seems to have come closest, of all the supreme courts of the Commonwealth, to the practice of the United States Supreme Court. The problem the High Court of Australia approached in the *Engineers'* case in 1920,<sup>39</sup> and in effect resolved *per incuriam*, of how to approach the interpretation of a constitution, was faced also by the Indian Supreme Court in *Gopalan v. State of Madras* in 1950, the leading case to date under the new constitution.<sup>40</sup> Though the majority of the court, through Chief Justice Kania, successfully maintained the positivist approach to constitutional law, with strict and literal interpretation as the guiding principle of construction, Mr. Justice Fazl Ali, in a

<sup>37</sup> Constitution of 1937, articles 41, 42, 44.

<sup>38</sup> Abolition of the Privy Council Jurisdiction Act, 1949, Constituent Assembly Act No. V of 1949.

<sup>39</sup> (1920), 28 C.L.R. 129.

<sup>40</sup> (1950), 13 Supreme Court Journal 174.

brilliant dissent that is surely as much an appeal to the future as to the present, came out in favour of a "purposive" (or policy-oriented) approach to constitutional interpretation.<sup>41</sup> In maintaining such an attitude in his dissent in the following year in *Keshavan Madhava Menon v. State of Bombay*,<sup>42</sup> Mr. Justice Fazl has carved out for himself a strongly personalized approach to the new republican constitution, distinct from that of the current majority on the court, which is reminiscent of some of the more notable lines of dissent in American constitutional law.

It is to be noted that in the *Gopalan* case, five of the six judges sitting (Kania C.J., Fazl Ali, Mahajan, Mukherjea and Das JJ.) filed individual opinions, Mahajan J. dissenting specially along with Fazl Ali J. In the *Keshavan Madhava Menon* case, in which Fazl Ali J. and Mukherjea J. dissented from the majority, three opinions were filed: Das J. giving the opinion of the court, Mahajan J. concurring specially, and Fazl Ali J. dissenting specially.<sup>43</sup>

#### IV. *Practice of the United States Supreme Court*

During the first few years of the United States Supreme Court's work, its justices tended to deliver opinions seriatim, the first reported opinion of a justice, in fact, being a dissent delivered in this manner.<sup>44</sup> Though not himself originating the change, Chief Justice Marshall is generally credited with establishing the pattern that there should be an opinion of the court representing the views of the various justices.<sup>45</sup> At its inception the new practice was not without its critics: Thomas Jefferson, in particular, assailed the notion of an opinion arrived at by justices "huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind by the turn of his own reasoning".<sup>46</sup> Jefferson thought that there should be a rule requiring the judges to announce seriatim their opinions in each case: thus each judge would take his own position, "throw

<sup>41</sup> *Ibid.*, p. 197.

<sup>42</sup> (1951), 14 Supreme Court Journal 182, at p. 187.

<sup>43</sup> The opinion writing of the Indian Supreme Court justices in the *Gopalan* case approaches the prolixity of the High Court of Australia, the five opinions in the case totalling 136 pages: by contrast, the three opinions in the *Keshavan Madhava Menon* case amount to only seventeen pages.

<sup>44</sup> See *Georgia v. Brailsford* (1792), 2 Dallas 402, at p. 404.

<sup>45</sup> Hughes, *The Supreme Court of the United States* (1928) pp. 64 *et seq.*; Moorhead, *Concurring and Dissenting Opinions* (1952), 38 A.B.A.J. 821.

<sup>46</sup> Jefferson's Works, Vol. 7, p. 191, letter to Thomas Ritchie, December 25th, 1920; Hughes, *op. cit.*, p. 65.

himself in every case on God and his country; both will excuse him for error and value him for his honesty".<sup>47</sup> Nevertheless, the Marshall-established pattern of an "opinion of the court", or more precisely an "opinion of the court" representing all majority justices, seems to have prevailed with few exceptions for more than a century. As late as 1938, Mr. Justice Frankfurter felt it necessary to preface an opinion, in which he concurred specially with the majority of the Supreme Court,<sup>48</sup> by the following remarks:<sup>49</sup>

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. (The state of the docket of the High Court of Australia and that of the Supreme Court of Canada still permits them to continue the classic practice of seriatim opinions.) But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilised society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

By contrast to the United States Supreme Court's general and long-sustained avoidance of separate concurring opinions, however, the practice of writing special dissenting opinions seems to have become accepted fairly early. As noted already, *Georgia v. Brailsford*,<sup>50</sup> the first case in which opinions were reported, contains a dissenting opinion;<sup>51</sup> and it has been observed that what is often taken to be Chief Justice Marshall's masterpiece is a dissenting opinion, *Ogden v. Saunders*,<sup>52</sup> a case dealing with the validity of state insolvency laws.<sup>53</sup> The most famous dissents in the history of the United States Supreme Court, of course, are those of Mr. Justice Field and Mr. Justice Holmes; for in each case views that were originally heretical eventually became the new orthodoxy.

<sup>47</sup> Jefferson's Works, Vol. 7, p. 276, letter to William Johnson, March 4th, 1823.

<sup>48</sup> *Graves v. New York ex rel. O'Keefe* (1938), 306 U.S. 466. In this case Stone J. gave the opinion of the Supreme Court over-ruling earlier Supreme Court decisions (notably *Collector v. Day* (1871), 11 Wall. 113) in so far as they recognized an implied constitutional immunity from non-discriminating income taxation of the salaries of officers or employees of the national or state governments or their instrumentalities. Frankfurter J. concurred specially; and Butler J. (McReynolds J. with him) dissented specially.

<sup>49</sup> (1938), 306 U.S. 466, at p. 487.

<sup>50</sup> (1792), 2 Dallas 402.

<sup>51</sup> *Per* Johnson J. at p. 404.

<sup>52</sup> (1827), 12 Wheaton 212, at p. 331.

<sup>53</sup> Hughes, *op. cit.*, p. 66.



