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Constitutional Rights with a Privy Council Twist

Introduction

1. Almost every Justice on the Supreme Court will tell you that when they were sworn in at the Court and saw the list of cases they were going to hear during their first term they were very surprised by one thing. They were surprised at the number of cases in which they would be sitting not as a judge of the Supreme Court but as a member of the Board of the Judicial Committee of the Privy Council or JCPC. In the year ending 31 March 2025, I and my colleagues delivered 49 judgments in Privy Council cases – that is several more than the 42 judgments that we handed down over the same period with our Supreme Court hats on.¹
2. The Judicial Committee of the Privy Council has been described in its modern form as “a unique body”,² “a relic of empire”,³ and “a valuable selling point for the jurisdictions it covers”.⁴ I would describe it, for the purposes of this evening’s talk, as an evolving institution generating important case law.⁵ I hope to give you a sense of the JCPC’s role in resolving cases of constitutional importance that raise issues of fundamental rights and freedoms. These cases cover issues such as protecting the environment, death penalty, LGBTQ+ rights and most recently, the relationship between local municipal authorities and government. And I also hope to develop as my theme how the constitutions adopted by these territories, and perhaps by any territory, reflect the society as it evolves. As the Privy Council said in a case in 1999,

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

² Lady Arden, The Judicial Committee of the Privy Council as an important source of financial services jurisprudence, The 9th Annual P.R.I.M.E. Finance Conference The Peace Palace, The Hague, The Netherlands, 3 February 2020.

³ Lady Hale, *Spider Woman* (Random House 2021) 82.

⁴ Desiree Artesi, *The Privy Council and the Commonwealth*, Counsel Magazine (31 January 2022), <<https://www.counselmagazine.co.uk/articles/the-privy-council-the-commonwealth>> accessed 22 March 2023.

⁵ Daniel Clarry, “Institutional Judicial Independence and the Privy Council”, *Cambridge Journal of International and Comparative Law* 2014, 3(1), 46-76.

“a constitution is an attempt, at a particular moment in history to lay down an enduring scheme of government in accordance with certain moral and political values”.⁶

The JCPC

3. Some of you might be wondering what exactly is the JCPC? It is the court of final appeal for a number of UK overseas territories, such as the Cayman Islands, Gibraltar and Bermuda, of Crown dependencies such as Guernsey and Jersey, and of some Commonwealth countries such as The Bahamas and Trinidad & Tobago. The Privy Council dates back to the time of the Norman Kings and by the 1930s it was said to be the final court of appeal for more than a quarter of the world.⁷ Over the last century there has inevitably been a decrease in the extent of the JCPC’s jurisdiction. Appeals from Canada and India were ended in 1949, with Australia, Hong Kong and New Zealand following in 1986, 1997 and 2003, respectively. But many countries choose to retain the JCPC as their final court of appeal and today it continues to hear appeals in both civil and criminal matters from 29 overseas jurisdictions.⁸ It is not only the Justices of the Supreme Court who can sit on the JCPC. Judges of the Inner House of the Court of Session, the Court of Appeal in England & Wales and the Court of Appeal in Northern Ireland are also sworn in as members of the Privy Council when they take office and so can also sit on a Board to hear a case.
4. In addition, judges of superior courts in many Commonwealth countries have long been invited to serve as judges on the JCPC. During the time when India still sent cases to the Privy Council as its highest court of appeal, Sir Shadi Lal, the first Indian to become Chief Justice of Lahore, was appointed to the Committee in 1934 and served for four years. His portrait hangs outside Courtroom 3, which is the courtroom in our

⁶ *Matadeen v Pointu* [1999] 1 AC 98,108.

⁷ Mance and Turner, *Privy Council Practice* (Oxford University Press 2017).

