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How do Judges Decide Cases in the Judicial Committee of the Privy Council?[1]

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How do judges decide cases? I was asked this question a few months ago by a visitor to the court who was surprised when I told him that judges decide cases by applying the law to the facts of the case. Surely, he said, your own personal values must have an impact, particularly in the kinds of hard cases that come before apex courts like the Judicial Committee of the Privy Council? How else could different judges, all equally learned in the law, come to different conclusions on the outcome of a particular case? This lecture is my attempt to answer these questions, by giving you an insight into the values inherent in the law itself and the ways in which they influence, constrain and control judicial decision-making. In doing so, I am speaking not as a legal philosopher, but as a working judge who is asked almost every day to decide difficult cases which are of considerable public importance in the jurisdictions we serve, including Jamaica.

Non-lawyers sometimes think of the law as a set of rules which judges apply in a mechanical way to the facts of the cases that come before them. Some academic lawyers have a tendency to treat the law as a system of abstract propositions, applied as a matter of logical analysis. But these views of the law are very different from the reality of the work of judges in the Privy Council.

Let me begin by telling you about *Primeo*, a recent case from the Cayman Islands.[2] This will give you some idea of what a judge like me actually does, and will also illustrate some aspects of how the law operates in practice. The case concerned a multi-billion pound claim against an international bank, arising out of its involvement with investors in a Ponzi scheme operated by the US financier Bernard Madoff, which collapsed during the financial crash of 2008. The claim was brought after the normal time limit for bringing a claim had expired. The time limit can however be extended, under Cayman legislation, where the defendant deliberately committed a breach of duty in circumstances where it was unlikely to be

[1] I am indebted to my judicial assistant, Rebecca Fry, for her invaluable assistance in the preparation of this lecture.
[2] *Primeo Fund (In Official Liquidation) v Bank of Bermuda (Cayman) Ltd and another* [2023] UKPC 40.

discovered for some time. So one of the questions we had to answer was whether this exception applied.

That raised some difficult questions, including what was meant in this context by a breach of duty being deliberate. Must the defendant have known it was committing a breach, or would recklessness be enough? That is to say, would it be sufficient that the defendant realised that there was a risk that it was committing a breach and unreasonably took the risk anyway? The answer to that question could not be found in the text of the Cayman legislation, or in the UK legislation on which it was based. So, how did we go about deciding the case?

As law students, you probably know that different legal theorists would give different answers to this question. One view, associated with the 20th century American "legal realists", is that judges decide cases based primarily on what they think would be fair on the facts of the cases in front of them.[3] For example, Jerome Frank has claimed that judges' decisions do not result from the application of a legal rule to the facts of the case, but are the result of the judge's non-verbal "hunch" which precedes any analysis and must subsequently be translated into a logical verbal account of the facts and the applicable legal rules. In this sense, Frank says, "judges … are to some extent creative artists".[4] Legal positivists like HLA Hart agree that judges exercise discretion, but only in "penumbral" cases where general legal rules conflict or are indeterminate in their application. In these cases, their discretion is not unbounded. Rather, judges have a professional obligation to reach their decisions through a process of legal reasoning. They cannot think about the problem purely on its merits, nor can they reach their decisions on non-legal grounds.[5] Another theory is advanced by Ronald Dworkin, who says that judges decide hard cases by "trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."[6] On this view, the principles underlying the statutes and precedents before the judge always point towards the legally correct answer.

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[3] Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence" in *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007), pp. 21-22.

[4] Jerome Frank, "Say It With Music" (1948) 61 Harvard Law Review 921 at 921. See further Jerome Frank, "Words and Music: Some Remarks on Statutory Interpretation" (1947) 47 Columbia Law Review 1259.

[5] HLA Hart, "Positivism and the Separation of Law and Morals" (1957) 71 Harvard Law Review 593 at 607-608. See also John Gardner, "Legal Positivism: 5½ Myths" in *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012), pp. 39-42.

[6] Ronald Dworkin, *Law's Empire* (Hart Publishing, 1986), p. 255.

