

# THE JUDICIAL COMMITTEE AS CONSTITUTIONAL COURT FOR THE BRITISH EMPIRE 1833-1971\*

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## I. INTRODUCTION

Little attention has been paid to the role, or even the existence, of judicial or semijudicial institutions as agencies of imperial control in the literature on imperialism. Nor has much attention been given to the long-range effects of judicial decisions by imperial courts. Yet, at least for the British Empire, these decisions seem to have been one of the more important means of keeping the empire intact. The Privy Council's exercise of the semijudicial power of disallowing colonial statutes is an important aspect of imperial control; another aspect lies in the appellate jurisdiction of the Judicial Committee of the Privy Council. The purpose of this article is to provide the beginning of an evaluation of the Judicial Committee's performance in this role through a survey of some of the major cases which it decided.

The Judicial Committee was created in 1833 as the statutory successor to a series of earlier imperial courts which had existed as adjuncts to the Privy Council under royal ukase. It was composed of English (and later some colonial) high court judges who were members of the Privy Council, and it could, subject to statutory regulation, review on appeal any case from any colony. As the colonies gained a greater degree of self-government during the nineteenth century, the scope of the Committee's jurisdiction narrowed. As the colonies became Commonwealth nations, it disappeared altogether for many of them. The Committee still exists, but the number and variety of cases it hears has declined drastically, as have the number of colonial or Commonwealth units which still permit appeal to it.<sup>1</sup>

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\* The organization, personnel, and modes of operation of the Judicial Committee are surveyed in my article, "The Judicial Committee: its Development, Organization and Procedure," 1975 *PUB. L.* 219. Its impact on local constitutional development is surveyed in my article "The Judicial Committee and the Development of Judicial Review," 24 *AM. J. COMP. L.* 22 (1976). I wish to acknowledge gratefully the generosity of the National Endowment for the Humanities, which provided a grant for the research upon which these articles are based.

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<sup>1</sup> There is no adequate existing history of the Judicial Committee or its predecessor agen-

## II. FEDERATED SYSTEMS

The creation of the Judicial Committee in 1833 coincided with a rapid development of the institutions of self-government in the British colonies which remained after the defection of the United States or which were acquired shortly thereafter. These, sometimes called the "old" colonies, consisted primarily of Canada, the West Indian islands, New Zealand, Australia, India, Burma and Ceylon. The Committee was confronted therefore with many of the same problems its predecessor had faced with regard to the thirteen colonies. These problems were so successfully handled that the Empire remained intact for another century, and all the "old" colonies except Burma kept their Commonwealth ties for considerable periods even after gaining full independence. Apparently because London had sufficiently learned the lessons of the eighteenth century, no further full scale wars of independence were needed in the 1930's and 1940's when the "old" colonies secured independence. Independence for the four English-speaking areas was obtained through a civil method—the mere passage of an act of Parliament, like the Statute of Westminster in 1932—whenever enough pressure accumulated in the colonies to convince the home authorities that it would be wise to grant independence. Unrest and violence occurred on the Indian subcontinent, but even there it did not develop into war. When independence finally came to the area, the major problem was not whether to grant independence but rather how the vast area involved should be organized; that is, how many national units should be created. The separate independence of Burma and Ceylon was no doubt a foregone conclusion, but the separation of Pakistan (physically divided into two quite different areas) from the rest of India was not.

The performance of the Judicial Committee was so effective that the English-speaking colonies, with the exception of the Irish Free State, chose to retain appeal to the Committee considerably longer than was legally necessary. While Canada eventually abolished the right of appeal in 1949, New Zealand, Australia (in part), and most

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cies. The best work concentrates on the period before 1833 and on the American colonies. See F. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* (1950). There is also valuable material for the post-1833 period in W. F. FINLASON, *THE HISTORY, CONSTITUTION, AND CHARACTER OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL* (1878), and in FITZROY, *THE HISTORY OF THE PRIVY COUNCIL* (1928). I have surveyed the institutional development of the Committee in "The Judicial Committee: its Development, Organisation and Procedure," 1975 *PUB. L.* 219.

of the West Indies retain it even today.

From 1833 to 1950 the bulk of the cases heard by the Committee came from the old colonies—most of them from the Indian subcontinent, Canada and Australia respectively. The number of cases from India and Canada was substantial, certainly enough to form an important part of their developing jurisprudence. The same was true of Australia until 1901 when the present constitution was adopted. Thereafter the number of cases decreased rapidly and such cases as were heard are not a very large part of Australian law, with the exception of infrequent constitutional issues. Generally, the Committee's influence on development in New Zealand and the West Indies was not as great as in Australia. The only apparent reasons for this difference are those of the size of the territory and variety of their populations.

Some numerical data may be at least partially revealing, although difficulties of classification prevent complete accuracy. The following table nevertheless is somewhat instructive.

| <u>Classification of cases</u>          | <u>Canada</u><br>(appeal ended<br>ca. 1950) | <u>Australia</u><br>(through 1971) |
|---|---|------------------------------------|
| Business law                            | 194   | 125                                |
| Constitutional law                      | 157   | 45                                 |
| Tax law                                 | 61  | 74                                 |
| Land & water law                        | 56  | 55                                 |
| Family law                              | 54  | 45                                 |
| Public law                              | 46  | 66                                 |
| Negligence                              | 31  | 11                                 |
| Jurisdictional & other<br>legal matters | 61  | 42                                 |
| Other                                   | 81  | 44                                 |
| TOTAL                                   | <u>741</u>                                  | <u>507</u>                         |

As in the United States, much of the basic law of both Canada and Australia is state or provincial law. It will not be surprising, then, that most of the cases came either directly from the highest courts of the states or provinces, or indirectly from them through the Canadian Supreme Court or the Australian High Court. This fact serves to emphasize the fundamental character of the Privy Council's influence on legal development, since in such decisions the Judicial Committee was directly influencing the most basic areas of the legal system.

In attempting even briefly to analyze these figures certain factors are striking. One is the strong, but not surprising, emphasis on questions concerning business and property. The figures tend to understate the commercial questions, for many tax, land, negligence, constitutional and "other" cases involved these same interests. The old idea of the existence of a strictly *laissez-faire* economic system even in England has long been eroded, and these data indicate that the same is true for Canada and Australia. Private enterprise has always depended heavily on a supportive framework of favorable law. The table does not indicate how many of the decisions were favorable to private property interests or, even in total, what the net effect was on the developing economic systems of two initially primitive countries which had rich natural resources available for development. The common law system was favorable to private property rights and its adoption in both countries made the development of economic systems somewhat parallel to that of the British Isles inevitable. The effect of the Judicial Committee's decisions was to foster and maintain this parallelism.

A favorite criticism of Canadian writers has been that the Committee's decisions were pro-provincial rights. However, investigation of the constitutional cases makes plausible an alternative thesis that the decisions were pro-*laissez-faire*; that is, that they expressed the judges' economic convictions rather than their attitudes toward the nature of Canadian federalism. This tendency, if it existed at all, would inevitably have been modified by the same judges' forced (and yet real) attachment to the idea of parliamentary supremacy, which made it difficult for them to use constitutional provisions to prevent governmental regulation of business. Therefore they could not have, even if they so desired, emulated the Supreme Court of the United States in its pre-1937 *laissez-faire* stage.

A few cases will illustrate these points. Perhaps the closest the judges ever came to admitting the use of economic theory to support constitutional doctrine appears in Lord Haldane's judgment in *In re Board of Commerce Act*,<sup>2</sup> holding the Canadian antitrust laws of 1919 unconstitutional. He held that the laws interfered seriously with property and civil rights which were constitutionally under the protection of the provincial governments. He further held that there was no emergency which would justify exceptional measures; and that the imposition of criminal penalties on those who formed trusts

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<sup>2</sup> [1922] 1 A.C. 191 (P.C.) (Can.).

was unconstitutional, since antitrust laws were not within "the domain of criminal jurisprudence."<sup>3</sup> He concluded: "[T]heir Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitutional act. . . ."<sup>4</sup>

It would have been as easy to rationalize a decision holding that the laws did not infringe on property and civil rights and that (as the judges found in several other cases) the standard as to what is criminal is what the Parliament sees fit to *make* criminal.<sup>5</sup> Lord Haldane reverted to the same theme in 1925 when he stated that Parliament cannot make something constitutional by treating it as criminal unless it is criminal by its very nature. He did not explain how one determines what is criminal by its very nature and the doctrine was apparently dropped soon after his death.<sup>6</sup>

Judicial rhetoric in such cases, especially in English practice, is perforce confined to the constitutional text. Since the constitution embodies a scheme of federalism, not an economic theory, it is the judges' theories of federalism which have gained attention. It is difficult to "prove" judicial motivations, particularly in Britain where judges are not supposed to have policy preferences and where secrecy among judges is common. Decisions, at least until the last few decades, were expected to flow automatically out of the legal text with the judge acting merely as a neutral mouthpiece. But the pattern of decisions in Canadian cases, especially the Committee's reaction to the "Canadian New Deal" during the great depression of the 1930's, was too much like the American experience to escape notice, particularly since the Canadian constitution differs substantially from that of the United States.

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<sup>3</sup> *Id.* at 199. This was true even though the national government controls criminal law.

<sup>4</sup> *Id.* at 201.

<sup>5</sup> Indeed, in 1937 a differently constituted Committee upheld a fair trade practices law despite the fact that it, too, used criminal penalties. Lord Atkin swept aside Haldane's fear of adding to the "domain of criminal jurisprudence" by almost saying that *anything* could be made criminal: he refused to look at the motives of Parliament, merely saying that there was "no reason for supposing that the Dominions are using the criminal law as a pretence or pretext," for invading the Provincial legislative field. *Attorney-General for Brit. Colum. v. Attorney-General for Can.* [1937] A.C. 368, 376 (P.C.). Similarly, the Committee found warrant for upholding federal pilotage laws even though they trench upon property and civil rights. *Paquet v. Corporation of Pilots*, [1920] A.C. 1029 (Can.). See also *Priority Articles Trade Ass'n v. Attorney-General for Can.*, [1931] A.C. 310 (P.C.) (a later antitrust law upheld).

<sup>6</sup> See note 4. See also, as another instance of Haldane's attitude, *Attorney-General for Ont. v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.) (insurance regulation).

