

‘A British Empire Court’  
‘A Brief Appraisal of the History of the Judicial  
Committee of the Privy Council’

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INTRODUCTION

The British Empire in the late nineteenth and early twentieth centuries was vast. The Union Jack flew over one fifth of the land area of the globe and embraced over a quarter of its population. A single court in London held supreme jurisdiction over almost the entire expanse of this global empire. This was court was called the ‘Judicial Committee of the Privy Council’.

The Judicial Committee of the Privy Council is usually called by its shorter, although not entirely accurate, name of ‘the Privy Council’.<sup>1</sup> Its origins go back at least as far as the seventeenth century. In this period the jurisdiction of the Privy Council was extremely limited with respect to the three kingdoms of England, Scotland and Ireland that shared a single monarch. The real importance of the Privy Council lay in its role as the final appellate tribunal for Crown territories outside the British Isles. In the seventeenth century these territories were largely confined to the Channel Islands, a few scattered islands in the Caribbean and a few small settlements clinging onto the Eastern seaboard of the North American continent. Yet by the dawn of the twentieth century the Judicial Committee of the Privy Council was the final appellate court over a vast global Empire. This Empire was made up of a great variety of different colonies and possessions, the most important of which lay in the Indian subcontinent. It also included a number of self-governing colonies of white settlement that were known as ‘Dominions’.<sup>2</sup> These Dominions included Canada, Australia, New Zealand, South Africa and Newfoundland. In 1922 twenty six counties in the south and west of the island of Ireland left the United Kingdom and were recognised as forming a new Dominion under the name of the ‘Irish Free State’.

In fact, the jurisdiction of the Privy Council spread beyond the extensive territories of the British Empire. The Foreign Jurisdiction Act, 1890 facilitated appeals from all British protectorates, protected states, mandated territories and trust territories.<sup>3</sup> The Privy Council also heard appeals from certain foreign countries such as Japan, China, Siam and the Ottoman Empire which allowed British subjects to be tried by special tribunals that were independent of the local courts.

The Privy Council heard appeals from a bewildering array of different legal systems. It heard appeals on points of Romano Dutch law from southern Africa. Appeals from India could raise issues of Hindu or Islamic law. The Privy Council was also credited with maintaining the uniformity of the Common Law between the colonies of white settlement in North America and Australasia. These considerations ensured that the Judicial Committee of the Privy Council was seen as a vital pillar in maintaining the unity of the British Empire itself. One British commentator, writing in the early twentieth century, declared that '[T]he King, the Navy and the Judicial Committee are three solid and apparent bonds of the Empire; for the rest, the union depends on sentiment'.<sup>4</sup> Even commentators who were hostile to British power could not help expressing their awe at the immensity of the size and range of the jurisdiction of this global court. A memorandum written for the government of the Irish Free State acknowledged that 'In the variety of the suitors and the laws between and upon which it adjudicated and in the extent of the jurisdiction which it exercised it stood unique amongst the appellate tribunals of which history has any record'.<sup>5</sup>

The sheer size of the jurisdiction of the Privy Council and the variety of legal systems over which it presided also presented serious problems. Colonial lawyers sometimes expressed disappointment at the brevity of the judgments and asserted that the Privy Council did not always deal with the full complexity of the issues raised by the appeals.<sup>6</sup> A comprehensive analysis of the Privy Council appeal written in the 1930s emphasised the vastness of the jurisdiction of the Privy Council and concluded that 'The task which is superhuman excites one's pity for the judge who has to attempt it and one's admiration that it is so often accomplished successfully'.<sup>7</sup> Nevertheless, this analysis concluded that the magnitude of the challenge facing the Privy Council had resulted in failures that these had aroused considerable resentment and criticism in many parts of the Empire.<sup>8</sup> The growth of nationalism in the twentieth century also presented serious challenges. Even lawyers in the colonies of white settlement began to complain that the

decisions of this court, which was mostly comprised of English judges, did not always reflect the values of the colonial population.

This chapter does not attempt to provide a comprehensive account of the history of the relationship between the Privy Council and each constituent part of the former British Empire. Instead, it will offer a succinct appraisal of a number of general themes within the history of the Judicial Committee of the Privy Council in the twentieth century. The early part of this century saw the territorial size of the British Empire reach its zenith. The early part of this century saw the territorial size of the British Empire reach its zenith. It should be noted that the jurisdiction of the Privy Council survived the move for colonial independence that rose to prominence after the conclusion of the Second World War. In the latter half of the twentieth century the Privy Council continued to hear appeals from many of the newly independent states of the British Commonwealth. The appeal survived in Sri Lanka until 1971; Malaysia until 1985; Australia until 1986; Singapore until 1994 and in New Zealand until 2003. In June 2010 the Central American republic of Belize became the latest addition to the former parts of the British Empire to abolish the Privy Council appeal.<sup>9</sup>

This chapter focuses on the heyday of the jurisdiction of the Privy Council in the twentieth century. Consequently, it will exhibit a tendency to refer to the Judicial Committee of the Privy Council in the past tense. Nevertheless, it is important to emphasise that this extraordinary court remains very much in existence albeit with a much reduced area of jurisdiction. The Privy Council remains the final court of appeal for cases emanating from the Channel Islands, the Isle of Man and the remaining overseas possessions administered by the United Kingdom such as Gibraltar, the Falkland Islands and Bermuda. It continues to hear appeals from number of small sovereign states in the Caribbean and in the Pacific and Indian Oceans. These include such states as Jamaica, the Bahamas, Dominica, Mauritius, Kiribati and the Sultanate of Brunei.<sup>10</sup> The great decline in the jurisdiction of the Privy Council might tempt commentators to predict the imminent demise of the appeal. It is important to exercise a certain degree of caution before making prognostications of this nature. The appeal to the Privy Council has outlived many commentators who predicted its imminent demise with unrestrained confidence. These include Arthur Berriedale Keith, one of the greatest authorities on the law of the British Empire, who declared that the Privy Council appeal was 'in process of obsolescence'.<sup>11</sup> Keith wrote these words in 1921. The Privy

Council appeal remains in existence almost a century after he put pen to paper.