⁸ At the date of this speech, these Commonwealth countries use the JCPC as their highest court of appeal: Antigua and Barbuda, The Bahamas, Cook Islands, Niue, Grenada, Jamaica, Republic of Kiribati, Republic of Mauritius, St Christopher and Nevis, Saint Vincent and the Grenadines, Republic of Trinidad and Tobago, Tuvalu. These Crown Dependencies use the JCPC as their highest court of appeal: Guernsey, Isle of Man, Jersey. These UK Overseas Territories use the JCPC as their highest court of appeal: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Monserrat, Pitcairn Islands, South Georgia and the South Sandwich Isles, St Helena, Ascension, and Tristan da Cunha, Turks and Caicos Islands, Virgin Island. Akrotiri and Dhekelia remain overseas territory under the sovereignty of the United Kingdom on the island of Cyprus since its independence in 1960. There is also an agreement between the King and the Sultan of Brunei, which means that some civil appeals from Brunei are heard by the JCPC.

building in Parliament Square dedicated to JCPC hearings. The tradition of Commonwealth judges contributing their expertise continues today. Dame Janice Pereira, former Chief Justice of the Eastern Caribbean Supreme Court, and Sir Anthony Smellie, former Chief Justice of the Cayman Islands, currently serve as members.

5. The JCPC caseload covers a remarkably wide spectrum, from trusts or insolvency law in those jurisdictions which operate as tax shelters, to disputes between neighbours over land and appeals against criminal convictions. The cases I want to focus on this evening are those that raise issues of constitutional importance and I want to consider what they tell us about the place from which the appeal comes to us. One growing trend in our case work in the Privy Council is the number of cases that raise issues about the protection of the environment and the islands' natural resources. Many of the islands which we serve include areas of pristine natural beauty and rare protected habitats. They also are home to indigenous communities which have relied on the abundance of natural resources there for their livelihood for many centuries.
6. There is an increasing tension between the wishes of the Government to earn much needed revenue by allowing investment in tourist development or by selling the rights to international businesses to exploit those resources and the wishes of the local population to preserve their way of life. Let me give two examples of the kinds of question that can arise – one of which raises a very familiar issue of constitutional rights and one of which raises a very unfamiliar one.
7. An example of a decision covering familiar turf is an appeal about locus standi to bring judicial review proceedings. This appeal came from Mauritius and was decided in 2024: *Eco-Sud v The Prime Minister of Mauritius*.⁹ In that case the claimant Eco-Sud was non-profit lobbying association concerned with the protection of the environment in Mauritius. It wanted to challenge a decision by the Government to give approval to the construction of a residential development that threatened a mangrove forest protected as a wetland of international significance. The question was whether the association had locus standi to bring such a challenge. According to the applicable Environmental Protection Act in

⁹ *Eco-Sud v The Prime Minister of Mauritius* [2024] UKPC 19.

Mauritius, a person only has standing to challenge this kind of decision if they are “aggrieved by the decision” and if they can also show that “the decision is likely to cause him undue prejudice”. Could the environmental group say that they were “aggrieved” and that they would be caused “undue prejudice” by the development?

8. The Board held that the approach to be adopted when interpreting the scope of locus standi under the Mauritian statute should be the same as the approach adopted by the UK Supreme Court to locus standi. That is the approach set out in *Walton v The Scottish Ministers* in 2012.¹⁰ In that Scottish case Mr Walton brought an action under the Roads (Scotland) Act 1984 challenging the decision of Scottish Ministers to allow the construction of a new road network around Aberdeen. The question in that case was the same – was Mr Walton a person aggrieved by the Scottish Ministers’ decision. The Board in *Eco-Sud* applied the same factors that the Supreme Court had applied to Mr Walton in the earlier case for example looking at whether Eco-Sud had participated in the procedure which preceded the decision for example by making representations during the consultation period, which they had.¹¹
9. An interesting point arose about the requirement that Eco-Sud show that it would be caused undue prejudice. The Mauritian Government argued that this condition could only be met by someone who could show that his or her private interest was threatened by the development. The Board said no – it had to be a wider test than just looking at whether the person’s property rights or economic interests were likely to be damaged. The Board referred back to the judgment of Lord Hope in the earlier Scottish *Walton* case. Lord Hope had posited the plight of an osprey whose route to and from a favourite fishing loch would be impeded by the proposed erection across it of a cluster of wind turbines. The osprey, Lord Hope said in *Walton*, had no means itself of challenging the wind turbines, it needs someone to speak up on its behalf.¹²
10. Similarly with the Mauritian wetlands at issue in *Eco-Sud*. If we limited prejudice to economic prejudice or prejudice to a private interest that

¹⁰ *Walton v The Scottish Ministers* [2012] UKSC 44.

