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Keble College, Oxford

*Same Law – Different Weather:
the Significance of Privy Council Decisions for English Lawyers*

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Introduction

1. Between 1927 and 1936, the Judicial Committee of the Privy Council or JCPC¹ heard an average of 118 appeals annually.² At that time, the JCPC stood as the final court of appeal for more than a quarter of the world.³ Reflecting in 1950, Lord Normand attributed the romance of the JCPC to the scope of its jurisdiction. It was, he observed, “a jurisdiction wider in the area in which it was exercised, more varied in the population which it affected and in the laws which it administered than any that has ever been known”.⁴
2. Since then, many countries have chosen to leave the JCPC’s jurisdiction. Yet Lord Normand’s description still remains relevant. Today, the JCPC is the final court of appeal for both criminal and civil matters in 29 jurisdictions, each with its own body of law, history and customs. In the 2024-2025 financial year, the JCPC handed down 49 judgments; by comparison, the UK Supreme Court handed down 43 judgments in the same period.
3. This evening, I propose to address the question: why should English lawyers be interested in the JCPC? I have chosen this topic for two reasons. First, the work of the JCPC seems to receive less attention than it deserves despite it being a rich source of interesting case law. Second, the distinct nature and history of the JCPC gives rise to some novel issues concerning the doctrine of precedent. That is a topic on which Professor Harris, the much admired and loved law tutor in whose honour this lecture is named, did remarkable work of enduring authority.

¹ I am very grateful to my judicial assistant Liana Turner for her help in researching and preparing this lecture.

² Rohit De, “A Peripatetic World Court: Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council” (2014) 32(4) Law and History Review 821, page 848.

³ Mance and Turner, *Privy Council Practice* (Oxford University Press 2017).

⁴ Lord Normand, ‘The Judicial Committee of the Privy Council – Retrospect and Prospect’ (1950) 3(1) Current Legal Problems 1, page 2.

History of the JCPC

4. Let me start with the history of the JCPC. As is typical of an element in the British constitution, the judicial branch of the Privy Council developed incrementally and piecemeal. In 1833, Parliament passed the Judicial Committee Act which established for the first time a committee of trained lawyers with judicial experience to hear appeals. But as section 3 of the 1833 Act itself alludes to, the hearing of appeals by the Privy Council was already well-established by then.
5. The Privy Council was originally known as the King's Council and its purpose was to serve as a group of advisers to the reigning monarch. As well as an advisory role, it served both judicial and administrative functions. The monarch was regarded as "*the fountain of all justice throughout his dominions*". Accordingly it was the highest and final authority to turn to for redress against judicial decisions.⁵
6. By the early 14th century, receivers and triers of petitions were appointed to aid with dispensing justice. Appeals from the Channel Islands are the earliest example of the Privy Council exercising its appellate jurisdiction over foreign dominions of the Crown. The Channel Islands were in ancient times part of the Duchy of Normandy and when William of Normandy ascended the throne in 1066 becoming William I of England, this right of appeal became vested in English Kings and Queens. By Order in Council of 1495, Henry VII directed that all appeals from these islands should not go to any English court, but to the King and Council.⁶ Rules of procedure were adopted in 1580 and they contained many provisions recognisable to lawyers today: they fixed a time limit within which an appeal must be brought, provided that a judgment must be final and definitive before it could be appealed, and required the appellant to pay costs should their appeal be dismissed.⁷
7. As England's empire expanded during the 17th century, petitions from plantations in North America and the Caribbean began to reach the Crown seeking relief from decisions of local courts. In response, a Committee for the Business of Trade was established in 1667 to hear these petitions as well as appeals from Guernsey and Jersey.⁸ By Order in Council of 1696, this Committee was required to report its opinion as to how the appeal ought to be determined to the monarch.⁹
8. As the empire grew, Parliament passed several statutes granting the right to appeal to the Privy Council from particular territories. By this time, Parliament had long since abolished the jurisdiction of the Privy Council over appeals from courts in England, and the appellate jurisdiction over foreign dominions was by far the most important jurisdiction of the appellate committee, both in volume and in political importance.¹⁰ The

⁵ P.A. Howell, *The Judicial Committee of the Privy Council: 1833–1876 – Its Origins, Structure and Development* (Cambridge University Press 1979).

⁶ W.S. Holdsworth, *A History of English Law* (Volume 1, 3rd edn, Methuen & Co. 1922), pages 520–21.

⁷ N. Bentwich, *The Practice of the Privy Council in Judicial Matters* (Sweet & Maxwell 1912), page 4.

⁸ N. Bentwich, *The Practice of the Privy Council in Judicial Matters* (Sweet & Maxwell 1912), page 5.

⁹ *Ibid*, page 6.

¹⁰ W.S. Holdsworth, *A History of English Law* (Sweet & Maxwell, 3rd edn, Methuen & Co. 1922), pages 479 and 522.

JCPC sat in what is called a Board – in other words, a panel of judges, and the term “Board” is still used to describe the panel of judges sitting on a JCPC appeal.