This chapter offers a brief appraisal of some of the most important challenges faced by the Judicial Committee of the Privy Council over the past century. It will assess the claim that this court acted as the protector of minority communities within the constituent parts of the British Empire and Commonwealth. This appraisal will examine many of the practical objections raised against the appeal by its opponents, including the issues of expense and delay. It will also examine the assertion that the Privy Council was not suited to act as a final court of appeal on the grounds that it was an archaic institution that was out of touch with local conditions and local values in the disparate parts of the British Empire and Commonwealth. The conclusion questions the validity of many of these grounds for criticism and argues that they were often used to conceal underlying reasons for desiring the abolition of the Privy Council appeal.

#### THE PRIVY COUNCIL APPEAL AS A SAFEGUARD FOR MINORITY COMMUNITIES

The appeal to the Privy Council was often promoted as a safeguard for minority groups throughout the Empire in the early twentieth century. These groups included the French-speaking population of Canada, the English-speakers of South Africa and the Protestant population of the Irish Free State. The perception that the Judicial Committee of the Privy Council was a neutral party between the white majority and the Maori minority is sometimes stated to be one of the factors behind the retention of the appeal in New Zealand until 2003.<sup>12</sup>

The assertion that the Privy Council acted as the protector of minority communities sometimes contributed to the hostility to that court from the ruling majority. This was certainly the case in the Irish Free State in years between the two world wars. In 1930 Patrick McGilligan, the Irish Minister for External Affairs, made a special radio broadcast to the United States of America in which he condemned the assertion that the Privy Council acted as a safeguard for the Protestant community of the Irish Free State. An indignant McGilligan insisted that 'Irish Catholics have never been guilty of religious intolerance'. Nevertheless, Irish Protestants may have shifted uncomfortably in their seats when they heard themselves described by McGilligan as 'people whose ancestors had been responsible for a regime of religious bigotry and intolerance in Ireland' or to hear

themselves associated with 'the remnants of a class which had lived on the toil of Irish peasants working on lands which centuries ago had been torn from the Irish people'.<sup>13</sup>

The efficacy of the appeal as a minority safeguard is questioned in a number of monographs concerning the Judicial Committee of the Privy Council. Hector Hughes, in his work concerning 'Judicial Autonomy in the Dominions', insists that the Privy Council appeal is no more than a 'paper safeguard' for minorities.<sup>14</sup> He bases this conclusion on the argument that an oppressive majority could never be forced to accept the decisions of the Privy Council. Hughes argues that the Privy Council has 'no way – short of physical force, which even is not available to it – of enforcing its decisions'.<sup>15</sup> This line of reasoning is unconvincing and could be raised in relation to any court of law. In fact, the Privy Council only encountered serious difficulties in enforcing its decisions in two exceptional cases. The first concerned the Irish Free State in the 1930s and the second concerned Southern Rhodesia in the 1960s. In both of these cases the colony or Dominion in question was moving towards a process of secession from the Commonwealth. These special cases demand further attention because in both instances the Privy Council appeal was perceived to act a safeguard for vulnerable communities.

David Swinfen, author of a general history of the Judicial Committee of the Privy Council, doubts the reality of the claim that the appeal acted as a safeguard for the Protestant minority in the Irish Free State in the 1920s and 1930s.<sup>16</sup> He is even sceptical as to whether the appeal was really perceived as a safeguard by the Southern Protestants or 'Southern Unionists' of the Irish Free State. He concludes that the appeal was only supported by 'a tiny vociferous, proportion of former Unionists'.<sup>17</sup> This assertion echoes the position maintained by Irish governments in the 1920s and 1930s who were anxious to dispel the minority safeguard argument. Irish ministers often insisted that Southern Protestants did not actually want the appeal. Patrick McGilligan, who served as Minister for External Affairs and Minister for Industry and Commerce, claimed that support for the Privy Council appeal in Ireland was limited to a 'small clique' and a 'handful of extremists'.<sup>18</sup> Many historians, including Swinfen, seem satisfied to accept the assertions made by the Irish government on this matter. Yet the Irish government was hardly an objective observer of the Privy Council appeal and their assertions with respect to the Southern Protestant community are certainly open to challenge.

