

**The Annual Caroline Weatherill Memorial Lecture**  
**The Judicial Committee of the Privy Council in the 21<sup>st</sup> Century**  
**Isle of Man**  
**11 October 2013**

**Introduction**

1. A prominent constitutional lawyer recently wrote that ‘*nobody starting afresh would design a court that looks like the Judicial Committee of the Privy Council*’.<sup>1</sup> Well, I’m not at all sure that I agree, and, even if I do, I’m not at all sure that it’s an adverse criticism.
  
2. The JCPC has developed on an *ad hoc* basis reacting in a practical and principled way to changing needs and standards. An institution which matures in this way may well appear somewhat strange, but it has the enormous virtue of accommodating change without the need for revolution. In that, the JCPC is of a piece with the common law and the British constitution. The common law has been evolved over the centuries by the judges, and is based, as Oliver Wendell Holmes said, on experience not logic,<sup>2</sup> as compared to a civilian law system, which is based on a grand set of principles. The whole polity of the United Kingdom came about by evolution, through its unwritten constitution

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<sup>1</sup> A. Le Sueur, *What is the future for the Judicial Committee of the Privy Council?* (2001) at 4 <<http://www.ucl.ac.uk/spp/publications/unit-publications/72.pdf>>.

<sup>2</sup> O. Wendell Holmes, Jr, *The Common Law* (1881) at 1.

– a contradiction in terms, some might say, or, as Sam Goldwyn said of an oral contract – not worth the paper it’s written on. Nobody could have invented it from scratch, with its hereditary unelected head of state, its curious mixture of a hereditary and appointed House of Lords, its mixture of devolved powers, and its blend of statutory and common law. And yet it has stood the test of time: unlike almost any other major country in the world, the UK has had no revolutionary change for over 325 years, save perhaps the secession of southern Ireland in 1923.

3. Yet there is always a risk that the consequences of historical development might impede today’s public understanding of, and confidence in, institutions. It was largely for this reason that in 2005 the UK Parliament decided that, to use the words of the great 19th century constitutional thinker, Walter Bagehot, the country’s highest court should no longer be ‘*hidden beneath the robes of the legislative assembly*’ in the House of Lords, but instead should become a ‘*conspicuous tribunal*’; hence the UK Supreme Court, which opened for business in October 2009.<sup>3</sup>

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<sup>3</sup> W. Bagehot, *The English Constitution* (OUP, reprint 2001) at 96.

4. Whilst that change has been well publicised, it is less well known that, aside from an inevitable decrease in the physical extent of its jurisdiction, the JCPC has also undergone significant changes over the past century, including a shift in its premises in 2009. In fact, the modern JCPC increasingly looks very much like any other appellate court. But this modernisation has not involved the loss of the best and most fundamental of its historic characteristics. In fact, someone starting afresh may well design a court like the modern JCPC.
5. Any discussion of the role of the JCPC runs the risk of focussing on the single question of whether or not it should exist as the final appellate court for jurisdictions outside the United Kingdom. That debate is not new: it dominated discussion about the JCPC throughout much of the 19<sup>th</sup> and 20<sup>th</sup> centuries,<sup>4</sup> and explains, at least in part, why the JCPC is probably not the best-understood court. However, as we move further into the 21<sup>st</sup> century, it is important to move on from the single question, and to focus on the functioning of the modern JCPC and the changes that have been made to it.

### **The mystery of the JCPC**

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<sup>4</sup> D. B. Swinfen, *Imperial appeal: the debate on the appeal to the Privy Council, 1833-1986* (Manchester University Press, 1987) at 2.

6. Let me start by making it clear that the 12 judges of the UK Supreme Court, who in practice represent more than 95% of those who sit on the JCPC cases, are very happy to hear appeals from any jurisdiction which chooses to use our services. If a democratic country concludes, normally because of its small size, that it cannot justify having its own final appeal court, then we believe that the possibility of using the JCPC represents a valuable contribution to the rule of law in that country and indeed across the world. Speaking more selfishly, it is not only a compliment to be asked to act as a country's final appeal court, but it is a very enriching experience, both personally and legally, for judges to try cases from jurisdictions other than their own. Having said all that, it is only right to add that, if a country decides that it no longer wishes to use the JCPC, I accept, of course, that that is entirely a matter for that country.

