Legal Histories of the British Empire

Laws, engagements and legacies

Edited by
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Routledge
Taylor & Francis Group
a GlassHouse Book

Chapter 3

Asserting judicial sovereignty

The debate over the abolition of Privy Council jurisdiction in British Africa

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Introduction

In the early twentieth century, a debate raged within British colonial officialdom about whether to allow non-English judges from the colonies to sit on the highest court of appeal in the British Empire, the Judicial Committee of the Privy Council (JCPC). Although the JCPC had since 1886 occasionally included colonial judges, their presence on the board was always a vexed issue. In 1895, the Judicial Committee Amendment Act provided for the appointment to the Privy Council, and then to the Judicial Committee, of any judge of a superior court in the dominions and self-governing colonies. Further reforms introduced in 1908 and 1915 permitted representative judges from all British colonies to sit on the JCPC. This allowed for the appointment of colonial judges from India, Ceylon and Africa to the JCPC from 1909.[1]

In spite of these provisions, however, the three or five judges who sat to hear any one appeal were often judges from the United Kingdom.[2] To many in both metropole and colony, this was anomalous. A bench composed exclusively of English judges, critics argued, was ill-equipped to effectively adjudicate appeals from different legal systems within an expanding empire.[3] Although the most persistent calls for reforming the JCPC came from the colonies, there was also domestic pressure for a more representative JCPC or, in some cases, an alternate Imperial Court of Appeal.

Officials in Whitewall were, however, generally not persuaded as to the need for broader provisions for judicial representation from the colonies. They acknowledged a disconnect between the Privy Council and distant colonies but preferred instead the idea of a 'peripatetic Privy Council' that would go on circuit to the colonies. In the intervening years, colonial administrators, judges, lawyers and indigenous political leaders weighed in on one of the most contentious imperial legal debates of the twentieth century.

This chapter examines the polarizing debate over colonial representation and the inclusion of indigenous judges on the JCPC as it played out both in London and Britain's African colonies. Focusing on specific moments in the debate over the abolition of Privy Council jurisdiction in South Africa and Kenya, it explores

how concerns about judicial representation influenced the demands for the abolition of Privy Council appeals. It also examines the efforts made by British officials and politicians in the dominions and colonies to reform the JCPC in order to retain its relevance in the transition from Empire to Commonwealth from the 1930s to the 1960s. In this transition, most of the early debates centred on the JCPC's jurisdiction in the old dominions, notably the Irish Free State, Canada and South Africa.

The extension of the debate over the JCPC's jurisdiction to the rest of British Africa coincided with the post-war nationalist movement and the era of decolonization. After a century of judicial influence, the demise of the JCPC's jurisdiction in Africa was precipitous. By the 1950s, the influence and jurisdiction of the JCPC and the regional colonial appeal courts had diminished significantly as a direct result of the anti-colonial movements. Between 1957 and 1966, several British colonies in Africa achieved independence and many of these new countries, either immediately or upon declaration of republican status, ended their appeals to the Privy Council. For many nationalist politicians in these countries, executive, legislative and judicial sovereignty were inextricably interlinked. Delinking from the JCPC was therefore seen as a key step in the assertion of independence and sovereignty.[4]

The process of judicial delinking would turn out to be a complex and convoluted one. Although anti-colonialism and decolonization marked the defining moment in the demise of the JCPC in Africa as elsewhere within the British Empire, these developments in themselves did not necessarily make the JCPC's demise inevitable. In other parts of the Empire–Commonwealth, the influence and jurisdiction of the JCPC persisted for several decades after political independence was attained. Australia effectively abolished the right of appeal to the JCPC in 1986 and New Zealand in 2003. Sri Lanka abolished most appeals to the Privy Council in 1972, Malaysia in 1985 and Singapore in 1994. Most Caribbean countries continued appeals to the JCPC until 2001.[5] In contrast, most British ex-colonies in Africa had by 1966 abolished all appeals to the Privy Council.[6] Most of them had also left the two main regional courts of appeal – the West African Court of Appeal and the East African Court of Appeal.

Arguments for sovereignty and judicial independence aside, the demise of the JCPC in Africa also had much to do with longstanding dissatisfaction with the unrepresentative composition of the JCPC bench. The right of appeal to a 'court' located overseas, made up mostly of English judges who were sometimes considered out of tune with local law and values, was a sore point in the colonies even at the height of imperial power. This situation became even more untenable as imperial influence waned in the mid-twentieth century.

The question of colonial representation

Although the JCPC had occasionally included colonial judges since the 1880s, their presence on the board was always a vexed issue. The first dominion judge to sit

on the JCPC was the English-trained South African judge, Lord de Villiers, who was Chief Justice for the Cape Colony, and later the first Chief Justice of the Union of South Africa.[7] The provisions aimed at ensuring more colonial representation had little practical effect, either in terms of diversifying the JCPC bench or increasing the range of the Committee's expertise. Most of the early Indian assessors appointed to the Committee were serving and retired English officials and judges who had worked in India. However, from 1909, South Asian judges began to take on a major presence in the upper echelons of the imperial legal system with the appointment of Syed Ameer Ali as the first South Asian judge on the JCPC.[8] Indigenous judges, such as Syed Ameer Ali and Dinshaw Mulla, who was appointed in 1930, played a crucial role in bringing indigenous perspectives to the jurisprudence of the JCPC, particularly in terms of their expertise and interpretations of Hindu and Islamic law.[9] The inclusion of African judges (outside of South Africa) would wait until 1962, when the Nigerian judge Adetokunbo Ademola was appointed to the Privy Council. There was also the occasional judge from Canada, Australia or South Africa who sat on the Board by virtue of his appointment to the Privy Council. Sometimes, judicial assessors were also drawn from the ranks of retired colonial judges who provided advice on local laws and customs. Yet many, in both the metropole and the colony, considered this anomalous.

