

The Empire's Sentinels: The Privy Council's Quest to Balance Idealism and Pragmatism

JONAS-SÉBASTIEN BEAUDRY*

This article is a study of the Judicial Committee of the Privy Council's quest to balance Western ideals and pragmatic diplomacy. It surveys some critiques and praises of the Judicial Committee coming from Canada, Australia and India, in order to delineate the attitudes, strategies and beliefs adopted by the Law Lords when they sat on the Judicial Committee of the Privy Council during its most influential period, that is to say, from its creation in 1833 until the decline of the British Empire in the 1950s.

The text is divided into four sections. The first section analyses Lord Haldane's insightful assessment of the role of the Judicial Committee of the Privy Council within the Empire, and of the way the Lords perceived or should have perceived themselves when sitting on the Privy Council. The three following sections consists of external critiques of the Board's interventions in three dependencies: one colony whose Constitution was drafted and negotiated by the overseas subjects and granted almost full independence (Australia), one colony whose Constitution was drafted in London and was not ratified by the overseas subjects (Canada), and one colony that did not have its own Constitution and whose foreign subjects did not initially partake in the legal system (India). The distinctive characteristics of each dependency will allow for a multi-levelled critique of the Lords' conception of their institutional role, hopes and efforts.

Athenian Stranger – Tell me, Stranger, is a God or some man supposed to be the author of your laws?

Cleinius – A God, Stranger, in very truth, a God: among us Cretans he is said to have been Zeus, but in Lacedaemon, whence our friend here comes, I believe they would say that Apollo is their lawgiver: would they not, Megillus?

(...)

Athenian Stranger – And do you, Cleinius, believe, as Homer tells, that every ninth year Minos went to converse with his Olympian sire, and was inspired by him to make laws for your cities?

Cleinius – Yes, that is our tradition; and there was Rhadamanthus, a brother of his, with whose name you are familiar; he is reputed to have been the justest of men, and we Cretans are of opinion that he earned this reputation from his righteous administration of justice when he was alive.

Athenian Stranger – Yes, and a noble reputation it was, worthy of a son of Zeus.¹

Introduction

This article is an attempt to describe the Judicial Committee of the Privy Council's quest to balance Western, and more particularly legal, ideals and pragmatic diplomacy. The Judicial Committee of the Privy Council, or 'Board',² is the highest appeal tribunal for British colonies and protectorates. Since its creation in 1833 up to the decline of the Empire in the 1950's, the Lords sitting in the Committee occu-

* DPhil candidate, University of Oxford. I thank the Pierre Elliott Trudeau Foundation for its support.

¹ Plato, *The Laws* (Benjamin Jowett tr, Book I, Collier 2010).

² The expressions 'Board' and 'Privy Council' are commonly used to designate the Judicial Committee of the Privy Council. While the 'Board' means the panel of judges sitting to hear a particular case, it should be noted that the 'Privy Council' is, strictly speaking, the larger entity which advises the British sovereign on the exercise of its executive authority and of certain judicial functions, which are performed by the 'Judicial Committee'.

pied both a judicial and a political role in the imperial political frame. With the single act of judging, they were simultaneously spreading the legal genius of the British people and contributing to the maintenance of the British rule throughout the Empire. Having faith in the Empire's values and legal arrangements, they did so with good intentions, as far as paternalistic and colonial intentions go.

Through an analysis of critiques and praises of the Judicial Committee coming from Canada, Australia and India, we want to explore what it may have meant to 'think like a judge' for the Lords sitting on the Privy Council. By 'thinking like a judge', I mean to use particular methods (such as the use of an impartial discursive posture, of precedents, of analogies, of various interpretative techniques of legal texts, etc.) to analyse and present the law and the facts of particular cases in order to reach a solution. The content of these methods depends on certain legal fictions and beliefs held by the judiciary and the legal community in a particular time and place. These methods overshadow the judges' subjective input by making the judgment seem to be a product of the 'law', whose authority is transferred to the produced judgments. The legitimacy of their methods and interventionism also depends on a judge's conception of the judiciary role, as a legal and political actor. Exploring some of the Committee's failures and successes while pursuing Western values and legal ideals³ provides a historical illustration, and maybe a lesson, of the moral and mythical aspects of the good intentions of international adjudication, of the limitations of 'thinking like a judge', of the impossibility of judging apolitically, and of how judges deal with this impossibility.

The text is divided into four sections. The first section analyses Lord Haldane's insightful assessment of the role of the Judicial Committee of the Privy Council within the Empire and of the way the Lords perceived or should have perceived themselves when sitting on the Privy Council. This point of view should provide us with a favourable assessment of the Privy Council from the inside. The three fol-

³ As perceived by the judges, not necessarily by British governments.

lowing sections are based on legal scholars' critiques of the Board's interventions in three British dependencies: one colony whose Constitution was drafted and negotiated by the overseas subjects and granted almost full independence (Australia), one colony whose Constitution was drafted in London and was not ratified by the overseas subjects (Canada), and one colony that did not have its own Constitution and whose foreign subjects did not initially partake in the legal system (India). The choice of these colonies is justified by the fact that more appeals came from them than from other parts of the Empire and by their cultural and political distinctiveness. It is plausible that the Lords' pragmatic considerations would have been affected by their specific culture. The distinctive characteristics of each dependency will therefore allow for a multi-levelled critique of the Lords' conception of their institutional role, hopes and efforts.

A thorough exploration of the political factors affecting the writing and reception of the Council's judiciary decisions would be a monumental historical work, especially if extended to many more colonies. Not only must I limit my research for the purpose of single article, but I am not sure that a more extensive research would dispel the inevitable speculativeness of applying the familiar critical approach of legal realism to the Privy Council's judgements. As the quote from Plato illustrating principles of law coming from an external source indicates, the material I am most interested in is not the sort of hard data allowing me to come to decisive conclusions, but rather myths about the origins of legal doctrines and their adoption, prestige-enhancing stories and other political fictions that the Lords themselves believed in or helped to develop and impose within legal cultures to set up the legitimacy of their interventions.

My goal is only to underline why and when the Lords would oscillate between deference and intervention vis-à-vis local legal cultures. For instance when certain concerns (such as the unity of the Empire and some legal doctrines, as well as moral and political principles) were important enough to the Lords, they would adopt an interventionist attitude, but would do so in a language that cloaked their political views in a sort of universal necessity. I do not suggest that

there is a better balance that could have been struck by the Lords to avoid the failures of moral imperialism while holding to what mattered most to them. However, describing some of the motivations of the Privy Council to strike this balance may incite us to take a more critical stance toward similar practices taking place today, within judiciary bodies judging from a distance, geographical or cultural.

*A view from the inside: 'In good Imperial company'*⁴

In November 1921, in an address to the Cambridge University Law Society, Lord Haldane argued that the Board had an important role 'in the working of the Constitution of the Empire'.⁵ More precisely, he argued that the Board had two roles, both of which, he thought, would come to pass.

The primary role of the Board is legal, and more specifically judicial: to uphold higher principles of justice.

The ancillary one is political, 'that of assisting in holding the Empire together'. Lord Haldane writes: 'my own view is that [the Judicial Committee] is a disappearing body, but that it will take a long time before it will disappear altogether'. As the dominions develop their own constitutions, 'there will be less and less work for the Judicial Committee to do for these dominions'.⁶ Lord Haldane's speech implies two justifications for this second, political, role: a moral and a pragmatic one. On the one hand, he implies that it is morally justified to defer judicial governance to the national spheres to respect domestic autonomy. On the other hand, he is also aware of a practical problem: countries that are developing elaborate domestic systems of judicial review may not welcome appeals made to the Privy Council unless it serves their own ends.

⁴ Lord Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1923) 1 Cambridge LJ 143, 144.

⁵ *ibid* 146.

⁶ *ibid* 154.

It follows that, when the dominion countries are enforcing themselves a legal model which does not stray too far away from the ‘higher principles of justice’, the Privy Council is likely to respect its dominions’ political autonomy. Lord Haldane thus explains that ‘where they had got their own fully organized Courts, and their own sense of development, and their own feeling that it is their right to dispose of their own litigation, [...] we do not let [a litigant] appeal to the King, unless the question is so great that only the Supreme Court of the Sovereign can dispose of it satisfactorily.’⁷

If the primary role of the Board is to uphold ‘higher principles of justice’, what are these principles more precisely? What are these limits beyond which the Privy Council favours interventionism over deference?

Lord Haldane’s account of the Board’s role suggests that these principles are defined procedurally rather than substantially, i.e. by their application rather than by content. He says that, by applying those principles, a judiciary body would redress what a correctly functioning judiciary body would see as wrong and redress. This definition of principles of justice takes us back to a subjective appreciation of what is a ‘correctly functioning judiciary body’. Although it seems circular, it does tell us that justice is to be found in a procedure used to produce justice, rather than in commandment-like rules. How could we define, then, a correctly functioning procedure? Lord Haldane’s answer partially lies in judicial virtues. He describes that the judges who partake in such a procedure must attempt to reach justice impartially and remain above the political considerations of self-interest.

The dichotomy between formal/procedural rules and substantial/objectified rules suggests that the higher principles of justice will be expressed through an institution rather than a set of rules, but it does not mean that a set of objective rules cannot be defined. There is certainly a set of rules that the Lords sitting on the Board would

⁷ *ibid* 153.

have seen as universal rules that no correctly functioning judiciary body would have seriously contradicted. Lord Haldane writes:

We are constantly finding that, where great broad principles of justice are concerned, you find – veiled, but still there, and only distinguished by technicalities – the same substance as belongs to other systems. The human mind is much the same all the world over.⁸

Therefore, although the Committee insisted on preserving the royal prerogative of granting leave to appeal to the King in council and struck down statutory provisions to the contrary effect, as it did in *Nadan v The King*,⁹ it was ‘settled practice’ to defer to the dominion’s own courts. This was especially true in certain areas, like criminal law, where it would have been an ‘extreme inconvenience’ for the Board to act as a Court of criminal appeal, unless it had been shown that ‘by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice [had] been done’.¹⁰

At the same time Lord Haldane sees the King’s jurisdiction over culturally different structures as a politically delicate issue.¹¹ His diplomatic prudence is not only based on the consideration that the dominions may be reticent to have its disputes settled by the King’s standards, but also on the belief that this jurisdiction may interfere unduly with traditions able to produce otherwise acceptable results.

