

Original Paper

Judicial Committee of the Privy Council: The Persistence of a British Colonial Institution

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Abstract

Following the British decolonization process, the Judicial Committee of the Privy Council (JCPC) continued as the final appellate court for many new states. Originally designed as a colonial court, the JCPC, therefore, continues to influence independent states. This testifies to the persistence of British colonial influence in the jurisprudence of former colonies. This research on the JCPC provides evidence colonial influences persist beyond the ceremonial and examines the Gambia and New Zealand as cases illustrating different paths to shedding this colonial institutional.

Keywords

Courts, British Empire; British Commonwealth; Gambia, New Zealand, Caribbean, Judicial Committee of the Privy Council

1. Introduction

From 1947 through the mid-1980s, new states emerged onto the world stage. Following the end of British and other European imperial rule, independence was celebrated across Africa, the Pacific, and the Caribbean. Former dependent colonies took their places as sovereign states, standing alongside members of the United Nations and various regional groupings. The change was dramatic: In 1947 the United Nations included 57 independent states, by 1970th it had grown to 127, and by 1985 there were 159 member countries (United Nations, n.d.).

Although independent, not every state immediately severed all institutional ties with their former colonial power. This paper posits that the persistence of one particular British colonial institution, the Judicial Committee of the Privy Council (JCPC), was more than ceremonial, informal, or due to the fact a particular nation continued to be a member of the British Commonwealth. Instead, it argues that vestiges of British colonial rule persisted as states harnessed colonial institutions they decided could be of value as they charted the way forward, whether for a few years, or continuing today. This study

examine the retention of the JCPC as the final court of appeal, against decisions of the domestic courts in individual jurisdictions. Case studies of New Zealand and The Gambia show both the strength of this imperial tie, and the varying paths taken to replace eventually replace the JCPC with a domestic court of final appeal.

The JCPC is not just an historical aspect of the British Empire; its influence continues in the current [British] Commonwealth of Nations. Its respected position in the former colonies is captured by Justice Michael Kirby (2008) of Australia:

First, there was the realistic appreciation that the same personalities substantially constituted both their Lordships' House and the Privy Council... Secondly, the habits of Empire inculcated in Australian lawyers a high measure of respect for just about everything that came from the Imperial capital. Not least in the pronouncements of law which was the glue that helped to bind the Empire together. Thirdly, traditions long observed, and utility derived from linkage to one of the great legal systems of the world as well as the high standards of reasoning typical of the House of Lords, helped maintain the impact of its influence long after the Imperial tide had receded (para. 7).

As of 2018, 16 states still retained Queen Elizabeth II as Head of State (Note 1). While this largely ceremonial link with the former colonial power is enshrined in their constitutions, of far more consequence, however, are where the JCPC continues as the final court of appeal for independent states. Of the fifty former colonies, 30 (66 percent) retained the JCPC at Independence. Despite the adjudicative quality and reputation of the JCPC, the decision to retain such a powerful colonial vestige may seem counterintuitive, yet these decisions provide a powerful reminder of the persistence of British colonial influence long after independence. Two case studies exemplify the important role the decisions JCPC plays in the legal and political life of the states. New Zealand and Gambia are examples of states that abandoned appeals to the JCPC based on the collision of political considerations and the JCPC. New Zealand was free to abandon the JCPC with the Westminster Act of 1931, but the JCPC remained until 2005. The Gambia gained independence in 1964 and retained the JCPC until 1996. These case studies explicate the diverse circumstances under which each country finally severed this significant tie with the British Empire.

2. The British Empire

By 1740's, the British Empire comprised a mere few islands in the Caribbean, the eastern seaboard colonies of North America, the rim of Hudson Bay and Nova Scotia, and a few trading posts on the west coasts of Africa and India. By 1914 (even with the loss of the 13 North American colonies in 1776), it encompassed twenty-five percent of the world. This reflects the effective replication of British administrative and legal institutions as the empire expanded. As legal challenges percolate up the hierarchy, the judicial legitimization of legal policies is an important issue (Dahl, 1957). However, this reliance by independent states on such a colonial institution is fundamentally incompatible with the

modern notion of sovereignty (Swinfen, 1987).

The Judicial Committee of the Privy Council (JCPC)

The JCPC is the apex of the colonial judicial hierarchy. It was an important part of the expansion and entrenchment of British colonial rule, lending legitimacy to the policies of the colonizers, or what Dahl (1957) describes as the lawmaking majority. It is itself, therefore, a national policy maker. Shapiro (1964) refers to this notion as political jurisprudence.

It is important to understand the continued significance of the JCPC as part of the Privy Council, which is a large advisory body that advises the British monarch. Drawing its members from the Privy Council, the JCPC performs a substantive legal function and derives its jurisdiction from a custom based on the medieval *Curia Regis* (the King's Court) or councilors to the king. The JCPC's appellate jurisdiction rests on the theory that the monarch is the ultimate source and distributor of justice. By 1660, however, this power only extended to overseas territories under British rule (Burns, 1984), but included civil and criminal appeals.

The modern JCPC emerged with the Judicial Committee Act of 1833. The legislation formalized its important structural features and practices (Howell, 1979). The Judicial Committee Act of 1844 expanded the access of British subjects from all overseas territories (The National Archives, n.d.) by granting appeals without leave from a colony's court of appeal. Under the Appellate Jurisdiction Act of 1876 the Law Lords became the permanent judges of the court (The National Archives, n.d.). Currently, the thirteen Law Lords in London sit in panels of five or seven. The United Kingdom staffs and funds the JCPC entirely. Today, there is little doubt about the judicial nature of the JCPC (Burns, 1984). Herbert Bentwich (1856-1932), a British barrister and law commentator put it this way: "[T]he King, the Navy and the Judicial Committee are three solid and apparent bonds of the Empire; for the rest, the union depends on sentiment" (Pramdas, 1996, p. 15). Its mot to *Honi Soit Mal Y Pense* or "shame on him who thinks ill of it" (Privy Council, n.d.) encapsulates the reputation and the lofty position of the court.

The legal contributions of the JCPC are broad and important with fundamental principles adjudicated. Examples of this diversity include constitutional challenges to the death penalty, libel cases involving politicians, eminent domain, *habeas corpus* and issues involving provincial versus federal power. Furthermore, the JCPC (2019) touts appeals from jurisdictions with diverse legal histories and systems. Between 1858 and 1957, the JCPC handed down approximately 3,750 decisions for India alone.