Questions over colonial representations in the JCPC echoed longstanding debates over judicial unity and cohesiveness within the British Empire. Some officials in England and the colonies expressed concern about the ability of the JCPC to cope with the variety of cases from legal systems across the empire without adequate representation from the colonies and dominions. It was frequently pointed out, for example, that few judges on the JCPC had any training in Roman–Dutch law which was applicable in Ceylon and the Cape Colony. This raised further concerns about judicial incompetence and miscarriages of justice. The main complaint was that, being composed almost entirely of United Kingdom judges, the JCPC could not match local practitioners in their knowledge of local law and conditions.

The first cracks in the imperial judicial edifice appeared in the old dominions. The debate over the right of JCPC to appeal informed discussions of dominion status in the 1920s and early 1930s following the Statute of Westminster, which established legislative equality with the United Kingdom for the self-governing dominions of the British Empire. Most of the early discussion focused on strengthening representation from the old dominions of Canada, Australia, New Zealand, South Africa and, to a lesser extent, India. During this period, the JCPC arguably faced a crisis of relevance and legitimacy arising mainly from the demands in Canada and the Irish Free State for the abolition of the rights to Privy Council appeal. The political circumstances leading to the abolition of appeals in both countries foreshadowed the end of appeals in Africa and elsewhere in the Empire–Commonwealth.

By the 1920s, the question of colonial appeals to the JCPC had become a key issue in British imperial politics. At the Imperial Conference of 1926, much

attention was devoted to the problem of the relation between the emerging independence of the dominions and their continuing constitutional status as colonial dependencies. The conference ended with a declaration that 'it was no part of the policy of His Majesty's government that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected'.[10] In 1931, this principle was enacted into law in the Statute of Westminster, which effectively made it possible for dominions to abolish appeals to the JCPC.[11] Thereafter, discussions about the abolition of Privy Council appeals in the colonies became more prominent during negotiations for the dismantling of the British Empire. Associated with concerns about the lack of representation on the JCPC were longstanding complaints about the disconnect between the English judges who adjudicated colonial appeals in the comfort of Westminster, and the varied realities of life in the outposts of the Empire. A frequent complaint was that appeals to the JCPC involved inordinate expenses and delay due to distance, and that the JCPC was a rich man's court where poorer litigants could not afford to go.

Beyond the question of distance and representation, however, was also the general perception that the JCPC, regardless of the quality of judges that staffed its bench, was ultimately a second-class court. It was, after all, an appellate court constituted exclusively to adjudicate colonial cases – an Imperial Court situated in the imperial centre but with limited jurisdiction over metropolitan cases. The reluctance of British officials to contemplate having United Kingdom appeals heard by anyone else other than the House of Lords was taken as evidence that, with the Privy Council, the dominions and colonies were being subjected to an inferior court to which Britain did not subject her own citizens. Critics made reference to the landmark case of *London Joint Stock Bank Ltd v MacMillan*, in which it was held that the decisions of the JCPC were not theoretically binding in English courts, even if they might be deemed influential.[12]

Dominion politicians also drew attention to key procedural differences between the judicial work of the House of Lords and the Privy Council. The judgments of the House of Lords took immediate effect, while JCPC 'judgments' were, in fact, merely recommendations, upon which the Crown made the final decision in an Order in Council. This gave rise to doubts about the character of the Judicial Committee as a true court. The view that the JCPC was an inferior adjudicatory body designed for the colonies persisted in spite of assurances by officials in Whitehall that the Judicial Committee was indeed a court, and that the King in Council had no constitutional power to interfere in any way with its judgments.[13]

The image of the JCPC as a court for the colonial underclass was not easily shaken. If the JCPC was good enough for colonial subjects, why was it not also considered good enough for British citizens? This became a key argument against the retention of the right to JCPC appeals in the colonies. Perhaps more than any other critiques of the JCPC, the view that the JCPC dispensed 'selective and inferior justice' most undermined the public's perception of its relevance and legitimacy in Africa.[14] At a time when the assertion of national sovereignty and

claims about the 'equality of men and nations' were key messages of nationalist anti-colonial politicians, the idea of subjecting citizens of newly independent nations to 'selective and inferior justice' struck a chord in the colonies, and was strongly rejected.

The appointment of more colonial judges to the JCPC between 1930 and 1950 did not dampen the demands for indigenous representation on the JCPC bench. Such demands were occasioned by the significant changes in the legal and judicial landscape of British Africa from the 1930s onwards. The small but active group of Western-trained African lawyers who began to play an important role in the colonial legal system demanded greater inclusion in the colonial judiciary. The fact that these indigenous lawyers were not seriously considered candidates for the JCPC bench until the 1960s, had more to do with the racial restriction imposed on non-white judges than anything else. Their eventual engagement in the discussions about reforming the JCPC would be foreshadowed by nationalist demands for the abolition of JCPC appeals in South Africa.

