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Special Issue: Bench and Bar: The (Dis)appearance of Britain

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# Introduction

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As the British empire extended its reach during the eighteenth and nineteenth centuries, Western (specifically British) concepts of law and justice were exported around the world. As the empire retracted in the twentieth century, a residual legal order was left in its wake: the common law. In many colonies and British territories, the early twentieth century was a time of uncertainty. As the roles of the imperial Parliament and the Judicial Committee of the Privy Council changed, national legal systems began to emerge.

This special issue is dedicated to exploring the complex and often paradoxical heritage of British colonial rule and law in relation to numerous jurisdictions, namely the Pacific Islands, Africa, Ireland, Australia and Canada.

Focusing primarily on the area of Family Law, Sue Farran's paper, '"Paddling a canoe with an oar made of oak": the enduring legacy of British law in Pacific island states', examines the legal environment on the eve of independence in the south-west Pacific region and the continuing relevance of Britain's colonial legacy from the 1960s onwards. Although the influence of the English Bar and bench is no longer as immediate or direct as it was in the years of colonial rule or even in the years immediately following independence, justification for contemporary laws remains in British (or more accurately English) jurisprudence, despite its modification, hybridisation or even erasure in specific cases. Farran considers whether local law reform initiatives and the globalisation of laws are evidence of new forms of colonialism, especially legal colonialism. She concludes, however, that, just as a canoe can be paddled in more than one direction, so too might the continuing application of this colonial legacy in Pacific island courts lead to the development of a body of Pacific 'common law', which, in turn, may eventually influence English law.

In her paper, 'Courts and the emergence of statehood in post-colonial Africa', Rachel Ellett investigates the legal legacy of British colonial rule in the context of post-colonial state building in east Africa and concludes that this legacy cannot lay claim to an entirely positive or negative inheritance. The colonial/post-colonial legal institutions were, on the one hand, instruments of political power and manipulation. Yet, they were also sites of contestation and resistance and the ability of the courts to resist was both constrained and enabled by the colonial legacy. Moving beyond strict binaries, Ellett highlights the multifarious implications of the British legal legacy for various African courts, specifically those in Tanzania, Uganda and Malawi. These courts are theorised by Ellett as sites of simultaneous resistance and oppression, political contest and political censure.

Moving from Africa to Ireland, Thomas Mohr, in his paper 'The Privy Council appeal as a minority safeguard for the protestant community of the Irish Free State, 1922–1935", traces the history of the appeal from the Irish courts to the Judicial Committee of the Privy Council as a purported safeguard for minority rights in the Irish Free State during the inter-war years. The significance of the Irish appeal to the Privy Council is often underestimated or ignored, especially as it relates to inter-denominational relations in the early years of the self-governing Irish state. Many historians and other commentators simply echo the claims of the Irish governments of the time that the overwhelming majority of Southern Protestants did not want this purported safeguard of their rights. Mohr challenges these positions, though, and illustrates the central importance of this appeal to the entire British Commonwealth in this period. In the end, Mohr's paper says much about the continued legacy and role of British colonial law in the years that followed the secession of much of the island of Ireland from the United Kingdom.

Gabrielle Appleby's 'The evolution of a public sentinel: Australia's Solicitor General' outlines the British colonial tradition of 'Law Officers', focusing specifically on the development of the Australian paradigm of the Solicitor General (as Second Law Officer), which, to date, has been a largely untold story. Appleby chronicles three phases of the development of the Solicitor General position in the colonies: (1) the close mirroring of the British tradition; (2) the non-political, public-service position; and (3) the introduction of a quasi-independent statutory counsel position. This final phase, a uniquely Australian paradigm, emerged as the preferred model across all of the jurisdictions in the second half of the twentieth century and eventually became a specialist in high-level constitutional and public law advice and litigation.

Finally, Jonathan Swainger's 'Law and the practice of politics in the Canadian Department of Justice: completing confederation' examines the (dis)appearance of Britain through the regimes of practice in the early Dominion Department of Justice in Canada, 1867–1878. The department initially mirrored the approach to governance taken by Canada's first Prime Minister, Sir John A Macdonald, as that which emphasised tactics over legality and utilised law and its interpretation as statecraft in building a new nation. This approach, argues Swainger, reflected a confluence of law and politics that was a product of Canada's colonial history. Following the Liberal victory of 1873, though, through a combination of ministerial inexperience and the increasing presence of legally trained individuals, the Department of Justice took a more legalistic approach, one that favoured an activist Dominion approach to legal problem-solving. According to Swainger, this latter approach was less effective and, instead, truly effective statecraft was that practised at the confluence of law and politics.

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# 'Paddling a canoe with an oar made of oak': the enduring legacy of British law in Pacific island states

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## Introduction

The spread of the common law from early conquests and discovery to later empire might be described as one of the notable features of legal history. This legal system crossed mighty oceans, traversed inhospitable terrain and reached tiny islands, miles from their nearest neighbours. Like the intrepid sea-voyaging people of the South Seas in their great canoes, the common law, carried by settlers, colonial administrators and in some respects by proselytising missionaries, reached distant shores.[1] In the period prior to 1960, Britain, either directly or through its larger overseas territories – notably Australia and New Zealand – had considerable influence in the south-west Pacific region and in particular over many small scattered island countries which were often the political pawns in power struggles between Britain, France, Germany and later Japan. The history of British colonial rule in the south-western Pacific, which commenced in the mid-1870s,[2] has been covered elsewhere and is not the focus of this paper,[3] which is concerned with the legal legacy of that rule in the island states of the region.

The paper first outlines the legal environment found in the region on the eve of independence and the consequences of this as island states moved into a new era. Then, focusing primarily on the area of family law, the paper considers the continuing relevance of the colonial legacy and its contribution to contemporary law through judicial intervention. Finally, the paper considers whether local law reform initiatives and the globalisation of laws are evidence of new forms of colonialism, especially legal colonialism, and the relationship between these more recent developments and previous interventions.

1 Missionaries, along with beachcombers and deserting sailors, were often the first non-indigenous contact for South Sea islanders once islands had been initially discovered, and the former were often the first to attempt settlement on the islands, bringing with them not only Christianity but also the values derived from, and which in many cases informed, the common law.

2 Much of the region was discovered earlier in the 1770s by James Cook during his voyages in the region. British rule began in 1874 when Fiji was ceded to Britain and became a crown colony. Others followed, for example, Solomon Islands became a protectorate in 1893. Only Tonga was never administered by Britain, although for a time it was a protectorate (1900–70).

3 See, eg, R Louis and J M Brown (eds), *The Oxford History of the British Empire*, vol 4, 'The Twentieth Century' (OUP 2001); M Ntumy, *South Pacific Island Legal Systems* (University of Hawaii Press 1993); K Roberts-Wray, *Commonwealth and Colonial Laws* (Stevens & Son 1966); J Dupont, *The Common Law Abroad: Constitutional and Legal Legacy of the British Empire* (Hein 2001).

## Law on the eve of independence

Most of the countries in the Pacific region that came under the influence of the common law as a consequence of colonial encounters achieved independence as a result of the 'winds of change' policy of the 1960s and the United Nations' Declaration on the Granting of Independence to Colonial Countries and People.[4] Nevertheless, the move from colonial governance, either as directly ruled colonies, protectorates,[5] mandated trust territories,[6] or indirectly governed colonies,[7] took time. The first country to attain its independence was Samoa, in 1962; the last was Vanuatu, in 1980.[8]

Under colonial governance British law was introduced in a variety of forms and by various means, but essentially included legislation as well as the principles of law and equity articulated in the decisions of the courts.[9] In the common law tradition, settlers were also presumed to take their law with them.[10] As the mode of acquisition of a British possession was influential in determining what laws were to apply,[11] each Pacific island country experienced a slightly different reception, transplant or imposition of British laws with variable degrees of law-making powers conferred on local institutions, as well as internal law-making powers conferred on the governor or high commission of the territory.[12] For example, where imperial enactments were made in the contemplation that they applied to certain colonies – either expressly or impliedly – then those colonies could not make laws which derogated from these imperial enactments.[13] While law-making and the introduction of metropolitan laws may have been seen as a key to colonial control, in fact most

4 Resolution 1514 (XV), 14 December 1960. Some also changed their names either at independence or in the period leading up to it (Vanuatu was the New Hebrides) and others have changed their names since, eg, Western Samoa is now Samoa and Fiji is now Fiji Islands.

5 Eg, Kiribati (then the Gilbert Islands) was a British protectorate 1892–1916, then a British colony (Gilbert and Ellice Islands 1916–75), and then from 1975–1979 it was a separate British colony of Gilbert Islands.

6 Eg, Samoa was a League of Nations mandated territory of New Zealand 1919–45, and then a UN trusteeship of New Zealand 1945–62.

7 Nauru, eg, was administered by Australia.

8 Some have not yet attained self-government, eg, Pitcairn, or have limited self-government by choice, eg, Tokelau, and some have modified autonomy, with assistance in foreign affairs, when requested, still in colonial hands, as is the relationship between New Zealand and Cook Islands and Niue.

9 Primarily, this was the law from England and Wales but this is not always clearly stated. The Western Pacific (Courts) Order 1961 refers to the laws of England in force on 1 January 1961 (s 15), however, in the Fiji Independence Order 1970 there is reference to any laws of the UK Parliament (s 2(1) with reference to existing laws). It has also been suggested that in some texts 'English' is an adjective and could encompass other common law systems derived from that of England rather than just laws from England: D Paterson, 'The Application of the Common Law and Equity in Countries of the South Pacific' (1977) 21 Journal of Pacific Studies 1. For the extent of this reception, see J Corrin Care, 'Colonial Legacies? A Study of Received and Adopted Legislation Applying in the University of the South Pacific Region' (1977) 21 Journal of Pacific Studies 33; G Powles, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia' (1988) 10 University of Hawaii Law Journal 106; and for Vanuatu and Solomon Islands, K Brown, *Reconciling Customary Law and Received Law in Melanesia* (Charles Darwin Press 2005) 26–41.

10 As Blackstone stated: 'If an uninhabited country be di[s]covered and planted by Engli[s]h [s]ubjects, all the Engli[s]h laws then in being, which are the birthright of every [s]ubject, are immediately there in force', *Commentaries on the Laws of England*, vol 1, s IV, Classics of English Legal History in the Modern Era Series (Dissertations-G 1978) 108. See on this process Brown (n 9) 30–34.

11 A point made in *Salmond on Jurisprudence* (10th edn, Sweet & Maxwell 1947) 511–22.

12 Governor in the case of colonies and high commissioner in other dependent territories: D Paterson, 'South Pacific Customary Law and Common Law: Their Interrelationship' (1995) Commonwealth Law Bulletin 660, 662.

13 It was not always clear what countries these were as the list of British Western Pacific Territories changed over time, eg, Cook Islands and Niue were only British Western Pacific Territories until 1902 and thereafter came under New Zealand, whereas Fiji, New Hebrides (now Vanuatu) and Tonga were British Western Pacific territories until 1952, and the Solomon Islands until 1974.

introduced laws had limited impact on the private transactions of the indigenous population being directed primarily as ensuring the 'peace, order and good governance' of the territory, and of meeting the needs of settler communities and colonial administrators. Consequently, despite this potentially large-scale imposition of foreign laws during the period of colonial influence, in reality the lives of many indigenous people continued to be governed by customary laws and practices, modified in various ways by contact with missionaries and traders from the 1830s onwards, and later by colonial administration.[14] Unwritten customary law which survived the colonial era, even if marginalised during it, became formally recognised as a source of law in many island countries and in some cases elevated in status, as former colonies moved towards nationhood.[15]

At independence, new Pacific island states acquired written constitutions – courtesy of the departing colonial administration, and were left with a confusing plurality of laws.[16] Given the often very short period of transition from colonial administration to independence, interim strategies were incorporated into the new constitutions to provide that the laws in place would continue until replaced by national legislation made by the new legislative bodies. A typical example can be found in the Constitution of the Independent State of Samoa 1960:

> (a) The existing law shall, until repealed by Act, continue in force on and after Independence Day;
>
> (b) All rights, obligations and liabilities arising under the existing law shall continue to exist on and after Independence Day and shall be recognised, exercised and enforced accordingly; and
>
> (c) Proceedings in respect of offences committed against the existing law may be instituted on and after Independence Day in that Court, established under the provisions of this Constitution, having the appropriate jurisdiction, and offenders shall be liable to the punishments provided by the existing law (s 114).[17]

The inclusion of such a provision was considered recently in Samoa in the case of *Okesene v Rossi* [2010] WSCC 92, in which the continued application of the English law rule in *Searle v Wallbank* was being debated.[18]

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14 As pointed out by Paterson (n 12), customary law, although not often homogenous, was the 'common law' of Pacific island people, and, although purportedly the law of the people, like the English 'common law' tended to be articulated by a select few.

15 See G Powles, 'Common Law at Bay? The Scope and Status of Customary Law Regimes in the South Pacific' (1997) 21 Journal of Pacific Studies 61, although Paterson notes that this did not occur in Tonga, Niue or Cook Islands (n 12) 664.

16 On the diverse forms of legislation giving effect to independence, see J Corrin, 'Discarding Relics of the Past: Patriation of Laws in the South Pacific' (2009) 39(4) Victoria University of Wellington Law Review 635, 640.

17 See similarly, but with more complications because of its prior Anglo-French condominium rule, the 1980 Constitution of Vanuatu, art 95(1): 'Until otherwise provided by Parliament, all Joint Regulations and subsidiary legislation made thereunder in force immediately before the Day of Independence shall continue in operation on and after that day as if they had been made in pursuance of the Constitution and shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution. (2) Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom.' On problems in interpreting what this latter clause means, see Corrin (n 16).

18 The rule in *Searle v Wallbank* [1947] AC 341 (HL) was that an owner or occupier of land adjacent to a highway had no legal obligation to highway users to maintain his hedges and gates so as to prevent his animals from straying on to the highway. This remains good law in Samoa because Parliament has not stated otherwise, although the tort of negligence will usually provide a remedy.

The court stated:

> The framers of the Constitution obviously understood that our law as a newly independent nation would not be comprehensive and cover every situation. To fill any vacuum they provided for English common law and equity to apply until such time as local law could be brought to bear on the matter. As explained by Dr Aikman as constitutional adviser to the 1960 Constitutional Convention Debates (see Part III Constitutional Convention Debates (Samoan Language) 01 October 1960–28 October 1960 at page 1252) when speaking about article 111 and the definition of 'law':
>
> > 'Article 111, definition of the word "law" – you haven't got enough law to cover all the kinds of situations which will arise. You need some sort of reservoir of law when you strike a new and unusual case. Now the reservoir to which you will have to go in Samoa for many years to come, is going to continue to be the Common Law and equity as those have been developed particularly in the Courts in England . . . This particular definition of law has a most fundamental importance from the point of view of the future law of Western Samoa and therefore, I felt that it was my duty to explain it to you in the detail I have used.' (para 20)

What was included in this 'existing law' varied from country to country depending on what sources of law had originally applied;[19] what 'cut-off' date was specified;[20] and how the legislation retaining introduced law was phrased.[21] This in turn could be different for different sources of law. UK laws having effect in any country of the region included Westminster laws extended specifically to have effect either on certain areas of law or in

19 Eg, in Samoa prior to independence a wide range of laws applied including: the New Zealand Samoa Act 1921 and its amendments; decrees made by the German Government 1900–1919 until their repeal in 1972; ordinances made by the New Zealand administrator with the advice and consent of the Western Samoan Legislative Council, 1919–1947, and thereafter ordinances made by the Western Samoan Legislative Assembly with the assent of the New Zealand high commissioner 1947–1962; Acts of the New Zealand Parliament that were enacted for Western Samoa; Acts of the British Parliament that were in force in England on 14 January 1840, provided they were in force in New Zealand on 7 December 1921 and provided they were not inconsistent with the Samoa Act or any ordinance or regulation in force in Western Samoa, and not inappropriate to the circumstances of Western Samoa (Samoa Act 1921 (NZ), s 349); subsidiary legislation made under any of the above legislation; English common law and equity except so far as inconsistent with legislation or subsidiary legislation in force in Western Samoa or inappropriate to the circumstances of the country (Samoa Act 1921 (NZ), s 349); and custom for the purpose of ascertaining the rights to customary titles and land (Samoa Act 1921 (NZ), s 278); Samoan Land and Titles Ordinance 1934, s 37; and for the purpose of determining the validity of marriages prior to 1921 (Samoa Act 1921 (NZ), s 372): D Paterson, 'Sources of Law Information: Samoa' (2001) <www.paclii.org/ws/sources.html> accessed 14 August 2012. See, more extensively, J Corrin and D Patterson, *Introduction to South Pacific Law* (3rd edn, Palgrave Macmillan 2011).

20 This is the date after which introduced laws no longer applied. For many this is the date of independence but for some it is before this. See, eg, Samoa above and the article by Corrin Care (n 9), and J Corrin, 'Cultures in Conflict: The Role of the Common Law in the South Pacific' (2002) 6(2) Journal of South Pacific Law <www.paclii.org/journals/fJSPL/vol06/2.shtml> accessed 14 August 2012.

21 See Powles (n 9), and Corrin (n 20).

respect of British subjects abroad,[22] laws made under orders in council or proclamations,[23] regulations and ordinances,[24] and laws deemed to be of 'general application'.[25]

This last has caused some difficulty. According to Roberts-Wray, a statute of 'general application' is one 'of general relevance to the conditions of other countries and, in particular, not based upon politics or circumstances peculiar to England'.[26] Roberts-Wray expressed the opinion that the phrase 'statutes of general application' would probably be unacceptable today because of its lack of definition, but goes on to claim, nevertheless, 'it does not appear to have given the courts serious trouble', a view cited quite recently with approval by Lord Hope with reference to Pitcairn Islands.[27] In fact the question of whether a statute is one of general application or not has troubled the courts in the South Pacific region for some time.[28] Certainly, courts in the region have not been consistent in their understanding or interpretation of the phrase, to the extent that an English Act of Parliament may be held to be of general application in one Pacific island country and not in another,[29] or different approaches may be adopted by different judges in the same jurisdiction.

For example, in 2007, two different judges sitting at different times but in the same court in the Solomon Islands held different views on the Adoption Act (UK) 1958. In the case of *Re Noeleen Aba Miria (an infant)*,[30] the judge held that the Act was one of general application in force on 1 January 1961 (the cut-off date for statutes of general application in Solomon Islands) and therefore applied in Solomon Islands. In support of this conclusion the court found that the application of the Act was not limited solely to England and Wales but extended to Scotland (at the time); applied to applications for adoption by persons not normally resident in Great Britain; and concerned matters not peculiar or specific to the UK but of universal application. It was also held that there were no local circumstances that made the application of the Act inappropriate. In contrast, and in the same year, a different judge held that:

> The Act is wholly irrelevant and should be left to those resident in the United Kingdom, and to those conversant with the law appertaining to adoptions in that foreign jurisdiction with its peculiar incidents. There is no evidence of any proclamation, for instance that an adoption order made in this country will conclusively be presumed to comply with that law . . . I accordingly am not satisfied that the United Kingdom legislation has such extra territorial

22 See, eg, the extension of the Fugitive Offenders Act 1967 (UK); Nuclear Installations Act 1965 (UK); Civil Aviation (Investigation of Accidents) Regulation 1965 and the Emergency Powers Order in Council 1939 in Kiribati.

23 Eg, the Western Pacific Order in Council 1877, the Pacific Order in Council 1893, the Western Pacific (Courts) Order 1961 and the Western Pacific (Appeals to the Privy Council) Order 1970.

24 Eg, Queen's (King's) Regulations made by the high commissioner of the Western Pacific, 1893–1916 (Pacific Order in Council 1893, s 108); ordinances made by the high commissioner of the Western Pacific; the resident commissioner or the governor, if there was one, and any subsidiary legislation made under the above.

25 As provided for under Western Pacific (Courts) Order 1961, s 15.

26 Roberts-Wray (n 3) 556.

27 *Christian and Others v The Queen* [2006] PNPC 1; [2006] UKPC 47 [76] (Lord Hope quoting Roberts-Wray (n 3) 545). See, however, discussion on the problems caused by this phrase in Corrin Care (n 9) and the inconsistencies in interpretation found in the region.

28 See Corrin Care (n 9) and D K Srivasta and D Roebuck, 'The Reception of the Common Law and Equity in Papua New Guinea: The Problem of the Cut-Off Date' (1985) International & Comparative Law Quarterly 850.

29 Cf, eg, *Freddy Harrisen v John Patrick Holloway* (1980–1988) 1 VLR 147 (a Vanuatu case) with *Indian Printing and Publishing Co v Police* (1932) 3 Fiji LR 142 (a Fiji case). See also in respect of the criminal law in Pitcairn, A Angelo and F Wright, 'Pitcairn: Sunset on the Empire?' (2004) New Zealand Law Journal 431.

30 [2007] SBHC 138.

> effect as to require Solomon Islanders domiciled and resident in this country to seek to fit within its culture, administration and regime. By virtue of clause 1 to this Schedule 3 of the Constitution, I find that the Adoption Act 1958 (UK) is not of general application so as to have effect as part of the laws of Solomon Islands.[31]

This caveat of compatibility with 'local circumstances' which would allow a court to exclude the application of introduced laws appears to be one that has seldom been used despite the very different cultural and social circumstances found in Pacific island countries.[32]

Although, gradually, Pacific island states are replacing laws left in place at the date of independence with those passed by national parliaments, many of these new laws appear to be modelled on legislation drawn from other common law jurisdictions, or to retain reference to previously introduced foreign law, or to marginally modify existing introduced law to make it appear more 'home-grown'. There are also challenges to this process of 'patriation' of laws,[33] especially where there are practical constraints on how far the law in any area can be rewritten 'from scratch', and ideological constraints on the extent to which patriation – as a deliberate sovereign act, may mark formal (if selective) acceptance of 'foreign' legal transplants.[34] Even if legislation is patriated or the extent of the application of introduced law is curtailed, for example, through a process of review and rationalisation,[35] abolition,[36] or limitation, there are further considerations. First, where there is only partial exclusion of English law this may result in legal lacunae. For example, in Tonga under the Civil Law Act 1966, English common law (statutes and general principles of common law and equity) was widely applicable.[37] In 2003 all reference to English statutes was abolished by an amendment to the Act, so that now under the Civil Law (Amendment) Act only 'the common law of England and the rules of equity' apply in Tonga. As a result there are areas where presently there is no legislation because previously applicable English law has been excluded and no new laws have been put in place by the Tongan legislature. Second, dealing with legislation only partially addresses the issue of the colonial legal legacy. There is still the question of the general principles of common law and equity derived from the decisions of courts outside the Pacific. It is here, in particular, that the continuing influence of English judges and counsel endures.

In making provision for interim legal regimes, the independence documents of Pacific island countries included a variety of approaches to caselaw as a source of law.[38] Where a 'cut-off' date for general principles of common law and equity was given (or these were

31 *Re Tiokobule Bero (an infant)* [2007] SBHC 94, Brown J. Solomon Islands now has national legislation, the Adoption Act 2004, which came into effect in 2008, so the problem may in future be avoided.

32 See critical comment by B Narokobi, 'Adaptation of Western Law in Papua New Guinea' (1977) 5 Melanesian Law Journal 52.

33 This is a term used by Corrin (n 16). Examples can be found in Niue and Tokelau.

34 It is perhaps notable that the two countries where this has been undertaken, Tokelau and Niue, have relatively small populations (although geographically dispersed), which may have facilitated the democratic discussion necessary for the creation of truly autochthonous law and aid funding from New Zealand to support the project.

35 See, eg, in New Zealand the Imperial Laws Act 1988, and s 8 of the Repeal of Statutes Act 1972 (Samoa).

36 Eg, in Niue by the Interpretation Act 2004 and in Tokelau by the Repeal of Laws Rules 1997.

37 Pt 3: 'the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England'.

38 See, eg, in Nauru under the Custom and Adopted Laws Act 1971 it is clearly stated in s 4(2): 'The principles and rules of equity which were in force in England on the thirty-first day of January, 1968, are hereby adopted as the principles and rules of equity in Nauru'; whereas the 1965 Constitution of Cook Islands is much less specific, stating only that subject to constitutional provisions: 'The existing law shall, until repealed, and subject to any amendment thereof, continue in force on and after Constitution Day', s 77(a).

included in the more generic term 'English law' or 'common law') then subsequent caselaw of the English courts was in principle inapplicable.[39] However, the door was left open for subsequent developments in common law caselaw to reach the Pacific in a number of ways. First, via the Privy Council (where appeals to that court were retained) and the body of Commonwealth jurisprudence developed by the Privy Council. Secondly, while there may have been a cut-off date for English caselaw, this did not apply to the persuasive influence of decisions from other common law jurisdictions, such as Australia, New Zealand and the USA, so that reference to these might also incorporate cross-reference to later English court decisions.[40] Third, where English law 'statutes of general application' or other English laws extended to the colonies were retained, caselaw interpreting this legislation might still be referred to, and when novel cases arose in Pacific island jurisdictions and there was little local or regional caselaw to refer to, this was likely to happen especially where lawyers and judges themselves were more familiar with the jurisprudence from elsewhere.

There is, however, and arguably always has been, discretion given to the courts to be selective in the application of the general principles. For example, under colonial rule general principles were only applicable in so far as they were compatible with local circumstances, or were directed at specific purposes – for example, the peace, order and good governance of the colony or protectorate. Since independence, this discretion has been restrained in a number of ways, for instance: there may be restrictions regarding compatibility with the constitution or other legislation;[41] or sources of law may be specifically ranked;[42] or the application of these principles may be subject to a caveat, such as taking into account customary law or traditional values wherever possible;[43] or certain areas of law or subject matter may be stated to be governed by customary law only;[44] or reserved for customary courts and tribunals applying customary law.[45] Consequently, the reception, adoption, adaptation and continuing application of general principles of common law and equity as developed through the courts, can be selective and, while Pacific judges in the common law tradition do not 'make' the law, they can certainly shape it.

## The consequences of the colonial legacy for family law

The relevance and retention of introduced laws in the contemporary island Pacific is reflected in many areas of family law. This is an area which is particularly apt for consideration because, firstly, it is where one might expect personal/customary local laws to be strongest; secondly, it is an area where the context and environment of introduced laws might make them less likely to be laws of 'general application' – being specific to the social/familial time and place in which they are made; thirdly, because it is an area where national governments post-independence have been slow to act so that the 'interim' legal

39 It is not always clear if the same cut-off date for legislation or statute law applies to the general principles or not. See comment by Powles (n 9).

40 Also, if the cut-off date referred to 'the common law' without the adjective 'English' or 'British' or made reference to 'Britain', it could be argued that there was nothing to prevent courts from looking at the persuasive authority of other common law jurisdictions.

41 See, eg, Solomon Islands Constitution, s 5, which was brought into effect by SI 1978/783 and Constitution of Tuvalu, sch 5, s 2.

42 See, eg, the definition of 'law' in Samoa Constitution 1960, s 111.

43 See, eg, Constitution of Vanuatu, s 95(2).

44 See Paterson (n 12).

45 Even here the common law may be influential either because the subject matter raises concerns which transcend the boundary between customary and other law, eg, leases of customary land, or because there is appeal from the customary tribunals to a non-customary one, or because the matter raises human/fundamental rights issues which may also be affected by international treaty obligations (see below).

regime has often persisted unchallenged and judges have been confronted with the task of applying often outdated introduced laws – or national laws closely modelled on these, in the face of changing and sometimes conflicting normative orders. The dilemma can be illustrated by considering cases of guardianship, adoption and the allocation of matrimonial property on divorce.

## Guardianship

Throughout the region children are often cared for by other family members, for instance, in cases such as the death or absence of one or both parents, for purposes of schooling, in fulfilment of family obligations, or to take advantage of the diverse resources and members of the extended family. While these arrangements are frequently regulated by custom, it is often unclear what formal guardianship laws apply. For example, in Vanuatu, there is no domestic legislation on this matter. The law in force at the date of independence would include the Guardianship of Minors Act (UK) 1971,[46] as well as the French law in force at that date.[47] Whether such laws were of 'general application', however, is uncertain due to the specificity of the forms and structures, including jurisdiction of the courts, in their respective countries of origin. Similarly, in Fiji in the case of *Lakhan v Lata* [1994] FJHC 26, the court discovered that there was no law in Fiji that actually provided for the appointment of a guardian for an orphan. However, the court held that it had similar power to that of the English courts' *parens patriae* and cited with approval Lord Brandon's dicta in *Re F* [1990] AC 1 where he explained:

> This is an ancient prerogative jurisdiction of the Crown going back as far perhaps as the 13th Century. Under it the Crown as parens patriae had both the power and the duty to protect the persons and property of those unable to do so for themselves, a category which included both minors (formerly described as infants) and persons of unsound mind (formerly described as lunatics or idiots). [57]

and Lord Denning's dicta in *Re L (an infant)* [1968] PD 119, 156, referring to the inherent jurisdiction of the Court of Chancery in relation to infants.[48] As s 18 of the Fiji High Court Act (Cap 13) (formerly the Supreme Court) expressly gave the Supreme Court (ie High Court) 'all the jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by Her Majesty's High Court of Justice in England', Lord Denning's dicta that 'If a question arises as to the welfare of a child before any judge of the High Court, he can make such order as may be appropriate in the circumstances' was accepted. Although, the indigenous judge, Justice Fatiaki, found this state of affairs highly unsatisfactory, and expressed the view that:

> as we approach the 21st century it is wholly unsatisfactory that this court should have to resort to antiquated (even '*arcane*') '*sources of the law*' to find its jurisdiction to deal with infants. Furthermore in a young population such as ours where a very large proportion of the population is under the age of 21 years the absence of any specific legislation in this area represents a serious *lacuna* in our statute books.[49]

46 As acknowledged in *Re Chelsea Lea* [2000] VUSC 22 and, probably by implication, the amending Act, the Guardianship Act (UK) 1973.

47 Arts 389–476 Code Civil and Loi n 70–459. For comment, see S Farran, *A Digest of Family Law in Vanuatu* (University of the South Pacific Law School Monographs 2003), 36–38.

48 The English law principle of *parens patriae* has also been applied in Tonga in *Re Tevita* [2000] TOSC 22.

49 Original emphasis.

Nevertheless, reference to English law (and Lord Denning's dicta in *Re L* (above)) in this area continues, and *Lakhan v Lata* was cited with approval in *Nai v Cava* [2008] FJHC 274.[50]

Although in some countries of the region 'arcane' English law has been replaced, as, for example, in Tonga,[51] and in others it has been held that introduced law has no application to native and part-native children so that matters of guardianship are to be solely determined by reference to customary law,[52] the residual legacy of colonial law can place courts in the position of having to weigh introduced law and customary law and there may be a conflict. In the Solomon Island case of *K v T and KU* [1985] SBMC 2, it was held that, even though custom more usually governed adoption and guardianship, the UK Guardianship of Infants Act 1925 still applied because it had not been replaced by Solomon Islands legislation, and the applicable principles were those developed in English courts, notably:

> The concept of the interest of the child being paramount in guardianship or custody cases has been with lawyers and courts in the UK for a long time. It has become a statutory creature. The Guardianship of Infants Act 1886 section 5 'the Court may . . . make such order as it may think fit regarding the custody of such infant . . . having regard to the welfare of the infant . . . '. It was in the Guardianship of Infants Act 1925 section 1 that the words used by all courts today first appeared 'the Court . . . shall regard the welfare of the infant as the first and paramount consideration'.[53]

In some respects this reliance on the English law gives courts the opportunity to apply the law in a way that reflects contemporary mores, even if these are not necessarily local, as will be seen regarding judicial incorporation of the UN Convention on the Rights of the Child (UNCRC).

## Adoption

As with guardianship, adoption is frequently governed by customary laws and practices so that many adoptions occur outside the formal system. In Solomon Islands and Marshall Islands there have been recent efforts to enact new national legislation and in Samoa to reform existing law. Elsewhere, however, formal law on adoption remains that introduced from England or closely modelled on it.[54] This legacy is a mixed blessing. On the one hand, it provides certain procedural safeguards: for example, minimum ages for prospective adoptive parents; requirements of consent from the birth parent(s); sufficient differences in age between the child being considered for adoption and the adoptive parents; and certain protections for the child. On the other hand, most of the formal law reflects a period in which the rights of the legitimate child and his/her parents were very different from those of the illegitimate child and his/her parents – especially the father – and the supporting framework in which the law was designed to operate was very much that of the developed world in which the expertise of various educational and social services personnel was

50 Nor does guardianship appear to have been addressed by the Family Law Act 2003 (Fiji).

51 Guardianship Act 2004.

52 Eg, in Papua New Guinea, where the Infants Act 1965 was introduced, this was held to be inapplicable in *Sannga, Deceased; Timereke v Ferrie and Johns* [1983] PNGLR 143 and ignored in subsequent cases.

53 The applicability of English principles was accepted in later cases such as *Tavake v Tavake* [1998] SBHC 118, although here it was also noted that: 'How the courts in England have interpreted the Acts of general application in this area of the law is useful as a guide. This is however not to say that cases in Papua New Guinea, Australia, New Zealand and within the region are less relevant.'; per Kabui J.

54 Eg, the Adoption Act 1955 (NZ) (Niue); Children Act (UK) 1975 (Kiribati); Adoption of Children Ordinance 1965–1967 (Nauru); Adoption Act (UK) 1958 (Vanuatu); Infants Ordinance 1961 (Samoa – modelled on the Adoption Act (NZ) 1955, read with the Infants (Adoption) Regulations 2006); Adoption of Infants Act 1945 (Fiji).

available to the court in arriving at a decision which was in the best interests of the child and in which there was state welfare available for unwanted children. This presents a challenge for judges in a region where this framework is frequently not available. If judges stick to the letter of the law, then applications to adopt may fail. If they adopt a more liberal approach, the adoption may be granted, but in either case the welfare or best interests of the child may not always prevail.

The dilemma is illustrated by the caselaw. In the Tongan case of *Re Whyte and Whyte* [1993] TOSC 5, the applicant parent was the New Zealand husband of the mother of six illegitimate children residing in Tonga at the time of the application. He had a criminal record, an acknowledged drinking problem and had spent very little time bonding with the children prior to the application. If the application were to be granted the children would be removed from Tonga and live with their mother and her new husband in New Zealand. The New Zealand social welfare officer did not approve of the adoption. Nevertheless, the Tongan court approved the application, believing the adoption and the relocation of the children to be in their best interests even though this would mean uprooting them and probably subjecting the new relationship to considerable strain.

By contrast, in the Fiji case of *Social Welfare Officer v Marshall* [2008] FJHC 283, an adoption order granted by a magistrate was overturned on appeal on the grounds that the applicants were not resident in Fiji and therefore failed to comply with the mandatory residence requirement of s 6(4) of the Adoption of Infants Act 1945 (legislation passed under colonial administration), despite the fact that there was evidence that the prospective parents could offer the two children a good home together. Here, the judge held that 'Whilst I have much sympathy for the position that Mr and Mrs Marshall now find themselves and for the infants, it is the function of the courts only to interpret the law and not to amend it.'[55]

Adopting a flexible approach, however, can lead to inconsistent decisions. For example, in the Samoan case of *S & M v District Court, Apia* [2000] WSSC 42, the court had to decide if it had jurisdiction to consider an application for adoption of an illegitimate baby born outside Samoa. Now married, the child's mother and her husband wished to adopt the baby. Seeking to resolve the matter, the judge referred to the jurisdiction of the English courts in which the making of an adoption order was not dependent upon the domicile of the child to be adopted. Dicey and Morris on *The Conflict of Laws* and Cheshire and North's *Private International Law*[56] were cited with approval.[57] The court concluded that as neither English law nor New Zealand law made residence a requirement for adoption, Samoa would similarly not require it, despite a decision the year before that residence was required.[58]

While the formal laws represent only a partial picture of adoption in the region,[59] the way in which judges use this common law legacy is informative. Although there is the justifiable claim that much of the formal law suffers from many 'archaic' characteristics, nevertheless, it appears to offer sufficient scope to judges who are prepared to adopt comparative or pro-active approaches to interpretation to meet the contemporary needs of

55 This was also an inter-country adoption and even if the legislation had been amended the order may not have been granted.

56 L Collins (ed), *Dicey and Morris: The Conflict of Laws* (12th edn, Sweet & Maxwell 1993) 886; G C Cheshire and P M North (eds), *Private International Law* (12th edn, Butterworths 1992) 760.

57 Reference was also made to New Zealand law and *Butterworths Family Law in New Zealand* (6th edn, Butterworths 1993) 721–30.

58 *Re Application for Adoption by Solomona* [1999] WSDC 1.

59 Because forms of customary adoption also exist and may be widely practised in a number of countries and there are also restrictions on who can adopt or be adopted, eg, in Tonga only illegitimate children can be adopted, while in Nauru a Nauruan child can only be adopted by a Nauruan if his/her spouse is also Nauruan.

litigants, suggesting that, although the law may appear to be 'frozen in time', in practice this is not always the case.

## Matrimonial property

It is not just in laws pertaining to guardianship and adoption that this might be claimed. While it may be thought that disputes over matrimonial property in a region of underdeveloped and developing economies are rare, increasingly people are acquiring more disposable wealth and more material assets. Generally, the courts cannot exercise divorce jurisdiction over land held under customary tenure, but can determine the allocation of other forms of wealth that are considered to be matrimonial property. Where there is legislation relating to matrimonial property allocation ancillary to divorce, then the courts have considerable discretion as to how that allocation is made and in exercising this almost invariably, but not always, refer to English law precedents. Some countries, however, have gaps in their law on this matter. In Vanuatu, for example, although there is national legislation – the Matrimonial Causes Act 1986 (Cap 61), it failed to provide for matrimonial property issues, so the English Matrimonial Causes Act 1973 applies as a statute of general application in force at the date of independence in 1980.[60] In the case of *Hanghangkon v Hanghangkon* [2010] VUSC 117, the Supreme Court referred to s 25 (1)(f) of the 1973 (UK) Act with particular approval as this allowed the court to take into account 'the contributions made by each of the parties to the welfare of this family, including contributions made by looking after the home or caring for the family'. In the context of the Pacific, where society is still very patriarchal and where women are still predominantly the homemakers and men the wage earners, this English law enabled the court to take a non-gendered perspective of contribution by each spouse, which, while it may have offended traditional family ordering, gave effect to non-discrimination provisions in the constitution and Vanuatu's obligations under the Convention on the Elimination of all forms of Discrimination against Women.

In Vanuatu the courts have not gone so far as to accept the presumption of joint ownership of all matrimonial assets.[61] In Samoa, however, where, until recently, there has been no statutory provision governing the allocation of matrimonial property on divorce, the court has followed the very latest in English law thinking on this, adopting the 'yardstick of equality' for the division of matrimonial property, and demonstrating very clearly a preference for the English authorities that confer a wide statutory discretion on the courts to deal with matrimonial properties, rather than the more detailed statutory provisions found, for example, in New Zealand legislation.[62]

Although the formal law only presents a partial picture, the topics of guardianship, adoption and matrimonial property illustrate a combination of factors which foster the continuing relevance of English law in the region: lack of national legislation to replace colonial legislation, jurisdictional approaches shaped by English law, and contemporary references to English law decisions.

It is through these latter in particular that English judges have continued to hold authority in the region: notably in the area of equity.

60 For explanation, see S Farran 'The *Joli* Way to Resolving Legal Problems: A New Vanuatu Approach?' (2004) 1 Journal of South Pacific Law <www.vanuatu.usp.ac.fj/jspl> accessed 1 September 2012. For criticism of this approach, see Brown (n 9) 132–40.

61 *Joli v Joli* [2003] VUCA 27.

62 *Arp v Arp* [2008] WSSC 35. This approach has now been incorporated by an amendment in late 2010 into the Divorce and Matrimonial Causes Act 1961, ss 22B and 22C.

## Equitable intervention in family law

It is evident from a number of cases considered by the courts of the region that general equitable principles remain important in family matters, especially where there is a gap or inadequate provision in the written law, whether that written law is introduced 'imperial' law or national legislation.[63] As indicated, reference to a residual source of law, described as 'the general principles of English common law',[64] is taken to include the principles of equity. These principles can be of significance in deciding family cases especially where there is little alternative law to fall back on, for example, where there is a dispute among family members over property that does not fall under matrimonial legislation,[65] or where there is no provision in that legislation for the division of property ancillary to divorce.[66] For instance, in the Samoan case of *Elisara v Elisara* [1994] WSCC 14, the court held that:

> The common law principles which have been developed and applied by the courts to de facto unions really have their origin in English authorities where the House of Lords dealt with matrimonial property disputes between married couples applying common law principles.

Focusing on the use of the constructive trust, the court considered: the reasonable expectation test, developed and advocated in New Zealand;[67] the unconscionable conduct test favoured in Australia;[68] the unjust enrichment test advocated in Canada;[69] the principles of estoppel, which have found some favour in England and other common law jurisdictions;[70] and the test of common intention combined with detriment found in leading English cases.[71] Considering the choice of common law precedents, the Samoan Supreme Court elected to follow a combined test of unjust enrichment and reasonable expectation, on the grounds that the first had been applied in Canada to property disputes between de facto and married couples, while the second had been applied in de facto disputes or in situations where there was no matrimonial property legislation.[72] Although several years later in *Arp v Arp* [2008] WSCC 35 it was recognised that 'Since the decision in *Elisara v Elisara* [1994] WSSC 14, there have been significant developments in England in the area of matrimonial property', the Samoan judge was still 'of the respectful view that they provide relevant principles which may be used to guide the approach to be taken by the Samoan courts to the resolution of applications for ancillary relief in, or following, a

63 For a comprehensive overview, see Paterson (n 9).

64 Or words to similar effect, see, eg, the Constitution of Solomon Islands 1978, which states: '[T]he principles and rules of the common law and equity shall have effect as part of the law of the Solomon Islands.' (para 2 of sch 3).

65 See, eg, *Lafaele v Vito* [2001] WSSC 2 and *Maharaj v Chand* [1986] FJ-UKPC 5.

66 A legal state of affairs still found in Vanuatu and Tonga.

67 *Hayward v Giordani* [1983] 1 NZLR 140; *Pasi v Kamana* [1986] 1 NZLR 603; *Oliver v Bradley* [1987] 1 NZLR 586; *Gillies v Keogh* [1989] 2 NZLR 327.

68 *Muschinski v Dodds* [1985] 160 CLR 583; *Baumgarter v Baumgarter* [1987] 164 CLR 137.

69 *Murdoch v Murdoch* [1975] 1 SCR 423; *Rathwell v Rathwell* [1978] 2 SCR 436; *Pettkus v Becker* [1980] 2 SCR 834; *Sorochan v Sorochan* [1986] 2 SCR 38.

70 *Grant v Edwards* [1986] 2 All ER 426 (obiter per Sir Nicholas Browne-Wilkinson, 439); *Gillies v Keogh* (n 67).

71 *Pettit v Pettit* [1970] AC 777; *Gissing v Gissing* [1971] AC 886; *Grant v Edwards* (n 70); *Lloyds Bank v Rosset* [1990] 1 All ER 111 (HC). For comment on this judicial approach, see S Farran, 'Palm Tree Justice? The Role of Comparative Law in the South Pacific' (2009) 58 International & Comparative Law Quarterly 181.

72 In the end the court did not award the wife any interest in the matrimonial home after applying the unjust enrichment and reasonable expectations tests to this case.

petition for dissolution of marriage'.[73] He went on to refer to the more recent English cases of *Miller v Miller* [2006] UKHL 24 and *White v White* [2000] UKHL 54.[74]

As development brings more disposable wealth to Pacific islanders, the role of the trust, especially the constructive trust, in the resolution of property disputes on the breakdown of relationships may be increasingly important and, alongside this, continuing reference to English authorities,[75] including reference to the judgments of specific judges. Those who feature prominently include Lord Mansfield, Lords Reid, Diplock and Denning and Sir Nicholas Browne Wilkinson, Lord Nicholls and Baroness Hale, and, in citing their judgments, little critical distinction is made in Pacific courts between the context in which these judges sit and those of the Pacific bench. One reason for this may be that, besides the substantive law of Pacific islands being strongly influenced by British law, the approach of judges and the procedures of the court are predominantly those of the common law. Although there are some differences, for example, single judgments from Court of Appeal benches composed of more than one judge, a more limited range of authorities referred to and, occasionally, instances where the bench has had to assist the Bar or reprimand members of it, these are largely due to constraints on resources, such as court libraries, time – especially where the bench is composed of visiting judges – lack of experience on the part of lawyers appearing in court, or unrepresented litigants. Referring to the 'strength and uniformity of the common law judicial tradition', Sir Anthony Mason, who sat on benches in Australia, Hong Kong, Solomon Islands and Fiji, suggested that this is evidenced by:

> The sense of responsibility, the sense of independence and objectivity, the need to identify the issues and to ascertain the strength and the weakness of each party's case and to deal with the issues in a judgment which fully exhibits the reasons for the decision.[76]

While the full exhibition of reasons is not always apparent from reported judgments, this judicial tradition is one encountered throughout the region, particularly in the higher courts.