With the start of decolonization in 1931, the JCPC continued to play a role in states which retain the JCPC as the final appellate court. With a peak of 119 cases in 1931, the JCPC adjudicated an average of 52 appeals per year from 1932 to 2014. The number of cases, the diversity and its rich history, contribute to the positive reputation, and the continuing role and influence of the JCPC in the common law legal system in the British Commonwealth. While colonies had no choice in the establishment of the JCPC as their final appellate court, newly independent states did have this as an option, and could sever ties at independence.

Decolonization and the Persistence of the JCPC

In 1858, Oxford University professor Goldwin Smith called for colonial emancipation and a severing of all constitutional ties between the U.K. and her colonies (Howell, 1979), but the legal and political communities in the U.K. and the colonies derided Smith's assertion. This early call, however, foreshadowed the process of decolonization that unfolded gradually after 1900. Although five colonies gained dominion status within the Empire soon after 1900, it was not until 1931 that these five dominions—Australia, Canada, Ireland, New Zealand, and South Africa—established themselves as sovereign states in the international community. It is noteworthy that only Ireland, having fought for independence (Dorney, 2012), opted to replace the JCPC in 1931.

This process of decolonization accelerated after World War II. Starting with India in 1947, independence was gained by Pakistan, Myanmar (Burma), Sri Lanka (Ceylon), Ghana, Nigeria, Sudan, and Malaysia. By 1963, Cyprus and nine other African states were also independent (Watts, 2010). In the Caribbean, Jamaica was first in 1962, followed by eleven other states. Yet, the common law legal system persists and, in many cases, does so with little fundamental change. The JCPC continued to play a role in judicial policy-making in many small states such as in the Caribbean, and in large and populous states such as Malaysia and Sri Lanka in Asia, The Gambia in Africa, and some Pacific states. The situation is very mixed. For example, New Zealand and Sri Lanka severed ties with the JCPC, 95 and 24 years respectively, after independence. Others, such as Jamaica and St. Lucia have kept ties with the JCPC (as of January 2020). Today, only 14 British Overseas Territories (Note 2) comprise the remainder of the British Empire. The British Common wealth has 53 member states from Africa, Asia, the Americas, Europe, and the Pacific regions (Note 3).

A preliminary review provides more insight into the relationship between a sample of 50 states from the British Common wealth (Note 4) and the JCPC. A comparative analysis reveals that states fall into three distinct groups (see Table 1). Group 1 is comprised of the 20 former colonies (40 percent) that abolished all appeals to the JCPC upon independence. In Group 2 are the 17 states (34 percent) that retained the right of appeal for a period after independence before abolishing access to the JCPC. Group 3 consists of the 12 former colonies (24 percent) which as of January 1, 2016 still retain the JCPC as the final appellate court. These differences point to competing approaches in governance and policymaking by sovereign states, and how states view this extraterritorial court as a partner in policymaking and their approach to state sovereignty.

Table 1. Status of the JCPC in Each State at Independence

Group	Relationship with JCPC	States
1	Abolished appeals to JCPC at Independence (20 states)	Botswana, Cyprus, Ireland, Rep. of, Lesotho, Malawi, Maldives, Malta, Myanmar, Nauru, Papua New Guinea, Samoa, Seychelles, Sierra Leone, Solomon Islands, Swaziland, Tanzania, Tonga, Vanuatu, Zambia, Zimbabwe
2	Retained appeals to JCPC for a period before severing (18 states)	Australia, Barbados, Belize, Canada, Dominica, Guyana, Fiji, India, Gambia, Ghana, Kenya, Malaysia, New Zealand, Nigeria, Singapore, South Africa, Sri Lanka, Uganda
3	Retain appeals to JCPC (12 states)	Antigua & Barbuda, Bahamas, Brunei, Grenada, Jamaica, Kiribati, Mauritius, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, Trinidad & Tobago, Tuvalu

Note. Data for relationship of the states with the JCPC from Judicial Committee of the Privy Council (2019), and from Encyclopedia Britannica (2020).

As states emerged from colonial rule, there was a decrease in the number of states served by the JCPC and a decrease in the number of cases adjudicated (see Figure 1). The number of cases includes the states, colonies, and territories that continue to retain the JCPC as of January 1, 2015. The steep drop in the annual number of cases from 119 in 1931 to 34 in 1950 can be explained by the fact that Canada and India abolished appeals to the JCPC in 1948 and 1950, respectively. After that time, despite the gradual decline in the number of countries from 48 in 1955 to 12 in 2015, the number of cases per annum increased from 39 in 1955 to 43 cases in 2014, illustrating a continued reliance on the JCPC. Based on my review of JCPC cases, an uptick in appeals in death penalty cases from the Commonwealth Caribbean explains the high point in 1995 with 61 cases. Despite the gradual decline in the number of states, those that continue to use the JCPC do so more frequently. This speaks to the reputation of the JCPC and the reliance the states have on this extraterritorial court, despite any apparent contradiction with the ideals of sovereignty.

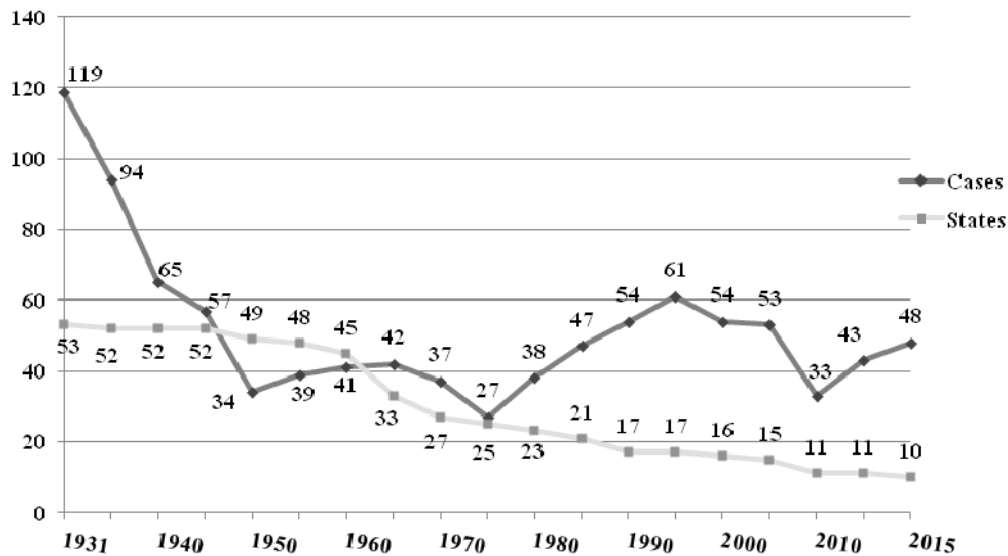


Figure 1. The Number of JCPC Cases from 1931 to 2015 and the Number of States

Note. Data is drawn from British and Irish Legal Information Institute's database (2020).