There is no certain method of gauging the level of support for the Privy Council appeal among members of the Protestant community of the Irish Free State in the 1920s and 1930s. Nevertheless, it is clear that a substantial portion of that community did perceive the appeal to be of value as a minority safeguard and refused to accept any political deal that involved its abolition. A draft declaration supporting the abolition of appeals, intended to be signed by Protestant members of the Irish Parliament, had to be abandoned as a result of the opposition that it aroused.<sup>19</sup> In addition, the Privy Council appeal enjoyed staunch support from three important pillars of the Protestant community in the Irish Free State. These included the *Irish Times*, the main newspaper read by the minority community.<sup>20</sup> The second pillar of support for the Privy Council appeal was the Church of Ireland, a member of the Anglican Communion and the largest Protestant church on the island of Ireland. In late 1929 the Standing Committee of the General Synod of the Church of Ireland went so far as to send a delegation to the Irish government urging the retention of the Privy Council appeal.<sup>21</sup> The delegation included members of the governing body of a third Southern Protestant institution, Trinity College Dublin.<sup>22</sup> This evidence suggests that it is not safe to conclude that the Privy Council appeal, as a safeguard for the minority community in the Irish Free State, was only supported by a 'handful of extremists' or by 'a tiny vociferous, proportion of former Unionists'. The short history of the Irish appeal to the Privy Council produced at least two cases that were seen as concerning the protection of property rights of Southern Protestants.<sup>23</sup> In both cases the Irish government imposed obstacles that were designed to prevent the enforcement of decisions of the Privy Council.<sup>24</sup> The Irish Free State abolished the Privy Council appeal in 1933 despite the protests of prominent members of the Southern Protestant community.<sup>25</sup>

In some instances the Judicial Committee of the Privy Council has been perceived as the guarantor of the rights of vulnerable majorities. This was of particular relevance to native communities living in parts of Southern Africa that were ruled by white minorities. In Southern Africa the ruling minorities had no difficulty in recognising the Privy Council as the protector of vulnerable communities. As a consequence, the ruling minority tended to see the appeal as a threat to their position of dominance. In South Africa the aftermath of the 1948 election saw apartheid become official policy. It was no coincidence that the abolition of the Privy Council appeal followed less than two years later.<sup>26</sup>



The Privy Council was also the final resort of the black majority living in the British colony of Southern Rhodesia.<sup>27</sup> The appeal to the Privy Council was recognised and guaranteed by the 1961 Constitution of Southern Rhodesia.<sup>28</sup> In 1965 a government dominated by the white minority delivered a unilateral declaration of independence from the United Kingdom. The regime by Prime Minister Ian Smith changed the name of the rebel colony from 'Southern Rhodesia' to 'Rhodesia' and purported to replace the Constitution of 1961 with a new Constitution in 1965. The provisions of the 1965 Constitution were designed to prevent appeals to the Privy Council.<sup>29</sup> However, the Smith government had to tread carefully in this area. The Rhodesian courts proved reluctant to recognise the unilateral declaration of independence or the legality of the new Constitution.<sup>30</sup> Rhodesian appeals continued to be heard by the Privy Council in spite of the provisions of the 1965 Constitution and in defiance of the wishes of the government led by Ian Smith.

The Rhodesian judiciary finally accepted the 1965 Constitution in the latter half of 1968 after a decision of the Rhodesian Appellate Court in the case of *Archion Ndhlovu v. The Queen*.<sup>31</sup> This development coincided with another high profile case in which the Rhodesian judiciary fatally undermined the ability of the Privy Council to overrule the actions perpetrated by the Smith regime. The applicants in the case of *Dhlamini and Others v. Carter N.O. and Another (No. 2)* had been sentenced to death by the Rhodesian authorities.<sup>32</sup> They tried to appeal these sentences to the Judicial Committee of the Privy Council in London. The Appellate Division of the Rhodesian High Court declined to grant a stay of execution on the grounds that even if the Privy Council found in favour of the applicants and the decision was reinforced by an order of the Rhodesian courts 'it is perfectly clear that the present Government would ignore it and ... carry out the sentences'.<sup>33</sup> Beadle CJ admitted that if 'there was a remote possibility of an appeal to the Privy Council being of any value to the applicants, I would not hesitate to give them the temporary interdict for which they ask'. The Rhodesian High Court refused to grant the stay of executions by arguing that 'such an order by increasing the delay would only be an act of gratuitous cruelty'.<sup>34</sup> The men who attempted to appeal to the Privy Council were executed despite an official pardon sent by the Queen.<sup>35</sup> The Rhodesian judiciary had shown that it was prepared to tolerate the constitutional order backed by the Smith government. It had also shown that it was not prepared to support the Privy Council in its efforts to challenge that order and

protect the interests of the black community that represented the great majority of the population. Within months the Smith brought in a new Constitution that copper-fastened the abolition of the Privy Council appeal and vested all judicial authority in the Rhodesian High Court.<sup>36</sup>

The position of the Privy Council as the guarantor of the rights of vulnerable communities was seen as being of particular significance in the Rhodesian context. The British government placed the Privy Council appeal at the heart of their demands during their negotiations with Ian Smith on HMS *Tiger* in 1966 and on HMS *Fearless* in 1968. Ian Smith's refusal to accept the Privy Council appeal proved to be the sticking point that prevented the acceptance of an agreement in the *Fearless* negotiations.<sup>37</sup> This hostility towards the Privy Council appeal prevented the attainment of a solution to the 'Rhodesian problem' until the birth of the Republic of Zimbabwe in 1980.

#### PRACTICAL GROUNDS FOR ABOLISHING THE PRIVY COUNCIL APPEAL

Opponents of the Privy Council often raised a number of practical objections to the continuance of the appeal. The expense of taking a case to the Privy Council in London was often raised by those who favoured the abolition of the appeal. The appeal was also accused of creating long delays in resolving legal disputes. Finally, the Judicial Committee of the Privy Council was widely accused of being an archaic institution. These practical grounds for criticising the Privy Council appeal are worthy of additional analysis.