## Law reform, internationalism and neocolonialism

Although young in post-colonial terms, Pacific island states, their governments and people are experiencing the pressures of rapid social and economic change, both from within and beyond their boundaries. Initially this shifted the emphasis for post-colonial states to issues of economic development rather than law reform.[77] More recently, however, there has been some agitation to engage with law reform and to put in place laws and mechanisms which

73 The willingness of the Samoan courts to resort to principles of equity in these situations can be contrasted sharply with that of the Tongan courts where, although the general principles of equity are still applicable, they are not applied: see *Halapua v Tonga* [2004] TOCA 5.

74 The choice of English legal authorities in *Arp v Arp* (n 62) has been upheld in *Hadley v Hadley* [2010] WSSC 6, which also follows English authorities decided prior to 2010, on the question of pre-nuptial contracts. Whether Samoan courts will follow English courts in a change of approach on this topic remains to be seen.

75 See, eg, in Papua New Guinea, *Kisekol v Kisekol (No 2)* [2009] PGNC 192; in Vanuatu, *Michell v Michell & Togase* [2001] VUSC 71; in Solomon Islands, *Goodhew v Goodhew* [2007] SBHC 140.

76 Hon Sir Anthony Mason, 'The Common Law in Final Courts of Appeal Outside Britain' (2004) 78 Australian Law Journal 183, 185.

77 D Weisbrot, 'Papua New Guinea's Indigenous Jurisprudence and the Legacy of Colonialism' (1988) 10 University of Hawaii Law Journal 1, 3.

meet the development agenda.[78] Although this is less so in the field of family law than, for example, banking, terrorism or trade, there are expectations raised by organisations ranging from Save the Children to the reporting committees of various UN conventions that laws will be reformed or initiated to meet international obligations and satisfy domestic demands. Invariably this means that funding has to be found and experts engaged. Often both come from donor states or organisations, for example, from Australia, New Zealand, Canada, the European Union and international bodies such as UNICEF.[79] This inevitably has an impact on the end product. In particular it raises questions about modern legal transplants where new laws and institutions are closely modelled on those from elsewhere or drafted by those coming from different socio-economic backgrounds albeit from common law jurisdictions,[80] and about the sustainability of such reforms once the experts and overseas advisers have left. In the context of family law, one example will be chosen: the Family Law Act 2003 from Fiji.[81]

The Act marked the culmination of a movement towards reform and consolidation of the law which commenced in 1998.[82] As with other Pacific countries which came under the influence of British colonial administration, Fiji's family law system was marked by a collection of inherited legislation or national legislation modelled on English laws and a system of courts that took no account of the special needs of family litigants.[83] After public consultations, the Family Law Bill was drawn up in 2002 and became law in 2003. The legislation incorporated major innovations in family law from a regional perspective. In particular it created the Family Court (a separate Division of the High Court and Magistrates Court) as a specialist court to deal with matters of divorce, maintenance, property division and children's issues. Intended to give effect to Fiji's obligations under the UNCRC, children and their welfare are a central feature of the Act, with an emphasis on the obligations of parents towards their children and procedures are directed at encouraging parents to come to agreements regarding the best interests of their children without litigation.[84] There is provision for counselling and an emphasis on reconciliation aimed at preserving or saving a marriage,[85] or, where this proves impossible, enabling the parties to terminate it as painlessly as possible. Plainly, although it is envisaged that these services will help the couple to stay married, the willingness to do so has to come from the spouses and in many situations the marriage may have irretrievably broken down. Where

78 There are, eg, Law Reform Commissions in Fiji, Solomon Islands and Papua New Guinea and recently those in Samoa and Vanuatu have been activated (after years of inaction). However, much of the work of these agencies is being done under the umbrella of the Australasian Law Reform Agencies and in Solomon Islands under the Australian-led Regional Assistance Mission to Solomon Islands (RAMSI): see Corrin (n 16) and there are therefore questions of autonomy and independence. Also to date little attention has been paid to their recommendations.

79 Most British funding today is through the European Union with some limited funding still coming from the Commonwealth and its various organisations.

80 See, eg, comments by I L W Richardson, 'Advising on Overseas Law Reform' (1978) 9 Victoria University of Wellington Law Review 385, in which he draws on his own experience as a legal reform adviser to Tonga.

81 This is not the only example of law reform in the area of family law, although these are relatively few. Others include the Adoption Act 2004 (Solomon Islands), the Adoption Act 2002 (Marshall Islands) and the Family Protection Act 2008 (Vanuatu).

82 D Beattie, *Commission of Inquiry on the Courts* (Fiji 1998).

83 English laws applying in Fiji included the Adoption of Infants Act 1945, Wills Act 1837 and Acts modelled on English law such as the Marriage Act (Cap 50) and the Matrimonial Causes Act (Cap 51). Only the last has been replaced by the Family Law Act 2003.

84 Eg, there is provision to seek the assistance of counselling where children are involved (ss 50–51). Parents and the wider family are encouraged to arrive at a parenting plan (s 56).

85 Pt III, s 9. This takes account of the strong Christian element in Fijian society and the voice of various churches in the consultation process.

this is the case, then the Act not only requires the spouses to have lived apart for a year and to demonstrate that the marriage has irretrievably broken down, but offers intervention in the form of counselling within the Family Court itself. Indeed, the Act offers marriage reconciliation counselling, family and child counselling and financial and property conciliation. The Act also provides for case assessment conferences, involving the registrar and/or the court counsellor, prior to any formal hearing, to inform the court of the future conduct of the case. The aim is to enable the parties – who may be unrepresented – to explore the issues in contention, consider the options and alternatives and, with assistance, to work towards solutions.

To monitor the administration of the new law and make recommendations for its improvement, the Act also established a Family Law Council to assist the Attorney General in matters such as legal aid relating to claims under the Act and the working of the Act. It also provides for accreditation of various organisations to assist with the practical purposes of the Act, for example, marriage education, counselling and the promotion of child welfare.

The Act has not, however, been without its critics both for the changes it has made and those it failed to make, and has encountered some challenges,[86] especially in terms of putting the structures and personnel into place. Although it is early days yet to determine how successful it has been, there may be two fundamental flaws in the Fiji experience. First, much of the new law and its procedures are modelled on those that are found in Australia. These models may in themselves be flawed,[87] or prove to be unsuitable for transplant to a country where the social, economic and political context is quite different. Second, the continued existence of these specialist courts is premised on specialist staff and adequate resources. In particular, there are considerable demands on human, physical and financial resources both in setting up the courts and their services and in maintaining them.[88] Judges, magistrates and registry staff will require ongoing training and more court counsellors need to be trained, especially those outside the capital of Suva. Access to law for low-income clients will continue to be a problem, especially where there is insufficient legal aid and lawyers are not very interested in the low fees generated by most family work. There is a danger that, for the time being at least, the system will be heavily reliant on staff trained elsewhere, or volunteers from overseas. It is likely that civil society, churches and non-governmental organisations will also need to be involved to make the Act work, for example, by providing a variety of support services such as supplementary counselling, safe housing, emergency financial assistance, legal advice and help in completing court forms. Economic and political instability in Fiji – which is currently under a military regime following a coup in 2006 – may jeopardise these.[89] By Pacific standards these are expensive courts to run. Arguably, the new Act, although a brave move to shed the legacy of British law and genuinely patriate family law, will not be the panacea hoped for and may indeed

86 Eg, proposals relating to de facto relationships and assisted reproduction had to be dropped because of opposition to, and misunderstanding about, these issues.

87 See R Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium' (2000) 29 Melbourne University Law Review 737; and R Field, 'Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution' (2005) (5)1 Queensland University of Technology Law & Justice Journal 28.

88 Eg, case assessment conferences had to be abandoned early on due to a shortage of trained or accredited counsellors.

89 Eg, a number of the judges and magistrates originally trained to officiate in these courts were dismissed or resigned from office in the aftermath of the 2006 coup.

merely replace an old colonial legal framework with a new colonial one, neither of which are particularly suited to the socio-legal environment of Fiji.[90]

Increasingly, the globalisation of law through treaties and conventions, and the advocacy of universal standards impacts on legal reform discourse, to the extent that even in small island states the locality of the law may have to give way to wider considerations – for example, human rights, trade imperatives, international policies on drug trafficking or money laundering. Although Narokobi might have hoped that law-making in newly independent Papua New Guinea would have meant 'building on our own rich soil first, and then merging it where necessary with the scattered soil of the Western laws',[91] innovation in law-making is becoming increasingly restricted because very little interaction takes place at a purely local level.[92] Law reform is therefore complex and challenging requiring inward and outward-looking strategies in order to take into account the particular context, culture and environment of the law on the domestic front *and* to give effect to international obligations or expectations.

There may be disappointment that the legal transformation that may have been hoped for at independence has not occurred in Pacific island states.[93] However, the retention of introduced or received law in the light of the challenges mentioned above, as well as resource constraints, may be seen as having some advantages. First, it can be claimed that Pacific island countries already have a substantial body of law which, although perhaps a 'chaotic' legacy,[94] has its roots in the developed world and provides a shared experience across nations that link island states with the wider international community.[95] Weisbrot points out that this 'civilising mission' of law 'is more durable than colonialism itself because it informs many of the practices and policies beyond those of the decolonisation period'.[96] Despite anti-colonial rhetoric, the emergence of a Pacific middle class with disposable wealth, the westernisation of life-styles and an agenda for economic development throughout the region have resulted in aspects of this 'mission' being internalised and an ambivalence about elevating the status of traditional laws and institutions. Second, the retention of this body of laws allows Pacific island states time to consider what their legal priorities are, while not leaving legal systems entirely without laws. Third, the existing legal framework provides a baseline for law amendment in a piecemeal way rather than root and branch reform. Fourth, it might also be pointed out that while much of the law introduced into the region appears dated in its country of origin, in the Pacific it may not seem out of place. For example, in family law, the retention of fault-based divorce, the criminalisation of abortion and homosexuality, and the total lack of legislative provision for cohabiting, unmarried heterosexual couples may not be out of step with the values of many Pacific islanders. These are, after all, societies which remain strongly

90 The Family Law Act is, eg, extremely cumbersome to read and difficult for local lawyers to understand.

91 Narokobi (n 32) 54.

92 And where matters are purely local they tend to fall under customary law and outside the remit of the state and the law reform agenda.

93 See Weisbrot (n 77); and see M A Ntumy, 'The Dream of a Melanesian Jurisprudence: The Purpose and Limits of Law Reform' in J Alecks and J Rannells, *Custom at the Crossroads* (eds) (University of Papua New Guinea 1995) 7.

94 A term used by J Corrin, 'Bedrock and Steel Blues: Finding the Law Applicable in Vanuatu' (1998) Commonwealth Law Bulletin 594, 608, although it might be added that the legacy of received law in Vanuatu was more chaotic than some other Pacific island countries.

95 L Benton, eg, points out that under colonial rule 'the law worked to tie disparate parts of empires and to lay the basis for exchanges of all sorts', *Legal Regimes and Colonial Cultures: Legal Regimes in World History 1400–1900* (CUP 2002) 3.

96 Weisbrot (n 77) 43.

patriarchal and in which the majority of the population are practising Christians. The emphasis given to tradition and custom and the centrality of the family and the church in daily life combine to create a conservatism in which advocacy for law reform is cautious.

Finally, as has been suggested, existing introduced legal principles can provide scope for innovation in the courts, as illustrated by judicial incorporation of the UNCRC into regional jurisprudence. This international convention is one of the few to which most Pacific island states are parties, and it provides courts with an additional legal resource for deciding matters pertaining to children. For example, in Vanuatu the court has been prepared to consider the UNCRC to support its decisions on the grant of custody of children, referring to the best interests of the child principle;[97] in Fiji it has been called on in arriving at the calculation of child maintenance;[98] in Samoa it has been applied in considering the punishment of banishment and its negative effects on children in the family;[99] and in some cases courts have expressed a willingness to consider the convention even where there is evidence of a general reluctance to apply conventions which are not incorporated into domestic law.[100] This judicial activism has been facilitated by residual English law. For example, in the Vanuatu case of *Re Adoption Act 1958 (UK), Child M* [2011] VUSC 16, the court opposed an inter-country adoption of a 13-year-old girl by prospective adoptive parents living in neighbouring New Caledonia, on the grounds that the 1993 Hague Convention (Convention for the Protection of Children and Cooperation in respect to Inter-country Adoptions) gives effect to Article 21 of the UNCRC. Despite recognising that Vanuatu is not a party to the Hague Convention, although it is a party to the UNCRC, the court exercising the discretion conferred on it under the UK law that applied – the Adoption Act 1958 – refused the application on the grounds that:

> There is currently no guarantee that any responsible and suitable government body in New Caledonia would undertake any responsibility for assisting with the assessment of the prospective adoptive parents and, if the adoption did occur, the on-going supervision and monitoring of the adoption. It is also not clear what would occur with respect to the nationality of the child given that there is currently no input from the governments of either France or New Caledonia that might clarify that issue.

Clearly, the Adoption Act 1958 predates these international conventions. Nevertheless, it was used here to address an issue of growing concern in the region, that of inter-country adoption, and, arguably, this expansive interpretive approach sets a persuasive precedent for other Pacific jurisdictions also facing the challenges of inter-country adoption applications.[101] It is also noticeable that in other areas of law where either there is no customary law in place,[102] or that which exists is seen to be contrary to the fundamental rights provisions of constitutional bills of rights,[103] or where alternative legal forms are being utilised to facilitate development,[104] introduced legal principles and institutions may provide useful tools.

97 *Molu v Molu (No 2)* [1998] VUSC 15. See also *Kong v Kong* [2000] VUCA 8.

98 *Murphy v Ragg* [2002] FJMC 2, in which it was held that the courts should give more emphasis to giving effect to the spirit and intendment of the UNCRC when dealing with any maintenance or divorce proceedings.

99 *Leituala v Mauga* [2004] WSSC 9.

100 Eg, in Tonga in the case of *Tone v Police* [2004] TOSC 36.

101 See S Farran, 'South Pacific Children: The Law on Adoption and Issues of Concern' (2008) 6(2) New Zealand Family Law Journal 30.

102 Eg, in contract or employment law.

103 Eg, the use of banishment in Samoa, or the exchange of women as head-pay in Papua New Guinea.

104 Eg, the use of trusts to manage land rents or timber royalties, or the use of leases to secure mortgage finance against land held under customary tenure.

## Conclusion

There may well have been hopes or expectations that on independence Pacific island countries would develop their own distinctive legal systems and eradicate the colonial laws that had been left in place or minimise their continuing relevance. It might also have been expected that customary laws and institutions would have come to the fore and dominated indigenous legal systems. For advocates of customary law, the common law is viewed as something of a pariah. Nevertheless, post-independence little has been done to foreground customary law, to reconcile customary law and received law, or to harmonise the different legal sources despite various suggested approaches.[105] There are no doubt a number of reasons why this has not happened. Two in particular stand out.[106] First, the complexity and diversity of custom and customary law makes it difficult to codify or apply at a national level, while at the same time the fact that many people's lives are governed outside the state system means that the two spheres of formal and informal law continue to exist in parallel,[107] often with little intersection.[108] Second, the confusion of introduced laws and uncertainty as to the extent of their application present considerable challenges for any patriation, harmonisation or unification project.

Consequently, and almost as a default situation, the legacy of English law continues to be relevant in the Pacific region. This is not so much due to the physical presence of judges and lawyers from England and Wales as to their interpretation of English laws, especially through caselaw.[109] This, combined with the colonial history of introduced laws and legal institutions,[110] the use of English as the language of instruction at the University of the South Pacific (where many young lawyers are now educated), and the secondment of legal advisers and personnel from other common law systems to Pacific island legal departments,[111] has contributed to the contemporary state of the law in the region. Although there are many more indigenous judges and chief justices than there were 10 or 20 years ago, they are essentially trained in the common law tradition, so that they in turn, as members of the bench and Bar,[112] ensure the survival of this legacy – at the expense

105 See, eg, A Angelo, 'Lo Bilong Yumi Yet' (1992) 22 Victoria University of Wellington Law Review, Monograph 4; J Corrin and J Zorn, 'Legislating Pluralism: Statutory "Developments" in Melanesian Customary Law' (2001) 46 Journal of Legal Pluralism 49; and the New Zealand Law Commission Report, *Custom and Human Rights in the Pacific* (2006).

106 There are many others, eg: the continued presence of ex-patriot judges and lawyers for many years after independence; lack of resources; unstable governments with fluctuating legislative agendas; lack of interest in law reform compared to economic development and lack of consensus on priorities; uncertainty as to the formal status of customary law; and lack of engagement with the state and by the state and its institutions in the lives of the majority of Pacific islanders.

107 'Formal' and 'informal' may be misleading terms because where customary law is recognised as a source of law by the state (eg, in the constitution) it has a formal status, although it is not 'state' law.

108 This is of course variable. In some countries appeals from traditional courts go to the state courts, or customary practices have to be adjudicated by the formal courts; or persons knowledgeable in custom are required to sit as assessors or advisers in the formal courts.

109 For some this is seen as a failure to develop a distinctive, Pacific, body of caselaw or jurisprudence. See Ntumy (n 93) and B Narokobi, 'In Search of Melanesian Jurisprudence' in P Sack and E Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (1986) 226.

110 The hierarchy of courts, eg, is essentially based on common law models as are rules of procedure and evidence, especially in non-custom courts: see J Corrin, *Civil Procedure and the Courts in the South Pacific* (Cavendish Publishing 2004). The system is consequently predominantly adversarial, although judges will on occasion adopt a more interventionist approach.

111 Notably, from Australia and New Zealand into state law offices, the offices of Attorney Generals, as legal draftspersons and as legal advisers and trainers.

112 Unlike England and Wales and, indeed, Scotland, the legal profession in Pacific island countries is not divided into solicitors and barristers/advocates.

some might argue of developing indigenous legal systems.[113] Moreover, the high court and appeal court benches of Pacific island countries continue to have a sizeable proportion of foreign common law judges drawn mainly from New Zealand and Australia[114] and, where new laws are being drafted, regional experts – from Australia and New Zealand (or, in the case of countries such as Marshall Islands, Federated States of Micronesia or Palau, the United States of America) – are more likely to be engaged than those from further afield.[115] While the influence of English law may be becoming less direct, being routed via other common law jurisdictions which in turn have their origins in English law, advances in information technology are making the law more accessible to local lawyers so that it is easier to refer to the caselaw and legislation of other Pacific island countries as well as the wider common law world.[116]

Therefore, although the influence of the English Bar and bench is not so immediate and direct as it was in the years of colonialism or even in the years immediately after independence, and in some cases legal transplants have been modified, hybridised or excised, nevertheless, when Pacific island judges trace the history of the law to justify the route they are taking today, invariably it is from the legacy of British (or more accurately English) laws.[117] At the same time, it could be argued that the Pacific reception of the common law and the continuing application of this legacy in Pacific island courts has led to a form of patriation of jurisprudence through the development of a body of Pacific 'common law' in the region's courts by the Bar and bench.[118] While it may be some time before barristers in England and Wales request to 'draw the court's attention' to a decision of a Pacific court (in the way that they might do with decisions from Canada, Australia or New Zealand, for example), a canoe can be paddled in more than one direction, especially if the oar is made of oak, and there may be some useful examples to be drawn from this emerging body of common law.[119]

113 See, eg, comments by Wiesbrot (n 77) and Ntumy (n 93).

114 In recent years some English judges have also sat on Pacific benches, including: Justice Coventry in Vanuatu and Fiji, Lord Slynn of Hadley and Justice Roger Chetwynd, together with the Irish judge Justice Edwin Goldsbrough (who also sat in Vanuatu) on the Court of Appeal in Solomon Islands. English judges have, of course, sat as members of the Privy Council when cases were referred to it: see from Fiji, eg, *Marahaj v Chand* [1986] FJ-UKPC 5; from Samoa, *Levave v Immigration Department* (1979) 2 NZLR 74; and *Lesa v Attorney General*, see R G Glover (1982) New Zealand Law Journal 315 and E J Haughey in the same journal 317–19. In the period before and immediately after independence in 1980 Justice Frederick Cooke sat on the bench in Vanuatu.

115 While leaders such as Somare had declared that countries such as Papua New Guinea did not want 'imitation of the Australian, English or American legal systems' but 'a framework of laws and procedures that the people of Papua New Guinea can recognise as their own': M Somare, 'Law and the Needs of Papua New Guinea People' in J Zorn and P Bayne, *Lo Bilong ol Manmeri: Crime, Compensation and Village Courts* (University of Papua New Guinea 1975) 1; and the view of Narokobi that independence entailed 'the creation of our own laws, based on our own world view' (n 32) 54. Measures to meet these aspirations have been disappointing.

116 Examples are the Pacific Island Information Institute (PACLII) and linked sites such as AUSTLII, BALII and WorldLII.

117 See, eg, histories of: the paramountcy of the welfare principle in cases involving children explored in *Hardeo v Lata* [2005] FJHC 410; the separate property of husband and wife *Tavake v Tavake* (n 53) and *Goodhew v Goodhew* (n 75); the law on concealment of birth as a criminal offence *Regina v Hong* [2004] SBHC 33, and more recently pre-nuptial contracts *Hadley v Hadley* (n 74).

118 Corrin (n 16) argues that the courts are not sufficiently critical of the applicability of the common law. That may be so, but there is also evidence that in a number of regional decisions there is careful reflection on the choice of caselaw being followed.

119 Eg, these countries have written bills of rights which considerably pre-date the UK Human Rights Act 1998, have had to find coping strategies to deal with environment and sustainability issues and have centuries of experience of alternative dispute resolution.

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# Courts and the emergence of statehood in post-colonial Africa

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## Introduction

Fifty years ago Roberts Wray proclaimed, '[B]ritish administration in overseas countries has conferred no greater benefit than English law and justice' and 'the ideal of justice and good government is the guiding star of British administration'.[1] The establishment of formal English legal institutions in African settings was believed to be one of the great 'civilising' achievements of British colonialism. For the coloniser, courts were critical to effective governance: protecting both property rights and the rights of the government to control its citizens. Since independence, African courts have waxed and waned in providing a veneer of legitimacy and credibility in the eyes of citizens and international audiences while simultaneously being subjected to coercion, co-option and marginalisation by increasingly autocratic regimes. Roberts Wray's proclamation epitomises many early accounts of the British legal legacy which had a tendency to be overly positive and self-congratulatory. The vast majority of contemporary scholarly attention is instead focused on the gap between the artificially imposed foreign institutions and society.[2] Moreover, as Okoth-Ogendo,[3] Makua Mutua[4] and others have argued, it was precisely these colonial legal institutions and practices which set the context for the emergence of post-colonial authoritarian regimes. For these critics, colonial courts remained intact and symbolise the mid-air suspension of the African state above society.[5] Formal institutions are meaningless on paper; in order for democracy to be secured judges must continually reaffirm the spirit and intention of constitutional provisions. From the colonial period to the present day, for African judges, this necessitates a shift away from a 'jurisprudence of executive supremacy'

1 Cited in Ravit Reichman, 'Undignified Details: The Colonial Subject of Law' (2004) 35(1–2) *ARIEL* 81–101.

2 See, eg, Sandra Fullerton-Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India' (2006) 41(2) Journal of Commonwealth & Comparative Politics 190.

3 H W O Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in I G Shivji (ed), *State and Constitutionalism: An African Debate on Democracy Human Rights and Constitutionalism Series*, No 1 (Southern African Political Economy Series (SAPES) Trust, Harare, Zimbabwe 1991).

4 Makau Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism' (2008) 51 African Studies Review 17–39; Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23 Human Rights Quarterly 96–118.

5 Goran Hyden, 'Urban Growth and Rural Development' in G M Carter and P O'Meara (eds), *African Independence: The First Twenty Five Years* (Indiana University Press 1986).

to a 'jurisprudence of constitutionalism'.[6] The gap between the formal institutional trappings and the actual realisation of judicial power in sub-Saharan Africa is not a new challenge. In this article I argue that, since their colonial inception, African courts continue to be suspended between two visions of the African state. The first, driven by powerful political elites, is a predatory state founded on neopatrimonial practices which maximise power and capital in the hands of the few.[7] The second is a vision of a more accountable, developmental state. Just as it is reductive to capture the African state in a superficial binary between authoritarianism and democracy; so the English common law legacy cannot lay claim to an entirely positive or negative inheritance. The colonial/post-colonial legal institutions were simultaneously instruments of political power and manipulation, in addition to sites of contestation and resistance. Moreover, the ability of the courts to resist was concomitantly constrained and enabled by the colonial legacy. The colonial era established a judicial identity which aided in bolstering institutional legitimacy and political differentiation. Judges were trained in London and brought back the established procedures of English common law (*stare decisis*, for example) and, indeed, the law itself. I refer to institutional legitimacy here as the concept that the judiciary is a distinct and separate arm of government that exists above the dirty fray of everyday politics. The courts are housed in separate buildings and judges are seen as professionals, appointed under constitutional guidelines that mandate specific years of experience and education. Aspects of this distinct institutional identity would become an important, although not always effective, defensive tool for the judiciary during the authoritarian era. Excessive reliance on the principle of *stare decisis* and of intricate procedural details of English common law (including reference to several outdated statutes) would reinforce the image of an apolitical judiciary. It can be argued that the cautious stance of the judiciary created a source of institutional protection. However, this conservative jurisprudence has been heavily criticised by members of the scholarly legal community[8] who see this as the source of a weak judiciary unwilling to protect human rights and unwilling to reform to the contemporary needs of African society. During the authoritarian era, the judiciary had to strike a balance between supporting the regime (to ensure its own survival) on the one hand, but on the other maintaining legal integrity.[9] As Ghai and McAuslan write in relation to the emergency period in Kenya, '[j]udges were prepared if necessary to bark, they felt considerable hesitation over biting'.[10]

In Tanzania, Uganda and Malawi distinct legal identities and strategies of legal co-option have stayed consistent in the face of changing domestic political regimes, changing global power structures (political, economic and legal), societal conflict and divisions and, indeed, alterations to the internal judicial structure. Given the delayed transition to multiparty democracy in sub-Saharan Africa, the courts become a useful constant location of inquiry as we unravel the contradictory aspects of the British legal legacy. This article

6 H Kwasi Prempeh, 'A New Jurisprudence for Africa' (1999) 10(3) Journal of Democracy 135–149.

7 While neopatrimonialism is a contested concept, broadly it refers to the accumulation of executive power through informal and corrupt clientelistic practices. See, eg, Jean-Francois Bayart, *The State in Africa: The Politics of the Belly* (Longman 1993); Michael Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge University Press 1997).

8 Joseph Oloka-Onyango, 'Judicial Power and Constitutionalism in Uganda' in *Centre for Basic Research Working Paper* (Centre for Basic Research, Kampala 1993) 47; Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Rudiger Koppe Verlag 1997).

9 Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press 2007); Hilbink posits that the Chilean courts were sticking to a path of legal positivism due to a pragmatic antipolitics rather than an ideological adherence to legal conservative principles.

10 Y P Ghai and J P W B McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present* (OUP 1970) 161.

strives to move beyond these binaries to reach into the liminal spaces of the emerging African state and highlight the multifarious implications of the British legal legacy for courts[11] in Tanzania, Uganda and Malawi. The central continuity that threads from the colonial, to post-colonial, to post-authoritarian period is the court as a site of simultaneous resistance and oppression, of political contest and political censure. As Roberts and Mann argue, 'law formed an area in which Africans and Europeans engaged one another – a battleground as it were on which they contested access to resources and labor, relationships of power and authority, and interpretations of morality and culture'.[12]

The central concern of this article is to highlight and consider the positive and negative continuities of the British legal legacy in sub-Saharan Africa from the post-colonial to the post-authoritarian period. The implications of this historical legacy are drawn with reference to contemporary political dynamics in the conclusion. The discussion that follows is divided into three sections. First, I examine the foundations of African courts under British colonialism. Second, through analysis of preventive detention laws and parallel jurisdictions, I highlight the continuities of British legal colonialism under authoritarianism. This section is framed through application of Neil Tate's theoretical framework on courts in crisis regimes.[13] Finally, I conclude by highlighting some of the continued challenges and possibilities presented in the contemporary post-authoritarian era.

## Distorted imposition of colonial British law

> Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein. (Denning LJ commenting on power conferred on the High Court of East Africa in 1902, in *Nyali Ltd v Attorney-General* [1956] 1 QB 1, 16–17

### Law for whom?

As Lord Denning captures above, under colonialism the vast majority of power and agency was located in individual judges rather than institutional structures. A functionalist approach allowed greater flexibility and manipulation of the law under colonialism. As Ghai and McAuslan note, '[n]either the lawyers nor the politicians saw the function of the law as standing impartially between two sides, or even leading in favour of the weaker side, but as making the way smooth for the stronger'.[14] The colonial court system was essentially the same across Uganda, Tanganyika and Malawi (although in Malawi appeals would go straight from the High Court to the Privy Council): Native Courts, to Magistrates Courts, to national High Courts, East Africa Court of Appeal and, finally, to the Privy Council. Customary law

11 The primary focus of this article is on the high courts and courts of appeal.

12 Richard Roberts and Kristin Mann, 'Law in Colonial Africa' in *Law in Colonial Africa* (Heinemann Educational Books and James Currey Ltd 1991).

13 C Neal Tate, 'Courts and Crisis Regimes: A Theory Sketch with Asian Case Studies.' (1993) 46(2) Political Research Quarterly 311–88.

14 Ghai and McAuslan (n 10) 34.

was tacked onto the bottom of the judicial hierarchy and this is where most Africans' experience with colonial law would begin and end. Customary law was the foundation upon which English common law was placed. The dual system, one for colonisers and one for the colonised, maintained the social, economic and political status quo.[15]

The integration of customary law was a mechanism by which the state could legitimise itself; albeit an invented tradition.[16] Yet customary law remained a distinctly separate, parallel system of law; a system which was not always to the benefit of those who had experienced injustice. A pluralistic legal system generated inequalities in access to and application of the law.[17] Moreover, the idea of integration is misleading. The goals of the British were to, where possible, resolve disputes in the customary or informal tribunals, this being cheaper and more efficient for the colonial government. If a case could not be settled in a Native Court of Appeal, it was brought before a superior (Magistrates' or Supreme) Court. British officials in these courts were instructed to apply native or customary law to colonial subjects, provided that this law met the requirements of the 'Repugnancy Clause',[18] which excluded practices that were anathema to justice, equity and good conscience.[19] This repressive measure was not just used to maintain the social and 'moral' order (as its name suggests), but it was also used as a means to achieve specific political and economic goals. The repugnancy clause enabled imported judges to pick and choose which customs were in their interests to maintain, and which should be abolished. Further, it expanded the scope for conflict in the community as individuals, or local experts, would present individual accounts of 'custom' as they wanted. Judges, with no understanding of indigenous custom, would pick and choose as they wanted.[20] One of the major difficulties the British experienced in the interpretation of customary law was the fact that it did not fit within the common law concept of *stare decisis*, or written precedent. Thus, British administrators had local experts testify to the existence of their laws, which were then converted into writing and incorporated into common law precedent.[21] By recording decisions in this way, British legal administrators established:

> a body of precedent, turning local law into something akin to English case law. Precedents were invoked and debated not only in British courts, but also in indigenous ones, where actors sometimes framed their arguments against the backdrop of their understanding of how matters would be handled in colonial courts.[22]

While there were clearly many problematic aspects to the judicial (in)validation of customary law, it could also be argued that it was an early exercise of judicial review, thus establishing legal institutional norms and socialising judges in preparation for the formal delegation of judicial review powers at independence.

15 Oloka-Onyango (n 8) 47. See also Ghai and McAuslan (n 10) ch 4.

16 See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Heinemann 1998); and Reichman (n 1).

17 Fullerton-Joireman (n 2).

18 The repugnancy clause was a standard in all instruments that applied the basic principles of common law and equity and statutes of general application to colonial territories. Any customs or traditions found offensive were declared 'repugnant' and abolished. See, eg, H F Morris and James S Read, *Uganda: The Development of its Laws and Constitution* (Stevens & Sons 1966) 6.

19 Reichman (n 1).

20 Roberts and Mann (n 12) 13–14.

21 Reichman (n 1) 257.

22 Roberts and Mann (n 12) 14.

## Colonial judges: law without legalism

There was a symbolic dislocation of law and the courts from everyday life. Judges were required to wear full British regalia, wigs, robes and all. An observer visiting Nigeria in 1937 noted this incongruous juxtaposition:

> The newcomer to Africa visiting the Courts of Law in different parts of the country for the first time views with astonishment the scene before him. The presiding magistrate or Judge, on special occasions in his official robes of scarlet, seated with native assessors – counsel in their robes and the prisoner in the dock – the crowd of spectators kept back by native police in uniform. A repetition of an English scene in African surroundings, often of a primitive nature.[23]

This impressive regalia did not, however, align with the weak power of the judges. Executive privilege operated above the law and governors had broad swathes of power to rule through executive fiat. Judges were part of the colonial civil service and typically advanced internally through a system of promotion.[24] The implication of this bureaucratic structure was a weakening of independence as judges were keen to ensure their continued tenure and promotion at the hands of the executive. In *Terrell v Secretary of State for the Colonies*,[25] Chief Justice Goddard outlined the colonial concept of independence of the judiciary:

> The provisions of Section 3 of the Act of Settlement relating to the tenure of judges of the Supreme Court of England did not apply to the Straits Settlements or to any other Colony. It is for the Crown by prerogative, or for Parliament by statute to set up Courts in a colony, and the conditions upon which judges there hold office are determined by the terms of the Statues.

Judicial independence for colonial judges was heavily circumscribed. It was a rare occasion when the courts attempted to restrain the governor. As Seidman notes in the case of *Mbui v Rex* (1951):

> [T]he enabling ordinance gave the governor the power to limit coffee growing by areas. The regulation made under the ordinance limited it by ethnic classifications. It was held *ultra vires* . . . These invocations of the received English law to curb the power of the governor were the exception not the rule. In most areas, the governor's decision-making powers were beyond the reach of judicial process, justified by a variety of technical grounds. Administrative decisions with respect to chieftaincy, land and deportation, and the detention of Africans were all insulated from challenge.[26]

Colonial judicial decision-making reflected the role of judges as representatives of the government and not the people.[27] The expansion of regulations created an increasingly powerful and oppressive colonial state as criminal convictions rose dramatically. In Tanganyika, the importation of English law generated a whole new rule book of restrictions: the Deportation Ordinance 1921, the Expulsion of Undesirables Ordinance of 1930, Emergency Power Orders in Council 1939–1961, the Witchcraft Ordinance 1928 and the Collective Punishment Ordinance 1921.[28] The statutes provided for the extensive

23 Cited in Reichman (n 1).

24 B O Nwabueze, *Judicialism in Commonwealth Africa: The Role of Courts in Government* (C Hurst & Co 1977) 265.

25 (1953) 3 WLR 331

26 Robert B Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem of Reception of Foreign Law' (1970) 5(2) Law & Society Review 161–204, 178.

27 Ghai and McAuslan (n 10).

28 See Michael Kajela Beatus Wambali, 'Democracy and Human Rights in Tanzania Mainland: The Bill of Rights in the Context of Constitutional Developments and the History of Institutions of Governance' (PhD Dissertation, School of Law Faculty of Social Studies, University of Warwick 1996).

powers of state to deny freedom of movement. Freedom of association was curtailed through the Societies Ordinance of 1954 (the same year the first official Tanganyikan political party was established). These restrictive laws were the direct ancestors of aged – many by this point overturned – English decisions and statutes.

To imply here that all colonial judges were identical is a fallacy. It is misleading to ignore the level of disharmony that existed within the colonial service in terms of attitudes towards the implementation and development of colonial law. It was not one homogenous whole. Morris and Read classify two distinct groups of colonial officials when they discuss attitudes towards the suitability of wholesale adoption of English law: the 'administrative' point of view versus the 'judicial' point of view:

> Broadly speaking, there were two clear-cut and opposing points of view, most members of the administrative service adhering to the one, and most members of the judiciary adhering to the other. According to the administrative point of view, the imported legal system needed very considerable modification if injustices were to be avoided, or, indeed if it were to bring any real benefit to the largely illiterate African populations, whose conditions of life differ completely from those in England, where the system had evolved. The adherents of the opposing judicial point of view maintained, on the other hand, that there should, and could be no serious watering down of English rules to meet what the administration claimed to be African needs; what might appear to be complexities and technicalities were, in fact, an integral part of the English legal system, and, in themselves, helped to ensure that high degree of justice which the system professed to provide: without them the standard of justice must be lower, and that a lower standard of justice should be provided for the African population could not be contemplated.[29]

Like chiefs, the district commissioners of colonial Africa were not only the rulers, but also the judges. Thus any judicial check on administrative power was eliminated. District commissioners existed as another form of bureaucratic supervision over the native administrators; but also had restricted power to interpret the law and sentence. Again, it is important to emphasise the role of the individual here. The lack of uniformity across districts and cases was dramatic, both in terms of the individuals involved and the local response to these individuals. Chanock illustrates this point:

> The experience of and response to the coming of colonial courts and legal forms was by no means uniform. Variations in the average length of a district officer's stay in a particular district and, more importantly, the relative wealth of the community; the strength of its indigenous organisation; and its degree of tribal homogeneity; appeared to have influenced local response to the new courts.[30]

Most cases coming to the native courts and to the district commissioners were of a criminal nature. The district commissioners passionately defended their legal power and in many cases even pushed for more. The following extract is from the report of a Tanganyika district officer in 1932:

> I consider that the present system of professional magistrates and judges should be abandoned. The conception that, because a man has passed Bar examinations and has eaten a number of dinners in one of the Inns of Court, he is fit to be a magistrate is, in my opinion, fallacious. It is a relic of the old English guild system, the modern relic of which in more humble occupations is the trade

29 H F Morris and James S Read, *Indirect Rule and the Search for Justice: Essays in East African Legal History* (Clarendon Press 1972) 73.

30 Chanock (n 16) 136.

> union . . . I submit that the class of official most qualified to exercise judicial functions is the administrative official and I would base a reorganization of the judiciary on this fact . . . Where I have attacked the legal profession it is because I feel it has a stranglehold on the country which should be loosened; the territory is rapidly becoming a lawyer's udder to the enrichment of the advocate and the impoverishment of the people.[31]

According to Morris and Read, the judiciary vociferously defended its position. Writing in 1926, Alison Russell, the then Chief Justice of Tanganyika wrote:[32]

> There are no doubt some administrative officers who look back regretfully to the days of Livingstone under his tree or James Martin marching up from the coast: days when, unencumbered by stationery, undistressed by the labour of keeping a record and untroubled by the thought that somebody might want to read it, decisions were given off hand and out of the head; and so on to the next shauri. This method of disposing of cases is no doubt extremely prompt and agreeable. But everyone who has tried cases knows how often a quiet perusal of a well kept record influences a judgment.

The lack of training and general inadequacies at the lowest levels of the legal system were highlighted by the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters, May 1933 (Colonial No 96).[33] Most of the detailed recommendations of the committee were accepted by the East African governments, but the broader recommendations met with resistance. For example, the governors were unable to accept the commission's contention that the dispensing of justice by lay magistrates was undesirable and should be taken over by professional magistrates.[34]

Colonial judges rejected and applied certain aspects of customary law in a discretionary manner. This was perhaps a reflection of the limited legal training received by individual judges. In his *Handbook for Magistrates in Nyasaland* (1940), C C Ross states that:

> The great majority of district officers who are called upon to undertake magisterial work have, however, had no experience and are not as a rule professionally qualified. In many cases natural aptitude and ability makes up to a large extent for this lack of experience but it can never do so entirely and, especially during his early years as a magistrate, the administrative officer is beset by many pitfalls into which, for want of this experience, he almost inevitably tumbles from time to time.[35]

Ross further suggests that the best training an African judge could get was to go and observe the magistrates' courts in England, in order to acquire the 'atmosphere' of a court. This once again underscores the misguided emphasis on order, procedure, English legal regalia and custom over substance. It was as if they had imported the skeleton (structure) and the clothes to dress the skeleton in, but the vital organs of the body were missing.

The discussion heretofore has focused on the cultural and structural aspects of the English common law legacy. Many see the longest-lasting and perhaps most profound legacy to be located in the legal culture established under colonialism. Legal conservatism is typically characterised as the strict binding of legal interpretation to precedent. The picture painted by African legal scholars is one of a clash between imported rules and

31 W E H Schupham and D O Mwanza, 29 February 1932, DSA 26002, cited in Morris and Read (n 29) 84–85.

32 Chief Justice to Governor, 2 January 1932, DSA 21429, cited in Morris and Read (n 29) 86.

33 For more on the work of the commission see, Oloka-Onyango (n 8).

34 Robert B Seidman, 'Administrative Law and Legitimacy in Anglophonic Africa: A Problem of Reception of Foreign Law' (1970) 5(2) Law & Society Review 161–204.

35 CC Ross, *Handbook for Magistrates, Nyasaland Protectorate* (Nyasaland Protectorate 1940) 5.

norms on the one hand, and a specific African political, economic and social context on the other. According to Yash Ghai, in Kenya the rigid adherence to English precedent became more pronounced as the colonial period advanced. Until the 1930s the Supreme Court of Kenya recognised that law applied in Kenya need not necessarily be exactly the same as law applied in England. This later changed due to the fact that the early judges had served for a much longer period in Kenya than in the latter half of the colonial era, and therefore had more opportunity to think in Kenyan terms.[36]

The colonial era established three important trends. First, the law and judges themselves were used as instruments of control and repression. The British judges were there to maintain law and order, to ensure that private property was protected, and that contracts were honoured. Law helped to create a system of order through which the colonisers ruled. Economic extraction was eased through a received system of British common law that protected colonisers at the expense of indigenous workers. The masses had little contact with the higher levels of the judiciary. Criminal cases were tried by High Court judges sitting with local assessors; almost no civil action was commenced.[37] As Ghai and McAuslan surmise, the judiciary was less human and impartial than it thought. The courts existed to prop up and propel forward the colonial administration. They did not exist to further the needs of the African population.[38]

Second, the courts had no ability to check the power of the colonial government. Despite the establishment of constitutional organs, power remained vested in the executive branch where the governor had power of veto and could rule through decree. The courts were weak in terms of their ability to check the power of the government (no judicial review), and in terms of their ability to protect the rights of citizens. Thus, their 'accountability role' within the colonial political order was minimal at best.

> [T]he 'separation of powers . . . was precisely contradicted in colonial East Africa. Not merely were administrative officers in control of the bureaucratic organisation but they also pre-empted to a great extent the areas of legislation and the administration of justice. The colonial territories might be termed administrative states: the structure of the administrative hierarchy was, in effect, the Constitution.[39]

Therefore, the inherited court system at independence was politically weak and marginalised. Judicial review was explicitly rejected in Tanzania and weakly adopted in Uganda and Malawi.[40] Despite some restructuring, and an attempt to Africanise the higher levels of the judiciary, this legacy remained intact.

Third, the weak institutionalisation of the courts, frequently unprofessional judges, and few lawyers created a very unstable base upon which to build a powerful judiciary at independence. Judicial power was a reflection of the distribution of political power under colonial rule. Although the courts did not build up any kind of substantial political power during the colonial era, they did establish an institutional identity and culture which continued to manifest long after independence through the use of traditional English legal regalia, including wigs for both judges and lawyers, the continued practice of legal conservatism and caution, and, above all, an overriding concern with 'the maintenance of the status quo

36 Ghai and McAuslan (n 10) 171.

37 See Morris and Read (n 29).

38 Ghai and McAuslan (n 10).

39 See Morris and Read (n 29) 288.

40 In Tanzania, judicial review was seen as anathema to the populist government of Julius Nyerere. The party embodied the state and represented the will of the people.