9. In those early days, the members of the Privy Council chosen to hear and decide a particular appeal did not have to be lawyers. This became untenable and complaints arose about the lack of legally qualified judges, the reliance on non-lawyers to make up the quorum who could then overrule their legally trained colleagues. There was also complaints about the limited number of sitting days that were made available.¹¹ Hence, the Judicial Committee Act 1833 sought to remedy these deficiencies by establishing the JCPC and ensuring that appeals would be heard by a Board comprising only legally qualified judges.

The modern JCPC

10. And so the JCPC was born. And although it largely endures in both form and substance today, there have been several amendments to its operation since 1833 worth noting.
11. First, several statutes have been passed which grant or formalise the JCPC’s jurisdiction in respect of certain miscellaneous matters arising in England.¹² Those include: appeals against certain schemes of the Church Commissioners;¹³ disputes under the House of Commons Disqualification Act 1975 and appeals against disciplinary decisions taken by The Council of the Royal College of Veterinary Surgeons.¹⁴ We last heard a veterinary disciplinary case in October 2019, with judgment handed down on 10 February 2020. Until 2009, the JCPC also had jurisdiction over the significant devolved matters arising under the Scotland Act 1998, the Government of Wales Act 1998, and the Northern Ireland Act 1998. But these powers were transferred to the UK Supreme Court on its creation following the enactment of the Constitutional Reform Act 2005.
12. Second, it used to be the case that the JCPC could not publish dissenting opinions. This goes back to an Order in Council dated 1627 which formalised the convention that a single opinion was delivered by the Board and its deliberations kept confidential under the Privy Councillor’s oath of secrecy.¹⁵ One Privy Councillor, Sir Fitzroy Kelly, disgruntled with the outcome in an ecclesiastical case, broke ranks and revealed details of his dissent to the press in 1878. *The Church Times* quoted him in capital letters describing the judgment as “INIQUITOUS” and “NOT...BASED UPON LAW, BUT UPON POLICY”.¹⁶ The public row that ensued was promptly followed by an Order in Council in 1878 which prohibited both dissenting and concurring judgments. That Order remained

¹¹ The Judicial Committee – Privy Council Papers.

¹² Section 4 of the Judicial Committee Act 1833 permitted the monarch to refer any other such matters as he or she thinks fit to the JCPC.

¹³ Mission and Pastoral Measure 2011.

¹⁴ Section 17 of the Veterinary Surgeons Act 1966.

¹⁵ Smith, “Ridsdale v Clifton: Representations of the Judicial Committee of the Privy Council in Ecclesiastical Appeals” (2008) 19 *Kings Law Journal* 551, 569.

¹⁶ *Ibid*, 570.

in place until 1966 when, largely due to the efforts of Sir Garfield Barwick,¹⁷ the then Chief Justice of Australia, the Judicial Committee (Dissenting Opinions) Order was adopted in 1966 allowing separate or dissenting opinions to be recorded. But that power is rarely used - in the 2024 – 2025 financial year, there were 3 dissenting judgments of the 49 handed down.¹⁸

13. Third, when the 1833 Act established the JCPC, only English lawyers were permitted to be members of a Board. But by 1887, any person who held ‘high judicial office’ was permitted to hear appeals. ‘High judicial office’ is now defined in the Constitutional Reform Act 2005 and includes judges of the Court of Appeal in England & Wales, the Inner House of the Court of Session, and the Court of Appeal in Northern Ireland.¹⁹
14. It is not only judges from the United Kingdom who can sit on the JCPC. In 1895 and 1908, provision was made to enable Chief Justices and Judges of a Supreme Court in the Dominions or an Indian High Court, if they were members of the Privy Council, to sit on the JCPC.²⁰ By the 1950s, it was common to have one or more members on the Board who had held judicial office in India, and it became customary to have a distinguished Canadian judge to sit for about a month each year.²¹ This practice continues today. In December 2024, Dame Janice Pereira DBE, former Chief Justice of the Eastern Caribbean Supreme Court, sat with the JCPC, returning remotely in March 2025. In January 2026, Sir Anthony Smellie KCMG KC, former Chief Justice of the Cayman Islands, was appointed to the Privy Council by His Majesty and sat on the Board for a week in January 2026.
15. Finally, hearings of the JCPC were formerly held in Downing Street. Sir Courtney Ilbert, the legal member on the Indian Viceroy's Council, once remarked that “almost all the laws and customs of the world – civilized and uncivilized – come up for discussion in that dingy little room.”²² When the apex court for the UK moved from the House of Lords across Parliament Square into the Supreme Court building in 2009, the JCPC moved with it. Appeals from the JCPC are now generally heard in Court 3, which is not a dingy little room but rather a grand room decorated with miniature version of the flags from all of the jurisdictions that the JCPC serves. During any given appeal, the miniature flags are set to one side, and a larger flag representing the jurisdiction from which the appeal is brought takes pride of place behind the Bench.