That's some of the theory. But what happens in practice? There are cases where my long experience of the law has taught me to hear something that sounds like a wrong note in a piece of music. A recent example from Jamaica concerned the conviction of the appellants, Shawn Campbell and others, for murder.[7] Over the course of the 64-day trial, there was a series of incidents involving the jury. A juror was discharged almost eight weeks into the trial, reducing the total number of jurors from the usual twelve to eleven. Then, on the last day of the trial, the judge was informed that one of the jurors, who I will call Juror X, had tried to bribe all the other jurors, urging them to acquit the appellants. The trial judge could not discharge Juror X at this stage because, under the Jamaican Jury Act, a trial for murder cannot continue with fewer than eleven jurors. The judge decided to proceed with his summing up and directed the jury to reach a verdict, reminding them that they had sworn or affirmed that they would reach a verdict in accordance with the evidence they had heard in court. By a majority of ten to one, the jury found the appellants guilty of murder. Juror X was immediately arrested and was later convicted of attempting to pervert the course of justice.

When the case came before the Privy Council, we had considerable sympathy for the dilemma faced by the trial judge on the final day of what had been a long and complex criminal trial. He either had to continue with the eleven remaining jurors, including Juror X, or discharge the jury, meaning that the time and resources spent on the trial up to that date would have been wasted. But that did not mean that he was right to continue the trial. In our view, there should have been no question of allowing Juror X to continue to serve on the jury. Allowing him to continue was an infringement of the appellants' fundamental right to a fair hearing by an independent and impartial court in accordance with section 16 of Chapter III of the Jamaican Constitution. The direction the judge gave to the jury was not enough to save the situation, particularly as it took no account of the risk that the other members of the jury might have been prejudiced against the defendants as a result of Juror X's actions. Accordingly, the Privy Council concluded that the convictions should be quashed. The case has been remitted to the Jamaican Court of Appeal, who will decide whether or not there should be a retrial.

The idea that a juror who had attempted to bribe the others should be permitted to continue as a member of the jury sounded a wrong note as soon as I read the papers in the case. However, that does not mean that the Privy Council decided the case on the basis of what we thought would be fair on the facts or according to a "hunch" as Jerome Frank would have it.

[7] *Shawn Campbell and others v The King (No 2)* [2024] UKPC 6 ("*Shawn Campbell*").

Rather, our decision was based on our analysis of the applicable legal rules, which set out a clear requirement for a fair trial, and their application to the facts of the case. I heard a wrong note because I have dealt in the past with other cases concerned with juror misconduct and had a strong impression that the judge had not dealt with the situation correctly. But I had to go back to the authorities and consider all the arguments with my colleagues before I was sure.

What happens, then, in a case like *Primeo*, where the effect of the applicable legal rule is not so clear? As I have explained, one of the issues we had to decide concerned the meaning of "deliberate" in the phrase "deliberate commission of a breach of duty". Primeo submitted that a reckless breach of duty was sufficient, but the Privy Council rejected this argument. Since words used in legislation are generally intended to be given their ordinary meaning, we considered the ordinary meanings of the words "deliberate" and "reckless" in general conversation, as well as the ways in which they have been used in other Cayman legislation. Since the wording of the Cayman legislation was in all material respects identical to the equivalent UK legislation, we also considered the case law dealing with the interpretation of that legislation. In addition, we examined the extent to which the Cayman legislation was intended to be a restatement in modern language of the previous law of concealed fraud, again drawing on the applicable authorities. Our conclusion was that it represented a fresh start, enabling us to give effect to the ordinary meaning of the statutory language as enacted by the Cayman Parliament without being tied to the past.

Another example concerned the powers of the Jamaican Independent Commission of Investigations, known as INDECOM, and its Commissioner and staff, to initiate prosecutions.[8] INDECOM was established by the Independent Commission of Investigations Act 2010 to undertake investigations into actions by members of the Jamaican security forces and other state agents that result in a person's death or injury, or an abuse of their rights. The 2010 Act was passed to address the need, identified by the Inter-American Commission on Human Rights in *Michael Gayle v Jamaica*,[9] for independent and effective investigation into the actions of the Jamaican security forces which could lead to independent prosecution.