(inclined towards judicial restraint)'.[41] This distinct identity, while certainly problematic and restricting, also served an important symbolic purpose as the judiciary came under increasing threat in the post-colonial authoritarian era. It aided in the (at least symbolic) separation of courts from the messy business of post-colonial African politics.

At independence African states were faced with a new dilemma. What configuration of laws and courts should the newly established state adopt? Under colonialism it was beyond the scope and power of the judges to develop a sense of constitutionalism. The primary *raison d'être* of the colonial judge was to support the economic project of extraction and not to challenge the colonial state. Thus, new independence constitutions were imposed on states and societies that were lacking a sense of constitutionalism. A commitment to constitutions without constitutionalism is democratically meaningless, for as Okoth-Ogendo claims:

> all law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of power; it matters not whether that power lies with the state or in some other organised entity.[42]

In each country new constitutional arrangements were negotiated closely with the British government and consensus on the constitution became a precondition for securing independence.[43] This was the first time that the British had paid significant, close attention to constitutional matters. The goals of the political project may have slightly shifted, but the mechanisms though which the goals were achieved did not. As Ekeh summarises, most independence constitutions

> were silently premised on the received notion of colonialism that the state belonged to its rulers. African nationalists were pressing for a change of personnel, not for a change in the system of rulership. In effect, decolonization became a process of transferring ownership of the state from the alien European rulers to native nationalists.[44]

The independence constitutions were not a domestic negotiated consensus, but were instead the outcome of a compromise between the colonial rulers and the nationalist leaders. As Shivji captures, their more important function was symbolic; an embodiment of the 'constitutional moment'.[45]

## Post-colonial (dis)continuities

> The past is always there, it doesn't go away. Whenever something goes wrong or seems to be going wrong people look to the past. This affects the judiciary. People are more determined to fight for the independence. For us we are so conscious of what we've gained now, we don't want it taken away.[46]

41 Sufian Hemed Bukurura, 'Judiciary and Good Governance in Contemporary Tanzania: Problems and Prospects' in *CMI Report* (Christian Michelsen Institute 1995) 5.

42 Okoth-Ogendo (n 3) 67.

43 Y P Ghai, 'Constitutions and the Political Order in East Africa' (1972) 21(3) International & Comparative Law Quarterly 403–34.

44 Peter P Ekeh, 'The Impact of Imperialism on Constitutional Thought in Africa' in O Akiba (ed), *Constitutionalism and Society in Africa* (Ashgate 2004) 33.

45 Issa G Shivji, 'Problems of Constitution-Making as Consensus-Building: The Tanzania Experience' in O Sichone (ed), *The State and Constitutionalism in Southern Africa* (SAPES Books, Harare, Zimbabwe 1998).

46 Author interview with Ugandan Constitutional Court judge, January 2007.

The leadership of Nyerere of Tanzania (1960–1986[47]), Banda of Malawi (1964–1993) and both Obote (1962–1966 and 1980–1985) and Amin (1971–1979) in Uganda followed patterns of classic neopatrimonial rule. As noted by Prempeh, in each country the process of 'reconfiguring legitimacy within the post-colonial state and society had but one beneficiary, the president. All other institutions and constituencies with potential countervailing power within the post-colonial society and the state were under the superior will of the putative philosopher-king.'[48] Under the three respective republican constitutions,[49] control was embodied in the hands of the president. The 1962 Tanzanian Republican Constitution enabled Nyerere to exercise his enormous powers 'in his own discretion and shall not be obliged to follow advice tendered by any other person' (s 3(3)).

Leaders across Africa defended their undemocratic forms of governance in a reactionary, nationalistic manner. Often this was a paternalistic-type argument that Africans were not ready for democracy and that democracy was a Western invention and thus not suited to Africans. There was also a very practical notion that the nation was fragile and needed to be kept intact through a powerful, autocratic state and that a 'strong-state' was best suited to development. In 1962, writing in the London *Observer*,[50] Nyerere stated that: 'Our constitution differs from the American system in that it . . . enables the executive to function without being checked at every turn . . . Our need is not to apply brakes to social change . . . We need accelerators powerful enough to overcome the inertia bred of poverty.'[51] In short, there were remarkable continuities between the colonial and post-colonial African constitutional order, 'the postcolonial project would thus be executed by a "colonial state in African guise"'.[52]

In Malawi and Uganda, high and appellate court expatriate judges stayed on the bench, in some cases until long after independence. At independence all senior positions in Malawi's judicial system were held by expatriates. This colonial personnel hangover proved to be an important dynamic in the institutional restructuring of the post-colonial state. Indeed, '[T]he main tendency of post-independence legal reform was not toward the democratisation of the legal system inherited from colonialism, but toward its deracialisation.'[53] Deracialisation in the higher levels of the judiciary began to take place, albeit at different speeds in different settings.[54] Maintaining colonial judges on the bench represented a symbolic and intellectual continuity across dramatic regime change. Colonial judges aided in the continued entrenchment of English common law practices and symbolised the ongoing detachment of the courts from the people and the courts from the new African government. Again, this could be seen as positive in that it initially prevented

47 Although Nyerere would step down as President of Tanzania in 1986, he would remain chair of the CCM party until 1993.

48 H Kwasi Prempeh, 'Africa's "Constitutionalism Revival": False Start or New Dawn?' (2007) 5(3) International Journal of Constitutional Law 469–506, 481.

49 Malawi 1966, Uganda 1967, Tanzania 1967.

50 Cited in J T Mwaikusa, *Towards Responsible Democratic Government: Executive Powers and Constitutional Practice in Tanzania 1962–1992* (Faculty of Law, University of London 1995) 105.

51 For discussion on Nyerere's mixed legacy on human rights, see Chris Maina Peter and Helen Kijo-Bisimba, 'Mwalimu Nyerere and the Challenge of Human Rights' (Pambazuka Press 13 October 2009) issue 452 <http://pambazuka.org/en/category/features/59511> accessed 21 August 2012.

52 Prempeh (n 48) 479.

53 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 136.

54 Uganda had a white British Chief Justice appointed (Justice Peter Allen) as late as 1986. Whereas in Tanzania the 'Africanisation' of the judiciary was rapid under Nyerere. In Malawi, the expatriate judges suddenly left of their own volition in 1966, after Banda began to openly defy the decisions of the court. See Peter Forster, 'Law and Society under a Democratic Dictatorship: Dr Banda and Malawi' (2001) 36(3) JAAS 275–93.

higher levels of interference in the judiciary. However, from a democratic standpoint it was clearly less desirable as it served to further alienate the people from their own institutions of justice. There are also important considerations as far as the structural elements of independence are concerned. Expatriate judges were, and continue to be, appointed on contract, and those contracts are typically renewed through executive decree.[55] Further, the expatriate judge does not have an obvious stake in the government and may be less willing to risk tenure through challenging that government.[56]

The ideological and intellectual climate had a significant effect on the courts. In Tanzania in the years during and immediately subsequent to independence, the courts' performance was evaluated in academic and journalistic spheres and there was significant pressure on the newly indigenised bench to support Nyerere's sweeping socialist policy reforms. As Chief Justice Saidi noted in 1972: 'As citizens and TANU [Tanganyika African National Union] members, the courts are bound to further ujamaa.'[57] The Dar es Salaam law faculty, under the guidance of Professor Nabudere, developed a curriculum that was grounded in radical Marxist theory. These developments were preceded by hot debate. The most famous of these debates occurred in the Makerere University magazine *Transition*.[57a]

In the aftermath of the Kabaka's exile and the promulgation of the 1967 republican constitution, Obote embarked on his 'movement to the left' strategy. This occurred simultaneously with the move to a single-power authoritarian state. As Nabudere notes, the judiciary was a vital part of pushing this 'new order' forward.[58] Indeed, it had successfully done that through ruling against *Matovu* in 1969.[59] Picho Ali was a Soviet-trained lawyer and a man on the staff of President Obote's office. In his article, 'Ideological Commitment and the Judiciary', Ali advocated that the normative school of jurisprudence was wrong in insisting on the application of legal norms in isolation of the apolitical rims. Ali later reflected on two other important cases from this time. The first was the trial of two mercenaries from Congo (in which an ex-pat judge overturned the original conviction and sent him back to his country of origin), and the second was the trial of 20 Ugandans under treason charges following the 1966 revolution (judge advised that separate charges be brought against the individuals and the state withdrew its case). In response to Ali's article, Nabudere argued that Ali had not correctly appraised the judiciary. Further:

> Although I agreed with the main thrust that law must reflect the ideology of a given society, my main interest was to define what kind of society existed in independent Uganda. After everything is said, I think we ought to agree – and I here agree with Picho – that there is no such thing as the independence of the judiciary anywhere. The judiciary has always been created by the politics of the economic based and not vice-versa. So it is always pointless to talk about the judiciary sitting in judgment of the economic base and its politics and hence its ideology. To say the judiciary (should) be at par with the ideology of an independent Uganda is therefore to beg these questions: What is the ideology of

55 Nwabueze (n 24) 273. For discussion of contemporary challenges surrounding use of expatriate judges, see John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press 2004).

56 Nwabueze (n 24) 311; Rachel Ellett, *Politics of Judicial Independence in Lesotho* (Report prepared for Freedom House 2012) < www.freedomhouse.org/article/new-report-finds-lesotho's-judiciary-lacks-independence> accessed 7 September 2012, 47–52

57 'Put Ujamaa First', *Daily News* (Tanzania, 26 September 1972), cited in Maina Peter (n 8) 489

57a Picho Ali, 'Ideological Commitment and the Judiciary' (1986) 36 Transition 47–49.

58 D Nabudere, *Law, the Social Sciences and the Crisis of Relevance* (Heinrich Boll Foundation, Nairobi 2001) 53.

59 *Uganda v Commissioner of Prisons, ex parte Matovu* (1966) EA 514. For detailed discussion of the legacy inducing implications of this case see Oloka-Onyango (n 8).

> an independent Uganda? Who has stated and propounded it? What is its economic base? Why is the judiciary still colonial-oriented in spite of such ideology (if any)?'[60]

Later the debate was joined by two mainstream lawyers who argued the case for an independent judiciary against the ideological view of Picho Ali. The first extract is from Kazzora:[61]

> While a good case could be made that a modest attempt should be made to Ugandanise the High Court Bench, I reject Mr. Picho Ali's contention that the judiciary should be a 'revolutionary institution and not a body interpreting laws in the exact manner as of the colonial regime is . . . in full power in Uganda'. The Courts are in duty bound to interpret the law of the land without fear or favour: in so doing they are guided and are bound by rules of the constitution which I hope Mr. Picho Ali knows some thing about . . . The principle of ideological parity may be valid in the context of Soviet jurisprudence but it would be undesirable to introduce it in Uganda where English common law still reigns.

Abu Manyanja pointed to rumours that the appointment of Ugandan Africans to the High Court had been delayed mostly because of tribal considerations. As Nabudere writes:

> These pointed remarks on the issue of tribal considerations influencing the retention of expatriate judges and attacks on lack of ideology of the ruling party and their retention of colonial laws landed Abu Mayanja in trouble. The following year, he was arrested under the State of Emergency and detained without trial under one of the colonial laws, which had been retained by independent Uganda.[62]

The editor of the magazine was also arrested under sedition charges. Nabudere surmises that it was beneficial for the judiciary to remain independent because it retained the colonial laws and these laws protected the interests of the property-owning classes.[63]

While this debate raged in the academy, newly formed governments began to consider the mechanisms through which colonial court structures could be mobilised in support of authoritarian goals in addition to ideological goals. Across Malawi, Tanzania and Uganda a key trait of the legal order was the enabling characteristics of the law, 'empowering, in very wide and unrestricted terms, the executive organs of the state to effect a wide variety of "functions" i.e. exercise arbitrary/discretionary power'.[64] Shivji's description of the 'extra-legal' state in Tanzania dovetails neatly with Neil Tate's explanation for why 'crisis rulers' do not always dismantle or significantly alter their judiciaries in the same way they do the legislature or political party.[65] Tate is not arguing that judiciaries are unaffected, but that structurally they emerged looking more or less the same. There are three foundational parts to Tate's thesis.

60 Nabudere (n 58) 55.

61 In Salvatore Yoanna Olwoc, George Kaggwa, A C Duffield, Krishan M Maini, Ian Livingstone, J E Goldthorpe, Shiraz Dossa, E R Watts, Elspeth Huxley, Russell Tain, Bilgram E Nsaba, Alexander Goodall, J W Onyango-Otieno, Eriya T Kategaya, D W Nabudere, John W R Kazzora, A K Mayanja and Tibor Kovacs, 'Letters to the Editor' (1968) 37 Transition 6–16, 13.

62 Ibid 42.

63 Ibid 392.

64 Issa G Shivji, 'The Changing State: From an Extra-Legal to an Intra-Legal State in Tanzania' in C K M A M Okema (ed), *Constitutional Reforms and Democratic Governance in Tanzania* (Friedrich Naumann Foundation and Faculty of Law, University of Dar es Salaam 1994) 82.

65 Tate (n 13).

*1 Rulers assume little risk:* by leaving the judiciary alone the regime is able to maintain at least some semblance of legitimacy. Moreover, a judiciary that is strongly on the side of the regime is an important enforcement mechanism. To illustrate, below is an extract from expatriate Justice Peter Allen's diary:

> Wednesday January 15th, 1975
>
> This evening my contact dropped in to see me[66] . . . He'd been asked by Amin and the Defence Council to obtain my unofficial reaction to a suggestion that they were considering for implementation. Their proposed scheme is to appoint one air force and two army officers, all captains, to be High Court judges and thus ensure, so they hoped, that they had an effective say in the running of the courts to the satisfaction of the military. I asked if the officers selected were legally qualified and the answer, of course was no. They had chosen three officers who had attended, but not completed secondary schools and spoke some English; which they considered to be a sufficient qualification . . . I pointed out that we still had a good working judiciary and it was pointless to destroy it in this way. I certainly would not want to be part of such a set-up and no doubt many of my colleagues would feel the same way. I mentioned that such a move would not be received at all favourably by the outside world and it would certainly result in bad publicity for Amin.
>
> Thursday January 16th, 1975
>
> My contact called in this evening and brought me the news that Amin had dropped the plan to infiltrate the Judiciary with his military officers.[67]

*2 Restrict scope and depth of decision-making:* parallel judicial structures presented a severe restriction on judicial power and frequently became heavily politicised and ridiculed. In the cases of Uganda and Malawi, hyperpoliticised parallel structures (traditional courts in Malawi and military tribunals in Uganda) reduced interference in the conventional court structures which were marginalised and underfunded but frequently left alone.[68] This interpretation aligns with Jose Toharia's work on authoritarian Spain, where the author found a surprising level of ideological diversity among members of the judiciary.[69] Toharia's explanation for this apparent paradox is the existence of a parallel set of special courts closely supervised by the regime; courts which became politicised thus reducing politicisation of and intervention in the conventional courts.

*3 No major setbacks from judiciary:* courts in newly independent Africa proceeded with caution. In *Uganda v Commissioner of Prisons, ex parte Ojok*,[70] the Ugandan High Court gave legitimacy to the extra-constitutional seizure of power by an illegal government, thus rendering the court less threatening. It was important for new governments to maintain the veneer of rule of law, for domestic and international audiences, and that meant the judiciary continuing to hear non-threatening, non-political cases. As previously noted, the more threatening cases could instead be dealt with through extra-judicial structures. As one judge in Malawi commented, 'If you look back at the Banda government, Dr. Banda was

66 It is interesting to note the use of the term 'my contact'. This implies that regular, informal contact between the judiciary and government was in place. Even if the government contact wasn't at the highest levels of government, he would certainly have access to those levels.

67 Peter Allen, *Interesting Times: Uganda Diaries 1955–1986* (Book Guild 2000) 390–91.

68 Rachel Ellett, *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda* (PhD dissertation, Department of Political Science, Northeastern University, Boston, USA).

69 Jose J Toharia, 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain' (1975) 9(3) Law & Society Review 475–96.

70 [1966] EA 514.

a stickler for legality. Whatever he did he had some law for it.'[71] People must at least perceive that the system is acting in the interests of justice. Indeed, the traditional courts in Malawi were extra-legal, extra-constitutional bodies, but, despite this, were often popular amongst rural peasants.[72]

Despite a political reticence to allow a truly independent judiciary, there was, to a remarkable degree, a great deal of lip service played to the concept. At the opening of the new faculty of law at the University of Dar es Salaam, Nyerere pronounced: 'It is of paramount importance that the execution of the law should be without fear or favour. Our judiciary at every level must be independent of the executive arm of the state.'[73] This perception of independence was critical if 'the law' was to be an ally of the rapidly expanding state. Although the courts examined in this paper align with Tate's central thesis, they were able to carve out small pockets of resistance. This resistance did not change the status quo, but perhaps slowed the authoritarian onslaught; further indicating that the regimes were sometimes slow to respond to potential judicial threats. Appointment and removal processes for judges were amended after the consolidation of power in the presidency.[74] I capture these competing tensions with reference to preventive detention cases and the use of parallel jurisdictions in Uganda, Tanzania and Malawi.

## Preventive detention

Preventive detention laws were part of the package of laws inherited at independence[75] and they originated directly from English common law. These powers were dramatically expanded with the excessive stretching of the concept of 'emergency powers'; a concept that continues to be abused by autocratic executives today.[76] Emergency powers gave governors the right to detain citizens without trial, to deport aliens, to deprive a naturalised British subject of citizenship and to anything else necessary to secure law and order in the colonies. Post-colonial preventive detention laws were numerous and appeared across a wide range of statutes and emergency powers provisions.[77] As Harding and Hatchard note: 'the modern statutory version of preventive-detention law may be said to have its origin about 200 years ago in the attempts by British authorities to preserve order and restrict political subversion or criticism in England'.[78] Preventive detention laws enabled governments to arrest individuals before they had committed a crime. Across Malawi, Tanzania and Uganda, governments were responsible for the derogation and irrelevance of

71 Author interview, Malawi High Court judge, Blantyre, Malawi, May 2007.

72 Author interview, Malawi Supreme Court judge, Blantyre, Malawi, May 2007.

73 J K Nyerere, 'Education and Law' in *Freedom and Unity: A Selection from Writing and Speeches, 1952–1965* (OUP 1966) 13.1.

74 Note, the independence safeguards for judicial appointments in Uganda remained until 1971, see Nwabueze (n 24) 268.

75 Note, Native Court Regulation of the East Africa Protectorate 1897, s 77; Tanganyika Deportation Ordinance 1921; Tanganyika Expulsion of Undesirable Persons Ordinance 1930; Townships (Removal of Undesirable Persons) Ordinance 1944; and the Criminal Procedure Code 1945 (cited in Nabudere (n 58)).

76 Eg, the rather elderly English common law precedent of *Liversidge v Anderson* [1942] AC 206 (which defines the legal relations between personal liberty of the subject and the security needs of the government) would continue to be cited by African courts long after it has been overruled in England itself, perhaps most famously in the Ugandan case *Ex Parte Matovu* [1964] EA 514. Colonial preventive detention laws have recently been resurrected in Uganda in response to protests by the opposition. See Tabu Butagira and Al-Mahdi Ssenkabirwa, 'Besigye Detained under Colonial Law', *Monitor*, 20 May 2011.

77 Jennifer Widner, *Building the Rule of Law* (1st edn, W W Norton and Co 2001) 118.

78 Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993).

individual human rights in the post-colonial era.[79] Insecure governments developed legal mechanisms through which to silence, and in some cases, eliminate opposition. The premonitory writing of Morris and Read in 1966 accurately predicted that:

> [t]here are signs there that the judicial ideal derived from the traditions of English law may not enjoy the final victory. Such signs may be detected in the refinement of powers of preventive detention without trial (established in the laws of each East African state).[80]

The principle fact that the preventive detention laws were not subject to judicial review was established under colonialism. In Tanganyika, *In The Matter of Railal Bhikhabhai Patel* and *In the Matter of an Application for a Writ of Habeas Corpus ad Subjiceiendum*,[81] Justice Lowe held that the High Court had no power to vary or revoke a deportation order made by the governor. In short, executive will and power was beyond revocation by the courts. In all three countries, the judiciary consistently shied away from confrontation. A fear of disorder permeated both the judiciary and society at this time. Indeed, this fear of returning to disorder is a theme reflected in some of the present-day judicial decision-making in Tanzania, Malawi and especially Uganda.[82]

In Uganda, both Obote and Amin used unlawful arrest and detention as a central plank to their official security policy. 'The Government relied on provisions in the Emergency Powers Act, 1963; Emergency Power (Detention) Regulations, 1966 and the Public Order and Security Act, 1967 to effect endless arrests which were fruitlessly challenged in the courts.'[83] The 1964 Deportation Ordinance gave the Ugandan government carte blanche to arrest whomever it wanted and its actions were not subject to review by the courts. Occasionally, a lower court attempted to push back, but would subsequently be shut down on appeal. Oloka-Onyango describes one attempt to challenge the Obote government in *Ibingira & Others v Uganda*.[84] After hearing of potential action against him by his cabinet, Obote arrested five ministers and detained them under the Deportation Ordinance. The ministers challenged the validity of the ordinance in relation to the fundamental rights contained in the 1962 constitution. Their case was first upheld in the High Court. However, on appeal Justice Spry of the Court of Appeal concluded that the Deportation Ordinance had been abrogated by the 1962 constitution. The ministers were subsequently detained. This, according to Oloka-Onyango, was a high point for the Ugandan High Court.[85] In the case of Uganda, the ability of the courts to try those charged before them and to enforce their judgments gradually weakened to the point that under Amin's regime they virtually came to a standstill.

Despite the introduction of a Bill of Rights in 1984 and the later introduction of judicial review, today Tanzania continues to maintain preventive detention statutes.[86] By the late

79 Most frequently cited is *Liversridge v Anderson* [1942] AC 206.

80 Morris and Read (n 18) 330.

81 High Court of Tanganyika at Dar es Salaam [1956] 2 TLR R 227.

82 Ellett (n 68).

83 Uganda Commission of Inquiry into Violations of Human Rights, *The Report of the Commission of Inquiry into Violations of Human Rights: Verbatim Record of Proceedings* (Government of the Republic of Uganda 1995) 879–82.

84 [1966] EA 306 and 445

85 Oloka-Onyango (n 8) 24.

86 The 1991 Nyalali Report, the 1999 Kisanga Report and Tanganyika Law Society Report all recommend the repeal of Tanzania's numerous preventive detention laws. For further discussion, see Mwesiga Baregu, 'Tanzania's Hesitant and Disjointed Constitutional Reform Process' (Conference on Constitution Making Processes in Southern Africa, Sheraton Hotel, 26–28 July 2000 <www.eldis.org/vfile/upload/1/document/0708/DOC8308.pdf> accessed 1 December 2011.

1970s the Chama Cha Mapinduzi (CCM) regime's use of preventive detention measures was frequent. By the early 1980s there were some calls for change, including from the legal community, because these laws were not subject to review in the courts.[87] There were occasions when some of the bolder judges attempted to release individuals only to have them immediately rearrested outside the court.[88] The prevalence of preventive detention cases in Tanzania belies the fact that there were many, according to several prominent Tanzanian scholars, opportunities for the court to strike down the statute.[89] Like many other preventive detention cases in Tanzania, *Attorney-General v Lesinoi Ndeanai & Others*[90] dealt with technicalities around the execution of the detention rather than the decision to detain itself.[91] In *Lesinoi* Justice Kisanga noted:

> [t]here is no doubt that the Preventative Detention Act confers vast powers of curtailing the liberty of an individual. It empowers the President to detain a person if he is satisfied that certain circumstances specified under it do exist. The issue as to whether those circumstances do exist is entirely subjective . . . and his decision to detain a person in pursuance thereof cannot be tested or questioned in any court.

Adhering to these technicalities was a mechanism through which the court could, in part, protect individuals from wanton behaviour on behalf of the state. The courts could not legally challenge the mechanism of preventive detention until after 1985.

Public detentions in Malawi were widespread as government officers made a practice of detaining people concomitant to criminal investigations.[92] President Banda used the Preservation of Public Security Regulations 1965[93] as a way to control potential opposition forces, to muzzle the judiciary and essentially nullify the Bill of Rights. On a few occasions the courts ensured the correct application of the Preservation of Public Security Regulations, but they never substantively stepped in. In the cases of *In re Pindeni*[94] and *Nyirenda v Republic*,[95] the High Court held that the period of detention prescribed by the 1965 regulations, regs 3(7) and 4(8), could not be extended. Later, in *Soles v Republic*,[96] the court stated that detention under the Preservation of Public Security Regulations was to be no longer than reasonably necessary to obtain a decision as to whether to make a detention order. *Soles* is the paramount preventive detention case in Malawi. Subsequent to this case, new legal provisions were enacted to establish a detention review board, the chair of which was a High Court judge. There was never a case in which the High Court ordered the release of a detainee on the grounds that the minister acted *ultra vires*, or on the grounds that the

87 The use of a parallel jurisdiction, the Economic Crimes Court, enabled a high rate of conviction under preventive detention laws. Over 100 people were incarcerated between 1981 and 1982 under preventive detention laws. See Widner (n 77) 144.

88 See, eg, *Happy George Washington Maeda v Regional Prisons Officer*, High Court of Tanzania at Arusha, Miscellaneous Criminal Cause No 36 of 1979 (unreported). Also see Chris Maina Peter, 'Incarcerating the Innocent: Preventative Detention in Tanzania' (1997) 19(1) Human Rights Quarterly 113–35, 125.

89 Eg, *Ally Lalakwa v Regional Prisons Officer* (1979) High Court of Tanzania (unreported). For discussion of preventive detention cases from the 1970s, see Lutfried X Mbunda, *Freedom of Speech and Association in Tanzania: A Study of Rights and Constitutional Development, 1961–1992* (Graduate School of Arts and Science, Department of Law, Policy and Society, Northeastern University, Boston 1999).

90 [1980] TLR 214

91 See Peter (n 88).

92 Clement Ng'ong'ola, 'Managing the Transition to Political Pluralisms in Malawi: Legal and Constitutional Arrangements' (1996) 34(2) Journal of Commonwealth & Comparative Politics 85–110.

93 The Act originated under British Colonial rule in 1960, but was revamped in 1965.

94 5 MLR 207, 211.

95 [1977] 8 MLR 273.

96 [1982] 10 MLR.

minister acted on facts which did not constitute a threat to order. During this era, a ministerial order was never challenged in the court on either procedural or substantive grounds.[97] Towards the end of the Banda era, the courts became a little bolder in striking down preventive detention cases; 85 per cent of applications in the 1980s and 95 per cent in 1991 resulted in unconditional release orders. Unfortunately, however, the release orders were largely ignored.[98]

## Parallel jurisdictions

As the Ugandan state militarised, public detentions became easy because judicial powers were transferred to the Military Tribunal, the Economic Crimes Tribunal, the State Research Bureau, the military police and the armed forces.[99] There was little the judiciary could do to rein in these excesses of power. As Justice Russell opined:

> There appears to be a widespread but mistaken belief not only among the general public and apparently even in legal circles that the police, soldiers and private persons lawfully entitled to arrest without warrant, persons whom them reasonably suspect of having committed or about to commit designated offenses, may shoot them in cold blood should they fail to acquiesce in their arrest.[100]

As with the establishment of parallel tribunals elsewhere, the government was dissatisfied with the work of the mainstream courts and sought an alternative with more reliable outcomes. In the Economic Crimes Tribunal (established in 1975) guilt was presumed and illegal sentences, not provided for under the decree, were common.[101] The removal of jurisdiction from the conventional courts had a profound effect. As Justice Allen writes:

> [Our courts] . . . cannot even remand such accused persons nor release them on bail. People are just slung into prison and left to await the arrival of a tribunal in that area. It could be quite a long wait as they don't sit very often . . . There is a provision for a Military Appeals Tribunal for appeals against their arbitrary decisions, but it has not yet been set up. It's just a paper court.[102]

In 1973 Amin established military tribunals which tried individuals and arbitrarily sentenced to death by firing squad.[103] As Amnesty International reported in 1978, the regular rules of the court were completely suspended. Normal rules of evidence did not apply, individuals rarely had access to a legal adviser and in some extreme cases trials were conducted in secret without the defendant's knowledge. There was no appeal from these tribunals to a non-military legal authority, only to the defence council, namely, President Amin.[104] Extra-legal behaviour by the military continues apace today. Recent incidences range from the military police storming the High Court to re-arrest suspects already granted bail, to civilians tried in military courts.[105] The absence of exclusive legal authority vested in the courts thus continues to thread through Ugandan history.

97 B P Wanda, 'Malawi' in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993) 125.

98 Joint Delegation of the Scottish Faculty of Advocates, The Law Society of England and Wales and the General Council of the Bar to Malawi, *Human Rights in Malawi* (London 1992) 85.

99 Oloka-Onyango (n 8) 30.

100 From *Efulayimu Bukenya v The Attorney General* [1972] 329, cited in Oloka-Onyango (n 8) 31.

101 Uganda Commission of Inquiry (n 83) 42.

102 Allen (n 67) 392.

103 Trial by Military Tribunals Decree No 12/1973.

104 Uganda Commission of Inquiry (n 83) 15 v.

105 Rachel Ellett and Alexei Trochev (2010) 'Victims, Villains, Heroes or Insurance Providers? Judicial Behavior in Uganda and Ukraine' (International Political Science Association RC 09 Annual Meeting (Comparative Judicial Studies), Bologna, Italy, 21–23 June 2010).

It was in Malawi that the most radical legal structural changes took place. Banda openly indicated his dissatisfaction with the inherited colonial system early on in the independence era, and in 1967 established a Commission of Inquiry into the criminal justice system. The main thrust of the commission's report was that convictions should be meted out without undue regard to technicality.[106] In 1969 certain traditional courts were upgraded to allow for the trial of all types of criminal cases and had conferred on them the authority to pass the death sentence. This further allowed Banda to direct that no appeal from these courts could go to the High Court, thus generating a parallel but separate system.[107] Which system a defendant entered depended on the political nature of the case, or the politically desired outcome. Banda personally had a hand in deciding which cases went through which system. However, it is important to distinguish between the very small traditional courts that were popular with the people, and the bigger regional traditional courts that became politicised. In this interview extract the judge further explicates this division between the 'real' traditional courts and Banda's introduced traditional courts:

> We had the *real* traditional courts. The small, small, what you would call the primary courts, they were in the villages, remote areas . . . It is when Dr. Banda created the bigger courts at the regional level and then national level to run parallel at the high level. That is where the problem was. When he created them it was to deal with murder and manslaughter cases involving Malawians . . . but over the years he started abusing the other courts, taking jurisdiction away from the regular courts.[108]

The construction and subsequent manipulation of customary law under colonialism would operate as an important precursor to the authoritarian era. President Banda was quick to manipulate aspects of the traditional to meet his autocratic ends. The establishment of parallel systems of justice in Malawi restricted the 'scope and depth of decision-making' in the court system.[109] Malawian traditional courts usurped significant tranches of power from the formal judicial institutions – trying and convicting individuals on charges of treason, sedition and murder without representation. Malawi's traditional tribunals were established early in the post-independence era, whereas in Tanzania the use of parallel jurisdictions came significantly later with the establishment of the special Economic Crimes Court.

Authorised under the Economic Sabotage Act of 1984, the Economic Crimes Court was established without supervision from the judiciary and its punishments were widely described as draconian. As Mbunda writes: '[A]ll cardinal principles of criminal jurisprudence were abrogated to ensure conviction of the suspects.'[110] In an interview, Nyalali paraphrased the President: 'I hope the judges and lawyers will forgive me; this time I am going to deal with these people outside the courts.'[111]

Nyalali went on to say:

106 'We had in this country before the British came and set up an administration in 1891, a judicial system that was far superior [to the British system] . . . Justice in this country must not only be done, but must be seen to be done . . . not only by 8,000 Europeans . . . but by the four million Africans', Hansard, Malawi, 21 November 1969, 220–22 (Government Printer, Zomba).

107 Morris and Read (n 29) 329; Faculty of Advocates (Scotland), Law Society (Great Britain), General Council of the Bar (England and Wales), *Human Rights in Malawi: Report of a Joint Delegation of the Scottish Faculty of Advocates, the Law Society of England and Wales and the General Council of the Bar to Malawi* (Law Society 1992).

108 Author interview with Malawi Supreme Court Justice, April 2007.

109 Tate (n 13).

110 Mbunda (n 89).

111 Widner (n 77) 145. Nyalali's shift to confront the CCM executive in person, outside of the court, would set a precedent. His behaviour has been followed by his successors (author interviews in Tanzania, June 2007).

> The legislation came as a shock. We had admired President Nyerere's intellect and courage . . . How could I continue to preside over the courts when it was declared a matter of policy to bypass the judiciary?' Ultimately the Economic Crimes Court came under the jurisdiction of the High Court and then in the early 1990s it was disbanded entirely.[112]

While on the one hand the creation of parallel jurisdictions was an entirely post-colonial phenomenon, on the other it can be argued that there are strong, albeit indirect links to the colonial state. The construction of multiple simultaneous jurisdictions due to contemporary political and economic exigencies was a norm established by colonial authorities. The institutional fluidity or malleability of colonial institutions marked continuity from the post-colonial period. The creation of colonial law was a contested and negotiated process.[113] Post-colonial legal orders remained contested spaces, but the space for contestation contracted in the face of an expanding administrative state whose *raison d'être* was the consolidation of executive power. Application of Tate's framework demonstrates the logic behind the maintenance of the overarching colonial legal institutional frameworks despite the rapid descent towards authoritarianism.

## Conclusion

While the colonial experiences of these three countries with regards to the judiciary and its role and function were quite similar, important differences emerged during the authoritarian era with regards to the strategic use of the courts. The autocratic leaders of Uganda, Tanzania and Malawi spearheaded what Kwasi Prempeh refers to as an 'assault on constitutionalism'.[114] While formally leaving the judicial institutions more or less intact, the post-independence authoritarian regimes perfected the use of informal and indirect attacks on the judiciary. As agitators for independence, Nyerere and Banda were seen as political heroes and father figures of the nation. This put the courts in an impossible position because any anti-regime decision was immediately tossed back in their faces as 'anti-nation' or 'anti-development' in the case of Tanzania, or 'anti-tradition' in the case of Malawi. In 1969, after an expatriate judge had acquitted five men on murder charges, President Banda forcefully stated: 'Those people are not going to be let loose. Not let loose. I am in charge, and I am not from England either.'[115] After the wholesale resignation of expatriate judges, the courts had little choice but to operate within the boundaries of that regime, even when that meant applying draconian and oppressive legislation. Early signs of judicial independence in Malawi were virtually shut down, first with the resignation of expatriate judges, followed by the removal of judicial review, and, finally, the removal and then transplantation of judicial power into traditional courts. The judiciary made a few attempts to chip away at the broad preventive detention laws over time, but this never posed a threat to the Banda regime.

After being placed under house arrest – based on a colonial preventive detention law – in May 2011, the Ugandan opposition leader came out of his house and declared the following: 'What they are doing is typical of [former presidents] Amin, Obote times. And I think this government is trying to bring back such obnoxious laws.'[116] But that same month the Uganda Law Society had already started to fight back, presenting a petition to the Chief

112 Ibid 149–51.

113 Chanock (n 16); Martin Chanock, 'Paradigms, Policies, and Property: A Review of the Customary Law of Land Tenure' in Roberts and Mann (n 12).

114 Prempeh (n 48).

115 J L Lwanda, *Kamuzu Banda of Malawi: A Study in Promise, Power and Paralysis* (Dudu Nsomba Publications 1993) 73.

116 Butagira and Ssenkabirwa (n 76).

Justice and going on strike for three days.[117] The Law Society drew on its actual and symbolic authority rooted in common law traditions.[118] Despite the promulgation of a new and expanded liberal constitution in 1995, there is the simultaneous use of the courts by Museveni to attempt to control dissent, but the refusal of the courts to acquiesce.[119] When it appears as though the system is not complying, then Museveni always has the backup power of the military. This game of cat and mouse is firmly rooted in Uganda's past. Today though, recent cases indicate that the Ugandan judiciary has refused to be totally compliant. In 2006, the court threw out rape charges against opposition members, rejected the superior jurisdiction of the Court Martial and ultimately released the opposition suspects on bail again.[120] When, for the second time, the regime refused to comply and sent in a military unit to recapture the prisoners, the judiciary took the unprecedented step of going on strike. The photographs of hundreds of Ugandan lawyers standing outside the colonial courtroom on strike in their full legal regalia serves as a powerful symbol of the distinctiveness and separateness of the courts from everyday politics.[121]

In multiparty Malawi, the courts have been successful at finding legal solutions to what are frequently purely political disputes. Overall, the language of judges is cautious and they rarely use appeals to a higher national morality or sense of justice. The courts have not accumulated legitimacy through dramatic populist appeals but instead through the delicate navigation of high-stakes disputes.[122] Consequently, until very recently the judiciary enjoyed some respect for its independence and willingness to challenge the executive. Recent trends under Bingu wa Mutharika indicate a reversal of this trend and increased interference.[123]

In the case of Tanzania, the judiciary experienced a very short period of judicial assertiveness at High Court level in the early 1990s.[124] This should not be seen as a wholesale institutional transformation because these decisions were concentrated in the courtrooms of two specific judges: Justices Mwalusanya and Lugakingira. Any possibility that other members of the judiciary would follow the lead of these more activist judges was shut off in 1994 with the passage of the Basic Rights and Duties Enforcement Act.[125] Since 1994 the government has developed a habit of nullifying judicial decisions. In 1995, a

117 Emmanuel Mulondo and Anthony Wesaka, 'Lawyers Petition Chief Justice Over Judicial Abuse', *Monitor*, 5 May 2011.

118 Law societies have become reinvigorated bodies in eastern and southern Africa in the past decade. With the expansion of local legal education, the number of lawyers has increased and the law societies appear to have reached critical mass. For further discussion on the political role of lawyers and law societies in sub-Saharan Africa, see Jeremy Gould, 'Strong Bar: Weak State' (2006) 37(4) Development & Change 921–41.

119 See, eg, *Charles Onyango Obbo and Anor v Attorney General (Constitutional Appeal No 2 of 2002)* [2004] UGSC 1 (11 February 2004).

120 *Col Rtd Dr Besigye v Uganda* (2006) Constitutional Petition No 1 of 2006 (UCA) (unreported).

121 'Courts Suspend Work Over PRA Suspects', *New Vision*, 2 March 2007.

122 See Peter Vondoepp, *Judicial Politics in New Democracies* ( Lynne Reinner Press 2009).

123 Peter Vondoepp, *Freedom House Malawi Country Report* (2011) <www.freedomhouse.org/uploads/ccr/country-7868–9.pdf> accessed 6 December 2011.

124 Peter Vondoepp and Rachel Ellett, 'Reworking Strategic Models of Executive-Judicial Relations: Insights from New African Democracies' (2011) 43(2) Comparative Politics.

125 Act No 33 of 1994. Under this Act, in order to litigate the Bill of Rights, first a single judge will have to gauge the soundness of the claim; then, if a prima facie case has been made before the single judge, the matter will be brought before a panel of three judges. There are numerous difficulties associated with compiling a panel of three High Court judges to hear a case in Tanzania. Some cases filed 10 years ago are still pending. Another aspect of this constitutional amendment is the serious weakening of powers of judicial review. By allowing a delay in the deliverance of courts' judgments, the government is given an opportunity to remedy the offending law before it is deemed unconstitutional.

workshop was held in which the principal judge of the High Court was called to explain the recent flurry of parliamentary Acts being overturned by judicial review.

> In his lengthy speech, the learned judge challenged the Parliamentarians to view the Diceyan concept of unlimited sovereignty in the light of the wind of change currently blowing over Western Europe as a result of some decisions of European Community law . . . Justice Samatta then posed six questions to the MPs, all of which questions had an effect of challenging them to concede to the fact that the notion of unlimited supremacy was an obsolete concept.[126]

In regards to the sense of entrenched conservatism and strict adherence to technicalities, Tanzania appears to be the most problematic in that individuals are choosing not to file cases under the belief that they will not be successful.[127] One Tanzanian lawyer did not link this approach to colonialism, but characterised the 'problem' in the following way:

> You see judicial conservatism/neutrality whenever a hard issue is raised. The problem with that is that it becomes part of your culture. That has happened in all three countries with the apex court. The apex court becomes an extremely technical court, a predatory court . . . The motivations are different, after a while it builds into a culture at that level of litigation. After a while that is the institutional culture. Even when a new entrant comes you'd think he is a breath of fresh air, [but] he is intoxicated with that culture. If you sit on a panel of three and you are the youngest, you can't say you disagree. It has become a specific feature of the Courts of Appeal in Kenya and Tanzania especially and to a certain extent in Uganda; a Court of extreme technicalities, even when the world trend is [moving] in the other direction . . . [A]fter a while because you developed it for constitutional and public interest matters it becomes a culture so that even in civil and commercial law [cases] it is applied.[128]

While there continue to be institutional–structural problems related to judicial independence and empowerment in Tanzania, there are key individuals sitting on the bench who seek to challenge the status quo. The former Chief Justice and other sitting judges strongly support the current and ongoing constitutional review process.[129]

This paper has demonstrated the series of historical continuities and discontinuities in English common law institutions in three African countries. Looking forward, it will be important for judges to continue to draw on legal traditions that support the continued democratisation of the African state, while rejecting outdated statutes, norms and conventions that generate timid and subservient behaviour. The British legal tradition in Africa is not reducible to a set of facile positive or negative stereotypes. We should instead consider it to be a set of tools, some of which are outdated and damaging, others which may continue to support and protect the evolution of judicial power and independence in the twenty-first century.

126 Yohana John Barnabas Yongolo, *Constitutional Developments and the Democratisation Process in East Africa: A Case Study of Kenya and Tanzania* (University of Dar es Salaam, Tanzania 2000) 243–44.

127 Author interviews, Dar es Salaam, Dodoma, Arusha, May–June 2007.

128 Author interview, Arusha, Tanzania, June 2007.

129 Rosemary Mirondo and Rosina John 'Tanzania: CJ Joins Debate on New Constitution', *The Citizen*, 9 December 2010.

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# The Privy Council appeal as a minority safeguard for the Protestant community of the Irish Free State, 1922–1935

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## Introduction

The secession of the Irish Free State from the United Kingdom in 1922 left a considerable number of Irish Protestants on the southern side of the border. In 1926 there were just over 200,000 Protestants in the Irish Free State out of a total population of just under 3 million.[1] This was a considerable reduction from the just over 300,000 Protestants out of a total population of just over 3 million who had been recorded in the 26 counties in the census of 1911.[2] It is difficult to attribute this considerable disparity in numbers to anything other than the traumatic nature of the birth of the Irish Free State. A reduction of one-third in just 15 years cannot be explained by considerations of high mortality, low fertility, religious conversions or even the withdrawal of British security forces in 1922. Kevin O'Higgins, Minister for Home Affairs, admitted to the Dáil in 1922 that:

> [C]ertain people differing from the majority in religion, and perhaps also, and I am not sure of that, even in political outlook, were driven from their homes and from their positions in greater numbers than I was aware of until quite recently.[3]

Despite this dramatic drop in numbers, a significant number of southern Protestants remained in the new Irish Free State. Many southern Protestants were Unionists and continued to identify with that tradition after the creation of the new state.

The 'abandonment' of a large number of loyal British subjects in the southern and western parts of Ireland remained an emotive issue at Westminster and in the British media for many years. Yet, it was argued that the minority community had not been left without important safeguards of their religious and political rights. The necessity for these safeguards was recognised by the Irish provisional government itself. Kevin O'Higgins recognised the real fears that existed within the minority community and expressed some sympathy for its position at the break-up of the Union 'when the thing they looked to and

1 In this context, the term 'Protestants' includes Protestant Episcopalians, Presbyterians, Methodists and Baptists. The decline in the Protestant population of the 26 counties that would eventually form the Irish Free State is discussed in Robert E Kennedy, *The Irish: Emigration, Marriage and Fertility* (University of California Press 1973) 110–38.