Lord Haldane’s attitude reflects both the Lord’s cultural sensibility and the Lord’s paternalism. On the one hand, he writes that they are ‘perfectly impartial’:

... we have no prejudices, either theological or otherwise ... We sit there and we do our best. We are only human beings and I daresay we make mistakes, but there is a tradition in the place which lifts it above all prejudice or

⁸ *ibid* 154.

⁹ [1926] AC 482 (PC).

¹⁰ *ibid* 495.

¹¹ Haldane (n 4) 148.

the disposition to think that one system must in some way be better than another.¹²

On the other hand, he sums up that the object of the Board ‘is to make the part of the Empire from which the appeal comes have the sense of seeing that there has been a mistake, if one has been made’.¹³ What we judge negatively as moral imperialism was probably experienced by the Lords as a sincere belief that the Board could correct certain legal decisions that were objectively wrong, and intervene when basic standards of justice were not met.

This interventionism was further justified in the Lords’ mind in a political context (such as in ‘remote parts of India’) where the Judicial Committee was seen ‘as a body which stands between the subject and the Government’.¹⁴ In such contexts, Lord Haldane considered that the Privy Council intervened to assure the rule of law, a ‘minimal standard’ from which the people actually benefited and whose decisions they would not complain of, as shows his anecdotic story of:

... a traveller who went to a remote part of Northern India and found a tribe sacrificing to an unknown god. He asked who the god was, and they said: “We don’t know, except that he is a very powerful god, because he interfered on our behalf against the Indian Government, and gave us back our land which the Government had taken, and the only other thing we know is that the name of the god is the Judicial Committee of the Privy Council!”¹⁵

Regardless of how condescending this statement may sound to our contemporary sensibility, the Committee considered that the royal prerogative of granting appeal was ‘a privilege belonging to every subject of the King’.¹⁶ Extrapolating Lord Haldane’s position in to-

¹² *ibid* 153-4.

¹³ *ibid* 148.

¹⁴ *ibid* 153.

¹⁵ *ibid*.

¹⁶ Nadan (n 9) 491.

day's discussion on cultural relativism, one could say that by refraining to intervene in order to protect individuals unrepresented, unprotected or prejudiced by their Government by fear of acting imperialistically, we may paradoxically be imposing our concept of self-determination on a people who views the Government and the Judiciary as entities having nothing to do with political representation and the rule of law.

Notwithstanding their political role, their lordships conceived themselves first and foremost as judges. Even though they contributed to 'hold the Empire together', they did not believe that they were political actors or, at least, they entertained the idea that law was a science yielding to objective results, and this faith in the science of law allowed them to endorse a plausible social script of their institutional role as apolitical. This apparently apolitical attitude, once imported in the Privy Council, further justified 'apolitical' judicial interventionism. Even though their lordships were aware of their limited knowledge of their foreign dependencies' culture, they were also confident that thinking like a common law judge would overcome the cultural gap they would meet between 'all the laws and customs of the world – civilized and uncivilized'.¹⁷

While being a 'mere judge' was politically modest, the Law Lords' conception of the law and of the British judicial institution itself was epistemologically immodest and a key factor in motivating the Law Lords to recognise more autonomy to other cultures only when they were sufficiently identical to that of the Empire.

We are not Ministers in any sense; we are a committee of Privy Councillors who are acting in the capacity of Judges ... We have nothing to do with politics or policies, or party considerations; we are really Judges ...¹⁸

Lord Haldane's account of the Privy Council's nature and work exemplifies well how in any given society a set of rules or procedures

¹⁷ Sir Courtenay Ilbert, quoted in George Rankin, 'The Judicial Committee of the Privy Council' (1939-1941) 7 Cambridge LJ 2, 11.

¹⁸ *Hull v McKenna* [1926] IR 402, 403 (PC) (Lord Haldane).

(such as the judiciary ‘higher principles of justice’) may be objectified, in what could be considered as an epistemologically immodest manoeuvre, and then how certain institutional actors (such as the Privy Council) may act upon them with an apparent neutrality since they are enforcing moral truths or ‘natural’ rules. This paradox between ontological immodesty and political modesty is made possible because of the faith jurists have in the truth - and therefore, non-negotiability - of the rules they are invoking or of the structure within which they are working. Such a faith seems somewhat delusional as judges themselves contribute to the elaboration of the truth they are invoking. However, it is through an endorsement of law as science and a belief in their legal ideals and structures as inherently superior, that the Privy Council Judges contributed to the construction of a legitimate social script for their own role, as an answer to the fact that the concept of justice is highly contested in colonial situations.

Australia: Between deference and intervention

The Evolution of the Legal Frame for Appealing to the Judicial Committee

Let us first present the ambit of the appeals provided for in constitutional Australian law. Clause 74 of the Commonwealth Of Australia Constitution Act¹⁹ provides for appeals to the Queen in Council.

¹⁹ ‘No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the Question is one which ought to be determined by Her Majesty in Council. The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question with-out further leave. Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty’s pleasure.’ Commonwealth Of Australia Constitution Act 1900, section 74.

There can be no appeal from the High Court on questions concerning the ‘limits inter se of the Constitutional powers of the Commonwealth and those of any State’ or the ‘limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the Question is one which ought to be determined by Her Majesty in Council. ... for any special reason.’ Clause 74 also preserved the royal prerogative to grant special leave of appeal to the Board, although ‘the Parliament may make laws limiting the matters in which such leave may be asked’. Such was the compromise that Joseph Chamberlain, Secretary of State for the Colonies, struck between the Australian delegates who wanted to abolish the appeals to London altogether, and the Imperial Government, British investors, banks and other commercial institutions who wanted to preserve the overarching imperial legal frame.²⁰

The High Court only granted a certificate of appeal for an inter se question once, in 1912,²¹ although the Privy Council has allowed many appeals by special leave.²² In *Kirmani v Captain Cook Cruises PTY Ltd (No.2)*, in 1985, the High Court closed off the possibility that they would ever grant an appeal: ‘The march of events and the legislative changes that have been effected – to say nothing of national sentiment – have made the jurisdiction obsolete.’²³ The Court was referring to the Privy Council (Limitation of Appeals) Act 1968 and the Privy Council (Appeals from the High Court) Act 1975 which had the effect of making the High Court’s special leave the only way to take a constitutional case to the Privy Council. In 1986, the Australia Acts severed any remaining link with the United Kingdom:

²⁰ On the steps leading to this compromise see, Gerard Brennan, ‘The Privy Council and the Constitution’ in HP Lee and George Winterton (eds) *Australian Constitutional Landmarks* (CUP 2003) 312-4; Josiah H Symon, ‘Australia and the Privy Council’ (1922) 4 J Comp Legis & Int’l L 137, 138-9.

²¹ *Colonial Sugar Refining Co Ltd v Attorney-General (Cth)* (1912) 15 CLR 182.

²² Douglas Menzies, ‘Australia and the Judicial Committee of the Privy Council’ (1968) 42 ALJ 79, 80.

²³ (1985) 159 CLR 461, 465.

The most significant formal change to the constitutional systems of the Australian States since federation occurred in 1986 with the enactment of dual Australia Acts – one by the Commonwealth Parliament and one by the United Kingdom Parliament. Their principal effect was to terminate prospectively, with one important exception, all remaining constitutional links between Australia (both Commonwealth and States) and the United Kingdom. The exception is, of course, the continued adoption of the United Kingdom Monarch as Queen of Australia.²⁴

As we will see in the next section, Australia's constitutional situation differs from the Canadian one in one essential respect. The Australian Constitution was drafted and negotiated by Australian subjects, whereas the British North America Act (the Canadian Constitution) 'was framed and drafted in London. It was never submitted for approval or ratification to the people of Canada.'²⁵ The discussion on the desirability of appeals to the Privy Council in Australia therefore always contained an underlying concern for the paradox caused by a country that had 'come of age' (as Sir Symon, Attorney General of Australia for 1904-1905, wrote in 1922) but that remained under the British judiciary authority.

This paradox may well be an anomaly but Sir Symon, the same who attempted with Edmund Barton to prevent the Privy Council from having jurisdiction over 'matters involving the interpretation of the Constitution of the Commonwealth or of a State' at the 1898 Melbourne Convention,²⁶ wrote that:

The British Empire is a mass of anomalies. You meet them at every turn. There is no precedent even for the British Empire. Its very existence and cohesion is an anomaly. To stigmatize something as an anomaly – perhaps rightly – and seek to get rid of it merely on that account is unsafe.

²⁴ Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (CUP 2006) 66.

²⁵ Symon (n 20) 141.

²⁶ Brennan (n 20) 313.

By such reasoning one might almost justify the extinction of the Empire.²⁷

Our current distance nonetheless allows us to wonder (1) what made this anomaly viable, that is, what fictions lawyers came up with and what attitude the Lords from the Privy Council took to make it endure with a parallel national consciousness that demanded self-determination, and (2) if this intellectual justification was the real reason behind the desire to preserve the appeals to the Privy Council. If not, we will try to delineate possible motivations, especially from a jurist's point of view. Why would a country that has 'come of age' want to keep living under the Privy Council's paternalistic shadow? What were the ideals or the pragmatic advantages that the Privy Council offered to some Australians?