Precedent value of JCPC decisions for JCPC jurisdictions

¹⁷ Oliver Jones, ‘The history of the Judicial Committee (Dissenting Opinions) Order 1966’ LQR 2026, 142(Jan), 85-111.

¹⁸ The Supreme Court and Judicial Committee of the Privy Council – Annual Report and Accounts.

¹⁹ See section 1(4) Judicial Committee Act 1833.

²⁰ Lord Normand, ‘The Judicial Committee of the Privy Council – Retrospect and Prospect’ (1950) 3(1) Current legal problems 1, page 4.

²¹ Ibid.

²² Sir Courtenay Ilbert, *Journal of the Society of Comparative Legislation* (1905) Vo. 6, No. 2, 191.

16. So what of the precedent value of JCPC decisions? A decision of the JCPC will finally determine that case and be a binding precedent on all of the lower courts within the jurisdiction from which the appeal came. But the courts of jurisdictions of the JCPC have also determined that an appeal from one country will also bind all of the other countries within the JCPC's jurisdiction.²³ That said, decisions will of course be readily distinguished where the underlying applicable law is not the same, even if the same point of law arises.²⁴
17. So far, so straightforward. What about jurisdictions that formerly had the right to appeal to the JCPC, but who chose to leave the JCPC's jurisdiction? In those cases, it is a matter for their local courts to determine the precedent value of JCPC decisions. Most common law jurisdictions have held that they are bound by pre-abolition decisions of the JCPC. Barbados, for example, left the jurisdiction of the JCPC in 2005 and the Caribbean Court of Justice ("CCJ") is now its final appellate court. The CCJ was set up in 2001 and is an alternative final supra-national appeal court for a number of countries in the Caribbean. In 2007, however, the CCJ noted that decisions of the JCPC from other Caribbean countries were binding in Barbados when it was under the JCPC's jurisdiction and further held that such decisions remain binding unless and until they are overruled by that court.²⁵ We will see one such example of the CCJ deciding not to follow a JCPC decision later on. Australia is the outlier: its courts have held that pre-abolition JCPC decisions are not binding, though this conclusion has been the subject of considerable academic criticism.²⁶
18. The next issue is whether the JCPC will be bound by its own decisions. Historically, the House of Lords could not depart from its previous decisions. That changed when the House of Lords issued the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 ('the 1966 Practice Statement'). This provided that the Law Lords would depart from their earlier decision "*when it appears right to do so*". As we know, that ability is used very sparingly by the Supreme Court.²⁷
19. The JCPC, however, has never been bound by such rigid rules. In *Ridsdale v Clifton (No. 2)*, a case in 1877 concerning an ecclesiastical appeal, the Law Lords said that although "*great weight*" should be given to their previous decision, they were entitled to examine the reasons upon which the decision was arrived at and if necessary dissent from those reasons.²⁸ A later case confirmed that although the JCPC's own previous decision was not strictly binding it "*ought not to be reopened without the greatest hesitation*".²⁹

²³ Marshall, 'The Binding Effect of Decisions of the Judicial Committee of the Privy Council' *The International and Comparative Law Quarterly* Vol. 17, No. 3, Jul 1968, pages 743 – 749.

²⁴ Mance and Turner, *Privy Council Practice* (Oxford University Press 2017), page 135.

²⁵ *Attorney-General (Barbados) v Joseph* [2007] 4 LRC 199 at 233.

²⁶ Oliver Jones, "Do the Law Lords Bind Lower Courts?" (2013) 87 *Australian Law Journal* 383.

²⁷ See e.g. *Knauer (Widower and Administrator of the Estate of Sally Ann Knauer) v Ministry of Justice* [2016] UKSC 9 at [23].

²⁸ *Ridsdale v Clifton (No. 2)* (1877) 2 P.D. 276 at 307. See also *Tooth v Power* [1891] AC 284, citing *Ridsdale v Clifton (No. 2)*, page 292.

²⁹ *Gideon Nkambule v The King*, [1950] AC 379, pages 397– 398.