In South Africa, the first legal initiative to abolish appeals to the Privy Council began with the enactment of the South Africa Act of 1909 that abolished the right of appeal from provincial courts, even as it allowed for appeal from the Supreme Court by special leave of the Privy Council.[15] The restriction on JCPC appeals was clarified in 1920, when the Privy Council itself announced in *Whittaker v. Durban Corporation* (an application for leave on facts relating to power to change municipal boundaries), that, in denying leave in this case, henceforth it would refuse leave except on very important matters, such as serious constitutional issues.[16] This decision engendered debate in South Africa where it was welcomed by those advocating the abolition of Privy Council appeals. Opposition to the appeals reflected the view that English judges sitting on the Committee were ill-equipped to adjudicate cases based on the Roman-Dutch traditions of the country. Appeals from South Africa to the JCPC, which were never significant in number previously, reduced to almost zero between 1920 and 1933.[17]

One such case, *Pearl Assurance Co. Ltd. v Government of the Union of South Africa*, came before the JCPC in 1934. It provided the main impetus for the abolition of appeal in South Africa.[18] The case concerned questions regarding the amount of damages recoverable on a breach of contract under Roman–Dutch law and the onus of proof as to the amount of damage suffered. Before this case, it had been the established practice of the JCPC to grant a leave of appeal for South African cases only in far-reaching questions of law or on matters of dominant public importance. In *Pearl Assurance*, however, the JCPC departed from this principle by granting leave on a question relating to the domestic law of contract. This raised the prospect of almost unrestricted appeals to the JCPC. It also caused concern among local politicians over what was considered the unilateral expansion of JCPC jurisdiction in the country, which was then expressed in the South African Parliament in 1935, when a motion was raised for the abolition of appeals to the Privy Council.[19]

Apart from criticism of the extension of the JCPC's jurisdiction to matters relating to private law, there was also opposition to the decision itself, which

partially overruled the judgment of the Supreme Court of South Africa. Some critics of the JCPC decision suggested that the judges of the Committee were charged with an impossible task of applying a system of law, with which they were only slightly acquainted.[20] This case brought to a head the longstanding disquiet among nationalist politicians over JCPC appeals, and gave strength to the movement for abolition. A related argument for abolition was the feeling that the existence of the right of appeal to the Privy Council was inconsistent with the sovereign independent status of the Union of South Africa. The Nationalist Party in South Africa, which was at the forefront of the calls to abolish the right of appeal to the Privy Council, frequently pointed to the inequities inherent in the appeals process that, apart from being 'an undeserved slur' on South African judges, 'placed a powerful weapon in the hands of rich litigants'.[21]

The 'abolitionists', as the advocates for ending the JCPC appeals came to be known in the local press, pointed to the unsatisfactory nature of decisions by a Privy Council composed of men unlearned in the Roman–Dutch law.[22] Nationalist politicians claimed it was anomalous for a sovereign independent state to subject its own tribunals to the overruling jurisdiction of a court of another state over whose constitution it had no control. They contended that the Appellate Division of South African Supreme Court was the most suitable and most competent court to give judgment in cases relating to the South African law.[23] Proponents of the retention of JCPC appeal, mainly members of the pro-British Dominion Party, countered that calls for the abolition of the right of appeal related to anti-British nationalist politics rather than to the jurisprudence of the JCPC.[24] They pointed out that appeals to the Privy Council from the Union of South Africa had been rare, and that decisions of the JCPC had no demonstrable prejudicial effect on the administration of justice in the country.[25]

In the end, nationalists opposed to the retention of the right to Privy Council appeals won the argument. South African appeals to the JCPC were finally abolished in 1950 with the enactment of the Privy Council Appeals Act.[26] The Act provided that there would be no future appeal to the King in Council, from any judgment or order of any court in the Union of South Africa or South-West Africa.[27] This, however, did not foreclose the continued efforts to rehabilitate the JCPC and assert its continued relevance in the transition from Empire to Commonwealth.

Salvaging the JCPC: A peripatetic Commonwealth Court

Scholars of the JCPC have suggested that opposition to the jurisdiction of the Privy Council in Dominion and Commonwealth appeals was political rather than juridical.[28] In his pioneering study of the debate over the abolition of Privy Council appeals, David Swinfen argued that the opposition to JCPC jurisdiction in colonial appeals was fundamentally founded on political grounds. Opposition

to the jurisdiction of the Privy Council was linked first with sovereigntist demands in the dominions, and later with anti-colonial movements in Asia and Africa. The shrinking of JCPC jurisdiction revolved around questions of sovereignty and the 'republican drift' of newly independent nations more than anything else.[29]

In truth, multiple factors drove the political impulses behind the abolition of JCPC jurisdiction and it is not always possible to clearly distinguish political from juridical impulses, since juridical arguments for abolition of JCPC appeals were often shaped by political calculations. Arguments for judicial autonomy, for example, could not be entirely separated from demands for executive and legislative independence. Moreover, the core set of political arguments against the retention of JCPC appeals in Africa pivoted on the question of 'colonial alienation', which arose from the historically unrepresentative composition of the JCPC.