¹¹ *Walton*, [21]; *Duff v Causeway Coast and Glens Borough Council* [2023] NICA 22, [21].

¹² Along similar lines see the judgment of the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* (application no. 53600/20) [2024] ECHR 304.

would lead to an absurd result. It would mean that the more remote and idyllic the wilderness that the developer wants to build on, the less likely it is that there will be someone to challenge the grant of permission.

11. The appeal in *Eco-Sud* was therefore remitted back to the local Tribunal in Mauritius to decide if Eco-Sud did have standing, applying the test as elucidated by the Board in its judgment.
12. Other appeals on environmental matters take the Board into far less familiar territory. In *Framhein v AG of the Cook Islands* in 2022 the Board was asked to determine the content of the customary law of the Maori people living in the Cook Islands. The Cook Islands is a group of islands in the South Pacific about three hours flying time east of New Zealand.¹³ Article 66A of the Cook Islands Constitution provides that custom and usage shall have effect as part of the law of the Cook Islands, unless that custom, tradition, usage or value has been overridden by a provision of the Constitution or of any other enactment. How do you find out what that customary law is? Article 66A(4) said that for the purposes of this Constitution, “the opinion or decision of the Aronga Mana ... as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom shall be final and conclusive and shall not be questioned in any court of law.”
13. The Aronga Mana, we learned, is the collective name given to the chiefs and elders of the different islands and districts of the Cook Islands. Each district is known as a “vaka” which is also the Māori word for the canoe in which Cook Islanders traditionally voyaged across the Pacific Ocean.
14. The appeal to the Board in *Framhein* concerned the decision by the Cook Islands Fishing Minister to set an annual quota for how many tonnes of tuna fish could be caught by international trawlers off the coast of the Islands. The indigenous population was worried that the quota was too high. They worried that over-fishing in the waters in the Cook Islands’ Exclusive Economic Zone far off the coast would seriously deplete the number of tuna that local, small scale fishermen would be able to catch in their artisanal vessels close to the shoreline. In the hearing bundle before the Board, we had many affidavits from Cook Islanders who were members of the Aronga Mana for their particular vaka voicing this

¹³ *Framhein v AG of the Cook Islands* [2022] UKPC 4.

concern in moving terms. They asserted that under Cook Islands customary law, the Aronga Mana had a right to be consulted about fishing quotas and that the consultation carried out by the Fisheries Minister before setting the quotas had been inadequate.

15. We held that the evidence gathered by Mr Framhein did constitute the collected views of the Aronga Mana. But while we acknowledged the sincere and deep concern that many of the chiefs expressed at the extent of fishing, the evidence did not establish that the Aronga Mana have a customary right to be consulted or informed about fishing plans.¹⁴ Whatever rights they had concerning fishing quotas, had also been overridden by the legislation that the Cook Island Parliament had adopted governing fishing rights and quotas. The legislation had been adopted pursuant to a bewildering mass of international treaty agreements on fishing quotas. We held that Article 66A of the Constitution recognised that customary law could be trumped by legislation of the Cook Islands parliament. That is what had happened here.

Fundamental Rights Chapters

16. Let's now turn to the cases raising issues about fundamental human rights. It is worth first considering the constitutional context in which these issues arise. Most countries that use the JCPC as their final court of appeal have 'Westminster model' constitutions designed to reflect in written form basic features associated with the United Kingdom's constitution albeit that ours of course is mostly in unwritten form.¹⁵ Broadly speaking, these constitutions are divided into separate Chapters dealing with, for example, the establishment of different chambers of the Parliament, setting out who is eligible to stand for Parliament and who is eligible to vote in elections. They also deal with establishing the different departments of the executive and the different levels of judiciary.
17. With the exception of early prototypes, most of these written Constitutions also contain a Bill of Rights or a Chapter, usually towards the beginning of the constitution, dealing with the fundamental rights and

¹⁴ *Framhein* at [147].