Mr. Justice Field's dissents in the *Slaughter-House* cases,<sup>54</sup> and in *Munn v. Illinois*,<sup>55</sup> in which he propounded his own rigorous beliefs in laissez-faire and liberty of contract, provided the basis for Mr. Justice Peckham's opinion for the court in *Allgeyer v. Louisiana*,<sup>56</sup> and that decision in its turn formed the basis of Mr. Justice Peckham's majority opinion in *Lochner v. New York*,<sup>57</sup> which at last formally enshrined the doctrine of liberty of contract (under the name of "substantive due process") in the American constitution as a protection for the businessman against governmental regulation. The *Lochner* case is distinctive also in the fact that it contains certainly the earliest, and probably also the most famous, of the great Holmesian dissents. The Holmes dissent in the *Lochner* case in 1905 and the parallel Holmes dissent in *Adkins v. Children's Hospital* in 1923<sup>58</sup> from the attempt, by a majority of the court, to equate the due process clauses in the 5th and 14th amendments to the United States constitution with the maintenance of economic laissez-faire, were fully vindicated by the Supreme Court's decision in *West Coast Hotel Co. v. Parrish* in 1937.<sup>59</sup> Likewise, Holmes' dissents from the drastic limitations imposed by the then majority of the court on the scope of the national commerce power, as a support for legislation by the national government in the social and economic sphere,<sup>60</sup> were finally accepted by a new majority on the court after 1937 as the proper interpretation of the commerce power under the constitution.<sup>61</sup>

It is not surprising that the year 1937 and the period immediately following, when a majority of the Supreme Court finally approved the basic interpretation of the constitution that had been sponsored, as an heretical view only, by Mr. Justice Holmes from the time of his appointment to the court in 1902, and by Mr. Justice Brandeis after his appointment in 1916, are conventionally described in American constitutional law as the period of the "Court Revolution". For the crucial defection by Mr. Justice Roberts in 1937, in *West Coast Hotel Co. v. Parrish*,<sup>62</sup> from the position he

<sup>54</sup> (1873), 16 Wall. 36, Bradley J. also dissenting specially.

<sup>55</sup> (1877), 94 U.S. 113.

<sup>56</sup> (1897), 165 U.S. 578.

<sup>57</sup> (1905), 198 U.S. 45.

<sup>58</sup> (1923), 261 U.S. 525.

<sup>59</sup> (1937), 300 U.S. 379. *West Coast Hotel v. Parrish* expressly overruled the *Adkins* case.

<sup>60</sup> See, for example, *Hammer v. Dagenhart* (1918), 247 U.S. 251, Holmes J. dissenting.

<sup>61</sup> See, for example, *United States v. Darby* (1941), 312 U.S. 100.

<sup>62</sup> (1937), 300 U.S. 379.

had maintained up to that time,<sup>63</sup> had the effect of dethroning the reigning conservative majority on the court (Van Devanter, McReynolds, Sutherland and Butler) and converting it into an impotent minority of four in a court of nine, a situation which subsequent retirements from the court and the accompanying Roosevelt replacements consolidated beyond immediate redemption.

A dissent of the Holmesian variety is, therefore, in a special sense what Chief Justice Stone labelled a

warning note that legal doctrine must not be pressed too far. It sometimes, for better or for worse, arrests a trend and sometimes reverses it. Its appeal can properly be only to scholarship, history, and reason, and if the business of judging is an intellectual process, as we are entitled to believe that it is, it must be capable of withstanding and surviving these critical tests.<sup>64</sup>

Dissents do tend, of course, as Chief Justice Stone also noted,<sup>65</sup> to "break down a much cherished illusion of certainty in the law and of infallibility of judges". His own pungent dissent in the *Gobitis* case in 1940 (the first "flag salute" case<sup>66</sup>), coupled with the very strong criticism to which the majority opinion was subjected in law reviews throughout the United States,<sup>67</sup> brought about the overthrow of the majority opinion within the space of three years, in *West Virginia Board of Education v. Barnette* (the second "flag-salute" case<sup>68</sup>) over a strong dissent by Mr. Justice Frankfurter, who castigated the majority for their rapid *volte face*.<sup>69</sup> Major switches of judicial opinion, particularly when they occur as in the "flag salute" cases over only the briefest space of time, have done much to arouse the quite considerable volume of criticism that has been directed at the various benches of the United

<sup>63</sup> Roberts J. had concurred, in the previous year, in the majority opinion in *Morehead v. New York ex rel. Tipaldo* (1936), 298 U.S. 587.

<sup>64</sup> Stone, *Dissenting Opinions Are Not Without Value* (1942), 26 J. Am. Jud. Soc'y 78.

<sup>65</sup> *Ibid.*, p. 78.

<sup>66</sup> *Minersville School District v. Gobitis* (1940), 310 U.S. 586, Frankfurter J. giving the opinion of the court, with Stone J. the sole dissent.

<sup>67</sup> The *Gobitis* case was discussed in (1941), 1 Bill of Rights Rev. 267; (1940), 15 Calif. St. B. J. 161; (1940), 40 Col. L. Rev. 1068; (1940), 26 Cornell L.Q. 127; (1940), 2 Ga. B.J. 74; (1940), 29 Geo. L.J. 112; (1940), 9 Int'l Jurid. Ass'n Bull. 1; (1941), 9 J. B. A. Kan. 279; (1940), 39 Mich. L. Rev. 149; (1941), 6 Mo. L. Rev. 106; (1940), 18 N.Y.U.L.Q. Rev. 124; 19 *ibid.* 31; (1940), 12 Rocky Mt. L. Rev. 202; (1940), 15 St. John's L. Rev. 95; (1940), 14 So. Calif. L. Rev. 57; (1940), 14 U. of Cin. L. Rev. 444; (1940), 4 U. of Detroit L. J. 38; (1940), 15 Wash. L. Rev. 265. See Dowling, *Cases on Constitutional Law* (4th ed., 1950), 1952 Supplement, p. 208.