7. An address delivered over 90 years ago provides useful fodder to understand the differences between the JCPC of yesteryear and the JCPC of today. In 1921, Viscount Haldane of Cloan (who was Lord Chancellor between 1912 and 1915, and again in 1924) spoke publicly<sup>5</sup> about the work of the JCPC. He recognised at the outset of

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<sup>5</sup> Viscount Haldane of Cloan, speech to the Cambridge University Law Society, published as *The Work for the Empire of the Judicial Committee of the Privy Council* (1923) 1 Cambridge LJ 143.

his address that those *‘who sit on the Judicial Committee have taken a tremendous oath not to disclose any of the secrets that come to the fore there’*.<sup>6</sup> He insisted that *‘[y]ou cannot learn much about [the JCPC] from documents’*, because *‘[i]ts constitution is mainly unwritten, and its conventions are unwritten’*, and therefore, *‘unless you have lived in it and in the atmosphere, you do not know what happens there’*.<sup>7</sup> Perhaps, in part, this was a rhetorical flourish to capture the attention of his audience. But when one delves deeper, it is fair to say that, apart from the single question debate, at the time of Viscount Haldane’s address, the JCPC was indeed shrouded in secrecy. Quite apart from any concern about open justice, this secrecy is all the more surprising when one recalls that, at that moment, the JCPC was the highest appellate court for around a quarter of the world’s population.<sup>8</sup>

8. Similar perceptions of the mystery of the JCPC are illustrated by remarks made by Mr Stanley Leighton MP in 1900 during a debate on the Commonwealth of Australia Bill in the House of Commons. Mr Leighton complained that:

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<sup>6</sup> Ibid 143.

<sup>7</sup> Ibid 146.

<sup>8</sup> F. Safford & G. Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901, Sweet and Maxwell, London) at vii.

*‘with the exception of some gentleman of the long robe, very few people knew what the [JCPC] was, of whom it was composed, what it did, and where it held its court. [He had] determined ten years ago to make a search and make quite sure that it not only had a name but a local habitation, and he enquired of all his friends ‘Where is the Privy Council?’ and no one knew. He asked judges and the like, and was referred to Whitaker and a little book entitled ‘Things not Generally Known’, from neither of which could he extract the desired information. He then conceived of the idea of starting at the top of Parliament Street and knocking at every door and enquiring if the Privy Council was at home, and in the course of his peregrinations he came to a door at which a policeman was standing who, in answer to his enquiries, directed him up a small back staircase, and upon entering a small room on the second floor he found himself in the presence of the august assembly.’<sup>9</sup>*

9. For most of the 19<sup>th</sup> century and all of the 20<sup>th</sup> century, the JCPC heard appeals in the Council Chamber at 9 Downing Street. As Viscount Haldane described, on arriving at Downing Street, a visitor would:

*‘come to a very dirty door inscribed “Judicial Office”; and he will think, unless he knows better, that this is some minor department of the Treasury, where it collects the fees from the County Court suitors. Do not let him be deterred. It is true that the door is in a very bad condition; I did my best when I was Lord Chancellor to get the Treasury to make it better, but that body always takes the view that the more obscure a door the better it will function in the Empire. Consequently, and very grudgingly, they agreed to give only £200 for the improvement of the doorway; but that was cut off when the war broke out, and the talk of economy began to arise. Well, do not be deterred by that door, but go in. You will not think that it looks like a Court, particularly as you*

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<sup>9</sup> Hansard, House of Commons Debates, 4<sup>th</sup> Ser. LXXXIII, 14 May 1900, 103-4, as cited in Swinfen (1987) at 1.

*will see one or two gloomy-looking officials glancing enquiringly at you. Brush them aside. This is the supreme tribunal of the Empire, and every subject of the King-Emperor is entitled to go in there. You will see on your right a rather dilapidated-looking red-covered stair. Go up it ... all sorts of people may be straying in there, and you will feel yourself in good Imperial company. When you get to the top, go forward till you come to a rather forbidding door, and when you have penetrated that you will find yourself in a really respectable and nice-looking courthouse panelled with oak, with a high ceiling – everything, in short, that a Court should be.’<sup>10</sup>*

10. Yet not everyone shared Viscount Haldane’s positive view of the courtroom in the Downing Street premises. Sir Courtenay Ilbert remarked that, ‘[a]lmost all the laws and customs of the world ... come up for discussion in that dingy, little room’.<sup>11</sup> And in 1929 a journalist described the JCPC premises as ‘a pleasant looking room the size of a largish dining room in a country house and having the same smell of leather, English gentlemen, and old, old dust’.<sup>12</sup>

11. The Council Chamber had in fact been built in 1828 on the site of a former brewery and pub, and had been designed by Sir John Soane, the architect of the Bank of England, whose house in Lincoln’s Inn Fields is a museum which, to use M Michelin’s expression, is *vaut le voyage*. I well remember after I became a Law Lord in 2007, how we

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<sup>10</sup> Haldane (1923) at 143-144.