Case Studies

Yin (2003) defines a case study as “an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident” (13). Collier (2010) states that this process can further evaluate the hypotheses and deepen our understanding of the phenomenon not possible with the quantitative analyses. For our purposes, case studies of New Zealand and The Gambia present two distinct sequence of events culminating in the replacement of the JCPC with a domestic court of final appeal. Using causal-process observations, I conduct a within-case comparison on each state leading to replacing the JCPC. Each study provides insight into the importance of the legal link and how national governments view this potential legal check on domestic matters and sovereignty.

3. New Zealand

Although both The Gambia and New Zealand eventually abolished appeals to the JCPC, the political environment at the time was much more nuanced in New Zealand than in The Gambia where this change followed years of authoritarian rule. Nevertheless, replacing the JCPC in New Zealand was no less driven by the will of the governing coalition in a changed political environment. The Westminster Act (1931) gives all Dominions the option of replacing the JCPC, but as Wilson (2010) points out, this act was not even adopted by the New Zealand parliament until 1947 (Statute of Westminster Adoption Act), and the status quo was never seriously challenged until after World War II.

Sir Robert Stout (Former Chief Justice in New Zealand), called for the abolition of appeals in 1908 (Cornes, 2015), and serious debates about abolishing the JCPC took place at four junctures after the Westminster Act of 1931. In the 1940s, Chief Justice Sir Michael Myers presented a cabinet report focusing on the establishment of “a Commonwealth Court of Appeal” (Wilson, 2010, p. 12). This idea was raised by then Attorney General Hanan in 1965 at the Third Commonwealth and Empire Law Conference in Sydney, Australia, but it lacked political support in New Zealand (Wilson, 2010). In 1987, the Labor Party government (1984-1990) announced a proposal to abolish the JCPC at the New Zealand Law Conference. The decision to drop the proposal was partly influenced by *Databank Systems Ltd v. Commissioner Inland Revenue* (1990) and *Petrocorp Exploration Ltd v. Minister of Energy* (1991) in which the JCPC upheld the state’s regulatory power over financial services and natural resources respectively (Richardson, 1997).

In 1996, The National Party introduced a bill to replace the JCPC. The general elections later in 1996 forced the National Party into a coalition government with the New Zealand First Party which opposed the abolition of appeals to the JCPC (Courts of New Zealand, n.d.; Wilson, 2010). Richardson (1997) concludes that this effort was also partially derailed by the JCPC’s decision favoring the government’s regulatory authority over fishing rights in *Treaty Tribes Coalition v. Urban Maori Authorities & the Attorney General of New Zealand* (1997).

The next section traces how the successful attempt unfolds and points to the causal elements underpinning the replacing of JCPC with the Supreme Court of New Zealand in 2004. Further, it discusses changes in the political environment, the debate about the structural relationship between parliamentary sovereignty and the power of judicial review, the role of JCPC decisions, and the influence of the governing elite and the public.

Although not as extreme as the changes in The Gambian regime after the 1994 coup d’état, there were alterations in New Zealand’s political environment in 1999. Freedom House reports consistently high scores for political freedom and civil liberties and the country always maintained its status as “free” (Freedom House, 2014a; Freedom House, 2014b), but there were clear ideological shifts in New Zealand at that time. These influenced the deliberate steps taken by the governing coalition aimed at replacing the JCPC. The Labour Party that won the general elections in 1999 (Electoral Commission of New Zealand 2015) claimed the “center-left of the political spectrum” (Markey, 2008, p. 87); while the Labour Party had a history of liberalism, relying on support from the working class and was more inclined to view government as having an important role to play in the society (Markey, 2008), the party’s manifest to explicitly included a pledge to abolish appeals to the JCPC. Furthermore, the Labor Party formed the government with the Alliance Party, which was also ideologically left-leaning (Pierce, 1999) and supported replacing the JCPC. On taking office, Prime Minister Clark and her cabinet were very purposeful in the handling of this issue, trying to ensure that those who raised objections during previous attempts were heard. The cabinet had “extensive consultation with Maori, the legal profession and the business community before it committed to the policy” (Wilson, 2010, p. 17). This set the stage

for the public debate with the December 2000 release of “Discussion Paper: Reshaping New Zealand’s Appeal Structure” (Wilson, 2000), produced by the Office of the Attorney General in close consultation with the Prime Minister, Deputy Prime Minister, Minister of Justice, and Minister of Maori Affairs. The Discussion Paper (Wilson, 2000) provides five official rationales for pursuing this constitutional change as follows:

- “National identity and independence” (1)
- “Many Commonwealth countries have abolished appeals to the Privy Council” (2)
- “Few New Zealand cases are heard by the Privy Council” (2)
- “New Zealand’s changing international relationships” (2)
- “Cost and accessibility” (3)

Margaret Wilson was the Attorney General (1999-2005); in a lecture at Inner Temple in London, Wilson (2010) expounded on the rationale of the new governing coalition government for pursuing the abolition of appeals to the JCPC. Using Wilson’s lecture notes along with other sources, this section examines the official rationales in the Discussion Paper, focusing on constitutional change to replace the JCPC. Wilson (2010) makes it abundantly clear that “while abolition of appeals to the Privy Council [JCPC] was part of New Zealand’s development towards real independence, it was not the primary motive for the initiative” (28). Other issues such as the costs of accessing JCPC and the small number of cases with limited value as precedent for New Zealand are addressed by Wilson but seem not to be the primary focus.