The Privy Council appeal has often been criticised as being a 'rich man's appeal'.<sup>38</sup> This perception was stressed by the Irish provisional government during an unsuccessful attempt to resist the imposition of the appeal on the infant Irish Free State in 1922.<sup>39</sup> It cannot be denied that the cost of taking an appeal to London from the various corners of the globe has always been high. Yet the unfortunate reality that the affluent enjoy significant advantages when entering into litigation is hardly unique to the Privy Council appeal. In the late nineteenth century special provisions were introduced to allow persons to plead before the Judicial Committee *in forma pauperis*. This was a facility that was not always provided by local courts in the constituent parts of the British Empire.

The Privy Council appeal has also been accused of producing long delays in the resolution of court cases. Yet long delays are also common features of litigation and it could be argued that the Privy Council's



record compares favourably with many courts that were not faced with such formidable geographic barriers. It should be noted that this ground for attacking the Privy Council appeal was often raised in the Irish Free State where the barriers of distance were far from formidable. These complaints persisted even though Irish appeals to the Privy Council never suffered unusually long delays.<sup>40</sup> It should be noted that the Privy Council made repeated efforts to minimise the obstacles imposed by distance. For example, the rules of court of the Privy Council were reformed in an effort to reduce the expense and delay endured by litigants.<sup>41</sup> The geographical barriers that underpinned much of the expense and delay encountered by litigants were gradually diminished during the course of the twentieth century with advances in communications technology.

The Judicial Committee of the Privy Council has always had a number of idiosyncratic characteristics that have resulted in accusations of being an archaic institution. Although the Judicial Committee is a *de facto* court it is technically an advisory panel that reports directly to the Crown. Another unusual feature is that the decisions of the Privy Council do not have any value in terms of binding precedent.<sup>42</sup> An additional idiosyncrasy concerned the 'single judgment rule' established in 1627. This rule limited the Judicial Committee to making a single collective decision and forbade the publication of dissenting judgments.<sup>43</sup> The Privy Council was also an unusual court in that its jurisdiction included disputes between constituent parts of the British Empire in addition to disputes between private litigants.<sup>44</sup> These idiosyncratic features of the Judicial Committee of the Privy Council have always been a source of endless fascination to academics. Nevertheless, there can be little doubt that they contributed to the general impression of the Privy Council as 'an archaic and effete institution'.<sup>45</sup>

A number of initiatives have been taken to modernise the Judicial Committee as an appellate court. The single judgment rule was abolished and dissenting judgments permitted in 1966.<sup>46</sup> The membership of the Judicial Committee was gradually widened in order to create a court that was more representative of the diverse parts of the British Empire and Commonwealth. Radical attempts at reform were advocated in the early twentieth century. These included proposals for the creation of an entirely new court of appeal for the British Empire. The critics of the Privy Council appeal were not confined to nationalists seeking greater autonomy or independence for their Dominion or colony. Much of the criticism of the Privy Council appeal in the early twentieth century came from individuals who wanted to replace the

Privy Council with a stronger Imperial court. The possibility of creating a new Imperial court was raised at the Imperial Conferences of 1911, 1918 and 1930.<sup>47</sup> The inability of nationalists and 'Imperial federalists' to agree on any proposal for a new Imperial court preserved the *status quo* and inhibited serious reform of the Privy Council appeal.

#### THE JUDICIAL COMMITTEE AS AN EXTERNAL TRIBUNAL

The Privy Council was a tribunal whose appellate jurisdiction encompassed most of the British Empire in the early twentieth century. Throughout this period the Judicial Committee sat in a small room in Whitehall, London. Yet the Judicial Committee of the Privy Council has never been an exclusively 'British' institution. It is seen as an advisory body to the reigning King or Queen who is considered to be omnipresent in the territories that accept the constitutional status of the monarchy. In the early 1920s a judge hearing an appeal from the newly established Irish Free State stressed that the Judicial Committee was in no sense 'an English body'.<sup>48</sup> Lord Haldane emphasised that the omnipresence of the King throughout the Empire meant that the Privy Council could just as well sit in South Africa or in India, in Ottawa or even in Dublin. Haldane insisted that it only sat in London for reasons of convenience.<sup>49</sup> These constitutional niceties have never had much impact on popular perceptions of the Privy Council which have always tended to see this court as a United Kingdom institution. This impression was shared by supporters and opponents of the appeal. The latter included the Irish statesman Patrick McGilligan who insisted that the Privy Council was a 'purely British Court' in a radio broadcast made in 1930.<sup>50</sup> Robert Stokes, a commentator on Imperial affairs who fell into the former category, wrote that 'the Dominions regard the present Judicial Committee of the Privy Council with a profound but often grudging respect ... it is to them essentially an English or United Kingdom institution'.<sup>51</sup>

The popular perception of the Privy Council as a British or even English court is supported by the physical location of this court in Whitehall, London. Although the Privy Council can sit outside London and the United Kingdom it has very rarely done so.<sup>52</sup> Suggestions were raised in early twentieth century of creating a travelling Privy Council that would visit the other parts of the Empire on circuit. This idea failed to attract significant support even among supporters of the Privy Council appeal.<sup>53</sup>

A more important factor in supporting the popular perception of

the Privy Council as a British court lies in the fact that that it has always been dominated by judges from the United Kingdom. It is true that judges from outside the United Kingdom have often sat on the Privy Council and continue to do so. Determined efforts were made in the early twentieth century to boost the numbers of colonial judges on the Judicial Committee. It was particularly important that the Privy Council have access to legal expertise in the sphere of Indian law in the early twentieth century. More appeals came from India in this period than from the rest of the Empire combined.<sup>54</sup> This ensured that a number of assessors who were familiar with Indian law were always attached to the Judicial Committee of the Privy Council.<sup>lv</sup> A particular effort was made to attract judges from the self-governing colonies of white settlement or 'Dominions'.<sup>56</sup> Nevertheless, the barriers of distance and limited funds have always ensured a preponderance of judges from the United Kingdom on the Privy Council. This means that the history of the Judicial Committee of the Privy Council is a history of court cases from many parts of the world being decided by judges who were often perceived to be outsiders or even foreigners in the places of origin of these appeals.