In the African debates, three main arguments against the continuation of appeals were brought forward. First, the JCPC was regarded as a United Kingdom Court, whose continued jurisdiction was out of harmony with the status of independence. It was frequently pointed out that the Committee sat in faraway London, and, although some of its members were from other Commonwealth countries, none were indigenous African judges. The second argument was that the JCPC was out of direct contact with local conditions in Africa as a result of its physical and jurisdictional distance. Unlike the practice in Indian appeals, for example, the adjudication of African cases drew little on the expertise of local assessors and judges. There was also criticism of the JCPC's inclination towards imperial legal uniformity – the tendency to apply the law of one country too readily to another country, largely disregarding local differences. The third main argument concerned the relevance of the JCPC in the post-Second World War period and the dwindling number of appeals from African jurisdictions.[30]

By the 1950s, the issue of colonial representations and the future of the JCPC had become a subject of growing public and parliamentary interest in Britain itself. The general sentiment was that the British government had not done enough to create an inclusive and representative JCPC, reflective of the transition from Empire to Commonwealth. In 1955, Member of the UK Parliament Graham Page raised one of the many key questions. He queried why Commonwealth or colonial judges were rarely nominated when there was a vacancy on the JCPC. 'However brilliant our judges may be', he argued, 'one can understand the injury to political prestige which such nations would feel that they suffer in continuing to submit appeals to an entirely United Kingdom court.'[31] Page stressed the continued relevance of the JCPC as an important pillar in the structure of the Commonwealth that had to be strengthened and adapted to meet modern standards. He was particularly critical of the practice of drawing members of the JCPC almost entirely from the ranks of high judicial officers in the United Kingdom. In his view more had to be done to dispel the notion – prevalent especially in the colonies – that the JCPC was a committee of 'rather old gentlemen sitting in Whitehall'.[32]

The calls for reform of the JCPC were in line with what many British officials considered a necessary strategic shift from sustaining an Empire that was clearly in decline to maintaining British influence in the emergent Commonwealth.[33] Throughout the period of decolonization British policy consistently favoured the retention of the Privy Council appellate system.[34] This was because it afforded an opportunity for Britain to exercise control over Empire–Commonwealth affairs. In the 1960s, this goal partly informed discussions of the establishment of a Commonwealth Court of Appeal as a successor institution to the JCPC. Like the JCPC, the new Commonwealth Court of Appeal would be a bastion for maintaining judicial standards in the Commonwealth. The old concept of imperial responsibility had taken on a new form. British officials came to believe that the continuation of the right of appeal from courts in the countries of the new Commonwealth to the Judicial Committee or to another new Commonwealth Court of Appeal would most effectively safeguard human rights and civil liberties in these countries. For a period of time, discussions also revolved around a Commonwealth Bill of Rights, to be underwritten by the reformed appellate system.[35]

One of the suggested reforms to keep the JCPC relevant in an era of decolonization was the proposal to transform the Judicial Committee – in its general Commonwealth functions – into a new peripatetic or itinerant Commonwealth Court, with a membership more truly representative of the countries within its jurisdiction.[36] The Court would be composed of Commonwealth judges who would hear and determine appeals from the courts of all Commonwealth countries, including the United Kingdom. Unlike the JCPC, the new Court would cease to be closely identified with the United Kingdom, and would become more closely acquainted with local conditions. The anticipated increase in the number of appeals coming to the new Commonwealth Court would require the Court to sit in multiple divisions and in multiple locations. These far-reaching changes, some officials thought, would address longstanding discontent about the JCPC's composition in the colonies. The fact that the proposed Commonwealth Court would have jurisdiction also over the United Kingdom would remove one of the major impediments to the legitimacy of the JCPC in the colonies – the notion that it was a second-class court with jurisdiction over colonial subjects but not the citizens of the United Kingdom.[37]

Although the calls for a peripatetic JCPC grew louder in the 1950s, similar proposals had been made earlier. Politicians and judicial officers in the dominions expressed their longstanding demands for the JCPC to go on circuit to the great cities of the empire, including Ottawa, Delhi, Sydney and Wellington, instead of remaining in London. In a speech to the Canadian Bar Association in 1935, Justice (later Lord) Maugham made the case for a circuit-based JCPC comprised of dominion and colonial judges. He argued that the practical difficulties of the JCPC's rotations had been reduced with the technological advances in air travel and civil aviation. Two decades later, John Wyatt, the Attorney General for Kenya, made the exact same argument in a memorandum to the Colonial Office,

suggesting the inclusion of the African cities of Lagos, Nairobi and Salisbury in the JCPC circuit.[38]

By the end of the 1950s, the debates seem to have diverged from reforming the JCPC to constituting a successor, the Commonwealth Court of Appeal. A key impetus in the creation of the Commonwealth Court of Appeal was the notion that it would be more acceptable for such a tribunal to adjudicate constitutional disputes – this incapacity had been one of the Achilles heels of the JCPC. The hope was that the new Court might become a forum for the settlement of justiciable disputes between the members of the expanded Commonwealth of Nations. Advocates of these changes drew an analogy with the newly established International Court of Justice in The Hague.[39]

Even proponents of a peripatetic JCPC or the Commonwealth Court of Appeal recognized the shortcomings of such a vision, however. They were apprehensive about the procedures for setting up such a court and staffing its bench. Many feared that allocating seats on the bench to particular countries, especially the newly independent ex-colonies, would compromise the high judicial standards historically maintained by the JCPC. The dominant view was that the ability of a country to provide judges of the requisite calibre should not be contingent on the size or importance of that country, but rather on the quality of its judicial establishment and the pool of judicial officers. One critic also doubted whether countries, especially the newly independent states with limited judicial resources, would even agree to release their best judges for long periods of time to serve the Commonwealth.[40]

Another question raised was whether the countries visited on circuit by the Court would have input in creating the panel of visiting judges. Some worried that the newly independent countries – eager to assert their political and judicial autonomy – may insist on having greater influence in the composition of visiting judges to invidious effect. Additionally, they feared it might prove difficult to secure the high standard of advocacy required for a supranational appellate court created on the model of the historic JCPC.