The assertion is that there are three interconnected reasons underpinning the governing coalition’s initiative to replace the JCPC with a domestic final appellate court. First, the Labour Party in 1999 espoused a new vision for New Zealand as an independent state and its role in the world community. This included revisiting of the neo-liberal economic policies championed by the more conservative National Party government (Wilson, 2010). Charting a new path required harnessing the governing institutions, including the judiciary, to effectively develop and implement policies that advance the new economic and political agenda. Wilson (2010), therefore, reflects on the governing coalition’s view that the JCPC was not the appropriate venue to support the new vision. In fact, the JCPC was viewed as having a limited role in producing necessary precedents for the following reasons: (1) few cases were actually going to the JCPC; (2) there was a decline in the number of countries that use the JCPC (while Wilson makes no direct reference to other countries having abolished appeals to the JCPC, it should be noted that New Zealand’s Asian-Pacific neighbors Australia and Fiji abolished appeals in 1986 and 1988, respectively); (3) statutory limitations on the JCPC’s jurisdiction in important areas such as workers’ rights and environmental issues limited its utility as an ally; and (4) the influence of legal developments in the U.K. on the JCPC was deemed inappropriate for New Zealand. This last point is particularly significant and is exemplified in the New Zealand Court of Appeal case, *R v Hansen* (2007), which refers to and interprets the U.K. Human Rights Act of 1998. In the Hansen decision, Justice Tipping states, “whether [such an approach] is appropriate in England is not for me to say, but I

am satisfied that it is not appropriate in New Zealand” (as cited by Wilson, 2010, p. 8).

Second, as the Labour Party took control, there needed to be a re-examination of the vision for the state and the citizens. The prevailing view was that this issue was best handled by “the New Zealand community and by judges familiar with that community and responsible for the maintenance of the rule of law” (Wilson, 2010, p. 24). The new vision focused on the relationship between parliamentary sovereignty and the power of judicial review of the policies of the elected governing coalition. The governing coalition’s view was that New Zealand’s domestic and international realities had changed and placed on “...both parliament and the courts new responsibilities... in a relationship better described as a ‘collaborative enterprise’... rather the traditional command model...” (6).

The Wilson (2000) arguments are reminiscent of those put forward by Hogg and Bushell (2007) in addressing this issue in Canada. They describe the relationship between the courts and the legislature as a “dialogue” (79). Without explicitly pointing a finger at the JCPC as being an unsuitable partner in New Zealand’s “collaborative enterprise”, Wilson (2010) states that “appeals to the Privy Council [JCPC] seemed increasingly anomalous” (16). Further, she cites examples going back to 1904 where then-Chief Justice of New Zealand Robert Stout notes, “At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, our conveyancing terms, or our history” (as cited by Wilson, 2010, p. 11).

Finally, it is worth examining a sample of decisions of the JCPC on cases originating in New Zealand in which the state is a party. Wilson (2010) indicates no displeasure with any decision or the history of decision-making by the JCPC. Nevertheless, two points need to be made. First, in referring to examples of decisions of the New Zealand Court of Appeals, Wilson (2010) states categorically that each domestic appellate court decision “accurately reflects the constitutional reality within which the relationship between the courts, the executive and the parliament work” (8). In other words, the judges appointed by the governing coalition should understand New Zealand and its realities. The implication is the domestic final appellate court, staffed with judges from New Zealand; would ipso facto be advantageous for New Zealand. Edwards (2001) suggests that the domestic courts had been performing better over time. Arguably, this is reflected in the decisions: between 1990 and 1994, the JCPC allowed 17 of 33 appeals from New Zealand. That dropped to 11 of 48 between 1995 and 1999 which is the period preceding the Attorney General’s position paper (Wilson, 2000) on severing ties with the JCPC (Edwards, 2001).

Second, the data on the level of success in cases from New Zealand where the state is a party may provide some insight. From 1990 to 1998, the JCPC decisions favor the state in 80 percent of the cases. From 2000 to 2005, JCPC decisions favor the state in 57 percent of the cases, which is a 23 percent drop from the preceding period. From 1990 to 1998 (the year before the general elections won by the Labour Party), there were 25 cases where the state was the respondent. Significantly, the JCPC decisions favor the state in 90 percent of the cases. From 1999 to 2005, JCPC there were 40 cases where the state was the respondent. The decisions favor the state in 61 percent of the cases, which

represents a 27 percent drop from the preceding period. This comparison of state success before the JCPC is presented in Figure 2.

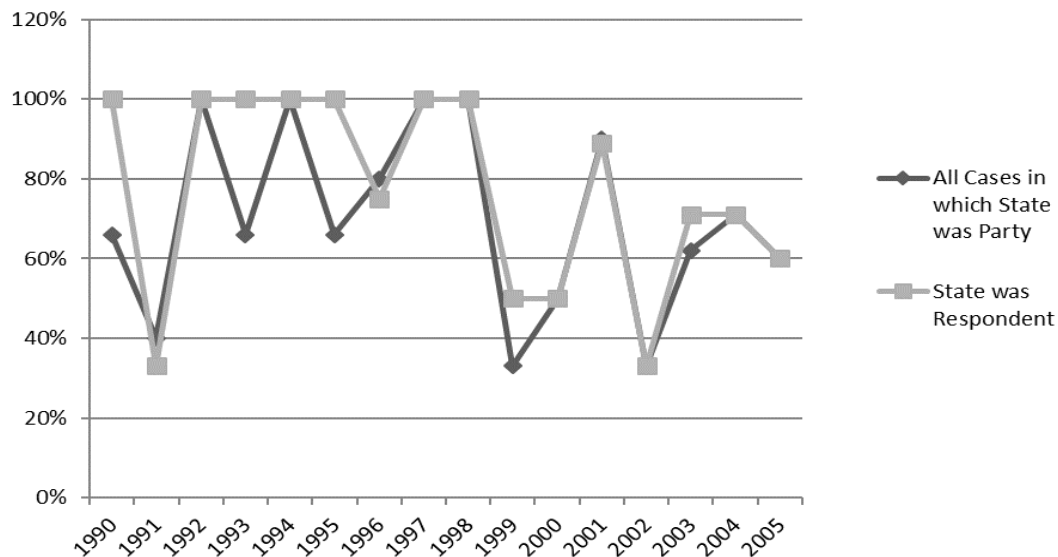


Figure 2. Comparison of Success Rates for All Cases in Which the State Is a Party and Cases Where the State Is the Respondent in Favor of the State between 1990 and 2005

Even taking into consideration that there was lag time between when the petition was filed and when the case decision was handed down by the JCPC, the difference between the two periods compared is stark and may be indicative of a growing disconnection between the new governing coalition's vision for New Zealand and the JCPC.