<sup>11</sup> C. Ilbert in (1909) 9(1) *Journal of the Society of Comparative Legislation* at 23, cited in Sir George Rankin, *The Judicial Committee of the Privy Council* (1939) 7 Cambridge LJ 2 at 11.

<sup>12</sup> Rankin (1939) at 11.

travelled to 9 Downing Street from the House of Lords. The five Law Lords due to sit in the JCPC solemnly gathered in the Parliamentary courtyard, and then climbed into a very old black Austin Princess Limousine to take us the enormous distance of 200 yards. We must have looked like a deputation of senior funeral directors on their way to present a petition to the Prime Minister. Given the traffic in Parliament Square, it would have taken a third of the time to walk, and occasionally we had to do just that, when the ancient Austin temporarily gave up the ghost.

### **The JCPC's new home**

12. Things have been very different since October 2009, with the new home of the JCPC in the renovated Middlesex Guildhall on Parliament Square, facing the Parliamentary courtyard from which we used to set off to Downing Street. When the UK Supreme Court opened for business there in October 2009, the JCPC found its place in the same building, with the same chief executive. It is obviously sensible for the JCPC to be co-located with the UK Supreme Court, given that the two courts share, to a significant extent, the same Justices and administrative functions.



13. Instead of the rather forbidding entrance in Downing Street, visitors come into a welcoming environment. Courtroom 3 is dedicated to JCPC hearings, which is a very pleasant space, with beautifully moulded timber beams, and tall perpendicular style windows bearing armorial stained glass. Occasionally, when a JCPC hearing is expected to draw large numbers, an appeal is heard in Courtroom 1, the largest of the three courtrooms in the Middlesex Guildhall. Such an appeal from the Isle of Man was heard there in 2010.<sup>13</sup> Lord Haldane would be pleased to know that the doors are not dirty. And the courtroom staff are not gloomy-looking: well, at least when I happen to be present. As for ‘*good Imperial company*’, the mix of national visitors and international tourists who drop in on hearings might be enough to satisfy Lord Haldane.

### **A bit more history**

14. Having dealt with the JCPC’s locational history, let me say a word about its jurisdictional history. From the time of the Norman Kings, the Privy Council was the cabinet through which the monarch governed England. Its jurisdiction to resolve legal disputes was based on the premise that ‘*the King is the fountain of all justice throughout*

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<sup>13</sup> *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

*his dominions and exercises jurisdiction in his Council, which acts in an advisory capacity to the Crown*'.<sup>14</sup> The JCPC had its origins in the procedure whereby a party aggrieved by a decision of the Courts of Jersey and Guernsey might petition the King in Council to exercise in his favour the sovereign's royal prerogative as the fountain of justice.

15. With the founding of colonies in the 17<sup>th</sup> century, petitions began to be received from the West Indies asking for the King's grace as a relief from the decisions of local courts. As a result, in 1681, by an Order in Council, certain members of the Privy Council were appointed to form a Standing Committee (the Plantation Committee) to deal with petitions from the plantations as well as hearing appeals from Jersey and Guernsey.

16. As the British Empire developed, so did the jurisdiction of the JCPC. In 1831 a petition for special leave to appeal from a decision of the East India Company came before the Privy Council. The petitioners were '*certain hindoos of Calcutta complaining of a regulation of the*

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<sup>14</sup> F. Safford & G. Wheeler *op cit*, and for those with more curiosity than discrimination, see N. Bentwich, *The Practice of the Privy Council in Judicial Matters ... with the statutes rules and forms of procedure (founded upon Safford and Wheeler's Practice of the Privy Council in Judicial Matters)* (1912, Sweet and Maxwell, London).