CANADA  
 CONSTITUTIONAL DECISIONS ON FEDERALISM AND  
 LAISSEZ-FAIRE  
 1875 to 1954

|   | 1875-<br>1912 | 1913-<br>1932 | 1933-<br>1954 | Total |
|---|---------------|---------------|---------------|-------|
| Pro-provincial-rights,<br>pro-laissez-faire:  | 4             | 7             | 4             | 15    |
| Anti-provincial-rights,<br>pro-laissez-faire: | 9             | 11            | 8             | 28    |
| Pro-provincial-rights,<br>anti-laissez-faire: | 5             | 9             | 8             | 22    |
| Anti-both:                                    | 6             | 7             | 5             | 18    |
| Total   | 24            | 34            | 25            | 83    |

Total pro-provincial-rights: 37

Total pro-laissez-faire: 43

Can any light be shed on the question of judicial motivation by looking at the political affiliations of the judges? The Judicial Committee members sitting in the antitrust case, *In re Board of Commerce Act*,<sup>7</sup> were Lords Haldane, Buckmaster, Cave, Phillimore and Carson. Haldane does not seem to have been especially conservative; he was a Liberal Member of Parliament (MP) for 25 years, and was considered liberal enough to serve as Lord Chancellor in the short-lived Labour Government of 1924. Buckmaster, another Liberal and former Lord Chancellor, was disliked by the Conservative Dunedin apparently because of his liberal political views. Phillimore had no public political record. Lord Cave served as a Unionist MP, a Cabinet member during the First World War, and Lord Chancellor in the Conservative governments of 1922-1924 and 1924-1927. Lord Carson was most famous as the leader of the Ulster Unionists, but he was also an English Solicitor General in the Conservative Government from 1896 to 1905, and a Cabinet member during World War I. It is difficult to detect a pattern in these scattered bits of information, although additional research would proba-

<sup>7</sup> 1 A.C. 191 (P.C.) (Can.).

bly reveal more. In any case, English political attitudes<sup>8</sup> often concern controversies which are very different from those in any of the dependencies, and thus the English politics of the judges provide only tantalizing clues as to how they would view Canadian problems.

The Judicial Committee also showed a tendency to become mired in fruitless controversies on constitutional issues, reminiscent of the United States Supreme Court attempts to draw a line between direct and indirect effects on interstate commerce. In Canada this took the form of the so-called "pith-and-substance" rule. An example of the rule is provided by Alberta's attempt to help the mortgage-ridden farmers during the depression. The Judicial Committee held that the province's Debt Adjustment Act of 1937 was unconstitutional because it was "in pith and substance" in relation to insolvency, a matter which is constitutionally under the control of the national government under the bankruptcy clause.<sup>9</sup> However, a prior case had upheld an Ontario law concerning assignments and preferences by insolvent persons, using the argument that it was "merely ancillary" to bankruptcy law, not in relation to it.<sup>10</sup> It is difficult to see the difference in the two cases. In effect the Judicial Committee seems to have constructed two distinct sets of precedents which could be used as preferred, a situation in which it could, if it wished, use economic doctrine to sway the decision.

The two most obvious areas of private law in which the Privy Council decisions have had profound impact on local law have been those of inheritance law and negligence. The 37 succession and 31 negligence cases from Canada (42 and 11 respectively from Australia) by their numbers alone seem to indicate that the Committee deeply influenced legal development in these areas. Perhaps of more importance is the fact that these were basically common law areas, in which court decisions *were* the law.<sup>11</sup> The importance of judicial

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<sup>8</sup> Hughes, a rather biased Irish observer, has claimed very specifically that the Judicial Committee is "the representative of either large vested interests or monied interests, particularly in England." This has worked against "the litigant who is either a Dominion person or a poor person or firm." He further charges that the British government (especially Austen Chamberlain) regarded the right of appeal to the Committee as a safeguard for British investors. H. HUGHES, *NATIONAL SOVEREIGNTY AND JUDICIAL AUTONOMY IN THE BRITISH COMMONWEALTH OF NATIONS* 99 (1931).

<sup>9</sup> Attorney-General for Alberta v. Attorney-General for Can., [1943] A.C. 356 (P.C.).

<sup>10</sup> Attorney-General for Ont. v. Attorney-General for Can., [1894] A.C. 189 (P.C.).

<sup>11</sup> Lederman, *The Common Law System in Canada*, in *CANADIAN JURISPRUDENCE* 34 (E. McWhinney ed. 1958); and Bawker, *Succession to Property in the Common Law Provinces*, *CANADIAN JURISPRUDENCE* 260 (E. McWhinney ed. 1958).

interpretation of the law was not as fundamental in areas where only the meaning of statutory law was at issue. Due to the economic importance of taxes, an area dependent on statutory law, there were many cases concerning them (61 from Canada and 74 from Australia).

Another means of gauging the influence of the Judicial Committee is to determine the number and proportion of reversals and affirmances of lower court decisions. A reversal signifies some degree of disagreement over the meaning or application of law, and the hierarchical character of the judicial system means that the lower courts must accept the Committee's decisions unless they are changed legislatively. While some cases are difficult to classify, the figures are accurate enough to indicate that the Committee had a very significant impact.

AFFIRMATIVE/REVERSAL  
(1829 to 1971)

|                     |      |      |
|---------------------|------|------|
| Canada:             | 390  | 312  |
| Australia:          | 278  | 212  |
| India-Burma-Ceylon: | 1472 | 1068 |
| West Indies:        | 83   | 107  |
| New Zealand:        | 65   | 42   |

The reversal rate is far higher than one would have expected. It has not only been high for all of the countries studied, but has remained high in all periods. Nevertheless, there is a degree of periodicity: for Australia, reversals ran as high as 50% for the period 1901-1920; for New Zealand, for the period 1898 to 1904; for India, for the period 1836 to 1871; for Canada, close to 50% for the period 1901 to 1920; and for the West Indies, well over 50% from 1829 to 1905. These periods do overlap to some degree, which makes it probable that the composition of the Judicial Committee, particularly in the years just after the turn of the century, may have had something to do with the rate of reversals. In any case, one can assume that reversals force legal development in directions desired by the Committee rather than by the jurisdiction from which the cases came.

In order to assess the significance of these figures precisely, the reversal rates for different types of cases from Canada and Australia have been checked.



|                     | Canada  |         | Australia |         |
|---------------------|---------|---------|-----------|---------|
|                     | Affirm. | Revers. | Affirm.   | Revers. |
| Constitutional Law: | 99      | 54      | 25        | 12      |
| Public Law:         | 32      | 19      | 44        | 22      |
| Legal practice:     | 24      | 21      | 12        | 17      |
| Private Law:        | 235     | 218     | 197       | 161     |

While the reversal rate is surprisingly high in each category, it is lower in the two areas of constitutional and public law, in which one would expect British courts to defer to the judgment of legislatures, and it is highest for those in which the Committee exercises a supervisory function over the lower courts. Perhaps the most significant "finding" is that the rate runs close to 50% in private law cases. Those cases allow the Committee to exert maximum impact on the development of social and economic institutions; a position of which it has apparently taken full advantage.

Still another possible measure of Judicial Committee influence lies in the number of provincial or national laws or other governmental acts found to be constitutionally invalid. Many such cases are in fact affirmances of lower court decisions, but nevertheless they stand as means by which the Committee can negate, with partial success, policy deliberately adopted by a commonwealth legislature or executive. Since the adoption of such laws often expresses the legislative judgment of what the constitution means, court decisions invalidating them force constitutional growth in directions not desired by the contemporary legislatures. Of course, one must keep in mind that often federal system cases involve one or several states actually in conflict with the national legislature or with other states, so that the Judicial Committee decisions in such cases seldom (if ever) represent a reversal of a unanimously accepted policy; rather, they constitute a choice between two or more policies desired by differing local constituencies.

The number of times the Judicial Committee has invalidated laws or other acts is of interest, and the figures do not show any hesitation on the part of the Committee to take such action. For Canada, 47 state acts and 16 federal acts were found unconstitutional from 1867 to 1954. For Australia, keeping in mind the restricted access to the Privy Council, five state and four federal acts have been invalidated since the present constitution was adopted in 1901. The total number of constitutional cases is 153 and 37 respectively, so the proportions are quite high, much higher than in the United States. Thus tabular data indicate that the Judicial Com-

mittee has played an enormously significant role in constitutional development in Canada and Australia.

### III. UNITARY SYSTEMS

The Privy Council has played no such role in constitutional development, in contrast to legal development in India, the West Indies, or New Zealand, as it has in Canada and Australia. This is not due to the lack of written constitutional documents, but to the unitary systems of government present in each of the West Indian countries, New Zealand, Ceylon, and pre-independence India, Pakistan and Burma. While there have been occasional constitutional cases from these areas, they are neither numerous nor significant.

#### A. *West Indies*

Such insignificance in the constitutional area for the West Indies is compounded by the fact that there were many autonomous jurisdictions. Since 1833 there have been no more than three constitutional cases from any single jurisdiction. The bulk of the cases arose before their governments assumed their modern shape. Thus, an 1841 case denying the Governor of St. Lucia the power to appoint temporary judges has no modern force.<sup>12</sup> Nor does another denying the Governor of Barbice power to act outside the authority of his commission.<sup>13</sup> In Grenada the legislative assembly was denied the power of removing the Chief Justice;<sup>14</sup> the London agent for British Honduras could not be paid because the colonial government had not observed the proper constitutional forms;<sup>15</sup> and, in a decision with perhaps wider repercussions, the legislature of Dominica had no power to punish for contempt analogous to the power of the House of Commons unless that power had been given to it expressly.<sup>16</sup> This case was decided despite an earlier holding that the Jamaican legislature did have such power.<sup>17</sup> Another Jamaican case emphasized the limitations on the power of governors, holding that a governor is not a Viceroy and does not possess general sovereign power beyond the express or implied terms of his commission.<sup>18</sup>

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<sup>12</sup> *Gahan v. Lafitte*, 13 Eng. Rep. 155 (P.C. 1841-1842) (St. Lucia).

<sup>13</sup> *Cameron v. Kyte*, 12 Eng. Rep. 678 (P.C. 1835) (Barbice).

<sup>14</sup> *Grenada v. Sanderson*, 13 Eng. Rep. 596 (P.C. 1847).

<sup>15</sup> *Hodge v. Attorney-General for Brit. Hond.*, 15 Eng. Rep. 924 (P.C. 1864).

<sup>16</sup> *Doyle v. Falconer*, [1865-1867] L.R. 1 P.C. 328 (Dominica).

<sup>17</sup> *Beaumont v. Barrett*, 12 Eng. Rep. 733 (P.C. 1836) (Jamaica).

<sup>18</sup> *Musgrove v. Pulido* [1879-1880] 5 A.C. (P.C.) (Jamaica).

Such decisions were important because they demonstrated the way in which the Judicial Committee would use its power, and also because they "fleshed out" the constitution as it then existed, even if they now have only historical significance.