¹⁵ The term 'Westminster model' was first used by SA de Smith in *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964) p 77 but has since been adopted in subsequent authorities: see *Hinds v The Queen* [1977] AC 195 at p 212G; *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 302-303.

freedoms conferred on the citizens of the territory.¹⁶ For example, the Constitution of the Republic of Mauritius contains 11 Chapters that deal with fundamental rights (Chapter 2), the selection of President and the powers the President has (Chapter 4), similarly in relation to the Parliament (Chapter 5), the Executive (Chapter 6), and the Judicature (Chapter 7).¹⁷

18. To understand how these constitutions came to be drafted with Chapters on fundamental human rights, we need to go back to 1951. That was the year the British government ratified the European Convention on Human Rights. Article 56 of the Convention (formerly Article 63) permits a Contracting State to extend the application of the Convention to territories for whose international relations it is responsible. The British Colonial Office therefore wrote to the colonial governments at the time asking them whether they wanted the Human Rights Convention to extend to their territories.¹⁸ In 1953, the same year the Convention came into force, the United Kingdom extended the application of the Convention so that it applied to the 42 overseas territories that had agreed.¹⁹ This meant, for a brief period, the ECHR applied in part to almost all seven continents, including places as far flung as North Borneo and Tanzania (as well as British Antarctica).

19. As it became clear that the colonies were moving towards independence or self-governance, the UK was keen to ensure that these jurisdictions adopted constitutions which protected fundamental rights, particularly where there were minority groups living in the territory.²⁰ The policy of the UK was to negotiate with representatives of each country for rights which corresponded with ECHR rights although the negotiations resulted in each state developing its own unique constitution.²¹ While many constitutions contain fundamental rights Chapters modelled on the ECHR, there are exceptions. For example, Trinidad and Tobago modelled its fundamental

¹⁶ *Hinds*, 213E; K Roberts-Wray, *Commonwealth and Colonial Law* (Stevens London 1966), 282 and 413.

¹⁷ [The Constitution of the Republic of Mauritius](#) (last accessed 18 October 2025).

¹⁸ Charles O. H. Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* (Oxford University Press 2007), 38.

¹⁹ *Ibid.*

²⁰ Colonial Constitutional Note 23 (CO 1032/283).

²¹ *Attorney General for Bermuda v Ferguson* [2022] UKPC 5 at [16].

rights chapter on the Canadian Charter (although the Canadian Charter was itself influenced by the ECHR).²²

20. The influence of the ECHR in drafting the fundamental rights chapters in the constitutions of these former colonies is now well established and clearly influences how we approach the task of construing them.²³ In an appeal from Bermuda in 1980, *Minister of Home Affairs v Fisher*, the Board said that it was appropriate to apply what it described as a “generous interpretation” to the constitution of Bermuda. One must also avoid what the Board called “the austerity of tabulated legalism” when construing the human rights conferred on Bermudan citizens.²⁴

21. On the other hand, there can be substantive differences in the expression of the rights protected. The Board has made clear that each constitution must be interpreted on its own terms. In *Boyce v The Queen*, an appeal from Barbados in 2004, Lord Hoffmann acknowledged the origins of the constitution and the influence of the European Convention, but then said:

“The Constitution does not confer upon judges a vague and general power to modernise it. The specific terms of the designation of Her Majesty as the executive authority make it clear that the power to make a change is reserved to the people of Barbados, acting in accordance with the procedure for constitutional amendment. That is the democratic way to bring a constitution up to date.”²⁵

22. Lord Hoffmann warned that:

“a court can concern itself only with the actual Constitution and not with what it thinks might be an ideal one.”²⁶

23. One important and useful effect of this ECHR heritage is that the parties in appeals before the Board usually agree that we can apply the evolving jurisprudence of the Strasbourg Court when interpreting the rights

²² *Matthew v Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433, [37].