<sup>68</sup> (1943), 319 U.S. 624; Jackson J. giving the opinion of the court; Black and Douglas JJ. concurring specially in a joint opinion; Murphy J. concurring specially; Roberts and Reed JJ. dissenting; Frankfurter J. dissenting specially.

<sup>69</sup> (1943), 319 U.S. 624, at p. 646.

States Supreme Court during the Roosevelt and Truman eras. Mr. Justice Roberts, his own crucial switch in 1937<sup>70</sup> notwithstanding, was moved to protest against the

present policy of the court freely to disregard and to over-rule considered decisions and the rules of law announced in them. This tendency, it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. . . . The reason for my concern is that the instant decision [*Smith v. Allwright*], over-ruling that announced about nine years ago,<sup>71</sup> tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced to-day may not shortly be repudiated and over-ruled by justices who deem they have new light on the subject. . . .<sup>72</sup>

Now the United States Supreme Court of the post-1937 era has been a court not merely of frequent and sometimes multiple dissents but a court of multiple concurrences. Where on the "Old Court" before 1937 there was a clear line of division between majority and minority justices—a two-party system, as it were, with a "conservative" majority and a "liberal" group of dissenters—no such easy two-way, conventional classification could be applied meaningfully to justices who were all, shortly after 1937, "New Deal" or "Fair Deal" appointments.<sup>73</sup> The simple explanation seems to be that with the overthrow of the "laissez-faire constitution" after the court revolution of 1937, and the accompanying ignominious rout of the conservative bloc on the court, the new appointees to the court, having no longer any one polar issue (con-

<sup>70</sup> *Supra*, pp. 611-2.

<sup>71</sup> *Grovey v. Townsend* (1935), 295 U.S. 45.

<sup>72</sup> *Smith v. Allwright* (1944), 321 U.S. 649.

<sup>73</sup> As a contemporary critic of the immediately post-1937 court noted: "The participation of Justice Stone in right-wing dissents may seem strange, in view of his reputation as one of the soundest and ablest liberals on the Court. Two explanations suggest themselves. One is that he has deviated slightly to the right in his views with the passage of time. The other is that he has maintained very nearly his original position, but that the Court with recent appointments moved so substantially leftward that views which put Stone to the left of the Court ten years ago now occasionally leave him exposed in dissent on the right." Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939-1941* (1941), 35 *Am. Pol. Sci. Rev.* 890, at p. 897.

Stone, of course, was a carry-over, as an associate justice, from the pre-1937 court, having been originally appointed to the Supreme Court by Calvin Coolidge in 1925. He was promoted to chief justice by Franklin Roosevelt in 1941, a promotion undoubtedly influenced strongly by Stone's "liberal" voting record as an associate justice during the era of the "Old Court" before 1937.

servative-liberal) around which they could revolve, began to disagree among themselves.<sup>74</sup>

It is not proposed to canvass in detail the areas in which the more basic disagreements have occurred on the Supreme Court since 1937: it is sufficient here to say that the disagreements have been concerned essentially with the rights of man and not with rights of private property. The disagreements mark differing degrees of judicial tolerance toward legislative and executive action on the part of the states as distinct from the national government.<sup>75</sup> The line of cases on freedom of speech from the early 1940's onwards, which is highlighted by the decision on the boundaries of free speech during the Cold War given in the *Dennis* case in 1951,<sup>76</sup> would seem to confirm the existence of a new conservative-liberal line of division on the court (though in the area of political and civil rights now, as distinct from the division over economic rights on the pre-1937 court), the new conservative majority having been consolidated markedly by the deaths of Justices Murphy and Rutledge in 1949 and their replacement by Justices Clark and Minton. Yet major controversies, like the one over the recent *Steel* decision,<sup>77</sup> suggest that any such classification is over-facile and tends to ignore some significant cross-factors.

Critics of the practice of the United States Supreme Court in opinion-writing since 1937 point to a diminution in the value of the judicial precedent as a guide to future decisions, and a consequent increase in the problems of the business man and of the lawyer who must advise him.<sup>78</sup> They point to the fragmentation of opinion:

<sup>74</sup> "Perhaps one answer is that battle lines which were maintained fairly rigidly when there was organized and rather equal conservative-liberal opposition have degenerated into guerilla warfare now that the major battle has been won by the liberals. . . . Perhaps it is that since the old rules have been overthrown in so many fields, there is natural uncertainty while the new ones are being worked out." Pritchett, *The Coming of the New Dissent: The Supreme Court 1942-43* (1943), 11 *U. of Chi. L. Rev.* 49.

<sup>75</sup> Cf. Lashly and Rava, *The Supreme Court Dissents* (1943), 28 *Wash. U. L. Q.* 191.

<sup>76</sup> *Dennis v. United States* (1951), 341 U.S. 494: Vinson C.J. for the court (Reed, Burton and Minton JJ. with him); Frankfurter J. and Jackson J. each concurring specially; Black J. and Douglas J. each dissenting specially; Clark J. taking no part in the case.

<sup>77</sup> *Youngstown Sheet and Tube Co. v. Sawyer* (1952), 343 U.S. 579: Black J. for the court (Frankfurter, Douglas, Jackson and Burton JJ. with him); Frankfurter J., Douglas J., Jackson J. and Burton J. also each concurring specially; Clark J. concurring in the judgment (though not also in the opinion) of the court and also concurring specially; Vinson C.J. dissenting (Reed and Minton JJ. with him).

<sup>78</sup> Ballantine, *The Supreme Court: Principles and Personalities* (1945), 31 *A.B.A.J.* 113.