It is often argued that the advantages of external arbitration have ensured the continuance of Privy Council appeals in many parts of the world that have long since severed constitutional links with the United Kingdom. Yet the perception of the Privy Council as an external or foreign tribunal has also proved to be one of its greatest weaknesses. The growth of nationalism throughout the Empire during the course of the twentieth century presented serious challenges to the Privy Council. Even lawyers in the British Dominions began to complain that the decisions of a court that was mostly comprised of judges from the United Kingdom did not always reflect the values of the colonial population.<sup>57</sup>

Criticism of the Privy Council appeal was always heightened in the aftermath of an unpopular decision in a case emanating from a particular region of the British Empire or Commonwealth. A number of key decisions by the Privy Council in the last century proved to be particularly damaging. These decisions gave increased prominence to calls for the reform or abolition of the Privy Council appeal. Examples of decisions of this nature include *Webb v. Outrim*<sup>58</sup> in Australia; *Nadan v. R*<sup>59</sup> in Canada; *Pearl Assurance Co. Ltd. v. Government of the Union*<sup>60</sup> in South Africa; *Wigg and Cochrane v. Attorney General*<sup>61</sup> in the Irish Free State; *Lesia v. Attorney General* in New Zealand<sup>62</sup> and *Pratt and Morgan v. AG of Jamaica*<sup>63</sup> in the Caribbean.

The reaction of lawyers and statesmen in the colonies and Dominions to unpopular decisions reveal a key weakness of the Privy Council appeal. All courts, including national courts of final appeal, make unpopular decisions from time to time. These decisions are often met with widespread indignation and accusations of incompetence. Yet unpopular decisions by national courts are seldom followed by calls for the complete abolition of these courts. The increased prominence in calls for the abolition of Privy Council appeals in the aftermath of unpopular decisions exposes a vulnerability that challenges all external or supranational tribunals. When external tribunals make unpopular decisions they are frequently accused of being out of touch with local values and conditions. These accusations are used to justify calls for the reform or abolition of the appeal to that external tribunal. The Privy Council is no exception to this principle.

Accusations of being out of touch with local values and conditions have been levelled at the Privy Council from all parts of the former British Empire. This includes former colonies of British settlement. One scholar from New Zealand has accused the Privy Council of being 'unresponsive to our national way of life'.<sup>64</sup> This is no recent phenomenon. In 1903 a New Zealand judge, Mr Justice Edwards, counselled the judges of the Privy Council to reflect before overturning the decisions of 'trained lawyers who have spend their lives in the Colony, who know and understand its genius, its laws and its customs, as they cannot hope to know and understand them'.<sup>65</sup> Edwards complained that, despite the relative ignorance of the judges of the Privy Council of local laws and conditions, they tended to treat the decisions of the colonial courts 'with something akin to contempt',<sup>66</sup> and his expressed frustration.

The perception of the Privy Council as being out of touch with local values and conditions is often cited as having fatally undermined the Privy Council appeal in many of the island nations of the Caribbean. The decision in *Pratt and Morgan v. Attorney General of Jamaica*<sup>67</sup>, which concerned the subject of capital punishment, was met with widespread complaints that the Privy Council was out of touch with Caribbean values. These values are said to demand the retention of the death penalty. Yet it is important to note that this case was not directly concerned with the legality or otherwise of imposing capital punishment. Instead, it focused on the length of time that convicted persons spend on death row awaiting the death penalty. The Privy Council determined that long periods of detention, such as periods of five years or more, on death row constituted cruel and inhumane

treatment and were inconsistent with the provisions of the Jamaican Constitution. This decision was not necessarily incompatible with the retention of capital punishment in the Caribbean. Nevertheless, the stance taken by the Privy Council on this matter has resulted in many Caribbean nations initiating the process of abolishing the appeal.

There are commentators who have risen to the defence of the Privy Council when that court is faced with accusations of being out of touch with local conditions and therefore unsuited to serve as a court of final appeal. A Canadian observer has noted that a similar argument could be made with respect to many national courts, including the Canadian Supreme Court. Sir Charles Hibbert Tupper, the Canadian Minister for Justice between 1894 and 1896, once asked 'Is a judge from British Columbia very much more familiar with the conditions of the Nova Scotia fishermen, or a judge from Alberta very intimate with the Civil Code of the Province of Quebec, the language of its people and its customs'?<sup>68</sup> An Australian commentator makes a similar point when he asks: 'what local knowledge has the [Australian] High Court of the Northern Territory or other parts, near or remote, of this vast island continent?'<sup>69</sup> Although these comments were made in the 1920s their logic holds true almost a century later. It should be remembered that judges from different parts of the Empire could and did sit on the Judicial Committee throughout the course of the twentieth century. It should also be noted that all too often the purported 'values' of a particular society are equated with the interests of dominant groups. The relative freedom of the Judicial Committee of the Privy Council from these interests was the very reason why the appeal was valued by so many people, especially by those who saw it as a safeguard for minorities.