²³ *Reyes v The Queen* [2002] 2 AC 235, [23].

²⁴ *Minister of Home Affairs v Fisher* [1980] AC 319.

²⁵ *Boyce v The Queen* [2004] UKPC 32; [2005] 1 AC 400, [29].

²⁶ *Boyce*, [70].

conferred by their local constitutions, where the wording has clearly been drawn from the ECHR. Thus, in *Attorney General for Bermuda v Ferguson*, a judgment of the Board in 2022, Lord Hodge and Lady Arden said that the starting point is that the rights conferred by a constitution which echoes the wording of Convention rights should be read and applied in accordance with the case law in Strasbourg and in the UK domestic courts relating to the European Convention.²⁷

24. Let me focus on some recent examples of fundamental rights cases which the Board has had to grapple with.
25. One recent example I think illustrates very nicely how the issues arising on an appeal can be very similar to the issues that would arise on the same facts if they occurred in the UK but that those facts can throw up in that jurisdiction an issue that is very unfamiliar. This appeal arose from the treatment of same sex relationships in the Cayman Islands. The Cayman Islands have not become independent and so they still rely on the United Kingdom for their international relations. They are also one of the territories to which the UK has extended the application of the European Convention under article 56 as I mentioned previously. The Foreign and Commonwealth Office in 2008 proposed the introduction of a new constitution for the Cayman Islands. This would include a Bill of Rights which would reflect the provisions of the ECHR.
26. Negotiations on the constitution took place between the United Kingdom Government and Cayman Islands representatives. Although the Constitution would in many respects be a bespoke instrument for Cayman, it was also important to recognise in those negotiations that the UK still has some skin in the game and needed powers in the Constitution to ensure that local law there is compatible with ECHR norms.²⁸ It was important that the Governor of the Cayman Islands, who is the Sovereign's representative there, retained sufficient reserved powers to ensure that the United Kingdom's international obligations to ensure that Cayman Island law was compatible with the Convention would be met. The resulting draft constitution was agreed between the UK and Cayman

²⁷ *Attorney General for Bermuda v Ferguson* [2022] UKPC 5, [16].

²⁸ *Day v Governor of the Cayman Islands* [2022] UKPC 6.

Islands governments and was put to the Cayman Islands electorate in a referendum and was approved by over 62% of the Cayman Islanders.²⁹

27. Same sex relationships proved to be an area of controversy leading to appeals to the Board on the proper interpretation of the Cayman Islands constitution.
28. First, there was the case in 2022 of *Day v Governor of the Cayman Islands*. Ms Day and Ms Bodden-Bush, who were in a committed relationship, wished to enter into a same-sex marriage.³⁰ The Cayman Registrar refused to grant them licence to marry on the grounds that section 2 of the relevant Cayman law, the Marriage Law (2010 Revision), defined marriage as “the union between a man and a woman as husband and wife”. Ms Day claimed that the Bill of Rights, Freedoms and Responsibilities, which forms Part 1 of the Cayman Islands Constitution, conferred on her a constitutional right to legal recognition of such a marriage. Further she argued that the Marriage Law should be read in such a way as to reflect that right.
29. So what did the Cayman Islands Bill of Rights as adopted say on the subject? Section 14 of the Bill of Rights is headed “marriage”. It provides that “government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.”
30. However, Ms Day and Ms Bush sought to rely on the sections in the Cayman Island Bill of Rights which correspond to article 8 of the ECHR, dealing with private and family life, article 9 of the ECHR dealing with conscience and religion, article 12 dealing with the right to marry and article 14 the prohibition on discrimination.
31. The claimants also relied on two broader principles of constitutional interpretation to argue that these sections should be interpreted to include a right to same-sex marriage, overriding the provisions of the ordinary marriage law. First, they referred to the “living tree” principle - that is to say the then Lord Chancellor’s classic description in a Canadian case in 1930 of the Constitution established by the British North America Act 1867 as a “living tree capable of growth and expansion within its

²⁹ *Anglin v Governor of the Cayman Islands* [2025] UKPC 30, [60].