While the governing coalition parties were united in favor of abolishing appeals, the opposition parties were equally opposed. The National, New Zealand First, ACT New Zealand, and United Future Parties all voted against the bill. Besides the opposition parties, there were other opposing voices to the proposal to abolish the JCPC. These voices were predominantly from the legal and business communities, though there was no majority consensus for or against the proposed change (Justice and Electoral Committee Report, 2003). As most of the cases from New Zealand that reached the JCPC were commercial disputes, those that opposed the abolition stressed that it would negatively affect the confidence of large companies and international investors in New Zealand (Story, 2001). The editor of the *New Zealand Law Journal*, Bernard Robertson was one such opponent who felt that the JCPC contributed to "good political policy", and a change was politically short-sighted (cited in Story, 2001, p. 22). John Hagan, Chairman of Deloitte Touché Tohmatsu, spoke on behalf of his and four other accounting firms. He asserts that commercial interests would be subject to a biased and less competent domestic court. Finally, Robert Kerr, Chairman of the New Zealand Business Round Table, reiterated confidence in the JCPC, particularly regarding commercial cases, and expressed skepticism about the Attorney General's process of consultation about its domestic replacement (Story, 2001).

What did the public think about the proposal to abolish appeals to the JCPC? The Discussion Paper (Wilson, 2000) released by the Office of the Attorney General presenting the position of the governing coalition provided for a three-month period of public discussion and written submissions following its release. The Attorney General also continued consultations with Maori leaders, the business community, and the legal profession. When the period for public comment ended on March 30, 2001, only 70 submissions had been received, and they were evenly split between support for and rejection of the proposal. (Wilson, 2010). Another period for public comment followed the first reading of the bill in Parliament on December 9, 2002. Wilson (2010; see also the Justice and Electoral Committee Report 2003) reports that the 312 written submissions received were again evenly split between those supporting abolition and those favoring retention of the JCPC, while “the majority of oral submissions supported retention” of the JCPC (21). With a population of four million in 2003 (Statistics New Zealand 2011), this level of response from New Zealanders was low by any measure. A petition, initiated by Attorney Dennis Gates with support from the opposition parties (National Party and ACT New Zealand), put the question of abolishing the JCPC to a referendum that also reflected the low level of public interest. This was opposed by the governing coalition partners (Labour Party and New Zealand First Party). The petition failed to gather the 310,000 signatures required by law (Archive. is 2012; Justice and Electoral Committee Report 2003). Further, a 2003 public opinion poll found that 51 percent favored the Supreme Court Bill replacing the JCPC, but 40 percent knew nothing about the matter (UMR Research 2003).

With a solid majority in parliament (Markey, 2008; Electoral Commission of New Zealand 2015), the governing coalition moved forward and prevailed. The Supreme Court Bill introduced in 2002 was passed after the third and final reading in Parliament on October 14, 2003. It came into force on January 1, 2004, and officially abolished any possibility of appeal to the JCPC for all decisions of New Zealand courts made after December 31, 2003. It also established the New Zealand Supreme Court as the final appellate court, which began hearing appeals on July 1, 2004 (Courts of New Zealand, n.d.).

Ultimately, the change in environment, beginning with the 1999 general elections victory of the Labour Party revealed a different vision for New Zealand that was deemed incompatible with a continued role for the JCPC. The new coalition government, led by the Labour Party and with the support of the Alliance Party and the Green Party, did not believe that their new domestic and international vision for New Zealand could be realized with the JCPC as a policy-making partner. While the governing coalition did invite public participation, it was obvious that the passing of the Supreme Court Act of 2003 was primarily driven by the political leadership. Wilson (2010) confirms this based on the public’s low levels of response: “it was obvious this was not an issue that attracted a great deal of public concern and what concern that was expressed was amongst the elites” (18).

Tracing the change in the political environment, the specified goals, and the deliberate process of the governing coalition in imposing its will, supports my theory that a governing coalition expects a final appellate court to be a reliable partner in the process of producing and upholding public policy. In New

Zealand, the changed political environment is not captured on the democratic-authoritarian continuum operationalized using Freedom House or the Center for Systemic Peace (Polity IV) data. There was, however, an ideological change in the approach of the governing coalition representative which shifted the status quo. This influenced the governing coalition to deem the JCPC as not the best, or most appropriate, partner for implementing their new vision for New Zealand. Margret Wilson, Attorney General from 2000 to 2005, was a primary collaborator with other leaders of the governing coalition that produced the Discussion Paper (2000) that publicly presented the rationales for abolishing appeals to the JCPC. It seems improbable that Wilson would have been unaware of the increasingly unfavorable decisions being handed down by the JCPC. This assertion is supported by Wilson's statement in 2010 that "appeals to the Privy Council [JCPC] seemed increasingly anomalous" (Wilson, 2010, p. 16). In other words, the right of appeal to the JCPC had become incongruous or inconsistent with the new vision for New Zealand. Even more telling was her repetition of the Robert Stout's 1907 comment of the JCPC's lack of knowledge about the laws, practices, and history of New Zealand (as cited by Wilson, 2010, p. 11).

By establishing the New Zealand Supreme Court, the governing coalition brought this final appellate court within the administrative control of the governing coalition. Unlike with the JCPC, the governing coalition could control all important administrative aspects including judicial appointments, terms of service, and fiscal allocations for the highest appellate court. The changed political environment with the results of the 1999 general elections was enough to effectively forge a change to an important institution in the judiciary. This shift in the political climate was not as drastic as that ushered in by the 1994 coup d'état in The Gambia. The constitutional change in both states, however, was driven by the will of the governing coalition influenced by the political climate and the perception of the governing coalition that the JCPC was no longer a viable partner. The JCPC no longer served the purposes of the governing coalition, resulting in the need to establish a domestic final appellate court. The importance of the political will to effect change was summarized by the former President of the New Zealand Court of Appeal, Sir Thaddeus McCarthy. He stated in 1976 that he had no doubt that the questions surrounding severing ties with the JCPC "are ultimately political questions" (Richardson, 1997, p. 915).