*Governor General of India in Council abolishing the practice of Sutte*'. The petition was dismissed.

17. In 1833, Parliament enacted the Judicial Committee Act, which created the JCPC as a formal statutory body, and provided that all appeals which had previously been brought before His Majesty in Council would now be referred by His Majesty to the JCPC. Although the powers of the Committee were limited to making a report or recommendations to His Majesty in Council, Viscount Sankey said that according to constitutional convention it was unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee '*who are thus in truth an appellate court of law*'.<sup>15</sup>

### **Past imperialism and current internationalism**

18. Unsurprisingly the JCPC's past cases reflect the prevailing cultural and political concerns and values, which were very different from current ones. A good example may be found in the *Case of the Army of the Deccan*.<sup>16</sup> In 1817-18, British forces took part in the Pindaree

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<sup>15</sup> *British Coal Corporation v King* [1935] AC 500, 512-3, cited in *Seaga v Harper* [2009] UKPC 26, [2010] 1 WLR 312.

<sup>16</sup> [1833] II Knapp 102, 418.

and Mahratta war, after which, a dispute arose as to the proper distribution of valuable booty which had been captured. At the time, '[n]o proposition of law [was] more notorious than that all booty and prize belongs to the Crown, except in those specific cases in which, by some specific statutory enactment, some particular right has been vested in some particular description of captors'.<sup>17</sup> There was no statute regulating the distribution of the booty from the Deccan, and it therefore rested with the King to decide on the distribution of the booty by virtue of his prerogative.

19. The Lords of the Treasury, as advisers to the Crown in matters of revenue and property, appointed trustees to ascertain and collect the booty and to prepare a scheme, which they did. However, some officers thought they had been short changed and presented memorials to the Privy Council appealing against the distribution scheme. Ultimately, the Committee to the King in Council (as the JCPC was then called) ducked the issue, reporting to the King (at great length) that it would be advisable to refer the memorials back to the Lords of the Treasury, which was the appropriate body to determine the dispute.<sup>18</sup>

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<sup>17</sup> Ibid at 433.

<sup>18</sup> Ibid at 440.

20. That such disputes came before the JCPC might explain why the institution in the 19<sup>th</sup> and early 20<sup>th</sup> centuries had more than a whiff of cultural imperialism about it. In his address, Viscount Haldane described an apocryphal story of the JCPC,<sup>19</sup> said to have been a favourite of 19<sup>th</sup> and early 20<sup>th</sup> century after-dinner speakers addressing legal gatherings. It went something like this:

*‘When crossing India’s Rajputana plateau, a nineteenth-century traveller noticed a group of villagers offering sacrifice to a far-off god, who had restored to them certain lands which had been seized by a predatory rajah. Inquiries about the deity they were worshipping drew the response: ‘We know nothing of him but that he is a good god, and that his name is the Judicial Committee of the Privy Council’.*<sup>20</sup>

21. Such tones of moral paternalism and cultural superiority have no place in the JCPC of the 21<sup>st</sup> century (if ever they did). The JCPC sits not as a ghost of the colonial past, but as the highest appellate court in the jurisdiction from which the appeal in question is being brought. This is well illustrated by an initiative of the recently retired Deputy President of the UK Supreme Court, Lord Hope.

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<sup>19</sup> Haldane (1923) at 153.

<sup>20</sup> P. A. Howell, *The Judicial Committee of the Privy Council 1833-1876* (CUP Cambridge 1979) at 1.

22. In 2008, the JCPC visited Mauritius for the first time – sitting in London has always been merely for practical convenience.<sup>21</sup> When inspecting the courtroom, Lord Hope noticed a large Union Jack behind the judges' table. He directed its removal and replacement with the Flag of Mauritius, and the Mauritian State's Coat of Arms, which was duly done.

23. Following this, it was decided to have the flag of the relevant jurisdiction on the flagpole in the relevant courtroom, visible for all to see during JCPC hearings. So, when we hear an appeal from the Isle of Man, we see the evocative and unmistakable three armoured legs with golden spurs making up the ancient triskelion in the centre of your bright red flag.

