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INTRODUCTION

When crossing India's Rajputana plateau, a nineteenth-century traveller noticed a group of villagers offering sacrifice to a far-off god, who had restored to them certain lands which had been seized by a predatory rajah. Inquiries about the deity they were worshipping drew the response: 'We know nothing of him but that he is a good god, and that his name is the Judicial Committee of the Privy Council.'[1] This anecdote, once a favourite of after-dinner speakers addressing loyal societies, bar associations and gatherings of academic lawyers and their students, may be apocryphal. However, its long currency reflected the belief of many late-Victorian and early-twentieth-century English jurists that no human institution was more worthy of such honour than the supreme appellate tribunal for the British Empire. The more extreme manifestations of their satisfaction did not impress their brethren in Canada, South Africa and Australasia, for, during the long period in which the dominions passed from responsible government to full self-government, the Judicial Committee's construction of the laws and constitutions of those countries was often controversial. Besides, relatively few of the Crown's overseas subjects ever had cause to be interested in, let alone grateful for, the Judicial Committee's judgment in the *Essays and Reviews* appeals (1864), in which the Committee, as the wits put it, 'dismissed Hell with costs', and deprived the members of the Church of England of their last hope of eternal damnation.[2]

[1] There are many versions of this tale. Typical examples appear in N. W. Hoyles, 'The origin and present position of the Privy Council', *Queen's Quarterly*, 10 (1903), 403; Lord Haldane, 'The work for the Empire of the Judicial Committee of the Privy Council', *Cambridge Law Journal*, 1 (1922), 153; *Law Times Journal*, 175 (1933), 443; C. G. Pierson, *Canada and the Privy Council* (London, 1960), 5.

[2] J. B. Atlay, *The Victorian Chancellors* (2 vols., London, 1906), II, 264. G. C. Faber, *Jowett*, 2nd edn (London, 1958), 272–6.

Colonial indifference to the Judicial Committee's handling of appeals involving Anglican doctrines and liturgy was matched by metropolitan concern. It is notorious that some of the Committee's judgments in spiritual causes were denounced by the more extreme elements within the Anglican Communion. The Cambridge University Library's collection of pamphlets discussing *Gorham* v. *Bishop of Exeter* (1850),[3] for example, includes more than a hundred items which appeared within a year of the publication of the Judicial Committee's opinion on that appeal. Yet it seems to have been forgotten that the latitudinarianism of the Committee's judgments in such causes was acclaimed by the press and, as the Puseyites themselves admitted, by the great mass of the lay members of the Church. This had important political consequences. Thus, Lord John Russell, who was one of the very few early-Victorian statesmen who recognized the principal defect of the Judicial Committee's structure (until 1871 it was manned by volunteers), afterwards forgot that flaw in his eagerness to hail the Committee as the saviour of the Church of England. Because it had effectively stopped High Churchmen from persecuting Low Churchmen, Low Churchmen from persecuting High Churchmen, and both these parties from persecuting Broad Churchmen, he argued that the Committee had made the Church 'more of a national Church than it had ever been before'.[4]

After 1857, when, on the creation of the Probate and Divorce Court, the Privy Council's jurisdiction in English testamentary and matrimonial appeals was transferred to the House of Lords, the occasional spiritual appeals were almost the only matters which reminded the people of England of the Judicial Committee's existence. However, they constituted only a minute proportion of its business. Throughout the Victorian era the Committee had the duty of determining appeals from some 150 colonial, Indian, Admiralty, Vice-Admiralty, prize and consular jurisdictions, besides having to dispose of certain patent and copyright matters and appeals from the Channel Islands and the Isle of Man. It also

[3] Moore, Special report.
[4] Lord Russell, *Essays on the rise and progress of the Christian religion* (London, 1873), 278–9, 304–7.

provided a remedy in certain cases not falling within the jurisdiction of ordinary courts. Even that dedicated High Churchman W. E. Gladstone, who deplored the Judicial Committee's judgment in the *Gorham* appeal, appears never to have questioned the value of its work in these other areas.