There have been several recent cases from the West Indies. Flying in the face of American decisions, the Committee recently held in *King v. The Queen*,<sup>19</sup> that after an illegal search and seizure under the Jamaica constitution, the evidence so obtained may still be admissible in court at the discretion of the judge, since it was not "a case in which evidence has been obtained by conduct of which the Crown ought not to take advantage."<sup>20</sup> This is surely a cryptic statement of a somewhat doubtful doctrine, and perhaps illustrative of the defects of using a common law court to decide constitutional issues.

An appeal from Trinidad and Tobago raised the question of whether acting Supreme Court judges could constitutionally act as judges of the Court of Criminal Appeals. The Privy Council decided to allow such action.<sup>21</sup> Another case reminiscent of American constitutional issues arose where unions were challenging the constitutionality of the Industrial Stabilization Act of 1965, which had imposed compulsory arbitration and prohibited strikes in violation of the act.<sup>22</sup> The union claimed that the law violated the constitutional freedom of association, sanctioned illegal right of entry, and allowed unfair trials based on secret information. The Judicial Committee pointed out that the act did not interfere with the freedom to associate, a freedom which could not be equated with the freedom to bargain collectively and to strike; that the law as to right of entry had been amended; and that there was no general constitutional principle prohibiting the use of secret information in trials. Lord Donovan concluded that "any alleged wrongful exercise" of the power to admit secret information could itself be tested on appeal.<sup>23</sup> This was perhaps the most important modern case from the West Indies involving a constitutional issue.

The modern West Indian cases, though not numerous, reflect important constitutional issues. But as pointed out elsewhere, when the Judicial Committee decides such cases against the local govern-

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<sup>19</sup> [1969] 1 A.C. 304 (P.C.) (Jamaica).

<sup>20</sup> *Id.* at 319.

<sup>21</sup> *Butler v. The King*, [1939] A.C. 484 (P.C.) (Trinidad and Tobago).

<sup>22</sup> *Collymore v. Attorney-General*, [1970] A.C. 538 (P.C.) (Trinidad and Tobago).

<sup>23</sup> *Id.* at 551.

ment, it is almost inviting that government to withdraw the review power from the Committee.

### B. *New Zealand*

The Privy Council also contributed little to the development of the New Zealand Constitution, although the cases are more recent and seem to involve more significant questions. One case held that the Governor can appoint Supreme Court judges only when an ascertainable salary is payable by law at the time of appointment; this was apparently on the assumption that unless the legislature had made such provisions, the position did not really exist.<sup>24</sup> When the legislature authorized judicial proceedings on persons absent from New Zealand, the Committee upheld the act.<sup>25</sup> Later the Committee held that the New Zealand Constitution inherits the British constitutional principle that public moneys cannot officially be spent without a "distinct authorization" from the New Zealand Parliament.<sup>26</sup>

A more recent New Zealand case *Tukino v. Aotea District Maori Land Board*,<sup>27</sup> is also of some importance. Here the Judicial Committee upheld a law changing the status of Maori lands which were protected by treaty. The Committee held that the courts are bound by such law, and cannot go behind its terms to find out why it was enacted. Further, it was held that courts cannot enforce treaty rights, since treaties are not law (or at least, if law, they are subordinate to statutes). Despite the treaty, the New Zealand legislature had the same power to change native land law as the British Parliament would have had.<sup>28</sup> This is legislative supremacy with a vengeance, perhaps inevitable in a system where the executive can conclude treaties without legislative assent. Any other decision would enable the executive to become supreme by concluding treaties on domestic subjects which would then be untouchable by legislation.

But probably the most significant influence from England is not specifically attached to Privy Council decisions directly applicable to New Zealand. It rests instead on the doctrine, apparently followed rigidly, that *all* Privy Council decisions (even those from other jurisdictions) must be followed in New Zealand; further, that

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<sup>24</sup> *Buckley v. Edwards*, [1892] A.C. 387 (P.C.) (N. Z.).

<sup>25</sup> *Ashbury v. Ellis*, [1893] A.C. 339 (P.C.) (N.Z.).

<sup>26</sup> *Auckland Harbour Board v. The King*, [1924] A.C. 318 (P.C.) (N.Z.).

<sup>27</sup> [1941] A.C. 308 (P.C.) (N.Z.).

<sup>28</sup> *Id.*

where not conflicting with Privy Council decisions, the New Zealand courts are "absolutely bound" by decisions of the British House of Lords.<sup>29</sup> Even more surprising, the doctrine dictates that the New Zealand Court of Appeals will follow English appeals decisions.<sup>30</sup> This practice apparently results from the principle in New Zealand that "in all parts of the Commonwealth where the common law prevails the interpretation of the law should be the same."<sup>31</sup> It is followed so rigidly that "on occasion the most unconsidered dicta of the highest English courts and of the Privy Council have been scrupulously followed."<sup>32</sup> Such a doctrine means that the twists and turns of English legal development are likely to be reproduced in New Zealand without regard to differences in local needs and desires. Whether such excessive attachment to the home country will survive the loosening of the ties of commonwealth preference remains to be seen.

### C. *Burma-Ceylon-India*

Constitutional cases from Burma-Ceylon-India are more numerous, but as with the West Indies, many of them are so old that their effect has been superseded by later charters and constitutions. Only two cases came from Burma, both in the twentieth century. One, in 1912, held that the Burmese law of 1898 depriving the civil courts of jurisdiction over the government in claims of rights to land was in violation of the Government of India Act of 1858, the provisions of which could not be repealed by any Indian legislature. The theoretical basis of the decision was that acts of the British Parliament become supreme law for any colony to which they specifically apply.<sup>33</sup> The other case upheld the assumption of legislative power by the governor during the emergency of World War II and its aftermath, finding the governor's Special Judges' Act of 1943 valid.<sup>34</sup> But since independence Burma has adopted a new constitution, has barred appeal to the Privy Council, and has become a military dictatorship. While British law and British court decisions may exercise a continuing influence in Burmese life, the constitutional decisions are now invalid.

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<sup>29</sup> Cameron, *The Judicial System*, in *NEW ZEALAND: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 103 (J. Robson ed. 1967).

<sup>30</sup> *Id.* at 104.

<sup>31</sup> *Id.* at 101.

<sup>32</sup> *Id.* at 103.

<sup>33</sup> *Secretary of State v. Moment*, [1912] 40 I.A. 48.

<sup>34</sup> *Chittambaram v. King-Emperor*, [1947] A.C. 200 (P.C.) (Rangoon).

Even though there were no constitutional cases of any importance from Sri Lanka (Ceylon) before independence, the facts that (1) it retained appeal to the Judicial Committee after independence; (2) its constitution contains clauses attempting to protect minority language groups; and (3) criminal appeals were not barred, has led to a constant flow of cases not only in the constitutional, but also in the general areas of the law. The first constitutional issue concerned a law regulating voting rights, which the Tamil minority claimed was discriminatory. The Privy Council found it constitutional on the assumption that the discriminatory effect was not directed toward the Tamils, *per se*.<sup>35</sup> Some years later the Committee held that appeal to it in criminal cases, since it was not specifically abolished in the constitution, was still permissible.<sup>36</sup>

When the Sri Lanka legislature passed an act which amended the constitution by changing the constitutional provisions as to appointment of government personnel, the Judicial Committee found the law unconstitutional despite the Committee's general bias toward parliamentary supremacy, holding that the legislature does not have "the general power to legislate so as to amend its Constitution by ordinary majority resolutions."<sup>37</sup> The Committee also held that Ceylon's constitution requires the essentials of natural justice, such as notice and hearing, to be observed in citizenship hearings, since these are semijudicial proceedings.<sup>38</sup>

The government of Sri Lanka attempted to respond to an abortive *coup d'etat* in 1962 by passing a measure legalizing *ex post facto* the detention and prosecution of persons suspected of "offenses against the state."<sup>39</sup> While the Judicial Committee did not feel that this law was in itself contrary to natural justice, it found that it was a usurpation of the judicial power as granted in the Constitution, and thus invalid.<sup>40</sup>

A third case regarding judicial power was decided in 1968. The question considered was whether members of Sri Lanka's labor tribunal are judicial officers. If so, they would presumably need to be appointed by the process established for judges in the constitution.

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<sup>35</sup> Pillai v. Mundanajoke [1953] A.C. 514 (P.C.) (Ceylon). The Tamils are an important but minority language group, which the constitution makes special efforts to protect.

<sup>36</sup> Ibralebbe v. The Queen, [1964] A.C. 900 (P.C.) (Ceylon).

<sup>37</sup> Bribery Commissioner v. Ranasinghe, [1965] A.C. 172, 198 (P.C.) (Ceylon).

<sup>38</sup> Shareef v. Commissioner for Registration of Indian and Pakistani Residents, [1966] A.C. 47 (P.C.) (Ceylon).

<sup>39</sup> Liyanage v. The Queen, [1967] 1 A.C. 259, 279 (P.C.) (Ceylon).

<sup>40</sup> *Id.*

The Judicial Committee found that they were not judicial officers such as contemplated in the constitution.<sup>41</sup> Finally, in a second case regarding the amending power, the Committee held that it is the process of amendment, not the title given to the action, that is important. The legislature had used the proper amending procedure for a measure imposing civic disabilities on public servants, including members of the legislature, who had been indentified as bribe-takers by a special commission of inquiry, but it had neglected to label the measure as an amendment. The Committee held that if the constitution was changed, the use of the proper procedures was all that was necessary; the measure need not be properly named.<sup>42</sup>

Considering Sri Lanka's small size and the youth of its Constitution, a fair number of cases have been presented, and several of them are obviously of great importance. It can thus be seen that the Privy Council continues to play a large role in Sri Lanka's constitutional development. It is, however, this very fact which may lead in the future to the abolition of appeal to the Privy Council.

Both India and Pakistan abolished appeals to the Judicial Committee almost immediately upon gaining independence. For this reason the Committee's constitutional decisions are formally dead, although some of them doubtless live on in Indian constitutional provisions (and, to a much lesser extent, in those of Pakistan as well). The Indian Constitution incorporated judicial review, which has been used with some effect.

The British East India Company had occupied areas at Bombay, Calcutta and Madras long before 1800. These were for a time governed under separate charters, and until 1935 each had its own Supreme Court from which cases flowed directly to the Privy Council. (Other Supreme Courts were added in the course of the nineteenth century as Britain took control of more and more of India.) These courts were originally company-dominated and company-oriented, but by 1833 all three were using professional judges who had attained a great deal of independence from the company. These judges had gained such a reputation for fairness that Indians often used them voluntarily in preference to native courts. The company courts were finally abolished in 1861.<sup>43</sup> As stated earlier, it was the practice as early as 1840 to have at least one former "Indian" judge

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<sup>41</sup> *United Engineering Workers' Union v. Devanayajam*, [1968] A.C. 356 (P.C.) (Ceylon).