The idea behind the judiciary clauses of the Constitution limiting the ambit of the appeals to British authorities was that 'if Australia was fit to frame its own Constitution she was fit to interpret it'.²⁸ The framers knew they had to limit the Privy Council's jurisdiction if they did not want the most important constitutional questions to be decided by an external power.²⁹ Australia had to remain in control of her newly established constitutional identity. This 'cardinal principle'³⁰ was not betrayed by the 'Chamberlain compromise', by which the High Court retained 'exclusive jurisdiction to determine finally all constitutional questions, with power, if for sufficient reason it thinks fit, to call in aid the Privy Council, as it might be in a quasi-consultative capacity although in form and result an appeal.'³¹ Although Sir Symon fought hard to obtain an exclusively Australian constitutional jurisdiction, he also was convinced, at least in 1922, that it was 'salutary' that the High Court preserved the option of

²⁷ Symon (n 20) 143.

²⁸ *ibid* 139.

²⁹ Brennan (n 20) 312.

³⁰ Symon (n 20) 139.

³¹ *ibid*.

asking ‘the opinion of another leader of larger or wider experience than himself’.³²

Australia, like other nations, therefore overcame the paradox of exercising their freedom to limit this freedom by thinking that they were, like Ulysses who remained in charge of his boat, tying themselves to the mast, and only to the extent to which they wanted, and not irremediably. The Judicial Committee, confident of Parliamentary supremacy, refused to uphold a High Court’s decision for the first time in *McCawley v the King*,³³ where the High Court decided that a State’s parliament could not enact a law in violation with the State Constitution, although the same parliament could amend the Constitution. According to the Board, such a law was already an implicit amendment.³⁴ It did not matter that the Constitution had been enacted following an Imperial order, for the Empire did not mean

... to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people, what was given was given completely, and unequivocally, in the belief ... that these young communities would successfully work out their own constitutional salvation.³⁵

This granted power, their Lordships would later recognise in *Attorney General (NSW) v Trethowan*,³⁶ included the power to bind the Legislature constitutionally at least to follow a certain procedure to repel certain institutional arrangements and rules.

However, the doctrine of constitutional pre-commitment did not completely solve the contradiction created by delegating a portion of one’s self-governance to a foreign power. It is one thing to abide by one’s cold-headed commitment to higher principles, and another to surrender to a wiser stranger’s decision. In order to argue that there

³² *ibid* 140.

³³ *McCawley v R* (1918) 26 CLR 9.

³⁴ *McCawley* (n 33); Brennan (n 20) 327-8.

³⁵ *McCawley* (n 33) 117.

³⁶ [1932] AC 526 (PC).

was nothing ‘derogatory to our autonomous dignity – nationhood if you like’, Sir Symon, for instance, adjusted the concept of Nation. He referred to the conception of autonomy: the self, to preserve its dignity, must be autonomous, that is, obey to rules emanating from itself. To avoid heteronomy (as opposed to autonomy), one needs either to relocate the source of law inside the self, or to transform the conception of the self so that it includes the external source of law. This second strategy may sound tenuous, but it has long been a common justification for democracy. Extending this strategy from the self to a country and from domestic to international politics, Sir Symon redefines the concept of the Australian Nation and retracts from his former position, as he had raised, at the beginning of the twentieth century, ‘the banner of nationhood, contending that the first duty of a nation was to administer final justice to its people’.³⁷ This claim of nationhood, he wrote in 1922, was a ‘phrase without substance’. According to Sir Symon, this initial perspective failed to understand that ‘we were within the British Empire, under the same King and Flag’.³⁸ If the Australian federal union was a nationhood, it was a federal union ‘within the Empire’.³⁹ Clause 74 was not a ‘badge or mark of servitude or inferiority’⁴⁰ because ‘Australia is an integral part of the Empire’,⁴¹ i.e. its self is subsumed in a greater self.

As we will see there were many justifications to preserve the appeals to the Privy Council, but as far Australia wanted to preserve, at least theoretically, a relative independence, one had to believe that the Privy Council was ultimately more able than the High Court to decide difficult questions, which is a questionable assumption. Sir Brennan, assessing the legacy of the Judicial Committee in the development of Australian constitutional law, with the benefit of hindsight, wrote in 2003 that the members of the Board ‘were not familiar with local affairs’ and showed their ‘want of understanding of the

³⁷ Symon (n 20) 141-2.

³⁸ *ibid* 142.

³⁹ *ibid* 143.

⁴⁰ *ibid* 145.

⁴¹ *ibid* 144.

framework of the Constitution' in a few cases.⁴² The restriction of the Board's jurisdiction actually contributed to the Lords' increasing lack of familiarity with Australian law.⁴³

Their Lordships' reticence to take on a more political role, conduced Bailey to criticise their tendency to settle important questions on narrow, factual, technical or minor grounds.⁴⁴ That does not mean that the Board did not consider itself as the keeper of higher principles. Indeed, Sir Brennan wrote that '[the] opinions of the Judicial Committee in matters arising under the Commonwealth Constitution were not as satisfactory as the opinions given in matters of general constitutional principle.'⁴⁵ However, even those 'higher principles' did not correspond to a wide-ranging political agenda, like the kind that has been associated with the American Supreme Court's activism, but only to basic constitutional principles. As we have seen, the Board was reluctant to define extensively these principles, which caused frustration to the Australian lawyer expecting that the issues – which often went 'to the very roots of system of government' – would be resolved not only with a 'lawyer's rigor' but also a 'statesman's breadth of view', Bailey writes, quoting Chief Justice John Marshall (which is telling of his vision of the judiciary given Marshall's activist role in American judiciary history).

Defences of the Privy Council's attitude must rely on legal formalism, a theory of law according to which law can and should operate in-

⁴² Brennan (n 20) 330 (referring to *Webb v Outtrim* [1907] AC 81 and *Attorney General (Cth) v Colonial Sugar Refining Company Ltd* (1913) 17 CLR 544).

⁴³ Symon (n 20) 330: 'In a sense, the provisions of s.74 are responsible for some of the difficulties. By excluding the Privy Council from exercising jurisdiction in inter se matters, the section precluded their Lordships from acquiring a familiarity with the jurisprudence that had to be developed.' See also, KH Bailey, 'Appeals to the Privy Council in Constitutional Cases' (1935-1938) 1 Res Jud 1, 4-5: 'Cases of this kind [important questions of public law] must necessarily come from Australia so seldom that with all their ability their Lordships cannot hope to acquire ad hoc the experience of a lifetime that has gone to the making of the High Court's judgments.'

⁴⁴ As was the case, according to Bailey, of *James v Cowan* [1932] AC 542 (PC) and *Attorney General (NSW) v Trethowan* [1932] AC 526 (PC).

⁴⁵ Brennan (n 20) 330.

dependently from political and social institutions⁴⁶ or legal idealism, a view according to which laws, rights and duties ‘genuinely exist’, and which may ‘imply too much faith in the capacity of law to solve problems’.⁴⁷ Such theories, for instance, allowed Sir Symon to present the Privy Council’s lack of local knowledge as an advantage:

... too great or intimate local knowledge, whether of persons or things – apart from the evidence – is not favourable to acceptable or unbiased judgments, and that a Court which sits, so to speak, in Olympus – removed from the local influence not seldom associated with local knowledge – might be the more ideal tribunal.⁴⁸

This attitude toward an idealised judiciary probably still represents a popular view of some Courts, but is naïve, as we will illustrate with a few examples in the following sections. Even at a time when this sort of legal formalism was a plausible approach to legal problems, many contemporary jurists considered that,

... in most of the constitutional cases, if not all, something more than “pure interpretation” and something more than expert legal technique is required. As professor Smith put it: ‘in the field of public law the gravity of the issues involved and the difficulty of legislative change compel the judges to act upon broader views of policy.’ Not only is some legal knowledge and experience desirable if Courts are to understand the substance as well as the form of the matter at stake, but in Bench and Bar alike the adequate handling of such issues is a task requiring a considerable amount of specialized knowledge. ... Whatever may be said in favor of the Privy Council in common law cases, ...

⁴⁶ ‘The theory that law is a set of rules and principles independent of other political and social institutions.’ Bryan A Garner (ed), *Black’s Law Dictionary* (7th edn, West Publishing 1999) 904.

⁴⁷ Edward Craig (ed), *Routledge Encyclopedia of Philosophy: Vol 5* (Routledge, 1998).

⁴⁸ Symon (n 20) 148.

the Judicial Committee has not illustrated the advantages of distance [for appeals in constitutional matter].⁴⁹

At any rate, what tipped the scale in favour of the appeals to the Privy Council was probably not their Lordships' legal competence, which was after all matched by domestic courts. In the eyes of jurists like Sir Symon, there were other practical advantages in retaining the appeal to the Privy Council.

First, it solidified the larger community to which Australia belonged, by establishing one final interpreter of the laws. This way to secure the core ideals of a community was thought to promote cohesion rather than conflict on fundamental legal matters. Symon explains that federalists like himself did not want to part from the British Empire:

... we were not creating a nation in the political sense. If we had been then it would have followed, as the night the day, that we should erect Courts to dispense final justice to our own citizens. The purpose of the old Federalists like myself was to remove the vice of disunion among the States as much and as far as possible – not to cure or replace it by secession from the British Commonwealth. What we did was to bring about a more perfect co-operation or union for common though limited purposes between the six self-governing States with the central idea of creating one single State in its relations with the Mother-country and the rest of the Empire as a unit of the Empire in relation to foreign States.⁵⁰

It seems paradoxical that the subordination to the United Kingdom would unify Australia and thus help it to 'come of age' but the maintenance of appeals to the Privy Council might have contributed to maintain the fiction of legal idealism, and the idea that geographical distance was not a real problem, or was at least outweighed by the advantage of being above Australian political contingencies. Sy-

⁴⁹ Bailey (n 43) 5.