2 Ibid.

3 *Dáil Debates*, vol 1, col 572 (21 September 1922).

felt was a buttress and shelter for them is suddenly swept away and they find themselves in the awful position of being at the mercy of their fellow countrymen'.[4]

## Minority safeguards

On 6 December 1921 British and Irish representatives signed the document popularly known as 'the Treaty' in Ireland.[5] The months that followed saw the gradual crystallisation of the institutions of the new self-governing state in the 26 counties of the south and west of the island of Ireland. Some of the most important institutions were designed to ensure that southern Protestants would have a significant voice in the political affairs of the new state. The new Irish Parliament, or Oireachtas, included an upper house of parliament, or Seanad, which was to be elected from a single electoral area that spanned the entire Irish Free State.[6] The lower house, or Dáil, was to be elected on a proportional representation voting system. Both measures were designed to ensure that the Protestant population, scattered throughout the territory of the new state, would be able to elect representatives to the Oireachtas. In addition, eleventh-hour amendments provided that three representatives from Trinity College Dublin and three from the National University of Ireland would sit in the Dáil.[7] The guarantee of three representatives from Trinity College Dublin, then a bastion of the minority community, was often perceived to be a concession to Southern Protestants.[8]

Article 8 of the Constitution of the Irish Free State provided guarantees of freedom of conscience and free profession and practice of religion. This article also provided that no law would be made directly or indirectly to endow any religion. In addition, Article 8 sought to prevent religious discrimination in the sphere of education.[9] In 1922 the Irish provisional government had proposed a much more succinct guarantee of freedom of religion.[10] The British government was not satisfied with this and had insisted on the detailed provisions

4 *Dáil Debates*, vol 1, col 482 (20 September 1922).

5 Its official name was 'Articles of Agreement for a Treaty between Great Britain and Ireland'.

6 Article 32, Constitution of the Irish Free State.

7 Article 27, Constitution of the Irish Free State.

8 University representation was originally intended for the Seanad and not the Dáil. The original initiative to move university representation from the upper to the lower house was not based on arguments relating to safeguards for Southern Protestants: *Dáil Debates*, vol 1, cols 1106–33 (4 October 1922). However, this initiative was soon perceived in this light. This factor certainly influenced the success of the relevant amendment: Dáil Debates, vol 1, cols 1151–57 (4 October 1922); col 1725 (18 October 1922); and col 1916–17 (25 October 1922). University representation in the Dáil and the Irish Free State Seanad were abolished in 1936. However, it should be noted that a new Seanad was created by the constitution of 1937 with powers that differ from those enjoyed by its predecessor. This Seanad includes representation from Trinity College Dublin as provided under Article 18.4.1.

9 Article 8 provided: 'Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.'

10 Article 9 of the draft constitution produced by the provisional government in May 1922 provided: 'Freedom of conscience and the free profession and practice of religion are inviolable rights of every citizen, and no law may be made either directly or indirectly to endow any religion, or to give any preference, or to impose any disability on account of belief.': UCD Archives, Kennedy Papers, P4/326, Document No 39. This article was broadly similar to Article 8 of Drafts A and B produced by the Constitution Committee: National Archives of Ireland (NAI), Department of the Taoiseach, S8953.

that eventually appeared in Article 8. These provisions had a long provenance and were based on s 3 of the Government of Ireland Act 1914 and s 5 (1) of the Government of Ireland Act 1920. Similar provisions had, in turn, been replicated in Article 16 of the 1921 Treaty. The sensitivity of religious matters resulted in a reluctance to depart from this established formula in 1922. In the 1930s de Valera also seems to have recognised the need to tread carefully in this area. This is evident from the fact that almost identical provisions to those that appeared in the 1922 constitution now appear in Article 44 of the current constitution of 1937.

The first Seanad, which as a transitional measure had half of its members elected by the Dáil and the other half nominated by the President of the Executive Council,[11] included many prominent Southern Protestants such as W B Yeats, Oliver St John Gogarty, Sir Horace Plunkett, the Earl of Dunraven, James Douglas, the Earl of Granard, Andrew Jameson, the Earl of Kerry, Alice Stopford Green, the Earl of Mayo, the Marquess of Headfort, the Earl of Wicklow and Douglas Hyde, who would go on to serve as President of Ireland between 1938 and 1945. The first chairman or Cathaoirleach of the Seanad was Lord Glenavy.[12] This list, which is far from exhaustive, is notable for the large number of titled gentry and for its mixture of Protestants of Nationalist and Unionist sympathies. The installation of so many Southern Protestants in the Seanad cannot be entirely attributed to an enlightened policy by the Irish government. Southern Protestant negotiators secured a guarantee, during a series of Anglo-Irish negotiations in London in the summer of 1922, that a number of important professional bodies, in which Protestants were well represented, would have an input into nominations for the initial membership of the Seanad.[13] Nevertheless, the composition of the Seanad between 1922 and 1936 does reflect a perceived need to reconcile an insecure minority community to the new state and its institutions.

Despite the above concessions, a team of Southern Protestant negotiators emerged dissatisfied from a series of Anglo-Irish talks held in London in June 1922. In particular, they were unhappy with the institution of the Seanad as an effective safeguard for the minority community. Lord Midleton, John Henry Bernard (Provost of Trinity College Dublin), Lord Donoughmore and Andrew Jameson believed that, despite the initial award of a generously disproportionate number of senators, Southern Protestants would only have minority representation in a house of parliament that would, in time, be popularly elected. The limited powers of the Seanad were also seen as inhibiting its ability to safeguard the minority community. The four Southern Protestants made their dissatisfaction clear in a letter that was published in the newspapers on 16 June 1922, the same day that the text of the draft Constitution of the Irish Free State was revealed to the public.[14]

11 Article 82, Constitution of the Irish Free State.

12 James Henry Mussen Campbell, first Baron Glenavy (1851–1931), was a barrister and Unionist MP. He served as Solicitor General for Ireland (1901–1905), Attorney General for Ireland (1905 and 1916), Lord Chief Justice of Ireland (1916–1918) and Lord Chancellor of Ireland (1918–1921). On his retirement from the office of Lord Chancellor he was created Baron Glenavy of Milltown, County Dublin. In 1923 he was appointed as chairman of the Judiciary Committee that advised the Irish government on the creation of a new judicial system. He held the office of Cathaoirleach of Seanad Éireann from 1922 to 1928.

13 These included the Chamber of Commerce, the Royal College of Physicians of Ireland, the Royal College of Surgeons in Ireland, the Benchers of the Honorable Society of King's Inns, Dublin, the Incorporated Law Society of Ireland and the councils of the County Boroughs of the Irish Free State. This was the basis of an agreement reached between Arthur Griffith and Lord Middleton, John Henry Bernard, Lord Donoughmore and Andrew Jameson: The National Archives-Public Records Office (TNA-PRO) CAB 43/3 SF(C) 37, draft constitution and CAB 43/3 SF(C) 42, Conference on Ireland, 15 June 1922.

14 *Irish Times* (16 June 1922).

## The Privy Council appeal as a minority safeguard

Many of the concessions detailed above are not unfamiliar to Irish constitutional historians. This article will focus on a much less known legal institution that was seen as safeguarding the rights of the minority community of the Irish Free State. This was the appeal from the Irish courts to the Judicial Committee of the Privy Council.

The jurisdiction of the Judicial Committee of the Privy Council has its roots in the medieval concept of the King as the fount of all justice throughout his Dominions. The right to hear and determine appeals in the territories controlled by the King of England was considered to be a crown prerogative. By the late seventeenth century, appeals to the King in Council were heard by ad hoc appeals committees. Lord Chancellor Henry Brougham brought increased order and professionalism to the appeals process when he ensured that a new 'Judicial Committee of the Privy Council' was placed on a statutory basis with the passage of the Judicial Committee Act 1833.[15] By the early twentieth century the Judicial Committee of the Privy Council, better known by its shorter but not entirely accurate name of the 'Privy Council', was the final court of appeal for all the constituent parts of the British empire with the exception of the United Kingdom itself.[16] When the Irish Free State came into existence as a self-governing Dominion of the empire, it too was obliged to accept this institution. British insistence on this point ensured that an unhappy Irish government finally acquiesced to the recognition of an appeal from the Irish Supreme Court to the Privy Council in Article 66 of the Irish constitution of 1922.[17] Once this had been accepted, the British government attempted to allay the fears of some Southern Protestants by emphasising that this institution would ensure that a court sitting in London would act as the final arbiter of their rights. It was held out to the Protestant community of the Irish Free State as the ultimate safeguard in the event of discrimination by the dominant majority. This was not a novel argument. The Privy Council appeal was also seen as safeguarding the rights of other minority groups throughout the British empire, such as the French-speaking community in Canada and the Maoris of New Zealand.[18]

15 This was later amended by the Judicial Committee Act 1844. John A Costello argued that this amending legislation did not apply to the Irish Free State: UCD Archives, Costello Papers, P190/94, memorandum on *Lynham v Butler*, undated. Historical accounts of the origins and significance of the Privy Council appeal can be found in Peter Anthony Howell, *The Judicial Committee of the Privy Council 1833–1876* (Cambridge University Press 1979) and Thomas Mohr, '"A British Empire Court": A Brief Appraisal of the History of the Judicial Committee of the Privy Council' in Anthony McElligott et al (eds), *Power in History: From Medieval Ireland to the Post Modern World – Historical Studies XXVII* (Irish Academic Press 2011).

16 Appeals to the Judicial Committee of the Privy Council from within the United Kingdom have long been limited to a few obscure and archaic areas of jurisdiction. These include appeals from certain ecclesiastical courts and disputes under the House of Commons Disqualification Act 1975, which prohibits certain groups of people from sitting in the lower house of the British Parliament. The Privy Council is also empowered to hear appeals from the Court of Admiralty of the Cinque Ports. The last full sitting of this court occurred in 1914. In the 1990s the Privy Council was empowered to hear appeals relating to the devolution of powers to legislative assemblies in Scotland, Wales and Northern Ireland: Scotland Act 1998; Government of Wales Act 1998; and Northern Ireland Act 1998.This jurisdiction has since been transferred to the new Supreme Court of the United Kingdom, which was established in October 2009 following the enactment of the Constitutional Reform Act 2005. See Mohr (n 15).

17 Article 66 provided: 'The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever. Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council of the right of His Majesty to grant such leave.' See Thomas Mohr, 'Law without Loyalty: The Abolition of the Irish Appeal to the Privy Council' (2002) 37 Irish Jurist 187–226.

18 For example, see David Harkness, *The Restless Dominion* (New York University Press 1969) 93 and 114 and Megan Richardson, 'The Privy Council and New Zealand' 46 (1997) International & Comparative Law Quarterly 908.

Successive Irish governments were deeply hostile to the appeal to the Privy Council from the Irish courts in the 1920s and 1930s. It was seen as a serious limitation on Irish judicial sovereignty.[19] In addition, the suggestion that the rights of Southern Protestants required protection by means of recourse to an external court was often perceived as an affront to the honour of the infant Irish Free State.[20] Irish ministers asserted with total confidence that the great majority of Southern Protestants did not actually want this purported safeguard. Patrick McGilligan, Minister for External Affairs, stated that: 'The religious minority numbers one in nine of the entire population, of these, not an infinitesimal proportion desires the retention of the appeal.'[21] W T Cosgrave, first President of the Executive Council, wrote: 'As a Court there is no support for it here outside of a small section of the minority.'[22] Those who did support the appeal were dismissed by McGilligan as a 'small clique', 'a handful of extremists' and even 'a small group . . . who wish to perpetuate religious strife'.[23] Some of these contentions have received the support of legal historians writing in recent decades. For example, David Swinfen concludes that appeal from the courts of the Irish Free State only enjoyed the support of 'a tiny vociferous, proportion of former Unionists'.[24]

19 In 1922 Professor William Magennis of University College Dublin told the Dáil, sitting as a special Constituent Assembly: 'So long as there is an appeal of any sort . . . Ireland is not independent.': *Dáil Debates* vol 1, col 1414 (10 October 1922). Barra Ó Briain's work on the Constitution of the Irish Free State concludes that the appeal 'constitutes the one real diminution of National Sovereignty contained in the Constitution': Barra Ó Briain, *The Irish Constitution* (Talbot Press 1929) 124. Leo Kohn's better known work on the 1922 constitution was no more restrained and declared that the appeal was 'the most obnoxious feature of the Constitution' and was repugnant to the general design of that legal instrument: Leo Kohn, *The Constitution of the Irish Free State* (Allen & Unwin 1932) 355–56.

20 De Valera wrote as he put in place his preparations to abolish the Privy Council appeal in 1933: 'I am convinced that the minority as a whole are prepared to trust the good sense and the good will of their fellow-citizens who belong to the majority, and to work with them in securing the freedom and in building up the prosperity of their common country. That, if safeguard be needed, will, in the last resort, be the greatest safeguard of all.': NAI, Department of Foreign Affairs, 3/1.

21 UCD Archives, McGilligan Papers, P35/166, draft article 'Irish Free State and the Judicial Committee of the Privy Council', undated. Note: parts of the McGilligan Papers were reorganised in 2007. All documents in this article listed under P35/166 and P35/167 were originally listed under P35/196 before these files were reorganised.

22 Draft letter from W T Cosgrave to Lord Granard in *Documents on Irish Foreign Policy, vol III, 1926–1932* (Royal Irish Academy 2002) 688.

23 Patrick McGilligan, 'Who Wants the Privy Council?' (May 1931) 1(9) The Star/An Reult – A National Review, 207. An article in *The Times* reported that McGilligan had referred to Southern Protestants as 'bigots': *The Times* (4 May 1931). McGilligan's article had actually stated: 'Except by a few frenzied bigots the view is held that it would be deplorable if Protestant Irishmen did not take the fullest part in every field of national activity on a footing of equality with their Catholic fellow-countrymen.' J W Dulanty, the Irish High Commissioner in London, protested in a letter to the editor of *The Times* that 'the words "frenzied bigots" unmistakably referred to a small handful of Catholic extremists': UCD Archives, McGilligan Papers, P35/166, J W Dulanty to editor of *The Times* (7 May 1931). The assistant editor of *The Times* declined to apologise and pointed to the second heading of the article which referred to the 'Sinister and Disloyal Attempts of a Bigoted Handful to Work Up Feeling over its [the Privy Council's] Abolition by Saorstát': UCD Archives, McGilligan Papers, P35/166, R M Barrington to J W Dulanty, 7 May 1931. It is possible that McGilligan did not write this as no such heading appears in draft versions of this article: UCD Archives, McGilligan Papers, P35/166, draft article 'Who wants the Privy Council?'. See also the response of the *Manchester Guardian* (7 May 1931) to McGilligan's article which condemned his attitude towards the 'very moderate leaders of the Protestant community' in 'publicly denouncing them as bigots and extremists'.

24 David B Swinfen, *Imperial Appeal* (University of Manchester Press 1987) 124.

## The Protestant community of the Irish Free State

The Protestant population of the Irish Free State was often referred to as 'Southern Unionists' or 'Southern Loyalists'. It hardly needs to be stated that not all Protestants living in the Irish Free State would have described themselves in these terms. For example, Ernest Blythe, a Presbyterian born in Country Antrim, was an ardent Nationalist who held several ministerial portfolios in the 1920s and 1930s.[25] The term 'Southern Unionist' would certainly not have been an accurate description of the political views of Mabel FitzGerald (née McConnell) despite her Presbyterian background. Her son Garrett, who would hold the office of Taoiseach for much of the 1980s, later wrote of how his mother 'in a moment of revolutionary fervour, told her former employer, George Bernard Shaw, that she would bring her eldest son up to hate England'.[26] Her opposition to the 1921 Treaty contrasted with that of her husband Desmond FitzGerald, a member of the pro-Treaty government. It should also be noted that many Southern Unionists were not actually Protestants.[27] Despite these complications, the Protestant inhabitants of the Irish Free State were often referred to as 'Southern Unionists', 'former Unionists' or often 'ex-Unionists'.[28] The latter terms must have been offensive to many people whose political preferences had not necessarily been altered by the creation of the Irish Free State. One might imagine the reaction of the minority community of Northern Ireland to being described as 'ex-Nationalists'. The term 'Southern Protestants' is not without its own difficulties based on considerations of geography and movements of people. Nevertheless, this article will use the term 'Southern Protestants' on the basis that it is preferable to all alternatives as a useful shorthand description of the Protestants living in or native to the 26 counties of the island of Ireland that would eventually form the territory of the Irish Free State.

## The Irish appeal to the Privy Council

The origins of the Irish appeal lie in Articles 1 and 2 of the Treaty or Articles of Agreement signed in London in 1921. These provisions ensured that the Irish Free State came into existence as a Dominion of the British empire.[29] Article 2 ensured that the Irish Free State was to hold the same constitutional status within the empire in certain key areas as was enjoyed by the Dominion of Canada. The British government led by David Lloyd George considered the institution of the Privy Council appeal to be essential in ensuring that the new Irish Free State was perceived as a British Dominion. The decisions of the courts of all the existing Dominions were, after all, subject to appeal to the Judicial Committee of the

25 (1889–1975) Minister for Trade and Commerce, First and Second Dáil 1919–1922; Minister for Local Government 1922–1923; Minister for Finance 1923–1932; and Vice-President of the Executive Council 1927–1932.

26 Garret FitzGerald, *Ireland in the World* (Liberties Press 2005) 189.

27 A detailed account of the Catholic Unionist tradition is provided in John Biggs-Davison and George Chowdharay-Best, *The Cross of Saint Patrick: The Catholic Unionist Tradition in Ireland* (Kensal Press 1984).

28 Eg TNA-PRO CAB 32/56 E (IR26) 4th Meeting, 2 November 1926, UCD Archives, McGilligan Papers, P35B/108 and NAI, Department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930. The term was sometimes used by Southern Protestant sources, eg, *Irish Times* (13 February 1932). It is still occasionally used today e.g. Liam Weeks, 'We Don't Like (to) Party. A Typology of Independents in Irish Political Life, 1922–2007' (2009) 24(1) Irish Political Studies 1, 14.

29 The use of a capital 'D' when referring to the 'British Dominions' was required by the British government in order to avoid confusion with the wider term 'His Majesty's dominions' which referred to the British empire as a whole. See TNA-PRO HO 45/20030. This article will follow this convention.

Privy Council.[30] The British government also saw it as a means of safeguarding the rights of the Southern Protestant community in addition to providing a mechanism for maintaining the integrity of the settlement imposed by the 1921 Treaty.[31] They insisted that, although the appeal to the Privy Council was not explicitly mentioned in the text of the Treaty, acceptance of the appeal was implicit in the overall acceptance of Dominion status.[32] The Irish were far from happy with this position and made a determined effort in bilateral negotiations to exclude the appeal from the text of the constitution. This position had to be abandoned in the face of serious pressure from the British government.[33]

Despite this unfortunate beginning, the Privy Council appeal hardly disturbed the waters in the first few years of the existence of the Irish Free State. The Privy Council heard three Irish petitions for leave to appeal in 1923.[34] The Irish government was relieved and reassured when all three were refused leave to appeal.[35] This period of relative calm was obliterated in 1926 when the Privy Council granted leave to appeal in the case of *Lynham v Butler*.[36] The case concerned the interpretation of certain provisions of the Land Act 1923. This was seen as matter of purely domestic significance and, as far as the Irish were concerned, this was not a matter that should have been the subject of an appeal to the Privy Council. The grant of leave to appeal revived earlier fears that the Privy Council appeal might be used by the British to meddle in the internal affairs of the Irish Free State.[37] A new statute known as the Land Act 1926 was rushed through the Oireachtas that confirmed the interpretation of the Land Act 1923 given by the Irish Supreme Court during its consideration of the issues involved in *Lynham v Butler*.[38] This extraordinary measure effectively blocked any further consideration of this case by the Privy Council. Protestant members of the Seanad recognised the danger of the precedent represented by the Land Act 1926. Lord Glenavy, Cathaoirleach of the Seanad and chairman of the committee that had assisted in the creation of the new Irish judicial system, was deeply opposed to it and tried to convince many of the independent members of the Seanad to oppose the measure.

30 The appeal was based on crown prerogative and was regulated by imperial statutes such as the Judicial Committee Acts 1833 and 1844. See Peter Anthony Howell, *The Judicial Committee of the Privy Council 1833–1876* (Cambridge University Press 1979) 3–71. The sources of Privy Council appeals between the years 1911 and 1917 have been estimated as follows: India 514; Canada 180; Australia 45; New Zealand 18; Newfoundland 6; South Africa 3: *Irish Independent* (31 December 1929).

31 Eg, see TNA-PRO CAB 43/1 SFB 21, Meeting between Representatives of the Southern Unionists and the British Representatives on the Conference on Ireland, 7 December 1921 and TNA-PRO CO 739/7/47027, Curtis to Churchill, 20 September 1922.

32 TNA-PRO CAB 43/7, 22/N/162, draft Irish constitution, 27 May 1922.

33 See Mohr (n 17).

34 These three petitions were *Alexander E Hull and Co v Mary A E M'Kenna*, *The 'Freeman's Journal' Ltd v Erik Fernstrom* and *The 'Freeman's Journal' Ltd v Follum Traesliberi*: all are reported at [1926] IR 402.

35 Irish observers at the proceedings, which included Hugh Kennedy and John A Costello, must have taken comfort from Lord Haldane's admission that 'it is obviously proper that the Dominions should more and more dispose of their own cases' and therefore the Judicial Committee did not interfere 'unless the case is one involving some great principle or is of some very wide public interest': [1926] IR 402, 404. Haldane concluded that the Irish Free State 'must in a large measure dispose of her own justice': [1926] IR 402, 407–08. Lord Buckmaster added that 'as far as possible, finality and supremacy are to be given to the Irish Courts' [1926] IR 402, 409. Hugh Kennedy, then Attorney General of the Irish Free State, wrote 'if they had been so dishonestly minded, the British side could have eaten into our rights very substantially': UCD Archives, Kennedy Papers, P4/516, Hugh Kennedy to W T Cosgrave, 30 July 1923.

36 [1925] 2 IR 82 (High Court) [1925] 2 IR 82 (Supreme Court).

37 Eg, UCD Archives (n 35).

38 A B Keith claimed that he had anticipated the use of such measures as the Land Act 1926 in advice given to Darrell Figgis during the drafting of the Irish constitution. Arthur Berriedale Keith, 'Notes on Imperial Constitutional Law' (1926) 8 Journal of Comparative Legislation & International Law 286–87.

His attempt to organise Protestant opposition to the measure was thwarted by Senator James Douglas, an opponent of the appeal, who argued strenuously against Glenavy in a meeting of Independent senators lasting over three hours.[39] Although Southern Protestants did protest against the Land Act 1926 in the Oireachtas, they lacked the confidence to actually vote against it.[40]

Irish perceptions of the Privy Council appeal sank even further when the Irish government disputed two judgments concerning the compensation payable to civil servants who had been transferred from Great Britain to Ireland before 1922.[41] The Irish insisted that the Privy Council had made fundamental errors in calculating the level of compensation payable to these persons.[42] This time the Irish protest took the form of refusing to pay the awards fixed by the Privy Council.[43] In short, the Irish executive refused to enforce the decisions of a court that was recognised by the provisions of the Irish constitution.

The next Irish appeal heard by the Privy Council was *Performing Right Society v Bray Urban District Council*.[44] This case concerned whether the Copyright Act 1911, a British imperial statute, applied to the Irish Free State. The Supreme Court held that it did not while the Privy Council held that it did.[45] The decision of the Privy Council was more desirable from a practical perspective since it prevented the creation of a significant gap in the protection of copyright in the Irish Free State. Unfortunately, the deterioration of relations caused by previous appeals ensured that the Irish government refused to accept this judgment.[46] Instead, the Oireachtas enacted special legislation, the Copyright (Preservation) Act 1929 that attempted to fill the lacunae in Irish copyright law created by the decision of the Irish Supreme Court.[47]

By the end of the 1920s the Irish government made no secret of its desire to abolish the appeal and spared no effort to achieve this goal. This objective was pursued at successive Imperial Conferences in the 1920s and 1930s. The Privy Council heard one more Irish case before the abolition of the appeal was placed beyond dispute. This was *Moore v Attorney General*, a case that will be examined at a later stage in this article.[48]

It is readily apparent from this short but ignoble history that the foundations of the hostility of the Irish government towards the appeal centred on fears of diminution of sovereignty. Yet, the assertion that the appeal acted as a safeguard for Southern Protestants was also a significant cause of friction. Claims that such safeguards were necessary were seen as attempts to stir up dormant sectarian feelings.[49] The antipathy of the Irish government towards the assertion that the Privy Council appeal acted as a minority safeguard was heightened by the perception that this safeguard had been introduced by means of subterfuge.

39 John Anthony Gaughan, *Memoirs of Senator James G Douglas (1887–1954) Concerned Citizen* (UCD Press 1998) 123–24.

40 *Seanad Debates*, vol 6, cols 395–445 (24 February 1926).

41 *Wigg and Cochrane v The Attorney General of the Irish Free State* [1927] IR 285; *In the Matter of the Reference as to the Tribunal under Article 12 of the Schedule appended to the Irish Free State Agreement Act 1922* (Cmd 2214).

42 Robert Francis Vere Heuston, *Lives of the Lord Chancellors 1885–1940* (Clarendon Press 1964) 441.

43 *Irish Times* (15 November 1928) and HL Deb 25 April 1928, vol 70, cols 819–20.

44 [1928] IR 512.

45 [1928] IR 512 (Supreme Court) and [1930] IR 509 (Privy Council).

46 See Mohr (n 17).

47 Copyright (Preservation) Act 1929.

48 [1935] IR 472 and [1935] AC 484.

49 For example, McGilligan (n 23) and UCD Archives, McGilligan Papers, P35/166, draft article 'Who wants the Privy Council?'.

## The Irish appeal to the Privy Council as a minority safeguard

In 1930 the Irish government ordered an extensive search of its files on the negotiations that led to the signing of the 1921 Treaty in order to discover any discussions on the appeal to the Privy Council as a minority safeguard.[50] The failure to find any discussions on this issue buttressed a perception that this purported safeguard had been invented in the years that followed 1921 as a device for obstructing the desire of the Irish governments to abolish the appeal.[51]

If the Irish government had examined pre-1921 material they might have found evidence that contradicted their assertion that arguments concerning the utility of the Privy Council appeal as a minority safeguard had only been raised after the signature of the Treaty. The Bills and Acts relating to Irish Home Rule made it clear that the Privy Council had been intended to act as the arbiter of these settlements in the event of dispute.[52] In this context, the Privy Council appeal had long been promoted as a safeguard for Irish Protestants living under a Home Rule Parliament.[53] In addition, it was well known that the Privy Council appeal was perceived to be a minority safeguard in other parts of the empire, most notably by the French-speakers of Canada.

The potential offered by the Privy Council appeal to safeguard the rights of Southern Protestants gained greater importance as the possibility of total secession of parts of Ireland from the United Kingdom became a real possibility. Southern Protestant representatives discussed this safeguard with the British government before and immediately after the signature of the 1921 Treaty. The Church of Ireland Archbishop of Dublin[54] raised the Privy Council appeal in correspondence with Lloyd George in October 1921.[55] The day after the Treaty was signed Lloyd George met a delegation of Southern Protestants, consisting of Lord Midleton, Lord Desart, John Henry Bernard and Andrew Jameson. The British Prime Minister used the Privy Council appeal to counter Midleton's complaint that the terms of the Treaty offered nothing to Southern Protestants.[56] Although

50 NAI, Department of the Taoiseach, S4285A, Michael McDunphy to W T Cosgrave, 8 November 1930, and Michael McDunphy to Diarmuid O'Hegarty, 8 November 1930.

51 This formed the basis for a line of argument that was used in Anglo-Irish negotiations and at the Imperial Conferences of the 1920s and 1930s. Eg, see TNA-PRO CAB 32/79 PM (30)18 Appendix, meeting of prime ministers and heads of delegations, 5 November 1930, and NAI Department of the Taoiseach, S4285A, memorandum for the Imperial Conference of 1930, undated.

52 S 25 of the Irish Government Bill 1886, better known as the first Home Rule Bill, would have empowered the Judicial Committee to decide whether legislation passed by the proposed Irish Parliament was *intra vires*; in other matters, the appeal from the Irish courts to the House of Lords would have remained intact: ss 25 and 36 of the Irish Government Bill 1886: <http://multitext.ucc.ie/d/Home_Rule_Bill_1886> accessed 20 July 2011. The Irish Government Bill 1893 and the Government of Ireland Act 1914 would have completely replaced the jurisdiction of the House of Lords with that of the Privy Council. They also contained provisions that would have allowed for the 'speedy determination' by the Judicial Committee of such constitutional questions as the validity of laws passed by the Irish legislature. Ss 28 and 29 of the Government of Ireland Act 1914 were virtually identical to ss 22 and 23 of the Irish Government Bill 1893. S 30 of the 1914 Act contained additional provisions that were not found in the 1893 Bill. For the full text of the 1893 Bill see 'The Home Rule Bill, 1893' (1893) 67 Pall Mall Gazette Extra. The Government of Ireland Act 1920 retained the appeal to the House of Lords but gave special jurisdiction to the Privy Council to decide certain constitutional questions: ss 49 to 53 of the Government of Ireland Act 1920.

53 Eg, see Sir John MacDonell, 'Constitutional Limitations upon the Powers of the Irish Legislature and the Protection of Minorities' in John Hartman Morgan (ed), *The New Irish Constitution* (Hodder & Stoughton 1912) 110.

54 John Allen FitzGerald Gregg, popularly known as 'John Dublin' (1873–1961), Archbishop of Dublin and Glendalough (1920–1939), Archbishop of Armagh (1939–1959).

55 TNA-PRO LCO 2/910, Archbishop of Dublin to Prime Minister, 27 September 1930.

56 TNA-PRO CAB 43/1 SFB 21, Meeting between Representatives of the Southern Unionists and the British Representatives on the Conference on Ireland, 7 December 1921.

this safeguard was not mentioned in the text of the Treaty, Lloyd George revealed the intention of the British government to use the constitutional link with Canada in Article 2 of the Treaty to secure an appeal to the Privy Council from the Irish courts.[57] The existence of an appeal to the Privy Council from the Canadian courts ensured that the same position would have to apply to the Irish Free State.

The complaints raised by Irish governments in the 1920s and 1930s to the effect that the British delegation did not raise this potential safeguard with their Irish counterparts during the Treaty negotiations might well have been justified. It was certainly not in the interests of the British government to raise this difficult issue at this juncture.[58] The British did raise the Privy Council appeal in public after the Treaty was safely signed. The appeal was discussed in some detail during the negotiations on the provisions of the draft Irish constitution that took place in the summer of 1922. Yet, the British still refrained from emphasising the potential of the appeal to offer minority safeguards to the Protestant population of the embryonic Irish Free State. It is unlikely that such an argument would have impressed the Irish representatives and, in any case, the British were anxious to play down the significance of the Privy Council appeal at this point. The negotiating stance adopted by the British government on the Privy Council appeal focused on the constitutional link with Canada established by Article 2 of the 1921 Treaty. The Irish were under the impression that appeals from the Irish courts would be rare and exceptional events.[59] Emphasis on the use of the appeal as the guarantor of the rights of Southern Protestants would have undermined this expectation. It would also have heightened Irish fears as to the potential offered by appeal to meddle in the internal affairs of the Irish Free State. The Irish representatives at these negotiations paid little heed to Home Rule antecedents or to perceptions of the appeal by minorities in other parts of the empire. The absence of detailed discussions on the use of the Privy Council appeal as a minority safeguard was clearly advantageous to the British negotiating position in 1921 and 1922. Yet, it had unfortunate consequences in the longer term. When the minority safeguard argument was raised in the years that followed, the Irish government perceived it as an issue that had fallen from a clear blue sky.

Rejection of the minority safeguard argument became more vociferous as the attitude of the Irish government hardened towards the Privy Council in the aftermath of the dispute surrounding *Lynham v Butler* and the appeals concerning transferred civil servants. On 9 November 1930 Patrick McGilligan made a radio broadcast to the United States of America that consisted, for the most part, of an emotive diatribe against the Privy Council. The appeal was presented as 'the last element of British control in Ireland'. McGilligan was particularly eager to refute the argument that the appeal was of any utility as a minority safeguard. According to McGilligan, 'Irish Catholics have never been guilty of religious intolerance.' This sweeping statement did not prevent McGilligan from describing Southern Protestants as 'people whose ancestors had been responsible for a regime of religious bigotry and intolerance in Ireland'. He also associated them with 'the remnants of a class which had lived on the toil of Irish peasants working on lands which centuries ago had been torn from the Irish people'.[60]

57 Ibid.

58 TNA-PRO CO 532/257, Lionel Curtis to Sir James Masterson Smith, 8 October 1923 and 1 November 1923.

59 Eg, Kevin O'Higgins went so far as to assert that leave to appeal would be limited to cases that involved 'international issues of the first importance': *Dáil Debates*, vol 1, col 1404 (10 October 1922). See also TNA-PRO LCO 2/910, Dominions Secretary to Lord Chancellor, 17 February 1926.

60 NAI, Department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930.

Although the Irish government was deeply hostile to perceptions of the Judicial Committee of the Privy Council as the champion of the minority community in the Irish Free State, it had to recognise that this contention created a serious obstacle to the abolition of the appeal. Complaints made by Irish ministers that this issue had not been examined in detail during the Anglo-Irish negotiations of 1921 and 1922 were not sufficient to remove this issue from the political agenda in the years that followed. These considerations ensured that the Irish government adopted four additional approaches in its efforts to undermine the image of the Privy Council as the ultimate safeguard for the rights of Southern Protestants.

## Challenging the appeal

### Inefficacy

The first approach used by the Irish government was to stress the inefficacy of the appeal to serve as a minority safeguard. It could not be denied that the decisions of this court had been thwarted on at least four separate occasions in the 1920s. The appeal in *Lynham v Butler* and the decision in *Performing Right Society v Bray Urban District Council* were blocked by special legislation.[61] The decisions in the two cases concerning the transferred civil servants had simply been ignored until the British government brokered a successful compromise.[62] Patrick McGilligan told delegates to the Imperial Conference of 1930 that the Oireachtas could ensure 'that any interpretation contrary to the decision of the Irish courts could be nullified'.[63] The success of the Irish government in blocking or ignoring appeals allowed one Irish commentator, Hector Hughes, in a monograph on *Judicial Autonomy in the Dominions*, to insist that the Privy Council appeal was no more than a 'paper safeguard' for minorities.[64] Hughes insisted that an oppressive majority community could never be forced to accept the decisions of the Privy Council. He concluded that the Privy Council had 'no way – short of physical force, which even is not available to it – of enforcing its decisions'.[65] The difficulty with this argument is that it could be raised in relation to any court of law. It was an argument that rested on assertions of power on the part of the majority community rather than on any overriding moral consideration. Those who argued that the decisions of the Privy Council had been made ineffective in the past could not ignore the inconsistency with respect for rule of law that characterised many of these actions.[66] If anything, these

61 The Land Act 1926 prevented the appeal in *Lynham v Butler* [1925] 2 IR 82 (High Court) [1925] 2 IR 82 (Supreme Court) from going ahead while the Copyright (Preservation) Act 1929 ensured that the Privy Council could do no more than award costs in *Performing Right Society v Bray Urban District Council* [1930] IR 509.

62 The difference between the amount of compensation for the transferred civil servants calculated on the basis of the Privy Council decisions and the amount calculated by the Irish Supreme Court was recouped by the British government. This solution was cemented by the enactment of parallel legislation, Civil Service (Transferred Officers) Compensation Act 1929 (Dublin) and the Irish Free State (Confirmation of Agreement) Act 1929 (Westminster).

63 TNA-PRO CAB 32/88 E (IR) (30) 8th meeting, 21 October 21. See also, NAI, Department of the Taoiseach, S4285A, memorandum for the Imperial Conference of 1930, undated.

64 Hector Hughes, *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (P S King 1931) 109.

65 Ibid 108.

66 It should be recalled that the attempts to obstruct the decisions of the Privy Council were not the only extraordinary legal measures being taken at this time. Other examples included the Public Safety Act 1927, which explicitly overrode the provisions of the constitution, the Constitution (Amendment No 16) Act 1929, which could be seen as fatally undermining the intention that constitutional amendments should be approved by means of referenda after the expiry of an eight-year transitional period and the Constitution (Amendment No 17) Act 1931, which created a new system of military courts with sweeping powers. In this context, the use of retrospective legislation to thwart the jurisdiction of a court or, in other cases, the simple refusal to enforce its directions could be seen as evidence of a serious deterioration in respect for the integrity of law in the Irish Free State.

considerations seemed to bolster, rather than undermine, arguments that minority safeguards were indeed necessary. Nevertheless, as will become apparent, this 'lack of efficacy' argument did convince a number of prominent Southern Protestants to withdraw their support for the continuance of the Irish appeal to the Privy Council.

### Lack of necessity

More constructive attempts at undermining the image of the Privy Council as the champion of Southern Protestants focused on the assertion that there was no real necessity for a minority safeguard of this nature. Kevin O'Higgins told the Imperial Conference of 1926 that the 'ex-Unionists' were among the 'best citizens' the Irish Free State had.[67] A memorandum written for the Imperial Conference of 1930 stressed that Southern Protestants:

> [H]ave never suffered discrimination or injustice. They have been accepted in the fullest sense as fellow-citizens, they have with the exception of a negligible number of irreconcilables accepted the position themselves.[68]

It was also emphasised that Southern Protestants were well represented in the ranks of the judiciary of the Irish Free State.[69]

The Protestant community of the Irish Free State could not compare its position to the level of discrimination endured by the Catholic community in Northern Ireland in the inter-war years and beyond. Yet, this did not mean that sectarian tensions were absent from the 26 counties. Protestant members of the Oireachtas had to endure jibes from Fianna Fáil TDs and the *Irish Press*, which identified them with freemasonry and British imperialism and as the British garrison in Ireland. Sectarian attacks had occurred during the Anglo-Irish conflict of 1919 to 1921.[70] During the lifetime of the Irish Free State it became clear that Protestants often had different ethical positions on matters such as censorship, divorce and contraception to those of their Catholic neighbours. Protests based on the position that the new state should not impose Catholic principles on the entirety of the population of the Irish Free State seldom evoked a sympathetic response.[71] The *Ne Temere* decree, which required non-Catholics in a mixed marriage to agree to raise and educate their children as Catholics, remained a source of contention for much of the twentieth century.[72] The burning of Protestant churches in the 1930s as reprisals for attacks against Catholics in

67 TNA-PRO CAB 32/56 E (IR26) 4th Meeting, 2 November 1926.

68 NAI, Department of the Taoiseach, S4285A, memorandum for the Imperial Conference of 1930, undated.

69 It has been suggested that the Irish state has maintained a conscious policy of ensuring that religious minorities are represented in the ranks of the judiciary. Paul C Bartholomew, *The Irish Judiciary* (University of Notre Dame Press 1971) 39–40. A draft speech on the Privy Council written by Eamon de Valera in 1933 stressed that one out of three members of the Supreme Court and four out of six members of the High Court were Protestants: NAI, Department of Foreign Affairs, file 3/1, draft speech on 'Abolition of Appeals to the Privy Council', undated 1933. At the time of writing of this article the first Protestant, Susan Denham, has just been appointed as Chief Justice of the Irish Supreme Court.

70 See Peter Hart, 'The Protestant Experience of Revolution in Southern Ireland' in Richard English and Graham Walker (eds), *Unionism in Modern Ireland: New Perspectives on Politics and Culture* (Macmillan 1996) 81–98.

71 See John Henry Whyte, *Church and State in Modern Ireland, 1923–1979* (Gill & Macmillan 1984) 57–60

72 This decree also resulted in litigation, most notably in the case of *In re Tilson, Infants* [1951] IR 1. See also Gerard Hogan, 'A Fresh Look at *Tilson's* Case' (1998) 32 Irish Jurist 311. It is interesting to speculate what might have happened if this case had been heard two decades earlier and appealed to the Privy Council. It has been suggested that the Irish courts may have been guilty of bias in the past with respect to child custody disputes between Catholic and non-Catholic spouses: Bartholomew (n 69) 17–18.

Northern Ireland and the Fethard-on-Sea boycott in the late 1950s illustrate that the creation of the self-governing Irish State had not eliminated sectarian tensions.[73]

One of the most notorious incidents of this nature during the lifetime of the Irish Free State itself was the rancorous dispute fuelled by the appointment of Letitia Dunbar-Harrison, a Protestant graduate of Trinity College Dublin, as a librarian in County Mayo. The Local Appointments Commission had recommended Harrison for the post in 1930. Nevertheless, the Mayo Library Committee refused to endorse the appointment. This body objected to the appointment on two grounds. First, it was noted that she had no qualifications in the Irish language. This objection ignored Harrison's entitlement to a period of three years in which to obtain such a qualification. The second objection was that a Protestant was not a suitable person to supervise the reading of a population that was overwhelmingly Catholic. Richard Mulcahy, Minister for Local Government, responded by suspending Mayo County Council when it threw its support behind the library committee. Harrison was duly appointed to the position, although pragmatic considerations ensured her rapid promotion and transfer to a more congenial post in the library of the Department of Defence in Dublin. The robust response of the Irish government transformed a short-term disaster into a major publicity coup for the Irish Free State. The dispute was widely reported in the international press, which ensured that the Irish government received widespread praise for its strong stance against religious intolerance.[74]

The Dunbar-Harrison incident is significant because the Irish government made extensive use of it to support its case that the Protestant minority did not require external intervention in order to uphold its rights.[75] Yet, this dispute was not an untrammelled propaganda victory for the Irish Free State as a tolerant society. Eamon de Valera tarnished this image by his robust support for Mayo County Council. He told the Dáil:

> I say that if I had a vote on a local body, and there were two qualified people who had to deal with a Catholic community, and if one was a Catholic and another a Protestant, I would unhesitatingly vote for the Catholic.[76]

One of the most important methods of attacking the need for the appeal as a minority safeguard was to argue that none of the Irish cases heard by the Privy Council had ever involved any question of religion.[77] Some Southern Protestants did argue that official efforts to prevent the availability of divorce constituted religious discrimination and violated Article 8 of the constitution, but these complaints never crystallised into a legal challenge.[78] Nevertheless, those who emphasised the lack of religious content in any of the Irish appeals to the Privy Council failed to consider that perceived attacks on the rights of the minority community need not have been directly concerned with matters of religion.

73 Kurt Bowen, *Protestants in a Catholic State: Ireland's Privileged Minority* (McGill–Queen's University Press 1983) 64, and T Fanning, *The Fethard-on-Sea Boycott* (Collins 2010). See also Heather K Crawford, *Outside the Glow: Protestants and Irishness in Independent Ireland* (University College Dublin Press 2010) and Marianne Elliott, *When God Took Sides: Religion and Identity in Ireland: Unfinished History* (Oxford University Press 2009).

74 Eg, (1931) 21 Round Table 404.

75 Eg, see UCD Archives, McGilligan Papers, P35B/115, Walshe to McGilligan, undated; TNA-PRO LCO 2/910, note by Sir H Batterbee and Mr Machtig, 27 February 1931 and (1931) 21 Round Table 404.

76 *Dáil Debates*, vol 39, col 517 (17 June 1931). An interesting analysis of the Dunbar-Harrison incident can be found in Whyte (n 71) 44–47. This controversy had a predecessor in the form of a letter from a parish priest, which was read out in the Dáil by a Fianna Fáil TD, complaining of the appointment of a Protestant doctor to serve a Catholic community in County Meath. De Valera followed this by giving notice that he would not be afraid of dealing with religious considerations when making appointments: *Dáil Debates*, vol 24, cols 346–49 and 368 (8 June 1928).

77 Eg, Hughes (n 64) 107–09.

78 *Irish Times* (23 February 1925) and Dáil Debates, vol 10, cols 158–82 (11 February 1925).