The growth of Conciliar appellate jurisdiction

While the immediate origin of the Judicial Committee of the Privy Council was statutory, its jurisdiction derives ultimately from custom. It has often been observed that the British peoples are singularly tenacious of form, however easily they may be induced to accept changes in substance.[5] The Privy Council is a prime example of their resolute retention of ancient conventions and institutions, for it stems from the medieval Curia Regis. Its appellate jurisdiction had its genesis in the theory that the King was the source and dispenser of justice throughout his dominions and was therefore the authority to be resorted to in any case of grievance by error, delay or obstruction in the ordinary courts.[6] Indeed, the right of finally determining all controversies between the citizens of a state has always been considered the best evidence, and the firmest safeguard, of sovereign power. In England this principle was reinforced by practice, in the Norman period, when subjects bearing grievances against the administration of justice by baronial and other subordinate judicatures were permitted to petition the Crown. The King always exercised jurisdiction in his Council, which acted in an advisory capacity.[7]

As Parliament developed out of the Council, it became the tribunal for the redress of grievances arising from the courts

[5] E.g., Lord Macmillan, 'The last court of appeal', *The Times*, 14 August 1933; R. H. S. Crossman, in J. P. Mayer *et al.*, *Political thought: the European tradition* (New York, 1939), 188.

[6] Henry de Bracton, *De legibus et consuetudinibus Angliae*, ed. T. Twiss (6 vols., London, 1878–83), II, 172, VI, 160. S. B. Chrimes, 'Introductory essay', in *H.E.L.*, I (7th edn), 30*.

[7] M. M. Bigelow, *Placita Anglo-Normannica: law cases from William I to Richard I* (London, 1879), xxxiv, 175–8, 211–13, 238–40. T. Madox, *The history and antiquities of the Exchequer*, 2nd edn (2 vols., London, 1769), I, 100–2. *H.E.L.*, I, 32–40. *Encyclopaedia of the laws of England*, ed. A. W. Renton, 2nd edn (15 vols., London, 1906–9), XI, 644.

of the realm, and by the end of the middle ages the power of finally declaring the law was normally entrusted to the House of Lords. The most important surviving branches of the Council's jurisdiction in England were swept away in 1641, when the Long Parliament abolished the Court of Star Chamber, the Council of Wales, the Council of the North, the ecclesiastical Court of High Commission and other prerogative courts. The *Privy Council Act* (16 Car. I. c. 10) and the *Ecclesiastical Causes Act* (16 Car. I. c. 11) left the Council – styled the 'Privy Council' from Henry VI's reign[8] – with domestic jurisdiction only in appeals from the county palatine of Chester, the Court of the Lord Warden of the Stannaries of Cornwall (in the absence of a Duke of Cornwall), and in appeals in lunacy from the Lord Chancellors of England and Ireland. Such appeals were very rare.[9]

Meanwhile, the King in Council retained appellate jurisdiction in the overseas dominions. The Channel Islands, remnants of the Duchy of Normandy, were regarded as parcel of the Crown and had never been united to the realm of England. They had their own law and their own courts, and feudal law vested appeals for default of justice in the overlord. According to the custom of Normandy, the Norman and Angevin kings of England had claimed an immediate prerogative over all Channel Islands cases in which unjust judgment or default of justice was alleged.[10] In

[8] A. V. Dicey, *The Privy Council*, 2nd edn (London, 1887), 43. Professor G. R. Elton has pointed out that although the term 'Privy Council' was 'often employed as early as the fourteenth century', at that stage 'no separate council was meant by it; the name exemplified the special "secretness" or closeness to the king of his more intimate advisers'. *The Tudor revolution in government* (Cambridge, 1953), 317. *Contra* D. M. Gladish, *The Tudor Privy Council* (London, 1915), 10.

[9] *Jennet* v. *Bishop* (1683), 1 Vern. 184. *Re Pitt* (1728), 3 P. Wms 111. 1 Rolle, Abridgment, 745. L.P. 1842 (117) XIV, 22. 2 Knapp App. iv n. Greville, II, 370 n. 1. Macpherson, 222. W. Blackstone, *Commentaries on the laws of England* (4 vols., London, 1765–9), I, 231, III, 80. MacQueen, 752–6.

[10] J. Goebel, 'The matrix of Empire', in Smith, *Appeals* (q.v., 5), xv, xxv. W. Burge, *Commentaries on colonial and foreign laws* (4 vols., London, 1838), I, xlvi. W. Anson, *Law and custom of the constitution*, 4th edn (2 vols., Oxford, 1909–35), II, pt ii, 55. G. A. Washburne, *Imperial control of the administration of justice in the thirteen American colonies* (New York, 1923), 54–6. T. Pownall, *The administration of the colonies*, 2nd edn (London, 1765), 82. *Contra* MacQueen, vii, 682–6, and A. B. Keith, *The constitutional history of the first British Empire* (Oxford, 1930), 305.