In the end, none of these arguments mattered. Many indigenous elites in the colonies and in the newly independent ex-colonies increasingly saw the JCPC as an anachronistic survivor from the days of the empire. Indeed, even the idea of replacing the JCPC with a peripatetic Commonwealth Court of Appeal was considered to be a 'doomed undertaking' that had come at least half a century too late.[41] Although in the 1950s and1960s interest in a revamped British Commonwealth bore fruit with the creation of the Commonwealth Secretariat and various other forms of intra-Commonwealth cooperation, the Commonwealth Court of Appeal proved to be a broadly unattractive idea.[42] In many African colonies, nationalist politicians continued to link the proposals for a new Commonwealth Court to the role of the JCPC in the colonial context and to the question of national sovereignty. Nevertheless, a small minority of legal professionals continued to envision a reformed and relevant JCPC or a successor institution in independent former colonies.

Independence and the abolition of appeals

In the era of African decolonization, official and public opinion over whether or not to retain the practice of appeals to the JCPC broke down along both ideological and professional lines. Senior members of the local bar, as well as some conservative politicians, favoured an arrangement whereby appeals could continue in a reformed and more representative JCPC after the attainment of independence. In contrast, indigenous nationalist politicians at the forefront of the anti-colonial movement sought a complete break from the Privy Council and the JCPC upon the attainment of independence. The Malawian nationalist politician, Kamuzu Banda, who became Prime Minster of the country at independence, spearheaded a vigorous campaign against the retention of JCPC jurisdiction in the country. He declared before the Malawian parliament in 1965: 'We are now an independent country and I see no need for having our cases reviewed outside our country 6000 miles away. It is an infringement on our sovereignty.'[43]

Developments in Kenya demonstrate the practical implications of the debate surrounding the retention or abolition of the right to JCPC appeal as it played out in Africa in the decolonization period. The Kenya Independence Act of 1963 and the Kenya Constitution provided for the continuation of Privy Council appeals, not to Her Majesty in Council, but specifically to the JCPC. These policies effectively made the JCPC a court constituted for Kenya.[44] Under this arrangement, applications for leave to appeal were made directly to the JCPC, rather than to the British Crown. JCPC decisions were conveyed in the form of an order granting the leave to appeal and directing the courts of origin (or the concerned local authorities) to take the necessary action. This process differed from the traditional Privy Council procedure, whereby appeals were addressed to the British Crown. Usually, JCPC decisions were conveyed as recommendations to the Crown, which subsequently issued Orders in Council.[45] The new constitutional arrangement, which allowed for a modified role of the JCPC in independent Kenya, was the result of a tenuous political compromise between African nationalists desiring the right to Privy Council appeal abolished, and white settler politicians who were generally in favour of the retention of appeals. As Kenya moved towards independence, British officials were keen to ensure the retention of the right to Privy Council appeals. The push to retain JCPC jurisdiction proved more contentious in Kenya than in any other African colony.

A major concern of the British authorities in urging that the independent government of Kenya maintain appeals to the JCPC was the protection of British economic interests in the country. In the political and diplomatic discussions leading up to independence, such concerns were carefully couched in arguments highlighting the need to institute a judicial arrangement that would guarantee the constitutional protection of human rights in independent Kenya. At the Kenya Constitutional Conference in 1960, the Secretary of State for the Colonies stated that it was the 'firm view' of the British Government that legal provisions should be included in Kenya's independence constitution, to provide for the judicial protection of human rights and for the protection of property rights specifically.[46]

The emphasis on property rights in the discussions about JCPC jurisdiction in independent Kenya reflects the deeper economic and political considerations that shaped decolonization in Kenya. As majority rule and the loss of European political power became increasingly inevitable, British officials and leaders of the European settler community refocused on setting up constitutional safeguards that would protect European economic interests in the independent state. Concerns in Britain over the property rights of European settlers in independent Kenya prompted assurances from the Colonial Office that the new Bill of Rights being proposed for the country would continue to guarantee that property could not be compulsorily acquired by the State, except for public purposes and upon the payment of full compensation. Assurances were also made that a right of appeal to the JCPC would continue to exist.[47]

British interest in maintaining appeals to the JCPC was also presented in terms of protecting minority rights, which, in this case, were mainly the rights of the white settler and Asian minorities. British officials expressed concern that the minorities in Kenya may feel 'dangerously uncovered' without the right of appeal to the JCPC. During the British Parliamentary debate on Kenyan independence in 1962, one Member of Parliament concurred that it was 'wise in the home country of three races and many different tribes to include in the Constitution a Bill of Rights, enforceable by the courts, with an ultimate appeal to the Privy Council'.[48]