The transferred civil servants involved in *Wigg and Cochrane v Attorney General* and the special reference that followed were, accurately or otherwise, perceived to be Protestants and Unionists by their supporters.[79] The appellants in *Moore v Attorney General* were Protestants from Donegal and Derry. The case involved a challenge to their exclusive fishing rights on the tidal estuary of the river Erne by a number of fishermen. The description of the owners of these property rights as 'foreigners' by those who instigated the legal action reflects an unpleasant sectarian aspect to this dispute.[80]

It is important not to place disproportionate emphasis on isolated incidents such as the Dunbar-Harrison dispute or the events surrounding *Moore v Attorney General* when examining the position of the Southern Protestant community as a whole during the lifetime of the Irish Free State. The short span of time since the conclusion of the bloody conflict that had preceded the creation of the Irish Free State is far more important in explaining the sense of vulnerability that persisted among many Southern Protestants. The Church of Ireland Archbishops of Armagh and Dublin, Charles Frederick D'Arcy and John Allen FitzGerald Gregg, emphasised that 'memories in Ireland are long' in a letter to *The Times* supporting the retention of the Privy Council appeal.[81] A British memorandum written in 1926, in response to calls by the Irish government to abolish the Privy Council appeal, made clear that:

> the bitterness of the past cannot be wiped out in three years, and there is still a substantial minority in the Free State who would regard the abolition of the right to petition for special leave to appeal to His Majesty in Council as a betrayal at the hands of the British Government.[82]

### Absence of protestant support

A third approach in challenging the claim that the Privy Council provided a minority safeguard focused on the Southern Protestant community itself. Irish officials were anxious to dismiss claims that Southern Protestants valued the Privy Council appeal as a safeguard of their rights and freedoms. Kevin O'Higgins used this approach to deny the reality of this minority safeguard at the Imperial Conference of 1926 and successive Irish governments repeated it throughout the 1920s and 1930s.[83] O'Higgins went so far as to claim that if a plebiscite were taken on the Privy Council appeal the only persons who would be found to support it in the Irish Free State would be members of the Irish Bar. Members of the legal profession were seen as having an obvious interest in maintaining what the Irish government characterised as a 'rich man's appeal'.[84] Patrick McGilligan believed that only a small clique of Southern Protestants supported the appeal and equated this position to a desire to retain class privileges.[85]

79 Eg HL Deb 1 December 1931, vol 83, cols 232–33.

80 *Donegal Democrat* (12 August 1933).

81 *The Times* (7 November 1930).

82 TNA-PRO LCO 2/3465, Imperial Conference 1926, Appeals to the King in Council, 1 November 1926.

83 TNA-PRO CAB 32/56 E (IR26) 4th Meeting, 2 November 1926.

84 TNA-PRO CAB 32/56 E (IR26) 4th Meeting, 2 November 1926, and TNA-PRO CAB 43/3 SFC 40 Griffith to Lloyd George, 2 June 1922.

85 McGilligan (n 23) and UCD Archives (n 23).

The Irish government was particularly keen to point to prominent Southern Protestants who had little time for the Privy Council appeal.[86] Ernest Blythe was among the most obdurate opponents of the Privy Council appeal within the Irish government.[87] In 1930 Senator James Douglas, a Quaker who had sat on the committee that created the early drafts of the 1922 constitution, wrote a letter to the press in order to refute claims made by other Southern Protestants as to the value of the appeal as a minority safeguard.[88] Douglas considered that it was necessary for Southern Protestants to reject the appeal in order to prove their loyalty to the new state:

> We, non-Catholics, in the Saorstát [Free State] cannot serve two masters, for else we will hold to one and despise the other. Loyal acceptance of the new order of things means trusting the majority to safeguard the rights of the minority. If the majority cannot be trusted, no constitutional provision however carefully worded – no political interference by an outside authority – no appeals to an outside Court will be of any avail whatever.[89]

Irish governments in the 1920s and 1930s were convinced that the minority safeguard argument was a convenient ruse employed by persons outside the 26 counties, who were hostile to the self-governing Irish state, to ensure the retention of the Privy Council appeal. John A Costello told the Imperial Conference of 1930 that, as far as he was aware:

> No one in Ireland had ever put forward the argument that the 'Loyalists' [of the Irish Free State] should continue to receive the protection afforded by the appeal to the Judicial Committee: that was an argument only put forward in England.[90]

## A TOOL OF EXTERNAL INTERFERENCE

The final means by which Irish governments attacked the assertion that the Privy Council appeal acted as a minority safeguard was to question its objectivity as a court of law. As far as Irish governments were concerned, a court that was subject to external influence was ill-equipped to act as the final arbiter concerning the relationship between the Irish state and religious minorities. Nationalist suspicions as to the objectivity of the Judicial Committee of the Privy Council were ostensibly based on the absence of clear separation of powers in key British institutions. The Lord Chancellor heard Privy Council appeals but also sat in the House of Lords and had a seat in the British Cabinet.[91] Irish commentators, including members of the Irish government itself, openly questioned the independence of the Judicial Committee of the Privy Council vis-à-vis the British government. John A Costello wrote that the Judicial Committee had a 'political tinge' and supported this by noting that it was 'formed of people who are at one and the same time Judges and Politicians'.[92] Patrick McGilligan asked his radio audience in 1930:

86 The Irish government listed Mr Justice FitzGibbon, a Protestant judge who formed one of the three members of the Irish Supreme Court, among those who opposed the Irish appeal to the Privy Council: NAI, Department of the Taoiseach, S4285A, memorandum of the Imperial Conference of 1930, undated. These claims rest on purported statements made by FitzGibbon during the debates on the Constitution of the Irish Free State in 1922. Analysis of his contributions to these discussions does not evince any obvious hostility to the Privy Council appeal. For example, see *Dáil Debates*, vol 1, cols 1406–07 (10 October 1922).

87 Eg, see *Dáil Debates*, vol 32, cols 667–68 (31 October 1929).

88 Douglas' intervention was a response to the letter to the press written by the Church of Ireland Archbishops during the Imperial Conference of 1930. This letter was published in *The Times* (7 November 1930).

89 *Sunday Independent* (9 November 1930). See also (1931) 82 Round Table 402.

90 TNA-PRO CAB 32/88 E (IR) (30) 8th meeting, 21 October 1930.

91 The office of Lord Chancellor was finally reformed by the Constitutional Reform Act 2005.

92 UCD Archives, Costello Papers, P190/94, notes on the memorandum prepared for the Imperial Conference of 1926 on appeals to the Privy Council, undated. See also Hughes (n 64) 104–05.

> Are not the British government and parliament still in a position to interfere in Irish affairs through this purely British Court, the majority of whose judges have most violently opposed the liberation of the Irish people?[93]

These suspicions filtered down to opinion pieces in Irish periodicals in which the Privy Council was described as the 'pocket tribunal of the English political party in power'.[94] The Irish appeal to the Privy Council was dogged by conspiracy theories throughout its lifetime. One example was the rumour that the Judicial Committee had granted leave to appeal in *Lynham v Butler* on the erroneous assumption that the case would affect a considerable number of Anglo-Irish landlords.[95]

Fears of clandestine subversion received public expression in Patrick McGilligan's radio broadcast of 1930. McGilligan warned his listeners of sinister elements who wished to use the Privy Council appeal 'as a means of keeping Ireland a pawn in British party politics and of preventing Irish ex-Unionists from becoming an inseparable element of the Irish nation'. According to McGilligan, attempts were being made through 'a well-subsidised Press and other means to maintain a feeling of discontent amongst the small ex-Unionist population of the Irish Free State'. Behind it all were 'enemies of the Irish people' who were 'violently opposed to the Treaty, and if they were strong enough to-day they would reduce them to subjection once more'.[96] In a subsequent newspaper article, McGilligan characterised support for the retention of the appeal as a 'sinister and disloyal campaign'. He asked his readers 'Is it the desire of the Protestant population of our country to become part of the warp and woof of the Irish nation?' McGilligan took the controversy over the appeal to a new level when he concluded: 'Is there not at the back of the demand the desire that the appeal to the Privy Council might one day be used as an indirect means for bringing the British back to Ireland?'[97]

## The 'cleaning of the slate' negotiations

Claims that the Privy Council appeal offered a vital safeguard to Irish Protestants received significant attention outside Ireland. The issue was raised at successive Imperial Conferences in the 1920s and 1930s. The protection of the Protestants of the Irish Free State also encroached into the debates that preceded the enactment of the Statute of Westminster. The Imperial Conference of 1926 had decided that changes should not be made to the Privy Council appeal in any one Dominion without prior consultation and

93 UCD Archives, McGilligan Papers, P35B/108, radio broadcast, 9 November 1930.

94 Donal McEgan, 'John Bull's Privy Council' (1933) 23 The Catholic Bulletin 739.

95 Hughes (n 64) 99.

96 UCD Archives, McGilligan Papers, P35B/108 and NAI, Department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930.

97 McGilligan (n 23) and UCD Archives (n 23).

discussion with other members of the Commonwealth.[98] For its part, the Irish government sought to win Dominion support for its position on the appeal in order to place pressure on its British counterpart. Arguments based on the success of the Irish government in thwarting Privy Council appeals and on fears of external subversion were designed to appeal to an Irish audience and were ill-suited to the collegial proceedings of an Imperial Conference. The argument that safeguards for Irish Protestants were not necessary was heavily intertwined with the claim that the minority community of the Irish Free State did not actually desire an appeal to an external tribunal. This offered the most promising approach to achieving external agreement for abolition of the appeal. Although this argument was raised without success during the Imperial Conferences of 1926 and 1930, the Irish government had good reason to believe that a series of Anglo-Irish negotiations initiated in 1931 held out greater promise of success.

In 1931 the minority Labour government in London was pre-occupied with the task of ensuring that the Statute of Westminster Bill passed through Parliament without substantial amendment. This historic piece of legislation was the response to demands for greater autonomy from some of the self-governing Dominions of the empire, such as Canada, South Africa and the Irish Free State.[99] The original Bill was based on a wording that had finally been agreed at the Imperial Conference of 1930. Amending the agreed text would require reopening negotiations with the Dominions. This would endanger the survival of the Statute of Westminster and of the British government itself.

The most serious threat to the agreed text concerned the application of the proposed Statute of Westminster to the Irish Free State. Determined efforts were made within the British Parliament to ensure that the greater autonomy offered by the Statute of Westminster could not be used to abolish the Irish appeal to the Privy Council. The number of Irish Protestants at Westminster was relatively small. Yet, they represented a body of opinion that could never be entirely ignored.[100] The position of the Southern Protestants left behind in the Irish Free State was an emotive cause that was capable of garnering widespread support if properly harnessed. In early 1931 the Irish government seemed set

98 Cmd 2768 19–20. This reflected the views of the New Zealand delegation to the 1926 conference which refused to admit that any one Dominion had the right to abolish the Privy Council appeal without the consent of the others. TNA-PRO CAB 32/56 E(IR-26) 4th Meeting, 2 November 1926. It should be noted that the conference report of 1926 also stated 'it is no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the part of the Empire primarily affected' (Cmd 2768 19). In reality, this statement provided nothing that had not been said to the Irish by British politicians during the constitution negotiations or by the Privy Council itself when dealing with Irish appeals. For example, see the comments made by Viscount Haldane when hearing the three petitions, *Alexander E Hull and Co v Mary A E M'Kenna*; *The 'Freeman's Journal' Ltd v Erik Fernstrom* and *The 'Freeman's Journal' Ltd v Follum Traesliberi* [1926] IR 402, 404. A B Keith referred to this statement as 'the usual, it must be feared insincere, declaration'. Arthur Berriedale Keith, *Responsible Government in the Dominions, vol II* (Clarendon Press 1928) 1230. Keith believed that the significance of this statement was nullified by the recognition that changes should not be made with respect to the appeal without prior consultation and discussion with other members of the Commonwealth. He concluded that this requirement stated in plain words that 'if Canada did not desire to change – and in the face of Quebec this must be Mr. King's attitude [W L M King, Prime Minister of Canada] – nothing had better be done': ibid.

99 Australia only adopted the operative provisions when its Parliament passed the Statute of Westminster Adoption Act 1942. New Zealand finally adopted the operative provisions of the Statute of Westminster in conjunction with the abolition of its upper house in 1947. The New Zealand Parliament passed the Statute of Westminster Adoption Act 1947 and the New Zealand Constitution (Request and Consent) Act 1947 received the royal assent on 10 December 1947. The latter measure was supplemented by the New Zealand Constitution (Amendment) Act 1947 passed at Westminster.

100 Eg, Sir Claude Schuster wrote that Lord Danesfort was 'a most stubborn and unreasonable person': TNA-PRO LCO 2/910, C Schuster to N M Butler, 7 November 1930.

on a policy of unilateral abolition of the Privy Council.[101] The British feared that any such action would garner support for those who argued that the rights of Irish Protestants were being threatened. An agreed settlement on this issue might avert the impending crisis. The British government now focused on the claims made by their Irish counterparts that the Southern Protestant community of the Irish Free State did not value the Privy Council appeal and would not raise serious opposition to its abolition.[102] If these claims could be verified, an agreed settlement on the Privy Council appeal might become a real possibility and the threat to the Statute of Westminster averted.

In early 1931 the British government asked the Irish if evidence could be provided to support their claims as to Southern Protestant opinion with respect to the Privy Council appeal. If such evidence could be produced in a form that could be presented to Parliament, the abolition of the Irish appeal might form part of a wider settlement on outstanding legal difficulties between the United Kingdom and the Irish Free State.[103] The Irish agreed to postpone the introduction of legislation abolishing the appeal in order to explore the feasibility of this solution.[104] This signalled the beginning of negotiations on a proposed settlement that soon acquired the charming soubriquet of the 'cleaning of the slate' agreement. A wide range of issues was proposed for inclusion in this draft agreement. These included the settlement of a territorial dispute between Northern Ireland and the Irish Free State over Lough Foyle, the *inter se* operation of international conventions between the United Kingdom and the Irish Free State, the surrender of fugitive offenders, mutual enforcement of judgments and court orders, the use of the Great Seal, the sealing of probates, Irish lights, estates of persons of unsound mind, execution of criminal warrants, maintenance and bastardy orders, repatriation of paupers, and matters concerning cables and wireless facilities.[105] However, the dominant issue in the entire 'cleaning of the slate' agreement was always the search for a bilateral agreement on the appeal to the Privy Council. The fate of the entire agreement was dependent on the Irish government producing solid evidence that the Southern Protestant community in the Irish Free State did not desire the continuance of the appeal.

## Gauging Protestant support for the Privy Council appeal

Given the importance placed on this issue, it is now necessary to examine the level of support for the Privy Council appeal among Southern Protestants in 1931. There are formidable obstacles in doing this. The Protestant minority was thinly scattered over the entire territory of the Irish Free State. The political views of its members were and remain notoriously difficult to pin down. Many could be accurately described as 'Southern

101 *Dáil Debates*, vol 37, col 1620–21 (18 March 1931).

102 Eg, see UCD Archives, McGilligan Papers, P35B/115, Walshe to McGilligan, undated; NAI, Department of the Taoiseach, S6164, report on meeting between Dulanty and Batterbee, 6 March 1931; and TNA-PRO LCO 2/910, Dominions Secretary to Attorney General, 2 March 1931, and note by Sir H Batterbee and Mr Machtig, 27 February 1931.

103 TNA-PRO LCO 2/910, CP 120(31), The Irish Free State and Appeals to the Judicial Committee of the Privy Council. See also TNA-PRO LCO 2/1231, undated memorandum attached to a letter from Sir Henry Batterbee to Sir Claude Schuster, 21 March 1931, and UCD Archives, McGilligan Papers, P35/167, undated British communiqué marked 'Secret'.

104 TNA-PRO LCO 2/910, CP 120(31), The Irish Free State and Appeals to the Judicial Committee of the Privy Council.

105 The draft forms of the proposed agreement can be found in TNA-PRO LCO 2/1231. An agreement over the position of the Ulster King at Arms was also suggested during the negotiations on the 'cleaning of the slate' agreement: TNA-PRO DO 35/127/7 file 4431/9, negotiations with the Irish Free State, 30 April 1931. A detailed treatment of the proposed 'cleaning of the slate' agreement can be found in Thomas Mohr, 'The Irish Free State and the Legal Implications of Dominion Status' (unpublished thesis, UCD 2007) 99–149.

Unionists' while the appellation was inappropriate and even offensive to others. Southern Protestants were understandably reticent to speak freely to strangers on sensitive political questions. A referendum confined to the Protestant community of the Irish Free State was obviously out of the question. Yet, the British were never so unrealistic as to ask for evidence of this nature. A memorandum drafted by the Dominions Office that was communicated to the Irish government suggested that 'the position that the Southern Unionists no longer desire the retention of the appeal' might be illustrated by means of 'a resolution in the Dáil or otherwise'.[106] This suggestion assumed that the attitudes of Protestant members of the Dáil, or more accurately the Protestant members of the Oireachtas given the large representation in the Seanad, reflected those of the wider Protestant community in the Irish Free State. Nevertheless, the task of discovering the attitudes of the Protestant members of the Oireachtas involved asking no more than two dozen individuals. This was not an unrealistic undertaking and the Irish government already had a head start. The Irish government had long anticipated the need to provide some form of evidence that there was no significant support for the Privy Council appeal among the Southern Protestant community. In late 1930 or early 1931 the Irish government initiated a quiet process of consulting the Protestant members of the Oireachtas in order to learn their views on the Privy Council appeal and to search for a means of making these views clear to the British.

The consultation process was entrusted to two Protestant senators who supported the policies of the Irish government with respect to the Privy Council. James Douglas had earned the respect of members of the Irish government through his work with the White Cross during the War of Independence.[107] He was on close terms with Michael Collins and was a member of the committee charged with drafting the Irish Constitution in 1922. Samuel L Brown, a senator and barrister, undertook the bulk of responsibility for this process of consultation. Brown was assisted by Senator Andrew Jameson at a later stage of the consultation process. Jameson had been a member of the delegations that had spoken on behalf of the Southern Protestant community during the negotiations that preceded the signing of the 1921 Treaty and the enactment of the 1922 constitution. Brown and Jameson had formerly been strong supporters of the Privy Council appeal. They had both formed part of a delegation in 1929 that had delivered a formal protest to W T Cosgrave on the government's policy with respect to the appeal.[108] The basis for the 'road to Damascus' travelled by both men over the intervening year is difficult to trace. The final conclusion of the fiasco surrounding the transferred civil servants[109] together with the inefficacy of the Privy Council's decision in *Performing Right Society v Bray Urban District Council* are likely to have influenced their conversion.[110] Whatever their motivations were, the Irish government's position that the minority community was not in need of external safeguards was greatly enhanced by the support of such individuals. Yet, as Douglas, Brown and Jameson were to

106 TNA-PRO LCO 2/1231, undated memorandum attached to a letter from Sir Henry Batterbee to Sir Claude Schuster, 21 March 1931, and UCD Archives, McGilligan Papers, P35/167, undated British communiqué marked 'Secret'.

107 Gaughan (n 39).

108 TNA-PRO LCO 2/910, statement of 10 December 1929 attached to letter from Archbishop of Dublin to Prime Minister, 27 September 1930.

109 *Wigg and Cochrane v The Attorney General of the Irish Free State* [1927] IR 293 (High Court), [1925] 1 IR 149 (Supreme Court) and [1927] IR 285 (Privy Council) and *In re Compensation to Civil Servants under Article X of the Treaty* [1929] IR 44.

110 [1928] IR 506 and [1930] IR 509. Senator Brown was broadly supportive of the enactment of the Copyright (Preservation) Act 1929, which was passed to prevent the appeal in this case: *Seanad Debates*, vol 12, col 988 (3 July 1929).

discover, not all of their co-religionists agreed with their conclusions as to the value of the Privy Council appeal.

In January 1931 Douglas and Brown gave preliminary reports on their assessment of Protestant opinion in the Oireachtas. Douglas reported: 'Most of the people, to whom we are likely to appeal would favour an appeal to the Privy Council in important cases if this were practical politics.' He added 'there is no doubt that in a general way they mostly disapprove of the government's policy with regard to appeals'. Douglas concluded that in his opinion there would be more likelihood of strong opposition to the introduction of a Bill designed to block an appeal in a particular case, such as had occurred with respect to *Lynham v Butler*, than a general abolition of the appeal by means of amending Article 66 of the constitution.[111] Senator Brown agreed with Douglas' assessment but added the warning that the emergence of future controversies might radicalise Protestant opinion. Brown noted that there was a case currently under consideration in the Irish courts, *Moore v Attorney General* or the Erne fishery case, that showed every sign of forming a future appeal to the Privy Council. This legal challenge, supported by the state, to property rights held by members of the Protestant community had the potential to augment support for the appeal. Brown's warning proved prophetic and in just over two years the bitter struggle surrounding the Erne fishery case would prove to be the decisive climax of the entire dispute over the Privy Council appeal.[112]

In the spring of 1931 the Irish government entrusted Brown with the task of carrying out a general consultation with Protestant members of the Oireachtas. His task was to assess whether they might be prepared to subscribe to a resolution on the question of Privy Council appeals. The government also gave some thought as to what form such a resolution might take. It was obvious that passing an official resolution through both Houses of the Oireachtas would not be a suitable course of action. An official resolution would have to be tailored to meet the views of the majority of all members of the Oireachtas rather than the views of its Protestant members. Instead, the government hoped that a series of informal conferences would see the members of the 'Independent Groups in the Dáil and Senate' pass some form of unofficial resolution. In June 1931 a group of Independents from both Houses of the Oireachtas had an informal conference to gauge their views on the Privy Council appeal. A report was written on the conclusions of this conference that was intended to form the basis of a final resolution to be passed by Protestant TDs and senators.[113]

The report began by recognising that: 'The majority of those present at this conference are opposed to the abolition of the right of appeal to the Privy Council, and desire that if possible it should be preserved.' Having made this position clear, those consulted recognised that the appeal had already been made ineffectual in practice and that the Independent members of the Oireachtas were powerless to prevent its proposed abolition by means of legislation. The report went on to recognise the inevitability of change and, in these circumstances, urged that abolition be brought about through agreement with the British government in order to avoid the dangers resulting from an alleged breach of the 1921 Treaty. It concluded with a proposal that the Protestant members of the Oireachtas should approach the Irish Minister for External Affairs to urge him to attempt to bring about the proposed change by agreement with Great Britain. It was made clear that any such resolution would reiterate the point that the majority of the relevant members of the Oireachtas remained opposed to the abolition of the appeal to the Privy Council in principle. The proposed resolution would add that these representatives felt duty-bound to

111 UCD Archives, McGilligan Papers, P35/166, undated memorandum by Senator James Douglas.

112 UCD Archives, McGilligan Papers, P35/166, undated memorandum by Senator Samuel L. Brown.

113 UCD Archives, McGilligan Papers, P35/166, memorandum re Privy Council appeals, 17 June 1931.

oppose any unilateral legislation seeking abolition. Nevertheless, these members of the Oireachtas would have expressed their willingness to accept abolition as a *fait accompli* in the event of an Anglo-Irish agreement on this matter. If this proved possible, the persons concerned would limit their criticism in the Oireachtas to 'an expression of regret that, in spite of the wishes of a large section of the Minority on the subject, the Government had not been willing to continue the right of appeal to the Privy Council'.[114]

As events transpired, the proposals enshrined in this proposed resolution were never initiated. It seems likely that the Irish government was uncomfortable with many aspects of it. The strong expression of support in principle for the continuance of the Privy Council appeal was at total variance with the government's contention that Southern Protestants placed no value on the appeal. Moreover, the proposed resolution made it clear that the position of its adherents was based on their recognition that the appeal had already been rendered ineffective by the Irish government and also on the basis of their own powerlessness to prevent abolition by unilateral means. These admissions gave a definite impression of acquiescence under duress, an impression that would not have been lost upon Unionists at Westminster. In addition, the strong expression of opposition to unilateral abolition could not have been comfortable reading to a government that was determined to follow this course in the absence of bilateral agreement and had already drawn up the legislation required to bring it into effect.[115] However, the final nail in the coffin of the proposal does not seem to have come from the Irish government but from the Southern Protestants themselves.

A list of the senators who were consulted by Brown on the Privy Council appeal has survived. The list includes his own name along with those of Douglas and Jameson. It also shows that Brown consulted Sir John Griffith, Henry Guinness, The McGillicuddy, John Bagwell, Arthur Vincent, Sir Edward Biggar and the Countess of Desart.[116] The addition of the last name is interesting because the Countess of Desart was not a Protestant but belonged to the Jewish faith. However, the list does expressly mention that Brown had not consulted two senators, Sir John Keane and William Barrington. No reason is given for ignoring these two senators but subsequent events illustrate that Keane was certainly a supporter of the appeal to the Privy Council. Keane was one of those who objected most strenuously to abolition when de Valera finally put it into practice in 1933.[117] It is possible that Keane's views had been radicalised in 1933 by the dispute over the Erne fishery case, as had been predicted by Brown. Nevertheless, Keane's omission from the consultation process is strongly suggestive of a perception that he and Barrington were not seen as likely supporters of the intended resolution.

Notwithstanding the doubts that might have surrounded Senators Keane and Barrington, there was certainly strong opposition to the draft resolution among members of the Dáil. No list of the TDs who were consulted appears to have survived. Nevertheless, W T Cosgrave wrote that three 'northern deputies were violently opposed to the

114 Ibid.

115 NAI Department of Foreign Affairs, 3/1, draft Bills.

116 This list has survived in two sources. It was written on the back of the document entitled 'memorandum re Privy Council appeals', 17 June 1931, and on an envelope containing a letter from Cosgrave to McGilligan, dated 26 June 1931. The author found both of these when the original documents were still accessible to members of the public in UCD Archives (at this time they were archived under McGilligan Papers, P35/196). These files have since been re-organised under the new reference of McGilligan Papers, P35/166. Public access is now limited to microfilm copies that do not reproduce these important lists. Archivists take note!

117 *Seanad Debates*, vol 17, col 1681 (31 October 1933).

proposal'.[118] It is difficult to identify these persons with total certainty, but it is likely that these were Major James Sproule Myles, John James Cole and Alexander Haslett. These Southern Protestants were, respectively, TDs for Donegal, Cavan and Monaghan. Myles was a retired officer from the Royal Inniskilling Fusiliers and had served as a Unionist MP at Westminster, Cole came from a Protestant farming background while Haslett, another farmer, had been endorsed by the Orange Order in the first election of 1927.[119] It is possible that the opposition to the abolition of the appeal extended beyond these three 'northern deputies'. When de Valera sought to abolish the appeal in 1933 his most vocal opponents in the Dáil were Professor William Edward Thrift and John Good. Thrift had grown up in England and represented Trinity College Dublin while Good was TD for Dublin County.

It is uncertain whether the proposed convention of the 'Independent Groups in the Dáil and Senate' might have delivered a majority of Protestant members of the Oireachtas in favour of the draft resolution on the Privy Council appeal. Even if it had, the presence of a vocal minority who, in Cosgrave's own words, were 'violently opposed' even to a limited form of acquiescence is indicative of the strength of feeling on the Privy Council issue among certain sections of the Protestant community. It was a situation that was completely at variance with the claims made by Irish officials to their British counterparts that none of the Southern Protestants in the Dáil would oppose abolition.[120] Even if the proposed resolution had been acceptable to the Irish government and even if a majority of Protestant members of the Oireachtas had given it their support, it is possible that the opposition of a determined minority might have been enough to rally Unionist sympathy at Westminster.

The failure of the proposed resolution did not mean that the Irish government had given up on the search for a bilateral settlement. It explored other means of indicating Protestant acquiescence to the abolition of the Privy Council appeal. The preferred alternative was to offer the British the testimony of notable Southern Protestants as to the feelings of their co-religionists in the Irish Free State as a whole. This task fell to Senators Brown and Jameson who travelled to London in September 1931 and secured an interview with the Dominions Secretary, James Thomas.

The two Irishmen met the Dominions Secretary on 17 September 1931. Brown and Jameson were keen to stress the fair treatment of the minority by the Irish government. The two senators declared that they had no complaints and went as far as to claim that there was no longer any 'religious question' in the Irish Free State.[121] Brown and Jameson stated that the Southern Unionists could be divided into three classes on the specific question of the Privy Council appeal:

1 There was the class of those who regarded the appeal as futile and an irritant to good relations between the Protestant minority and the rest of the population of the Irish Free State, and who, on that ground, were in favour of its immediate abolition;

2 There was a second class, who, while regretting the disappearance of the appeal, recognised that the Irish Free State government was committed to

118 UCD Archives, McGilligan Papers, P35/166, Cosgrave to McGilligan, 26 June 1931.

119 Bowen (n 73) 52–53. See also the database of Oireachtas members at <www.oireachtas.ie/members-hist/default.asp?housetype=0> accessed 6 July 2011.

120 TNA-PRO LCO 2/910, CP 120(31) The Irish Free State and Appeals to the Judicial Committee of the Privy Council.

121 TNA-PRO DO 35/127/7 file 4431/20, note of interview between Mr Thomas and Senator Brown and Senator Jameson, September 1931.

securing its abolition. They thought that it should come by agreement with the United Kingdom government;

3 There was a third class who was opposed to abolition in any shape or form.

Brown and Jameson admitted the difficulties in gauging the opinions of Protestants throughout the Irish Free State. Nevertheless, they were prepared to offer their own estimations of Protestant opinion on the Privy Council appeal. They began by noting that among 'the thinking and educated people' the majority belonged to the first class. Senator Brown added that this category included members of the governing body of Trinity College Dublin. Nevertheless, Brown and Jameson were prepared to concede that a larger proportion of the Southern Protestants probably belonged to the second class. In their opinion the number belonging to the third class in the Irish Free State was small and largely confined to the border counties. This claim may have reflected the position of the three 'northern deputies' in the Dáil mentioned by Cosgrave. Brown and Jameson did note, however, that eruption of controversy in the near future might arouse old prejudices and have the effect of driving some of the Southern Protestants out of the second class of opinion and into the third.[122]

As for opinions within the Oireachtas, the senators stated that of the 11 or 12 representatives of the minority in the Seanad, all belonged to the first class. They added that of the 11 representatives of the minority in the Dáil, three belonged to the first class and eight to the second class. Although the two senators might be expected to be on firmer ground with respect to Protestant opinion in the Oireachtas than with respect to the Irish Free State as a whole, these figures are open to serious question. Their claim that Protestant senators were all of the opinion that the Privy Council appeal was an irritant and should be abolished immediately is particularly dubious. These views do not reflect the conclusions of the informal consultations with Protestant members of the Seanad and Dáil in June 1931 that had made it clear that a majority favoured the retention of the appeal in ideal circumstances. The lack of consultation with Senators Keane and Barrington has already been noted. The figures given with respect to the Dáil are even more questionable. It should be recalled that the proposed resolution, which would have expressed support for the appeal while acquiescing in a position of bilateral abolition, was 'violently opposed' by at least three unidentified 'northern deputies'.[123] The staunch opposition of these persons surely placed them in the third class of Southern Protestants.

The testimony offered by Brown and Jameson did not result in the anticipated bilateral agreement that would have paved the way for the abolition of the Privy Council appeal. The opinions offered by the two senators were not sufficient to satisfy the criteria suggested by the original British proposal.[124] First, the opinions of the two senators did not constitute evidence that could be shown to those in the United Kingdom who professed to sympathise with the Protestants of the Irish Free State. Second, the British government may not have been entirely convinced by their testimony. Senators Brown and Jameson were among those who saw the appeal as 'futile and an irritant' and as such were, by the admission of their own evidence, unrepresentative of the majority of Southern Protestants. As shown above, there was certainly good reason to doubt the accuracy of some of the evidence provided by them.

122 Ibid.

123 UCD Archives, McGilligan Paper, P35/166, memorandum re Privy Council appeals, 17 June 1931.

124 See TNA-PRO LCO 2/1231, undated memorandum attached to letter from Sir Henry Batterbee to Sir Claude Schuster, 21 March 1931, and UCD Archives, McGilligan Papers, P35/166, undated British communiqué marked 'Secret'.

There are definite indicators that suggest that Southern Protestant support for the Privy Council appeal was far more substantial than the Irish government was prepared to admit. Two major Protestant institutions gave unwavering support to the Privy Council appeal throughout the 1920s and 1930s. The first was the *Irish Times*, the main newspaper read by the minority community, which repeatedly stressed the importance of the appeal to the minority community and consistently condemned the efforts of the Irish government to dilute its effectiveness.[125] The second was the Church of Ireland. In late 1929 the Standing Committee of the General Synod of the Church of Ireland decided to send a delegation to interview President Cosgrave on the Irish government's declaration that it intended to seek the abolition of the appeal at the Imperial Conference of 1930. This delegation included representation from a third Southern Protestant institution, Trinity College Dublin.

On 10 December 1929 a delegation consisting of the Church of Ireland Archbishop of Dublin, the Provost of Trinity College Dublin, Edward John Gwynn, together with Senators John Bagwell, Samuel L Brown and Andrew Jameson met with Cosgrave to discuss the Privy Council appeal.[126] The delegation read out a prepared statement of protest on behalf of the minority community at the policy of the Irish government towards the Privy Council appeal. The statement 'most respectfully' protested the policy of the Irish government and made clear that 'the minority which we represent must not be taken as acquiescing therein'.[127] Indeed, the deputation sought to 'impress on the President of the Executive Council the fact that there is a feeling of grave disappointment – we might even say of alarm, on the part of those whom we represent'.[128] The efforts of the delegation to impress the strength of their objections on Cosgrave were not successful. Cosgrave recounted, almost two years after the meeting, that the delegation had been resigned to the position that the Privy Council appeal was bound to be abolished and, consequently, had focused on securing an enlargement of the Supreme Court as an alternative safeguard.[129]

The failure to impress the seriousness of objections to government policy on Cosgrave's mind at the meeting of 10 December 1929, either through poor communication or lapse of memory, had serious consequences. It had a profound influence on the Irish government's reaction to a letter to *The Times* written by the Church of Ireland Archbishops of Armagh and Dublin at the time of the Imperial Conference of 1930.[130] Although the letter did little more than repeat the concerns raised with Cosgrave the previous year, the Irish government seemed to regard it as a bolt from the blue. The government refused to consider the letter as a genuine protest and preferred to regard the Archbishops as proxies in the hands of the British government.[131] This is yet another example of the conspiracy theories that resulted from the breakdown in relations between the Irish government and the Judicial Committee of the Privy Council. In fact, the initiative behind this intervention came from the Archbishops

125 Eg, see *Irish Times* (19 February 1929). The *Irish Times* condemned the Irish practice of passing ad hoc legislation to block appeals as a 'standing protest against the Free State's membership of the British Empire, and a warning to the English people that the Saorstát will secede at the earliest opportunity': *Irish Times* (11 April 1930).

126 Brown and Jameson had not yet come to the conclusion that the appeal was 'futile and an irritant' at this point.

127 TNA-PRO LCO 2/910, statement of 10 December 1929 attached to letter from Archbishop of Dublin to Prime Minister, 27 September 1930.

128 Ibid.

129 NAI, Department of the Taoiseach, S4285A, Michael McDunphy to Diarmuid O'Hegarty, 8 November 1930.

130 *The Times* (7 November 1930).

131 See NAI, Department of the Taoiseach, S4285B, Diarmuid O'Hegarty to Michael McDunphy, 7 November 1930 and W T Cosgrave to Lord Granard, 8 November 1930.

themselves.[132] The British government had actually considered the Archbishops' letter to be an unhelpful intervention and had opposed its publication in the press.[133]

## The Statute of Westminster

The failure to provide evidence of Southern Protestant consent or acquiescence to the abolition of the Privy Council appeal undermined the keystone of the 'cleaning of the slate' agreement. By the middle of 1931 the negotiations had petered out. Unilateral means of abolishing the appeal returned to the forefront of the agenda of the Cumann na nGaedheal government led by W T Cosgrave. Draft legislation to achieve this goal was prepared and members of the Oireachtas were assured that it would be introduced in the near future.[134] However, the introduction of this legislation was delayed for reasons that have never been made clear. The most likely explanation for this delay was the need to avoid disrupting the passage of the Statute of Westminster through the British Parliament in late 1931. The Irish Free State had much to gain from the augmentation of Dominion autonomy offered by this historic piece of legislation. It was imperative to avoid rocking the boat on Privy Council appeals during this sensitive period of time.

Those who professed to sympathise with the Protestant community of the Irish Free State were determined to insert special provisions into the Statute of Westminster Bill to ensure the continuance of the Irish appeal to the Privy Council. Lord Danesfort,[135] himself a Southern Protestant, introduced an amendment to this effect during the Bill's passage through the House of Lords.[136] Danesfort was convinced that the Privy Council was an effective safeguard for Southern Protestants and made it clear that his actions were motivated by concern for the position of his co-religionists in the Irish Free State.[137] Despite impassioned argument, this proposed amendment never had any real chance of acceptance. The British government made it clear that amendment of the agreed text of the

132 The archbishops wrote to the Dominions Secretary, J H Thomas, on 27 September 1930, outlining the arguments that were later used in their letter to *The Times*. The letter ended with an appeal to Thomas to resist any proposal to limit what they saw as a constitutional right granted by the Treaty: TNA-PRO DO 35/88, 4002/3 and LCO 2/910, Archbishop of Dublin to Prime Minister, 27 September 1930. The British government was given the text of their letter to *The Times* three days before publication: TNA-PRO DO 35/88, 4002/5.

133 TNA-PRO LCO 2/910, C Schuster to N M Butler, 7 November 1930.

134 *Dáil Debates*, vol 37, cols 1620–21 (18 March 1931).

135 John Butcher (1853–1935) Baron Danesfort, of Danesfort in the County of Kerry was the second son of Samuel Butcher, Bishop of Meath.

136 Danesfort's amendment would have inserted the following provisions into the Bill: 'Without prejudice to maintenance of the other provisions of the Treaty of sixth December, nineteen hundred and twenty-one, and of the Irish Free State (Agreement) Act 1922, and of the Irish Free State Constitution Act 1922, it is hereby declared that nothing in this Act shall be deemed to authorise the Parliament of the Irish Free State to alter or repeal Section two of the said Treaty or the provisions contained in the Irish Free State Constitution Act 1922, as to the right of any person to petition His Majesty for leave to grant such leave.' : HL Deb 1 December 1931, vol 83, col 231. Danesfort's amendment was, in many respects, a poorly drafted provision. The reference to the 'Supreme Court of Southern Ireland' was an unfortunate, if not untypical, error. There was no such legal entity as 'Southern Ireland' in existence in the 1930s. The reference to the Articles of Agreement of 1921 as 'the Treaty' was particularly regrettable given the insistence of successive British governments on the legal nature of this instrument. Even though British officials, for the sake of convenience, often referred to the agreement reached in 1921 as 'the Treaty', their official position was that it was nothing of the sort in strict legal terms. For a discussion of this issue, see Henry Harrison, *Ireland and the British Empire* (Robert Hale & Co 1937) 131–70.

137 HL Deb 1 December 1931, vol 83, cols 232–23. Danesfort supported his claim that the appeal was an effective safeguard by pointing to the final outcome of the appeals concerning the transferred civil servants. See *Wigg and Cochrane v The Attorney General of the Irish Free State* [1927] IR 285 and *In re Compensation to Civil Servants under Article X of the Treaty* [1929] IR 44.

Statute of Westminster would never be acceptable to the Dominions.[138] The leader of the Conservative Party in the House of Lords, Lord Hailsham,[139] also stressed that acceptance of the amendment would damage Anglo-Irish relations and would also have wider ramifications throughout the Commonwealth.[140] Even Lord Midleton, a leading Southern Unionist who had lobbied for safeguards for the Protestant community during the negotiations on the 1921 Treaty and the 1922 constitution, failed to support Danesfort's initiative. Midleton did not underestimate the determination of the Irish government on this issue. He told the House of Lords that even if the amendment were passed it would prove ineffective, as 'We all know that we are not going by force of arms to reaffirm the right of appeal to the Privy Council.'[141] The defeat of the amendment meant that all that Danesfort and his supporters could do was to call upon the leaders of the Irish government to pause before carrying out a measure that would be seen as a 'gross breach of faith'.[142]

## The abolition of the Privy Council appeal

The Statute of Westminster was finally enacted without any major deviation from the text that had been agreed at the Imperial Conference of 1930. In February 1932 the Cosgrave government lost a general election in the Irish Free State and was replaced by a new Fianna Fáil government led by Eamon de Valera. The new administration promised a programme of constitutional reform that was far more radical than anything proposed by Cumann na nGaedheal. Ironically, this actually provided the Privy Council appeal with a short stay of execution. The removal of the controversial parliamentary oath was the priority issue for the new Irish government and this objective was not achieved until 1933.[143] Then and only then, did the Fianna Fáil government introduce the Constitution (Amendment No 22) Bill into the Oireachtas, which aimed at abolishing the appeal to the Privy Council from the Irish courts.

De Valera had hoped that the constitutional amendment abolishing the appeal to the Privy Council would attract unanimous support in the Oireachtas.[144] This hope was dashed when members of the minority community in the Oireachtas registered strong protests. Those who spoke against the constitutional amendment in the Dáil included Professor William Edward Thrift[145] and John Good.[146] Sir John Keane spoke against this measure in the Seanad.[147] The most interesting intervention was that of Professor Thrift, a future Provost of Trinity College Dublin.[148] The strength of the intervention of a relatively passive TD who seldom spoke in the Dáil seemed to take the house by surprise.[149] Thrift was incensed at the policy of successive Irish governments, which took for granted the support or acquiescence of the minority community with respect to opposition to the Privy

138 This had been recognised in the report of the Imperial Conference of 1926.

139 Douglas McGarel Hogg, Viscount Hailsham (1872–1950) was Lord Chancellor (1928–1929) and (1935–1938).

140 HL Deb 1 December 1931 vol 83, col 237–41.

141 Ibid col 244.

142 Ibid col 243.

143 Constitution (Removal of Oath) Act 1933.

144 *Dáil Debates*, vol 17, col 2116 (4 October 1933).

145 TD for Dublin University.

146 TD for Dublin County.

147 *Dáil Debates*, vol 17, col 1681 (31 October 1933).

148 Thrift was Professor of Natural and Experimental Philosophy (1901–1929) and Vice-Provost (1935–1937). He was a TD for Trinity College Dublin (1922–1937) before he became the Provost of that university (1937–1942).

149 *Irish Times* (Dublin, 13 October 1933).

Council. Thrift insisted that protests had been registered on every occasion on which the Irish appeal to the Privy Council had been attacked.[150] He objected to the final abolition of the appeal on the basis that it had been part of a bargain concluded between the majority and minority communities that underpinned the foundation of the Irish Free State.[151] Thrift emphasised that the Privy Council appeal had been one of a number of vital concessions that had won the acquiescence of Southern Protestants to the conclusion of the 1921 Treaty. He concluded that the minority community had honourably maintained its side of the bargain and that integrity of the majority community was now in doubt:

> When concessions are made in a bond it is not an honest way of dealing with that bond immediately to set yourself out to remove from the bargain – because you have the power – anything that you do not like in that bargain. That is not the way I understand such a bargain at any rate . . . Whittle away this concession and every other concession until you get the Treaty to the form in which you want it and what chance have you of making any bargain in the future with those who disagree with you?[152]

De Valera flatly denied the existence of the bargain asserted by Thrift. Arguments based on a betrayal of trust that were founded on the conclusion of the 1921 Treaty left him unmoved.[153]

The Irish government was far more concerned with opposition from a completely different quarter. The Privy Council granted leave to appeal the decision of the Irish Supreme Court in *Moore v Attorney General* while the Constitution (Amendment No 22) Bill was being debated in the Oireachtas. This appeal would give the Privy Council the opportunity to pass judgment on its own abolition with respect to the Irish Free State and on all the other constitutional amendments aimed at dismantling the settlement imposed by the 1921 Treaty.[154] The Irish government attempted to prevent this by introducing the last in a long line of efforts to block Irish appeals to the Privy Council. This took the form of making the abolition of the Privy Council appeal retrospective in effect in the final text of the Constitution (Amendment No 22) Act 1933.[155] The determination of the Privy Council to consider the appeal in defiance of these actions made it clear that the long-running dispute over Irish appeals still had at least one more round to run.

The decision of the Privy Council in *Moore v Attorney General* was finally delivered in 1935. The Judicial Committee unexpectedly upheld the validity of its own abolition in relation to the Irish Free State. The substance of the decision of the Privy Council was summarised in a single sentence:

150 *Dáil Debates*, vol 49, col 2389 (12 October 1933).

151 *Dáil Debates*, vol 49, cols 2389–90 (12 October 1933). Thrift made a similar argument during the debates on the Constitution (Removal of Oath) Act 1933. Dáil Debates, vol 41, cols 922–33 (29 April 1932).

152 *Dáil Debates*, vol 49, cols 2389–90 (12 October 1933).

153 Ibid col 2392.

154 At this point these included Constitution (Removal of Oath) Act 1933, Constitution (Amendment No 20) Act 1933, Constitution (Amendment No 21) Act 1933 and Constitution (Amendment No 22) Act 1933.