<sup>42</sup> *Kariapper v. Wijesinha*, [1968] A.C. 717 (P.C.) (Ceylon).

<sup>43</sup> See C. FAWCETT, *THE FIRST CENTURY OF BRITISH JUSTICE IN INDIA* (1934).

sit on the Judicial Committee (he was always English until 1910), and after the 1860's there were usually two or three. These judges sat in all the Indian cases, which were numerous, but they at no time formed a formally separate panel; they were always judges with no Indian background sitting on Indian cases. Nevertheless, the Committee's level of expertise in Indian matters was about as high as it could have been.

Only a few nineteenth century constitutional cases need be mentioned. The 1823 Bombay charter withheld from the Supreme Court's jurisdiction cases concerning revenue. When the question whether quit-rents were revenue arose, the Judicial Committee held that they were and that therefore the Supreme Court had no power to try quit-rent cases.<sup>44</sup> Later, the Committee confirmed the power of the Calcutta Supreme Court to remove or suspend officers of the court for misconduct, even when the misconduct was unconnected with their jobs.<sup>45</sup> Finally, the Committee upheld a law which excluded certain specified districts from the jurisdiction of the Calcutta Supreme Court, upon the Lieutenant-Governor's discretion. The Committee felt that, since this discretion was conditional rather than delegated legislation, it was valid.<sup>46</sup>

The successive acts of Parliament creating unified governments for India in the twentieth century were also litigated. The Government of India Act of 1935, although short-lived, was the subject of many constitutional controversies, partly because of its complexity. One important case, involving the age-old question of what powers a government has in emergency situations, stemmed from the 1919 constitutional act. It raised the question of whether the Governor-General has the emergency power to create special tribunals. In upholding the power, the Judicial Committee gave the Governor-General almost dictatorial powers: "[I]t cannot be disputed that an emergency existed and that [the governor's actions] are for the peace and good government. . . . Those are matters of which the Governor-General is the sole judge; he is not bound to give any reasons."<sup>47</sup>

This decision undoubtedly reflected the judges' feeling that they were dealing with a rebellious and fractious colony. Additionally, British courts have always been reluctant to question the discretion

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<sup>44</sup> *Spooner v. Juddon*, 13 Eng. Rep. 682 (P.C. 1848-1850) (Bombay).

<sup>45</sup> *In re Grant*, 13 Eng. Rep. 833 (P.C. 1850) (Bengal).

<sup>46</sup> *The Queen v. Burah*, [1878] 3 App. Cas. 889 (P.C.) (Bengal).

<sup>47</sup> *Bhagat Singh v. Emperor*, [1931] 58 I.A. 169, 131 A.I.R. 111 (P.C. 1931).



of the executive; *Liversidge v. Anderson*,<sup>48</sup> upholding detention without trial in England during World War II, stands as the most notorious case expounding this view, but there are many others.<sup>49</sup> The Irish decisions upholding the special courts under the Offences against the State Act of 1940,<sup>50</sup> are similar, as are the American Japanese Exclusion Cases.<sup>51</sup> Nevertheless the cases are not entirely analogous. The English and American cases came at a time when a threat of invasion could have resulted in the actual extinction of the state. The Irish cases involved internal matters; *i.e.*, the threat of civil insurrection and the possible substitution of one government for another. The Indian case was both more understandable and less justifiable, for it involved the natural opposition of a subject population to the maintenance of colonial authority. The same question was to arise under the 1935 constitutional act, and was to be decided the same way.<sup>52</sup> However, the latter holding was somewhat limited, since the Committee in another case held that detention orders under emergency legislation had to be issued by the Governor himself. Such orders could not be delegated in the form of police recommendations, and the civil courts had a corresponding power to investigate the validity of detention orders.<sup>53</sup>

Other constitutional issues under the Government of India Act of 1935 involved a variety of questions. Two cases concerned the tax power. One held that the federal income tax could be imposed on foreign companies if most of their income arose in India,<sup>54</sup> an almost inevitable conclusion, and one which doubtless still is valid in independent India. The other involved the inevitable attempt to use the complexities of a federal constitution to avoid taxation; the question was whether a province had the constitutional power to impose a tax on the first sale of manufactured goods. The Judicial Committee, perhaps rather sophistically, held that as it was a tax on the goods rather than on the sale or the proceeds of the sale (even though unsold goods were not taxed), it was not an excise which would have been restricted to the federal government; therefore the tax was valid.<sup>55</sup>

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<sup>48</sup> [1942] A.C. 206 (P.C.).

<sup>49</sup> *Id.*

<sup>50</sup> In re Article 26 and the Offences Against the State (Amendment) Bill, [1940] I.R. 470.

<sup>51</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>52</sup> *King-Emperor v. Benoari Lal Sarma* [1944] 72 I.A. 57, [1945] A.C. 14 (P.C.) (India).

<sup>53</sup> *King-Emperor v. Sibnath Banerji*, [1945] 72 I.A. 241, 32 A.I.R. 156 (P.C. 1931).

<sup>54</sup> *Wallace Bros. & Co. v. Commissioner of Income Tax*, [1947] 75 T.A. 87.

<sup>55</sup> *Governor-General in Council v. Province of Madras*, [1945] 72 I.A. 91, 32 A.I.R. 98 (P.C. 1945).

This mildly states-rights attitude carried over into two of the land cases. The United Provinces Tenancy Act of 1939 was found to be valid even though it diminished the absolute rights to an estate held under a preceding crown grant.<sup>56</sup> A Punjabi debtors' relief law was found to be limited to agricultural lands and was therefore within the "land" control granted to the provinces constitutionally.<sup>57</sup> But in a third case a similar Punjabi law was struck down insofar as it purported to have retroactive effect.<sup>58</sup>

As both the tax and land cases demonstrated, the chief constitutional problem presented by the federal form of government, as was true in Canada, was how to delineate a precise line between national and provincial power. The Government of India Act of 1935 established three "lists" to define power: powers of the national government, powers of the provincial governments, and concurrent powers. But the Judicial Committee found, in *Prafulla Kumar v. Bank of Commerce, Ltd.*,<sup>59</sup> as it had in Canada, that these lists did not actually mark a clearcut line between the powers of the various legislatures. Overlap was inevitable, and the Committee decided to use the "pith and substance" rule which it had developed for Canada to decide this case. Thus, the Bengal Money Lenders Act of 1940, which limited interest charges, was held to be valid "in pith and substance" as dealing with moneylending and money lenders, even though it "trenched incidentally" on promissory notes and banking which were national powers.<sup>60</sup> One might agree with Mr. Justice Brandeis, who said in another connection that it was more important to get the question settled than it was to get it settled right. No doubt as long as India remains a real federal system, its courts will be called upon to settle similar questions and it will use or develop "rules" which have all the spurious precision of the "pith and substance" rule.

It is clear that of the countries thus far surveyed the effect of Judicial Committee decisions on constitutional development has been minimal in most, and marginal at best in two, Sri Lanka and

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<sup>56</sup> *Thakun Jagannath Baksh Singh v. The United Provinces*, [1946] 73 I.A. 123, 33 A.I.R. 127 (P.C. 1946).

<sup>57</sup> *Megh Raj v. Allah Rakhia*, [1947] I.A. 12, 34 A.I.R. 72 (P.C. 1947).

<sup>58</sup> *Punjab Province v. Daulat Singh*, [1946] 73 I.A. 59, 33 A.I.R. 66 (P.C. 1946).

<sup>59</sup> [1947] 74 I.A. 23, 34 A.I.R. 60 (P.C. 1947).

<sup>60</sup> *Id.*; see also *Board of Commerce, Ltd. v. Amulya Krishna*, [1947] 74 I.A. 45, 34 A.I.R. 66 (P.C. 1947).

India. It is, of course, otherwise in the two "old colonies" not yet discussed in detail, Canada and Australia.

#### IV. CANADA

Appeal to the Privy Council was regarded in Canada as a defense of provincial power against the encroachments of Ottawa. Canadian federalism takes its shape largely, if not solely, as a result of the existence of French Quebec within the federation. Nevertheless, the other provinces were not backward in pressing appeals beyond the Canadian Supreme Court to Whitehall. Thus Canada became, after India, the most prolific source of appeals.

There was a significant lack of consensus among the framers of the British North America Act of 1867, Canada's constitution, which left fertile ground for policymaking in the judgments of the Privy Council. Indeed, such policymaking was not only inevitable but necessary, if certainty was to be drawn from ambiguity. Thus, their Lordships became the prime shapers of Canadian federalism until after World War II. The influence of the Judicial Committee on overseas constitutional development reached its apogee in Canada. This was possible only because the Canadians had deep internal disagreements unlike the Australians, which led to an unwillingness to trust any Canadian court to settle disputes about the working of the federal system. This job fell to the Judicial Committee largely because it was the nearest thing to an impartial arbiter.

In 1949 the decision to abolish appeals to the Privy Council was only in part the result of the growth of Canadian nationalism. It was also made possible by an (unfortunately temporary) "era of good feelings" between the French and the English populations, and even more by the development of a degree of trust by the French in the willingness and ability of the Canadian Supreme Court to protect French status and interests. Nevertheless it is true that the heritage of Canadian disunity continues, as evidenced by the inability to agree upon a method of amending the British North America Act. This makes it impossible to reverse court decisions by amendment and thus places an even greater burden on the Supreme Court in its use of judicial review. When a civil liberties protection act was passed in 1960 it could only be passed as an ordinary act of Parliament, limited in effect to acts of the national legislature, and amendable and reversible at will since it lacks the superior status of a constitutional provision.

Before 1949 the shape of Canadian federalism had been pro-

foundly influenced by Judicial Committee decisions in a manner that will be difficult to erase quickly, especially because of the absence of easy amendment procedures and the continued reliance of Canadian judges on precedent and on a statutory-interpretation approach to the British North America Act. It would be easier to evaluate the Committee's work if one knew what the Canadian constitution means, but such knowledge is inhibited by the known differences in opinion among its framers and, of course, by their inability to foresee the kinds of questions that would develop in posterity. Critics of the Committee's performance commonly assume that there is a known meaning for the constitution, an assumption which seems historically false. MacDonald, for instance, claims that the British North America Act did not create a "true federal system but a highly specialized kind of federalism" in which the federal government was to play a dominant role.<sup>61</sup> If this were the unambiguous truth one would have to accept his judgment that the Judicial Committee misread the constitution. But in reality it is the very question of the "kind of federalism" intended by the Act which has been the focus of controversy. Various parties came to the framing sessions with very diverse goals, and the result was, as in the American Constitution, the inclusion of some particularly ambiguous clauses such as the "peace, order and good government" clause and those clauses dealing with the regulation of trade and commerce, property, and civil rights in the provinces. Mr. Justice Laskin concluded that "[a]ll that is certainly known is that the framers had large plans for the new Dominion and they proposed a strong central government with ample financial powers to carry the program through."<sup>62</sup> But certainty goes no further. He also reminds us that

[T]he framers . . . could not foresee the revolutionary economic and social changes that have since taken place and could have had no intention at all concerning them. . . . [I]ntentions cannot provide answers for many of the questions which agitate us . . . for the simple reason that the conditions out of which present difficulties arise were not even remotely considered as possibilities.<sup>63</sup>

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<sup>61</sup> MacDonald, *The Privy Council and the Canadians Constitution*, 29 CAN. B. REV. 1021 (1951) [hereinafter cited as MacDonald]; see also McWhinney, *Legal Theory and Philosophy of Law in Canada*, in CANADIAN JURISPRUDENCE 1 (E. McWhinney ed. 1958).