⁵⁰ Symon (n 20) 142.

mon's metaphor of the Privy Council's location in 'Olympus' reflects an underlying mystical lexicon that is sometimes found in relation to the Privy Council. In this sense, judicial subordination may not have been perceived as conflicting with Australia's growing self-governing unity since the Australian Commonwealth could be perceived as an equal to the United Kingdom in so far as they both shared a faith in the Law, higher than them both, and a trust in its official interpreters:

... the Justices of the High Court and the members of the Judicial Committee had a similar (if not precisely the same) understanding of the way in which a constitution should be construed. All were worshippers at the altar of the English common law and the Judicial Committee was respectful of the quality of High Court judgments.⁵¹

Their institutional prestige made the Lords plausible final interpreters of higher principles. This is why I cited Plato's late dialogue *The Laws* at the beginning of this text. The fact that a God has authored laws is a very good argument to support the authority of these laws. But once Cleinias is asked by the Athenian Stranger if he believes that 'every ninth year Minos went to converse with his Olympian sire, and was inspired by him to make laws for your cities', the Cretan falls back on the good reputation of one of the men who administered justice. The authority of law is maintained through the reputation of its administrator/interpreter, 'a noble reputation', 'worthy of a son of Zeus'.⁵² The fact that the Law Lords belonged to a much older institution than Australian judges also contributed to this prestige.

This dimension of judiciary decision-making can hardly be overtly acknowledged by jurists who also value principles of self-governance and parliamentary supremacy, but neither could it be ignored when one wondered, as Sir Symon did, 'how may we best secure the most

⁵¹ Brennan (n 20) 330.

⁵² Plato (n 1).

authoritative decisions to make an end of controversy in litigated disputes of commensurate importance'.⁵³

Therefore, it is likely that the Board's authority, based on its prestige and its capacity to provide an external answer to national disputes and a link that 'may eventually more closely bind together Great Britain and the various British Dominions, States and Colonies'⁵⁴ has justified why, at the beginning of the twentieth century,

... a large majority of the Australian Judges, including Sir Samuel Way, Chief justice of South Australia, and Sir Samuel Griffith, Chief Justice of Queensland, and a great body of the legal profession generally [were] in favour of retaining intact the appellate jurisdiction of the Privy Council.⁵⁵

There was therefore a disagreement about whether the Privy Council's distance/externality was an advantage which allowed the Lords to make 'purely legal' decisions and which gave their decisions a particular authority, or a disadvantage because it implied their lack of local knowledge and a legal formalism which made them reluctant to settle issues of a political nature.

One part of the legal Australian legal community considered the Privy Council as 'our highest tribunal', 'a body we have learned to recognize as the highest Appellate Court of the British Empire' or, if united with the House of Lords to become, 'with the addition of some Colonial Judges', the 'Supreme Court of the Empire' and 'the greatest tribunal of the world' whose 'visible dignity'⁵⁶ was an asset ensuring both the authority of their decisions and national, as well as imperial, cohesion:

... if the Australian Commonwealth breaks away from the present inter-Imperial legal system the jurisdiction and

⁵³ Symon (n 20) 143.

⁵⁴ Anonymous, 'The Australian Commonwealth and the Privy Council' (1900) 17 Cape LJ 46, 48.

⁵⁵ *ibid* 48.

⁵⁶ *ibid* 49.

dignity of the Privy Council will be reduced; we shall have a dangerous precedent which may be followed hereafter by the Canadian Dominion and the South African British possession; and the position and prestige of the only working institution of a distinctly and exclusively Imperial character which we possess would be seriously impaired.⁵⁷

However, it is far from obvious that ‘a decision by the Privy Council would be accepted without demur in every case, simply because it would be given by a judicial tribunal of the very highest standing’,⁵⁸ as Sir Henry Barwell, Premier of South Australia from 1920 to 1924, said. While this may have been a ‘widespread conviction in Australia’, Bailey writes, ‘almost the reverse is the truth’ in other regions.⁵⁹ Dissatisfaction with the Privy Council was obviously stronger among those who disagreed with the political implications of its judgments. ‘Large groups of people are bound to feel a sense of injustice, whichever way the decision goes.’⁶⁰ The Privy Council’s political capital was not only fuelled by jurists’ attachment to the highest instance of Common Law traditionally, but also by the interests of the Imperial Government wanting to preserve its colonies and of ‘banks and other financial and commercial institutions having interests in Australia’.⁶¹

When he was a Justice at the High Court of Australia, Sir Douglas Menzies wrote that ‘Great respect has been paid by the Privy Council to the reasoning of High Court judges, even when that reasoning supports a dissenting judgment’⁶² and that ‘the Privy Council has been of assistance in clearing away bold but unjustified generalizations made by the High Court from time to time to avoid the inescapable difficulty of the section itself, and, that in doing what it has,

⁵⁷ Anonymous (n 54) 48.

⁵⁸ Bailey (n 43) 5.

⁵⁹ *ibid* 5; we will see how the Board’s decisions caused dissatisfaction in Canada, and Bailey adds that it caused even greater division in the Irish Free State. See also Thomas Mohr, ‘The Colonial Laws Validity Act and the Irish Free State’ (2008) 43 *I J* 21, 21-44.

⁶⁰ *ibid*.

⁶¹ Brennan (n 20) 313.

⁶² Menzies (n 22) 83.

the Privy Council has left it to the High Court to work out a doctrine that recognized both the great importance of the section and its necessary limitations'.⁶³ This fits the mentality previously described. The Lords would only be intervening to maintain the essential frame within which a solution was to be worked out. It was also an approach that avoided politicising judicial decision-making, although 'bold generalizations' may have seemed like a more efficient approach to Australian jurists who held, like Judge Owen Dixon, that 'nearly every consideration arising from The Constitution can be described as political'.⁶⁴ The Privy Council was considered itself as freeing the High Court 'from the burden of its own error' and inviting it 'to develop the law in its traditional style, that is to consider each case and decide it upon its own facts'.⁶⁵

The negative way to assess the Privy Council's interventions is to observe that, rather than keeping the High Court on the right course, it caused frustration and legal uncertainty. For instance, by the time the appeals to the Privy Council had been abolished, the High Court reviewed the numerous Privy Council and High Court's cases on section 92 of the Australian Constitution and found that 'the decisions of the Privy Council and of the High Court had spoken with different voices so that it was impossible to get authoritative guidance on the operation of s.92'.⁶⁶ So while it is probable that their Lordships 'intended to leave the Australian courts work out their own constitutional solutions ... the execution of that intent was frustrated by the bifurcation of judicial authority. Definition of the content of s.92 required the development of a doctrine susceptible of practical application ...'.⁶⁷ It is the conflict between the High Court's and the Privy Council's attitudes, more than the Privy Council's formalist, case by case, approach that prevented both organs to properly discharge this

⁶³ *ibid.*

⁶⁴ *Amalgated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (High Court of Australia).

⁶⁵ Menzies (n 22) 83.

⁶⁶ Brennan (n 20) 325.

⁶⁷ *ibid* 326.

responsibility.⁶⁸ Had the Privy Council remained unchallenged by the legal conscience of a nation ‘coming of age’, its prestige and the hopes it offered could have maintained a cultural, ‘organic link’ between legal frameworks growing apart. Although Sir Menzies was still leaning toward the ‘organic links ... rooted in history, in tradition, in loyalty’⁶⁹ in 1968, he weighted it against a need for ‘greater national unity and self-sufficiency’ that inevitably followed the destruction of the ‘so-called colonial sovereignty’.⁷⁰ The paradox of pursuing national autonomy while maintaining a unique imperial identity was only overcome with the kind of political rhetoric paradigmatically exemplified by Lord Symon and with the Board’s well-intentioned but ultimately problematic deference.

Canada: Decentralisation as a Legal Structural Ideal and as a Political Compromise

Favoring the Decentralisation of Power: The Watson-Haldane Era

The influence of the Privy Council is remembered in Canada primarily for its constitutional interpretation in favour of the provinces. It can be said that the Privy Council re-wrote the sharing of powers between the federal government and the provinces.

Indeed, the Constitution Act of 1867 as it was drafted has conventionally been interpreted as indicating that the framers had the intention to found a centralised federal system.⁷¹ Peter Hogg and Wade Wright enumerate many features of the Canadian Constitution that make it more centralised and hence distinguish it from the American one. This is meaningful, they say, given that the American Constitution was the only federal precedent available to the framers, apart

⁶⁸ *ibid* 326.

⁶⁹ Menzies (n 22) 87.

⁷⁰ *ibid* 85.

⁷¹ Peter Hogg and Wade Wright, ‘Canadian Federalism, the Privy Council and the Supreme Court’ (2005) 38 *UBC L Rev* 329, 333-9; Peter Hogg, ‘Canada: From Privy Council to Supreme Court’ in Jeffery Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (OUP 2006) 61.

from the Swiss Constitution. Those features are the federal legislative heads of power over ‘trade and commerce’, limited to foreign, inter-state, and Indian commerce in the United States, as well as other topics (banking, marriage and divorce, criminal law and penitentiaries).⁷² In addition, the Constitution gave power to the Parliament of Canada ‘to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces’.⁷³

However, this residuary power does not apply where specific heads of legislative power do. The minority of commentators that argued that the text itself favoured a decentralised form of federalism emphasised the broad character of the provincial heads of power, starting with the power to legislate over ‘property and civil rights in the province’, which meant ‘much of the law relating to property, the family, contracts and torts’, although it excluded a few particular federal heads of legislative power (trade and commerce, banking, bankruptcy, copyrights, marriage and divorce).⁷⁴ In short, there was enough leeway for judges to mould a centralised or decentralised form of federalism by interpreting broadly or narrowly the different heads of legislative power and the residual legislative power.

The Privy Council’s bias for the provinces resulted in a narrow interpretation of the federal power ‘to make Laws for the Peace, Order, and good Government of Canada’ (the POGG power as called by Hogg) and of the other federal heads of legislative power (like trade and commerce) and in a broad interpretation of the provincial ones (like property and civil rights).⁷⁵ The English Canadian scholars did not appreciate the Board’s ‘relentless refusal to give significant content to the federal [POGG power] whenever it came into potential

⁷² Hogg and Wright (n 71) 333-4.

⁷³ Constitution Act 1867, s 91; although a less conventional reading would hold that there is ‘not one residuary power, but two complementary grants of power that distribute the residue between the federal Parliament and the provincial Legislatures.’ Hogg and Wright (n 72) 336.