155 S 2 provides: 'The amendments made in this Act in Article 66 of the Constitution shall, in relation to judgements and orders pronounced or made by the Supreme Court before the passing of this Act apply and have effect in regard to the institution and prosecution, after the passing of this Act of an appeal or a petition for leave to appeal from any judgement or order and to the further proceeding after the passing of this Act of an appeal or a petition for leave to appeal from any judgement or order which was instituted before such passing.'

> The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power.[156]

This surprising decision seemed to confound critics of the Judicial Committee of the Privy Council in the Irish Free State who questioned the objectivity of this court. Nevertheless, to many observers the abolition of the appeal and its confirmation by the Privy Council itself cut the final bonds between the United Kingdom and the Protestants of the Irish Free State. Ronald Ross, an Ulster Unionist MP, expressed his dismay that the Protestants who had decided to stay and keep their property in the Irish Free State on the basis of certain safeguards were 'now at the mercy of the courts of that country without appeal'.[157] It is important to emphasise that suspicions as to the objectivity of the Judicial Committee of the Privy Council expressed by Irish Nationalists were matched by expressions of distrust by Unionists as to the objectivity of the courts of the Irish Free State.[158] Yet, the dismay of Unionists at Westminster at the demise of the Irish appeal to the Privy Council seems to reflect deeper concerns. The United Kingdom was seen as having a special duty in maintaining the rights of the minority community. This was reflected in a number of unsuccessful attempts to amend the Statute of Westminster, sponsored by Winston Churchill and others, in order to safeguard the Privy Council appeal.[159] It was a responsibility that was seen as important in maintaining a direct link between the United Kingdom and this minority community. This link was now seen as having been severed as a result of careless concessions granted to the Irish Free State by the Statute of Westminster that had been pushed through by a British government whose priorities did not include protecting the interests of the Protestants of the Irish Free State.[160] If the term 'ex-Unionists' was not an accurate description of the views of Southern Protestants in 1935, there was now little to prevent it from becoming increasingly accurate in the future.

156 Per Sankey LC [1935] IR 472, 486–87 and [1935] AC 484, 499. This judgment was based on the assertion that the Irish 1922 constitution had been created by the Irish Free State Constitution Act 1922, an imperial statute passed at Westminster. The enactment of the Statute of Westminster had removed any fetters that might have been placed on the Irish Free State in terms of amending imperial legislation. This meant that the Oireachtas was capable of removing the provisions of the 1922 Act that demanded that all Irish laws be compatible with the 1921 Treaty. This had purportedly been done by means of the Constitution (Removal of Oath) Act 1933. Consequently, the Oireachtas was also capable of abolishing the appeal to the Privy Council under Constitution (Amendment No 22) Act 1922 notwithstanding questions of compatibility with the provisions of the 1921 Treaty. A detailed analysis of *Moore v Attorney General* can be found in Mohr (n 17).

157 HC Deb 20 June 1935, vol 303, cols 639–40.

158 Eg, see A B Keith, *The Constitutional Law of the British Dominions* (MacMillan 1933) 271–72.

159 One amendment, moved in the House of Commons by Colonel John Gretton, was aimed at maintaining the integrity of the entire Treaty settlement. From a British perspective, the Privy Council appeal was a key aspect of this settlement. The proposed amendment would have provided that: 'Nothing in this Act shall be deemed to authorise the Legislature of the Irish Free State to repeal, amend, or alter the Irish Free State Agreement Act, 1922, or the Irish Free State Constitution Act, 1922, or so much of the Government of Ireland Act, 1920, as continues to be in force in Northern Ireland.': HC Deb 24 November 1931, vol 260, col 303. The defeat of this amendment resulted in an attempt at amendment moved by Lord Danesfort that was aimed specifically at the Privy Council appeal. See n 136.

160 The British government had insisted in 1931 that the enactment of the Statute of Westminster would not permit the Irish Free State to dismantle the Treaty. For example, Stanley Baldwin told the House of Commons: 'I am advised by the Law Officers of the Crown that the binding character of the Articles of Agreement will not be altered by one jot or tittle by the passing of the Statute.': HC Deb 24 November 1931, vol 260, col 344. These words came back to haunt Baldwin in the aftermath of the Privy Council's decision in *Moore v Attorney General*: HC Deb 10 July 1935, vol 304, cols 439–47.

## Conclusion

The institution of the Seanad, university representation in the Dáil and the appeal to the Judicial Committee of the Privy Council were all perceived as safeguards for the Southern Protestant minority. By the middle of 1936 all these institutions had been removed from the Constitution of the Irish Free State.[161] The provisions of Article 8 of the 1922 constitution[162] and the proportional representation voting system were left as isolated survivors of the undertakings that had been given to the Southern Protestant minority in the early 1920s.[163] These developments led to predictable accusations of 'betrayal' at Westminster. This can be seen in the context of the abolition of the Privy Council appeal in 1933, which provoked Edward Carson, in one of his last speeches to the House of Lords, to deliver a political swansong resonant with unleavened bitterness:

> All I can say . . . is that every single promise we have made to the loyalists of Ireland has been broken, that every pledge of law and order has been destroyed, that everything that makes life and property safe has gone and now the last remnant is to be taken away.[164]

What conclusions can be drawn as to the relationship between the Protestants of the Irish Free State and the Privy Council appeal? As has already been noted, the political views of this community remain notoriously difficult to pin down. Even persons who were themselves members of that community admitted the difficulties of gauging the overall opinion of their co-religionists.[165] Nevertheless, it is clear that most Protestant members of the Oireachtas disapproved of the Irish government's actions in blocking Privy Council appeals. This is evident from the informal consultations that took place in 1931. Senators Douglas and Brown warned of the danger of radicalising Protestant opinion if this policy was maintained, as it was with respect to the appeal in *Moore v Attorney General*.[166]

More importantly, it is clear that the extent and depth of Southern Protestant support for the appeal to the Privy Council from the Irish courts was consistently underestimated throughout the lifetime of that appeal. This consideration is evident in the flawed analysis of the opinions of Protestant members of the Oireachtas that was presented to the British government by Senators Brown and Jameson in 1931. The views of the delegation that visited W T Cosgrave in 1929 to protest the policy of his government with respect to the appeal proved to be words written on water. The letter written to the press by the Church of Ireland Archbishops in 1930 was written off as a ploy by proxies of a devious British

161 Constitution (Amendment No 24) Act 1936, Constitution (Amendment No 23) Act 1936, Constitution (Amendment No 22) Act 1933. Seán Lemass made the following remarks during the debates that preceded the abolition of the Free State Seanad: 'Is it not about time that the democracy of this country was taken out of the leading strings of that very small minority who previously had it in halters? . . . If there is going to be a dictatorship in consequence of this measure, it will be a dictatorship of the majority of the Irish people . . . If we abolish the veto of that [minority] group, if the Granards and the Jamesons and the like are no longer to be in a position to block the progress of the Irish nation . . .': *Dáil Debates*, vol 51, cols 1868–69 (18 April 1934). It should be noted that Lord Granard and Andrew Jameson were supporters of the abolition of the appeal to the Privy Council from the Irish courts.

162 Later substantially reproduced in Article 44 of the Irish Constitution of 1937.

163 Even proportional representation was threatened with replacement in referenda held in 1959 and 1968. It survived these challenges and has emerged intact into the twenty-first century.

164 HL Deb 6 December 1933, vol 90, col 335.

165 Senators Brown and Jameson admitted this in their interview with J H Thomas on 17 September 1931: TNA-PRO DO 35/127/7 file 4431/20, note of interview between Mr Thomas and Senator Brown and Senator Jameson, September 1931.

166 UCD Archives, McGilligan Papers, P35/166, undated memoranda by Senators James Douglas and Samuel L Brown.

government. The consistent stance of the *Irish Times* seems to have made little impact outside the readership of that newspaper.

The constant underestimation of support for the Privy Council appeal among the Southern Protestant community did come at a price. It was this consideration that led to the failure of the proposed resolution that was intended to show that Protestant members of the Oireachtas did not value the appeal, which, in turn, doomed the proposed 'cleaning of the slate' agreement. The same underestimation of support led Eamon de Valera to voice his expectation that abolition of the appeal would be passed by universal acclaim when the necessary legislation was finally presented to the Oireachtas.[167] De Valera seemed genuinely surprised when embarrassing voices of opposition from the Southern Protestant community were raised.

All these considerations should cause the historian to hesitate before echoing the position asserted by representatives of Irish governments, who were by no means disinterested parties, and concluding that opposition to the abolition of the Privy Council appeal in the 1930s only came from 'a tiny vociferous, proportion of former Unionists'.[168] Nor is it safe to dismiss a position that was supported by the majority of the Southern Protestants at Westminster, by a significant number of Protestant members of the Oireachtas, by the *Irish Times* as the major newspaper of the minority community, by three successive Provosts of Trinity College Dublin[169] and by the leaders of the Church of Ireland as the viewpoint of 'cranks' or 'a handful of extremists'.[170]

The attitude of the population of the Irish Free State to the Privy Council appeal as a whole is not open to dispute. There can be little doubt that the majority saw the appeal as a serious attack on national dignity and national sovereignty. On a similar theme, few people in living in the inter-war years would have disputed that relations between the majority and minority communities were far healthier in the Irish Free State than in neighbouring Northern Ireland. Yet, equally few have been able to endorse McGilligan's claim that Irish Catholics had 'never been guilty of religious intolerance'.[171] De Valera's belief that 'this country knows nothing about religious persecution and intolerance' can be placed at the same level of hyperbole.[172] Confident assertions by successive Irish governments that the overwhelming majority of 'ex-Unionists' rejected the need for an appeal to an external court supported the convenient conclusion that there was no real 'minority community' in the Irish Free State.

The ability of Irish ministers to 'look into the hearts' of Southern Protestants and so glean their political opinions was matched by a determination to abolish the Privy Council appeal even if, contrary to their divination, a majority of Southern Protestants turned out to be opposed to this course of action. W T Cosgrave deplored the contention that 'a minority of seven and a half per cent should be entitled to prevent the wishes of the remaining 92 and a half from being realised' with respect to the Privy Council appeal.[173] In 1933 the abolition of the appeal was opposed in the Oireachtas on the basis that it violated

167 *Dáil Debates*, vol 17, col 2116 (4 October 1933).

168 Swinfen (n 24) 124.

169 John Henry Bernard (1919–1927), Edward John Gwynn (1927–1937) and William Edward Thrift (1937–1942).

170 TNA-PRO DO 35/127/7 Granard to Thomas, 20 August 1931, and McGilligan (n 23).

171 NAI, Department of the Taoiseach, S4285B, transcript of radio broadcast of 9 November 1930.

172 NAI, Department of Foreign Affairs, 3/1. De Valera wrote this in a draft speech that was intended to accompany the introduction of the Bill designed to abolish the Privy Council appeal in 1933.

173 NAI, Department of the Taoiseach, S4285B, Cosgrave to Granard, 8 November 1930.

an unwritten 'bargain' between the majority and minority communities that underpinned the foundation of the state. Eamon de Valera responded in uncompromising terms:

> If there are any bargains standing in the way of the sovereignty of our people they have got to go. That is our attitude at any rate, and that is the spirit in which I move that the Bill [to abolish the Privy Council appeal] do now pass.[174]

Over seven decades have passed since the abolition of the Irish appeal to the Privy Council. Today, Irish citizens can access a number of external tribunals in order to assert their rights. These include the European Court of Justice and the European Court of Human Rights. Yet, it is important to examine the history of the Irish appeal in the context of the early twentieth century and not that of the early twenty-first century. The circumstances in which the self-governing Irish state was created, together with the limitations on key areas of sovereignty that remained after 1922, did not create favourable conditions for the toleration of an external tribunal sitting in London. The appeal was seen as having been imposed on the Irish Free State by stealth and serious doubts as to the objectivity of this court gained wide currency in Irish political circles. The Irish Free State was far from unique in inter-war Europe in witnessing a conflict between assertions of national sovereignty and demands for the protection of the rights of vulnerable minorities. This article is not intended to pass judgment on this conflict and its final resolution. Its only purpose is to illustrate the existence of this conflict. This is necessary because its significance has, in the past, been dismissed without detailed investigation or, far more commonly, been ignored completely.

It is important to remember that the 'disappearance of Britain', the theme of this special issue of the *Northern Ireland Legal Quarterly*, first manifested itself in the secession of much of the island of Ireland from the United Kingdom. Many of those who had opposed this process opted to leave the 26 counties after 1922. For those who shared this political perspective, yet opted to remain in the new Irish Free State, the appeal to a court in London represented a real link with a United Kingdom from which they were now excluded. It is also important to recognise that a substantial portion of the population of the Irish Free State did feel uneasy and vulnerable in this new and untested entity. One or both of these considerations ensured that a considerable number, perhaps even a majority, of Southern Protestants did value an appeal to an external tribunal in order to uphold their rights in the last resort. The protests that accompanied the removal of this appeal indicate that these considerations remained relevant more than a decade after the creation of the state. If firmer foundations in cross-community relations were gradually established in the decades that followed, a contention that few would deny, it is important that this signal achievement should not be taken for granted or dismissed as being in some way inevitable.

174 *Dáil Debates*, vol 49, col 2392 (12 October 1933).

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# The evolution of a public sentinel: Australia's Solicitor General

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> There is obviously no magic in institutions that were developed for an age which has long disappeared.[1]

## Introduction

In the state and federal jurisdictions of Australia the historic 'law officer' role of chief legal adviser and advocate for the Crown is now performed by the *second* law officer, the Solicitor General. In Australia, the Attorney General now performs an almost exclusively political function as one of the ministers of the Crown. The Attorney is concerned with day-to-day political pressures and has little or no time, often not the expertise, and increasingly lacks the necessary independence and detachment to fulfil the traditional legal functions of the role.[2] The progression in the first law officer's role has been marked by the devolution of many of the traditional legal functions of the law officers to the Solicitor General. It is now the Solicitor General who provides the final constitutional and legal foundation for government action and legislative policy. In many respects, the Solicitor General has become the first law officer in all but name.[3]

The British tradition of the law officers was forged over centuries, from the King's personal attorney and solicitor, to the more recognisable paradigms of Attorney and Solicitor

* I have many people to thank for their assistance in researching this article, which forms part of my PhD research on the constitutional role of Australian Solicitors General. I would particularly like to acknowledge my supervisors, Professor John Williams, the Hon Chief Justice Patrick Keane, Professor Clem Macintyre, and also the assistance of the Hon Keith Mason AC QC and Leigh Sealy QC. I would also like to thank the referees for their comments. Responsibility for mistakes and oversights remains with me.

1 Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government: vol 1 Principles and Values* (The Law Book Company 1995) 102.

2 See further analysis of the shift of the Attorney General towards the political in Fiona Hanlon, *An Analysis of the Office of Attorney General in Australia and Directions for the Future* (PhD Thesis, University of Melbourne 2007); Fiona Hanlon, 'Death of the Rule of Law? The Attorney General – First Law Officer of the Crown, Political Guardian of the Rule of Law, or just Another Politician? – An Historical Assessment of the Office in Australia and Directions for the Future' (12th Annual Public Law Weekend, National Museum of Australia, Canberra, 9–10 November 2007); Gareth Griffith, 'The Office of Attorney General in New South Wales' (2007) 11 Legal History 79; Alana McCarthy, 'The Evolution of the Role of the Attorney-General' (2004) 11(4) Murdoch University Electronic Journal of Law.

3 John Ll J Edwards commented that: 'In terms of legal expertise and judgment the burden rests on the shoulders of the Solicitor General, a non-political office.'; John Ll J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell 1984) 371.

General.[4] Today in Britain these offices carry distinct legal and public interest obligations in addition to those they owe as political ministers of the Parliament. In Britain the tensions that result from combining these obligations and loyalties have never been adequately resolved. The law officers must find a delicate balance between the necessary loyalty they must exhibit as executive ministers and the independence from political interests that is fundamental to the provision of accurate and robust legal advice and for making decisions about where the public interest lies, for example, in prosecutorial matters.[5] The tensions have variously attempted to be reconciled in Britain by the doctrines of 'independent aloofness', where the Attorney General does not engage too closely in government policy, political debates and party politicking,[6] or that of 'intimate but independent involvement'.[7] At the turn of the twenty-first century, these tensions in Britain were again under scrutiny when the independence of the Attorney General's advice to the government on the legality of the Iraq War was brought into question. The episode was a reminder of the ongoing weaknesses of the British model and the propensity for political pressure to be placed on the law officers, particularly in the carriage of their legal functions.[8]

In the nineteenth century, the British tradition was received in many of the Australian colonies. But it was not long until the law officers started to evolve with the new constitutional landscape, so that eventually a very different, non-political role has been forged for the Solicitor General to complement a now overtly political Attorney General. This has created a paradigm in which the legal functions of the law officers, at least, have been freed from many of the controversies that continue in Britain.[9] The current framework in which the Solicitor General operates allows the independent discharge of the legal services function of the law officer free from political pressures. The placement of the

4 For a fuller account of the evolution of the British Law Officers, see John Ll J Edwards, *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell 1964); W S Holdsworth, 'The Early History of the Attorney and Solicitor General' (1918–1919) 13 Illinois Law Review 604; James William Norton-Kyshe, *The Law and Privileges Relating to the Attorney-General and Solicitor-General of England: With a History from the Earliest Periods, and a Series of King's Attorneys and Attorneys and Solicitors-General from the Reign of Henry III to the 60th of Queen Victoria* (Stevens & Haynes 1897).

5 Further discussion on the 'tightrope' of interests that the law officers must navigate in Britain can be found in Neil Walker, 'The Antinomies of the Law Officers' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press 1999) 135; Edwards (n 4); Edwards (n 3).

6 For a strong account of the doctrine of independent aloofness, see Peter Rawlinson, 'A Vital Link in the Machinery of Justice' (1977) 74 Guardian Gazette 798, 799.

7 See S C Silkin, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978) 59 The Parliamentarian 149. For further discussion of the two doctrines, see Edwards (n 3) 67–71.

8 This affair led to a series of government and parliamentary inquiries on the role of the Attorney General. See the initial government White Paper, *The Governance of Britain: A Consultation on the Role of the Attorney General* (Cm 7192, 2007), and the subsequent parliamentary reports: House of Commons Constitutional Affairs Committee, *The Constitutional Role of the Attorney General: Fifth Report of Session 2006–2007* (HC 2007, 306) and House of Lords Select Committee on the Constitution, *Reform of the Office of Attorney General: Report with Evidence* (HL 2008, 93). One recommendation that was made was the division of the Attorney General's role between a Minister of Justice and a non-political legal officer to perform the legal services function. This model closely aligns with that which has evolved in the Australian jurisdictions. The recommendation was rejected by the government: United Kingdom Government, *The Government's Response to the Constitutional Affairs Select Committee Report on the Constitutional Role of the Attorney General* (Cm 7355, 2008).

9 For example, Electoral and Administrative Review Commission, *Report on Review of the Independence of the Attorney General* (EARC 1993) 2, 16–17, McCarthy (n 2) para 15. Although the continued exercise of some of the public interest and administration of justice functions by the Attorney General, such as the instigation of public interest litigation or the grant of a fiat in relator actions and the defence of the judiciary from criticism, have continued to attract controversy and robust critique in Australia: see, eg, Hanlon, *An Analysis* (n 2); Patrick Keyzer, *Open Constitutional Courts* (The Federation Press 2010), ch 4.

Solicitor General outside politics with statutorily guaranteed tenure, remuneration and pension created an office that provides both the actuality and appearance of independence in the discharge of the legal advisory role. The non-political nature of the office and its exclusively legal focus has also meant that there has been a shift in its essence: officeholders have moved away from being politicians with some legal qualifications and are now highly qualified legal professionals.

The development of the Australian paradigm of the Solicitor General is largely untold.[10] This article chronicles the story of the Solicitor General across three phases. The first phase commenced in the early nineteenth century. In this phase the law officers, as best they could in the colonial conditions, mirrored the British tradition. The introduction of self-government to the colonies in the 1850s brought familiar tensions in the offices between loyalties to executive interests and the parliament, although in the colonial parliament these were aggravated as the law officers were also members of the Executive Council. In the second phase the Solicitor General became a non-political, public service position. This commenced in Tasmania as early as the 1860s and was gradually adopted across the other jurisdictions. The third phase started in Victoria in 1951 with the introduction of a quasi-independent statutory counsel position. This was a uniquely Australian paradigm that would emerge as the preferred model across all of the jurisdictions in the second-half of the twentieth century. It would eventually become a specialist position in high-level constitutional and public law advice and litigation. This paradigm has remained stable in Australia since the 1970s.

## The British tradition in the colonies

The law officers were initially introduced in the colonies as far as practicable modelled on the British tradition. This is discernible in the colonies of New South Wales, Van Diemen's Land (later called Tasmania) and later Victoria.[11] This period in the law officers' development was characterised by questions over how to adjust the British traditions to colonial circumstances; the necessity of two law officers in light of concerns about finances and over-governance; the independence of the law officers, particularly as they became responsible ministers and took up seats in the Executive Council; and the broader responsibility of the law officers for the provision of legal services across the whole of government, a wider mandate than existed in Britain. It was these concerns and developments that would eventually form the impetus for lasting change in the office.

10 The exception being histories available in New South Wales: Keith Mason, 'The Office of Solicitor General for New South Wales' (1988) Autumn Bar News 22; and more recently in Queensland: Crown Law, *In My Opinion: The History of Crown Law Queensland 1859–2009* (Crown Law, Department of Justice and Attorney General 2009).

11 In Western Australia and, by and large, in South Australia and Queensland (there had been single, brief appointments of Solicitor General in the 1890s in these jurisdictions, but the office did not establish itself permanently), the position of Solicitor General did not emerge until the twentieth century. This has led one historian, and former Solicitor General, Keith Mason, to comment: 'a polity can get along just fine without a Solicitor General': Keith Mason, 'Aspects of the History of the Solicitor General in Australia, 1788 to 1970' (The Role of the Solicitor General in the Legal and Political Landscape conference, Bond University, 15 April 2011) 13. However, in these colonies other officers, while they lacked the appellation, carried out the functions of the Solicitor General. For example, in 1836 when the province of South Australia was established it had an Advocate General: Order-in-Council Establishing Government, 23 February 1836 (UK); Gordon D Combe, *Responsible Government in South Australia* (Wakefield Press 1957) 8; *Attorney General v Adams* [1965] SASR 129, 132 (per Napier CJ); *The Cyclopedia of South Australia* (The Cyclopedia Company 1907) 335.

## Colonial beginnings: adopting and adapting the British tradition

The colony of New South Wales was given an Attorney General as early as 1823, and the appointment was quickly followed by the creation of a deputy for the office in the form of a Solicitor General. From this beginning, the evolution of the two offices would continue to be closely related. The first colonial Attorney General was appointed in New South Wales in 1823 by the Colonial Secretary from the English Bar.[12] The appointment was made pursuant to the recommendations of the influential Bigge Report.[13] Prior to that, the colonial governor would refer important questions of law to the British law officers.[14] Prosecutorial functions were performed by the Deputy Judge Advocate, who was also called upon for legal advice.[15] The Bigge Report was critical of the concentration of powers in the Judge Advocate and recommended the appointment of an Attorney General to act as grand jury and prosecute criminal matters, as well as draft legal documents and legislation for the governor.[16] The Attorney General's other roles included providing legal advice to the government and acting as counsel in civil matters.[17]

The colony's first Solicitor General was appointed in 1824 under letters patent.[18] The appointment read:

> The Solicitor General will by virtue of his appointment be considered as the legal adviser of Her Majesty's Government in the Colony, either in cases where sickness or absence of the Attorney General or any other unavoidable cause may render it necessary to employ a substitute for that Office, or in cases which for their peculiar difficulty or importance require that the Attorney General should have the professional assistance of another Counsel.[19]

The colony of Van Diemen's Land was established separately from New South Wales in 1824 with a governor advised by a Crown Council. An Attorney General was appointed in 1824, and a Solicitor General in 1825 (who was also shortly thereafter appointed Crown Solicitor).[20]

The creation of the colonial law officers was considered to have brought with it all the common law duties and powers of the offices applicable to the circumstances of the colony.[21] The early appointments of the law officers in both colonies mirrored as far as possible that in Britain, despite dramatic differences in constitutional context (namely the

12 Edwards (n 3) 367; Norton-Kyshe (n 4) 49, fn 1.

13 John Thomas Bigge, *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land (Common's Paper 33, ordered to be printed 21 February 1823, Lords Paper (118) ordered to be printed 4 July 1823) Facsimile* (Libraries Board of South Australia 1966) 56–57.

14 For example, extract of opinions of the English law officers to the governor in J M Bennett and Alex C Castles, *A Source Book of Australian Legal History* (The Law Book Company 1979) 263–66. See also Herbett Vere Evatt, 'The Legal Foundations of New South Wales' (1938) 11 Australian Law Journal 409, at 416.

15 Evatt (n 14) 416; J M Bennett, 'The Status and Authority of the Deputy Judge Advocates of New South Wales' (1956–1958) 2 Sydney Law Review 501; Terry Kass, *A Brief History of the Attorney General's Department* (Attorney General's Department 1996) 5.

16 Bigge (n 13) 56–57, 59.

17 New South Wales Act 1823; Kass (n 15) 6.

18 *Historical Records of Australia* (HRA), *Series I: Governors' Dispatches to and from England*, vol XI, 199; vol XIV, 372; Mason (n 10) 22.

19 HRA, Series I, vol XI, 199.

20 HRA Series III, vol IV, 265, see also at 270 and vol V, 61; A Colonist, 'Correspondence: To His Honor Lieutenant Governor Arthur', *Hobart Town Gazette and Van Diemen's Land Advertiser*, 10 June 1825, 3 <http://newspapers.nla.gov.au/ndp/del/article/1090808?searchTerm=%22solicitor+general%22> accessed 11 October 2011.

21 HRA, Series I, vol XI, 883–84; Griffith (n 2) 95–96.

absence of representative or responsible institutions). The Solicitor General was the more junior law officer appointed to assist the Attorney General and a natural stepping stone to the senior position. The offices enjoyed the right to private practice until the 1890s.[22] The appointment of law officers early in the colonies' history demonstrates that even in the context of a penal colony, the importance of government within the law was recognised and this required access to independent legal advisers.

The law officers in both colonies quickly came to be among the appointed advisers to the governor. When the Solicitor General was created in New South Wales, the officer joined the Attorney General as a member of the Executive Council advising the governor (although at this time the governor was not bound to follow such advice).[23] In Van Diemen's Land, the Attorney General was made an *ex officio* member of the Crown Council in 1830.[24] The focus of qualification for appointment to the offices in the early years was primarily political.[25] The practice of the law officers sitting in the Executive Council was a marked departure from that in Britain,[26] although, unlike the British Cabinet, the institution lacked actual political power at this early stage. It is likely, however, that the practice set a precedent that would continue when responsible government was introduced and power vested in the Executive Council (later the Cabinet). The ramifications of this are returned to later.

In the 1820s and 1830s, despite difficulties in the colonial conditions, it was repeatedly confirmed that as far as possible the law officers' duties should follow the division in England.[27] In 1836 the New South Wales Solicitor General was abolished, in all likelihood because of the bickering between the law officers over the division of responsibilities.[28] By 1840 the governor requested the re-establishment of the office to allay concerns about delays in the law business of the Crown which now devolved on the Attorney General, and also to ensure there was a person to perform the Attorney's duties during his absence.[29] However, the Colonial Secretary refused the request because of concerns about the finances and over-governance of the colony.[30] Despite this, in 1841 the governor appointed an acting Solicitor General.[31] The Colonial Secretary refused to confirm the appointment,[32] and the position remained as an acting appointment until 1843 when the new Colonial Secretary decided to revive the office before the first elections for the newly created Legislative Council.[33]

22 Kass (n 15) 6; Edwards (n 4) 98, 100; *The Cyclopedia of Tasmania: An Historical and Commercial Review: Descriptive and Biographical Facts, Figures and Illustrations: An Epitome of Progress: Business Men and Commercial Interests* (Maitland and Krone Publishers 1900); 'Letter to Editor', *The Mercury*, from N E Lewis, 12 December 1905, extracted in full in Royal Commission on the Proposal to Make the Office of Attorney General Permanent Non-Political, *Report of the Commission* (Hobart, John Vale, Government Printer of Tasmania 1908) 39. The right to private practice was reintroduced in Queensland in the 1980s, the reasons for this are detailed below.

23 Edwards (n 3) 367; Alpheus Todd, *Parliamentary Government in the British Colonies* (2nd edn, Longmans Green 1894) 25–26.

24 <www.parliament.tas.gov.au/History/tasparl/mlcs1825to1855.htm> accessed 5 October 2010.

25 Edwards (n 3) 370.

26 Ibid 367–68, 369; Griffith (n 2) 85.

27 See the correspondence in relation to a number of disputes between the law officers in HRA, Series I, vol XIV, 371–73; HRA, Series I, vol XV, 10; HRA, Series I, vol XVII, 284–94.

28 HRA, Series I, vol XVII, 298; see also 585.

29 HRA, Series I, vol XX, 524.

30 HRA, Series I, vol XX, 716.

31 HRA, Series I, vol XXI, 291.

32 HRA, Series I, vol XXI, 299, 468. See also 524.

33 HRA, Series I, vol XXII, 592.

### The colonial law officers take their seats in parliament

In 1842 the creation of a Legislative Council in New South Wales[34] highlighted the increasingly political nature of the law officers in the colonies. The new council was made up of elected members and appointed members. The Colonial Secretary noted that it would be desirable for some of the governor's executive officers in the council to be popularly elected, but it would be 'unadvisable' that other officers, including the Attorney General and the Solicitor General, 'should be dependent on particular constituencies, and appear to represent particular interests' other than the governor.[35]

In 1850, Van Diemen's Land was also given a Legislative Council of appointed and elected members. As was the case in New South Wales, the Attorney General and Solicitor General were appointed and expected to be the 'governor's men' in the council.[36]

Prior to Victoria's separation from New South Wales, the law officers of New South Wales were technically also those for the Port Phillip District, although in practice the superintendent for the district received advice from the local Crown Clerk.[37] After separation in 1851, Victoria established its own colonial law officers. Both officers were appointed members of the Victorian Legislative Council (composed of nominated and elected representatives),[38] and the Attorney General was also a member of the Executive Council, highlighting the more senior and already more politically important nature of this office.[39]

### Responsible government and the Solicitor General: further breaks with tradition

The New South Wales, Victorian and the Tasmanian Constitution Acts of 1855 finally brought responsible government to the colonies and made the law officers among the first responsible ministers of the Crown.[40] Under these constitutions, the governor was no longer solely responsible for the government of the colony. Rather, the governor had to act on advice of his elected ministers. The law officers were, as in Britain, now responsible ministers. However, in each colony they also formed part of the Executive Council, the core group of ministers that advised the governor on the exercise of his power.

In New South Wales, the law officers were named in the five permanent heads of departments who made up the Executive Council.[41] The Solicitor General shared departmental responsibility with the Attorney General.[42] While it may appear strange that

34 Which at that time included Victoria and Queensland.

35 A C V Melbourne, *Early Constitutional Development in Australia: New South Wales 1788–1856 Queensland 1859–1922* (University of Queensland Press 1963) 275, extracting Letter from Lord Stanley to Governor Gipps, Private, 5 September 1842, CO 202/45.

36 <www.parliament.tas.gov.au/History/tasparl/mlcs1825to1855.htm> accessed 5 October 2010.

37 Hanlon, *An Analysis* (n 2) 42, referring to Colonial Secretary to C J La Trobe, 9 January 1840, extracted in P Jones, *Beginnings of Permanent Government*, Historical Records of Victoria Foundation Series (Victorian Government Printing Office 1981) 288.

38 Edward Sweetman, *Constitutional Development of Victoria 1851–1856* (Whitcombe & Tombs Ltd 1920) 28.

39 Ibid 73; Public Record Office Victoria, *Function VF 169, Solicitor General* <www.access.prov.vic.gov.au/public/component/daPublicBaseContainer?component=daViewFunction&breadcrumbPath=Home/Access%20the%20Collection/Browse%20The%20Collection/Function%20Details&entityId=169#> accessed 5 October 2010.

40 Hilary Golder, Politics, *Patronage and Public Works: The Administration of New South Wales vol 1, 1842–1900* (University of New South Wales Press 2005) 108; John Michael Bennett, *A History of the New South Wales Bar* (Law Book Company 1969) 72.

41 Kass (n 15) 9.

42 Golder (n 40) 121.

a small colonial government would need two law officers in the Executive Council, this reflected its colonial past, largely defined by legal and convict business.[43] In Victoria, the Solicitor General also joined the Executive Council,[44] and was occasionally held with the Ministry of Justice, or they would occur in the alternative.[45]

For the first time, the law officers were, as in Britain, made responsible and accountable to the parliament for the exercise of their independent discretions (such as the prosecutorial discretion). However, responsible government also saw the introduction of collective accountability and the inclusion of the law officers in the Executive Council brought different challenges to bear on the officers' independence.[46] A number of episodes in Victoria highlighted the tensions between the law officers' loyalty to the political executive as responsible ministers and membership of the Executive Council on the one hand, and their legal and public interest obligations on the other.

In 1864 and 1878 the independence of the advice of the Victorian law officers from the government was called into question. George Higinbotham, the Attorney General, and Archibald Michie, the Solicitor General, were both members of the Executive Council and held seats in the Legislative Assembly. In 1864, the Legislative Council was unpersuaded by the law officers' opinions that the tacking of a tariff reform Bill onto an appropriation Bill was lawful. Many in the Council particularly questioned the independence of the advice of the politically ambitious Higinbotham.[47] When the matter finally came to a head, the governor refused to receive advice from the British law officers, claiming he must accept the opinions of his local law officers.[48]

In the second instance, in 1878, the governor actively sought advice from the British law officers after receiving conflicting advice from his colonial law officers over whether approval of the council was required in relation to Bills of supply.[49] The Colonial Secretary replied that the governor had an independent constitutional duty to assess the legality of any questionable action. In a statement that is clearly based on a British assumption that law officers operated with ostensible independence, the Colonial Secretary said that, in such cases, the governor should request the advice of the law officers in their capacity as 'the authorised exponents to the law' and not as political advisers.[50] In debate in the House of Lords, Lord Carnarvon asserted that in the circumstances he would have preferred for the appointment of 'one permanent and impartial legal adviser, who might be in a position to advise a colonial Governor as emergencies arose'.[51] This suggestion was strongly refuted by Higinbotham, who noted the similarities between the colonial and British law officers, and said that the suggestion of a separate law officer to advise the governor in urgent matters was 'illegal' and 'absurd'.[52]

43 Arthur McMartin, *Public Servants and Patronage: The Foundations and Rise of the New South Wales Public Service 1786–1859* (Sydney University Press 1983) 267.

44 Sweetman (n 38) 81, 83.

45 James Smith, *The Cyclopedia of Victoria: An Historical and Commercial Review: Descriptive and Biographical, Facts, Figures and Illustrations: An Epitome of Progress* (The Cyclopedia Co 1903) 205.

46 Hanlon, *An Analysis* (n 2) 127.

47 Charles Parkinson, 'George Higinbotham and Responsible Government in Colonial Victoria' (2001) 25 Melbourne University Law Review 181, 187.

48 Ibid 204.

49 Todd (n 23) 725–26.

50 Ibid 726–27; see also Herbert Vere Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (2nd edn, Frank Cass & Co Ltd 1967) 189–90.

51 Extracted in Evatt (n 50) 190.

52 Ibid.

The necessity for independence in the exercise of the law officer's prosecutorial function, an issue that has caused heated controversy in Britain, raised its head in Victoria in 1893. The Solicitor General, Isaac Isaacs, resigned from the Solicitor Generalship, ostensibly to protect his independence.[53] The incident involved the collapse of the Mercantile Bank and subsequent allegations of fraud by the bank's executives. Summonses were issued on the instructions of the Attorney General, but the charges were dropped after a change of government. Isaacs, almost immediately, announced he would institute new criminal proceedings against the men under what he saw as his independent (albeit concurrent) prosecuting authority.[54] The Attorney General was furious, asserting that the Solicitor General was subordinate to the senior law officer and ordered Isaacs to abstain.[55] Isaacs refused:

> No amount of custom, red tape, officialdom, of personal consideration, or of etiquette, or relative status of law officers of the Crown, can in any way lessen my individual responsibility for the due, honest and fearless performance of the functions entrusted to me.[56]

For Isaacs, the functions of the Solicitor General had to be exercised absolutely independently, of the Cabinet and even of the Attorney General. Of course, as a minister, Isaacs had his own elected mandate. The Cabinet resolved in favour of the Attorney General, but Isaacs refused to back down. Finally, the Premier requested his resignation, which Isaacs tendered.[57]

## Debate over the law officers in Cabinet

The inclusion of the law officers in the Executive Council under a system of responsible government (essentially the Cabinet) was a major break with British tradition and likely contributed to the increased politicisation of the law officers. The move did not take place without debate in these early years.

In New South Wales, it was particularly controversial in relation to the prosecutorial function, which led to the drafting of legislation for an independent public prosecutor (although this was never passed).[58] At times during the 1850s and 1860s the New South Wales Attorney General was not included in the Executive Council over concerns that the office could not properly perform its public interest functions if it were seen to be too political.[59] In 1859 the New South Wales law officers were relieved of administrative duties in an attempt to remove the incompatibility of these roles with their position as legal advisers, although the strength of vested interests saw the Attorney General retained in the Executive Council 'for the present'.[60]

Substantial reform was achieved, albeit fleetingly, in New South Wales in 1873 when the Attorney General became a non-Executive Council minister presiding over the newly created Department of Justice and Public Instruction and the Solicitor General was abolished for a period (this is returned to below).[61] The change took place for a number of

53 Although there has been surmise that it was also caused by personal machinations between Isaacs and the Attorney General over priority between them as ministers: Hanlon, *An Analysis* (n 2) 93–94.

54 Crimes Act 1890 (Vic), s 338.

55 Extracted in Edwards (n 3) 374–75.

56 Ibid.

57 Ibid.

58 Golder (n 40) 121.

59 Kass (n 15) 10, referring to P Loveday and A W Martin, *Parliament Factions and Parties: The First Thirty Years of Responsible Government in New South Wales 1856–1889* (Melbourne University Press 1966) 116.

60 Golder (n 40) 133; McMartin (n 43) 273.

61 Golder (n 40) 186.

reasons. Foremost was an attempt to improve efficiency in the colonial administration by removing the necessity of having *two* law officers in a ministry that was only composed of between six and eight departments. Another reason was the desire to increase the independence of the law officers in advising and prosecuting by bringing the nature of the roles closer to that in Britain, where they were less overtly political and, in an effort to achieve the ideal of 'independent aloofness', did not sit as members of Cabinet.[62] In the course of this debate an alternative proposal to have one of the law officers appointed outside the Parliament was rejected on the basis that the responsibility of the law officers to Parliament was a fundamental principle of the operation of British parliamentary government.[63] The 1873 reforms to the Attorney's role were short-lived; by 1878 the Attorney General had returned to the Executive Council.[64]

In the 1850s, the province of South Australia was debating whether to require both law officers to sit in the Executive Council under its new constitution Bill. Justice Benjamin Boothby was strongly against the move, and warned that the early colonial practice must not be allowed to continue under responsible government:

> The Crown cannot be compelled to seek legal advice from law officers who, after the advice is given, have the power, it may be, by a casting vote to compel that advice to be adopted . . . Such a position would unfit the Law Officers of the Crown for the impartial consideration of questions necessarily requiring their decision, and so lessen their power of efficient service to the Crown. The wish, as Cabinet Ministers, that a certain course should be pursued, would become 'father to the thought' that the law would permit it. The Attorney and Solicitor General were never Cabinet Ministers in the whole course of English constitutional government. That these officers have been made members of the Executive Councils of Colonies has only arisen from this, that constitutional government has not existed, and that law officers so situated had only the right to offer advice, without any power to compel that advice being adopted.[65]

Boothby's warnings drew heavily upon the ideal of having law officers within government aloof from politics: someone who has the ability to conduct 'impartial consideration of questions'. It is this ideal that characterised much of the development of the British tradition of the law officers, and would be the driver for continuing reform of the office in Australia into the twentieth century. Ultimately, under the South Australia Constitution Act 1856 the Attorney General was included in the Executive Council, but the office of Solicitor General was not, and was disqualified from sitting in the Parliament.[66]

62 'Legislative Assembly: Thursday 27 November 1873', *Sydney Morning Herald* (Sydney, 28 November 1873) 2, <http://nla.gov.au/nla.news-article13327384> accessed 11 October 2011.

63 Ibid.

64 Golder (n 40) 186.

65 Edwards (n 4) 167–68, quoting from (1862) H C Papers, vol 37.

66 Constitution Act 1856 (SA), ss 32, 34, 17. For one month in 1857 John Tuthill Bagot briefly held a ministerial office as Solicitor General. This appointment, however, was successfully challenged on the basis it was in breach of the prohibition of a Member of Parliament holding an office of profit under the Crown: 'The State's First Parliament: A Dip into History', *The Advertiser* (Adelaide, 20 April 1917) 9, <http://newspapers.nla.gov.au/ndp/del/article/5579748> accessed 11 October 2011; 'The Parliament: Legislative Council, July 2', *The Advertiser* (Adelaide, 3 July 1889) 6, <http://newspapers.nla.gov.au/ndp/del/article/24479756> accessed 11 October 2011; 'South Australian Parliament: Legislative Council, Tuesday, April 30', *South Australian Advertiser* (Adelaide, 1 May 1861) 2, <http://newspapers.nla.gov.au/ndp/del/article/24479756> accessed 11 October 2011; see also Boyle Travers Finniss, *The Constitutional History of South Australia: During 21 Years from the Foundation of the Settlement in 1836 to the Inauguration of Responsible Government in 1857* (R V C Rigby 1886) 470; R M Hague, *Hague's History of the Law in South Australia 1837–1867* (University of Adelaide Barr Smith Press 2005) 721.

### The law officers and an integrated government legal service

In a further break with British tradition, the move to responsible government also saw the centralisation of legal services in the colonial law officers' department.[67] This was the continuation of a trend that had started when the administration of legal services was a relatively small task overseen by the law officers personally. The law officers' department eventually became responsible for overseeing the legal position across the whole of government, with relatively few exceptions. Selway asserted there were probably a number of reasons for this: 'governments were smaller and centralisation was easier', 'colonial Attorneys-General were adequately paid' and 'usually had the support of competent professional lawyers in the Solicitor General . . . and Crown Solicitor'.[68]

### Depoliticisation in the public service

The depoliticisation of the Solicitor General was a major break with the British tradition of the law officers and would create the seeds of change that eventually led to the adoption of a statutory counsel position outside the public service. As is often the case with constitutional transitions, the change was predominantly made to meet the exigencies of a particular situation rather than resting on high constitutional principle. This trend started in Tasmania in the 1860s. It was adopted in Western Australia in 1902.[69] The Commonwealth introduced a similar office in 1916; New South Wales and Queensland in 1922. While the public service basis for the position was broadly consistent across these jurisdictions, some performed more administrative functions within the department than others.

### Tasmania breaks with British tradition

In the 1860s the Tasmanian office was the first in Australia to become non-political on a permanent basis.[70] After 1855 there had been occasions where there was no Solicitor General in the ministry,[71] although it was not until 1863 that the 'firm decision' was made to remove the Solicitor General from a ministerial and political post.[72] The development was advanced at the time simply as a cost-cutting measure.[73]

The Attorney General continued the duties of the first law officer, assisted now by a public service Solicitor General. After this time the Solicitor General's evolution was characterised by a decline in the legal duties of the Attorney General (who became the political and administrative head of the department only) and a concomitant rise in the legal duties of the Solicitor General.[74] The centralisation of legal services in the one department, explained above, meant the Solicitor General became 'the core of legal administration' in

67 For an overview of the British position, see Edwards (n 3) ch 7.

68 Bradley Selway, 'The Different Role of an Australian Attorney General' (2002) 13 Public Law Review 263, 266–67.

69 J S Battye, *The Cyclopedia of Western Australia: An Historical and Commercial Review: Descriptive and Biographical Facts, Figures and Illustrations: An Epitome of Progress* (The Cyclopedia Co 1912) 479; see also <http://newspapers.nla.gov.au/ndp/del/article/25712845> accessed 11 October 2010.