Edward III's reign the King in Council also heard and determined appeals from Gascony, and in the same reign the Court of King's Bench decided that it had no jurisdiction over the Crown's dominions outside the realm.[11] In 1495 and again in 1565, Orders in Council directed that all appeals from the Channel Islands should be heard only by the King in Council.[12] The Long Parliament did not interfere with this jurisdiction. In 1649–50, during the Interregnum, Charles II and his Privy Council, at St Germain and St Helier, heard and determined appeals from the Jersey Royal Court. Under the Protectorate, only a few Channel Islands appeals went to the Privy Councils of the Cromwells, but after the Restoration the number of appeals rose sharply.[13]

The Council's Channel Islands jurisdiction was extended by analogy to all the overseas colonies.[14] Like those islands, the first American plantations were regarded as part of the King's personal demesne. The special strength of the royal prerogative in these territories was reflected in the practice of granting them to be held as part of the manor of East Greenwich, or as part of the Castle of Windsor or Hampton Court.[15] Besides, as the King is supreme over all persons and in all causes in his dominions, the Crown has always exercised the prerogative right of receiving petitions, except where that right has been expressly delegated or surrendered.[16]

After 1660, the charters granted to individual and corporate plantation proprietors contained express provision for ap-

[11] Goebel, 'The matrix of Empire', xlvii. *H.E.L.*, I, 520.

[12] Cited in Safford & Wheeler, 228.

[13] Smith, *Appeals*, 38–40, 63–4. First Report of the Channel Islands Criminal Law Commission (1847), 8 S.T. N.S. App. C.

[14] See the first five authorities cited in n. 10 above.

[15] A. W. Renton & G. G. Phillimore, *Colonial laws and courts* (London, 1907), 356. A mid-Victorian variation on the theory behind this practice appeared in Benjamin Disraeli's Crystal Palace speech, 24 June 1872, when he declared that the granting of self-government to the settlement colonies ought to have been accompanied by 'securities *for the people of England* for the enjoyment of the unappropriated lands which belonged to the sovereign as their trustee'. Cited in T. E. May, *The constitutional history of England*, ed. and cont. to 1911 by F. Holland (3 vols., London, 1912), III, 293 (emphasis supplied).

[16] Safford & Wheeler, 699. 25 Hen. VIII c. 19. 8 Eliz. I c. 5; 27 Eliz. I c. 8. 16 Car. I c. 10. O. H. Phillips, *The principles of English law and the constitution* (London, 1939), 462.

peals to the King. For example, the charter dealing with the governance of New York, issued to the Duke of York in 1664, contained a clause

> SAVEING and reserveing to us our heirs and successors the receiveing heareing and determineing of the Appeale and Appeales of all or any Person or Persons of in or belonging to the Territories or Islands aforesaid in or touching any Judgment or Sentence to bee there made or given.[17]

Similar provisions were inserted in the 1672 concession to the Lords Proprietors of New Jersey and the charters for Pennsylvania and Massachusetts Bay granted in 1681 and 1691.[18] Moreover, from 1680, the commissions and instructions issued to the governors of the plantations contained rules for regulating appeals. They were to be allowed in causes involving property of a specified minimum value (at first, £50 or £100), but only if instituted within a fortnight of sentence, and if the appellant gave security to prosecute the appeal and pay all costs and damages awarded in London.[19] In 1726 it was further ordered that, whenever a colonial court admitted an appeal to the King in Council, execution of the judgment in question was to be suspended until the final determination of the appeal unless the respondent also gave security – sufficient to restore, in the event of reversal, all that the appellant had lost in the court below.[20]

To hear and report on appeals, the Council appointed a series of short-lived committees.[21] A more stable arrangement was introduced in 1679, when appellate jurisdiction was vested in the Board of Trade, a standing committee possessing entire control of plantation affairs.[22] Using procedure modelled on that which had been evolved for handling Channel Islands appeals, none of these committees had full judicial power. In all cases, their decisions acquired force only through proclamation in Orders in Council, issuing from

[17] Cited in J. Goebel & T. R. Naughton, *Law enforcement in colonial New York* (New York, 1944), 3.
[18] Smith, *Appeals*, 53, 73.
[19] Labaree, I, 319–25.
[20] *Ibid.*, 324.
[21] Smith, *Appeals*, 12–45, 63–72.
[22] A.P.C.C., I, 295, 819–20. C. M. Andrews, *British committee, commissions and councils of trade and plantations, 1622–75* (Baltimore, 1908), 62–3. E. R. Turner, *The Privy Council of England in the seventeenth and eighteenth centuries* (2 vols., Oxford, 1928), II, 189.

formal meetings of the Council itself.[23] In January 1683/4, the requirement that each appellant must give sufficient security to prosecute his appeal and abide by the outcome was extended to all the plantations.[24]

By December 1696 there had been a total of eighty-seven appeals from the American plantations, chiefly from the West Indies.[25] In that month, the appellate jurisdiction of the Board of Trade was abolished, and it was ordered that all appeals to the King in Council be heard and reported on by a committee consisting of all the members of the Council, three to be a quorum.[26] This standing committee of the whole Council, hereinafter referred to as the (old) Appeals Committee, remained the body to which appeals were referred until the more professional Judicial Committee was established in 1833.