4. The Gambia

At independence in 1965, the Gambian constitutional system reflected the Westminster model. Dawda Kairaba Jawara (1965-1994) led the post-independence rule of the Peoples' Progressive Party (PPP), in what is generally characterized as a period of stability with open elections and respect for civil rights and liberties (Perfect, 2010). The PPP won five consecutive elections with the only unconstitutional challenge being the failed coup d'état in 1981 (Country Watch 2019). To gauge the health of the Gambian democracy, the Freedom House scores (2019) of democracy are useful. This leading international organization monitors the political environment based on regime changes on a

democratic-authoritarian continuum. Freedom House scores are available starting 1972. States are rated in three categories as follows:

- Respect for Human Rights: high to low (1-7)
- Upholding of Civil Liberties: high to low (1-7)
- Overall score (Freedom Score): Free, (1); Partially Free, (0); and Not Free (-1)

The Gambia receives a favorable rating regarding political rights and civil liberties in 14 of the 21 years reported. Figure 3 presents the scores in the three categories discussed above from 1972 to 1998, reflecting the dramatic decline starting in 1994. The Gambia is rated as “partially free” (“0”) from 1981 to 1988, which coincides with the failed coup d’état in 1981 and the short-lived federation with Senegal from 1984 to 1989.

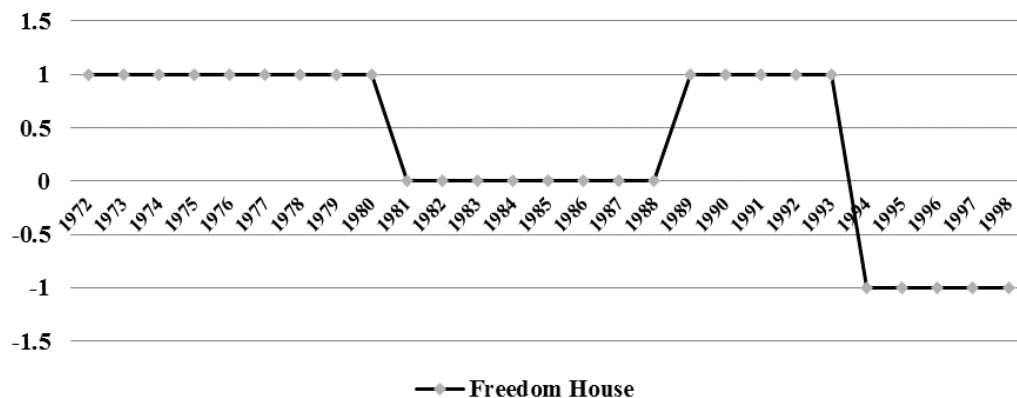


Figure 3. Gambia’s Freedom House Scores from 1972 through 1998 (Freedom House 2014)

Based on the preceding discussion, The Gambia enjoyed a consistent period of democratic rule after independence in 1965 through 1994. During that period, the state was a party in three cases, with a favorable JCPC decision in only one of the three. The state was the appellant in one of the three, and the decision was not in its favor. In the other two cases where the state was the respondent, it prevailed in one. There are several reasons for the small number of JCPC cases involving the state. First, the lower courts handed down decisions favorable to the governing coalition, thereby removing any need to appeal to the JCPC. Second, using the GDP per capita as a proxy for resource availability, the costs of accessing the JCPC is prohibitive, except in cases considered particularly important to litigants. The literature also discusses the high costs associated with accessing the JCPC (O’Conner & Bilder, 2012; Swinfen, 1987; Taylor, 2005). While the costs may be a deterrent for many litigants, if the state is dissatisfied with lower court decisions it is prepared to use resources to access the JCPC, as it perceives the court to be a reliable partner. Those conditions may have contributed to the status quo. Despite the costs, and regardless of the number of cases that it actually adjudicates, the states often perceive there to be a benefit to having this reputable extraterritorial court (Lange, 2004; Seow, 1997). This point is best exemplified by the statement of the first Prime Minister of Singapore, Lee Kuan Yew, to

parliament in 1967:

As long as governments are wise enough to leave alone the rights of appeal to some superior body outside Singapore, then there must be a higher degree of confidence in the integrity of our judicial process. This is most important (cited in Seow 1997, para. 15).

This was the case, in *Attorney General of Gambia v. Momodou Jobe*, adjudicated by the JCPC before the coup d'état in 1994. It was an appeal to the JCPC against a decision of the Gambian Court of Appeal that declared four provisions of the Special Criminal Court Act (1979) to be ultra vires, or in violation of the 1970 Constitution. The JCPC declared that only Section 8(5) was ultra vires. Section 20(2) guaranteeing the fundamental right to the "presumption of innocence" until proven guilty and was, therefore, unconstitutional and void (Jammeh, 2011). Senghore (2010) notes that in the *Momodou Jobe* decision the JCPC effectively curbed the power of the legislature by declaring a section of the Special Criminal Court Act as unconstitutional: "This case [Jobe] represents a practical example of the functioning of the special criminal court on one hand and corrects the excesses of the legislature and executive on the other" (222). This challenge to the policies of the state was important enough for the state to use public resources to appeal the unfavorable decision of the lower court to the JCPC. The decision reinforced the constitutional rule of law, and the governing coalition did not perceive the decision to be a serious enough challenge to their legitimacy.

At the time, however, the democratic political environment made the governing coalition less sensitive to the unfavorable section of decision. Those in power, therefore, are willing to have power partially curbed by the JCPC as the decision generally upheld the governing coalition's policy for addressing crime reflected in the Special Criminal Court Act. This JCPC decision, despite failing to uphold the all sections of the Special Criminal Court Act, was not sufficient to move the state to abolish appeals to the JCPC in a political environment where the governing coalition of President Jawara and the PPP supported reasonably strong democratic institutions (Country Watch 2019).

The second unfavorable decision to the governing coalition is *Alhaji Malang Kanteh v The Attorney General and others* (1975) which involved the sale of confiscated property by the police. The appellant claimed the property was on lease to another who was subject to a writ of fieri facias, or legal authority to seize property, to satisfy a judgment for another party. The value of the claim in 1975 was US\$832, which is more than twice the GDP per capita. While this may be significant to the appellant, the decision did not undermine a policy of the governing coalition resulting in a negative perception of the JCPC. During this period after independence, therefore, the governing coalition did not perceive a serious disconnection with the JCPC and, at the same time, may have considered this credible extraterritorial court as part of the constitutional right of appeals and beneficial to the state and the Gambian legal system.