It is actually becoming unusual for all the Justices to join in the so-called 'opinion of the Court'. It happens not infrequently that votes of the Justices are divided three or more different ways, so that there is no clear majority in favour of any single ground of decision. The exchange of views on opinion Mondays is coming to resemble the debates on the floor of Congress. . . . What has happened is that discussions previously cloaked in the secrecy of the conference room are being thrown open to the public. Most of the Justices are lawyers of exceptional stature, and the exposition of their differences of view is accompanied not only by penetrating and scholarly dissertations on the principles of government but by a brilliant display of the technique of the practicing advocate.<sup>79</sup>

Analyses of the causes of the multiplication of opinion-writing on the United States Supreme Court have mentioned certain no doubt obvious facts.<sup>80</sup> Personal differences among the individual justices clearly play some part in the work of the court—Mr. Justice McReynolds' difficult relations with his brother justices are notorious<sup>81</sup> and differences in more recent years between Justices Black and Jackson and between Justices Frankfurter and Douglas have been the subject of comment<sup>82</sup>—but the influence of such factors on the actual decisions of the Supreme Court should not be exaggerated.<sup>83</sup> Nor should the frequently-advanced argument of the lack of technical legal knowledge on the part of members of the court, through deficiencies in technical legal training and education or in sustained experience at the bar or on the bench, be accepted as a completely satisfactory explanation of the multiple concurrences and dissents in the court's decisions.<sup>84</sup> The justices of the United States Supreme Court, it is true, by comparison with the personnel of final appellate tribunals in other countries, are not so much technical lawyers as men of broad experience in public and national affairs;<sup>85</sup> yet Holmes, the great dissenter, was after

<sup>79</sup> *Ibid.*, p. 113.

<sup>80</sup> Palmer, *Supreme Court of the United States: Analysis of Alleged and Real Causes of Dissents* (1948), 34 A.B.A.J. 677.

<sup>81</sup> As to McReynolds' relations with Brandeis J., see Howe ed., *Holmes-Laski Letters* (1953) pp. 413, 842; Frank, *Cases on Constitutional Law* (1st ed., 1950) p. 361. As to his relations with Clarke J., see Howe, *op. cit.*, pp. 554-5, Frank, *op. cit.* As to his attitude towards Cardozo J., see Frank, *op. cit.* Curiously enough, Holmes speaks of McReynolds with kindness, Howe, *op. cit.*, pp. 413, 554, 842, 1253-4, 1259.

<sup>82</sup> See, for example, Schlesinger, *The Supreme Court 1947* (1947), 35 *Fortune* 73.

<sup>83</sup> Personal disputes of this nature are clearly not confined to the United States Supreme Court, though possibly they would be conducted more covertly in other countries. Shortly before the retirement of Mr. Justice Starke from the High Court of Australia, his brother justice, Mr. Justice McTiernan, announced that he could not continue to sit with him: *Sydney Morning Herald*, October 23rd, 1948.

<sup>84</sup> Cf. Palmer, *op. cit.* (1948), 34 A.B.A.J. 677.

<sup>85</sup> The popular adage (cf. Howe, *op. cit.*, p. 1503) that the United

all, among his other remarkable qualities, an accomplished technical lawyer, and the two most distinguished members of the present bench from the viewpoint of formal legal education, the former law professors, Frankfurter and Douglas, are among the more persistent writers of individual opinions.

A further explanation for the proliferation of opinion-writing — the presence of unusually independent thinkers on the United States Supreme Court — deserves some closer examination. No one studying the work of the court to-day can fail to react to the stratification consciously employed by teachers and students in the analysis of the work of the individual justices: some judges are noticeably "stronger" than others, and their opinions, whether majority or minority, command respect in comparison with those of their more prosaic colleagues:

Because of the fame of the picturesque and 'magnificent Yankee' . . . and above all the later triumph of his ideas in matters of far-reaching significance, the dissenting opinion stood dramatically revealed and confirmed as a powerful instrument of change in the law. Would it be strange if some members of the present Court, particularly admirers of the late Justice Holmes, should be subconsciously moved in the direction of dissent. . . . The enhanced prestige of dissent may be in itself an encouragement to frequent utterance of dissident views.<sup>86</sup>

The manifest scorn reserved by contemporary law students for the "Four Horsemen" of the pre-1937 court (Van Devanter, McReynolds, Sutherland and Butler) stands as an implied warning to subsequent court majorities that their own supremacy may be equally transitory.<sup>87</sup>

States Second Circuit Court, certainly in the days when it included among its members Learned Hand and his cousin, Augustus Hand, is the "strongest English-speaking Court", seems in this regard less a reflection on the capacity of the United States Supreme Court than a recognition that the Supreme Court is a policy-making body rather than a technical law court.

<sup>86</sup> Palmer, *op. cit.* (1948), 34 A.B.A.J. 677.

<sup>87</sup> As to Holmes' own view on dissenting opinions, see Howe, *op. cit.*, at p. 560: "After all I succumbed and have written a short dissent in a case which still hangs fire [*Craig v. Hecht* (1923), 269 U.S. 255, at p. 280]. I do not expect to convince anyone as it is rather a statement of my convictions than an argument, although it indicates my grounds. Brandeis is with me, but I had written a note to him saying that I did not intend to write when the opinion came and stirred my fighting blood. Not of course that I refer to that, which I think is the worst possible form — but I think it will be gathered that I don't agree with it. I dislike even the traditional 'Holmes Dissenting'. We are giving our views on a question of law, not fighting with another cock." Again, *ibid.*, pp. 1258-9: "I regret being called the dissenting Judge in the papers for I don't like to dissent. But if one does one can talk more freely than when he speaks for others as well as for himself. Resolutions by a committee are always flat unless they put themselves into the hands of one man. I suspect that McReynolds may regard me as a bird that befouls its own nest, although nothing could be further from my wishes or intent."

A further explanation for the multiplication of concurrences and dissents on the United States Supreme Court is based on rather more technical grounds,<sup>88</sup> namely, the selective jurisdiction of the court as a result of the Judiciary Act of 1925. Since the Civil War there has been a "steady atrophy of ordinary private litigation and a growing pre-occupation of the Court with public law".<sup>89</sup> Under the Judiciary Act of 1925, with a single exception all adjudications by the Circuit Court of Appeals were made reviewable, not as of right, but only by the discretionary writ of certiorari. Common-law topics play nowadays only a minor rôle in the court's work, and *Erie Railroad v. Tompkins*<sup>90</sup> has played its part too.