<sup>62</sup> B. LASKIN, CANADIAN CONSTITUTIONAL LAW 11 (3d ed. 1966) [hereinafter cited as LASKIN].

<sup>63</sup> *Id.* at 11-12.

Thus the constitution has to be continually made, or remade, to settle new controversies.

Pigeon advances a much more pro-provincial rights argument. The British North America Act, he says, is "the expression of a compromise between many men holding different and opposed viewpoints. When agreement was reached on a text, are we justified in assuming that agreement was also reached on intentions?"<sup>64</sup> The question is, of course, rhetorical.

Of course, not all of the constitutional cases involved the federal division of powers, but as these caused the most controversy we shall deal primarily with them. The majority deal with one or the other of the major clauses of Sections 91 and 92 of the British North America Act, the first of which lists the powers of the central government, and the second lists those of the provincial authorities. Between the two it was evidently intended that "the whole area of self-government" would be covered, with any lacunae left to be filled in by the coverall clause vesting in the national government the power to "make laws for the Peace, Order and Good Government,"<sup>65</sup> a clause as outstanding in its ambiguity as the American general welfare clause. The general intent was clear enough—that national power was to extend to all areas not given to the provinces in Section 92. But upon investigation it becomes apparent that this neatness of classification is a grand illusion, for most of the specific powers in Section 92 can conflict in given instances with those in Section 91, and vice versa. As Laskin trenchantly remarks, "there is nothing in human affairs which corresponds to the neat logical divisions found in the constitution."<sup>66</sup>

With whatever preconceptions the Judicial Committee approached Canadian constitutional cases, a general bias in favor of national power was obviously not among them. The Committee has, on the contrary, been accused of taking a rigid conceptualistic stance, suitable perhaps to statutory interpretation but not to the construction of fundamental constitutional provisions. Evaluation of this criticism is hampered by the fact that opinions tend to vary strongly, depending on the commentator's agreement or disagree-

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<sup>64</sup> Pigeon, *The Meaning of Provincial Autonomy*, 29 CAN. B. REV. 1126, 1128 (1951) [hereinafter cited as Pigeon].

<sup>65</sup> British North America Act, 1867, 30 Vict., c.3, § 91, reprinted in E. CAMERON, *THE CANADIAN CONSTITUTION, AS INTERPRETED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL IN ITS JUDGMENTS* 55-56 (1915) [hereinafter cited as CAMERON].

<sup>66</sup> LASKIN, *supra* note 62, at 4.

ment with the actual decisions. MacDonald, for instance, says that "such a restrictive and conceptualistic view of its function is as remarkable in a court of last resort as its results have been bad. . . . for constitutions are not intended to be construed *in vacuo* but as living instruments of government."<sup>67</sup> However true, these comments do not add up to a guide for decision. Laskin remarks, more temperately, that court rules in England

required the Privy Council to consider the literal meaning of the words used without any conjecture as to the intentions of those who framed the Quebec and London resolutions. The Privy Council as a court was not free to consider historical evidence about intentions but was bound to restrict itself to a consideration of what may be called, by contrast, legal evidence.<sup>68</sup>

Here again there is disagreement. The *Report* of the Quebec Royal Commission of Inquiry on Constitutional Problems claimed that "Privy Council decisions carry out the intent without which Quebec would not have agreed to the British North America Act."<sup>69</sup> Pigeon denies that Judicial Committee decisions have been based on narrow and technical considerations:

[They proceed] from a much higher view. . . . They recognize the implicit fluidity of any constitution by resting distinctions on questions of degree. At the same time they firmly uphold the fundamental principle of provincial autonomy: they staunchly refuse to let our federal constitution be changed gradually, by one device or another, to a legislative union. In doing so they are preserving the essential condition of the Canadian confederation.<sup>70</sup>

With disagreement so universal, one wonders if everyone is discussing the same constitution. But whoever was "right" in this controversy, the adverse critics seem likely to be the eventual victors; Canada abolished the right of appeal to the Privy Council in 1949, and the Canadian Supreme Court apparently began almost immediately to "restore" the critics' view of Canadian federalism.<sup>71</sup>

The British North America Act assigns exclusive powers to the central government and to the provinces, with any "residual" powers allotted to the national government under the "peace, order and

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<sup>67</sup> MacDonald, *supra* note 61, at 1030.

<sup>68</sup> LASKIN, *supra* note 62, at 5.

<sup>69</sup> *Id.* at 15-16.

<sup>70</sup> Pigeon, *supra* note 64, at 1135.

<sup>71</sup> LASKIN, *supra* note 62, at 83-84.

good government" clause. For this reason, when a *national* act is challenged constitutionally, the first thing the courts must do is look at Section 92 to see whether the matter is within the exclusive provincial power. If it is not, the act is automatically valid. If it is within Section 92, the matter becomes more complicated, for this fact does not in itself invalidate the act. The judges must look to Section 91 to see whether there is a national power from which the challenged act could fairly find support. If there were, this national power would overbear the provincial power.

When *provincial* acts are challenged the judges must look first at Section 92, for if the act does not fall within that section it is automatically invalid. If it does come within Section 92, however, it is not necessarily valid, for it could still run afoul of a Section 91 provision which would take precedence. The major difficulty stems from the "peace, order and good government" clause, for if taken literally it could overbear all of Section 92 and render the provincial powers nugatory. But another difficulty is posed by the existence in Section 92 of a clause almost as ambiguous, *i.e.*, clause 16, which reserves to the provinces "all matters of a merely local or private nature in the province."<sup>72</sup>

By 1925, under the influence of Lords Watson and Haldane, these questions had more or less stabilized in such a way that the "peace, order and good government" clause had affirmative meaning only when a law fell outside the enumerations of both Sections 91 and 92, or when the law was an attempt to cope with an extreme, and temporary, emergency. While these principles were relaxed in the direction of expanded national power after Haldane's death, they were still largely in effect when the economic recovery legislation of Prime Minister Bennett came before the Privy Council in the late 1930's and 1940's, and even when appeal was abolished in 1949. In any case, the guidelines were of little assistance in the decision of cases which involved direct conflict between the provisions of Section 91 and those of Section 92.

As to these latter cases, Lord Sankey's judgment in *In re Regulation and Control of Aeronautics in Canada*<sup>73</sup> in 1932 laid out four principles: (1) legislation coming strictly under Section 91 was presumed to be valid unless it "trenched upon" matters assigned to the

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<sup>72</sup> British North America Act 1867, 30 Vict., c.3, § 92; reprinted in CAMERON, *supra* note 65, at 56.

<sup>73</sup> [1932] A.C. 54 (P.C.).

provinces under Section 92; (2) general legislation enacted under the aegis of Section 91 was to be "strictly confined to such matters as are unquestionably of national interest and importance, and must not trench upon . . . section 92 . . . unless these matters have attained such dimensions as to affect the body politic of the Dominion;"<sup>74</sup> (3) the Dominion had the power to legislate on matters which, though otherwise left to the provinces, are "necessarily incidental" to effective legislation under the first principle; and (4) there were some concurrent areas in which either government might legislate, but if the provincial legislation conflicted with federal legislation, the national law was to prevail.

This set of guidelines was enunciated after Haldane's death, and the Privy Council did not drastically change them later. A look at the "Canadian New Deal" cases may illustrate this point, if one adds a fifth principle which Lord Sankey did not mention; that is, that provincial legislation cannot stand, even if it is within Section 92 and does not conflict with existing national legislation, if it is found to be "in pith and substance" in relation to a power granted to the national government in Section 91.

Apparently, six cases of the New Deal period were decided upon the basis of the first of the above principles. A federal farm credit law was upheld as a valid national regulation based upon the power over bankruptcy and insolvency, against the argument that it trenched upon provincial property and civil rights powers.<sup>75</sup> An act which made unfair trade practices criminal was upheld as a valid criminal statute even though it was argued that it invaded a provincial legislative field.<sup>76</sup> Later, a second federal trade practices act was upheld on similar grounds.<sup>77</sup> On the other hand, the Judicial Committee felt that a treaty may create an obligation on the part of the national government to legislate pursuant to it, but if the field of legislation is constitutionally reserved to the provinces the mere fact of the existence of the treaty does not increase the power of the national government. A minimum wage and maximum hours act was therefore deprived of effect.<sup>78</sup> A federal natural products mar-

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<sup>74</sup> This principle was apparently applicable to the subject of the case in which Lord Sankey was writing, the control and regulation of airflight, a matter which could hardly have been enumerated in section 91.

<sup>75</sup> *Attorney-General of Brit. Colum. v. Attorney General of Can.*, [1937] A.C. 391 (P.C.).

<sup>76</sup> *Attorney-General of Brit. Colum. v. Attorney-General of Can.*, [1937] A.C. 368 (P.C.).

<sup>77</sup> *Attorney-General of Ont. v. Attorney-General of Can.*, [1937] A.C. 405 (P.C.).

<sup>78</sup> *Attorney-General of Can. v. Attorney-General of Ont.*, [1937] A.C. 326 (P.C.).



keting law was struck down because the Committee felt that it "trenched upon" provincial power in the field of property and civil rights.<sup>79</sup> Finally, a maximum hours law, as applied to a railway-owned hotel, was struck down; the Judicial Committee felt that even though the railway was undoubtedly under national control, its ancillary businesses were provincial.<sup>80</sup>

Under the second principle, regarding general Section 91 legislation, an act setting up a federal compulsory unemployment insurance scheme was invalidated on the grounds that it invaded an exclusive provincial competence without justification of an overriding national concern or emergency.<sup>81</sup> The third principle of implied power was applied in a case challenging the powers of the national railway board. The Judicial Committee felt that, even though the property and civil rights powers of the provinces might be encroached upon, the law was necessary in the securing of effective railway administration, a national concern.<sup>82</sup> Apparently no case fell squarely within the fourth principle regarding concurrent legislation.