The number of appeals rose with the growing wealth and sophistication of the colonists, the enforcement of the Navigation Acts, and the expansion of the Empire. In the 1720s the average annual number of appeals was nine. In 1755 there were eighteen appeals; in 1770, twenty-three.[27] The loss of thirteen of the American colonies in the years 1776–83, and of the Council's appellate jurisdiction in Chester – consequent upon the abolition of Chester's separate judicial system in 1830, by the statute 11 Geo. IV & 1 Wm IV c. 70 – was offset by the growing importance of the East India Company's territories, which extended both into the sub-continent and across the Bay of Bengal to Penang, Malacca and Singapore, and by the acquisition of jurisdiction over the Ionian Islands (1815) and twenty new colonies: British Guiana (1814), British Honduras (1798), Cape Breton (1763), the Cape Colony (1795), Ceylon (1802), Gambia (1765), Grenada, with Dominica, St Vincent and Tobago

[23] Smith, *Appeals*, 72.

[24] *Calendar of State Papers, colonial series, America and West Indies, 1681–5*, ed. J. W. Fortescue (London, 1898), 580, doc. 1518 (Order in Council of 23 January 1683/4).

[25] J. H. Smith, *Cases and materials on the development of legal institutions* (St Paul, Minn., 1965), 433.

[26] *A.P.C.C.*, II, vi. 310. *Contra* E. M. Campbell, 'The decline of the jurisdiction of the Judicial Committee of the Privy Council', *Australian Law Journal*, 33 (1959), 197.

[27] *A.P.C.C.*, V, xxxi.

(1763), Heligoland (1807), Ile St Jean (1769), Malta (1800), Mauritius (1810), New Brunswick (1784), New South Wales (1788), Quebec (1763), St Lucia (1794), Sierra Leone (1791), Trinidad (1802), Upper Canada (1791), Van Diemen's Land (1825), and Western Australia (1829).[28] By the period 1815–26, appeals were being lodged at the Council Office at the rate of forty-three a year.[29]

The degeneration of the old Appeals Committee, 1763–1828

In the first seven decades of the eighteenth century, such able judges as Sir John Holt, Lord Macclesfield, Lord Hardwicke, Sir John Willes, Lord Mansfield, Sir Thomas Clarke, Sir Thomas Sewell, Sir John Eardley-Wilmot and Sir Thomas Parker sometimes sat on the Appeals Committee.[30] Few of their immediate successors showed a similar interest in the Committee's work. F. W. Maitland claimed that, 'until 1833', the Council's appellate jurisdiction was 'exercised by such members of the Privy Council as had held high judicial offices'.[31] The real situation, in the greater part of the period 1763–1828, was more like one imagined by Kipling:

> Strangers of his Council, hirelings of his pay,
> These shall deal our justice, sell – deny – delay.[32]

Because the Appeals Committee was a committee of the whole Council, and because it implemented a resolution of 20 February 1627/8 that 'every Councillor hath equal vote',[33] it was possible for the lay members to outvote the law lords and judges. Occasionally they did so.[34] Indeed, the attendance of a judge at the hearing of Conciliar appeals was not obligatory.[35] Consequently, some appellants secured

[28] H. J. Robinson, *Colonial chronology* (London, 1892), 193–302.
[29] Hansard 2, XVIII, 156–7. [30] P.C. 2/17–114.
[31] F. W. Maitland, *The constitutional history of England* (Cambridge, 1908), 463.
[32] R. Kipling, 'The old issue', *Cape Argus*, 22 November 1899.
[33] Macpherson, App., 1.
[34] Smith, *Appeals*, 324–5 n. 335. This paralleled contemporary practice in the House of Lords. Thus, in *Bishop of London* v. *Ffytche* (1783), when the House of Lords decided for the appellant by 19 votes to 18, the majority included the votes of 13 bishops. 2 Bro. P.C. 211–19. T. Beven, 'The appellate jurisdiction of the House of Lords', *Law Quarterly Review*, 17 (1901), 367.
[35] N. Bentwich, *The practice of the Privy Council in judicial matters* (London, 1912), 7.