Only four per cent of the opinions from 1922 to 1932 were concerned with reviewable issues involving the common law. Only one opinion at the 1928 term turned upon common law principles. Federal specialties such as admiralty, bankruptcy, patents, claims against the government, and legislation concerning the public domain, and common law topics, absorbed 130 cases out of a total of 193 in the 1875 term. Less than ten per cent of the total dispositions dealt with questions of constitutionality, taxation and public law. Fifty years later, nearly half of the opinions related to control of economic enterprise, taxation, and interstate adjustments. Common law controversies shrank from forty-three per cent in 1875 to a bare five per cent fifty years later.<sup>91</sup>

The court has therefore been converted into essentially a constitutional tribunal, for under the certiorari system it has been disposed to accept only those cases posing basic policy issues—necessarily, to-day, the field of constitutional law.<sup>92</sup>

Mention should be made finally of the influence of the chief justice upon the work and practice of the Supreme Court:

The Chief Justice as the head of the Court has an outstanding position, but in a small body of able men with equal authority in the making of decisions, it is evident that his actual influence will depend upon the strength of his character and the demonstration of his ability in the intimate relations of the judges. It is safe to say that no member of the Supreme Court is under any illusion as to the mental equipment of his brethren.<sup>93</sup>

<sup>88</sup> Palmer, *op. cit.* (1948), 34 A.B.A.J. 677, speaks, in this connection, of "authentic causes of dissents and reversals of precedents".

<sup>89</sup> Frankfurter and Landis, *The Judiciary Act of 1925* (1928), 42 Harv. L. Rev. 18.

<sup>90</sup> (1938), 304 U.S. 64, over-ruling *Swift v. Tyson* (1842), 12 Pet. 1., and denying the existence throughout the United States of any "federal" common law over-riding the common law of the various states.

<sup>91</sup> Palmer, *op. cit.* (1948), 34 A.B.A.J. 677.

<sup>92</sup> For a pungent analysis of the actual record of the exercise by the Supreme Court of its discretionary powers in connection with the granting or with-holding of certiorari, see Harper and Pratt, *What the Supreme Court Did Not Do During the 1951 Term* (1953), 101 U. of Pa. L. Rev. 439.

<sup>93</sup> Hughes, *op. cit.*, p. 57.

Especially at the court's regular Saturday conferences, which take place each week while the court is sitting, does the chief justice have a real opportunity for leadership. At the Saturday conference it is customary for him to open the discussion; and each justice then proceeds to add his contribution in order of seniority down to the most junior of the nine: when the discussion is over, the court votes in reverse order of seniority, with the chief justice voting last. After a decision has been reached, the chief justice assigns the case for opinion to one of the members of the court: if, of course, there is a division on the court and the chief justice is in the minority, the senior associate justice in the majority assigns the case for opinion. It is recognized that when assigning cases the chief justice may retain any cases he pleases for himself, and that he has sole control over the assignment.<sup>94</sup>

Concerning the work of Charles Evans Hughes as chief justice during the period 1930-1941, it has been observed<sup>95</sup> that the Saturday conference would begin promptly at noon and last until five-thirty in the afternoon, with half to three-quarters of an hour for lunch. In opening the discussion on each case the Chief Justice would take the opportunity to fix the relative importance of the case and to suggest (if not to determine) the amount of conference time which should be spent on it. Chief Justice Hughes always had in the back of his mind that on the average a petition for certiorari could not be given more than three and a half minutes of conference time, remembering his own experience as an associate justice<sup>96</sup> under Chief Justice White, when the failure to limit discussion on certioraris and other preliminary motions often led to the neglect of important argued cases.<sup>97</sup> Likewise, it was Hughes' purpose, as chief justice, to secure as great a degree of unanimity as was possible without compromising the integrity of the majority opinion, and in this he was surprisingly successful, considering that up to 1937 his was a court split into rival conservative and liberal wings.<sup>98</sup>

<sup>94</sup> Hughes, *op. cit.*, pp. 58-59.

<sup>95</sup> McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes* (1949), 63 Harv. L. Rev. 5.

<sup>96</sup> From 1910 to 1916, when he resigned to become Republican candidate for the Presidency.

<sup>97</sup> McElwain, *op. cit.*, p. 14.

<sup>98</sup> "He approached his own opinions with his usual meticulous care, turning out innumerable drafts in order to be certain of the most correct and precise language. But he had no particular pride in authorship, and if in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant. Similarly, when other Justices seemed fairly close together, he would try to save a dissent or a concur-



By contrast, Harlan Stone,<sup>99</sup> who succeeded Hughes in 1941, was much more tolerant in the conduct of the business of the court:

A veteran dissenter with a New Englander's faith in town-meeting democracy, [he] found it hard to cut off talk until everyone had spoken his fill. Especially in his last two years, conferences began to spill over to Monday, sometimes to Tuesday and Wednesday. As the discussion was prolonged, argument tended to degenerate into wrangling, which greatly increased opportunities for mutual irritation. Stone's respect for the other person's view made him tolerant on the question of multiple concurrences and dissents. . . . When Stone's name was mentioned for the chief-justiceship in 1929, Taft had written with percipience that his appointment would be a 'great mistake, for the reason that Stone is not a leader and would have a great deal of trouble in massing the Court'.<sup>100</sup>