There was, however, disagreement between the Commonwealth Relations Office and the Colonial Office about the ideal course of action in maintaining appeals to the JCPC after colonies became independent. The Commonwealth Relations Office favoured a bilateral agreement, which would represent a binding international agreement that could not be terminated unilaterally. On the contrary, the Colonial Office thought that the conclusion of such an agreement might later cause embarrassment in Kenyan–British political relations if the Kenyan government wished to abolish appeals. In that case, the concurrence of the British government would be necessary before the agreement could be terminated and concurrence would appear to be sacrificing the interest of European and other minorities that the agreement was intended to safeguard. Officials at the Colonial Office also doubted that such an agreement could be effectively concluded at a time of tense political negotiations for independence. They preferred the entrenchment of constitutional provisions guaranteeing the retention of the right of appeal to the JCPC.[49]

In constitutional negotiations, the Colonial Office pushed strongly to enact the right of appeal to the JCPC in the independence constitution, rather than through later bilateral agreements as Kenyan politicians had proposed. British officials considered the retention of appeals to the JCPC a crucial point that had to be addressed through constitutional rather than diplomatic means. Officials of the East African Department of the Colonial Office strongly advised against waiting until after the colonies became independent to negotiate the retention of JCPC jurisdiction in Kenya. The reason, as one official put it, was because 'we cannot be sure that any agreements eventually concluded would cover all the cases in which we want appeals to lie to the Privy Council'.[50]

At the Lancaster House Conferences, in which Kenya's constitutional framework and independence were finalized, it was agreed that the scope of Privy Council appeals from Kenya be narrowed but not abolished entirely. Appeals from Kenya would continue to apply in specific classes of cases, including interpretation of the constitution and enforcement of the Bill of Rights.[51] Still, British officials harboured no illusions that the right of JCPC appeal would be retained once independence was achieved. It was evident in the constitutional negotiations that leading African politicians were opposed to the idea of retaining appeals.[52] The Minister of State for Colonial Affairs and Privy Councillor, Lord Colyton, saw the abolition of Privy Council appeals as inevitable under the circumstances. He acknowledged that the right of appeal to the Privy Council would probably disappear after independence, given the inclination of Kenyan politicians to move towards a republic upon attaining independence. He nevertheless stressed the need for Britain to do as much as possible to ensure that these rights were entrenched in the independence constitution.[53]

Apart from the political impulses against the retention of JCPC's jurisdiction in Kenya, there were also legal arguments for abolition. As in South Africa, the main concern within the local political and legal establishment was that English judges who constituted the JCPC bench were ill-equipped to adjudicate complex matters arising from local customary, Islamic and Hindu law. The case that was most frequently cited as proof of these shortcomings was the 1951 case of *Bakhshuwen v Bakhshuwen*.[54] The issue involved Islamic law, not English law, but the JCPC resolved that the courts of Kenya (and Zanzibar) were bound by a decision on the point given earlier in an appeal from India.[55] In Kenya, where the distinction between the practice of Islamic law in East Africa and in India had long been understood, officials voiced strong disagreement with this verdict.[56] The JCPC judgment was perceived as a simplistic and homogeneous view of Islamic law, ignorant of the cultural contingencies and complexities of Kenya. Moreover, the Indian case that had provided the grounds for the JCPC decision in the Kenyan case was also severely criticized in India and eventually overruled by Legislative Act. Local critics of the Kenyan decision argued that the JCPC did not consider – and apparently did not have evidence for – the different course of historical development of Islamic law in India and East Africa. According to one contemporary legal scholar, the verdict in the *Bakhshuwen* case amounted to applying judicial precedent in such a way that extended the judicial errors of one country to make them law in another.[57]

Discontent over cases such as these, where local opinion thought JCPC decisions were wrong or undesirable, combined with nationalist sentiments prompted demands for judicial independence – the abolition of the right to Privy Council appeals specifically. In 1965, new legislation ending all Kenyan appeals to the Privy Council was introduced, bringing an end to a century of JCPC jurisdiction in that part of East Africa.[58]

Conclusion

Half a century after the abolition of Privy Council jurisdiction in Africa, similar concerns about sovereignty, judicial independence and the lack of representation on the JCPC bench re-emerged in Jamaica – one of the last Commonwealth countries that still recognized the Privy Council as its court of final appeal. Discontentment with the cost of bringing appeals to London, the lack of representation on the JCPC bench and the implications of JCPC jurisprudence for national sovereignty were among the issues raised. Developments in Jamaica in many ways mirror the African debates: the urge to abolish JCPC jurisdiction was equally fostered both by a sense of dissatisfaction with the institution and by nationalist sentiments. The general feeling was that the JCPC – once a necessity in the age of empire – was an anachronism in a period of decolonization and independence.[59] In spite of the promise of reform, the JCPC had failed to reform fast enough in transitioning from Empire to Commonwealth. Ultimately, it succumbed to the growing feeling in the newly independent ex-colonies that the right of appeal to a court composed of foreign judges overseas was a derogation of national sovereignty that effectively placed executive and judicial officers in a position of subordination. The right to Privy Council appeal, however excellent and valuable it may have been in the colonial days, was considered incompatible with the dignity and responsibility of an independent sovereign state.

The central challenge that confronted the JCPC in the age of decolonization was transitioning from its historic task of managing colonial differences to the new mission of managing national differences. In managing and adjudicating colonial differences in the British Empire, the JCPC operated within a framework of imperial, political and normative cohesiveness. Colonial otherness could easily be accommodated and managed against the background of overriding imperial legal and judicial standards, which were cast in universalist terms. The aspiration towards judicial standardization and normative legal cohesiveness effectively legitimized the work of the JCPC, and validated the accommodation of colonial differences.