## CONCLUSION

This chapter has examined many of the practical drawbacks associated with the appeal to the Judicial Committee of the Privy Council. It has argued that most, if not all, of these drawbacks are common to all appellate courts in all jurisdictions. All too often, the practical arguments used against the appeal to the Privy Council seem to obscure underlying hostility to that institution as an external or supranational tribunal. The years since the conclusion of the Second World War have seen an unprecedented expansion in the number of supranational tribunals. These include the creation of the International Court of Justice, the European Court of Human Rights and the European Court

of Justice. None of these supranational courts can be compared to the Judicial Committee of the Privy Council. The jurisdiction of the Judicial Committee was never limited to one distinct area of law. It was a final appellate court that was empowered to interpret and apply any of the laws of the state, colony or other entity that was subject to its jurisdiction. It was a supranational court that enjoyed wide and unconstrained powers to determine disputes between governments and between individuals within the British Empire and Commonwealth. This position proved to be incompatible with nationalistic sentiments that rose to greater prominence with the advance of the twentieth century.

Nationalistic fervour in one constituent part of the British Empire had a particularly negative impact on the position of the Judicial Committee of the Privy Council as a supranational court. One part of the British Empire proved to be exceptionally determined and successful in its refusal to submit to the jurisdiction of the Privy Council. This member of the Empire was not a colony or a Dominion. It was the United Kingdom, the 'mother country' of the Empire. Appeals to the Privy Council from within the United Kingdom have long been limited to a few obscure and archaic areas of jurisdiction. These include appeals from certain ecclesiastical courts and disputes under the House of Commons Disqualification Act, 1975, which prohibits certain groups of people from sitting in the lower house of the British Parliament. The Privy Council is also empowered to hear appeals from the Court of Admiralty of the Cinque Ports. The last full sitting of this court occurred in 1914.

In the 1990s the Privy Council was empowered to hear appeals relating to the devolution of powers to legislative assemblies in Scotland, Wales and Northern Ireland.<sup>70</sup> This jurisdiction has since been transferred to the new Supreme Court of the United Kingdom which was established in October 2009.<sup>71</sup> The remaining areas of jurisdiction of the Privy Council attract little attention from the British public.

During the course of the twentieth century the majority of British lawyers and statesmen remained steadfast in their opposition to accepting the Privy Council as the final court of appeal for their country. The single judgment rule and the position that decisions of the Privy Council did not constitute binding precedent under British law were often used to justify this stance. Yet these drawbacks were capable of resolution if sufficient determination had existed. The real obstacle lay in the fact that Dominion and colonial judges sat on the Privy Council in addition to British judges. British officials often questioned the quality of Dominion and colonial judges. For example, in



1930 a British inter-departmental committee charged with examining the creation of a new Commonwealth tribunal concluded that 'though the Court might have at its disposal the best judges in the various Dominions, it is felt that they would hardly command the universal respect which is given to the highest standard of judicial talent in this country'.<sup>72</sup> These expressions of doubt as to the competence of colonial and Dominion judges could be seen as masking deep-seated fears and hostility to having British cases decided by foreign judges. This is the same consideration that has spurred the decline elsewhere in the jurisdiction of the Privy Council throughout the course of the past century. There is no doubt that the reluctance of the United Kingdom, as the 'mother country' of the British Empire, to accept the jurisdiction of the Judicial Committee of the Privy Council undermined the position of that court elsewhere. This conclusion was given expression over a hundred years ago in the House of Commons by Richard B. Haldane, who himself would one day sit on the Judicial Committee of the Privy Council. Haldane expressed his great regret that 'Though the Privy Council is considered good enough for the colonies, it is not allowed in Great Britain and Ireland to be good enough for us'.<sup>73</sup>

Commentators should always exercise a measure of caution before predicting the imminent demise of the Judicial Committee of the Privy Council. As stated earlier, this institution has outlived many commentators who made such rash predictions in the past. Nevertheless, it should be noted that the Privy Council appeal now faces a serious threat based on considerations that could never have been predicted in the early twentieth century. A series of constitutional reforms have resulted in the creation of a new Supreme Court of the United Kingdom which began work on 1 October 2009. Members of this new court are now raising questions as to the desirability of maintaining the Judicial Committee of the Privy Council. Lord Nicholas Phillips, who has recently become the first President of the Supreme Court of the United Kingdom, has stated that 'in an ideal world' Commonwealth countries would set up their own final courts of appeal and stop using the Privy Council.<sup>74</sup> It is now the turn of British lawyers to complain that the Privy Council appears to be an anachronism that ties the new court structure of their country to an uncomfortable Imperial past. Complaints of expense and delay have now re-emerged in a form that focuses on the burdens placed on the judiciary and treasury of the United Kingdom rather than on the burdens placed on litigants. It is argued that many former colonies have maintained the link with Privy Council because it provides them

with access to *pro bono* judicial expertise and saves them the expense of maintaining their own courts of final appeal.<sup>75</sup> Lord Phillips has complained that the Law Lords are spending a 'disproportionate' amount of time on cases coming from former colonies.<sup>76</sup> This could be seen as delaying the resolution of cases from the United Kingdom.

The Judicial Committee of the Privy Council remains in existence despite the serious reduction of its jurisdiction over the past few decades. It has survived many challenges from many different quarters over the past century. The one challenge the Judicial Committee of the Privy Council cannot survive is a determined campaign for its abolition within the United Kingdom itself. The greatest failure of the Judicial Committee over the past century concerns its inability to gain widespread attention and support within its country of origin. Unless this trend can be reversed, the future of the Judicial Committee of the Privy Council will always remain in doubt.