70 R L Wettenhall, *A Guide to Tasmanian Government Administration* (Platypus Publications 1968) 94; *Cyclopedia of Tasmania* (n 22) 61; B E Briggs and C K Murphy, 'Presidents–Speakers–Ministers–Members–Officers' in F C Green (ed), *A Century of Responsible Government 1856–1956* (L G Shea Government Printer 1956) 277, 301.

71 James Fenton, *A History of Tasmania* (Walch & Sons 1884) 310.

72 Wettenhall (n 70) 2.

73 Royal Commission to Inquire into the Accounts, and the Departments of Government, Southern Side, *Report of the Royal Commission* (Government Printer of Tasmania 1963) 27.

74 Letter to Editor, *The Mercury*, from N E Lewis, 12 December 1905, extracted in full in Royal Commission on the Proposal to Make the Office of Attorney General Permanent Non-Political, *Report of the Commission* (John Vale, Government Printer of Tasmania 1908) 39.

the colony.[75] The office conducted all civil and criminal litigation for the Crown,[76] including from 1887 the role of Crown Prosecutor.[77] The advantages of the new model for the Solicitor General were described as bringing continuity of practice and knowledge of government to the role.[78] Depoliticisation also meant that no longer was the Solicitor General a stepping stone to the Attorney Generalship.

## A Commonwealth office: the Solicitor General Act 1916 (Cth)

At the time of federation, then, two models for the Solicitor General had emerged in the colonies: a ministerial office assisting the Attorney General or a public servant conducting the predominance of legal business to assist an increasingly politicised Attorney General.

Despite the historical pedigree of the office, a Solicitor General for the new Commonwealth was not considered during the constitutional conventions of the 1890s at which the constitution was drafted. The framers were aware of the need to have authoritative legal advice on hand to the different polities to ensure the smooth operation of the federal system: the role of the Attorney General in providing legal advice on constitutional questions was referred to on several occasions,[79] and the increased importance federation would bring to the role of the Attorney General, advising on the interpretation of the Commonwealth Constitution, was noted.[80]

Why, then, was there no discussion of the role of the Solicitor General of the Commonwealth? The likely explanation is twofold. It was anticipated by many that the Commonwealth was going to be relatively small, only as large as was necessary to discharge the powers selectively bestowed upon it.[81] As such, it was probably anticipated that the legal work of the government would not be so large as to require the assistance of the second law officer. Secondly, was the pervasiveness of the idea that the Attorney General would continue to operate as an impartial and properly qualified legal adviser. While this did not reflect the growing trend in the colonies towards an increasingly political Attorney General, it continued to follow the British tradition of the first law officer, 'independently aloof' from politics.

Once the federation was established, both of these assumptions proved untrue. The first Attorney General, Alfred Deakin, appointed Robert Garran as secretary of his department.[82] Included in the department's responsibilities was drafting legislation,[83] advising the government on legal and constitutional issues and conducting litigation on behalf of the government.[84] Garran described his functions 'as those of the Chief

75 Wettenhall (n 70).

76 *Cyclopedia of Tasmania* (n 22) 129.

77 Ibid.

78 Royal Commission (n 74) 7, per Lewis.

79 See, for example, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 7 April 1891, 858 (per John Cuthbert); *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 8 March 1898, 2008 (per Joseph Carruthers); 9 March 1898, 2094 (per George Reid).

80 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 7 April 1891, 858 (per John Cuthbert).

81 See, eg, the first resolution adopted by the National Australasian Convention in Sydney, 1891: 'That the powers and privileges and territorial rights of the several existing Colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.': extracted in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press 2005) 45.

82 Sir Robert R Garran, *Prosper the Commonwealth* (Angus & Robertson 1958) 143.

83 Ibid 143–45.

84 Ibid 151.

Permanent Law Officer of the Commonwealth'.[85] Even at this early stage the position Garran was filling was akin to that of the Tasmanian public service-style Solicitor General. As the Commonwealth grew, so did the work of the Attorney General's department, which largely devolved onto Garran. In 1910, Sir William Harrison Moore commented:

> It must be remembered that in Australia, unlike England, the Attorney General is a member of the Cabinet, so that the office may be filled by reference to political rather than professional qualifications. It is, therefore, the more important that there should be a permanent official of high legal qualification, a necessity which has been recognised in some of the colonies by the appointment of a Solicitor General as a non-political and permanent officer.[86]

The gap left by the lack of Solicitor General at the federal level became particularly acute with the commencement of the First World War. In 1916, Billy Hughes, the Prime Minister and also Attorney General, introduced the Solicitor General Bill which contained skeletal provision for a public service office.[87] Its purpose was to provide him with additional support and assistance.[88] Garran was the first appointment to the position, while continuing in his role as permanent head of the Attorney General's department. On its face, it seemed little had changed. Indeed, it was questioned at the Bill's introduction why the new title was required at all.[89] The major change, according to Hughes, was the ability for the Attorney General to delegate powers under a wide range of legislation.[90]

The Solicitor General Bill 1916 engaged the Parliament in debate over the accountability of a non-political Solicitor General; a debate that would continue across the jurisdictions until the 1980s. In introducing the legislation, Hughes briefly explained how the new office was intended to operate to ensure accountability despite the change from British practice:

> The Minister will declare the policy of the Government in every case, and the Solicitor General will give effect to it. Thus Ministerial discretion will remain, and Ministerial responsibility will not be lessened. The Government will be as much responsible for every act done by the Solicitor General as if it had been done by the Attorney General . . . [91]

Garran said that upon creation of the office, he was vested with 'practically all the powers of the Attorney General'.[92] He went on to explain how he believed such power remained limited and accountable under the new Australian model because of the operation of responsible government: behind the Solicitor General was the Attorney General, behind him was the Parliament, and behind it stood the people.[93]

85 Papers of Sir Robert Garran, Manuscripts, NLA, Letter, 5 March 1915, Robert Garran to C W Harriott, Secretary of the New South Wales Council of the Bar.

86 William Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd edn (1st edn 1910), Legal Books 1997) 179–80.

87 National Archives of Australia: Series A-2863, Item 1916/28.

88 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (per Hughes); see also 8998 (per Littleton Groom); and the debate in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (per Robert Guthrie, James Stewart)).

89 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (per Earle Page).

90 Ibid (per Hughes); Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (per Albert Gardiner); Solicitor General Bill 1916, cl 3.

91 Commonwealth, *Parliamentary Debates*, House of Representatives, 27 September 1916, 8998 (per Littleton Groom); and the debate in the Senate: Commonwealth, *Parliamentary Debates*, Senate, 28 September 1916, 9043 (per Robert Guthrie, James Stewart).

92 Garran (n 82) 221.

93 Ibid 221–22.

### Other jurisdictions: move to the public service

In New South Wales, the move to a public service model was incremental. As already explained, the Solicitor General was abolished in 1873 when the Attorney General was removed from the Executive Council.[94] In 1891 a Public Service Inquiry Commission found that the Attorney General's ability to meet his responsibilities as a law officer and political minister had been seriously affected by the removal of the Solicitor General.[95] The commission recommended its re-introduction, although noting this could be as a traditional ministerial office, or a 'permanent officer with the duties of a Solicitor General'.[96] The office reappeared as a ministerial appointment for brief periods in the 1890s, although these correlate with the absence of the Attorney General from the jurisdiction,[97] rather than as a response to the inquiry. The office reappeared permanently in 1900.

During its period in abeyance, the office was substantially depoliticised.[98] In 1884 it was removed from the responsible ministry.[99] One of the disadvantages of having a political appointee was seen in the constant reshuffling of the ministries, leading to disruption in the administration of the justice portfolios.[100] Despite the change in 1884, the office was held by both political (in the form of a non-remunerated appointment or an upper-house appointment to avoid the prohibition on a member of the Legislative Assembly holding an 'office of profit under the Crown') and non-political appointments during the early twentieth century.

In 1922 New South Wales permanently adopted a public service model and the holder of this appointment performed both administrative and legal functions within the Crown Law Department. In 1953 the government appointed a practising silk and the office evolved into a non-political and non-departmental position.[101]

In Queensland, the Solicitor General appeared in 1922 as a non-political public servant within the Crown Law Department.[102] South Australia created a public service office of Solicitor General only in 1969 by simply changing the name of the 'Crown Solicitor' to 'Solicitor General'.[103] In 1970, with a new appointment, this was changed to take the Solicitor General outside of Crown Law, but the office was still a public servant within the Attorney General's department.

### Common law powers and privileges in the public service

The adoption of a public service Solicitor General raised a question about whether the office still exercised the powers and enjoyed the privileges of the common law office. The

94 Kass (n 15) 13.

95 *Report on the Attorney General's Department* (Public Service Inquiry Commission 1891) 2–3.

96 Ibid 3.

97 Eg, Richard O'Connor (MLC) was appointed Solicitor General for a short duration between July and September 1893 to deputise for Attorney General Edmund Barton while he was overseas in Canada: 'The Solicitor General', *Sydney Morning Herald* (Sydney 19 July 1893) 4, <http://nla.gov.au/nla.news-article13918822> accessed 11 October 2011; 'Ministerial Movements', *Sydney Morning Herald* (Sydney, 13 September 1893) 6, <http://nla.gov.au/nla.news-article13928783> accessed 11 October 2011. During his premiership, George Reid also held the office for brief periods from time to time throughout the 1890s, presumably for the same reason.

98 Bennett (n 40) 72, fn 168.

99 M G Sexton, 'The Role of the Solicitor General' in Geoff Lindsay (ed), *No Mere Mouthpiece: Servants of All, Yet of None* (LexisNexis Butterworths 2002) 86, 88.

100 Bennett (n 40) 73.

101 Mason (n 10) 25.

102 Crown Law (n 10) 2, 89.

103 South Australia, *Parliamentary Debates*, House of Assembly, 1 March 1972, 3563 (L J King, Attorney General).

Supreme Court of New South Wales confirmed on two occasions that it did. In 1900, in New South Wales, the Solicitor General was appointed from the private Bar and held a non-political appointment.[104] He was nonetheless, in accordance with tradition, listed in 1902 next in order of precedence to that of the Attorney General in the Bar listing. The Council of the Bar was firmly against such a characterisation, believing that he did not hold 'the office of Solicitor General as known to the Constitution; that is, he is not, though called Solicitor General in the Commission, entitled by virtue of this Commission to any precedence'.[105] The government asked the Supreme Court to consider the question. The court advised that, while the non-political nature of the office was a substantial break with Britain, it still received the privileges conferred on the office, including the right of precedence.[106]

In 1945, the matter was considered again in *Solicitor General v Wylde*.[107] The case concerned an information laid by the Solicitor General against the Bishop of Bathurst alleging that the Bishop had acted illegally by administering the Holy Communion other than as required by the Book of Common Prayer of 1662. A preliminary issue arose as to whether the Solicitor General had the necessary standing to lay the information. It was argued unsuccessfully that the Solicitor General was 'in a radically different position', not comparable to his English counterpart, because the position was only a civil servant, and not the agent of the King in the same sense as in the UK.[108] Jordan CJ (with whom Halse Rogers J agreed) said that the change in New South Wales from a responsible minister to a member of the Bar had not removed the Solicitor General's common law powers and prerogatives.[109] To support this position, he relied upon *Attorney General v Belson*: 'The mere appointment to an office by name in a colony, generally carries with it the right and duty of doing all acts done by usage by an officer of the same name in the mother country.';[110] and a New Zealand authority, *Solicitor General v Dunedin*:

> The fact that at present these offices are non-political does not affect the question. The Crown has power to appoint these officers, and there is nothing in the nature of the duties they have to perform that makes it necessary that they should be members of the Ministry for the time being.[111]

This was rejected by Nicholas CJ (in equity) in a strong dissent that echoed the concerns raised at the introduction of the 1916 Commonwealth legislation.[112] He relied heavily upon the ability in the United Kingdom to bring the office to account for its decisions and actions before Parliament: 'it is because he is in Parliament that there is a safeguard against the abuse of his power'.[113]

104 Peter J Tyler, *Humble and Obedient Servants: The Administration of New South Wales* (University of New South Wales Press 2006) 17.

105 Resolution of the Council of the Bar, extracted in Bennett (n 40) 147.

106 Decision extracted in Bennett (n 40) 147; this was confirmed in *Solicitor General v Wylde* (1945) 46 SR (New South Wales) 83.

107 *Solicitor General v Wylde* (1945) 46 SR (New South Wales) 83.

108 Ibid 85–6.

109 Ibid 93.

110 (1867) 4 WW & a'B (E) 57, 62 (Molesworth J); [1867] VR 57, 62–63.

111 (1875) 1 NZ Jur R N S 1, 15.

112 *Solicitor General v Wylde* (1945) 46 SR (New South Wales) 83, 108.

113 Ibid.

## A new paradigm: statutory counsel

The last state to remove its Solicitor General from the ministry was Victoria in 1951.[114] The 1951 legislation created a new office with two roles: representative of and chief legal adviser to the Crown. While the Victorian Attorney General said that the move brought the state into line with the other jurisdictions in Australia, it was actually an innovative step.[115] Other jurisdictions had depoliticised their offices, but Victoria was the first to create it as a quasi-independent, statutory one without large administrative duties within the department.

In the years before the move, the Victorian office had often been simultaneously held with the Attorney General.[116] Since 1900 both the law officers no longer engaged in the day-to-day provision of legal advice and representation, relying instead on their officers in the Law Department.[117] To a large extent this reflected the fact that well-respected barristers had ceased to be actively engaged in politics.[118] The framework that Victoria adopted was largely based on a formalisation of the non-statutory office of 'senior Counsel to the Attorney General' that was established in January 1950 and filled by Henry Winneke KC.[119] Winneke had a large influence on the features of this original post, including the necessity of appointing from King's Counsel at the Bar and the need to appropriately remunerate the appointee to compensate him (it was not envisaged at that time it would be a female) for loss of income at the Bar. Winneke insisted that the office be outside the public service:

> One thing I would insist on, though, is that it should not be a Public Service appointment. He might be required to report on senior officers, including, say, members of the Public Service Board. That would be an embarrassment if he were a public servant himself.[120]

The basic position established in 1951 continues in Victoria to this day.[121] The Victorian paradigm was the main template for the fundamental shift at the Commonwealth level from a public service appointment to the independent counsel system introduced by the Law Officers Act 1964 (Cth). It also drove change in the other states between the 1960s and 1980s.[122] So while Victoria had lagged behind in removing the Solicitor General from the rough and tumble of party politics in Parliament, it was the first Australian jurisdiction to adopt the paradigm of a permanent statutory office of Solicitor General appointed outside of politics and the public service and relieved from large administrative burdens. It recognised the desirability of having a legally qualified officer with some statutory guarantees of tenure, status and remuneration. While not removing the constitutional and statutory links of responsibility between the office and the responsible minister, the Attorney General, it did go some way towards guaranteeing independence from arbitrary interference from the government of the day.

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114 Solicitor General Act 1951 (Vic).

115 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5682 (per Thomas Mitchell, Attorney General).

116 Arthur Dean, *A Multitude of Counsellors: A History of the Bar of Victoria* (F W Cheshire 1968) 268; Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 219 (per John Cain, Premier).

117 Dean (n 116) 269.

118 Ibid 268; Robert Coleman, *Above Renown: Biography of Sir Henry Winneke* (Macmillan Company 1988) 159.

119 Coleman (n 118) 160–62.

120 Ibid 160.

121 The position in Victoria was updated with the Solicitor General Act 1958 (Vic). This was further updated in Attorney General and Solicitor General Act 1972 (Vic).

122 See, eg, *Solicitor General v Wylde* (1945) 46 SR (NSW), 83 (per Jordan CJ); New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (per Kenneth McCaw, Attorney General).

In the states, the new office included responsibilities for the prosecution of the criminal law until the creation of the Director of Public Prosecutions (DPP) in the 1980s and the 1990s. When the Commonwealth adopted the Victorian paradigm in 1964, the intention was to develop an officer who would bring coherency and expertise in the areas of *constitutional and public law*. It was towards this model that the states would also move. For example, in 1979 New South Wales introduced the position of the Crown Advocate, as a precursor to the creation of the DPP, to relieve the Solicitor General of much of the criminal work and thereby make 'a far greater contribution to constitutional and legal problems'.[123] Thus, it was within the new statutory paradigm that the focus of the office moved from the predominantly criminal to developing an almost monopoly on constitutional advice and litigation work. While in the first decades of the High Court the Solicitor General played no great part in the constitutional jurisprudence that would define the Australian system, Solicitors General started to emerge as leaders of the constitutional Bar in the 1960s, developing in the 1970s and 1980s the stranglehold on this work that now defines the contemporary office.[124]

The move towards greater independence for the Solicitor General did not come without consternation from the parliaments across the jurisdictions, primarily for the same reasons that questions had been raised in 1916 at the Commonwealth level: it was perceived that this move was accompanied by less responsibility. The Victorian government was keen to emphasise that the Solicitor General had no continuing political role, becoming subject to

123 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 April 1979, 4010 (per Frank Walker, Attorney General); New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 April 1979, 4528–29 (per Walker). In this move, New South Wales followed similar models already in place in Victoria and Tasmania.

124 In the first decades of federation, the interests of the states and Commonwealth were represented by private counsel in major constitutional litigation or, on rare occasions, the Attorney General. It was only very occasionally that appearances were noted for the Solicitor General. For example, in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129, the Western Australian defendants, and the Victorian, South Australian, Tasmanian and Commonwealth interveners were all represented by private counsel. In *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, the Commonwealth and Victoria, intervening, were represented by private counsel, and South Australia and Western Australia, intervening, were represented by the South Australian Crown Solicitor, A J Hannan KC (in South Australia, the profession was fused, meaning that Crown Solicitors would often perform the advocacy role in the High Court; this also occurred in Western Australia). In *Bank of New South Wales v Commonwealth (State Banking Case)* (1948) 76 CLR 1, H V Evatt KC, the Commonwealth Attorney General, represented the Commonwealth, assisted in a rare appearance by the Commonwealth Solicitor General, K H Bailey and a number of other junior counsel. Victoria was represented by private counsel and South Australia and Western Australia by the South Australian Crown Solicitor. With the creation of the Victorian Solicitor General in 1951, Sir Henry Winneke KC started to make appearances as counsel for Victoria in constitutional matters. One of his first appearances as such was in *Hospital Provident Fund Pty Ltd v Victoria* (1953) 87 CLR 1. In the following decades, as the jurisdictions adopted non-political Solicitors General tasked to act as 'counsel', these officers appeared for the governments in constitutional litigation. (This general statement is with two notable exceptions. In New South Wales, throughout the 1970s, private counsel were retained in constitutional matters. This can be explained by the large criminal load the Solicitor General's office was carrying until the creation of the Crown Advocate and the DPP. In Tasmania, since the mid-1980s, the state has been represented by private counsel in most High Court litigation. This is because of the unique position that has developed in that state where the office performs almost all of the state's advisory work). In 1969, in *Western Australia v Chamberlain Industries* (1970) 121 CLR 1, each of the plaintiffs, Western Australia and Victoria, and New South Wales, South Australia and Tasmania (intervening) and the Commonwealth (seeking leave to intervene) were represented by the Solicitor General of the jurisdiction. Queensland was represented by private counsel. The picture would be completed in 1989 with the appointment of a Solicitor General for Queensland. See, eg, *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, where the respondent was represented by the New South Wales Solicitor General, and the Attorneys General of the Commonwealth, Western Australia, Victoria, South Australia and Queensland (intervening) were all represented by their respective Solicitors General.

direction by the Attorney General, who remained responsible for all actions taken and decisions made by the Solicitor General.[125] In New South Wales, much was made of ensuring the Solicitor General was not a minister of the Crown,[126] so as to make him 'aloof from matters of policy of a political kind'.[127] The Attorney General would remain responsible for all decisions of the Solicitor General,[128] and the decisions of the Solicitor General would be regarded as those of the Attorney.[129] The Attorney General emphasised that the Solicitor General would remain 'always under ministerial control'.[130]

Measures in the new model not seen before in the Solicitor General's office were lauded for the independence they would foster. At the introduction of the 1964 federal Bill, Attorney General Billy Sneddon emphasised the importance of retaining a member of the practising Bar to ensure they continued to enjoy the independence of counsel, which would also be guaranteed by statutory tenure.[131] Much was made of the provisions relating to the salary, pension, and in the event of a person not being reappointed so as to qualify for such a pension, a payment to allow them to re-establish themselves at the private Bar. These provisions, it was thought, would ensure the best legally qualified candidate could be induced to take the position.[132] When the provisions were originally proposed by Winneke their objective was to prevent a narrower sort of perceived conflict of interest: to offset the disadvantage he might suffer when approached (as he surely would be) to suggest names for judicial appointments, and he could 'scarcely' suggest his own.[133]

In the Tasmanian Bill of 1983, there was even greater focus on preserving the independence of the office, and a number of new mechanisms were introduced aimed at protecting the officeholder from undue interference from the executive.[134] This was said to be in recognition of the fact that the office required not only a person of requisite legal expertise, but also 'the utmost integrity and independence on the part of the incumbent'.[135] The legislation required a resolution of both Houses of Parliament prior to removal on the grounds of misconduct or incapacity, and required the Solicitor General to tender an annual report tabled in Parliament. The provisions were defended on the basis that they would ensure the independence of the office, and set it apart from the departmental administration.[136]

125 Victoria, Parliamentary Debates, Legislative Assembly, 31 October 1951, 5684 (per Mitchell); Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 223 (per Cain).

126 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 971 (per McCaw).

127 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 October 1969, 1478 (per McCaw).

128 Ibid 1480 (per McCaw).

129 Ibid 1481 (per McCaw).

130 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (per McCaw).

131 Commonwealth, P*arliamentary Debates*, House of Representatives, 22 October 1964 (per Billy Sneddon, Attorney General). Although, note that when the position of 'Senior Counsel to the Attorney General' was originally proposed to Winneke, he rejected that security of tenure would be necessary. He was said to have asserted: 'The right man would need none, if he became dissatisfied, he could always return to the Bar.' See Coleman (n 118) 160.

132 New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 September 1969, 969 (per McCaw); Commonwealth, *Parliamentary Debates*, Senate, 30 October 1964, 1493 (per Samuel Cohen); see also Coleman (n 118) 160.

133 Coleman (n 118) 165.

134 Tasmania, *Parliamentary Debates*, House of Assembly, 5 May 1983, 825 (per Geoffrey Pearsall, Minister for Tourism).

135 Ibid.

136 Ibid.

Under the original Victoria model, the office was in the exclusive employ of the Crown.[137] In other state jurisdictions, the position was introduced with an ability to engage in private practice with the permission of the governor, or Attorney General. In Western and South Australia, when concern was raised over this arrangement, it was explained that it was *not* intended to allow the Solicitor General to engage in extensive private practice, but to allow for small, discrete private employment such as at a university.[138] In Queensland, however, it was intended to allow the Solicitor General to engage extensively in private practice in a manner not seen since the nineteenth century. It was thought 'necessary for senior counsel to be permitted to supplement the income which he receives from his statutory duties in order to attract the most capable counsel'.[139] This provision was opposed by the opposition, arguing that the post should be filled on a full-time basis,[140] and that 'the demands of modern Government bring with them a need for constitutional advice, commercial advice and, nowadays, advice arising out of the tens of thousands of pages of legislation that is passed at an increasing rate'.[141] A further concern was raised, that it might compromise the independence of an officeholder not wishing to lose the favour of the government because this might result in the loss of this right.[142] However, one member asserted that the provision in fact supported the independence of the office because of the increased ease of returning to full-time private practice.[143]

## Reasons for change

The reasons for the change in Victoria can be distilled into three strands that were largely mirrored in the other jurisdictions in the following decades. First, the changing constitutional position of the polities in the federation and government more generally dictated the need for a full-time legal officer (unhampered by day-to-day administration of the department) who could provide continuity across changing administrations.[144] The increased constitutional complexities arising from the federal compact had given rise to increases in constitutional litigation. This was coupled with the rise of the interventionist state and the increase in legal work associated with it.[145] The Victorian Attorney General said the Bill would provide 'a pilot to guide the ship of State through troublous waters'.[146] A full-time legal expert in the form of the Solicitor General could provide the government with high-

137 Solicitor General Act 1951 (Vic), s 3(b).

138 Western Australia, *Parliamentary Debates*, Legislative Council, 1 May 1969, 3611 (per A F Griffith, Minister for Justice); South Australia, *Parliamentary Debates*, Legislative Council, 14 March 1972, 3796 (per Sir Arthur Rymill); South Australia, *Parliamentary Debates*, Legislative Council, 16 March 1972, 3963 (per A J Shard, Chief Secretary). Similar concerns were raised in other jurisdictions, see Northern Territory, *Parliamentary Debates*, House of Assembly, 20 March 1986, 2324–26 (per Brian Ede); Northern Territory, *Parliamentary Debates*, House of Assembly, 22 March 1986, 2422–28 (per Terry Smith) and (per Dan Leo).

139 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 March 1985, 4098 (per N J Harper, Attorney General and Minister for Justice).

140 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4374–75 (per Wayne Goss). Although note that, as Premier, Wayne Goss made Patrick Keane QC's appointment under the Act and with the right to private practice, having reconciled himself with this scheme at some stage.

141 Ibid 4389 (per Agnes Innes).

142 Ibid 4380 (per Paul Braddy).

143 Ibid 4384 (per Douglas Jennings).

144 Coleman (n 118) 159.

145 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5682–83 (per Mitchell); see similar reasoning given later in Queensland: Crown Law (n 10) 227, referring to *Hansard*, 27 November 1984, 4097; see also Queensland, *Parliamentary Debates*, Legislative Assembly, 26 March 1985, 4388 (per Mr Innes).

146 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5683 (per Mitchell); see also Western Australia, *Parliamentary Debates*, Legislative Council, 30 April 1969, 3524 (per Griffith).

level legal advice with continuity and deep understanding of government policy objectives because of the ongoing retainer and the close relationship with the Attorney General.[147]

When Western Australia introduced its legislation, the Attorney General noted the advantage of an enduring, politically astute but non-political legal counsel for the state. He referred to a piece of correspondence from the Commonwealth Attorney General:

> One of the special merits of our system (that of the Solicitor General appearing as counsel) is that the High Court in particular may explore in a case peripheral or related matters which it is difficult to foresee and on which it is difficult to brief outside counsel adequately.[148]

This highlights one of the features of the statutory counsel position that had not necessarily been exhibited in the public service model: under the new paradigm the states and Commonwealth would come to be represented by the same counsel consistently before the High Court. This was no doubt seen as particularly important with the increase in volume and complexity of constitutional litigation.

The second reason for introducing a statutory counsel position was that, in this environment of greater need for legal services by government, the Attorney General was not able to personally fill the traditional legal role. The position of the Attorney General had developed in Australia to such a degree that it was almost wholly political, with sometimes little, or even no, legal qualifications and experience.[149] In many jurisdictions it was often held with other important portfolios leaving the officeholder little time to devote to legal duties. As such, the government needed an alternative and non-political (and therefore independent in the sense of being free from political party affiliation) officer to take over this heavy responsibility. In contrast to the Attorney General, the Victorian legislation required the Solicitor General to be taken from the ranks of His Majesty's counsel.[150]

The third reason behind the Victorian shift, and the immediate impetus for the change in many other jurisdictions, was an effort to retain the services of Winneke, who had until then been the non-statutory 'senior Counsel to the Attorney General', while the Attorney General held both law officer posts.[151] It was thought the office of 'Solicitor General' would provide the requisite increase in status and remuneration.[152]

## Conclusion

The developments of the second-half of the twentieth century are a clear embodiment of the growing importance of the Solicitor General across the Australian jurisdictions. It is now the government's highest-level legal officer in matters of constitutional and public law. Since its enshrinement in statute, the role has been a stable and important part of government. It complements (together with the DPP in relation to the criminal law) the

147 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5684–85 (per Mitchell). See also Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 232 (per Mitchell).

148 Extracted in Western Australia, *Parliamentary Debates*, Legislative Assembly, 24 April 1969, 3436 (per Charles Court).

149 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 222–23 (per John Cain, Premier); Hanlon, *An Analysis* (n 2).

150 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 5684 (per Mitchell).

151 Victoria, *Parliamentary Debates*, Legislative Assembly, 27 November 1951, 224 (per Cain). This was also behind the move in Western Australia, which wanted to keep the employ of Ronald Wilson QC, then Crown Counsel; and in South Australia seeking to keep Brian Cox QC: South Australia, *Parliamentary Debates*, House of Assembly, 7 March 1972, 3651 (per King).

152 Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 1951, 568 (per Mitchell). And also ensure he stayed with the Crown for the duration of his appointment: Coleman (n 118) 167.

position of the Attorney General, who has all but shed the title of first law officer. This is in recognition not simply of the reality that the Attorney General very rarely possesses the legal aptitude and experience required for these legal roles, but it operates to create distance between the exercise of the law officers' legal services functions and the day-to-day politics and administration in which an Australian Attorney General is immersed.

The Australian Attorney General has been, almost since inception, at the core of government as a member of the Executive Council and later Cabinet, heading a large administrative department. This is in direct contrast with England, where 'a conscious policy . . . to divorce the Attorney General from day-to-day political issues' has been pursued.[153] The Australian position, many argue, brings advantages. The Attorney General gains intimate awareness of the 'battles and the arguments and the stresses and strains that eventually result in policy', better equipping the officer to find (if possible) a lawful and proper way to achieve the policy objective.[154] It has also been argued that the Attorney General in the Cabinet gives greater weight to the office's authority among Cabinet colleagues, ensuring compliance and adherence to legal advice.[155] The Australian system secures these benefits but, as this article has shown, acknowledges the increased danger of political and administrative pressures in this environment through the development of independent statutory officers to assist the Attorney General.

The current paradigm of the Solicitor General has addressed this danger through a number of developments. Tensions between political allegiances and the independent discharge of the Solicitor General's functions have been removed by the creation of an office outside of politics that has statutory guarantees of tenure, remuneration and pension. Further, the focus on the legal nature of the position has meant the office's independence is largely protected by the professional training and obligations of appointees. Finally, no longer is the office plagued with the politically charged prosecutorial discretion, this having been hived off to the statutorily independent office of the DPP.[156]

153 Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report 27) (1985) <www.alrc.gov.au/report-27> 90 [160], accessed 11 October 2011.

154 Sam Silkin QC, former English Attorney General, cited in Edwards (n 3) 71.

155 Geoffrey Palmer, 'New Zealand Office of the Attorney General' (1987) 13 Commonwealth Law Bulletin 248, 249, 252.

156 Prior to the removal of this jurisdiction, see, eg, the political controversy that surrounded the discharge of the criminal law functions of Mary Gaudron, New South Wales Solicitor General in the 1970s and 1980s during 'The Ages Tapes' scandal: Pamela Burton, *From Moree to Mabo: The Mary Gaudron Story* (University of Western Australia Publishing 2010), chs 11 and 12.

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# Law and the practice of politics in the Canadian Department of Justice: completing confederation

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In the broadest possible sense, the law occupied a central role in transforming the mid-nineteenth-century British North American colonies into the Canadian Confederation of 1867.[1] With more than a passing nod to Enlightenment notions of the centrality of rights and the desirability of founding nations on written constitutions, beginning with the Charlottetown Conference of 1864, constitutional negotiation and authorship mapped the path to the union of Upper and Lower Canada with New Brunswick and Nova Scotia.[2] Given the profession's prominence in colonial life and politics, its role in the process was hardly surprising. Of the 30 men who participated at some stage of these discussions, 20 were associated with legal practice. The extent to which the law played an important role in fostering a sense of the new nation and its ideals – an effort revealed in the standardisation of a number of legal institutions and practices, the creation of a national penitentiary system, the reformation and eventual codification of criminal law, and creation of a Dominion Supreme Court – is equally intriguing.[3] Yet, at the same time, the trajectory of constitutional law took Canada in a direction quite contrary to that intended by Sir John A Macdonald, a central figure in the Confederation scheme, as well as the nation's first Prime Minister, Minister of Justice and Attorney General.[4] The result was double-edged. In one guise, legal institutions and the law helped set out markers of the new nation's identity,

1 Aspects of this discussion were first broached in Jonathan Swainger, *The Canadian Department of Justice and the Completion of Confederation, 1867–1878* (UBC Press 2000).

2 The best treatment of the path to the Canadian Confederation agreement is Ged Martin, *Britain and the Origins of Canadian Confederation, 1837–67* (UBC Press 1995). Also see Christopher Moore, *1867: How the Fathers Made a Deal* (McClelland & Stewart Inc 1997) and Ged Martin (ed), *The Causes of Canadian Confederation* (Acadiensis Press 1990).

3 Histories of the Canadian Supreme Court are James G Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (The Osgoode Society for Canadian Legal History 1985) and Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (McGill-Queen's University Press 1992). The Canadian codification of the criminal law was a notable achievement unmatched by the mother country. See Desmond Brown, *The Genesis of the Canadian Criminal Code of 1892* (The Osgoode Society for Canadian Legal History 1989) and his masterful edited collection of documents on the process published as *The Birth of a Criminal Code: The Evolution of Canada's Justice System* (University of Toronto Press 1995).

4 Martin argues that Macdonald's emergence as a political leader was partly attributable to his legal skills that 'made him a master of official business'. Macdonald reportedly drafted 50 of the 72 Quebec resolutions in 1864. See Ged Martin, *Canadian History: A Play in Two Acts – Inaugural Lecture for the University of Edinburgh Centre of Canadian Studies* (Centre of Canadian Studies 1999) 10.

while, at the same time, judicial interpretation unravelled the centrist constitutional identity that Macdonald and like-minded individuals envisaged for Canada.

Considered from the vantage point of the present, these developments underscore questions about law, its interpretation and its application within the political machinery of the new Dominion. In particular, a telling illustration is the degree that these notions played a pivotal role in the change that overcame Sir John A Macdonald in the mid-1870s. Schooled in Upper Canada's patron, client and brokerage environment, Macdonald's conduct of both private and public affairs demonstrated sharp political skills, scepticism concerning the reformability of human beings, and modest expectations about the law as a device to independently initiate and sustain change.[5] Although his disarming bonhomie in marshalling public men and political support remained largely intact, he became increasingly inflexible and prone to constitutional battles after returning from the political wilderness in the run-up to the national election of 1878.[6] For someone whose public life often hinged on knowing when and where to choose his legal and political contests, Macdonald's instincts seemingly abandoned him, especially in those constitutional struggles of the early and mid-1880s. In broadening our gaze to consider the Department of Justice we find evidence of an increasingly literalist interpretation of law and legal remedy between 1867 and 1878, suggesting that Macdonald's altered behaviour possibly owed something to the shifting mentalities of government as the collection of colonies articulated a regime of practices to mirror a new national existence.[7] The degree to which Macdonald acquiesced in these new practices or was simply wrong-footed is unclear but his increasingly belligerent outlook signalled a deviation from the methods upon which he had built his career and ultimately fed into a series of constitutional confrontations undermining his own vision of the Canadian Confederation.

Centred on the 11 years after the union of 1867 hardened into shape, this article examines the evolution of the Attorney General's functions in mid-nineteenth century British North America leading to the creation of a Dominion Department of Justice and its role in law and statecraft in the early Confederation era. Brought into existence during Sir John A Macdonald's first term as Prime Minister, the department and its approach to managing the government's legal affairs initially mirrored its architect's method in all things legal and political. Macdonald's political roots adhered to the notion that the law's strength was to be found in creating a superstructure within which private citizens might better direct their own affairs and those with others, where society is protected from those who failed to follow rules for the common good, where governments make informed decisions about the allocation of resources, and where men of public affairs accessed the means to seek out accommodations to ensure effective governance. His was a 'governmentality' emphasising tactics rather than law and that used the law and its interpretation as tactics in a broader

5 Mitchell Dean's notion of conduct informs this discussion; see Dean in *Governmentality: Government and Rule in Modern Society* (2nd edn, Sage 2010) 17. On the political culture that produced Macdonald and his generation, see S J R Noel, *Patrons, Clients, Brokers: Ontario Society and Politics, 1791–1896* (University of Toronto Press 1990). Additional impressions are found in David Mills, *The Idea of Loyalty in Upper Canada, 1784–1850* (McGill-Queen's University Press 1988).

6 For Macdonald's political ideas and style as well as his tumultuous career viewed through his Kingston connections, see Ged Martin's splendid study, *Favourite Son? John A Macdonald and the Voters of Kingston, 1841–1891* (Kingston Historical Society 2010). On the largely accidental unveiling of political picnics as a part of electioneering, see the most recent full biographical treatment of Macdonald by Richard Gwyn, *Nation Maker: Sir John A Macdonald: His Life and Times* (Vintage Canada 2011) 284–85.

7 Dean explores Michel Foucault's language around governmentality and regimes of practices in Dean (n 5) 24–28. See, more generally, Michel Foucault, 'Governmentality' in Graham Bruchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 87–104; and Colin Gordon, 'Government Rationality: An Introduction' in the same essay collection, 2–3.

enterprise that, for Macdonald, was the statecraft of building a new nation.[8] A combination of ministerial inexperience and the increasing presence of legally trained individuals in the Department of Justice abandoned this approach after 1873 in favour of a more rigid and prescriptive approach to legal problem-solving. The advantage gained in playing the long game wherein decisions not to act or do so indirectly were an integral element in the older regimes of practices was shelved in favour of a new strategic logic favouring an activist Dominion approach to legal problem-solving.[9]

What follows is a two-part exploration of the congruence of law and politics revealed in the statecraft practised by the Canadian Department of Justice during the completion of Confederation from 1867 to 1878. Section one examines the historic law officers in British North America and draws particular attention to their assumption of an overtly political character, a process culminating in the creation of a Dominion Department of Justice led by a Minister of Justice who also acted as the Attorney General. The political environment in the colonial world placed increasing pressure of effective public leadership in the aftermath of the establishment of responsible government, and those possessed of legal training and the skills of marshalling men were at a premium in an environment where political parties were 'but loosely organized'.[10] It was in this setting that the Attorney General emerged as a pivotal figure and consequently the question of the extent to which political leadership compromised the legal counsel expected of the law officer attracted increasing attention. Although given voice during the two decades before 1867, concern over the politicisation of the Attorney General's office was invariably hobbled by ideological assumptions about the law and thus, within a year of Confederation, the Dominion government of Sir John A Macdonald unveiled the new Department of Justice that housed both a Minister of Justice and Attorney General. The means whereby the department performed its advisory functions and the changing tenor of that advice forms the second part of this discussion. Infused with the flavour of Macdonald's political methods, the department initially conceived of the law as a tactic employed in a broader political setting but, after the Liberal electoral victory of 1873, the literal application of legal remedy as an end in itself emerged as a preferred course of action. A consequence of ministerial inexperience, the concomitant reliance on the rising number of legally trained staff in the department created an increasingly legalistic approach to governance. Consequently, by the time that Sir John A Macdonald successfully returned to office in 1878, the department's advisors had grown increasingly bold and arguably overconfident in their ability to wield the law for the Dominion's cause.

## The politicised Attorney General

A basic paradigm that informed how most professionals and much of the public regard the law framed the ideological mindset for the law's contribution to the completion of confederation. Canadian legal scholar Harry W Arthurs has described the outlook in this sense:

> The law is formal; it exists as a thing apart from society, politics, or economics; law has the capacity to achieve, and does achieve, results by encouraging or discouraging behaviour, by attaching specified consequences to behaviour that

8 Foucault (n 7) 95.

9 Simon Gunn notes that early arguments about hegemonic power acknowledged the authority inherent in the ability not to act and not to decide. See Gunn, 'From Hegemony to Governmentality: Changing Perceptions of Power in Social History' (2006) 39(3) Journal of Social History 706.

10 J M S Careless, 'The Place, the Office, the Times, and the Men' in J M S Careless (ed), *The Pre-Confederation Premiers: Ontario Government Leaders, 1841–1867* (University of Toronto Press 1980) 6.

> facilitate it, deter it or undo its harmful effects; law is made and administered by the state; and access to law is provided in courts by legal professionals – lawyers and judges – who invoke a body of authoritative learning in order to argue and decide cases.[11]

Essentially, the law and its practitioners were 'apolitical and necessary'.[12] Common law training reinforced this ideology through the assertion that those schooled in the law marshalled highly specialised and ancient knowledge affirming the status of those possessed of that learning. Fashioning the link, American legal historian Robert Gordon argued:

> The tradition associated law with both science and high culture, and justified the prestige and power of its practitioners. Law was authoritative because it was autonomous and its autonomy derived from two sources, its formality (or technicality) and its antiquity.[13]

Most practitioners would have disavowed such lofty intellectual pretensions and sought refuge in the self-acclaimed role as skilled artisan applying technical rules. This merely substituted one characterisation for another; lawyers were apolitical because they applied ancient principles that were uncoloured by contemporary political interests or they were apolitical because they pulled levers in a mechanical legal structure.

While the office of Attorney General has interwoven law and politics since its origins, the open acknowledgment of this marriage in the Canadas began in the aftermath of the 1837 and 1838 rebellions when the task of examining the circumstances leading to the outbreak fell to the newly minted Governor General, Lord Durham. The subsequent report highlighted the irresponsible nature of colonial government in that 'The Executive Council, *the law officers*, and whatever heads of departments are known to the administrative system of the Province, were placed in power, without any regard to the wishes of the people or their representatives.'[14] Durham's notion of responsibility raised two specific issues for the Attorney General. Legislative responsibility meant that when tendering legal advice to the cabinet and assembly, the Attorney General did so as a political animal. Further, the Attorney General's position as head of a department of state meant that the chief law officer was to be accountable for the sound management of that department. The question, of course, was how was this to be defined? Was soundness a matter of bureaucratic efficiency, the wisdom of the legal counsel, or the degree to which that counsel aligned with the government's policy objectives? Sorting out the implications of Durham's reforms fell to Charles Poulett Thomson who, upon his appointment as Governor General of British North America, assumed his peerage as Lord Sydenham. Influenced by Benthamite utilitarianism, Sydenham embraced centralisation and reform in the united Canadas as the key elements in solidifying imperial bonds and preventing further outbreaks of

11 H W Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985), p. 1.

12 David Sugarman, 'Law, Economy and the State in England, 1750–1914: Some Major Issues' in David Sugarman (ed), *Legality, Ideology, and the State* (Academic Press 1983) 231.

13 Robert Gordon, 'Introduction: J Willard Hurst and the Common Law Tradition in American Legal Historiography' (1975) 20 Law & Society Review 31.

14 Gerald Craig (ed), *Lord Durham's Report* (McClelland & Stewart 1963) 55. The emphasis is mine; Durham evidently thought that the Attorney General was, in terms of responsibility, no different than any other public figure. On Lord Durham, see Ged Martin, 'John George Lambton' in *Dictionary of National Biography* <www.oxforddnb.com/view/article/15947?docPos=2> accessed 2 May 2011. Janet Ajzenstat notes that Durham believed that responsible government would counter democratic tendencies in Upper and Lower Canada. See Janet Ajzenstat, *The Political Thought of Lord Durham* (McGill-Queen's University Press 1988) 52–53.

disaffection.[15] Indeed, Sydenham and Colonial Secretary Lord John Russell agreed that a complete reorganisation of the local departmental structure had to occur before any fundamental reordering of colonial government.[16] Not only did this place the Attorney General at the head of his own department, but also the direct responsibility of the other departmental heads encouraged an increased reliance on the Attorney General for guidance in the formulation of a wide range of government initiatives.[17] It was, within the broader context of empire politics, a singular transformation. Before Durham and Sydenham, colonial Chief Justices were regular attendees in Cabinet and advisers to the executive.[18] By the end of the 1840s, the reform of conduct unveiled en route to responsible government confined the judiciary to the bench and the Attorney General controlled the centre of colonial politics and governance.[19] It was a fundamental transformation not only in how law and governance would intersect in British North America but it signalled the emerging difference between the colonies and England despite continuing rhetoric of shared traditions, ideals and practices.[20]

Responsible government, the parallel emergence of political parties and the ascent of legally trained individuals to positions of political leadership meant that, 'it became the practice for the leader of the government party to take the office of the Attorney General'.[21] Once again, the law adviser's position revealed the congruence of law. These events had not created the intersection but rather confirmed that the notion of an apolitical law officer was a fiction. Indeed, as J E Hodgetts writes:

> *by the time* responsible government had been granted, the offices of the Attorney General for Canada East and Canada West had become the centres where parliamentary strategy was planned and major administrative decisions were reached. It was no accident, then, that found the two premiers most frequently operating from these two offices.[22]

Indeed, the expanding political activities of the Attorneys General made it increasingly difficult to perform their traditional legal functions by 1846 since the law officers were providing:

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15 See Ian Radford, 'Sydenham and Utilitarian Reform' in Allan Greer and Ian Radford (eds), *Colonial Leviathan: State Formation in Mid-Nineteenth Century Canada* (University of Toronto Press 1992) 81. On Lord Sydenham, see Phillip Buckner, 'Charles Poulett Thomson' in *Dictionary of National Biography* <www.oxforddnb.com/view/article/27294?docPos=3> accessed 2 May 2011.

