

**LONDON LEGAL HISTORY SEMINAR**

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**Judicial Committee of the Privy Council Case papers  
symposium**

Venue: Institute of Advanced Legal Studies, 17 Russell Square, London WC1B  
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Date: Friday 13 May 2016

At this symposium a number of papers were delivered with regard to different aspects of the very broad jurisdiction of the Judicial Committee of the Privy Council. Each of the speakers is currently engaged in researching areas concerned with the jurisprudence of the Judicial Committee. The first three speakers addressed overarching themes concerned with the Judicial Committee and two papers concerned with specific areas of the Judicial Committee's jurisdiction then followed this introduction.

A short abstract of each speaker's paper is set out below.

**THE PERSONALITIES OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**

Professor Catharine MacMillan (Research Advisor to the IALS JCPC case papers project)

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This paper sought to analyse aspects of the Judicial Committee of the Privy Council's vast jurisdiction by examining the individuals – the personalities – who shaped the functioning of the Judicial Committee. Drawing upon two periods of the 'Imperial' Judicial Committee, between 1875 and 1885 and then again from 1905 to 1915, Professor MacMillan presented a representation of these personalities according to the different ways in which they were related to the Judicial Committee. Beginning with Henry Reeve, the Judicial Committee's registrar, she moved on to analyse the roles and impact of two leading Privy Council judges, Lord Selborne and Viscount Haldane. Consideration was given to the multiplicity of different barristers who appeared before the Privy Council – both members of the English Bar (Judah Benjamin, Edward Fry, Francis Jeune, Arthur Cohen) and of the Canadian Bars (Edward P Davis and D'Alton L McCarthy) – and the nature of their roles. Finally, the paper examined something of the nature of the litigants who brought their appeals to the Privy Council and why they brought these appeals. The suggestion was made that in this often complex and interactive process, different actors had different objectives.

## **EXPERIMENTATION IN THE PRIVY COUNCIL**

Professor Paul Mitchell  
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Professor Mitchell explored the extent to which the structure and role of the Privy Council encouraged its members to experiment with new ideas and doctrinal innovations. These innovations were not only unique but were also simultaneously bolder and more timid than the practices which then prevailed in the House of Lords and the Court of Appeal. Taking illustrations from private law, he argued that Privy Council judges felt demonstrably less constrained by formal limitations and conventional expectations than when they were carrying out their more habitual judicial roles. A particular example can be found in *Goldman v Hargrave* [1967] 1 AC 645, in which Lord Wilberforce's judgment can be taken as just such a form of judicial experimentation in relation to tort law. The paper reflected on why this was the case, and then considered the importance of this phenomenon for English law. The greater freedom shown in Privy Council decisions always had the potential to cause unhelpful uncertainty in the short term, but often, it was argued, the legal profession (both academic and practising) made use of sophisticated analytical techniques which ensured that innovative and experimental Privy Council decisions were beneficial to the development of English law.

## **THE JCPC AS THE FINAL COURT OF ECCLESIASTICAL APPEAL**

Dr. Charlotte Smith  
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What became the Judicial Committee of the Privy Council assumed jurisdiction over ecclesiastical appeals to the Crown under Lord Brougham's Privy Council Appeals Act 1832. The transfer of ecclesiastical appeals from the High Court of Delegates to the Judicial Committee of the Privy Council had been recommended by the special report, solicited by Brougham, of the first Royal Commission on Ecclesiastical Courts in 1832. In the years which followed the ecclesiastical jurisdiction of the Judicial Committee was often the subject of controversy, and in 1873 and 1883 it seemed likely that ecclesiastical appeals would be transferred elsewhere. Yet it remains today the final court of ecclesiastical appeal in all except doctrinal cases.

Dr Smith's paper explored popular perceptions of the Judicial Committee of the Privy Council as the final court of ecclesiastical appeal in the nineteenth century. It examined the various arguments made about its authority, composition, work, and constitutional position. Many important observations were seen in the analysis concerned with the decision in *Risdale v Clifton* (1876-77) LR 2 App Cas 574. The paper examined the interconnections between the Privy Council's role as the court of appeal for the British Empire, and its fortunes as an ecclesiastical appellate court. Concerns expressed in relation to its ecclesiastical jurisdiction had an impact in relation to its Indian and colonial jurisdictions. While this may seem a rather odd corner in the jurisdiction of a Privy Council which spent

so much time concerned with Indian and colonial appeals it is impossible to divorce these two jurisdictional hemispheres in considering the Privy Council.

### **PALESTINE AND THE JCPC: AN INTRA-IMPERIAL COURT IN INTERNATIONAL JURISPRUDENCE**

Professor John Strawson

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Palestine came under British control first through belligerent occupation and then by the award of the Mandate of the League Nations. As Palestinian nationalists observed in the consultations on the Mandate and accompanying Order in Council, Palestine was being treated politically and juridically in the exactly the same way as other British Crown colonies. The incorporation of Palestine into the British Empire also brought its courts within the jurisdiction of the Judicial Committee of the Privy Council.

Professor Strawson argued, however, that there was a fundamental difference between ordinary Crown Colonies and the Mandates in that the new Permanent Court of International Justice had a critical role in ensuring the Mandatory Power was applying Mandate correctly. Two important questions were considered: first, the role of international law in relation to Palestine; and, second, the construction and application of law, derived from a wide variety of sources, within Palestine.

By taking selected cases from the *Mavrommatis Palestine Concessions* (1924) to *Naim Molvan v Attorney-General for Palestine (the Asya)* (1947) 81 Ll. L. Rep 277 the paper tracked the manner in which “established principles of international law” influence the manner in which the Judicial Committee acted. The paper will suggest that the necessity of taking international law into account modified the relationship between the Judicial Committee and Palestine – and other mandated territories – which constituted the jurisprudence as a distinctive.

### **MALAYA AND THE JCPC**

Professor Carol Tan

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This was concerned to explore the workings of the Judicial Committee of the Privy Council in relation to Malaya. Employing a tri-partite structure for her investigation, Professor Tan began with a commentary on the initial jurisdiction of the Judicial Committee of the Privy Council in Malaya. She was concerned to outline where the Privy Council acted as the final appellate court within this region and where it did not in the often-complicated legal history of the area. The movement towards political independence of Malaysia and the relationship between this political independence and a removal of the Judicial Committee’s jurisdiction was discussed in the second part of the paper. The paper then proceeded to its third part, the relationship between the decisions of the Judicial

Committee of the Privy Council and the economic development of post-war economy in the Federation of Malaya and then Malaysia.

Here select Malaysian decisions between 1957 and 1970 were considered in relation to the work of business and economic historians. These decisions of the Judicial Committee are not only a primary source of information about the functioning of this post-war economy but also indicative of the functioning of this economy. In these select cases, it was argued, the Judicial Committee presented a 'business friendly' environment in which economic actors with shared ideology participated in the development of the Malaysian economy.