#### V. *The Canadian Supreme Court and the Single-opinion Proposal*

Certain cardinal features of the Canadian Supreme Court's jurisdiction and responsibilities need noting in connection with the single-opinion proposal. First, because in Dicey's words federalism means legalism, the Canadian Supreme Court, as final appellate tribunal for a federal country, can expect to continue to have major responsibilities in the field of constitutional law, in the same way as the United States Supreme Court and the final appellate tribunals in other federal countries, notably Australia and India. Secondly, the Supreme Court of Canada is a final appellate tribunal for private-law as well as for public-law matters, a factor which may provide some ground for differentiating it from the United States Supreme Court, whose responsibilities are now effectively confined to public-law questions, the assumption here being that the interest in "certainty" in the law bulks much less largely in public-law than in private-law matters.<sup>101</sup> Thirdly, Canada, in contradistinction to most of the other countries mentioned,<sup>102</sup> is, in a jurisprudential sense, a pluralist country with a duality of legal traditions. This factor, obvious enough in itself, deserves repetition, because it seems frequently to be overlooked even in Canada:

ring opinion by suggesting the addition or subtraction of a paragraph here or a word there in one of the proposed opinions. In these endeavours he was highly successful because of the respect and admiration the other members of the Court had for his vast knowledge of the precedents and his thorough knowledge of the particular case." McElwain, *op. cit.*, p. 19.

<sup>99</sup> Stone was an associate justice from 1925 to 1941 and chief justice from 1941 until his death in 1946.

<sup>100</sup> Schlesinger, *op. cit.*, pp. 211-2.

<sup>101</sup> Cf., though, Frank, *Law and the Modern Mind* (1930) p. 20, as to the "legal-certainty myth".

<sup>102</sup> For practical purposes, the civil-law tradition in the State of Louisiana can be overlooked here.

for example, the Association of Canadian Law Teachers, in a recent statement on the "Propriety of a One-Judgment Rule for the Supreme Court of Canada", says that no appellate court "in any common law jurisdiction" follows the Privy Council practice, and speaks of "the common law tradition, which recognizes and expects the personal contribution of an appellate court Judge", but contains not a word on civil-law practice and tradition. The same essentially monistic attitude can be found even in a chief justice trained in the civil law: the refusal of the Chief Justice of Canada, for example, to allow citation of legal periodicals before the Supreme Court<sup>103</sup> follows (no doubt unconsciously) the narrow common-law definition of what are "authorities" in courts of law; by contrast the South African Supreme Court, which also has a joint common-law and civil-law jurisprudential tradition, seems to accord considerable weight to the views of text-writers.<sup>104</sup>

In attempting to assess the influence of the civil-law strain upon the development of a distinctively Canadian jurisprudence, it is to be noted that, though in a loose, popular sense one may tend to think of civil-law judicial techniques and practices as representing a polar extreme from those of the common law, in action this may not be so at all. Recent analysis of judicial interpretation under the Quebec Civil Code reveals something of an approximation of Quebec judicial techniques to common-law techniques:

On sait que le juge anglais s'exprime sous une forme personnelle qui tient plus à vrai dire de l'annotation d'un arrêt français par un professeur de droit que d'un jugement européen. Toute décision anglaise se compose d'une *'ratio decidendi'* qui est la sentence même, éclairée par l'avis purement personnel du juge, avis qui contient les motifs de fait et de droit. C'est une véritable confession, dans laquelle toute la pensée et la personnalité du juge est mise à nu.

Les jugements français par contre contiennent obligatoirement deux parties distinctes, motifs et dispositif, et ne sont jamais rédigés sous une forme personnelle mais au contraire anonyme. Le jugement ou l'arrêt est l'oeuvre des magistrats qui ont siégé et délibéré, sans que l'on puisse savoir ceux qui ont été de la même opinion et ceux ou celui qui sont dissidents.

Le jugement canadien, chose curieuse, n'est à proprement parler ni un jugement anglais ni un jugement français.<sup>105</sup>

As Professor Baudouin observes:

<sup>103</sup> See generally Nicholls, *Legal Periodicals and the Supreme Court of Canada* (1950), 28 Can. Bar Rev. 422.

<sup>104</sup> See, for example, the opinion of Centlivres C.J. for the court in the first *Harris* case, [1952] 2 S.A.L.R. 428, at p. 449, and the opinions of Centlivres C.J. and Van Den Heever J.A. in the second *Harris* case, [1952] 4 S.A.L.R. 769, at pp. 776 and 789.

<sup>105</sup> Baudouin, *Le Droit civil de la Province de Québec* (1953) p. 89.

Or, malgré le texte de l'art. 541 du Code de procédure civile du Québec qui exige que tout jugement contienne deux parties essentielles, à savoir les motifs et le dispositif, la pratique anglaise veut qu'au Québec, devant les Cours de la Province, et, à l'échelon supérieur devant la Cour suprême du Canada pour les causes relevant du droit civil du Québec, les magistrats éprouvent comme les juges anglais le besoin d'exprimer leur opinion sous la forme personnelle. Il n'y a pas à vrai dire de motifs et de dispositif, mais une certaine forme de décision, dans laquelle il est parfois difficile de discerner, étant donné le nombre des juges qui peuvent être appelés à se prononcer dans une même cause, quelle est, en définitive, sur chaque point de droit l'opinion de chacun, pur déceler la majorité. Le problème se complique ici [Québec] comme en Grande-Bretagne du fait de la pratique de l'*obiter dictum*, sorte de point d'interrogation posé par le juge, expression d'un doute sur le point de droit. Cet *obiter dictum* 'ne renseigne, selon un juriste canadien, que sur l'ignorance confessée par le juge lui-même de la solution qui serait la sienne s'il était appelé à en trouver une sur le point qu'il soulève lui-même. Cet *obiter dictum* n'est ni un attendu ni un considérant; il n'ajoute rien à la force de l'exposé des motifs dont il embrume l'éclat; il n'y a là qu'une faiblesse qu'il peut accentuer.' [Ferdinand Roy, Dicts et silences de la magistrature, [1941] R. du B.18]

Il y a là une pratique de la common law qui peut se comprendre dans cette forme d'expression du droit positif anglais qu'est la common law, mais qui est difficilement acceptable dans un droit codifié. Quoi qu'il en soit elle est un signe de l'influence britannique et de l'influence du recrutement des magistrats.