The appeal concerned the fatal shooting of Frederick Mikey Hill by police in 2010. Following an investigation, INDECOM investigators initiated the prosecution of a police officer for Mr Hill's murder. The Police Federation and others brought an action seeking

[8] *Commissioner of the Independent Commission of Investigations v Police Federation and others* [2020] UKPC 11 ("*Indecom*").
[9] (Case 12.418) Report No 92/05, 24 October 2005.

administrative orders and constitutional redress under section 25 of the Constitution of Jamaica on the ground that INDECOM had exceeded its powers. In broad terms, they contended that INDECOM only had the power to investigate police misconduct, and not to prosecute officers for an offence.[10]

The principal question for the Privy Council was whether the Jamaican legislature intended that INDECOM should have a prosecutorial function, in addition to its investigative function. Since the Act which established INDECOM did not confer any express powers to prosecute, it was necessary to consider whether such powers arose under the common law. This turned, first, on INDECOM's legal status. The Privy Council concluded that, although the 2010 Act did not expressly incorporate INDECOM, it created it as a distinct entity with perpetual succession. INDECOM was therefore in a position analogous to that of a statutory corporation sole. The relevant case law established that the consequence of this was that, in common with other kinds of statutory corporation, INDECOM only had the powers conferred on it by legislation. It was therefore clear that the provisions of the Act gave INDECOM only investigative powers.

These examples illustrate some general points. In the first place, even where an area of life is regulated by legislation, the common law remains important. That is partly because legislation usually draws on concepts and principles developed in the common law, or on case law interpreting earlier statutes. In addition, every statutory provision of importance soon accrues a body of case law in which it is interpreted, so that lawyers and the courts consult the cases rather than just the text of the legislation itself in order to understand its effect. In reality, legislation cannot be enough by itself. It depends on the courts to bring it to life and to resolve its inevitable uncertainties, ambiguities and omissions.

A second point is that legal rules are often less clear than non-lawyers tend to imagine. How they are understood and applied by the courts can evolve over time, as new problems present themselves and our society changes. In reality, the reasoning of judges in the most difficult cases is often based on understanding the thinking of their predecessors in the context of the problems which they faced, and trying to adapt their ideas to find the best solution for the problems of our own time, within the framework of concepts and principles which the

[10] Note that the Privy Council reached a different conclusion in relation to offences under section 33 of the Independent Commission of Investigations Act 2010. It held that INDECOM had an implied power to prosecute these offences because they were closely related to, and intended to promote the effective performance and prevent obstruction of, INDECOM's investigative work. See *Indecom*, para 44 (Lord Lloyd-Jones).

earlier decisions have given us. That involves not only reading the text of earlier judgments, but understanding what the question was to which the judgment was intended to provide an answer, understanding the historical context, and considering the impact of any relevant social changes which have occurred since then.

For example, we recently heard a case where one of the questions is whether an injunction should be granted to prevent an employer from dismissing a number of its employees. The law books will tell you that an injunction is not available, because the law will not compel an employer to keep on an employee against his will. The leading authorities are 19th century cases concerned with masters and servants, where there was a personal relationship of confidence between the master and the servants whom he chose to employ. Our case concerns manual workers employed by a multinational company with over 300,000 employees in the UK. Does the rule established by the older cases apply in this situation? We do not answer the question by asking ourselves what we think is a desirable social policy, but by analysing the rationale of the earlier decisions and considering whether it applies in the different set of circumstances before us. In this way we arrive at a result which fits the circumstances of our own time.

Since society is constantly evolving, it follows that the law is in a process of continuous development by judges deciding cases that come before them in the courts. And because we have a system of precedent, in which judges are bound by the decisions of higher courts, judgments in the higher courts are not simply decisions on the facts of particular cases, but have to form part of, and often articulate, a coherent explanation of the area of law relevant to the case in question, setting out principles which lower courts are bound to follow.

How does this fit with my first contention, that judges always decide cases in good faith by applying the law to the facts of the cases before them? Some people argue that, if that were true, surely there would always be one legally correct answer.[11] Yet the debate before the Privy Council in *Primeo*, for example, arose partly as a result of what we considered to have been a wrong decision made by the English Court of Appeal in construing the equivalent UK legislation.[12] And there are decisions in the Privy Council which have caused significant shifts in the common law.

[11] See, for example, Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985), Ch 5.
[12] *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339. This decision was overturned by the UK Supreme Court on appeal [2023] UKSC 41.