20. A number of important cases about the role of precedent in the JCPC have arisen from the fact that several JCPC jurisdictions retain the death penalty as a punishment for murder. Moreover, some countries made the imposition of the death penalty mandatory when a person was convicted of murder rather than leaving it to the discretion of the judge to decide whether the death penalty or a term in prison was the appropriate sentence. The constitutionality of the death penalty – either mandatory or discretionary – comes before the court as a clash between the statutory provision in their domestic legislation imposing the death penalty and a provision in the country’s written constitution outlawing cruel and inhuman punishment along the lines of article 3 of the European Convention on Human Rights. In these appeals against a capital sentence, sometimes the Crown accepts that the death penalty does amount to cruel and unusual punishment.³⁰ But there is an issue as to whether the validity of the death penalty is nevertheless saved by a clause which some of the Constitutions include which provides that any law in force immediately before the Constitution came into effect cannot be challenged on the ground that it is incompatible with fundamental rights provisions brought in by the Constitution.
21. The clash between these three legislative provisions in the particular jurisdiction – the statutory death penalty, the prohibition on cruel and unusual punishment and the saving for pre-existing law was considered by the Board in *Roodal v Attorney General of Trinidad and Tobago*.³¹ The *Roodal* judgment was handed down in November 2003 and addressed the question of how to square this difficult circle created by the Trinidad & Tobago Constitution. The state conceded that the mandatory death penalty constituted cruel and unusual punishment. In *Roodal* five judges sat and by a 3-2 majority, the Board had held that the savings clause in the 1979 Trinidadian Constitution only came into operation if it were not possible to modify a law to make it conform with the 1976 Constitution by reading the text down, reading in additional text or by severance. The majority therefore held that the relevant provision should be read to provide that the death penalty was a maximum sentence in the discretion of the sentencing judge rather than a fixed penalty.
22. But not very long after *Roodal* the same question arose in 2004 in *Boyce v The Queen*.³² That case concerned the constitutionality of the mandatory death penalty in Barbados. Barbados had enacted in 1868 a statute in similar terms to the English Offences Against the Person Act 1861. Both statutes provided by section 1 that “whosoever shall be convicted of murder shall suffer death as a felon”. The 1861 Act section was repealed in England when the death penalty was abolished here in 1965 but there was no equivalent repeal of the mirror provision in the Barbados Act. The Barbadian Constitution contained two relevant provisions. Section 15(1) provides that no person shall be subject to an inhuman or degrading punishment. But section 26 contains a ‘savings clause’ as I have

³⁰ The JCPC so held in *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235.

³¹ *Roodal v Trinidad and Tobago* [2005] 1 AC 328 at [32]. See also the discussion of the case law in the earlier case of *Watson v The Queen* [2004] UKPC 34, [2005] 1 AC 472.

³² *Boyce v The Queen* [2005] 1 AC 400 and *Matthew v State of Trinidad and Tobago* [2004] UKPC 33.

described saying that no existing law shall be held to be inconsistent with any of the fundamental rights provisions, including section 15(1).

23. The Board decided that *Boyce* was a good opportunity to reconsider what had been decided in *Roodal*. So as is usually the case when either the House of Lords or the JCPC is considering whether to overrule one of its own decisions, the *Boyce* appeal was directed to be reargued before an enlarged Board – in that case of nine members. It was also heard alongside a further appeal raising the same issue in *Matthew v State of Trinidad and Tobago*. The hearing was for the specific purpose of considering whether the *Roodal* judgment decided only a few months previously was correct. Counsel for the condemned men in *Boyce* was one Mr Starmer QC.
24. Despite his best endeavours, the majority of the Board – a five four split, held that the decision in *Roodal* purporting to read down the mandatory death penalty despite the savings clause had been irrational, ultra vires and inconsistent with the language and purpose of the constitutions of both Barbados and Trinidad and Tobago. It was in these “*highly exceptional circumstances*” that five out of nine of the panel declined to follow *Roodal*, holding instead that the clear language and purpose of the savings provision in the Constitutions protected even the mandatory death penalty from constitutional challenge.³³ The story doesn’t end there, but more on that later.

³³ *Boyce v The Queen* [2005] 1 AC 400 at [62].

Precedent value of JCPC judgments for English lawyers

25. You might be thinking – this is all very interesting – but what has it got to do with us? Let's start first with whether the courts in England and Wales are bound by JCPC decisions. The traditional view was that the courts in this jurisdiction were not bound by the Privy Council because the JCPC was not a court within the UK judicial hierarchy.³⁴ On this view, as a matter of strict precedent, the lower courts are bound to follow a High Court, Court of Appeal or House of Lords decision even if it conflicts with a decision of the JCPC.
26. This rule can, however, give rise to some odd situations given that the JCPC often applies the common law or equity and the case is argued on the basis that the law applicable is the same as in England and Wales. In fact, often in the opening paragraphs of the parties' written submissions or at the start of the hearing, counsel will tell us that they are agreed that the case can be decided on the basis that the local law on the topic is the same as English law. Further, either all or four of the five Privy Counsellors who sit on any appeal will be Justices of the Supreme Court. This can create a dilemma for the lower courts. For example, in 1964 in the case of *Doughty v Turner Manufacturing*,³⁵ the Court of Appeal was faced with a decision of the Privy Council decided on an appeal from Australia only two years earlier in 1961, known as *The Wagon Mound*.³⁶ As all law students learn, that case established that in order for damage caused by the defendant's negligence to be recoverable in a tortious claim, the damage must have been foreseeable. The Privy Council Board in *The Wagon Mound* explicitly held that the old English Court of Appeal decision in the 1921 case of *In re Polemis*³⁷ should not be regarded as good law. What was the Court of Appeal in *Doughty* to do? Follow its own prior decision that had recently been disapproved by the same judges who sat in the House of Lords? Or apply the decision of the JCPC which it was not bound by as a matter of strict precedent? The Court of Appeal chose the latter option. And so a decision of the JCPC became an established part of English law.
27. A similar issue arose more recently in *R v James*³⁸ about the defence of provocation in a trial for murder and in particular how brain damage which reduces the defendant's capacity for self-control should be treated. In that case the Court of Appeal (Criminal Division) was faced with a decision of the House of Lords in a majority judgment handed down in July 2000 called *R v Morgan Smith*.³⁹ But in his judgment in *R v James* Lord Phillips – then Lord Chief Justice presiding in the Court of Appeal - said that *Morgan Smith* was one of the rare occasions when a decision of the House of Lords is almost immediately recognised to have been erroneous. However, there had been no suitable appeal coming up to the House of Lords in which it could depart from that judgment relying on the 1966 Practice Statement. Instead, an appeal from Jersey had come before