Cette forme des décisions judiciaires a laissé s'incruster une manière de penser, une manière d'aborder les litiges qui a pu incliner certains magistrats en toute bonne foi et notamment dès le début de la codification à épouser une telle méthode.

A cela s'ajoute enfin, comme exemple de l'influence anglaise dans le domaine de l'interprétation judiciaire, le fait de l'existence jusqu'à l'année 1949 du comité judiciaire du Conseil privé, qui, bien que n'étant pas constitutionnellement une 'juridiction', avait exercé une influence considérable sur toute l'interprétation du Code civil.<sup>106</sup>

All this is paralleled, of course, by the tendency in continental French jurisprudence, first noted by Gényn,<sup>107</sup> towards modification of the traditionally close judicial interpretation of the French Civil Code, producing in practice something of the creative judicial choice more normally considered as belonging only in common-law jurisdictions. Of course the developments in the jurisprudence of the Quebec civil law noted by Professor Baudouin go much beyond this, representing as they do something of a bridge between

<sup>106</sup> Baudouin, Méthode d'interprétation judiciaire du Code civil du Québec (1950), 10 Revue du Barreau 397, at p. 400. And cf. also Lawson, Review of Nadeau (1949), 31 J. Comp. Leg. & Int'l L. (3rd Series, Parts 3 and 4) 128.

<sup>107</sup> Gényn, Méthode d'Interprétation (1st ed., 1899). And see generally, Friedmann, Legal Theory (2nd impr. rev. 1947) pp. 211 *et seq.*; Stone, The Province and Function of Law (1946) pp. 149 *et seq.*

continental judicial practice and that of the common law. Enough has been said, however, to make it clear that any argument that might seek to rest justification for the adoption of a single-opinion practice by the Canadian Supreme Court upon the conventional conception of judicial practice in civil-law countries would be rather superficial. Indeed, there seem special reasons, from the Quebec viewpoint, why the right of individual members of the Canadian Supreme Court to write specially concurring or dissenting opinions should be supported. The Watson-Haldane "provincial-rights" interpretation of the Canadian constitution no doubt accords most closely with Quebec's special interests,<sup>108</sup> but would it not be helpful, too, to have an authoritative opinion by a French-Canadian member of the Supreme Court corresponding to M. Pigeon's recent forthright statement?<sup>109</sup> Differences of this nature in cultural, social and economic attitudes, especially where they are based on distinct constitutional viewpoints, deserve to be articulated at the highest judicial level, so that they may be tested in the give and take of the discussion in the judicial conference room, and subsequently in law journals and law schools, and at bar meetings. I think it is clear in this regard that Mr. Justice Van Den Heever's special concurrence in the second *Harris* case in South Africa materially strengthened the South African Supreme Court's decision by providing an authoritative Roman-Dutch basis for that decision, side by side with the purely English precedents.<sup>110</sup>

## VI

Summing up the material surveyed, the following points seem to emerge. The responsibilities of the Supreme Court of Canada, both as a federal court and as the final appellate tribunal for a country with a duality of legal traditions, would seem to indicate that it could with advantage continue to do as the courts do in other countries where either of those conditions pertain, allow its individual judges the right to write individual concurrences or dissents. On the other hand, the Canadian Supreme Court's responsibilities as a final appellate tribunal in private-law, as well as public-law

<sup>108</sup> See Pigeon, *The Meaning of Provincial Autonomy* (1951), 29 *Can. Bar Rev.* 1126.

<sup>109</sup> *Ibid.*

<sup>110</sup> [1952] 4 S.A.L.R. 769, at p. 789. In contrast to his brother justices of the Appellate Division of the Supreme Court of South Africa, Mr. Justice Van Den Heever seems to have had a predominantly Roman-Dutch legal training. He is referred to, somewhat euphemistically, in the *South African Law Journal* as the "latest but it is to be hoped not the last of the Roman-Dutch Barons" (1952), 69 *So. Afr. L. J.* 25, at p. 26.

matters might seem to indicate some greater need for tidiness in its opinion-writing than is currently the case with the United States Supreme Court, the assumption here being that multiple opinion-writing militates against clarity and certainty in the law, and that the interest in clarity and certainty is higher in private law than in public law. The idea of an "opinion of the court", with separate concurrences and dissents kept for the special occasion rather than made the order of the day, would, in this respect, seem to accord most closely with Canadian needs; and it must be remembered that individual concurrences or dissents, when employed too frequently in relatively unimportant matters, may lose their educational value in major causes.

As a purely abstract question, of course, it is true that the presence of multiple opinions increases the possibility of "distinguishing" the instant case in the future, in so far as the ratio decidendi of the case must be limited so as to fit the sum of all the facts held material by the various judges writing individual opinions:<sup>111</sup> and likewise the presence of several majority opinions increases the number of propositions from which alternative major premises may be derived for future cases.<sup>112</sup> To that extent a strict approach to stare decisis, as for example the approach of the House of Lords, is more readily tolerable where the members of the court indulge in the writing of individual opinions, because of the greater ease with which unwanted precedents may be "distinguished" in the future: correspondingly the strains on stare decisis are likely to be severest when the court permits itself only a single opinion — it is perhaps not by accident that the Privy Council does not formally regard itself as bound by its own decisions.<sup>113</sup> Yet, as I have noted earlier, it may be less a matter of one single opinion versus multiple opinions than of the nature and content of the opinions when actually written. The five dreary, repetitive, Gothic, opinions written by the judges of the High Court of Australia in the *Bank Nationalisation* case gain, it is suggested, little by comparison with the Privy Council's single opinion in the same case.

<sup>111</sup> Goodhart, *Essays in Jurisprudence and the Common Law* (1931) p. 26.

<sup>112</sup> Cf. Laskin, "Peace, Order and Good Government" Re-examined (1947), 25 Can. Bar Rev. 1054, at p. 1086.