³⁰ *Day v Governor of the Cayman Islands* [2022] UKPC 6.

natural limits”.³¹ Secondly, they relied on the principle that a generous interpretation should be given to fundamental rights and freedoms established in the *Fisher* case I mentioned earlier.³²

32. The Board in *Day* recognised that while the “living tree” principle and generous interpretation principle are important, they can only extend the meaning as far as the language of the constitutional provision reasonably allows.³³ The right to marry in section 14(1) of the Cayman Bill of Rights had been drafted in precise terms to emphasise that the right to marry applies only to “a person of the opposite sex ...”.

33. In its judgment, the Board discussed in detail the case law of the Strasbourg Court on this subject.³⁴ That Court has repeatedly made clear that same sex partners have a right to have available to them a form of civil partnership which gives them equivalent rights to married partners, but they do not have a right to marriage itself. That is because article 12 of the European Convention, dealing with the right to marry refers expressly to marriage as being between members of the opposite sex. That has been recognised as a *lex specialis* which cannot be overridden by the more general words of the rights conferred by the other articles. Similarly, the right to marry in the Cayman Islands Constitution was a specific treatment of that issue that could not be overridden by the more generally worded rights conferred by other articles.

34. The Board in *Day* also considered the approach that had been taken by the United Nations Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights in 1999 in the case of *Joslin v New Zealand*.³⁵ That Committee had also concluded that the rights of same sex couples did not extend to marriage. Finally, the Board in *Day* commented³⁶ that the Constitution had been adopted in Cayman Islands pursuant to a process involving a vote by the public to approve it in a referendum. The public were entitled to understand that they were voting to approve the Constitution in the form in which it was

³¹ *Edwards v Attorney General for Canada* [1930] AC 124.

³² *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

³³ *Day*, [37].

³⁴ See paras 45 – 50 of the *Day* judgment discussing in particular *Schalk and Kopf v Austria* (2011) 53 EHRR 20, *Hämäläinen v Finland* (2014) 37 BHRC 55 (Grand Chamber) and *Oliari v Italy* (2017) 65 EHRR 26.

³⁵ *Joslin v New Zealand*, Communication No 902/1999. UN Doc A/57/40 (2002).

³⁶ *Day* [57].

presented to them, interpreted in the light of the context and circumstances in the public domain at that time. That wording had made clear that marriage was still limited to marriage between a man and a woman.

35. Thus far, this case progressed as it would have done if it had been brought in the UK or any other of the ECHR Contracting States. But the story doesn't finish there. I said that the Strasbourg court, whilst drawing the line at saying people have a right to same sex *marriage* has made clear that same sex partners must have available to them some form of civil partnership giving them equivalent rights as regards for example inheritance or tax allowances. It had been common ground in the *Day* litigation that the Cayman Bill of Rights (which provided the right to respect for family and private life) also required the Cayman Islands to provide Ms Day and Ms Bush with a legal status functionally equivalent to marriage, such as civil partnership. It was also common ground that the Cayman government was in breach of this obligation because there was no such status in their legislation. The Cayman Island Court of Appeal at an earlier stage of the *Day* proceedings had made a declaration to that effect. There had been no appeal by the Government to the JCPC against that finding of infringement.
36. What happened then was that in response to the Court of Appeal's declaration, the Cayman Islands Government introduced the Domestic Partnership Bill into the Legislative Assembly. But, following two days of debates the Bill was defeated by nine votes to eight on 29 July 2020.
37. That put the UK in a difficult position. It appeared that Cayman was in breach not only of its own Constitution by failing to provide for civil partnership but it also put the UK in breach of its obligations under the ECHR since the Convention had been extended to apply in Cayman and Cayman was also in breach of the Convention. The impasse was resolved by the Governor of the Cayman Islands using his reserved powers under section 81 of the Constitution. Section 81 provides that the Governor may enact legislation that he or she considers necessary or desirable with respect to a list of matters which include "external affairs". The Governor exercised that power to bring into law the Domestic Partnership Bill which had been rejected by the Parliament. This became the Civil Partnership Law 2020 and provided for both opposite-sex and same-sex couples to

enter into civil partnerships which were equivalent to marriage as regards the rights they conferred.