³⁴ *Dulieu v White* [1901] 2 KB 669 at 677, 683.

³⁵ *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518.

³⁶ *Overseas Tankship Ltd v Morts Dock and Engineering Co Ltd* [1961] AC 388.

³⁷ *In re Polemis and Furness, Withy & Co. Ltd* [1921] 3 KB 560.

³⁸ *R v James* [2006] QB 588.

³⁹ *R v Smith (Morgan)* [2001] 1 AC 146.

the JCPC in June 2005 called *Holley*. In *Holley*, a nine judge Board had been convened to decide the Jersey appeal and Lord Nicholls who was sitting on that Board had expressly said that given that Jersey law is the same as English law, the *Holley* appeal was being heard by an enlarged Board of nine members to clarify definitively the present state of English law and hence Jersey law on this important subject.⁴⁰ And the Board in *Holley* had by a majority said that the House of Lords judgment in *Morgan Smith* was wrong.

28. So coming back to the poor Court of Appeal in *James*, the Lord Chief noted that the Court of Appeal was not bound by the *Holley* decision of the Privy Council but it was bound by the *Morgan Smith* decision of the House of Lords. But if the Court of Appeal followed *Morgan Smith* there would inevitably be a successful appeal to the House of Lords – that was a “foregone conclusion” given that the same judges sit on the UK Supreme Court and the JCPC. In these exceptional circumstances, the Lord Chief said the Court of Appeal was entitled to disapply the House of Lords authority and instead apply the JCPC decision.
29. That left the law in a state of confusion for a few years until the status of JCPC decisions in the courts of England and Wales was authoritatively determined more recently in *Willers v Joyce* in 2016.⁴¹ That case concerned the tort of malicious prosecution and whether the prosecution in that tort could be the bringing of a malicious civil claim or only a malicious criminal prosecution. In that case, a House of Lords decision conflicted with a more recent decision of the JCPC. At first instance, the Deputy Judge in the English High Court said that it was clear that if she followed the House of Lords decision, a successful appeal from her decision to the Supreme Court would be a “foregone conclusion”. That meant that she could instead apply the law as set out in the JCPC decision. But when the case reached the Supreme Court, Lord Neuberger gave the unanimous judgment of the Supreme Court *Willers v Joyce* and firmly disapproved this “foregone conclusion” test. He said that the rules of precedent were absolute: a judge should never follow a JCPC decision if it is inconsistent with a decision of an English court which is otherwise binding on him or her. This traditional, absolute rule was clear and simple in its application and avoided any argument about whether an appeal was or was not “a foregone conclusion”.
30. So does what Lord Neuberger said in *Willers* mean that the judges in *Doughty v Turner* and *R v James* wrong to apply the JCPC decision? Well, strictly yes. But here’s the twist. Lord Neuberger recognised that it would clearly be sensible and justified by experience to allow the JCPC to settle a point of law in both the jurisdiction from which the appeal was brought and in the law of England and Wales at the same time. So the Court held that there would be a new procedure whereby the JCPC could direct that the domestic courts should treat their decision as representing the law of England and Wales. This creative solution is perhaps a prime example of the value of flexibility offered by the common law system.

⁴⁰ *Attorney General for Jersey v Holley* [2005] UKPC 23.

⁴¹ *Willers v Joyce* [2016] UKSC 44.