24. This is important, because it reminds the judges that they are sitting as the highest appellate court of the jurisdiction to which that flag belongs, applying the laws of that jurisdiction. It sends the same message to the parties and their lawyers, who have often had a long journey to get to London. It is not unknown to see counsel having their picture taken alongside the flag before hearings start. Lady Hale, the new Deputy President of the Supreme Court, reminded me

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<sup>21</sup> *Ibralebbe v The Queen* [1964] AC 900 at 922.

recently of a case we heard concerning alleged professional misconduct of a Jamaican attorney.<sup>22</sup> Counsel noticed the Jamaican flag in the courtroom, and said that, while he was nervous to be appearing in London, the Jamaican flag reminded him that he was at home in the JCPC, and ought to feel so as well.

25. The notion that the JCPC is applying the law of the state in question is not new. Eighty years ago, in *British Coal Corporation v King*,<sup>23</sup> Viscount Sankey said that it was ‘*it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be delivered otherwise than in accordance with the wishes of the part of the Empire primarily affected*’.

26. On occasion, a judge from outside the UK will sit. Earlier this year, the Chief Justice of New Zealand, Dame Sian Elias, sat on what will probably have been the last appeal from New Zealand, as well as on another appeal. She has a special place in the history of the JCPC, as she was the first female judge to sit in it in 2001 – which is before the first female judge, Lady Hale, sat in the House of Lords in 2004.

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<sup>22</sup> *The General Legal Council v Haughton-Cardenas* [2009] UKPC 20.

<sup>23</sup> [1935] AC 500.

27. The JCPC's international quality was expressed in 1923 in a case concerned with the newly created Irish Free State:

*'The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body ... I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law.'*<sup>24</sup>

28. Overall, the legal influence of the JCPC was well described last year by Michael Kirby, a former Justice of the High Court of Australia, in these terms:

*'All of us were originally linked through the imperial court of the British Empire, the [JCPC,] a court of distinguished (mostly) English judges. They offered a little of their time to resolve legal problems in the far-away dominions and colonies. Their integrity, intelligence and efficiency set a very high standard for the performance of judicial duties by judges far from London. Sometimes, their Lordships did not have a full appreciation of the local conditions that made it difficult for them to reflect all of the factors necessary to a lawful and just resolution of the cases. Some critics suggested that they were occasionally unduly protective of British commercial interests in the Empire. For all this, the role of the Privy Council was mainly benign and highly useful.'*<sup>25</sup>

## **The role of the sovereign**

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<sup>24</sup> *Alexander E Hall & Co v Mackenna* [1923] IR 402, 403-4, per Lord Haldane

<sup>25</sup> M. Kirby, Address to the Justices of the Supreme Court of Nigeria (12 June 2012) at 8.



29. Another aspect of the JCPC concerns the role of the sovereign. In his 1921 address, Viscount Haldane described how at the bench there was *'always a chair left vacant, for a very highly constitutional reason – the Sovereign is supposed to come and sit there, and dispense justice to the whole Empire'*, although he noted that he could *'not say that [he] ever observed him do so'*.<sup>26</sup> Nowadays, you will be unsurprised to hear, there is not merely no monarch present, but no vacant chair.

30. Yet it is clear that some regarded there to be a real possibility that the sovereign could refuse to implement a decision of the JCPC. In 1891, Lord Selborne, who was Lord Chancellor between 1872 and 1874, and again from 1880 to 1885, made clear that he did not regard the JCPC as a court, on the basis that *'the Sovereign is the Judge, and the Councillors his advisers. The Appeal is to the Sovereign, not to his Council, or to the Committee'*.<sup>27</sup>

31. This view may well be correct in constitutional theory, but it is rather hypothetical in practice. In the *British Coal* case,<sup>28</sup> the JCPC said that *'it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in*

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<sup>26</sup> Haldane (1923) at 145.

<sup>27</sup> Lord Selborne, *Judicial Procedure in the Privy Council* (London 1891) at 44.

<sup>28</sup> [1935] AC 511.

*truth an appellate Court of law*'. And in *Ibralebbe v The Queen*,<sup>29</sup> the JCPC said that the effect of the 1833 Act was '*that the connection between the [Privy Council and the JCPC] was in future no more than nominal*'. In 2003, the recently retired Lord Walker, delivering the judgment of the JCPC, said that the 1833 Act showed that Parliament '*must be taken to have intended to confer on the Board [as the JCPC often has referred to itself] all the powers necessary for the proper exercise of its appellate jurisdiction*'.<sup>30</sup> Thus, in a very recent British Virgin Islands case, we held that the JCPC had power to extend terms for relief from forfeiture in an order made by Her Majesty.<sup>31</sup>

32. Nonetheless, as I have been reminded today by the President of the Law Society, the role of the monarch is of real importance to many of the jurisdictions, including this one, which the JCPC has the honour to serve. The fact that the JCPC advises, and that it is the monarch who formally makes the decision, is of constitutional and symbolic significance, not least because it emphasises that the ultimate decision is that of the head of the territory concerned, here the Lord of Man. Accordingly, for the majority of the territories which we serve, the JCPC's final rulings are advices, not formal decisions.