Within the framework of empire, local assertion of autonomy and difference posed no serious threat to the role of the JCPC in upholding common standards of imperial justice. As the empire disintegrated, however, the political and normative framework for maintaining legal and judicial conformity also fell apart. The notion of universalist imperial justice could no longer provide constraints on the expression of colonial differences. Attempts to reform the JCPC, transitioning it into a Commonwealth Court of Appeal, could not resolve the problems of relevance and legitimacy. A new effort to link the retention of JCPC appeals to the protection of constitutional human rights in the Commonwealth resulted from these debates. Even so, it could not legitimize the ongoing existence of the JCPC. Without the homogenizing power of the empire, the JCPC became increasingly seen as insular and unrepresentative, falling into irrelevance amidst the varied and autonomous judicial systems of the newly independent nations of the Commonwealth.

Notes

1 Judicial Committee Amendment Act 1895 (UK), s 1; Appellate Jurisdiction Act 1908 (UK), s 3; Appellate Jurisdiction Act 1913 (UK), s 3. Colonial judges could also serve as assessors under the Appellate Jurisdiction Act 1908, s 1.
2 Graham Page, Adornment Debate, 29 June 1956, National Archives, London (TNA), CO1026/114/7.
3 J.B. Nihill to K. Roberts-Wray, Confidential Memorandum, 20 May 1955, TNA, CO1026/114/2.
4 Graham Page, Adornment Debate, 29 June 1956 (TNA), CO1026/114/7.
5 Some former British Caribbean colonies and dependencies abolished the right of appeal to the Privy Council in 2001, when nations of the Caribbean Community voted to abolish the right of appeal to the Privy Council in favour of the Caribbean Court of Justice (CCJ). P. Robinson, 'The Monarchy, Republicanism and the Privy Council: The Enduring Cry for Freedom', *The Round Table*, August 2012, 7–8.
6 The abolition of appeals to the Privy Council also came relatively early in India, Burma and Pakistan. India abolished the right of appeal to the Privy Council in 1949, two years after it gained independence, while Pakistan abolished the right of appeal in 1950.
7 Z. Cowen, 'Notes on Constitutional Development in the Commonwealth', *Journal of Comparative Legislation and International Law*, 32, 1954, 73–74.
8 For a history of Ameer Ali's pioneering role on the JCPC, see Muhammad Yusuf Abbasi, *The Political Biography of Syed Ameer Ali*, Lahore: Wajidalis, 1989; Shan Muhammad, *The Right Honourable Syed Ameer Ali: Personality and Achievements*, Delhi: Uppal, 1991. See also the chapter by Nandini Chatterjee in this collection.
9 The Mulla who wrote the leading textbooks on Islamic and Hindu law for colonial India also decided several cases on personal law from British South Asia.
10 D. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986*, Manchester: Manchester University Press, 1987, p. 102.
11 *Statute of Westminster* 1931 (UK); W.S. Livingston, 'Abolition of Appeals from Canadian Courts to the Privy Council', *Harvard Law Review*, 16, 1950, 107–112.
12 *London Joint Stock Bank v MacMillan* [1918] AC 777. For an analysis of this case, see H.H. Marshall, 'The Binding Effect of Decisions of the Judicial Committee of the Privy Council', *International and Comparative Law Quarterly*, 17, 1968, 743–749, p. 744.
13 Kenneth Roberts-Wray, 16 May 1955, TNA, CO1026/114/2.
14 For example, see the *West African Pilot* (2 July 1963), p. 6.
15 South Africa Act 1909 (UK): An Act to Constitute the Union of South Africa, Pretoria, Government Print and Stationery Office, 1910. Sections 104 and 106 provided that appeals would lie to the Supreme Court of the Union of South Africa. Also see Anonymous, 'Decline of the Judicial Committee of the Privy Council. Current Status of Appeals from the British Dominions', *Harvard Law Review*, 60, 1947, 1138–1145, p. 1144.
16 [1921] 121 LTR 104 (JCPC).
17 See note on South African Appeals to the Judicial Committee, *South African Law Times* 2, 1933, pp. 230–231.
18 [1934] AC 570, p. 579.
19 'Official Government Memorandum on the Privy Council Jurisdiction', Privy Council Acts: Imperial Judicial Committee, NASAP, GG 1845 53/592.
20 D. Malan, 19 January 1937, NASAP, GG 1845 53/592.
21 Internal Government Memorandum, Appeals to the Privy Council, Office of the Governor General, NASAP, GG 1845 53/592.
22 Privy Council Acts: Imperial: Judicial Committee, NASAP, GG 1845 53/592.
23 Appeals to the Privy Council, Office of the Governor General, NASAP, GG 1845 53/592.