31. The *Willers v Joyce* procedure was used recently in *Jardine Strategic v Oasis Investments* on an appeal from Bermuda.⁴² The issue in that case concerned a question of legal advice privilege in a law suit between a company and its shareholder. At the conclusion of our judgment, we gave a specific direction that our judgment would have effect in the law of England & Wales overriding any English authority to the contrary. This decision seems to have caught the attention of the city law firms.⁴³ It is clear then, that JCPC decisions will be relevant to English lawyers where a *Willers v Joyce* direction is included in the JCPC judgment.
32. JCPC decisions are also particularly relevant to English lawyers in the field of human rights. This is because, with the exception of early prototypes, most Constitutions of the JCPC jurisdictions confer fundamental rights and freedoms on the citizens of the territory and the language in which those rights are elaborated is closely based on the European Convention on Human Rights.⁴⁴
33. To understand how this came about, we need to go back to 1950, the year the British government ratified the European Convention on Human Rights. The British Colonial Office wrote to the colonial governments asking them whether they wanted the Convention extended to their territories.⁴⁵ In 1953, the same year the Convention came into force, the United Kingdom extended the application of the Convention to the 42 overseas territories that had agreed.⁴⁶ This meant, for a brief period, the ECHR applied in part to almost all seven continents, including places as far flung as North Borneo and Tanzania (as well as British Antarctica).
34. As it became clear that the colonies were moving towards independence or self-governance, the UK was keen to ensure that these jurisdictions adopted constitutions which protected fundamental rights.⁴⁷ The result of these negotiations is that most though not all JCPC jurisdictions have a fundamental rights Chapter closely modelled on the ECHR. The effect of this is that when an appeal comes before the JCPC raising an issue of the interpretation of a fundamental rights provisions of the country's Constitution, the Board will turn to the case law of the Strasbourg Court if the wording of the written Constitution has clearly been drawn from the ECHR.
35. This has been apparent in another socially controversial area in which Strasbourg case law has been applied in Caribbean jurisdictions namely that of same sex marriage and civil partnerships. For example, in *Attorney General for Bermuda v Ferguson* in 2022, the Board was asked to consider the Domestic Partnership Act 2018, an Act passed by the

⁴² *Jardine Strategic Ltd v Oasis Investments II Master Fund Ltd (No 2)* [2025] UKPC 34.

⁴³ Privy Council Abolishes Shareholder Exception to Legal Advice Privilege | 08 | 2025 | Publications | Insights & Publications | Debevoise & Plimpton LLP; Privy Council confirms there is no Shareholder Rule - a company's privileged documents remain privileged as against its shareholders.; Court overturns privilege 'shareholder rule' in welcome development for companies.

⁴⁴ K Roberts-Wray, *Commonwealth and Colonial Law* (Stevens London 1966), pages 282 and 413.

⁴⁵ Charles O. H. Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press 2007), page 38.

⁴⁶ *Ibid.*

⁴⁷ Colonial Constitutional Note 23 (CO 1032/283).

Bermudian legislature. This Act provided for domestic partnerships to be entered into by any two people conferring the same rights as marriage. But section 53 of that Act declared that a marriage is void unless the parties are male and female respectively. The issue arose whether this was compatible with the Bermudian Constitution. Lord Hodge and Lady Arden stated that the Bermudian Constitution must be interpreted having regard to its historical origins.⁴⁸ They said that the starting point is that where the rights conferred by the Caribbean Constitution echo Convention rights, they should be read and applied in accordance with the jurisprudence generated by the Convention. The majority of the Board then relied heavily on Strasbourg jurisprudence which makes it clear that the European Convention does not confer any right to same sex marriage although there is a right to a legally recognised union short of marriage.

36. I said earlier that the story on the death penalty did not end in 2004 with *Boyce*. So let us pick up where we left off – with the JCPC in *Boyce* and *Matthew* having overturned its own previous decision in *Roodal*, the effect of which was to uphold the constitutionality of the mandatory death penalty in Trinidad and Tobago and Barbados where it was saved because it pre-existed the Constitution.

37. After the decision in *Boyce*, Barbados left the jurisdiction of the JCPC, replacing it with the Caribbean Court of Justice. In 2018, the CCJ considered the effect of constitutional savings clauses on the death penalty afresh in an appeal before it called *Nervais v The Queen*.⁴⁹ They declined to follow the Board’s judgment in *Boyce*, which, as I explained earlier, that Court is entitled to do. In that case, the President of the CCJ, Sir Dennis Byron, gave the savings clause short shrift. He said:

“With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights.”

38. The Caribbean Court of Justice held that the rights to life, liberty and security of person rose above the savings clause and that the savings clause could not be relied on to validate pre-existing laws that breached those fundamental rights.

39. The decisions of the Caribbean Court of Justice on the death penalty prompted the Board recently to revisit this difficult subject and review its previous decisions in the case of *Chandler v Trinidad and Tobago*.⁵⁰ The Board once again sat as a panel of 9 and unanimously decided that it should not depart from its decision in *Boyce* despite the harsh words of Sir Dennis Byron in *Nervais*. The Board held that although the Constitution might be a living instrument, not all provisions allow themselves to be adapted to changes

⁴⁸ *Attorney General for Bermuda v Ferguson* [2022] UKPC 5, [16]. See also the Gibraltar case of *Rodriguez v Minister of Housing of the Government of Gibraltar; The Housing Allocation Committee* [2009] UKPC 52; [2010] UKHRR 144, in which Lady Hale, giving the judgment of the Board, stated (para 11) that provisions in the Gibraltar Constitution which were equivalent to provisions in the Convention should, if possible, be interpreted as giving no less protection than their equivalents in the Convention.