The fifth principle was responsible for three provincial acts being upheld against "pith and substance" arguments; a British Columbia dairy licensing law,<sup>83</sup> a British Columbia tax on fuel oil consumers (held to be a direct tax),<sup>84</sup> and an Ontario law imposing a debt moratorium which could obviously have been regarded as "in pith and substance" a law in relation to insolvency.<sup>85</sup>

But other provincial laws were invalidated. The Alberta Debt Adjustment Act of 1937 was, in contradiction to the Ontario act above, struck down.<sup>86</sup> Two laws were found unconstitutional for being "in pith and substance" in relation to "interest," a matter within exclusive national competence.<sup>87</sup> The Judicial Committee also found the Social Credit legislation of Alberta entirely unconsti-

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<sup>79</sup> Attorney-General of Brit. Colum. v. Attorney-General of Can., [1937] A.C. 377 (P.C.).

<sup>80</sup> Canadian Pac. Ry. Co. v. Attorney-General of Brit. Colum., [1950] A.C. 122 (P.C.).

<sup>81</sup> Attorney-General of Can. v. Attorney-General of Ont., [1937] A.C. 355 (P.C.).

<sup>82</sup> Canadian Elec. Ass'n v. Canadian Nat'l Ry., [1934] A.C. 551 (P.C.).

<sup>83</sup> Shannon v. Lower Mainland Dairy Prods. Bd., (P.C.) (Canada).

<sup>84</sup> Attorney-General of Brit. Colum. v. Kingcane Navigation Co., [1934] A.C. 45 (P.C.).

<sup>85</sup> Abitibi Power & Paper Co. v. Montreal Trust Co., [1943] A.C. 536 (P.C.) (Canada).

<sup>86</sup> Attorney-General of Alberta v. Attorney General of Can., [1943] A.C. 356 (P.C.).

<sup>87</sup> Attorney-General of Sask. v. Attorney General of Can., [1949] A.C. 110 (P.C.) (a Saskatchewan crop failure relief act); Board of Trustees of the Lethbridge N. Irrigation Dist. v. Independent Order of Foresters, [1940] A.C. 513 (P.C.) (Can.) (Alberta act reducing the interest on securities issued or guaranteed by the province.).

tutional because the credit sections of the law were interpreted as being properly within the federal banking power and the remainder of the act was felt to be inseverable from the defective provisions.<sup>88</sup>

This is a catalogue of economic recovery legislation, both federal and provincial, appealed to the Privy Council. There were only fifteen cases concerning this legislation, six of which involved provincial legislation and seven of which upheld the national power. The figures are unremarkable in themselves, but it may be argued that the implications of the eight cases upholding provincial power went far beyond the cases themselves and in effect made it impossible for the national government to deal with the economic emergency. Even if this is true, it leaves open the question of whether the constitution was properly interpreted; for one cannot assume—despite one's own desires—that a constitution contains within it all that the wise and prudent, many years later, might wish to find there. Thus, most constitutions provide for amendment.

It is also remarkable that the Privy Council in most of these cases affirmed the judgment of the Canadian trial courts. Of the ten cases appealed from the Supreme Court, eight resulted in clear affirmances, one involved an even split of the Canadian justices, and the tenth varied, without reversing, the decision of the Supreme Court. The provincial courts from which the other five cases came were affirmed twice, reversed twice, and reversed in part once. This seems to lend credence to Eggleston's argument that the courts followed the trend of opinion in Canada rather than using an arid conceptualism, and that the Privy Council for the most part just "went along."<sup>89</sup> Nevertheless, there exists a strong possibility that the Supreme Court was itself doing what it felt was required by previous decisions of the Judicial Committee, or merely applying its own brand of conceptualism.<sup>90</sup> But conceptualism, as many writers have remarked, in an effort to avert judicial policymaking succeeds only in making the policy choices subconscious or inarticulate, thereby preventing "any very conscious, intelligent balancing of [the] interests" presented in constitutional cases.<sup>91</sup>

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<sup>88</sup> *Attorney-General of Alberta v. Attorney General of Can.*, [1947] A.C. 503 (P.C.).

<sup>89</sup> W. EGGLESTON, *THE ROAD TO NATIONHOOD* 35-39 (1946).

<sup>90</sup> This appears to be the essence of McWhinney's comment on the subject, in which he remarks on "the pervasive, if subtle, influence of a common legal education and training, and a common system of professional organization throughout the Commonwealth Countries." E. McWHINNEY, *JUDICIAL REVIEW IN THE ENGLISH-SPEAKING WORLD* 27 (3d ed. 1965), [hereinafter cited as McWHINNEY, *JUDICIAL REVIEW*].

<sup>91</sup> *Id.* at 29-30.

## V. AUSTRALIA

Although in 1900 the Australian states had their own brand of particularism, it was not complicated by an ethnic rivalry since the states were all English, with a common law legal system prevailing them. They were also able to agree upon a central government with rather limited powers; thus, they produced a constitution with fewer of the ambivalences that characterized that of Canada.

This being true, they had no need to rely on the Privy Council to settle federal disputes; they had settled many of them already and had confidence in their ability to continue to do so. They also had before them thirty years of Canadian experience, which seemed to provide two lessons: write your constitution carefully and do not let the Privy Council interfere. It was, in fact, this Australian attitude which led to the great struggle with England over the adoption of the Australian constitution. The Colonial Office, headed by Joseph Chamberlain, felt that the strict limitations on Privy Council appeals were subversive of the Imperial system. Prolonged discussion led to a compromise of sorts with the Australians achieving most of their goals.<sup>92</sup> Questions involving the federal system ("inter se" questions in the constitution) could be appealed only from the state courts (there are no trial level national courts) to the High Court of Australia and to the Judicial Committee only with the High Court's permission, which has very seldom been given. Other constitutional questions could be appealed to the Committee in similar fashion to other dependencies.

While even such a restricted right of appeal has produced a rather surprising number of cases, the Privy Council has never been able to play the significant role in Australian constitutional development that it played in Canada. Its decisions can be more easily negated, since Australians can, albeit with some difficulty, amend their own constitution. Purely state questions can also be appealed to the Committee if they involve only the state constitution. However, three states have British-type unwritten constitutions with parliamentary supremacy; Queensland, New South Wales and Tasmania. This somewhat reduces the potential for constitutional cases.

However, until recently, the influence of British decisions was perhaps greater than in Canada in nonconstitutional areas. This is

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<sup>92</sup> DeGaris, *The Colonial Office and the Constitution Bill*, in *ESSAYS IN AUSTRALIAN FEDERATION* 104-17 (A. Martin ed. 1969).

because, as in New Zealand, Australian courts paid great deference to all British court decisions. Professor Paton remarks, as late as 1952, that the Australian courts almost always follow House of Lords decisions, and often those of the British Court of Appeals as well. While admitting that "theoretically no decision of the House of Lords is binding," Paton goes on to remark that "since this tribunal follows its own decisions a refusal by Australian courts to follow it would produce a permanent divergence between the law in England and Australia."<sup>93</sup> He does not indicate why Australians should be concerned about such divergence. Thus Australian law has been shaped to an unknown extent by British judges who were ruling in other and vastly dissimilar circumstances.

It is also true that the more ordinary type of nonconstitutional private law cases may still be appealed to the Privy Council under the same rules as before independence. These cases have not declined very much in number in recent years; 23 were decided in the decade 1962-1971. Thus both indirectly through following British precedent, and directly through decisions of the Judicial Committee, the development of the general law of Australia (which, as in the United States, is largely state law) has been both greatly and fundamentally influenced by British judges. These judges have shown a good deal of deference to special conditions as reflected in Australian lower court decisions. The development of land law in an arid and largely unsettled country, for instance, seems not to have been notably hampered by the fact that English judges live in such a different physical environment. Any inhibition of development could be explained by the excessive deference paid by Australian courts to British precedents, a matter which can be changed by the Australians themselves and can hardly be discrediting to British courts, much less the Judicial Committee.

British preconceptions also account for the fact that the Australian judges have, to an even more extreme degree than their Canadian *confreres*, adopted a highly legalistic approach to their constitution. They generally seem to regard it as an ordinary statute, to

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<sup>93</sup> Paton, *Reception of the Common Law*, in *THE COMMONWEALTH OF AUSTRALIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 12 (G. Paton ed. 1952). But see the recent case of *Australian Consolidated Press, Ltd. v. Uren*, [1969] 1 A.C. 590, in which the Judicial Committee upheld the High Court's refusal to follow a House of Lords ruling, saying that "in matters of domestic or internal significance the need for uniformity is not compelling." It should also be noted that in 1963 the House of Lords deserted its former rule which required it to maintain its own precedents.

be applied without benefit of either scientific or policy-oriented types of evidence, and without any presumption of constitutionality. This emphasis on a law of concepts has been carried to an extreme which even a favorable Australian commentator has called "refined or ludicrous according to taste."<sup>94</sup> Another writer refers to it as "the lawyer's unawareness that he is taking sides on burning questions."<sup>95</sup> Since this criticism is similar to that widely voiced by Canadians about the Privy Council, one may conclude that it is a result of the use in the Commonwealth of "prevailing methods of legal education in the United Kingdom and the Commonwealth countries . . . [which fall] far short of giving the legal decision-maker the broad training in the social sciences that is so necessary in handling the complex public law issues of present-day society."<sup>96</sup>

In Australia the result of conceptualism in the courts has been to render constitutional decisions socially and politically unrealistic. More specifically, since conceptualism involves decisionmaking on the basis of "inarticulate major premises" of which both the public and the judges themselves are often aware, it has resulted in the use of Manchester liberal economic preconceptions which, as in the cases concerning Section 92 (the so-called "free-trade" section), do not make good *legal* sense. The High Court has developed this constitutional provision into an analogue of the old American substantive due process doctrines. One should confess at this point, however, that judicial preconceptions are not necessarily conservative; recent American cases such as those regarding birth control and abortion demonstrate that conceptualism can be made to serve liberal (or at least "libertarian") preconceptions as well as *laissez-faire* ones.<sup>97</sup> The Australian decision invalidating the Communist Party Dissolution Act of 1950 illustrates the same point.<sup>98</sup> In any event, as Professor Sawyer concludes, Australian judges

all fall into the category of what . . . American [jurimetricians] call "dogmatic conservatives." They try to decide cases by formal inference from a limited set of premises found in the Constitution and in the decisions of the Privy Council and the High Court, and

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<sup>94</sup> G. SAWER, *AUSTRALIAN FEDERALISM IN THE COURTS* 29 (1967) [hereinafter cited as SAWER].

<sup>95</sup> McWHINNEY, *JUDICIAL REVIEW*, *supra* note 90, at 95.