24 E. Iwi, 'A Plea for an Imperial Council and Judicial Committee', 18 November 1937, NASAP, BLO 88 PS12/2/24.
25 Appeals to the Privy Council, Internal Memorandum, Office of the Governor General, NASAP, GG 1845 53/592.
26 R. Wash, 'The Privy Council Appeal Act 1950', *South African Law Journal*, 67, 1950, 67–77.
27 Marshall, The Judicial Committee of the Privy Council, pp. 705–706.
28 Swinfen, *Imperial Appeal*, p. 12.
29 Ibid., p. 12.
30 K. Roberts-Wray, *Commonwealth and Colonial Law*, London: Stevens, 1966, p. 461.
31 Graham Page, 29 June 1956, TNA, CO1026/114/7.
32 Ibid.
33 A. Lennox-Boyd to Viscount Kilmuir, 24 June 1955, TNA, CO 1026/114/7.
34 K. Roberts-Wray, Confidential Despatch, 4 July 1955, TNA, CO 1026/114/7.
35 Swinfen, *Imperial Appeal*, p. 12; Appeals to the Privy Council from Kenya, TNA, DO161/247.
36 K. Roberts-Wray, Confidential Despatch, 4 July 1955, TNA, CO 1026/114/7.
37 Roberts-Wray, *Commonwealth and Colonial Law*, p. 461.
38 John Whyatt, 21 April 1955, TNA, CO/1026/114/1.
39 Lord Dilhorne, Confidential Memorandum, 23 July 1963, TNA, DO 161/83/23.
40 Roberts-Wray, *Commonwealth and Colonial Law*, p. 461.
41 S. Voigt, M. Ebeling and L. Blume, 'Improving Credibility by Delegating Judicial Competence: The Case of the Judicial Committee of the Privy Council', *Journal of Development Economics*, 82, 2007, 348–373, p. 365.
42 Swinfen, *Imperial Appeal*, p. 22.
43 *The Times* (14 April 1965), p. 6.
44 *Kenyan Independence Act*, s 6 in 'Appeals to Privy Council from Kenya', TNA, DO161/247.
45 Appeals to Privy Council from Nigeria, TNA, DO 161/83.
46 'Kenyan Independence Conference', Confidential Memorandum, TNA, CO 822/3113/14.
47 Ibid., E5.
48 Lord Listowel, quoted in ibid., fol. 1A.
49 Appeals to the Privy Council, Commonwealth Relation Office Memorandum, 18 March 1964, in TNA, DO 161/247.
50 'Kenyan Independence Conference', fol. 5.
51 'Kenya: Appeals to the JCPC. Colonial Office Notes', July 1963, TNA, CO 822/3113/E5.
52 R.M. Tesh, 7 January 1965, TNA, DO 161/247.
53 'Kenyan Independence Conference', fol. 5.
54 *Fatuma binti Mohammed bin Bakhshuwen v Mohammed bin Salim Bakhshuwen*, [1952] AC. 1.
55 G.W. Bartholomew and J.A. Iliffe, 'Decisions: *Fatuma binti Mohammed bin Bakhshuwen v Mohammed bin Salim Bakhshuwen* [1952] A.C. 1', *The International and Comparative Law Quarterly*, 1, 1952, 392–399.
56 For example, in the case of *Talibu bin Mwijaka v Executors of Siwa Haji*, Justice Hamilton stated: 'The Mahommedan law in East Africa has not been subjected to the same modifying influences as in India and remains the same as when the Min Haj was written in the sixth century of the Hejira': *Talibu bin Mwijaka v Executors of Siwa Haji* (1907) EALR 33, p. 33.
57 Bartholomew and Iliffe, 'Decisions', p. 392.
58 Constitution Amendment Act (Kenya) 1965, s. 15.
59 Marshall, 'The Judicial Committee of the Privy Council', p. 709.

Chapter 4

Law, culture and history

Amir Ali's interpretation of Islamic law

Nandini Chatterjee

Introduction

This paper will look at the legal career of Saiyid Amir Ali (older spelling: Syed Ameer Ali) (1849–1928), the first Indian and first Muslim judge on the Judicial Committee of the Privy Council. To South Asianists, Amir Ali is known mainly as a politician and writer. He was a founder member of the All India Muslim League and its London branch, and as such he played a key role in lobbying the British government of India for special constitutional safeguards that would recognise Indian Muslims as a distinct political entity.[1] Thus he has been seen as a separatist leader, or conversely as a contributor to the nationalist movement for Pakistan. More broadly, Amir Ali has been seen as an Islamic modernist and a liberal – albeit one who remained more concerned with salvaging Islam's public image than with genuine restructuring of gender and class relations, or the formation of a truly liberal polity.[2]

In general, historians remain unenthusiastic about this weak-kneed liberal, who also arguably lost touch with India by marrying an Englishwoman and moving to England.[3] In all this, very little attention has hitherto been paid to his legal career – although he was an acknowledged authority on Islamic law, and one of the most eminent Indian judges and legal scholars of his generation. This paper works from the premise that a pioneer non-European judge with well-developed socio-political views on precisely the area of his professional expertise – Islam and Islamic law – deserves more attention as a cultural intermediary, specifically within the field of cultural translations that colonial law provided.

This observation is in line with recent transnational historiography on 'colonial lawyering', incisively surveyed by Mitra Sharafi.[4] In her extended review of recent research on (principally) non-Western lawyers in Mandate Palestine, India, Singapore and the Gold Coast (now Ghana),[5] Sharafi directs attention to the manner in which such legal professionals acted as cultural intermediaries. Cultural mediation, she says, involved inhabiting and exploiting the imperial legal system in order to construct legally recognised cultural truths about the collectives that these lawyers claimed to represent, either through belonging or sympathetic expertise. Pointing to the wide range of cultural and political agendas pursued by