⁷⁴ *ibid* s92(13); Hogg and Wright (n 71) 334-335.

⁷⁵ Hogg and Wright (n 71) 339-41.

conflict with the provincial power over property and civil rights'.⁷⁶ For instance, although it admitted that the federal government had the authority to deal with emergencies under the POGG power; it rarely found that there was an emergency: 'it struck down the Parliament of Canada's 'Canadian New Deal' legislation ... on the basis that the depression of the 1930s was not an emergency'.⁷⁷

An Inadvertent Wisdom?

What can explain this indubitable bias in favour of the provinces? While the Board's preference for the decentralisation of power under Lord Watson (on the Board from 1880 to 1899) and Lord Haldane (1911-1928) may indicate a belief that a more localised decision will better meet the needs of the people it affects, it seems more probable that the Lords were trying to strike a peaceful balance of power between the Parliament of Canada and the provincial Legislatures.⁷⁸ Even such a balance seemed to have been less the product of a careful consideration of local cultural needs than the reflection of 'a preconceived notion about the proper form of a federal system, a notion that placed much emphasis on the protection and enhancement of the position of the provinces'.⁷⁹ Indeed, the brevity of the Board's decisions (the Judicial Committee was producing a single unified judgment without dissent rendered in the name of the Court) and the legal formalism that reigned over British jurists of that era, makes it

⁷⁶ Hogg (n 71) 63.

⁷⁷ *ibid* 64.

⁷⁸ As Lord Haldane noted: 'At one time, after the British North America Act of 1867 was passed, the conception took hold of the Canadian Courts that what was intended was to make the Dominion the centre of government in Canada, so that its statutes and its position should be superior to the statutes of the Provincial Legislatures. That went so far that there arose a great fight; and as the result of a long series of decisions Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution of Canada took a new form. The Provinces were recognized as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produces a new contentment in Canada with the Constitution they had got in 1867.' Haldane (n 4) 150.

⁷⁹ Hogg and Wright (n 71) 341.

plausible that the Lords were simply trying to interpret the Constitution as any other statute,⁸⁰ which meant considering the text itself, without regard for original intention or legislative history.⁸¹ Once the Board decided they were to interpret it as a normal statute, ‘they insisted on an absolute prohibition of any resort to legislative history’⁸² which led to unfortunate out of context appreciations, since ‘their Lordships of the Privy Council ... were quite ignorant of the history, geography and society of Canada, as numerous faux pas in their opinions demonstrate.’⁸³

Whatever criticism can be made of the Board’s approach, Hogg and Wright argue that the Board’s pro-provincial bias has, at the end of the day, served Canada well. Firstly, the Lords were not so disrespectful of the Constitution Act since, as we have seen, there were textual anchors for their provincial bias. Secondly, a highly centralised federalism was not necessarily a preferable solution. The Canadian commentators note that the 1929 Depression and the Second World War’s call for the centralisation of power should not make us forget the virtues of decentralisation: the advantage of using provinces as social laboratories and the principle of subsidiarity, that is ‘the principle that decision-making should be kept as close to the individuals affected as possible’ that gained importance in Western European countries trying to accommodate the European community. Thirdly, the geographical (thinly distributed population over large superficies) and cultural context (multicultural with two official languages and two legal systems) make decentralisation more compelling. Fourthly, the concentration of an important cultural minority in Québec, which contains nearly a fourth of Canada’s population, cannot be ignored.⁸⁴

⁸⁰ See *Bank of Toronto v Lambe* (1887) 12 App Cas 575 (PC), 579, where the Privy Council stated that the Constitution was to be interpreted as other statutes.

⁸¹ Hogg (n 71) 75, 83.

⁸² *ibid* 75.

⁸³ *ibid*; refers to John Tupper Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press, 2002) as a ‘damning indictment of the quality of [the Privy Council’s] work’.

⁸⁴ Hogg and Wright (n 71) 342-7.

In spite of this, Hogg only makes a case for an ‘accidental’ sagacity, simply because the Lords were imposing a preconceived notion of what federalism was supposed to be like, as a decontextualised ideal, leading to both accidental successes and blunders. While a majority of Canadian scholars considered that the Privy Council had made the federal government impotent by the time the appeal to it was abolished in 1949,⁸⁵ it also bequeathed to Canadian law the conception of the Constitution as a ‘living tree capable of growth and expansion within its natural limits’,⁸⁶ which gave way to the Supreme Court’s liberal attitude, under judge Dickson, of interpreting the Constitution, and in particular the 1982 Charter of Rights, as ‘capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.’⁸⁷

Hogg and Wright both agree with former Prime Minister Pierre Elliott Trudeau’s suggestion that: ‘It has long been a custom in English Canada to denounce the Privy Council for its provincial bias; but it should perhaps be considered that if the law lords had not leaned in that direction, Quebec separation might not be a threat today: it might be an accomplished fact.’⁸⁸

Therefore, if one considers the Lords as purely judicial actors, their disregard of legislative history and the original intention of the framers, in accordance with legal formalism, may seem naïve, and their ‘positive’ achievements, accidental.

On the other hand, insofar as their Lordships’ political goal was to hold the Empire together, and therefore promote whatever balance of powers would better secure a peaceful status quo within Canada, the wisdom of the ‘wicked stepfathers of confederation’ as Eugene A Forsey calls them,⁸⁹ appear much less accidental.

⁸⁵ Hogg (n 71) 63.

⁸⁶ *Edwards v A-G Canada* [1930] AC 124 (PC), 136 (Lord Sankey).

⁸⁷ *Hunter v Southam* [1984] 2 SCR 145, 155.

⁸⁸ Pierre Elliott Trudeau, *Federalism and the French Canadians* (St Martin’s Press, 1968) 198.

⁸⁹ Eugene A Forsey, ‘Canada: Two Nations or One’ (1962) 28 *The Canadian Journal of Economics and Political Science* 485.

However, the distinction between the Lords' judicial and political roles is not so clear, as law was then conceived as holding the promise of a potentially universal language, able to provide, like a science, universal answers. Writing about the hopes inspired by the new International Court of Justice, Ernest Pollock wrote in the same period (the early 1920s) that 'law is, after all, the training which leads men away from mere conflict'. Lord Macaulay wrote about England that 'her mightiest empire is that of her morals, her language and her laws' and Pollock certainly saw a link between the three as he made paternalistic remarks about 'the bond between us and the great English-speaking race on the other side [of the Atlantic] as the root and foundation of peace at all times, and if we can only lay the same foundation between ourselves and other nations, we shall have done a great deal for the peace in the world.'⁹⁰ While exporting this 'science of law' was doubtlessly an imperial ambition, it was one carried out with an underlying cosmopolitan hope. There is no reason to doubt that their Lordships really saw themselves not so much as imposing the imperial language of law upon Canada but rather as providing 'an enormous service to the Empire and to the Dominion of Canada by developing the Dominion Constitution'.⁹¹

India: Lost in Translation

The relationship between the Empire and India was different. Contrarily to Australia and Canada, India was not only a foreign land, but the Indian culture was also much more different. From the battle of Plassey in 1757 to the independence in 1947, the British ruled over India, in which they exported many of their own cultural structures. The political discourse concerning independence was mainly taking place outside of the judicial realm. Their Lordships were more concerned about overcoming the cultural bridge in this colonial context than interested in reflecting upon the autonomy of the Indian

⁹⁰ Ernest Pollock, 'The International Court of the League of Nations' (1921-1923) 1 Cambridge LJ 29, 41.

⁹¹ Haldane (n 4) 150.

people which, they assumed, was too immature to exercise its autonomy.

Until its independence, India provided ‘the great majority of the appeals before the Judicial Committee’.⁹² Whether or to what extent their Lordships’ moral sensibility coincided with the Indian ones was nonetheless a less significant question than in Australia or Canada. Their rule was imposed from above and the legal structure was exclusively British:

In the first century of British Justice in Bombay, there is no record of any Indian judge or lawyer. It was only after the establishment of the High Court [in 1861] that Indian Barristers began to make their solitary appearances in the High Court.⁹³

The Exportation of British Legal Structures in India

The British did not merely export their legal culture but the Western concept of law itself:

Any discussion of Hindu conceptions of law has to start with the basic observation that nowhere in the Hindu tradition is there a term to express the concept of law, neither in the sense of *ius* or of *lex*. Not until the arrival of the colonial powers was the concept of law used on the subcontinent, by Europeans and through the medium of European languages.⁹⁴

As Hindu rules of life were contained in treatises on *dharma* (a concept akin to natural law), law could be taken to correspond to *dharma*, but only if one understands law so broadly as to encompass both the legal and the moral duties held by persons (although *dhar-*

⁹² Rankin (n 17) 14; Peter Anthony Howell, *The Judicial Committee of the Privy Council* (CUP, 1979) 110.

⁹³ Bombay High Court, ‘History of the High Court of Bombay’ (Bombay High Court) <<http://bombayhighcourt.nic.in/history.php>> accessed 29 March 2013.

⁹⁴ Ludo Rocher, ‘Hindu Conceptions of Law’ (1985) 29 *Hastings LJ* 1283, 1283.

ma applies not only to individuals but to all things). The end thus pursued by all things is, rather than the accomplishment of one's own nature, 'the progress and welfare of all in this world'.⁹⁵ The superposition of a legal culture that distinguishes moral or religious duties from legal, enforceable ones onto a culture that conflated moral and legal duties was bound to cause difficulties to the English Lords. However, it did not mean that a distinction between higher, guiding, principles and down-to-earth, applicable precepts did not exist in Hindu law. Although it is hard to ascertain how Hindu law was applied under the 500 years of Muslim rule preceding the arrival of the British, Gledhill writes that '[o]ne can only assume that it was mainly left to the castes and the panchayats [a small assembly of venerable elders] and that custom often dictated [which] rule applied'.⁹⁶ It is hardly conceivable that a universal set of ancient rules could settle any arising disputes in a coherent way, and those ancient rules did not claim to be enforceable laws. Native Hindu scholars knew that 'the law of the Sanskrit texts was an ideal law, never susceptible to complete and identical application, but subject to modification by custom, which varied from time to time, place to place, family to family, and caste to caste'.⁹⁷ The officials from the Anglo-Indian Courts realised that Hindu law mixed morals, religion and law, explains Gledhill, but they had difficulty 'to assign the rules to their proper category'.⁹⁸

Pundits learned in Sanskrit and Hindu Law assisted the British Courts in this task. Indians were officially associated with the judicial administration following the establishment of the Recorder's Court, in 1798.⁹⁹ The judges eventually gained enough expertise to use and assess the authority of the commentaries and digests of an-

⁹⁵ Mandagadde Rama Jois, *Legal and Constitutional History of India* (NM Tripathi 1984) 4.