The coup d'état ushered in two years (1994-1996) of military rule by the Armed Forces Provisional Ruling Council (AFPRC). The event transformed The Gambia from constitutional rule to rule by military decree (Jeng, 2013). This drastic change in the Gambian political environment is captured in

the Freedom House scores (2019) which rates The Gambia as “not free” (-1) from 1994 onward. After the coup, Amnesty International (1995) reports the change in governance by the AFPRC led by President Jammeh. Their 1995 report outlines a pattern of arbitrary arrests and detentions, restrictions on political activities, movement of leaders from the Jawara government and the PPP, and the harassment of journalists and owners of newspapers in an apparent effort to stifle criticism of the government. The AFPC transformed itself into a political party led by the coup d'état leader turned civilian president, Yahal Jammeh (Jammeh, 2011; Perfect, 2010; Wolf, 2019).

The August 6, 1996, referendum returned The Gambia to constitutional rule as the Second Republic (Jeng, 2013) and its new Constitution replaced the JCPC with the Supreme Court of Gambia as the final appellate court. As a result, access to the domestic court became less expensive than accessing the JCPC in London. While President Jammeh and the governing AFPRC had been able to intimidate and attack opposition supporters and constrain the media (Perfect, 2010), a situation the 2015 Amnesty International Country Report (2015) describes as repressive legislation “further restricting freedom of expression and increasing punitive measures against journalists” (para. 1), Gambians, were also more than ready for return to constitutional rule (Senghore, 2010).

The Gambia's democratic freedom scores have declined dramatically since 1993 when Freedom House rated The Gambia as “Free” (1). From 1994 to 1998, The Gambia received a rating of “Not Free” for each year. The change in environment illustrates the authoritarian shift in the regime, which increased the sensitivity of the governing coalition to challenges—including potential challenges before the JCPC—over which the governing coalition had no control.

In the absence of specific formal and recorded debate about the role of the JCPC, tracing the effects of specific decisions of the JCPC between the 1994 coup d'état and leading up to the adoption of the new constitution in 1996 is instructive. The state is a party to one of the four JCPC appeals between 1994 and 1998. In *West Coast Air Limited v Gambia Civil Aviation Authority and Another* (1998) damages were assessed against the state at US\$500,000 for breach of contract. Considering the GDP per capita of about US\$500, that assessment was a relatively large sum for breach of contract and probably enough to make the governing coalition resentful of the JCPC which overturned the lower domestic court of appeals. The low number of cases could reflect the lower court's support for the policies of the governing coalition, which would limit the governing coalition's need to rely on the JCPC. The results put a spotlight on the rare cases decided by the JCPC and highlight the potential risk of having challenges to policies adjudicated unfavorably by an exterritorial court.

The governing coalition was, therefore, aware of the potential existed for unfavorable JCPC decisions. Conversely, the regime was aware that it had control over the domestic courts and their role as a potential important ally in its quest for legitimacy. This is exemplified by the case of *Saihou Sanui Ceesay & Sons Limited V. AMRC* (1994). The issue is the constitutionality Sections 18(1) and (2) of the Asset Management Recovery Corporation Act (AMRC) of 1993. Section 18 (1) declares that no injunction or other restraints could be issued against the Assets Evaluation Commission set up under

the AMRC, and Section 18 (2) declares The Gambia Court of Appeal to be the final court on any issue. One High Court bench, therefore, dismissed the appeal in Saihou Sanui Ceesay, Saihou Ceesay & Sons Limited (1994). As a result, the state's actions are beyond review. In the High Court case of AMRC & Attorney General v. Saidou Sowe (1994) that challenged Section 18 (1), it was found to be partly constitutional but Section 18 (2) totally unconstitutional (reversing Saihou Sanui Ceesay & Sons Limited V. AMRC). Both decisions were handed down prior to the coup in July of that year, presenting conflicting decisions on the constitutionality of Sections 18(1) and (2) of the Asset Management Recovery Corporation Act (AMRC) of 1993. On appeal after the coup d'état, the Court of Appeals reaffirmed the constitutionality of both provisions (Jammeh, 2011). The state, therefore, is not subject to injunctive remedies but has the option to seek those remedies against others. Jammeh (2011) points out that this was a derogation of the protection of fundamental rights and freedoms enumerated in the 1997 Constitution (Sections 17 through 33), including deprivation of property (Constitution of The Republic of Gambia 1997).

The decisions of the Court of Appeals after the 1994 coup d'état illustrate that while the domestic courts may function as reliable partners in the governing coalition by legitimizing its policies, the JCPC still remains the final possible legal veto point. The governing coalition is not willing to take the chance of having a favorable decision overturned by the JCPC.

A reading of the 1996 constitution makes it clear that the governing coalition sought to constrain the jurisdiction of the judiciary and insulate itself from legal challenges to its policies and actions. Schedule 2 of the constitution includes Section 13 that ousts the jurisdiction of the courts about any actions or decisions of the AFPRC on the day of the coup d'état (July 2, 1994), following the suspension of the 1970 constitution and under the constitution of 1996. Further, the 1996 constitution provides for the establishment of the Supreme Court of Gambia within 18 months of the approval of the new constitution, with appeals continuing to go to the JCPC until that time.

The case involving Lamin Waa Juwara is a much-publicized example of the effects of Section 13 and the power to replace the JCPC in the 1996 constitution. Juwara served as the Minister of Lands before the coup d'état and subsequently joined the opposition United Democratic Party. In 1996, he was arrested twice for banned political activities and held for 10 weeks. He was released in October 1996 without being charged (Amnesty International 1996). Claiming human rights violations, Juwara filed a lawsuit against the government in July 1998, which was dismissed by the judge, citing Section 13 of the constitution which provides immunity from legal action to all members and representative of AFPC (Interparliamentary Union 2001). Both the Interparliamentary Union (2001) and Mass (2012) report that Juwara filed a petition to appeal to the JCPC. The governing coalition replaced the JCPC with the Supreme Court of Gambia in October 1998, before the petition before the JCPC could be considered (Senghore, 2010). This effectively ended the possibility of the petition going any further and any risk of the JCPC handing down a decision unfavorable to the governing coalition. Mass (2012) states, "Jammeh administration was determined to cover up its dirty linen... decided to change the Gambia's

legal status. It rushed to establish the Supreme Court of the Gambia so the Gambians would not seek redress outside the country's jurisdiction" (para.7).