<sup>96</sup> *Id.*

<sup>97</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>98</sup> *Australian Communist Party v. Commonwealth*, [1951] 83 C.L.R. 1. See McWHINNEY, *JUDICIAL REVIEW*, *supra* note 90, at 81.

in a high proportion of cases—increasing with the volume of precedents—they succeed.<sup>99</sup>

Whether their “success” results in good decisions or bad depends more on whether one likes the decisions than on one’s response to the approach utilized.

Constitutional cases appealed to the Judicial Committee from the Australian states before federation were fairly numerous, although their continuing vitality in the twentieth century is doubtful. The bulk of them came from the oldest and largest colony, New South Wales. These decided such points as the following: a judge cannot be dismissed by the Governor-in-Council without being allowed a hearing;<sup>100</sup> the ordinary civil servant may be dismissed at pleasure by the Governor-General, without right of appeal to the Privy Council;<sup>101</sup> despite an English parliamentary act making English law as of 1828 applicable to the colony, the legislature can adopt by its own act English laws passed after that date, and the death of a sovereign makes no difference in the status of such laws;<sup>102</sup> there is a Crown prerogative, vested in the Judicial Committee, to hear appeals in criminal cases;<sup>103</sup> a colonial legislature is not a delegate of the British Parliament, and therefore can pass customs laws which entrust the actual imposition of the duty to the executive;<sup>104</sup> the legislature has the power to repeal its own acts;<sup>105</sup> and a member of the legislature can be suspended only under the rules applicable in England as of the date of their adoption in New South Wales.<sup>106</sup> Several of these decisions were of importance, of course, in the development of full self-government, but they cover matters which would be taken for granted in later times.

Cases from other Australian colonies were similar in nature and effect, if not so numerous. The Victoria legislature was upheld in an exercise of the power to cite for contempt, under Imperial legislation and also under its own constitution.<sup>107</sup> Queensland had a case ruling

<sup>99</sup> SAWER, *supra* note 94, at 75.

<sup>100</sup> Willis v. Gipps, 13 Eng. Rep. 536 (P.C. 1846) (New South Wales).

<sup>101</sup> Ex parte Robertson, 14 Eng. Rep. 704 (P.C. 1857) (New South Wales).

<sup>102</sup> Devine v. Holloway, 15 Eng. Rep. 314 (P.C. 1861) (New South Wales).

<sup>103</sup> Attorney-General, New South Wales v. Bertrand, [1865-1867] L.R. 1 P.C. 520. The Judicial Committee decided that the colonial Supreme Court could not grant a new trial in a felony case under the English law then prevailing in the colony.

<sup>104</sup> Powell v. Apollo Candle Co., [1885] 10 App. Cas. 282 (P.C.) (New South Wales).

<sup>105</sup> Harris v. Davies, [1885] 10 App. Cas. 279 (P.C.) (New South Wales).

<sup>106</sup> Barton v. Taylor, [1886] 11 App. Cas. 197 (P.C.) (New South Wales).

<sup>107</sup> Dill v. Murphy, 15 Eng. Rep. 784 (P.C. 1864) (Colony of Victoria); Speaker of Legislative Assembly v. Glass, [1869-1871] L.R. 3 P.C. 560.

that a legislator was not disqualified "by reason of his having entered into a contract . . . for and on account of the public service."<sup>108</sup> The Queensland constitution was also held to allow Privy Council review of whether a legislative seat had become vacant.<sup>109</sup> In addition there were two cases from Tasmania, one involving the Governor and Council's power to remove a judge,<sup>110</sup> and another holding that the legislature has no inherent power to cite for contempt for an act committed outside the legislative chamber.<sup>111</sup>

Such cases under state constitutions have continued to come to the Judicial Committee since 1900, although they are not frequent. However, since Australian writers frequently ignore them, it may be useful to mention them briefly. Two of them involved the validity of provisions of state death duty laws, under which the states attempted to collect for assets held outside the state. In the first, it was held that New South Wales could not constitutionally collect such duties on property situated outside the state,<sup>112</sup> while in the other cases it was held that shareholdings held outside the same state *are* dutiable.<sup>113</sup>

The Judicial Committee, in *Colonial Sugar Refining Co. v. Irving*<sup>114</sup> held that cases pending at the time of the adoption of the Australian Constitution Act could properly be heard by the Committee on direct appeal, even though similar later cases could not be appealed. When it heard the case on the merits, the Committee ruled in favor of the new national government, holding that a uniform federal excise tax can be enacted preceding uniform customs duties, and that such a tax does not discriminate between states.<sup>115</sup>

Two cases took up questions of the legislature's power to regulate its own affairs, similar to some earlier cases. The New South Wales legislature was held to have power to suspend a member in the interest of maintaining "orderly conduct" in the chamber, even though a judicial verdict on a previous alleged offence was pending.<sup>116</sup> The other case, also from New South Wales, questioned the

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<sup>108</sup> *Miles v. McIlwraith*, [1883] 8 App. Cas. 120 (P.C.) (Queensland).

<sup>109</sup> *Attorney-General, Queensland v. Gibbon*, [1887] 12 App. Cas. 442 (P.C.).

<sup>110</sup> *Montagu v. Lt. Governor of Van Dieman's Land*, 13 Eng. Rep. 773 (P.C. 1849).

<sup>111</sup> *Fenton v. Hampton*, 14 Eng. Rep. 727 (P.C. 1858) (Van Dieman's Land).

<sup>112</sup> *Johnson v. Commissioner of Stamp Duties*, [1956] A.C. 331 (P.C.) (New South Wales).

<sup>113</sup> *Thompson v. Commissioner of Stamp Duties*, [1969] 1 A.C. 320 (P.C.) (New South Wales).

<sup>114</sup> [1905] A.C. 369 (P.C.) (Queensland).

<sup>115</sup> *Id.*

<sup>116</sup> *Harnett v. Crick*, [1908] A.C. 470 (P.C.) (New South Wales).

validity of an amendment to the state election laws. The Judicial Committee decided that the legislature had the power to make its upper house an elective body. Such an amendment could properly be submitted to the electorate in a referendum and did not infringe upon Crown rights. The significance of this lies in the fact that the upper chamber had begun, as in most British colonies, as the Governor's Council; therefore, a distinct change in Crown rights was being made by legislative act.<sup>117</sup>

Finally, there have been two recent challenges to Queensland's motor vehicle laws. In one case the license law for commercial vehicles was upheld against the charge that its retroactive effect was invalid.<sup>118</sup> The other challenged the state's power to enact the law at all. The Committee found that the law properly falls within the state's power to legislate for the "peace, welfare and good government," emphasizing in its judgment the "plenary" power of the states in areas where there is no conflict with national power.<sup>119</sup>

Although the state cases reviewed above are not numerous, they do involve constitutional issues which are quite important, and they demonstrate as well the continuing vitality of direct appeal from the states to the Judicial Committee, even under the restrictive Australian laws which attempt to force all constitutional cases into the High Court.<sup>120</sup>

Most cases, however, come to the Privy Council (if at all) through the High Court. These cases, which have often turned on interpretations either of federal grants of power under the Constitution Act or the meaning of the provision that interstate trade shall be "absolutely free," have been recently and ably analyzed by Professor Sawyer and by other earlier writers, so that there seems little point in reviewing them. They indicate that as late as 1970 the Judicial Committee was still playing an important role in the interpretation of the Australian Constitution, although it seems doubtful that the Committee's judgments have, on the whole, been far different from those favored by the majority of the High Court. There has been some canvassing by Australian writers of the possibility of abolishing appeal completely, but it seems unlikely that this will be

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<sup>117</sup> *Doyle v. Attorney-General, New South Wales*, [1934] A.C. 511 (P.C.).

<sup>118</sup> *Western Transp. Pty., Ltd. v. Kropp*, [1965] A.C. 914 (P.C.) (Queensland).

<sup>119</sup> *Cobb & Co. v. Kropp*, [1967] A.C. 141 (P.C.) (Queensland).

<sup>120</sup> SAWER, *supra* note 94, at ch. 3.



done soon unless the Committee should perform the unusual act of reversing the High Court on some really fundamental matter.<sup>121</sup>

## VI. NEW COLONIES

The accidents of time and culture have guaranteed that the Judicial Committee could play no such role in the development of the "new" colonies as it did in the old. Aside from various small possessions such as Gibraltar and Mauritius, the new colonies are defined as those which came under British control during the nineteenth and twentieth centuries. Typically they were not populated by British (or even white) settlers, although the British (or other whites) may now compose important minorities in some, such as South Africa and Rhodesia. The languages and customs were not British, and the cultures predated British arrival. Some had established legal systems of a relatively advanced nature, for example the Dutch of South Africa, the French of Mauritius, and the Muslims of Zanzibar. Others had long-established customary systems of law which the British felt bound to observe, such as the tribal landholding customs of West Africa. For various reasons, most of these areas were, in greater or lesser degree, inhospitable to British political institutions, so that when they attained independence they did not precisely duplicate British parliamentarianism nor hold to British ideas of the rule of law. For this reason, even important Privy Council decisions are likely to have little present significance. Finally, in most cases the areas were not under British control long enough or thoroughly enough for English ideas and institutions to pervade them with even the depth that was the case in India.

After achieving independence, relatively few of these colonies have retained appeal to the Judicial Committee for many years. This may be due partly to the fact that almost all of them are unitary rather than federal states; significantly, federal Malaysia has kept the right of appeal and used it quite frequently. Even where appeal is retained, constitutions seldom seem to have bills of rights or other "entrenched" provisions, being British enough to resist this development. Many of them, in addition, have evolved into military autocracies in which constitutional provisions are changeable at the will of the current regime. Consequently, constitutional cases appealed to the Committee are few; the bulk of the

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<sup>121</sup> *Id.*; see also Nettheim, *The Power to Abolish Appeals to the Privy Council from Australian Courts*, 39 AUSTR. L.J. 39 (1965).

cases involve private law.

It is probably in the area of private law, then, that one must look for the major continuing influence of the Judicial Committee. Here the attempt to create a body of law common to the entire Empire was especially noticeable, even though it went hand in hand with a contrary tendency to use rules of local law or custom where it seemed desirable. A few examples will serve to illustrate these points.