38. When taking this step, the Governor said this:

“The failure of the Legislative Assembly to pass the Domestic Partnership Bill leaves me, as Governor and the UK Government, with no option but to act to uphold the law. ... I believe it is therefore imperative that the Domestic Partnership Bill is passed into law so that the discrimination suffered by Chantelle Day and Vicky Bodden-Bush, and others in same sex relationships, is brought to an end as required by the Court of Appeal. ...

As Governor, this is not a position I would ever have wanted to be in. Since arriving in October 2018, I have fully respected Cayman’s extensive responsibility for dealing with domestic matters. But I cannot simply stand aside when it comes to upholding the rule of law and complying with international obligations, which fall squarely within my responsibilities as Governor. ...”

39. So that raised the question whether the Governor could exercise those powers in a way brought something into law in the Cayman Islands even though it had been rejected by a vote in the democratically elected Cayman legislature? That question was posed to the Board earlier this year in the appeal *Anglin v Governor of the Cayman Islands*, a claim in which Ms Anglin sought to quash the Governor’s action.³⁷ The issue for the Board was whether the Governor was entitled to use his reserved powers to bring Cayman Islands law into conformity with international treaty obligations.

40. Ms Anglin focused her argument on what was meant by article 81 by “external affairs” as being the area in relation to which the Governor could exercise his legislative powers. She argued that the phrase “external affairs” should be given a narrow reading. The JCPC panel hearing the *Anglin* case, which included Dame Janice Pereira, unanimously upheld the legality of the Governor’s action. The Board held that the natural meaning of the words “external affairs”, considered in the context of this constitutional instrument, did include the relationship between the

³⁷ *Anglin v Governor of the Cayman Islands* [2025] UKPC 30.

Cayman Islands and the United Kingdom, as well as other countries and international obligations.³⁸

41. Let me now turn to a couple of examples of where human rights claims under Constitutions in the JPC jurisdictions have thrown up some interesting and novel points.
42. The first point arises from savings clauses which are included in some Bills of Rights adopted by these countries. The Constitutions we interpret in these cases are commonly expressed to be 'supreme'. This means that the local courts and the Board, as the final court within that jurisdiction, not only can but are required to strike down, adapt or modify ordinary laws in the territory to the extent that they conflict with the fundamental rights chapters of such constitutions. This is of course different from the position in England and Wales and Scotland: under the Human Rights Act 1998, courts must interpret legislation so far as possible to make it compatible with rights under the ECHR, but the courts do not have the power to strike down or disapply legislation of the Westminster Parliament.
43. Some of the constitutions make clear that the human rights norms that they contain apply as much to legislation in place at the moment that the Bill of Rights was adopted as they do to later legislation. For example, the Cayman Bill of Rights at issue in the *Day* and *Anglin* cases provides in section 5 that existing laws as at 6 November 2009 when it came into force shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.³⁹
44. But some countries have made a different choice and instead have included a provision in their Constitution that any law in force immediately before the constitution came into effect cannot be challenged on the ground that it is incompatible with fundamental rights provisions.⁴⁰
45. The effect of these clauses has been much discussed in the context of the continued application of the death penalty which several of these

³⁸ Ibid, [33].

³⁹ See *Day*, [8].

⁴⁰ *Watson v The Queen* [2004] UKPC 34, [2005] 1 AC 472, at [42].

jurisdictions still use. And it was one such savings clause that led the JCPC to uphold the use of the death penalty in 2004 in *Matthew v Trinidad and Tobago*.⁴¹ At the time the constitution of Trinidad and Tobago came into force, the death penalty was the mandatory punishment for murder. A panel of nine justices was convened for the JCPC Board to hear an appeal challenging the constitutionality of the death penalty on the ground it breached fundamental rights protected by the constitution.