16 J E Hodgetts, *Pioneer Public Service : An Administrative History of the United Canadas, 1841–1867* (University of Toronto Press 1955) 26. Also see, Donald Creighton, *John A Macdonald: The Young Politician* (Macmillan Company of Canada Ltd, 1952) 70–71.

17 Hodgetts (n 16) 27, and T D McGee, 'Report of T D McGee on the Public Departments', 1863, National Archive of Canada (NAC), Record Group (RG) 1, E7, vol. 59A, 32–33. See Robin B Burns, 'Thomas D'Arcy McGee', *Dictionary of Canadian Biography*, vol IX (University of Toronto Press 1976) 489–94. See David A Wilson's biography of D'Arcy McGee, *Thomas D'Arcy McGee: Passion, Reason, and Politics, 1825–1857* (McGill-Queen's University Press 2008) and *Thomas D'Arcy McGee: The Extreme Moderate, 1857–1868* (McGill-Queen's University Press 2011).

18 See Paul Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet, and Legislature, 1791–1899* (The Osgoode Society for Canadian Legal History 1988) and Patrick Brode, *Sir John Beverley Robinson: Bone and Sinew and the Compact* (The Osgoode Society for Canadian Legal History 1984).

19 The phrase 'reform of conduct' is taken from Dean (n 5) 32. It must be noted that prior to developments in the united province of Canada, responsible government in British North America was established in Nova Scotia on 2 February 1848.

20 Phillipa Levine admits that despite being 'a significant arena' for political experimentation as the empire matured in the nineteenth century, Canada has been 'neglected in histories of the British Empire'. See Levine, *The British Empire Sunrise to Sunset* (Pearson Longman 2007) 42.

21 Romney, (n 18) 159–60.

22 Hodgetts (n 16) 272–73. The emphasis is mine.

> much of the central co-ordination which was expected of cabinet as a body. Not only were they responsible for directing political strategy in Parliament but also their legal abilities induced other departments to appeal to them for rulings – not always on points of law – which in turn came to be treated as rulings of the whole cabinet.[23]

Inasmuch as the development signalled both the prominence of the law officers and the political timidity of their colleagues, it was also rather ironic. While on the one hand it remained necessary to maintain the fiction of law's apolitical character, it had also become convenient for legislators to assert the legal character of every decision they faced rather than shoulder the political responsibility for running their respective departments. It was, of course, this exact behaviour compelling D'Arcy McGee to conclude in 1863 that the law officers were assuming too much political responsibility for the other departments.[24]

Documenting the Attorney General's evolution over the previous 20 years, McGee's report fell short of being prescriptive. For example, the innovation of registering the various opinions delivered by the two Attorneys General was a positive practice. Unfortunately, it was a policy followed unevenly. While the directive recognised the utility of recording and maintaining the government's legal memory, inefficacious practice failed to prevent departing officeholders from carting off opinions and documents. In the end, however, McGee was no more able than earlier commentators and critics to move beyond the fictional separation of law and politics:

> it seems by no means necessary that references should be constantly made to the Attorney General East or West, on questions of administration as distinguishable from questions of law. That either of the chief law officers may happen to be Premier and, therefore to be consulted on grounds of public policy, cannot of itself relieve the head of any department from his own proper official responsibility.[25]

On the eve of confederation, therefore, the ideology of law in tandem with the consequences of the Sydenham experiment in responsibility and centralisation moved the Attorney General to the forefront of Canadian politics. While some commentators voiced concern over the Attorney General's rising stature, in part, because it paralleled his withdrawal from the courts, critics merely circled around the deeper issue, failing to recognise the futility of criticising the Attorney General for being political. The widespread subscription to the paradigm of law as apolitical and necessary forestalled such an enquiry and ensured that the apolitical Attorney General would continue to be a paradox during the completion of confederation between 1867 and 1878.

## The art of statecraft

Introduced during the first week of May 1868 and receiving royal assent three weeks later, the Bill establishing the Department of Justice retained the historic peculiarities of the Attorney General's office under new nomenclature.[26] The Act brought into existence a department of the civil service called the Department of Justice and created the post of

23 Ibid 83 and Canada, 'Report of a Committee of the Honourable the Executive Council', 12 November 1846, NAC, RG 1, E8, vol 16, 21–23. For ongoing debates concerning the law officers, see appendix to the Ninth Volume of the *Journals of the Legislative Assembly of the Province of Canada*, 1850, appendix BB.

24 McGee (n 17) 32–34.

25 Ibid 32.

26 Canada, 'An Act respecting the Department of Justice', 31 Victoria, chapter 39. The Bill received second reading on 6 May 1868 and third reading on the following day when it went into Committee of the Whole. See Canada, *Debates of the House of Commons* (1868) 643 and 646.

Minister of Justice, who would manage and direct that department and ensure that the administration of public affairs was in accordance with the law and the constitutional division of powers.[27] As distinct from the minister, the Dominion Attorney General was possessed of all the duties ascribed to the same office in England and enjoyed the powers and duties of the several provincial Attorneys General in the provinces prior to confederation, as long as they did not conflict with the British North America (BNA) Act 1867. This meant that the Dominion Attorney General would not supervise the daily administration of criminal law, but would continue to advise the government: a duty he shared with himself, acting as the Minister of Justice. That a single individual would occupy both roles was a sleight of hand that escaped any discussion in the House of Commons but, as John Edwards has written:

> it is difficult, however, if not wholly unrealistic, to make such a distinction drawn by the Act of 1868 in circumscribing the advisory role of the Attorney General, *qua* Attorney General, to that of advising the Heads of Department, as opposed to the Government itself.[28]

This unrealistic distinction was nonetheless maintained throughout the Act dividing duties between the Minister of Justice and the Attorney General.

The legislation that attracted little comment in Canada nonetheless drew the attention of the Colonial Office. Still, it was the provision allowing the Dominion Attorney General to oversee the criminal law that worried those at 14 Downing Street and not the peculiarity of a single individual occupying two offices that warranted comment.[29] The concern was quickly dismissed.[30] Oddly, the casting of the political Minister of Justice with the constitutional review of all provincial legislation, did not give additional reason to pause. For, to the extent that the contrived distinction between Minister of Justice and Attorney General could be maintained at all, the 'apolitical' Attorney General would have been better suited to render these highly sensitive and often contentious judgments. Here, we recall that Sir John A Macdonald was directing events for, if the completion of confederation was to be accomplished by building political understandings within the broad contours of the constitution, it was crucial that the minister, as opposed to the Attorney General, be in place to round off the edges of strict legalistic interpretation. Simply put, the law could not trump politics and, as if to underline this state of affairs, a fortnight after the Department of Justice Act became law, Macdonald issued a memorandum outlining the terms whereby the Minister of Justice would reserve or disallow provincial legislation.[31]

Issued on 8 June 1868, the memorandum on reservation and disallowance clarified that the authority to reserve or disallow was to be used to forward Macdonald's centralist vision of confederation, that the duty of reviewing provincial legislation placed the Minister of Justice in a quasi-judicial role, and that Macdonald remained open to discussions specifying the practical, as distinct from the literal meaning of the constitution.[32] The blurring of law

27 'An Act respecting the Department of Justice' (n 26) ss 1 and 2.

28 John Ll J Edwards, *Ministerial Responsibility for National Security to the Office of Prime Minister, Attorney General and Solicitor General of Canada* (The Queen's Printer 1980) 8.

29 On the Colonial Office, see David M L Farr, *The Colonial Office and Canada, 1867–1887* (University of Toronto Press 1955).

30 See Department of Justice Mail Registers, 1868, NAC, RG 13, A1, vol 435, no 924 and Colonial Office 42/672, NAC, reel B489, no 11668, 531–36.

31 Robert C Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (State University of New York Press 1991) and Garth Stevenson, *Ex Uno Plures: Federal-Provincial Relations in Canada, 1867–1896* (McGill/Queen's University Press 1993) detail the context for the power of disallowance.

32 The following is from the memorandum concerning the powers of disallowance, 8 June 1868, NAC, RG 13, vol 419. Also see Department of Justice letter book, 8 June 1868, RG 13, A3, vol 554, 696–99.

and politics in such an arrangement was plainly evident and for some it was a contentious mix. From the perspective of young reform politician David Mills, it was simply indefensible that a Minister of Justice could first claim that a provincial enactment was unconstitutional and then adjudicate the matter. According to Mills, declaring a piece of legislation *ultra vires* was 'a judicial determination and should be left to the courts exclusively'.[33] Indeed, he thought that a provincial court of error and appeal should constitute itself 'a Judicial Committee of the Privy Council' and then, with the provincial Attorney General arguing in favour and the Dominion Attorney General arguing against, a judge would adjudicate the matter prior to the Governor General actually disallowing any local legislation.[34] The difference between the two outlooks is instructive. Appalled that 'Macdonald behaved as if the highest act of federal statesmanship was to assess the national interest case by case and act accordingly', Mills felt that 'federal statesmanship consisted, rather, in understanding and respecting the division of authority set down in the constitution, the fundamental law'.[35] Obviously, such a literal approach held little appeal for a Dominion Minister of Justice whose duty was to identify the 'interests of the whole Dominion' while seeking out a balance between the letter and spirit of the law against broader political, economic and social interests. According to some, in adopting this course of action, Macdonald was actively attempting to resolve the tension between the exclusive areas enumerated for provincial jurisdiction and *the* Dominion's general authority as outlined in the BNA Act.[36] His were the goals of a politician seeking political order and not a lawyer seeking legalistic certainty.

A circular confirming the Attorney General's pivotal role as the Dominion government's legal persona on 11 June 1868 followed the creation of the Department of Justice and the memorandum on disallowance and reservation. Consistent with the centralising flavour of the early Sydenham reforms and the Department of Justice Act, the circular specified that the Attorney General, as distinct from the minister, was charged with advising all departmental heads upon matters of law and was 'entrusted with the regulation and conduct of all litigation for or against the Crown and any public department in respect of any subjects within the authority and jurisdiction of the Dominion'.[37] Revealing a persistent lack of co-ordination in managing legal business, the memorandum requested that the various departments of state provide a summary 'of all suits or matters in litigation' as well as the 'names and residences of the professional Gentlemen in whose conduct they may have been placed, to enable me to see that the same are in proper train'. Macdonald also requested the forwarding to the ministry of all documents involving litigation 'to enable me to take such proceedings as may be deemed advisable'.[38] Coming as it did, less than a year after the proclamation of the new Confederation and within a month of creating the Department of Justice, the move to coordinate legal counsel in the person of the Attorney General represented the final stage in clarifying the Dominion government's legal identity. Inasmuch as the Dominion government had put its legal house in order, the practical implications of these efforts remained unclear, as did their impress on the management of

33 *Daily Journal* (4 May 1868), David Mills Papers, box 4285, file no 244, University of Western Ontario Regional Room, London, Ontario. The entry over a month before the memorandum's release indicates that Macdonald circulated a draft among prominent lawyers for commentary before finalisation. Mills noted that Macdonald had initially proposed two grounds for disallowance: an act being contrary to public policy and its being *ultra vires*.

34 *Daily Journal* (4 May 1868).

35 Vipond ( n 31) 156.

36 Ibid 116.

37 Department of Justice Circular, 11 June 1868, NAC, RG 13, accession 86–87/361, box 2, file 13/1868.

38 Ibid.

the government's affairs. For while Macdonald invariably preferred that the large questions of governance and public policy would be shielded from the vicissitudes of law, the realities of the new nation challenged such aspirations, leaving the department with a more modest goal of attempting to ensure that nothing untoward occurred within areas of Dominion jurisdiction. The department's composition offers clues that the pursuit of this task was not to be a legalistic contest.

The character and qualifications of those charged with the duty of protecting the Dominion government's legal interests underwent important changes during the completion of confederation between 1867 and 1878. While it was true that in the early years of confederation the Dominion departments of state 'were small enough to enable energetic ministerial heads to attend personally to much of the day-to-day business', the press of events in the Department of Justice placed an enormous responsibility upon the deputy minister.[39] In this, a staff filled almost exclusively by English-speaking clerks, most of whom had worked for the Attorney General's office in Upper Canada, supported the deputy. Although one might expect familiarity with the law to have been a pre-condition for departmental work, beyond the deputy minister this was not initially the case. In fact, the eventual arrival of additional legally trained individuals reveals that the influence of legal education in the department's operation was a complex matter. Passing the Bar ensured neither the ability nor the will to become a knowledgeable practitioner or legal advisor and further, if a young lawyer was especially skilled, it seems unlikely that a career in the bureaucracy would be particularly attractive.[40] In truth, other than Hugh Richardson and Zebulon Lash, there were few examples of individuals who enjoyed notable success after leaving the bureaucracy.[41] While a keen legal mind could succeed in the department, the politically pragmatic approach to problem-solving offered limited appeal for expansive legal minds and especially those inclined to the instrumental application of the law. During these years, the result was a department staffed by competent if unspectacular individuals.

The deputy minister was unquestionably the most important figure in the department's daily operation. Responsible for the finalisation of all opinions, memorandums, edicts, orders and directives, the deputy was the conduit between the minister and the Department as well as between the Department and the Dominion and provincial bureaucracies. During the completion of confederation, the department was especially fortunate to have two adept deputies: Hewitt Bernard and Zebulon Lash. Having arrived in Upper Canada from Jamaica in 1851, Bernard had intended to establish a law practice. Hired as Macdonald's secretary on 15 February 1858, chief clerk since 4 March 1859, and less dutifully as his brother-in-law since 16 February 1867, Bernard was named Deputy Minister of Justice by an Order in Council on 29 May 1868; one day after the Department of Justice officially came into

39 J E Hodgetts, *The Canadian Public Service: A Physiology of Government, 1867–1970* (University of Toronto Press 1973) 49.

40 Cindy Sondik Aron has argued that employment in the bureaucracy often corresponded to aspirations of middle-class stability; see Sondik Aron, *Ladies and Gentlemen of the Civil Service: Middle-Class Workers in Victorian America* (Oxford University Press 1987).

41 Hugh Richardson's judicial career in western Canada has been subjected to critique in recent years which has called his abilities into question. For the critique, see Bob Beal and Barry Wright, 'Summary and Incompetent Justice: Legal Responses to the 1885 Crisis', in Barry Wright and Susan Binnie (eds), *Canadian State Trial, vol III: Political Trials and Security Measures, 1840–1914* (The Osgoode Society for Canadian Legal History 2009) 353–410; J M Bumsted, 'Another Look at the Riel Trial for Treason' in ibid 411–50; and Bill Waiser, 'The White Man Governs: The 1885 Indian Trials', in ibid. 451–82. For a more positive assessment based on a close reading of Richardson's career on the bench, see Shelly A M Gavigan, 'The First Nations and the First Criminal Court in the North-West Territories, 1870–1903' (SJD thesis, University of Toronto 2008) 86–94. Gavigan's dissertation is being prepared for publication as *'Of course no one saw them': Criminal Law on the Aboriginal Plains, 1870 – 1905* (UBC Press and the Osgoode Society for Canadian Legal History forthcoming 2012).

existence.[42] The heart of the staff until retiring because of ill health in 1876, Bernard provided constancy, especially during the early years of the Mackenzie government when ministers passed through the department at an alarming rate. Once it became clear that Bernard's tenure as deputy was to end, Liberal Minister of Justice Edward Blake offered the position to Zebulon Lash, then a 30-year-old lawyer practising in Toronto where he lectured in commercial and criminal law for the Law Society of Ontario.[43] Blake had described the work as 'arduous but very pleasant and after attaining familiarity with the general run of the office can be easily managed by a man of energy, system, and powers of organisation'.[44] Lash admitted that the offer was a surprise and that the opportunity of working with Blake was appealing, but the monetary considerations of giving up private practice necessitated his refusal.[45] Blake persisted and on 26 April Lash accepted the office he would hold until late May 1882, at which time he left and rejoined his former minister in private practice as a partner in Blake, Lash, Cassels and Holman.[46]

Beyond the deputy minister, there was a surprising absence of legally trained individuals in the department until Hugh Richardson's appointment as chief clerk on 26 October 1872.[47] Additional lawyers arrived over the next few years. The first appointment to the department during the Mackenzie administration involved the hiring of 55-year-old lawyer Augustus Keefer as a junior second-class clerk on 1 January 1874; a position he would hold for less than three years owing to poor health.[48] Citing the 12 October 1872 Order in Council recommending that the department needed a barrister from the province of Québec, Minister Télesphore Fournier acquired George Duval as a private secretary on 28 July 1874.[49] He later rose to the position of chief clerk while Richardson filled in for Bernard whose health was collapsing.[50] Educated at McGill University in Montréal where

42 J K Johnson (ed), *The Letters of Sir John A Macdonald, 1836–1857*, vol II (The Queen's Printer 1968) 51 and 126–27; Order-in-Council no 534/1868, 29 May 1868, NAC, RG 2. For biographical detail on Bernard, see (1893) 29 Canada Law Journal 130–31, and 149–50; W Stewart Wallace (ed), 'Hewitt Bernard' in *The Dictionary of Canadian Biography*, vol 1 (The Macmillan Company of Canada 1945) 45; and P B Waite, 'Hewitt Bernard' in *Dictionary of Canadian Biography*, vol XII (University of Toronto Press 1990) 97–98.

43 George Maclean Rose (ed), 'Zebulon Aiton Lash' in *Cyclopaedia of Canadian Biography: Being Chiefly Men of the Time* (Rose Publishing Company 1886) 657. Also see Henry James Morgan, *The Canadian Men and Women of the Time: A Handbook of Canadian Biography of Living Characters* (William Briggs 1912) 638–39; C W Parker, *Who's Who and Why*, vols 6 and 7 (International Press 1914) 1361; W Stewart Wallace (ed), *Dictionary of Canadian Biography*, vol II (Macmillan Company of Canada 1945) 344; and Theodore D Regehr, 'Zebulon Aiton Lash', in *Dictionary of Canadian Biography*, vol XIV (University of Toronto Press 1998) 97–98.

44 Edward Blake to Z A Lash, private, 18 April 1876, Archives of Ontario (AO), Manuscript Series (MS) 20 (19), 211–12.

45 Lash to Blake, NAC, Manuscript Group (MG) 27 I D2, reel M244, 19 April 1876.

46 Lash to Blake, ibid 26 April 1876. Lash accepted a day later; see Lash to Blake, ibid. 27 April 1876. Order in Council no 1190/1882, 23 May 1881, NAC, RG 2.

47 Order in Council no 984/1872, 26 October 1872, NAC, RG 2. Bernard's memorandum of 8 October 1872 requesting additional help began with the assertion 'that for some time past it has been found impossible, with the present staff of the Department of Justice, to keep up anything approaching to the efficient discharge of the daily business referred to it'. See Hewitt Bernard to the Privy Council, 8 October 1872, in Order in Council no 976/1872, 12 October 1872, NAC, RG 2.

48 Keefer was admitted to the Upper Canadian Bar in 1850. Henry J Morgan (ed), *The Canadian Legal Directory: A Guide to the Bench and Bar of the Dominion of Canada* (Toronto 1878) 50. Memorandum from Edward Blake, 16 November 1876 in Order in Council no 1077/1876, NAC, RG 2.

49 Order in Council no 977/1874, 28 July 1874, NAC, RG 2. On the civil law tradition within the Canadian Department of Justice, see Mélanie Brunet, *Out of the Shadows: The Civil Law Tradition in the Canadian Department of Justice, 1868–2000* <www.justice.gc.ca/eng/dept-min/pub/civil/index.html> accessed 3 June 2011.

50 Order in Council no 1532/1874, 18 December 1874, NAC, RG 2, and memorandum of Télesphore Fournier, 18 December 1874, NAC, RG 13, A4, vol 1382. For the original order, see Order in Council no 976/1872, 12 October 1872, NAC, RG 2 and Hewitt Bernard's memorandum of 8 October 1872 (n 47).

he acquired valuable knowledge of the French Civil law, the appointment of Augustus Power in July 1875 brought another legal mind into the department.[51] Finally, weeks after Lash replaced Bernard as Deputy Minister, John L B Fraser, a young barrister from Osgoode Hall, joined the staff in the aftermath of Richardson's departure to become Stipendiary Magistrate in the North West Territories.[52]

Several impressions emerge from a survey of departmental personnel. Supported by a small number of clerks without any legal training, at the outset Deputy Minister of Justice Hewitt Bernard was effectively *the* Department of Justice.[53] While he had the benefit of Sir John's legal experience, on a practical basis Bernard was very much on his own until 1872 and Richardson's appointment. Indeed, as Bernard wrote to Senator Alexander Campbell in August of that year:

> There is no Minister here, and I find that the Departments generally come to ask me what should be done in matters arising. In addition to which Sir John has evidently put everything coming to him, which is not absolutely electioneering, into my charge: and I have to answer letters and telegrams and look after important business all day, and that from British Columbia to Halifax.[54]

Essentially, the department's (and by extension the Dominion government's) legal imagination was limited to what Bernard and Macdonald were willing to countenance. Even had both been brilliant legal minds, and there is little evidence to sustain such an attribution, the department was over-matched by the volume and variety of legal issues arising from a new and diverse nation. Bernard acknowledged as much in a letter to Judge J R Gowan wherein the soon to be deputy minister admitted that his was an Upper-Canadian perspective on the nation.[55] The implication of this self-awareness was instructive for, until the mid-1870s, the department was almost exclusively composed of individuals from the pre-confederation Attorney General's office in Upper Canada. Theirs were the habits of office rooted in the political deadlock of the late 1850s and early 1860s; it was a culture valuing flexibility rather than hardened legal principles. Macdonald, as the only Minister of Justice and Attorney General from 1868, perpetuated this outlook. This stood in sharp contrast to developments following the victory of Alexander Mackenzie's Liberal government that arrived in 1873 full of righteous indignation, high principles, a shortage of

51 Power, whose father William P Power had sat on the Superior Court of Lower Canada, was appointed to the civil service on 7 December 1874 and transferred to the Department of Justice on 1 July 1875. See *The Civil Service List of Canada, 1887 (*The Queen's Printer 1888) 2. See 'Augustus Power' in Morgan (n 43) 914

52 See 'Hugh Richardson' in Morgan (n 43) 939 and Order in Council no 836/1876, 18 September 1876, NAC, RG 2. Also see Thomas Flanagan, 'Hugh Richardson' in *Dictionary of Canadian Biography*, vol XIV (N 43) 870–71.

53 A return of all the names of individuals employed by the Department of Justice on 22 November 1867 indicates that including the Attorney General, there were eight men on staff. See 'Return of the names of all of the officials and employees now concerned with the office of the Minister of Justice', 22 November 1867, NAC, RG 13, vol 16, file 310. Also see *The Blue Book; or, Statement of the Public Service of the Former province of Canada for the Half-Year Ended 30th June 1867* (Ottawa, 1868). The contingent would rise to 11 and then fall back to nine over the ensuing decade. See Zebulon Lash, 'Pay list and establishment of the Department of Justice, 1878', NAC, RG 13, vol 419.

54 Hewitt Bernard to Alexander Campbell, 23 August 1872, AO, Manuscript Unit 469.

55 Hewitt Bernard to James Robert Gowan, 15 August 1867, James Robert Gowan Papers, NAC, MG 27 I E 31. See Desmond H Brown, 'Sir James Robert Gowan' in *Dictionary of Canadian Biography*, vol XIII (University of Toronto Press 1994) 391–95.

experience in government and an understandable inclination to enjoy the spoils of office.[56] Reliant on a bureaucracy of doubtful allegiance, the first three Liberal Ministers of Justice – Antoine Aimé Dorion, Télesphore Fournier and Edward Blake – introduced greater geographical variety and professional training in departmental personnel, the latter of which fostered an increasingly rigid and supposedly more principled approach to its mandate and the rule of law.[57]

Although the consequences of this shift for the returning Macdonald government after 1878 are certain, there was no tipping point when one could draw a line under past practice and herald the new approach to legal counsel. Here we are reminded of John Cell's description of the mid-nineteenth-century Colonial Office where thinking was in a constant state of flux:

> At any given moment there is not so much policy as policy formation, an unsettled and changing set of responses by government to the continual interaction among men, forces, ideas and institutions.[58]

Thus, 'thousands of tiny contingent practices' of departmental routine documented both the persistence of older pragmatic approaches and their eventual retreat with the ascendency of new men and ideas.[59] It was a routine established through what the Civil Service Commission of 1868 described as the department's 'main business' the provision:

> of legal opinions given upon references from the other Departments, which are estimated at about 1200 annually, besides numerous verbal references upon questions of law. It has also to examine the legislation of the Provinces, and the bills brought in by private members, and to draft or devise Government bills.[60]

This 'main business' (which was underestimated by 25 per cent in 1868) transpired in concert with the administration of the nation's penitentiaries and prison population, managing both the royal prerogative and applications for remission of sentences, appointing and overseeing members to the senior courts and, by the mid-1870s, bringing the Dominion Supreme Court into existence.[61] One measurement of the ever-increasing workload was the department registers that recorded every *written* reference or query received. As reported by successive Liberal Ministers of Justice Edward Blake and Rodolphe Laflamme, department business tripled between 1869 and 1877, rising from 1693 enquiries in the first year with the expectation that in the latter year approximately 5600 would be handled.[62]

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56 Alexander Mackenzie's government assumed power in the aftermath of the so-called Pacific Scandal in which the Macdonald government was undone by accusations of bribery, dubious contracts for the Canadian Pacific Railway, and disreputable electoral practices. In calling on Macdonald to resign, then Governor General, Lord Dufferin based his concerns, in part, on the ideological construction of the law and the assertion that 'as administrator of justice and the official guardian and protector of the Laws, your responsibilities are exceptional'. See Governor General Lord Dufferin to John A Macdonald, 19 October 1873, NAC, MG 26A, vol 79, 30965–78.

57 Biographical treatments of these Ministers of Justice are found in Swainger, 'Governing the Law: The Canadian Department of Justice in the Early Confederation Era' (PhD dissertation, University of Western Ontario 1991) 78–92.

58 John W Cell, *British Colonial Administration in the Mid-Nineteenth Century: The Policy-Making Process* (Yale University Press 1970) xi.

59 Robert W Gordon, 'Critical Legal Histories' (1984) 36 Stanford Law Review 84–5 and 90, fn 80.

60 'Department of Justice', First Report of the Civil Service Commission, Canada, *Sessional Papers* (1869) no 19, 15.

61 These additional responsibilities have been examined in Swainger (n 1).

62 Edward Blake, 'The Teeswater Demonstration' in *Reform Government in the Dominion. The Pic-Nic Speeches* (The Globe Steam Book and Job Press 1878) 135, and Rodolphe Laflamme, 2 April 1878, Canada, House of Commons Debates (1878) 1585.

Numbers told only part of the story for they fail to capture the varying amounts of labour involved in each reference. A sliding scale between extremes marked by bureaucratic labour handled by clerks and signed off by the deputy minister and those concerns requiring the minister's political and legal acumen plot the profile of departmental work. The distinction could be as vast as the difference between a routine patent application for the appropriately patriotic Hallam's New Dominion Churn and Washer as compared with the three years of aggravation demanding co-ordination with provincial authorities, as well as international diplomacy with Spain, Great Britain and the United States, aimed at preventing the recruitment of volunteers for a Cuban invasion that was to be launched, in part, from Nova Scotia.[63] Still, regardless of whether the issue was relatively mechanical or required sustained attention to bewildering and minute detail, in the early years of confederation the goal was constant; Dominion authority should prevail and if concerns emerged, actual legal entanglements were avoidable through mutually beneficial accommodations. Thus, when litigation loomed in 1872 because of the laxity which had crept into the administration of the land reserves running parallel to the Rideau Canal bisecting the nation's capital, Deputy Minister of Justice Hewitt Bernard penned a series of unofficial communications seeking a means of escape, the most illuminating being one sent to the new Prime Minister and Minister of Public Work, Alexander Mackenzie, in June 1874. Asked to issue a land patent for a piece of land falling within the canal reserve, and thus violate both the letter and spirit of the law, Bernard balked:

> I think it best to represent to you, in the first instance, unofficially, that I think such a grant would be of a rather dangerous character . . . I have always had some doubts whether the leases of what are known as Canal lots, to private individuals, could be deemed 'purposes of the canal': but there is enough room for some argument that warehouses and stores for commercial purposes may be deemed so to be. And it has always been the custom in those cases, to give leases only as distinguished from absolute transfers, – and those leases, some for definite terms of years and not to be indefinitely renewable.
>
> To grant therefore to private individuals and thereby absolutely to alienate from the Crown and from 'purposes of the Canal' any portion of the land freely given by [Nicholas] Sparks for such 'purposes' only, is I fear a matter which might involve great difficulty . . . I suggest therefore for your consideration whether it is not well to abandon such a grant as is contemplated. I do not think that a lease even for term of years would get over the difficulty. And yet I think it would be injudicious publicly to give the reason which guides my views, as the whole question is one which may bear a different interpretation to that which I put on it.[64]

Bernard's language was instructive. Harbouring doubts as to the practice of granting leases, the deputy minister believed that 'there is enough room' in a definition of 'canal purposes' to permit business and industrial encroachments but that unconditional grants to private individuals were another matter altogether. This uncertainty threatened potentially every sale of reserve land made and Bernard counselled discretion and suggested that the

63 On the Canadian difficulties concerning the Cuban invasion and its context within the Ten Year's War, see Swainger (n 1) 51–53. More generally, see Joan Casonovas, *Bread Or Bullets: Urban Labor and Spanish Colonialism in Cuba, 1850–1898* (University of Pittsburgh Press 1998) 97–126 and Ada Ferrer, *Insurgent Cuba: Race, Nation, and Revolution, 1868–1898* (University of North Carolina Press 1999) 15–70.

64 Hewitt Bernard to Alexander Mackenzie, 12 June 1874, NAC, RG 13, A3, vol 566, 730–33. The statute to which Bernard referred was Canada, 'An Act to explain provisions of the Ordnance Vesting Act and to remove certain difficulties which have occurred in carrying the said provision into effect', Canada, 9 Victoria, chapter 42. His quotation from the statute was somewhat selective wherein Nicholas Sparks had granted the land 'for the purposes of the said Canal, provided no buildings be erected thereon'. The provision concerning canal purposes been interpreted very broadly and buildings had in fact been constructed within the reserve.

orchestration of lease was certainly preferable to granting an outright patent. Days later a 40-year lease with a rent of $1 per year was authorised; despite genuine reasons to question Bernard's loyalties – given his Conservative leanings and close ties to his brother-in-law, John A Macdonald – the deputy minister's 'legal' opinion had convinced Mackenzie.[65] For the early Department of Justice, this was the art of statecraft.

In as much as Bernard's efforts on the canal reserves represented the department's initial approach to orchestrating the law, he was also at hand when a dispute over escheats and forfeitures between the province of Ontario and the Dominion government foreshadowed constitutional battles to come. Escheat was the principle whereby the Crown assumed possession of the property of an individual who died intestate without heirs and the legislation in question was an Ontarian Act providing for the seizure of the estate of an individual convicted of treason or another felony. The seizure was justified as an extension of the Lieutenant Governor's prerogative powers. Liberal Minister of Justice Télesphore Fournier struck down the legislation as *ultra vires* since the Lieutenant Governors, as Dominion appointees, did not possess prerogative powers, and that all matters relating to criminal law were within Dominion jurisdiction. Bernard's authorship of the initial memorandum on the matter has provided a convenient, if unconvincing explanation, for the jurisdictional dispute.[66] The source of this disingenuous interpretation was Oliver Mowat, then Ontario's Liberal Premier.[67] Certainly, had Fournier actually subscribed to Mowat's position, surely the Minister of Justice was of stout enough fibre to stand up to his deputy, rather than cave in on an issue of constitutional interpretation? Yet, rather that consider the possibility that fellow Liberal Fournier actually believed that Ontario's legislation was unconstitutional, it was easier to construct a Macdonaldian conspiracy with Sir John directing events through his brother-in-law and accomplice.[68] That Edward Blake, who replaced Fournier when the latter was elevated to the newly created Dominion Supreme Court, agreed that all forfeitures for treason or criminal convictions did belong to the Dominion government while, at the same time, departing from the position concerning the Lieutenant Governor's prerogative powers, suggests that there had been room in Bernard's initial memorandum for negotiation, had the political will existed. Blake, however, whose mien envisaged a sharp line distinguishing things legal from those political, opted not for an understanding between gentlemen politicians but for turning the matter over to the Canadian Supreme Court for adjudication.[69]

More broadly, emphasising Bernard's role and his connection to Macdonald substitutes personal intrigue for an understanding grounded in how the Department of Justice had functioned since 1868. Given the department's method of dealing with conflicts, Bernard's memorandum had been an opening gambit in the type of negotiation that occurred prior to the mid-1870s. The process went awry when Fournier simply accepted Bernard's position as being sound from a Dominion point of view, rather than bringing the matter to Mowat's unofficial attention and again when Blake did not seize the opportunity of seeking out an accommodation. Believing that Ontario's position on the prerogative powers was correct, Mowat was especially annoyed that Fournier had officially concurred with Bernard before

65 Department of Justice to Department of Public Works, 16 June 1874, in ibid 770.

66 Romney (n 18) 248.

67 Report of Attorney General Oliver Mowat, 22 February 1875 in W E Hodgins (ed), *Correspondence, Reports of the Minister of Justice and Orders in Council upon the subject of Dominion and Provincial Legislation, 1867–1895* (The Queen's Printer 1896) 113.

68 Romney (n 18) 249. Margaret Evans, Mowat's biographer, follows Romney's lead on this view; see A Margaret Evans, *Sir Oliver Mowat* (University of Toronto Press 1992) 149. Also see Stevenson (n 31) 200–01.

69 Romney (n 18) 249. The Ontario matter never reached the Supreme Court because a Québec Court of Queen's Bench decision settled the matter in the provinces' favour.

discussing the matter. Reflecting on the breakdown, Mowat notably attempted to resurrect the earlier approach to business:

> Sir John Macdonald's course was to correspond privately about provincial Acts which he considered to be ultra vires before putting his objections in final shape. Fournier has not adopted this course, so far at least as Ontario is concerned, either in regard to the escheat Bill or to our general legislation. Do not you think Sir John's plan the better one, at all events as long as the two governments are in accord?[70]

Clearly, Macdonaldian schemes had not caused the skirmish or the ensuing constitutional dispute. Rather, the episode owed its origins to the abandonment of unofficial communications wherein law was as a tactic of statecraft and, in that guise, had successfully defused these situations in the past.

One hastens to add that the die need not have been cast. Upon his return in 1878, Macdonald could have resurrected an approach to governance and legal interpretation seeking out understandings in avoidance of exposing the Dominion government to the uncertainties of litigation and constitutional court challenges. Circumstances had changed and inasmuch as completing the nation's institutional structure had provided fertile ground for accommodations with friend and foe alike, one of the emerging issues of the late 1870s and early 1880s was that of fine-tuning the constitutional division of powers. Despite his awareness that the courts would not be allies in forwarding his own vision of the constitution, it seems as if Macdonald could not help himself.[71] And while he would never again be pushed from office, as early as 1878 there were already signs that time was catching up to Macdonald who was 'strangely unlike the self-effacing, repentant, ageing man' forced to resign five years earlier.[72] He has become notably more combative, and the electoral victory of 1878 offered an unexpected chance for redemption and yet another opportunity to champion his vision of Canada:

> The second chance would be the last chance. It had come late. It could not be, in the nature of things, as favourable a chance as the first. But it would be the last opportunity he would ever get.[73]

This realisation left Macdonald unwilling to brook opposition to either the style or substance of his governance and it was in his battles over the meaning of the constitution with Ontario Premier Oliver Mowat that Macdonald's increasingly pugnacious attitude was especially evident. To the degree that Macdonald had 'always found it a positive pleasure to do battle', there would be precious little pleasure for Macdonald in these engagements with Mowat, who proved to be a solvent for all the attributes and talents which had been central to Macdonald's career.[74] As Mowat's biographer A Margaret Evans pointed out, Macdonald's 'famous bonhomie, his skill in the management of men, his powers of conciliation, were not evinced where the provincialist premier was concerned'.[75] And by the time that Macdonald recognised that Mowat was deadly serious and 'would not be intimidated' in forwarding his own vision of the constitution, the course was unalterable.

70 Oliver Mowat to Edward Blake, 23 June 1875, NAC, reel M-242.

71 John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (The Osgoode Society for Canadian Legal History 2002) 92.

72 Donald Creighton, *John A Macdonald: The Old Chieftain* (The Macmillan Company of Canada 1955) 237.

73 Ibid 254.

74 Ibid 322.

75 Evans (n 68) 169.

Sir John committed himself to a battle that successive rulings of the Judicial Committee of the Privy Council indicated he would not win.[76]

In the course of these constitutional battles, the Department of Justice was hardly covered in glory as the legal adviser to the Dominion government. While Macdonald directed the Dominion charge behind the scenes, after 1878, his new Minister of Justice was the 'uninspired but judicious Nova Scotian' James MacDonald who was of indifferent mettle.[77] Marshalling the federal case in these clashes required considerable talent and James MacDonald was ill-suited, remaining in office until his May 1881 appointment as Nova Scotia's Chief Justice.[78] Into his place stepped Sir Alexander Campbell, a long-time associate and occasional business partner of Sir John's.[79] Hardly a newcomer to federal politics, Campbell had sat in the Senate since his appointment by Macdonald on 23 October 1867 from where he supervised the Post Office throughout Macdonald's first term.[80] Although more likely to hold Sir John's attention than did James MacDonald, Campbell was no more able to compel the Prime Minister to alter his course in refusing to speak with Mowat, with whom Campbell maintained friendly relations since the time both had clerked in Macdonald's law offices. Still, the one bright spot for the federal cause was the presence of the department's deputy minister, Zebulon Lash. Despite recognised political differences with the incoming Conservatives, Lash was willing to stay in the department where his strong centralist sympathies were welcome.[81] Although an increase in salary promised by outgoing Minister of Justice Laflamme was not forthcoming, Lash nonetheless received both a financial and professional boost by his appointment 'as counsel in cases in which the Government is interested'.[82] Consequently, Lash presented the Dominion case in *Mercer v the Attorney General for Ontario* before the Canadian Supreme Court and eventually before the Judicial Committee of the Privy Council (JCPC). Although his argument before the Canadian Supreme Court secured a Dominion victory in the winter of 1881, on appeal the JCPC overturned the result in the summer of 1883.[83] It would be but one in a series of constitutional defeats for the Dominion government and Sir John A Macdonald's vision of confederation. Having already returned to an increasingly prominent and lucrative private practice specialising in commercial law, with little apparent hesitation Lash safely left the business of advising the Dominion government to others.

76 Ibid 324 and 377.

77 Peter B Waite, *Canada 1874–1896: Arduous Destiny* (McClelland & Stewart 1971) 96, and Waite, *The Man from Halifax: Sir John Thompson, Prime Minster* (University of Toronto Press 1985) 102. MacDonald's name also appears as McDonald and Macdonald.

78 On the politicisation of the judiciary in post-confederation Canada, see Jonathan Swainger, 'A Bench in Disarray: The Quebec Judiciary and the Department of Justice, 1867–1878' (1993) 34(1) Les Cahiers de Droit 59–91 and J Swainger, 'Judicial Scandal and the Culture of Patronage in Early Confederation, 1867–1878' in Jim Phillips, R Roy McMurtry and John Saywell (eds), *Essays in the History of Canadian Law vol X: A Tribute to Peter Oliver* (Osgoode Society for Canadian Legal History and University of Toronto Press 2008) 222–54.

79 Ged Martin's recently completed article length study of Alexander Campbell paints a fascinating portrait of a public figure beset by health and physical difficulties and a marriage made difficult by his wife's institutionalisation. See 'Alexander Campbell (1822–1892): The Travails of a Father of Confederation' (forthcoming 2012) Ontario History. My thanks to Ged for sharing Campbell's extraordinary history that, for reasons of Victorian sensibilities, remained largely hidden from public discourse.

80 Donald Swainson, 'Sir Alexander Campbell', *Dictionary of Canadian Biography*, vol XII (University of Toronto Press 1990) 150–54.

81 See Regehr (n 43) 605.

82 R Laflamme to Z A Lash, nd, NAC, RG 13, vol 419; and Report of James Macdonald, 18 June 1879, NAC, RG 2, Order in Council no 914/1879. The appointment was confirmed on 25 June 1879.

83 The Attorney General of Ontario and Andrew F Mercer, *The House of Lords and Privy Council*, vol 8 (1883) 767. Also see Romney (n 18) 252–55.

Rooted in an outlook combining the ideology of law with a scepticism concerning the ability of law or legal remedy to effect thoroughgoing reform, regimes of practice in the early Dominion Department of Justice mirrored a confluence of law and politics that was a product of Canada's colonial history. Distinct from English ideals that portrayed an apolitical adviser to the Crown and government, the colonial Attorney General assumed political and governmental leadership in local assemblies and by the time of confederation in 1867, the Attorney General was synonymous with legislative and political power.[84] This accumulated influence was renovated within the jurisdictional framework of the new union; responsibilities were divided between the provincial and national levels of government and in the Dominion government the responsibility for provision of legal counsel was shared between an apolitical Attorney General, a political Minister of Justice, and a bureaucracy to provide necessary administrative support. The ideology of law and its corollary that those trained in the law were apolitical and possessed a cachet of specialised insight or knowledge framed all these developments. It was an ideology rationalising the prominence of legally trained individuals within a variety of governmental and bureaucratic roles while lending weight and legitimacy to their practices and decisions. The result was that law and accommodations grounded in the confluence of law and politics assumed a central role in clarifying the daily working principles of the new union. Such as it was, the emergent governmentality with its regimes of practices had worked well enough until 1873 when, because of governmental inexperience and consequent reliance on a developing literalist legal culture in the Department of Justice, there emerged an increasing acquiescence in legalistic responses as the favoured tactic in defence of the Dominion government's jurisdictional assertions. On the large constitutional questions of the day, this tactic failed while on almost every front in its oversight of the Dominion's daily legal business, the department was successful in forwarding its version of what constituted 'sound pragmatic common sense'.[85] Depending on where one looked, the Dominion's legal advisors were well versed in the art of government or had dramatically fallen short.[86]

Thanks to the efforts of Alexander Campbell and then John Thompson as consecutive Ministers of Justice, by the late 1880s the department righted itself in returning to less confrontational and more successful approaches to the government's legal business. The department soon shared in reflected glory of former deputy minister George Burbidge and his successor Robert Sedgewick who had played pivotal roles in codifying the criminal law in 1892, then an accomplishment still unmatched in England today.[87] Wielding the law unnecessarily had not garnered success. It was a telling lesson underlining that in the empire's oldest self-governing jurisdiction, truly effective statecraft was that practised at the confluence of law and politics.

84 The enormity of the gap in practice, let alone ideal, between England and Canada in reference to the Attorney General is shown in a comparison of John L J Edwards' study *The Law Officers of the Crown: A Study of the Offices of the Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) with that which emerged in the Canadas in the aftermath of responsible government.

85 As cited in Gordon (n 59) 112.

86 Dean (n 5) 28.

87 Burbidge departed the department to become the first permanent justice of the Exchequer Court. See Ian Bushnell, *The Federal Court of Canada: A History, 1875–1992* (The Osgoode Society for Canadian Legal History 1997) 81–92. Generally, see Brown (n 3) and, more specifically, Desmond Brown, 'George Wheelock Burbidge' in *Dictionary of Canadian Biography*, vol. XIII (University of Toronto Press 1994) 135–37 and on Sedgewick see Philip Girard, 'Robert Sedgewick' in ibid 931–34.