For the Dutch-settled portions of South Africa, for instance, the Committee consistently applied as best it could the Romano-Dutch law as it had developed in the colonies. This meant using South African cases as precedents even when they dated to a period before the British conquest.<sup>122</sup> This theme recurred in many cases. The rules of Chinese marriage were observed in appropriate cases from Malaya,<sup>123</sup> even though English law was applied in other cases, especially when wills and succession law were involved.<sup>124</sup> In Malta, the ancient Code of Rohan was held applicable in several succession law cases.<sup>125</sup>

Hong Kong for some reason has had practically no family law cases appealed to the Judicial Committee. Most of the fairly numerous appeals have been in the area of business law. Here, for quite understandable reasons, English law was uniformly applied. English common law on the use of subpoenas was held to apply in Nigeria,<sup>126</sup> but polygamy was held to be legal as consistent with local custom.<sup>127</sup> Additionally a chief was found to retain his traditional right to evict a man from the tribal compound.<sup>128</sup>

<sup>122</sup> One case in which this was made explicit, involving damages for breach of contract, was *Pearl Assurance Co. v. Union of South Africa*, [1934] A.C. 570 (P.C.).

<sup>123</sup> *Cheang Thye Phin v. Tan Ah Loy*, [1920] A.C. 369 (P.C.) (Penang); *Khoo Hooi Leong v. Khoo Hean Kwee*, [1926] A.C. 529 (P.C.) (Penang).

<sup>124</sup> *Yeap Cheah Neo v. Ong. Cheng Neo*, [1874-1875] App. Cas. 381 (P.C.) (Penang); *Ganapathy Pillay v. Alamaloo*, [1929] A.C. 462 (P.C.) (Selangor); *Khoo Hooi Leong v. Khoo Cheong Yeok*, [1930] A.C. 346 (P.C.) (Penang); *Leong v. Chye*, [1955] A.C. 648 (P.C.) (Federation of Malaya).

<sup>125</sup> *D'Amico v. Trigona*, [1888] 13 App. Cas. 806 (P.C.) (Malta); *Desain v. Viani*, [1925] A.C. 416 (P.C.) (Malta); *Strickland v. Strickland*, [1908] A.C. 551 (P.C.) (Malta); *Bugeja v. Camilleri*, [1869-1871] L.R. 3 P.C. 258.

<sup>126</sup> *Shorunke v. The King*, [1946] A.C. 316 (P.C.) (Nigeria).

<sup>127</sup> *Bamgbose v. Daniel*, [1955] A.C. 107 (P.C.) (Nigeria); *Mawji v. The Queen*, [1957] A.C. 126 (P.C.) (Tanganyika); *Coleman v. Shong*, [1961] A.C. 481 (P.C.) (Ghana).

<sup>128</sup> *Inasa v. Oshodi*, [1934] A.C. 99 (P.C.) (Nigeria). An excellent treatment of native courts operating within and under a British legal framework, is given in L. FALLERS, *LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COURTS OF COLONIAL BUSOGA* (1969); see also M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955).

Perhaps the one case that best illustrates the attempt to tie the Empire together involved, peculiarly enough, not English law but Muslim law. The Committee held, first, that Muslim law is applicable in relevant cases in Kenya, and secondly, that Committee decisions on Muslim law in India are binding on the rest of the Empire (thus including Kenya).<sup>129</sup>

The special concerns of a far-flung Empire are reflected in the activities of some of the lower courts. The Supreme Court for China and Japan (or, at times, China and Korea, or merely China) at Shanghai apparently handled mostly admiralty and business cases involving British subjects, as did the Supreme Consular Court of Constantinople. Such cases were sometimes appealed to the Judicial Committee.

The comparatively large number of criminal appeals received by the Committee, in contrast to the almost complete absence of these from the English-speaking colonies, is noteworthy. Perhaps this resulted from a distrust of native judges or a feeling that even English judges operating in the colonies might have trouble applying the rule of law in native circumstances. Also, it may have stemmed from the desire to ensure even-handed justice for natives.

Few cases explicitly raised racial issues, although it is probable that the whole structure of law tended to favor white men. But two cases illustrate both the limitations of a common law court and the changes that may take place when both the men and the constitutional situation are different. In *Commissioner for Local Government Lands and Settlement v. Kaderbhai*,<sup>130</sup> a 1931 appeal, the Committee held that the sale of town plots could legally be restricted to whites in Kenya, even though they were Crown lands up for public sale. Apparently feeling that an argument based on parliamentary supremacy was not enough, Lord Atkin went on to remark that "questions of policy . . . are not matters for the legal tribunal."<sup>131</sup> But by 1970, in reference to an independent Sierra Leone, the Committee in *Akar v. Attorney General of Sierra Leone*<sup>132</sup> was emboldened to take a much more activist approach. It is important to realize, however, that Sierra Leone had a written constitu-

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<sup>129</sup> *Bakhshuven v. Bakhshuven*, [1952] A.C. 1 (P.C.) (Kenya). In Egypt, Muslim law on wills was held to govern if the persons involved are Muslims even though English. *Bartlett v. Bartlett*, [1925] A.C. 377 (P.C.) (Egypt).

<sup>130</sup> [1931] A.C. 652 (P.C.) (Kenya).

<sup>131</sup> *Id.*

<sup>132</sup> [1970] A.C. 853 (P.C.).

tion which the Committee could apply. Even so, it was a rather exceptional act of judicial statesmanship (even though it favored whites) to hold that the constitutional provisions covered the new law, especially since the law was in form an amendment to the constitution. The law was an attempt to restrict citizenship to persons descended from a native African father, and the Committee held that it violated a basic clause of the Constitution barring discrimination; the amendment was "essentially a racial one" and thus invalid.<sup>133</sup> Lord Guest took advantage of the newly granted privilege of dissent, using an old-fashioned positivistic stance from which to accuse the majority of looking behind the face of the statute to its purpose. Additionally, he felt that the Committee had gone beyond its competence in claiming that there were no special circumstances which could justify the law. While one admires the courage of the majority, it is nevertheless true that, for an independent state like Sierra Leone, such decisions are the kind most likely to lead to the abolition of Privy Council appeal.

Aside from the above, the Privy Council has handled few significant constitutional cases. For instance, one older case raised an issue as to when Britain had gained territorial sovereignty over British Honduras. Although the area was not formally annexed until 1862, the Committee held, on the basis of royal land grants, that actual sovereignty was gained as early as 1817.<sup>134</sup> In a recent case involving freedom of the press, the Committee found that the post-independence constitution of Malta did not permit the government to prohibit government employees from having copies of the *Voice of Malta* in their offices.<sup>135</sup> Nigeria had five constitutional cases appealed, which was more than any other jurisdiction, but they were all pre-independence and are no longer applicable.

No doubt the most famous constitutional issue treated by the Committee in recent times stemmed from the unilateral declaration of independence by Rhodesia, which has still (as of 1975) not been accepted by the British government, due to Rhodesia's white supremacy policy. The case, *Madzimbamuto v. Landner-Burke and George*,<sup>136</sup> grew out of a detention order issued by the Smith regime. In court, the Rhodesian officials claimed that even if their authority

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<sup>133</sup> *Id.*

<sup>134</sup> *Attorney-General of British Honduras v. Bristowe*, [1881] 6 App. Cas. 143 (P.C.).

<sup>135</sup> *Oliver v. Buttiqueg*, [1967] 1 A.C. 115 (P.C.) (Malta).

<sup>136</sup> [1969] 1 A.C. 645 (P.C.) (Rhodesia).

was strictly illegal, they constituted the only government existing *de facto* in Rhodesia and their orders therefore were valid. The Judicial Committee, with Lord Pearce dissenting, held that the lawful sovereign was still the Queen-in-(United Kingdom) Parliament, and that the *de facto* rulers did not constitute a legal government.<sup>137</sup> Although it was the only decision an English court could have reached, it was obviously unrealistic and unenforceable without war, and therefore presents a classic illustration of the weaknesses of an appellate court external to the jurisdiction from which the cases stem. The Rhodesian courts, somewhat reluctantly, took the position that if they did not enforce the orders of the Smith regime there would be no law and no courts in Rhodesia, and that they were therefore constrained to act as though it was a legal government. Consequently, the Committee's decision was never obeyed in Rhodesia.

Another important series of cases came from Malaya. In one, the Committee held that under the Malayan Constitution, police could only be discharged by the appointing official, and that the process of discharge required notice and hearing.<sup>138</sup> The latter holding was based explicitly on a concept of natural justice—a pronounced change in the direction of activism perhaps reflecting the activist tendencies of Lords Denning and Devlin, both of whom sat for the case. This emphasis was repeated a few years later, but with an entirely different set of judges sitting.<sup>139</sup> In a less activist mood, the Committee (after a complicated set of maneuvers in Malaya) held that the dismissal of the Chief Minister of Sarawak was valid, because he had been dismissed by the central government under a declaration of a state of emergency. The Committee held that the appellant had failed to prove that there was no emergency, and that it was his duty to do so.<sup>140</sup>

## VII. CONCLUSION

This treatment of the work of the Judicial Committee of the Privy Council has necessarily resulted in a shallow furrow plowed in almost virgin ground. The true effects of the Committee's work may never actually be known, outside the comparatively easy constitu-

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<sup>137</sup> *Id.*

<sup>138</sup> *Kanda v. Malaya*, [1962] A.C. 322 (P.C.).

<sup>139</sup> *Maradana Mosque Trustees v. Mahmud*, [1967] 1 A.C. 13 (P.C.) (Ceylon).

<sup>140</sup> *Ningkan v. Malaysia*, [1970] A.C. 379 (P.C.).

tional sphere, unless scholars with the interest, time, and resources devote themselves to more specific issues than this article addresses. What kind of law do the former colonies now use regarding wills and inheritances, and how much does it resemble the Committee's rulings? The same question could be asked of other areas such as family law, business law, criminal law, and other fields.

It is true, of course, that the Committee still sits. It now receives around 30 to 40 appeals a year, mostly from Commonwealth nations since there are few colonies left. Its role as a constitutional court is no longer very important, since only Malaya, Ceylon and (occasionally) Australia allow appeals involving such questions. Shortly even these three may cease to do so. There are, however, cases of some importance in other areas of law which still come to London from these countries, and from New Zealand, Hong Kong, Sierra Leone, a few other African jurisdictions, Fiji, and some of the West Indian area mini-nations. Other former and present possessions send few, if any, cases, even when appeal is still technically possible. No recent cases have come from the Channel Islands or the Isle of Man,<sup>141</sup> and the populations of such territories as Gibraltar, the Falkland Islands, or St. Helena are too small to give rise to many cases in any event.

Still of some importance, the Judicial Committee is nevertheless only a shadow of its former self, and quite obviously the great days of its influence, from about 1880 to 1950, are gone forever. If indeed its influence lingers on, it is difficult to discern in most legal fields. Within its limitations it seems to have done a creditable and useful job. Empires are fragile things at best, and seem to be out of style, so there is not even the satisfaction of knowing that the British example may be of use in the organization of other similar situations—that is, barring the rise of some sort of effective worldwide legal organization.

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<sup>141</sup> The most recent case from Guernsey came in 1902; from Jersey in 1954 (one of very few in the twentieth century); and from the Isle of Man in 1910.