46. It is well established that savings clauses are to be construed restrictively, guided by the lofty aspirations by which the people have declared themselves to be bound.⁴² Even so, five out of the nine judges on panel held that, although the death penalty constituted inhuman and degrading treatment, the clear language and purpose of the savings provision in section 6(1) of the Trinidad constitution protected the death penalty from constitutional challenge.
47. More recently however, the Caribbean Court of Justice has declined to follow the Board's judgment in *Matthew*, as it is entitled to do. The Caribbean Court of Justice, set up in 2001 is an alternative final supra-national appeal court for countries, some of which such as Barbados and St Lucia used to use the Privy Council but now use this regional court instead.
48. The Caribbean Court took a different view of the effect of constitutional savings clauses on the death penalty. In *Nervais v The Queen*⁴³ that court in 2018 considered how the savings clause in section 26 of the Barbadian Constitution sat with section 11. Section 11 provides that every person in Barbados is entitled to the fundamental rights and freedoms of the individual including the right life, liberty and security of the person. The Caribbean Court of Justice held that the rights conferred by that general provision in section 11 were not subject to the savings clause. This was sufficient to circumvent the savings clause. In his judgment, the President of that Court, Sir Dennis Byron said:

⁴¹ *Matthew v Trinidad and Tobago* [2004] UKPC 33

⁴² *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259, [35] and *Chandler v Trinidad and Tobago* [2022] UKPC 19, [43].

⁴³ *Nervais v The Queen* [2018] CCJ 19 (AJ); [2018] 4 LRC 545. See also e.g. an appeal from Guyana, *McEwan v Attorney General of Guyana* [2018] CCJ 30 (AJ); [2019] 1 LRC 608. The decisions of the Caribbean Court of Justice on the death penalty led the Board to review its previous decision in the case of *Chandler v Trinidad and Tobago* [2022] UKPC 19, [68].

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

49. Well, yes and no. Of course, it is open to the legislature of any of these countries at any time to abolish the death penalty if they so choose. But unless and until the elected Parliament takes that decision, the Board has stuck to its view that the effect of the savings clause is to immunise the death penalty from the effect of the human rights conferred by the Constitution.
50. Let me close by bringing us bang up to date with the JCPC’s judgment in the recent case of *The Corporation of Hamilton v Attorney General of Bermuda*.⁴⁴ Judgment was promulgated on 8 October 2025. The Corporation is responsible for the administration of Hamilton, the capital city of Bermuda. The Government was proposing legislation which would abolish elections to the governing body of the Corporation and replace the current elected members with people appointed by Government Ministers. The Corporation asserted that the proposed amendments amounted to an expropriation of the Corporation’s property without compensation contrary sections 1 and 13 of the Constitution.
51. That judgment is a treasure trove of other interesting constitutional rights points. Is the Corporation the kind of body that can enjoy rights under the constitution at all given that although it is a corporate entity it is also a public body created by statute with limited functions? What is the precise meaning of “taking of property” used in section 13? Does the right to freedom of expression include a right to vote in municipal elections and if so would that be infringed by legislation which abolished elections as the Government proposed?
52. Again each of these issues involves looking at human rights case law but applying “with a twist” to take account of the local legislation and the views expressed by the local courts who have looked at these issues before they get to us.

⁴⁴ *The Corporation of Hamilton v Attorney General of Bermuda* [2025] UKPC 50, [80].

Conclusion

53. With the birth of newly independent states came the birth of a new challenge for the Judicial Committee of the Privy Council. In the Parliamentary debate on the Trinidad and Tobago Independence Bill in 1962, the Minister of State for Colonial Affairs pronounced that:

“the Constitution agreed upon will provide considerable safeguards for minorities and the protection of human rights.”⁴⁵

54. I hope to have shown you tonight is that every constitution is a little different, and that the rights that these different constitutions confer may also be slightly different. They reflect the priorities and experience of the societies which adopted them and the evolution of those societies over the years. But I hope that you will also take away the message that the decisions of the Privy Council Board are a rich source of interesting law on how to interpret fundamental rights and how they apply in the diverse societies for which it is our privilege to be the final court of appeal.

⁴⁵ Hansard HL Debate, 16 July 1962, accessible [here](#).