## NOTES

1. The term 'Privy Council' is also used to refer to 'Her Majesty's Most Honourable Privy Council' which is a body of advisors to the British Sovereign. The 'Judicial Committee of the Privy Council' is officially a constituent part of this advisory body.
2. The use of a capital 'D' when referring to the 'British Dominions' was required by the British government in order to avoid confusion with the wider term 'His Majesty's dominions' which referred to the British Empire as a whole. See the National Archives/Public Record Office (TNA/PRO) (United Kingdom) HO 45/20030. This chapter will follow this convention.
3. 'Protectorates' were territories that in which British oversight included internal and external affairs. E.g. Aden, Bechuanaland and the British Solomon Islands. In 'protected states' British oversight was largely confined to external affairs. E.g. The Maldives Islands, the Sultanate of Brunei and the Trucial States. 'Mandated territories' were administered under a mandate from the League of Nations. E.g. Palestine, Iraq and Transjordan. 'Trust territories' were administered under the trusteeship system of the United Nations. E.g. Tanganyika, Cameroons, Togoland. Most mandated territories that had not achieved independence by 1947 became trust territories under the Mandated and Trust Territories Act, 1947. <http://www.ukba.homeoffice.gov.uk/britishcitizenship/othenationality/britishprotectedperson/protectorates/> (accessed 23 June 2010).
4. Herbert Bentwich (1856–1932), barrister, owner and editor of the *Law Journal*. For quotation see *The Times* 14 August 1933. Hector Hughes, an Irish barrister who wrote a detailed analysis of the Privy Council appeal, denied the common assertion that the Privy Council was a symbol of Imperial or Commonwealth unity. Hughes concluded that 'a symbol which creates dissatisfaction is worse than useless; it is a grave danger to that friendly co-operation of nations which forms the real and only lasting foundation for the Commonwealth'. Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), p. 116.
5. National Archives of Ireland (NAI), Department of the Taoiseach, S5340/2, undated memorandum on 'The Judicial Committee Act, 1833 and after'.
6. For example, see A.B. Keith, *The Sovereignty of the British Dominions* (London, 1929), p. 258.
7. Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), pp. 96–7.
8. *Ibid.*
9. This decision will not affect appeals pending before 31 May 2010. [http://www.bbc.co.uk/caribbean/news/story/2010/05/100511\\_may11pm.shtml](http://www.bbc.co.uk/caribbean/news/story/2010/05/100511_may11pm.shtml) (accessed 23 June 2010).
10. Decisions in appeals from the Sultanate of Brunei take the form of advice to the Sultan rather than advice to the British Sovereign.

11. A.B. Keith, *War Government in the British Dominions* (Oxford, 1921), pp. 285–8.
12. For example, see Megan Richardson, 'The Privy Council and New Zealand' 46 (1997) *International and Comparative Law Quarterly* 908. See also <http://executive.govt.nz/MINISTER/wilson/privy-council/change.htm> and <http://www.converge.org.nz/pma/cra0409.htm> (Accessed 28 November 2009). There were other reasons put forward for retaining the New Zealand appeal to the Privy Council. See 'New Zealand's link with the Privy Council and the Proposed Supreme Court' New Zealand Parliamentary Research Papers 2003/02 8 May 2003. <http://www.parliament.nz/en-NZ/ParlSupport/ResearchPapers/9/a/c/9ac228b4a27949008d1bee6f84ff7e45.htm> (Accessed 24 June 2010). The decision to abolish the Privy Council appeal was followed by feelings of regret in certain quarters of opinion in New Zealand. Nevertheless, it was deemed impractical to attempt to revive the appeal. [http://www.nzherald.co.nz/catherine-masters/news/article.cfm?a\\_id=49&objectid=10439301](http://www.nzherald.co.nz/catherine-masters/news/article.cfm?a_id=49&objectid=10439301) (Accessed 23 June 2010).
13. NAI, Department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930.
14. Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), p. 109.
15. *Ibid.* p. 108.
16. D.B. Swinfen, *Imperial Appeal* (Manchester, 1987).
17. *Ibid.* p. 124.
18. University College Dublin (UCD) Archives, McGilligan Papers, P35/196, 'Who wants the Privy Council?' and *The Star*, May 1931.
19. UCD Archives, McGilligan Papers, P35/196, memorandum re Privy Council appeals, 17 June 1931 and Cosgrave to McGilligan, 26 June 1931.
20. For example, see *Irish Times*, 19 February 1929, 5 December 1929 and 11 April 1930.
21. TNA-PRO, LCO 2/910, statement of 10 December 1929 attached to letter from Archbishop of Dublin to Prime Minister, 27 September 1930.
22. *Ibid.*
23. *Wigg and Cochrane v The Attorney General of the Irish Free State* [1927] I.R. 285 and *Moore v. Attorney-General for the Irish Free State* [1935] I.R. 472 and [1935] A.C. 484.
24. The Irish government refused to enforce the decision in *Wigg and Cochrane v The Attorney General of the Irish Free State*. This resulted in a special reference to the Privy Council which was decided in *In re Compensation to Civil Servants under Article X of the Treaty* [1929] I.R. 44. The Privy Council was prevented from examining the substantive issues in the case of *Moore v. Attorney-General for the Irish Free State* as a result of the abolition of the appeal by the Irish Parliament.
25. Constitution (Amendment No. 22) Act, 1933.
26. Privy Council Appeals Act, 1950.
27. This should not be seen as suggesting that native litigants were always successful before the Privy Council. The Ndebele and Shona tribes were unsuccessful in asserting land rights in *In re Southern Rhodesia* [1919] A.C. 211. Lord Sumners' conclusions as to the land rights of indigenous peoples ([1919] A.C. 211 at 233) can be contrasted to a more recent Australian judgment in *Mabo v. Queensland (No. 2)* [1992] H.C.A. 23; (1992) 175 C.L.R. 1.
28. Sections 56 and 71(5) of the Southern Rhodesia (Constitution) Act, 1961.
29. Sections 65 and 80, Constitution of Rhodesia, 1965. Pending appeals to the Judicial Committee of the Privy Council were saved under Section 65(2).
30. See *Madzimbamuto v. Lardner-Burke N.O. (No. 1)* 1968 (2) S.A. 284.
31. 1968 (4) S.A. 207, 515.
32. 1968 (2) S.A. 464.
33. *Ibid.* 466.
34. *Ibid.* 464.
35. J.M. Eekelaar, 'Rhodesia: The Abdication of Constitutionalism' 32 (1969) *Modern Law Review* 19, p. 28.
36. Section 62 of the Rhodesia Act, 1969.
37. Robert Blake, *A History of Rhodesia* (London, 1977), p. 401.
38. TNA-PRO, CAB 43/3 SFC 40 Griffith to Lloyd George, 2 June 1922.
39. *Ibid.*
40. For example, see Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), pp. 9 and 93. Hughes was a member of the Bar of the Irish Free State.