⁹⁶ Alan Gledhill, 'The Influence of Common Law and Equity on Hindu Law since 1800' (1954) 3 *Int'l & Comp LQ* 576, 576.

⁹⁷ *ibid* 577.

⁹⁸ *ibid*.

⁹⁹ Bombay High Court (n 93).

cient texts themselves,¹⁰⁰ and the post of pundit was abolished shortly after the establishment of the Bombay High Court, in 1862.¹⁰¹ The judges became all the more independent from the Hindu advisers as they could rely on their own case law and as India became mostly governed by a general law adapted from England, mainly statutory by the mid twentieth century, although the family and religious matters kept being dealt with under Hindu law.

The British tendency of interpreting the Sanskrit texts as English statutes, though problematic¹⁰² at least had the advantage of importing appealingly clear modalities of sanction and reparations. For instance, ‘the English procedural law, especially its rules for execution ... made the early Company’s courts in Madras and Bombay popular with litigants’.¹⁰³ A ‘great number of Indians’ preferred the ‘Royal English justice of the presidency towns to the Company’s in the moffusil [the countryside]’,¹⁰⁴ i.e. the regional areas outside of the urban centres. One can readily understand why execution rules were attractive for Indian tradesmen:

Not only does the Hindu law require a man to pay his debts; it threatens him who does not with dire punishment in the next life. The English law has, however, effective procedural measures to compel him to pay in this life, by seizure and sale of rights and interests capable of being realized.¹⁰⁵

The ‘Royal English Justice’ gave the practice of law in India a legitimacy and purpose that made the Indian legal profession previously lacked. In the time of Governor Gerald Aungier, who established the first British Court of Justice in Bombay in 1672, speculative solici-

¹⁰⁰ George Rankin, ‘Hindu Law To-Day’ (1945) 27 (3/4) *J Comp Legis & Int’l L* 1, 5-6.

¹⁰¹ Bombay High Court (n 93).

¹⁰² Gledhill (n 96) 577.

¹⁰³ *ibid* 580.

¹⁰⁴ Samuel Schmitthener, ‘A Sketch of the Development of the Legal Profession in India’ (1968-69) 3 (2/3) *Law & Society Review* 337, 345.

¹⁰⁵ Gledhill (n 97) 581.

tors were considered a ‘plague’.¹⁰⁶ Very few people were adequately trained in law. Aungier, who is said to have ‘exhibited a passion for fair, impartial and even-handed justice,’¹⁰⁷ asked the East Indian Company ‘to send a Judge Advocate learned in law’ to control the attorneys who ‘stirred up litigation’ (‘barrister’ being a misspelled form of ‘barritor’, ‘one who stirs up litigation’) and claimed to be legal experts.¹⁰⁸ Schmittener explains why the Company refused:

The Company tried to discourage the growth of the profession because the directors believed that more lawyers would bring an increase in law suits and foment more disputes in the colonies. The Company’s attitude of contempt for the legal profession reflected the disreputable state of the bench and bar in England during the years of the Restoration.¹⁰⁹

The purity of the motivations of the Company is however dubious, as they finally sent Dr St-John, an expert in Civil Law, to preside the Admiralty Court that had been set up by a 1683 Charter, but dismissed him ‘for his refusal to subordinate his own judgement to the wishes and directions of the Governor and Council’.¹¹⁰ The Company’s justice was to be administered by laymen until the establishment of the Recorder’s Court, in 1798, that was to include ‘a Barrister of not less than 5 years standing’ (the Recorder, appointed by the Crown).¹¹¹

However, Schmittener writes that the legal profession acquired some prestige in India before that, with the establishment of the Mayor’s Court in 1726.¹¹² The Mayor’s Courts were located in the three presidencies, directly chartered by King George I.¹¹³ Although they were still administered by lay people and still under the execu-

¹⁰⁶ BM Malabari quoted in Schmittener (n 104) 338.

¹⁰⁷ Bombay High Court (n 93).

¹⁰⁸ Schmittener (n 104) 339.

¹⁰⁹ *ibid.*

¹¹⁰ Bombay High Court (n 93).

¹¹¹ *ibid.*

¹¹² Schmittener (n 104) 41.

¹¹³ *ibid.*; Bombay High Court (n 93).

tive influence of the Company, there was for the first time a right of appeal to the Governor in Council and, in last resort, to the Privy Council. Appeals were readily granted from India to the Privy Council because, the Lords felt, such was ‘the desire of the people in India’.¹¹⁴ It is interesting to note that the first trace of prestige related to the legal profession appeared with the establishment of a system headed by the Privy Council. The profession gained ‘recognition, wealth and prestige’ as the Supreme Court was established in Calcutta, and trained English barristers and solicitors began to work in India, importing their technical language and professional knowledge. At least four of the Supreme Court judges had to be barristers with a minimum of five years standing. There was still ‘no record of any Indian judge or lawyer’, but non-licensed mukhtars acting as legal agents, made a profitable living at acting ‘more or less as solicitors’.¹¹⁵

Anglo-Hindu Law as a Culture-Sensitive Form of Legal Imperialism

The relative success of the implementation of British legal structures may have been due not only to the imperialistic strategies deployed by the British, but also to inherent traits of the Hindu culture that made it receptive to this new legal frame, which would endure after the independence of India, ‘[w]hereas the Indian Muslim has tended to revert to the Sharia’. Gledhill thinks that the Hindu’s receptivity to principles of English law may be accounted for by the fact that ‘so many Hindus have displayed such remarkable ability in the field of Anglo-Indian law’.¹¹⁶ That was possible because the British attempted to apply the Hindu law rather than supplant it and engaged in a dialogue with Indian specialists. After the Supreme Courts were merged with *Sudder Adalats* (Chief Courts) in the three presidency

¹¹⁴ Rankin (n 17) 15.

¹¹⁵ Schmittener (n 104) 343, 354; Bombay High Court (n 93).

¹¹⁶ Gledhill (n 96) 580.

towns by the Indian High Courts Act¹¹⁷ in 1861, these newly formed high courts applied ‘an admixture of Muslim and Hindu law with the Regulations and the common law’.¹¹⁸ The Judicial Committee of the Privy Council itself used assessors until ‘the practice of appointing retired judges of the Supreme Courts or High Courts to the Judicial Committee’ was established in 1863.¹¹⁹ It is however difficult to assess the importance of assessors in the Board’s deliberations, since these were not public.¹²⁰ Geldhill defines the ‘Anglo-Indian approach’ demonstrated by the Hindu Privy Councillors and the retired British judges in the following way:

... its characteristic features have been reluctance to depart from the Sanskrit texts, except in cases of conflict, either internal, or with the statute law, or with proved custom, a disinclination to introduce rules of English substantive law, except to fill a gap, and only then in an assimilable form, careful study of the course of Indian decisions on a particular question, upholding them whenever possible, frequently indicating legal or equitable principles on which they might be based, and, whenever necessary, deciding between conflicting schools of thought.¹²¹

Such was the Board’s approach to appeals from India, and, despite the occasional misunderstandings and misuse of English legal concepts, Geldhill is of the opinion that ‘the Board often did justice in questions of Hindu law, where the Indian courts had failed through taking too narrow a view of the problem’ and was careful not to introduce English notions in the fields left to Muslim and Hindu law.¹²²

¹¹⁷ Bombay High Court (n 93).

¹¹⁸ Schmitthener (n 104) 350; Geldhill (n 96) 578-9.

¹¹⁹ Geldhill (n 96) 579.

¹²⁰ Howell (n 92) 57.

¹²¹ *ibid.*

¹²² *ibid.*

In *Rungama v Atchama*,¹²³ the Judicial Committee listed three sources of authority that they had at their disposal: '(1) opinions of the Pandits, (2) Hindu treatises and (3) European authorities.'¹²⁴ By trying to use ancient Hindu texts as authorities, the Board was faced with exegetic difficulties that it openly recognised:

If we are to form our opinion of the law from the effect of these authorities we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption. At the same time it is quite impossible for us to feel any confidence in our opinion – founded on authorities to which we have access only through translations – and when the doctrines themselves and the reasons by which they are supported and impugned are drawn from the religious traditions, ancient usages and more modern habits of the Hindus, with which we cannot be familiar.¹²⁵

In 1872, Charles Collett, Puisne Judge of the High court of Madras, argued against the general bias of the 'colonial fellow-subjects' in favour of the courts 'located in England, with a Bench mainly composed of tried English judges, and a Bar frequented by the leading members of the profession'.¹²⁶ According to him, the judges in the Indian Courts are more 'experienced in dealing with native evidence'¹²⁷ and it would be 'practicable and expedient to restrict the right of appeal to the Judicial Committee'.¹²⁸ His critique of the Board is quite severe. He asserts that English lawyers are rarely versed in general jurisprudence or 'other systems of law, either ancient or modern'. According to Collett, their Lordships' 'municipal minds' and ignorance of Indian languages make it almost inevitable that they will confuse the nature and extent of foreign legal notion,

¹²³ *Rungama v Atchama* (1846) 4 MIA 1, 101.

¹²⁴ Rankin (n 100) 2.

¹²⁵ *Rungama* (n 123) 101.

¹²⁶ Charles Collett, 'The Judicial Committee of the Privy Council, with Special reference to India' (1872) 1 Law Mag & Rev 14, 14-15.