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<sup>29</sup> [1964] AC 900.

<sup>30</sup> *Belize Alliance of Conservation Non- Governmental Organisations v Department of the Environment of Belize (Practice Note)* [2003] UKPC 63, [2003] 1 WLR 2839 at [33].

<sup>31</sup> [Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd](#) [2013] UKPC 25 at [17].

33. In some appeals, however, namely from Dominica, Kiribati, Mauritius, and Trinidad and Tobago, the JCPC makes the final orders on appeals without any reference to the sovereign, because those jurisdictions, which are all now republics, appeal directly to the JCPC, rather than to Her Majesty in Council.

34. The JCPC is still faced with the occasional jurisdictional question concerning the role of the sovereign. Last year, the Chief Justice of the Cayman Islands sought to refer two matters to the JCPC for advice pursuant to section 4 of the 1833 Act,<sup>32</sup> namely the extension of a judge's appointment in the Grand Court for the Cayman Islands, and the publication of a judicial complaints procedure. A preliminary issue was whether it was open to the JCPC to decline to rule on issues raised in a petition referred to it by the monarch. We decided that it would be open to the JCPC to advise Her Majesty that it was inappropriate to provide substantive answers to issues she had referred to us. More particularly, we concluded that, if an issue could properly be determined in the courts of first instance in that jurisdiction, with an ultimate right (whether qualified or not) of appeal to the JCPC, it

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<sup>32</sup> *Chief Justice of the Cayman Islands v The Governor and The Judicial and Legal Services Commission* [2012] UKPC 39.

would be normally wrong for the JCPC to act as a court of first and last resort.<sup>33</sup>

### **Single and multiple judgments**

35. Those familiar with recent decisions of the JCPC will not be unaccustomed to seeing the occasional dissent, some mild, and others more strident, in nature. This was not always possible. Until 1966, the opinions of the decisions of the JCPC were expressed in a single judgment. Where there had been dissent, that fact, occasionally with the names of the dissentients, was included in the judgment, but no dissenting judgments were given.

36. In 1938, Sir George Rankin gave a lecture in which he explained:

*‘[I]f in any case the Board is not unanimous, the only advice tendered is that of the majority. His Majesty is not to be troubled with conflicting advice and it is contrary to the duty – and to the oath – of the Privy Councillors that what takes place at the Board should be disclosed, otherwise than in accordance with the practice, [which is] in marked contrast to the individual speeches in the House of Lords where even the judges who agree as to the result of an appeal may vary in their reasons, with the result that the Courts below may get uncertain guidance’.*<sup>34</sup>

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<sup>33</sup> Ibid at [33].

<sup>34</sup> Rankin (1939) at 18-19.

37. This may be seen as implying some sort of inferiority on the part of the courts of the countries served by the JCPC, as against the UK courts,<sup>35</sup> and it led to some pressure for dissenting judgments to be permitted. It was from Australia that real agitation emerged in relation to the single judgment issue, and the pressure eventually became too much. So, in 1966, the Judicial Committee (Dissenting Opinions) Order was issued, since which time the expressing of dissenting opinions has been permissible, and, where appropriate, is now commonplace.

38. The logic of this is there should also be the possibility of reasoned concurring judgments as well, and, albeit more recently, there have been cases where there have been such judgments. I think the earliest example is a Mauritian case in 2008,<sup>36</sup> where Lord Scott and Lord Mance gave one judgment allowing an appeal, Lord Walker and Lord Rodger gave another, and I agreed with both.

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<sup>35</sup> Swinfen (1987) at 222.

<sup>36</sup> *The Raphael Fishing Company Ltd v The State of Mauritius* [2008] UKPC 43.