As a minister in the former governing coalition and a prominent opposition figure to the Jammeh regime (Amnesty International 1996), had the Jawara case had reached the JCPC, it was inevitable that his persecution would have been laid bare before the court. A favorable JCPC decision of Jawara would embarrass the regime and lend support to its critics and support the negative democracy scores by Freedom House (2019) that started in 1994.

After ruling by decree for two years, the new constitution was approved through referendum and established the Second Republic in 1997. Replacing the JCPC with the Supreme Court of Gambia in October 1998 embodied the apparent desire of the Jammeh regime to control the judiciary. Section 138 (1) of the 1996 Constitution provides for the appointment of a Chief Justice by the President after consultation with the Judicial Services Commission, and Section 138 (2) provides for the appointment of all other judges by the President on the recommendation of the Judicial Service Commission. Section 141 of the constitution stipulates age for retirement criteria for judges. Senghore (2010) points out, however, that the tenure of judges is directly threatened by s. 141(2) (c) of the Constitution which legalizes presidential termination of services in consultation with the Judicial Service Commission. This is an effective loophole for the president as the Commission is appointed by the president (Senghore, 2010). These powers of appointment and dismissal are not available to the governing coalition when the JCPC serves as the final appellate court.

In a more democratic state, the governing coalition may be less reliant on the court for legitimacy. Furthermore, more democratic regimes may be less willing to pursue policies likely to be challenged in court. Authoritarian states lack the legitimacy of elections, making them more likely to want the approval of the courts (Moustafa, 2014; Solomon, 2007). Looking at the unfavorable decisions, the new governing coalition of The Gambia witnessed firsthand the power of the JCPC to undermine its policies. The small number of cases made each noteworthy and an easy focal point representing challenges to the governing coalition. Further, tracing the president's use of the constitutional power to appoint and dismiss a sitting justice point to the conclusion that replacing the JCPC with a domestic final court of appeal is to extend the governing coalition's control over the judiciary. The literature points to examples where the delivery of decisions unfavorable to the state is followed closely by the dismissal of a justice (e.g., Jammeh, 2010). Further, the examination of the governing coalition's use of the judiciary and other governing institutions to suppress opposition activities is reflected in the assessment of political and civil liberties.

It seems apparent that the governing coalition after 1994 did not view the JCPC as a viable partner. By establishing the Supreme Court of The Gambia, the governing coalition expected to gain a more reliable partner—one over which it had virtually unfettered constitutional control. This extension of control over the final appellate court had the effect of reducing the likelihood of successful legal challenges to the policies of the governing coalition.

5. Summary

The JCPC was an important part of the expansion, consolidation, and governance of the British Empire. What makes the phenomenon of the persistence of the JCPC unique is the fact that the U.K. made the court available to former colonies, and some new states did accede to the JCPC upon independence, effectively outsourcing the final appellate court to the former colonial power—an apparent affront to the traditional understanding of state sovereignty (Brown, 2002).

There is no denying the judicial experience, quality, and prestige attributed to the JCPC. In fact, the quality of the JCPC decisions is an important part of its credibility and not seriously questioned in the literature. New states which have not yet established an independent reputation for impartial adjudication can benefit from the right to appeal to the JCPC as it increases the credibility of their policy preferences (Voigt, Ebeling, & Blume, 2007). Additionally, for some of the new states, continued affiliation with the JCPC confers some degree of legitimacy on their judicial system. The statement by the then-Prime Minister Lee Kuan Yew of Singapore illustrates that the retention of the JCPC is a sign to the world of a commitment to judicial independence exemplifies this (Seow, 1997; Tan, 2015). The former President of The Bahamian Bar Association, Ruth Bowe Darville, also supports the retention of the JCPC (Rolle, 2012), pointing out that those who advocate for its removal are “treading in very dangerous waters”, as “litigants who come before us with multi-million dollar cases and they see us as a great financial centre, they need assurance that the Privy Council [JCPC] is there” (Mohr, 2011, p. 126).

The JCPC, therefore, has a long and prominent role in the judicial development of colonies and many sovereign states. The states that retained ties vary in size, population, socioeconomic conditions and geographic location. While the JCPC decisions establish precedents for those states, its decisions continue to be of assistance in the development of the jurisprudence of states that have severed ties (Gleeson, 2008). The persuasive value of JCPC decisions is recognized throughout the British Commonwealth and may even have similar authority on courts in England (Wilkie, 2016), underscoring the strong hold of the colonial legacy.

The case studies on New Zealand and The Gambia illustrate the struggles some countries go through to eventually sever ties with the JCPC. In the case of The Gambia, it took the adoption of a new constitution following a coup d'état and repressive military rule that damaged the country's human rights record. The regime was uncertain that the decisions of the domestic courts would be upheld by the JCPC. Officially, appeals to this vestige of colonialism was an affront to state sovereignty, and with the post-coup d'état constitution, the right of appeal was removed. Constitutional changes that excluded the right to appeal to the JCPC was also the case in other former colonies including Nigeria, Tanzania, Sierra Leone, Uganda, Kenya and India, which followed very quickly after independence. The change in New Zealand did not occur after paradigm shift in governance following a coup d'état but a change of political party ushering in a new direction for the state which found the JCPC incompatible with the vision. Further, like former colonies including Canada, Malaysia, Singapore, and Sri Lanka, breaking

the judicial tie with the former colonial power occurred many years after independence without a paradigm shift like a coup d'état.

As of 2019, 12 former colonies retain the JCPC. The highest concentration is eight Commonwealth Caribbean states which have retained the JCPC as the final appellate court even with the Caribbean Court of Justice (CCJ) available under the Treaty of Chaguaramas (1973). So far, only Barbados, Belize, Dominica, and Guyana have acceded to the CCJ. These states have replaced the JCPC with another court each has little direct control over. Ironically, while the court is in Port of Spain, Trinidad, that country along with the seven others, has yet to sever ties with the JCPC and accede to the CCJ. The phenomena of the CCJ with both original and appellate jurisdictions (much like the JCPC) developing within a framework of regional integration and the relationship of the states with the court needs further examination and provides fertile areas for future research.

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Notes

Note 1. Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, the Solomon Islands, and Tuvalu.

Note 2. Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, St Helena, Ascension and Tristan da Cunha, South Georgia and South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, Turks and Caicos Islands, and Virgin Islands.

Note 3. Not included are the 13 North American colonies that became the United States. They did not emerge as independent countries and independence in 1776 pre-dated the modern JCPC.

Note 4. The 14 territories that are currently British colonies and dependencies are not included.