¹²⁷ *ibid* 24.

¹²⁸ *ibid* 14.

moulding them to fit English legal notions.¹²⁹ However, this critique should be attenuated, as the misunderstandings flowing from the reliance on incorrect English translations of Hindu legal writings were neither numerous nor significant.¹³⁰

Collett nonetheless emphasised that the Board's inability to bridge the cultural gap is more problematic when the Lords made factual assessments. The Board 'used not to dissent from the local courts ... upon conclusions of facts, except in very clear cases, but of late years ... there has been a marked abandonment of this rule', which would be according to Collett one of the main causes of dissatisfaction with the Board's decisions abroad in the 1870s.¹³¹ Furthermore, cultural differences make the appreciation of foreign evidence highly problematic, as this evidence

... will very generally be that of foreigners whose habits of thought, morals, manners, and languages, they are utterly unacquainted, and to whose evidence it would be in the highest degree dangerous to apply the like tests, or the same standard of credibility that may be used in judging the evidence of witnesses in England.¹³²

The Empire preserved the local Hindu law and gradually integrated English law into it because there was enough of an 'overlapping consensus' between the higher principles of the respective cultures for English jurists to operate this integration. Nonetheless, the context of colonisation implied a relationship of domination which allowed the Lords to discard a rule that the British would have deemed as unacceptable. In *Re Southern Rhodesia*, the Privy Council showed that it

¹²⁹ *ibid* 16-17: 'Who has not heard some learned and patient judge in that Court struggling with a fundamental notion of the Hindu or Roman-Dutch law, and misleading himself as to its nature and extent by perpetually comparing it with the English legal notion apparently similar, and alone familiar to his mind'.

¹³⁰ Gledhill (n 96) 579-580: 'Inevitably, English terms of art crept into the translations and into the language used in courts. This gives rise to the danger that a term may carry with it associations which are out of place in the Hindu system. ... Yet, it may safely be said that the influence of words upon the Hindu law has been negligible; it is new ideas which have been absorbed'.

¹³¹ Collett (n 126) 17.

¹³² *ibid* 18.

shared the predominant evolutionist view of the time by presenting a dichotomy between the situations where a cross-cultural jurisprudence was possible and those where it was not:

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or legal ideas of civilized society. Such a gulf cannot be bridged. ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own.¹³³

This evolutionist view of society, which goes hand in hand with a paternalistic view of international relations, is fundamentally based in a ‘natural collective human right of the superior races to rule the inferior ones’.¹³⁴ Although the effort of cloaking an inadequate system in some moral apparatus may be seen as a justification for a deficient system to stay in place, it may have some positive impact, if only to remain a plausible façade. It is precisely because the prevailing evolutionist cultural theory ‘placed contemporary British society at the pinnacle of “civilization” and assigned other societies to various lesser stages of development’¹³⁵ that it was incompatible with overt, direct pillaging. My objective is not to assess to what extent giving a human face to imperialistic behaviours may indeed be beneficial for the dominated people but only to note that it incited the Lords themselves to grant these foreign subjects some rights that other, dehumanised and morally marginalised individuals would have been denied. For instance, there was a strong assumption in common law that pre-existing native property rights were to be respected. Lord Denning, sitting on the Privy Council, wrote that:

In inquiring ... what rights are recognized, there is one guiding principle. It is this: the courts will assume that the

¹³³ (1919) AC 211 (PC), 233-4.

¹³⁴ Upendra Baxi, ‘Voices of Suffering and the Future of Human Rights’ (1998) 8 *Transnat’l L & Contemp Probs* 125, 134.

¹³⁵ David Howes, ‘Introduction: Cultures in the Domain of Law’ (2005) 20 *Canadian Journal of Law and Society* 9, 16.

British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests ...¹³⁶

The compromises that their Lordships would attain often revealed their own convictions and biases. For instance, in *Bal Gangadhar Tilak v Shrinivas Pandit*,¹³⁷ it separated a religious notion from a legal one, whereas in the Indian culture, as we have seen, both are closely related:

... the Privy Council was asked to decide whether an adoption could be valid in the absence of the performance of a particular ritual (called dattahoma), which the dharmastras (treatises in dharma¹³⁸) clearly require. ... the court held that the legal act of adoption could be separated

¹³⁶ *Adeyinka Oyekan v Musendiku Adele* (1957) 2 All ER 785, 788. The Privy Council expressly held that the assumption that pre-existing rights are recognized and protected under the law of a British Colony is a 'guiding principle'. See also the survey offered by judges Deane and Gaudron, in *Mabo and others v Queensland (No. 2)* (1992) 175 CLR 1, [10]-[11]. The strong assumption of the common law was that interests in property which existed under native law or customs were not obliterated by the act of State establishing a new British Colony but were preserved and protected by the domestic law of the Colony after its establishment. Thus, in *Re Southern Rhodesia* (n 133) 233, the Privy Council expressly affirmed that there are 'rights of private property', such as a proprietary interest in land, of a category 'such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them'. Similarly, in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 407, the Privy Council affirmed and applied the 'usual' principle 'under British ... law' that when territory is occupied by cession, 'the rights of property of the inhabitants (are) to be fully respected'.

¹³⁷ (1915) 42 IA 113 (PC).

¹³⁸ 'The term *dharma*, which could be glossed over as "duty", refers essentially to the divinely ordained role which each person, depending on their *varna* (or caste), must fulfill, not only in their relations with other persons, but in the maintenance of the cosmic balance.' Howes (n 135) 11-12.

from the religious act (dattahoma), and held the former to be valid without the latter.¹³⁹

In *Kenchava v Girmallappa Channappa* ‘the Privy Council was called upon to decide whether a murderer can claim the estate of his victim’.¹⁴⁰ The Board noted that ‘the Hindu Law makes no provision disqualifying a murderer from succeeding to the estate of his victim, and therefore it must be taken that according to this law he can succeed’¹⁴¹ but ultimately overruled the applicable Hindu law of succession, because it was required by ‘the principle of equity, justice and good conscience’,¹⁴² the British equivalent, one might say, of dharma, and the one that prevailed.

The establishment of an Anglo-Indian law, formally more European than Indian, illustrates how the British did not marry Indian and British legal cultures even-handedly. It was on the contrary an act of imperialism: the coding of Indian moral/legal norms into digests by British scholars as a tool of colonisation. The product was a reliable hybrid more readily understandable by British jurists. In *Rungama v Atchama*¹⁴³ after listing three sources of authority (opinions of the Pandits, Hindu treatises and European authorities), the Court chooses to follow the interpretation of a British jurist experienced in Indian law.

... by far the most important authority is Mr William Machaghten, whose ‘Principles and Precedents of Hindu Law’ were composed as appears from the Preface after collecting all the information that could be procured from all quarters, and after a careful examination of all the original authorities and of all the opinions of the pundits recorded in the Sudder Court for a series of years ... We are informed by our very learned Assessor, Sir Edward Ryan, that this work of Mr Macnaghten’s is constantly referred

¹³⁹ *ibid* 12.

¹⁴⁰ *ibid*.

¹⁴¹ (1924) 51 IA 368 (PC), 372-373.

¹⁴² *ibid* 373.

¹⁴³ *Rungama* (n 123).

to in the Supreme Court as all but decisive of any point of Hindu law contained in it, and that much more respect would be paid to it by the judges there than to the opinion of the pundits. Upon the particular point in question, Sir Edward adds all the weight of his own high authority, concurring as he does entirely in the law as stated in Macnaghten.¹⁴⁴

Another evidence of the assimilation of Indian sources within British law is the growing importance of the rule of judicial precedent. As from 1861, with the merging of the Supreme Courts and the Chief Courts (Sudder adalats) by the Indian High Court Act, the High Court's decisions became binding on subordinate courts and '[t]he decisions of the Privy Council were binding on all courts in India, but it recognized different schools of law, so that a decision might have a limited territorial effect'.¹⁴⁵ Rankin writes that the Courts helped to define Hindu law: 'Within fifty years thereafter decisions had covered so much of the ground that the case law, rather than the texts, required attention from the lawyer.'¹⁴⁶ Their Lordships would then be very reluctant to question this new corpus of Anglo-Hindu law with alternative interpretations of the traditional texts upon which they were originally based. In *Thakoorain Sahiba v Mohun Lall*¹⁴⁷ and in *Chotey Lall v Chunnoo Lall*¹⁴⁸ for instance, they refused a new interpretation of the Mitakshara (a 12th century legal treatise on inheritance) and would have refused it even if the arguments presented would have been 'far stronger':

Their Lordships think that after the series of decisions that have occurred in Bengal and Madras it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end

¹⁴⁴ *ibid* 102; quoted in Rankin (n 100) 3.

¹⁴⁵ Gledhill (n 96) 578.

¹⁴⁶ Rankin (n 100) 2.

¹⁴⁷ (1867) 11 MIA 386 (PC).

¹⁴⁸ (1878) LR 6 IA 15 (PC).

of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless indeed it is manifestly opposed to law and reason.¹⁴⁹

The Board however specified that this did not mean that whomever invoking a law had to prove that it was in usage, which would reduce and subsume the concept of Hindu law into customs¹⁵⁰ but at least it meant that it was careful when going up the genealogy of a rule to pay more respect to the most recent ones than the most ancient ones from which the more modern ones are derived, and to choose the text applicable in a particular region over a general one.¹⁵¹

Stare decisis compensated for the Lords' incapacity to carry out an in-depth study of diverging schools and ancient texts in order to choose which of the diverging routes to take, and when it was not yet available, it relied on an analysis of the customs. For instance, in *Collector of Madura v Moottoo Ramalinga*, Sir James Colvile wrote that the duty of a European judge administering Hindu law:

... is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law.¹⁵²

Once *stare decisis* was available, not all the lords would enter into a localised cultural evaluation. For instance, whereas Justice Grey, in

¹⁴⁹ *ibid*, quoted in Rankin (n 100) 3.