⁴⁹ *Nervais v The Queen* [2018] CCJ 19 (AJ); [2018] 4 LRC 545. See also e.g. an appeal from Guyana, *McEwan v Attorney General of Guyana* [2018] CCJ 30 (AJ); [2019] 1 LRC 608.

⁵⁰ *Chandler v Trinidad and Tobago* [2022] UKPC 19.

in society; some provisions are concrete and rigid in their application – and the savings clause is one such provision.⁵¹

40. The Board emphasised that the allocation of powers in the 1976 Trinidadian Constitution placed on Parliament not the courts the burden of deciding when existing laws which are protected by the savings clause but which conflict with fundamental rights should be amended or repealed. So it was of course fully open to the Trinidad & Tobago Parliament at any time to modify or abolish the death penalty. It was not for the JCPC to circumvent this allocation of powers.⁵²

Sources of precedent in the JCPC

41. Let me now turn to a different topic – the sources of precedent in the JCPC. We are all very used, as judges, to looking at case law from Strasbourg or from other courts around the Commonwealth as a source of precedent. The JCPC jurisdictions have a historical background in different legal regimes and have adopted legislative provisions based not only on English statute or the European Convention but many other legal systems. So as judges on the Board, we have the opportunity to look at several different sources of law as precedent. In a case I sat on shortly after I arrived at the Supreme Court, the Board was considering an appeal from Mauritius concerning who owns the water that flows through a canal and who has the right to take water from the canal to irrigate their land.⁵³ Authorities cited to us included not only previous cases from Mauritius but articles of the French Civil Code because Mauritian law is heavily based on the French Code Napoleon of 1804. Sometimes Mauritian law will require the Board to look at judgments of the French Cour de Cassation which has interpreted an old French law on which the Mauritian law was based.⁵⁴
42. But the search for precedents in some of our JCPC work sometimes takes us into very different waters. One of the JCPC jurisdictions is the Cook Islands which is a group of islands in the South Pacific about three hours flying time east of New Zealand. The appeal in *Framhein v Attorney General of the Cook Islands* concerned the decision by the Cook Islands Fishing Minister to set an annual quota for how many tonnes of tuna fish could be caught by international trawlers off the coast of the Islands.⁵⁵ The indigenous population was worried that the quota was too high and would seriously deplete the number of tuna that local, small scale fishermen would be able to catch in their artisanal vessels close to the shoreline.
43. One of the arguments advanced on behalf of Mr Framhein who challenged the decision to set the quota, was that the decision-making process was flawed because the Minister had failed to consult the Aronga Mana. The Aronga Mana, we learned, is the collective name given to the chiefs and elders of the different islands and districts of the Cook Islands.

⁵¹ *Chandler v Trinidad and Tobago* [2022] UKPC 19 at [22].

⁵² *Ibid* at [97].

⁵³ *Ciel Ltd v Central Water Authority* [2022] UKPC 2.

⁵⁴ See for example *Beerjeraz v Dabee* [2012] UKPC 22.

⁵⁵ *Framhein v AG of the Cook Islands* [2022] UKPC 4.

Each district is known as a “vaka” which is also the Māori word for the canoe in which Cook Islanders traditionally voyaged across the Pacific Ocean. Mr Framhein argued that customary law required that the Aronga Mana be consulted. This was important because the customary law forms part of the binding domestic law in the Cook Islands, as provided for in Article 66A of their Constitution. Article 66A(3) provides that custom and usage shall have effect as part of the law of the Cook Islands except that it shall not apply in respect of any custom, tradition, usage or value that is inconsistent with the Constitution or with any enactment passed by Parliament. One of the issues in the case was whether there was a custom or value binding as part of domestic law that the Aronga Mana be consulted about the setting of fishing quotas.

44. How were we to go about finding out what those customs, traditions, usages or values are? Subsection (4) of Article 66A provides that the opinion or decision of the Aronga Mana of the island or vaka to which the custom relates shall be final and conclusive as to the content of that custom or usage and shall not be questioned in any court of law.

45. We were helpfully aided in our task by affidavits filed by members of the Aronga Mana of vaka on different islands setting out some of their customs and traditions. One of the Aronga Mana, from Rarotonga which is the main island of the Cook Islands, described the spiritual relationship that the Māori have with the natural resources of their lands:

“Praying before the removal of resources and constantly ensuring that conservation methods including ra'ui or open declarations of tapu are highly valued and observed. Such common practices are exercised through and by Aronga Mana of the area for the effective sustainability and continued integrity of resources.”

46. He goes on to set out a traditional prayer which highlights the family relationship and responsibility:

Io te Atua i te rangi tua tinitini
Piri mai taku maieti, taku maieta
Tu tu te rau tu

God almighty in the heavens
We are leaves of the same tree (we are family)
We all return to the family.