41. These new rules were agreed at the Imperial Conference of 1907. They were put into effect by an Order in Council passed on 21 December 1908. Norman Bentwich, *The Practice of the Privy Council in Judicial Matters* (London, 1937), p. 8.
42. For an Irish perspective on this position see *Dáil Debates*, vol. 1 col. 1403 and cols. 1407-8, 10 October 1922. For a South African perspective see H.R. Hahlo and E. Kahn, *The Union of South Africa* (London, 1960), p. 31.
43. Order in Council of 20 February 1627. P.A. Howell, *The Judicial Committee of the Privy Council 1833-1876* (Cambridge, 1979) p. 200. This was confirmed by Order in Council of 4 February 1878. A.B. Keith, *Responsible Government in the Dominions*, vol. III (Oxford, 1912), p. 1376.
44. An example of the former category of dispute was the boundary dispute between Canada and Newfoundland in Labrador. This is reported at (1927) 43 T.L.R. 289.
45. NAI, Department of Foreign Affairs, file 3/1, draft speech on 'Abolition of Appeals to the Privy Council', undated 1933.
46. Judicial Committee (Dissenting Opinions) Order, 1966 (S.I. 1966, No. 1100).
47. Cmd. 3479, para. 125 and Cmd. 3717, pp. 22-4.
48. *Hull v. M'Kenna* [1926] I.R. 402.
49. *Ibid.*, 404.
50. UCD Archives, McGilligan Papers, P35B/108, radio broadcast, 9 November 1930.
51. Robert Stokes, *New Imperial Ideas* (London, \* 1930), p. 86. See also Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), pp. 8 and 103-4 and Leo Kohn, *The Constitution of the Irish Free State* (Dublin, 1932), p. 356.
52. For example, see <http://www.bfsb-bahamas.com/news.php?cmd=view&id=1959&pre=y> (accessed 24 June 2010).
53. See Sir Josiah H. Symon, 'Australia and the Privy Council' (1922) 4 *Journal of Comparative Legislation and International Law* 137 at 147. See also Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (London, 1931), p. 115.
54. The sources of Privy Council appeals between the years 1911 and 1917 were: India: 514, Canada: 180, Australia: 45, New Zealand: 18, Newfoundland: 6, South Africa: 3. *Irish Independent*, 31 December 1929.
55. Section 30 of the Judicial Committee Act, 1833.
56. These efforts are reflected in the Judicial Committee Amendment Act, 1895, Appellate Jurisdiction Act, 1908 and Appellate Jurisdiction Act, 1929.
57. For example see J.S. Ewart 'Appeals to the Judicial Committee of the Privy Council – The Case for Discontinuing Appeals' 37 (1939) *Queen's Quarterly* p. 456.
58. [1907] A.C. p. 81. See also *Deakin v. Webb* 1 C.L.R. p. 585 and *Baxter v. Commissioners of Taxation, New South Wales* (1907) 4 C.L.R. 1087.
59. [1926] A.C. 482.
60. [1936] A.C. 570.
61. [1927] I.R. 285, 293.
62. [1982] 1 N.Z.L.R. 165.
63. [1993] 4 All E.R. 769.
64. Philip Joseph, 'Towards Abolition of Privy Council Appeals: The Judicial Committee and the Bill of Rights' 2 (1985) *Canterbury Law Review* p. 273.
65. *Wallis v. Solicitor General, Protest of Bench and Bar* [1903] N.Z.P.C.C. 730; 1 N.Z.L.R.C.C. 84
66. *Ibid.*
67. [1993] 4 All E.R. 769.
68. Sir Charles Hibbert Tupper, 'Position of the Privy Council', 3 (1921) *Journal of Comparative Legislation and International Law*, p. 189.
69. Sir Josiah H. Symon, 'Australia and the Privy Council' 4 (1922) *Journal of Comparative Legislation and International Law* p. 148.
70. Scotland Act, 1998; Government of Wales Act, 1998 and Northern Ireland Act, 1998.
71. Established under Part 3 of the Constitutional Reform Act, 2005.
72. TNA-PRO, CAB 32/83 E(B)(30)2.
73. *Hansard*, House of Commons, vol. 83 col. 101, 14 May 1900.
74. [http://www.bbc.co.uk/caribbean/news/story/2009/09/090922\\_privyccjphillips.shtml](http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml) (Accessed 30 November 2009).
75. *Ibid.*
76. *Ibid.*