¹⁵⁰ *Bhagwan Singh v Bhagwan Singh* (1898) LR 20 IA 153 (PC).

¹⁵¹ See for instance *Moniram Kolita v Kerry Kolitani* (1879) LR 7 IA 115 where it preferred the Dayabhaga over the Catyayana, the former governing Lower Bengal. Rankin also gives the example of the Commentaries and the Digests, the interpretation of which is preferred to the a direct interpretation of the venerated Smritis, especially since 'the Smritis themselves make clear that achara or usage is the source of authority in matters of dharma': Rankin (n 100) 5.

¹⁵² (1868) 12 MIA 397 (PC).

Juggomohun, took the mercantile character of the population in Bengal into consideration, Justice Ryan ‘declined to enter into the subject as a question of Hindu law, because he considered that the Supreme Court had uniformly held [a point that now] must be taken as settled’.¹⁵³

Thus, we once again find tension between the position according to which a good knowledge of the local cultural context is essential for judges to render a decision and their Lordships’ faith in the a priori science of law. These two legal poles correspond to cultural relativism and imperialism.

Many commentators note that the Judicial Committee was most successful when it adopted a less idealistic view of law, and recognised the importance of a localised approach. For instance, one commentator notes that

... from 1833 to 1871, two paid assessors who had been Indian or colonial judges were provided for, and ... during that time the reputation of the Judicial Committee rose to its greatest height in India, and gained the entire confidence of the Indian people.¹⁵⁴

As for Canada and Australia, many criticised the attempt to render justice from London:

Both Hindu and Mohammedan law may be roughly described as consisting of the precepts of the sages as interpreted by the customs of the people, and every one who has had experience of India knows that instances constantly occur where it is difficult, if not impossible, to ascertain from books what the customs of the people in some particulars are. ... a judge in England ... from his position as a judge is precluded from himself making inquiries which

¹⁵³ Rankin (n 100) 2.

¹⁵⁴ WC Petheram, ‘English Judges and Hindu Law’ (1900) 16 LQ Rev 392, 395.

an assessor, whose only duty was to inform the judge, might make without loss of dignity.¹⁵⁵

As a purely legal enterprise, the Judicial Committee – and the British legal domination over India more generally – is a failure. The hybrid that was achieved was not a successful translation of Indian principles into a British legal form, it was neither English nor Indian. A Madras judge wrote in 1877 that the Hindu law was a ‘phantom of the brain, imagined by Sanskritists without law, and lawyers without Sanskrit’.¹⁵⁶ However, if considered as a political enterprise, one which pursued the goal to dominate successfully a foreign culture and integrate it to the Empire, it is an indubitable success, as much of the English common law still operates in India.

A Lesson for International Adjudication?

‘Empires are fragile things at best’, Loren P Beth wrote in 1977, ‘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.’ There are, however, many international institutions that reproduce an imperialist attitude in novel ways although this new imperialism distinguishes itself from the colonial era by framing its interventions as respectful of the principle of autonomy of individuals and peoples. Could the Judicial Committee’s ‘successes’ and ‘failures’ teach us something? Substantially speaking, no, because ‘success’ and ‘failure’ are relative. I do not think that studying their Lordship’s successes and failures can provide us with substantive guidance, because their actions would be assessed using arbitrary standards, such as the lastingness of their input over time or its impact on the political culture of a foreign dependency. When drawing lessons from the past, one risks lecturing the dead rather than learning from them.

¹⁵⁵ *ibid* 395.

¹⁵⁶ JH Nelson quoted in Gledhill (n 96) 576.

This illustrative survey of how the Lords perceived themselves and of some external critiques of the Board's judgments reveals an inconsistency that does not, anyway, allow for any such black or white assessment of their work. Some of this work is seen today as having been beneficial, some of it is not. Some of its contributions were lastingly incorporated, some of them were not. Our analysis does reveal that their Lordships shared a faith in the 'altar of the common law' with Canada, and helped it to remain a strong federation by favouring the provinces, and provided Australia with an external arbitrator and an imperial identity. It also indicates that the Board contributed to provide India with a legal frame that was relatively welcome and lasting. It reveals how the Lords' biases and ignorance from the dependencies' local culture and legal beliefs led them to make decisions which were not politically satisfying, and that when they insisted on implementing a certain legal attitude although it was regionally unwelcome, they caused more frustration than good. Finally, this survey shows that such frustration happened when they ignored, or disagreed with, the dependencies' own views but that this cultural tension was tempered by a genuine effort to rely on the local legal culture to find acceptable solutions or to let the colonies that had come of age work out their own 'constitutional salvation'.

Their Lordship's faith in higher constitutional principles, just like their capacity to 'think like a judge', that is, to master a form of authoritative legal argumentation, are what caused both their successes and their failures. It seems that, although it was a servant of the Empire, the Committee was wiser (or less criticised) when it was deferent toward local cultures, which included being very present if this was perceived as being that culture's wish, as in the case of India and Australia. The fact that the Lords saw themselves primarily as judges explains why they were more respectful of the colonial subjects' autonomy than what would be needed for an Empire to survive. This is an illustration of 'higher principles' trumping an imperialistic objective.

Focusing on legal ideals to the detriment of local needs and complaints can be as ill-fated as turning a blind eye to one's ideals to ex-

ecute a technical task, may it be legal, medical or military. What we see as the Lords' successes may be attributed to their willingness to navigate between Western ideals and the diplomatic respect of local sensitivities. They hardly provide further tangible guidance to the international lawyer seeking a lesson from the past as to when an interventionist attitude does more good than bad. This is why I said at the beginning that the Judicial Committee's 'successes' and 'failures' could not provide us with a set of rules to avoid the pitfalls of some form of moral imperialism.

However, these relative successes and failures do make us more aware of the intractable character of our ideals as both subjectively inescapable moral imperatives and objectively unjustifiable forms of imperialism, that we are all too relieved to call 'truths' and the implementation of which we are quick to label as success. I am not making the point that there is no moral truth, simply that those who trumpet them are generally political actors with naïve or Machiavelian motivations.

Taken together, these observations could make a strong case for the use of a pragmatic approach that would favour a case by case decision-making based on the local culture over a search for legal solutions in higher ideals. Paradoxically, this faith in higher principles and paternalistic ideals may have humanised imperialism, by recognising a right to foreign peoples to benefit from this 'British genius' as well as from other moral principles, such as self-determination and autonomy. Whether it has done so only marginally or 'successfully' is an empirical matter to be decided at the light of normatively biased standards of humaneness.

The good intentions of international adjudication are ridden with practical concerns that are specific to particular tribunals at particular times, and the circumstances of the Privy Council's role within an imperial political frame were unique. Judges sitting in international or regional courts are simultaneously international lawyers, politicians and diplomats. As political actors, the Lords contributed to create a common legal culture that they could oversee, thus unifying

the Empire while recognising the importance of competing anti-imperialist principles such as self-determination. As wishfully apolitical judges considering law as a science and as a set of universal principles, they attempted to transmit ‘phantoms of the brain’, which raises the worrying possibility that their attempt may have been meaningless – indeed, harmful – and the counterbalancing hope that some good was done along the way.

Bibliography

- Anonymous, *The Australian Commonwealth and the Privy Council* (1900) 17 Cape LJ 46
- Bailey KH, ‘Appeals to the Privy Council in Constitutional Cases’ (1935-1938) 1 Res Judicatae 1
- Baxi U, ‘Voices of Suffering and the Future of Human Rights’ (1998) 8 Transnational Law and Contemporary Problems 125
- Brennan G, ‘The Privy Council and the Constitution’ in Lee HP and Winterton G (eds), *Australian Constitutional Landmarks* (CUP 2003)
- Carney G, *The Constitutional Systems of the Australian States and Territories* (CUP 2006)
- Collett C, ‘The Judicial Committee of the Privy Council, with Special reference to India’ (1872) 1 Law Mag & Rev 14
- Forsey EA, ‘Canada: Two Nations or One?’ (1962) 28 The Canadian Journal of Economics and Political Science 485
- Gledhill A, ‘The Influence of Common Law and Equity on Hindu Law since 1800’ (1954) 3 Int’l & Comp LQ 576
- Haldane L, ‘The Work for the Empire of the Judicial Committee of the Privy Council’ (1923) 1 Cambridge LJ 143
- Hogg P and Wright W, ‘Canadian Federalism, the Privy Council and the Supreme Court’ (2005) 38 UBC L Rev 329

- Hogg P, 'Canada: From Privy Council to Supreme Court' in Goldsworthy J (ed), *Interpreting Constitutions: A Comparative Study* (OUP 2006)
- Howell PA, *The Judicial Committee of the Privy Council* (CUP 1979)
- Howes D, 'Introduction: Cultures in the Domain of Law' (2005) 20 Canadian Journal of Law and Society 9
- Menzies D, 'Australia and the Judicial Committee of the Privy Council' (1968) 42 The Australian Law Journal 79
- Mohr T, 'The Colonial Laws Validity Act and the Irish Free State' (2009) 43 Irish Jurist 21
- Petheram WC, 'English Judges and Hindu Law' (1900) 16 LQ Rev 392
- Plato, *The Laws* (Benjamin Jowett tr, Book I, Collier 2010).
- Pollock E, 'The International Court of the League of Nations' (1921-1923) 1 Cambridge LJ 29
- Rama Jois M, *Legal and Constitutional History of India* (NM Tripathi 1984)
- Rankin G, 'The Judicial Committee of the Privy Council' (1939-1941) 7 Cambridge LJ 2
- Rocher L, 'Hindu Conceptions of Law' (1985) 29 The Hastings Law Journal 1283
- Saywell JT, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press 2002)
- Schmitthener S, 'A Sketch of the Development of the Legal Profession in India' (1968-69) 3 (2/3) Law & Society Review 337
- Symon JH, 'Australia and the Privy Council' (1922) 4 J Comp Legis & Int'l L 137
- Trudeau PE, *Federalism and the French Canadians* (St Martin's Press, 1968)