## The JCPC and the Isle of Man

39. I now turn to the relationship between the JCPC and the Isle of Man.

In a 1716 case,<sup>37</sup> the Privy Council asserted the right of the Crown to hear appeals from the courts of the Isle of Man. In approving this decision, the great work on the Isle of Man and the JCPC by Safford and Wheeler states that it:

*‘points to the conclusion that the Sovereign’s right to hear appeals exercised by the Sovereign in Council is of feudal origin, and confirms the view that the appeal to the Sovereign owes its origin and may be traced back to the appeal to the Duke of Normandy’.*<sup>38</sup>

40. The issues raised by appeals heard in the JCPC from the Isle of Man have been varied, ranging from the issue as to whether the Crown is entitled to the clay and sand in the customary estates of inheritance in the Isle of Man (it was held that it was not)<sup>39</sup>; to whether the long standing rule that pre-nuptial agreements are contrary to public policy and thus not valid and binding in the contractual sense could be reversed by the JCPC (which it could not, because it was more appropriate that any such policy change should be made by legislation rather than by judicial development).<sup>40</sup>

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<sup>37</sup> *Christian v Coren* (1716) 1 P. Williams 329.

<sup>38</sup> Safford & Wheeler (1901) at 257-258.

<sup>39</sup> *Her Majesty’s Attorney-General for the Isle of Man v Thomas Mylchreest* [1879] HL vol. IV at 294.

<sup>40</sup> *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298.

41. One case heard in the JCPC in 1872 must have caused quite a stir among the Isle's inhabitants.<sup>41</sup> A Bill had been introduced into the House of Keys, which, if passed, would have vested additional ecclesiastical patronage in the Bishop of Sodor and Man. At a public meeting, which the law report describes as having been '*of a somewhat excited character*', against the Bill, Alfred Laughton, a Manx barrister, spoke so effectively that he was retained as counsel to oppose the Bill. In addressing the House of Keys, he did not hold back, describing the Bishop '*under the cloak of anxiety for the public welfare and cure of souls, in reality [seeking] only increased patronage for himself, [and] attempt[ing] "to take by violence the property of his neighbour"*'. Mr Laughton ended by saying that the Bishop '*came here in 1854, and has ..., by act after act, till the whole Island has echoed and re-echoed with cries of 'shame!' brought a foul stain and scandal upon the Church*'.

42. The House of Keys duly threw out the Bill. On Whit Thursday 1868, the Bishop read a charge to his Clergy and sent a copy of the charge to the editor of the *Manx Sun* newspaper. In it, he described Mr Laughton '*as employing arguments and language not ordinarily used*

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<sup>41</sup> *Laughton v The Honourable and Right Reverend The Lord Bishop of Sodor and Man* (1872) LR 4 PC 495.

*by any man of high professional repute when pleading before a common jury or a Parish vestry; ... of being a wicked man; of making calumnious assertions; and of being guilty of the sin of bearing false witness against his neighbour'.*

43. Depending on your viewpoint, Mr Laughton couldn't be expected to stand by idly, or he was not prepared to get as good as he had given. He brought an action for libel against the Bishop. The Deemster directed the jury that, as the alleged libel was uttered on a privileged occasion, the claim could only succeed if there was express malice on the part of the Bishop. The jury must have concluded that there was such malice, and awarded Mr Laughton £400 damages. The Staff of Government Division set aside the verdict, on the ground that there was no evidence of express malice. The JCPC agreed, holding that, while some expressions used by the Bishop '*undoubtedly [went] beyond what was necessary for self-defence*', they did not amount to evidence of malice for a jury.

44. Appeals which have reached the JCPC from the Isle of Man in recent years often involve international commercial issues, demonstrating the increasing worldwide prominence of the Isle of Man in the field of business, and the value which is added to its legal system through



retaining the JCPC as its highest appellate court. Let me give a few very brief examples over the past ten years to make that claim good.

45. The decision in the *Barlow Clowes* case<sup>42</sup> importantly put the common law back on track on the important issue of dishonesty which an earlier decision of the House of Lords had thrown into confusion. In the *Cambridge Gas* case,<sup>43</sup> the JCPC held that rules of private international law concerning the recognition and enforcement of foreign judgments did not apply to the US bankruptcy proceedings, and that the underlying common law principle that fairness as between creditors required bankruptcy proceedings to have universal application, meant that the court would recognise the person who was empowered under the foreign bankruptcy law to act on behalf of the insolvent company. This case has subsequently been doubted by the Supreme Court.<sup>44</sup> *Pattni v Ali*<sup>45</sup> is an important decision on the effect of submitting to the jurisdiction of a particular court (the Kenyan courts in that case) in the context of an international commercial contract. *Altimo Holdings v Kyrgyz Mobil Tel Ltd*<sup>46</sup> represents

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<sup>42</sup> *Barlow Clowes International and others v Eurotrust International* [2005] UKPC 37, [2006] 1 WLR 1476.