47. We acknowledged the sincere and deep concern that many of the chiefs expressed at the extent of fishing and in our view, the evidence gathered by Mr Framhein did constitute the collected views of the Aronga Mana and therefore was the customary law of the Cook Islands that we might be bound to apply. But we went on to hold that the evidence did not establish that the Aronga Mana have a customary right to be consulted or informed about fishing plans.⁵⁶ Whatever rights they had concerning fishing quotas, had also been

⁵⁶ *Framhein* at [147].

overridden by the legislation that the Cook Island Parliament had adopted governing fishing rights and quotas. That legislation had been adopted to implement a bewildering mass of international treaty agreements to which the Cook Islands were a party and which dealt in great detail with fishing quotas in general and fishing for tuna in particular. We held that Article 66A of the Constitution recognised that customary law could be trumped by legislation of the Cook Islands parliament. That is what had happened here.

48. As I said in my judgment in that case, although it is an unusual exercise for the court to collect evidence to determine what the law is, it is not unique. English courts regularly receive evidence about the content of constitutional norms that have not been reduced to writing.⁵⁷ But this case does provide a stark example of the variety of forms a precedent may take: it might be a dusty law report resting in one of the Inns of Court libraries – but it might also be found in the prayers and chants of indigenous people in the Cook Islands.

Property cases in the JCPC

49. I hope you will have seen by now that the JCPC caseload covers a remarkably wide spectrum of law, from trusts or insolvency law in those jurisdictions which operate as tax shelters, to appeals against criminal convictions. But as Professor Harris had a particular interest in property law, I want to finish with some JCPC property decisions.
50. Disputes over land tend to crop up a lot in the JCPC. In part this is because some jurisdictions provide their citizens with an appeal “as of right” to the JCPC; that means they do not need to obtain permission to appeal from the lower court whose decision they are appealing or from the Privy Council in order to have their appeal heard. Sometimes the right is dependent on the value of the claim but the money figure hasn’t always kept pace with inflation. Appeals from the Cayman Islands to the JCPC are governed by The Cayman Islands (Appeals to the Privy Council) Order 1984 as amended by an Order of 2009, provides an appeal as of right from any final decision in civil proceedings where the value of the dispute is £300 or more.
51. An example of an interesting property case we heard recently was the case of *Carriacou Devcor v Corion*.⁵⁸ That case concerned a dispute over a parcel of land measuring approximately 7 acres on the western coast of the island of Carriacou which lies to the north east of Grenada. Carriacou Devcor was developing a new marina and associated jetties on land adjacent to the disputed land. The personal representatives of the estate of Mr Corion, deceased, maintained that the disputed land formed part of the Grand Ance estate which, they argued, was conveyed to Mr Corion in a conveyance dated 1914. The best evidence of the boundaries of the Grand Ance estate in 1914 at the time of the conveyance was a plan showing the boundaries of the Harvey Vale situated on the island dated 1904. In our view, the 1904 plan showed that the area of swamp lying immediately to the north of the northern boundary of the land, i.e. the southernmost part of the

⁵⁷ Ibid [131].

⁵⁸ *Carriacou Devcor v Corion* [2023] UKPC 1. See also *Cayman Shores Development v The Proprietors, Strata Plan No. 79* [2025] UKPC 27.

disputed land, was in 1904 a part of the Grand Ance estate. We therefore held that the developers did not own the land and Mr Corion's estate did.

52. Another JCPC decision likely to influence the development of English law is the very recent judgment in *Rubis Bahamas v Russell*⁵⁹, which was handed down last month – and reported in The Times. The claimant, Ms Russell lived opposite a petrol service station owned by Rubis, a leading supplier of fuel in The Bahamas. She claimed that on two separate occasions in 1994 and in 2012, a leak of fuel from the underground storage tanks had contaminated the groundwater and migrated onto her property. One of the issues raised in that appeal was whether Rubis was liable under the rule in *Rylands v Fletcher*.
53. Rubis argued first that it was not liable as it had no control over the petrol tanks as the owner of the property, and the person in fact liable was the lessee of the service station, and secondly, that the storage of petrol was an ordinary use of land. We rejected both of these arguments. The judgment contains a useful discussion of the rationale for the rule in *Rylands v Fletcher* and its relationship with the torts of private nuisance and negligence. It is a rare instance of the application of this case which we all learned about in our tort lectures and it will no doubt be of interest to academics, students and practitioners alike.

Conclusion

54. Lord Lloyd of Berwick said in *Invercargill City Council v Hamlin*⁶⁰ on appeal from New Zealand in 1996 that:

“The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.”

55. The JCPC has been described as a relic of empire – and it certainly is that.⁶¹ But I hope what you will take away from this evening is that it is also an institution of contemporary relevance dealing with all manner of legal issues, both grand and small. It continues to contribute to the evolution and flourishing of the common law, and English lawyers continue to have much to learn from its decisions.

⁵⁹ *Rubis Bahamas Ltd v Lillian Antoinette Russell* [2026] UKPC 9.

⁶⁰ *Invercargill City Council v Hamlin* [1996] AC 624.

⁶¹ Lady Hale, *Spider Woman* (Random House 2021) 82.