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Roland Young
Northwestern University

COMMENTS ON "SECRECY AND THE SUPREME COURT"

ROLAND YOUNG*

I have been asked to comment on that portion of the Miller-Sastri article which relates to secrecy in the English legal system. When the invitation was extended to me, my first reaction was that "things are different in England": secrecy in the operation of the English legal system is not a significant issue. This reaction was confirmed when I visited London recently and discussed the topic with several English legal scholars; and also observed again the procedure English courts use in arriving at a decision. My learned legal friends were of assistance only in a negative sort of way. They said that they had never applied their mind to the problem; they had never heard the matter discussed; and they did not think there was a problem of legal secrecy in England which warranted consideration.

The English method and the American method of making judicial decisions are different, as the Miller-Sastri article clearly points out. Although the American legal system was founded upon English common law, the subsequent development in America has been affected by the written Constitution, the federal system, the long period of independence, and by procedures of the United States Supreme Court which involve formalized judicial conferences and collective judgments. In the United States, judicial conferences, collective judgments, and secrecy all seem to be highly integrated into the legal system, while in England, judicial conferences and collective judgments play a subordinate role. Miller and Sastri argue strongly that there should be greater public "[d]isclosure of the mysteries of Supreme Court decision making"—but they stop just short of proposing that the judicial conference be abolished and that the English method of *seriatim* judgments be followed.

The equanimity of my English legal friends on the topic of judicial secrecy may be explained by the remarkable openness of the English system, which Professor Llewellyn describes as "a practice of conference, consultation, and decision going on in open court before ears

* Professor of Political Science, Northwestern University. Ph.D., Harvard University, 1940. Of Lincoln's Inn, Barrister.

and eyes of counsel, the bar at large, and the apprentices . . . ."[1] One of the most conspicuous and impressive features of the English system is the skill of the individual judges in giving their judgments in open court. The pronouncement of the judgment of the individual judges is a continuation of the informal, Socratic argumentation—comparable to a high-level seminar—when the case is heard by the court. At the conclusion of a case, which may have gone on for several days, the presiding judge may call for a whispered conference on the bench, following which the performance begins: the judges give their individual opinions extemporaneously, the opinions are well-phrased and reasoned, the precedents of other cases are analyzed and applied, differences are noted, exceptions made, and conclusions reached. It is judicial virtuosity of a high level. Some judgments are reserved; but the judge has no law clerks to help him with the drafting, and it is assumed that the written judgment, like the oral judgment, is the judge's own work. Thus, if the question of secrecy is posed one may properly ask "what more do you want to know that you don't already know?"

The procedure discussed above is particularly applicable to the Court of Appeal. The Law Lords in the House of Lords also give highly individualized opinions, which are circulated among their brother Lords. Disagreement is fairly common. In some cases, a judge may concur with the judgment of another judge with the expression, "I agree and have nothing to add." Unanimity through a single composite judgment is unusual.

Individual judgments are not common in the Court of Criminal Appeal. Since 1907, no separate judgments are given without the leave of the presiding judge; and the Act of 1966 excludes separate judgments unless the presiding judge believes that a point of law makes it expedient to do so.[2]

A relatively recent change has been made in the deliberations of the Judicial Committee of the Privy Council, so that dissenting opinions are now possible.[3] The former ancient rule declared "that no disclosure be made touching the matters treated of in Council, and no publication made by any man how the particular voices and opinions

1. Miller & Sastri, *Secrecy and the Supreme Court*, 22 BUFFALO L. REV. 799, 807 (1973), *quoting* K. LLEWELLYN, THE COMMON LAW TRADITION 324 n.308 (1960).

2. CRIMINAL APPEAL ACT 1966.

3. [1966] STAT. INSTR. (part 1) 1100 (Judicial Committee Order 1966).

went."[4] On March 4, 1966, the Judicial Committee (Dissenting Opinions) Order was adopted, which provides that the unanimity rule should no longer apply.[5]

Any member of the Judicial Committee present at the hearing "who shall dissent from the opinion of the majority of the members present as to the nature of the report or recommendation to be made Her Majesty thereon shall be at liberty to publish his dissent in open Court together with his reasons."[6] Some fourteen dissenting judgments had been given by the end of 1971. The Order, however, did not confer any power on the judges to deliver assenting judgments (as in the House of Lords).

There are of course aspects of the judicial system about which there is little public knowledge. One such area concerns the assignment of judges to hear particular cases, though it is difficult to envision anyone—other than perhaps the parties involved—benefiting by public disclosure of this procedure. Secrecy in this area is consonant with the policy that no public pressure be brought on the decisional process. Additionally, the doctrine of *sub judice* prevents public comment when a case is under consideration, but it is less clear that the doctrine applies to debate in the House of Commons. Its applicability to newspapers was recently restricted in the case of *Attorney General* v. *Times Newspapers Ltd.*[7]

As for the relation between judicial costume and judicial decisions (and the intriguing non-use of wigs and robes by the judges in the House of Lords and the Judicial Committee on the Privy Council), I must fall back on the judicial expression, "I have nothing useful to add."

The article contains a few minor errors (the House of Lords is the final court of appeal for England, Scotland, and Northern Ireland; Court of Appeal has no "s"; the normal length of an appeal before the Court of Appeal is two or three days; opinions given by the Law Lords in the House of Lords are technically known as speeches; normally a senior Law Lord presides over the special sitting of the House of Lords, not the Lord Chancellor, etc.).[8]

4. *Id.*
5. *Id.*
6. *Id.*
7. 98 THE TIMES (London) 5 (Feb. 17, 1973).
8. For a full, analytical account of the procedure followed by the House of Lords and the Judicial Committee of the Privy Council, see L. BLOM-COOPER & G. DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY (1972).