partial judgments by persuading particular Councillors, usually some of the bishops, to attend the hearings, and the better-informed counsel and judges in the colonies had little respect for Conciliar decisions.[36]

The position deteriorated after 1763 for three reasons. First, wars with European states brought into the Empire the island of Malta and long-established French, Spanish, Danish, Dutch and Portuguese colonies. According to the classic doctrine set forth by Sir Edward Coke C.J. in *Calvin's Case* (1608), in lands conquered from Christian kings the existing laws remained in force unless and until they were formally replaced by English law.[37] This common law rule was now reinforced and supplemented by various surrender documents – confirmed by the treaties of Paris (1763), Versailles (1783), Amiens (1802), Paris (1814) and Vienna (1815) – by which the inhabitants of the new colonies were guaranteed the continued application of their traditional laws and customs. As a result, the Privy Council's Appeals Committee had to determine many more causes involving systems of jurisprudence stemming from Roman civil law. Yet in the period 1763–1830 only one English judge had any substantial knowledge of continental law. The exception was Sir William Grant.

Secondly, in 1765, by the Treaty of Allahabad, the London East India Company acquired virtual sovereignty of the Diwani of Bengal, Bihar and Orissa. English law had been administered in Bombay, Madras and Calcutta from the foundation of the first factories in those towns. In *Calvin's Case*, Coke had declared that in the case of territories conquered from infidels, 'there *ipso facto* the laws of the infidel are abbrogated, for that they be not only against Christianity, but against the law of God and of nature'.[38] Despite this tradition, when the first Governor of Bengal, Warren Hastings, reorganized the courts in his territories, he provided that the Hindu and Mohammedan subjects of the Crown were to be governed by their own laws and usages in

[36] Smith, *Appeals*, 326–7, 655. *A.P.C.C.*, II, 743, IV, 309–11, VI, 505–7, 536.
[37] 7 Co. Rep. 17b. Reaffirmed by Sir John Holt C.J., in *Blankard* v. *Galdy* (1693), Holt K.B. 341–2; and by Lord Mansfield, in *Campbell* v. *Hall* (1774), 1 Cowp. 208–9.
[38] (1608) 7 Co. Rep. 17b. Reinforced by a Privy Council Memorandum, 1722, 2 P. Wms 75.

suits involving inheritance, succession, marriage, and caste and other religious customs and institutions.[39] Imperial statutes of 1781 and 1797 confirmed these regulations and extended them to Madras and Bombay.[40] The Privy Council's appellate jurisdiction in India had been made statutory in 1773,[41] but the Councillors' knowledge of Hindu law and Mohammedan law was even slighter than their acquaintance with continental European law.

Thirdly, as the population, trade and private wealth of England increased, so did the business of the courts of the realm, and the judicial members of the Council became reluctant to assist in the decision of plantation appeals. This left the Master of the Rolls as the only judicial figure regularly participating in the Appeals Committee's work, for he was much less occupied than the other judges. Though he was regarded as a deputy of the Lord Chancellor, his office contained no explicit reference to judicial duties and, by custom, his chancery sittings were generally in the evenings.[42]

Nevertheless, William Burge Q.C., who was Attorney General for Jamaica, 1817–29, and who later acquired some practice in plantation appeals, observed, in 1841:

> if ever the qualification of an individual could afford an excuse for the delegation of so momentous a trust as the Appellate Judicature of the Privy Council to a single Judge, the extraordinary and peculiar attainments of Sir William Grant, who assisted so many years in the decision of appeals, would have furnished that excuse.[43]

Burge's comment was well warranted. Before his call to the bar at Lincoln's Inn, Grant had studied Roman–Dutch law at Leyden University for two years. Afterwards he served as Attorney General of Quebec. As a member of the House of

[39] H. Cowell, *The history and constitution of the courts and legislative authorities in India* (Calcutta, 1872), 30. G. C. Rankin, *Background to Indian law* (Cambridge, 1946), 2. M. C. Setalvad, *The common law in India* (London, 1960), 18.

[40] 21 Geo. III c. 70. 37 Geo. III c. 142. E. C. Ormond, *The rules of the High Court of Judicature at Fort William, Bengal*, 4th edn (Calcutta, 1941), 87.

[41] 13 Geo. III c. 63.

[42] *Mirror of Parliament*, 1828, 442. W. Burge, *Observations on the supreme appellate jurisdiction of Great Britain* (London, 1841), 5, 10. C. P. Cooper, *Chancery cases and dicta* (London, 1852), 350–1. *H.E.L.*, I, 420–1. P.P. 1831–2 (199) XXIV, 241.

[43] Burge, *Observations*, 11–12.