<sup>113</sup> Cf. Paton, *Jurisprudence* (1st ed., 1946) p. 164, and Freund, *A Supreme Court in a Federation: Some Lessons from Legal History* (1953), 53 Col. L. Rev. 597, at p. 614. Of course the legal realists, in accord with their thesis that the binding force of precedent is only an illusion anyway (cf. Frank, *Courts on Trial* (1950) pp. 278 *et seq.*) would, I think, necessarily maintain that it matters little whether the ratio of a case is derived from a single or from several opinions. And see generally Stone, *The Province and Function of Law* (1946) pp. 166 *et seq.*

I have elsewhere suggested the advantages that might accrue, in clarity of focus on major public law issues, were final appellate tribunals in the Commonwealth countries to adopt some of the procedural devices employed in American constitutional law cases, especially the Brandeis Brief with its direct incorporation of social and economic "background" facts into the record before the court.<sup>114</sup> How many of the final appellate tribunals in the Commonwealth hold a formal conference of the judges, after the pattern of the United States Supreme Court's Saturday conference?<sup>115</sup> Regular conferences of this nature, at which the key policy issues can be thrashed out around a table before the formal stage of voting and subsequent opinion-writing is reached, whatever their other consequences, are a principal explanation of the crispness and directness with which great public-law issues are faced in the United

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<sup>114</sup> See, for example, my article, *Judicial Positivism in Australia: The Communist Party Case* (1953), 2 Am. J. Comp. Law 36, at pp. 47, 53.

Lord Morton has revealed, *op. cit.*, pp. 114-115, that prior to a hearing before the Privy Council he would read only enough of the printed record to realise what the appeal was about: "... we get the printed case of the appellant and the respondent before the hearing and we can also, if we wish, get a full copy of the record before the hearing. Every one of us can decide for himself how much he will read before counsel opens the case. My own plan, for what it is worth, is to read only enough of the printed cases at that stage to realize what the appeal is about. For instance, is it a constitutional question, a tax question, or some other kind of question? I read no more at that stage because I think it is fair that the appellant, who has, after all, lost in the court below, should have a clear opportunity to make his opening speech to minds free from preconceived ideas. I remember once, when I was opening an appeal in the House of Lords, the remark was made by one of the Lords, 'You are galloping along very smoothly now, but as you are for the appellant I suppose there is a water jump coming'. Well, there was, and there always is when one is in the position of the appellant's counsel, but I think counsel ought to be allowed to approach it in his own way."

Lord Morton's attitude could no doubt be explained also by the highly abstract nature of the record normally before the Privy Council: a similar omission on the part of a justice of the United States Supreme Court would have more serious consequences in view of the importance of the record in getting social and economic "facts" before that court. Likewise too, the drastic limitations on oral argument before the United States Supreme Court necessarily require that its justices acquaint themselves with the technical legal issues beforehand in order to get the most out of counsel's oral argument. Courts which are prepared to allow unlimited oral argument would correspondingly be relieved from the necessity (though not necessarily the wisdom) of prior acquaintance with the legal issues.

<sup>115</sup> Cf. Nicholls, *Supreme Court — Technique of Disposing of Appeal — Wills — Validity of English Will — Revocation by Holograph Later Will — Verbal Proof of Missing Will — Minotaur in Labyrinth* (1951), 29 Can. Bar Rev. 977, at p. 990: "No more important case on the Quebec law of wills [than *Langlais v. Langlais*] can have gone to the Supreme Court and in none for some reason are the results so confusing. . . . The . . . explanation is probably that the individual reasons for judgment were prepared without adequate preliminary conference among the judges, with the result that, among so many possible combinations of reasons, no two judges happened upon the same formula." And cf. also Brewin, *Criminal Law*—

States. The recent *Steel* case in the United States, for a number of purely technical reasons, may not go down in history as the best illustration of the United States Supreme Court at work;<sup>116</sup> yet one cannot live through the process of decision-making in such a case without realising that constitutional law adjudication in the United States is profoundly educational in nature, not merely for the individual justices making up the Supreme Court, but also for the public at large. No one would recommend that the Canadian Supreme Court should blindly follow the practice of any country—simple eclecticism, after all, is not a very scientific approach to the comparative study of law. But in these days when throughout so much of the world the gap between the positive law of the constitution and every-day practice is so marked, there are advantages in making a constitution and its processes of interpretation less of a mystery. The adoption of some (though not necessarily all) of the rather more flexible practices of the United States Supreme Court could help the judges of the Supreme Court of Canada to come down from time to time into the marketplace of everyday ideas.

### “Practical” and “Theoretical”

The most important thing about any practical book is that it can never *solve* the practical problems with which it is concerned. A theoretical book can solve its own problems. Questions about the nature of something can be answered completely in a book. But a practical problem can only be solved by action itself. When your practical problem is how to earn a living, a book on how to make friends and influence people cannot solve it, though it may suggest things to do. Nothing short of the doing solves the problem. It is solved only by earning a living. . . .

Every action takes place in a particular situation, always in the here and now and under these special circumstances. You cannot act in general. The kind of practical judgment which immediately precedes action must be highly particular. It can be expressed in words, but it seldom is. It is almost never found in books, because the author of a practical book cannot envisage the concrete practical situations in which his readers may have to act. Try as he will to be helpful, he cannot give them really concrete practical advice. Only another person in exactly the same situation could do that. (Mortimer J. Adler, *How to Read a Book: The Art of Getting a Liberal Education*. 1940)

Sedition—Witnesses of Jehovah—Civil Liberties—Consultation among Members of Appellate Court (1951), 29 Can. Bar Rev. 193, at 202: “But at least the present case [*Boucher v. The King*] illustrates the importance of consultation and conference between members of the court before judgment is rendered, which seemed to be absent when the reasons were announced after the first hearing but apparently took place after the second hearing”.

<sup>116</sup> See generally, Freund, *The Year of the Steel Case* (1952), 66 Harv. L. Rev. 89.