<sup>43</sup> *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

<sup>44</sup> *Rubin v Eurofinance SA* [2012] UKSC 36, [2013] 1 AC 236.

<sup>45</sup> [2007] 2 AC 85.

<sup>46</sup> *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804.

something of a landmark decision on the issue of when and whether a party can establish that it should be entitled to have its case heard in an otherwise inappropriate court on the ground that the more natural court would not give it a fair hearing. A Manx company engaged in litigation with a Kyrgyz company and Russian companies submitted that it would not be able to obtain justice from the courts of Kyrgyzstan, and that the Manx court should therefore exercise its discretion in favour of service out. The Manx court obliged, and when the case came before the JCPC, it agreed with the decision.

## **Conclusion**

46. In his 1923 address, Viscount Haldane said that *‘the real work of the [JCPC] is that of assisting in holding the Empire together ... [I]t is a disappearing body, but ... it will be a long time before it will disappear altogether’*.<sup>47</sup> As, I hope, I have demonstrated, the work of the modern JCPC has nothing to do with any imperial aim. It is an appellate court which serves to support and develop the rule of law. While the JCPC’s reach is far less than it was at the height of the Empire, in many ways, it has strengthened itself over the past century, through modernising its functions, so that today it is a fully-fledged appellate court, with a unique international character. In that respect,

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<sup>47</sup> Haldane (1923) at 154.

whilst some of the functions of the JCPC have disappeared, others have taken their place.

47. We try also to be forward looking, and to make it clear by actions as well as words that we are genuinely anxious to support the rule of law and the role of the courts in the jurisdictions which we serve. In a valuable talk given to a conference on the JCPC arranged by UCL last year, the First Deemster identified six improvements which he would like to see.

48. First, the recruitment of more senior judges from countries with the JCPC as their court of final appeal. This is obviously highly desirable, and has always occurred. Sir Shadi Lal, after serving as Chief Justice of Lahore for fourteen years, was a JCPC member between 1934 and 1938, and his portrait hangs outside Courtroom 3. And, as already mentioned in relation to Dame Sian Elias, this still happens. But to sit on the JCPC, a judge must be a Privy Counsellor. Through our Chief Executive, Jenny Rowe, we are seeing what can be done.

49. Secondly, Deemster Doyle suggested reducing the number of judges from five to three in smaller cases to deal with the workload. That solution appeals to me, but many of the judges we have consulted feel

that an appeal from three judges should be considered by five judges. The third suggestion was more sittings of the JCPC in the jurisdiction from which the appeal originates. Sitting in the relevant jurisdiction is a very attractive idea and we would be happy, indeed keen, to do this. The JCPC has sat more than once in the Bahamas and in Mauritius. I would be very happy to arrange a sitting in the Isle of Man, if the money and logistics permit.

50. Deemster Doyle's fourth suggestion was more visits by the members of the JCPC to those jurisdictions. Visits do occur, as today shows, and I agree that they are desirable, but Supreme Court Justices cannot spend too much time away from work. The fifth suggestion was for there to be live internet coverage of all proceedings before the JCPC. This already occurs in some cases, but at the moment we only cover one hearing at any one time. Some JCPC hearings are covered live, but the UK Supreme Court inevitably has the lion's share of the coverage. However, a JCPC judgment of general significance should be formally handed down, and such a handing down is broadcast. Finally, there is the suggestion of media summaries of JCPC decisions. We now do this for any JCPC appeals of significance. I question the value of media summaries for small appeals which raise no point of general principle.

51. I am of course open to any other suggestions for improvement, particularly from the judiciary of the jurisdictions which we serve. And I hope the next time you happen to be in London, you visit the JCPC to see it in action for yourself, without having the ordeal of entering through that old very dirty door inscribed "Judicial Office".

52. Thank you.

DAVID NEUBERGER