One example from Jamaica concerned the law of joint enterprise.[13] In 2010, the appellant, Ruddock, was convicted of the murder of Pete Robinson. Mr Robinson was a taxi driver, and the prosecution's case was that the murder was committed in the course of a robbery. His body was found on a beach; his hands and feet had been tied with cloth and his throat has been cut. A co-defendant, Hudson, pleaded guilty to the murder at the beginning of the trial. However, the investigating police officer's evidence was that Ruddock had given a statement, when interviewed under caution, to the effect that while he was not the one who had cut Mr Robinson's throat, he was involved in the robbery and had tied the deceased's hands and feet. The trial judge directed the jury that Ruddock was guilty of murder if he took part in the robbery and knew that there was a possibility that Hudson might intend to kill Mr Robinson. This direction derived from an earlier Privy Council decision, *Chan Wing-Siu*,[14] which was binding on him.

The Privy Council concluded unanimously that it had itself taken a wrong turn in *Chan Wing-Siu* and the cases which had followed it. It held that a defendant accused of being a secondary party to a crime could only be convicted if they intended to assist or encourage that crime. In other words, a secondary party such as Ruddock would only be guilty of Mr Robinson's murder if he intended to assist or encourage the primary party, Hudson, to carry out that crime. Knowing that there was a possibility that the crime might be committed was not sufficient; it was simply evidence (albeit it might be strong evidence) that the secondary party intended to assist or encourage the primary party in committing the crime. It was a question for the jury in every case whether the intention to assist or encourage was shown.

This change in approach by the Privy Council was not due to a difference between the personal views or values of the judges who decided *Chan Wing-Siu* on the one hand, and those who decided *Ruddock* on the other. The judges in both cases were engaged in a genuine attempt to identify a coherent set of legal norms from the previous authorities which they could use to resolve the problem before them. As Robert Sharpe, a Canadian appellate judge, has put it, "[d]ifferent judges see legal issues in different ways and different judges, acting in perfect good faith and sharing an eager desire to do justice, will disagree. But when I sit down to write my

[13] *Ruddock v The Queen* [2016] UKPC 7, heard with *R v Jogee* [2016] UKSC 8.
[14] *Chan Wing-Siu v The Queen* [1985] AC 168, developed further by the House of Lords in *R v Powell and R v English* [1999] 1 AC 1.

reasons, I find it difficult to describe my approach as being anything other than to do my best to come to the legally correct decision."[15]

Two points emerge from this. The first is that, as our legal system is a common law system based on the application of precedent, the primary source of its principles is the historical body of cases decided in the past and collected in the law reports. Each precedent concerns an individual human story which arose at some point in the past, and resulted in a legal dispute which came before the courts for decision. In deciding the case, the judge may have articulated a legal principle which he or she understood himself or herself to be applying, or later judges may arrive at a principle by a process of induction from a series of judicial decisions in individual cases.

The process of development of the common law reflects the nature of its sources. Judges usually find in previous cases the principles which they apply, but as circumstances change and new cases come before the courts, and as the concepts used by judges in the past – such as the concept of a "family", or of "torture" or "inhuman treatment" – come to denote other matters than those that judges may have envisaged in their own time, the principles which are inferred from the cases are refined or qualified, and the law develops in a way which is based on, but modifies, the tradition which the courts have inherited. In a case which raises a novel or difficult question, their task is to find the legal answer for their own time, and they may therefore need to take account of changes in attitudes and conditions since earlier cases were decided.

The second point is that judging can also be affected, consciously or unconsciously, by the social environment in which it takes place within the court, and by the personalities involved. Some judges are meticulous and conscientious. Some judges are imaginative. Some judges contribute to the creation of an atmosphere which encourages the free and confident expression of views. Some judges are good at working collaboratively with colleagues or assistants. Some judges are anxious to impress others with their cleverness. Some judges are keen to improve their prospects of promotion. Some judges are none of these things. Judges, in other words, are human beings operating in a social setting, and that can affect how they go about judging. My own aim, as the President of the UK Supreme Court and the Judicial Committee of the Privy Council, has been to create an environment in which everyone is

[15] Robert J Sharpe, "How Judges Decide" in *Principles, Procedure and Justice: Essays in Honour of Adrian Zuckerman* (Oxford University Press, 2020), pp. 97-98.

comfortable expressing their own view, in which everyone has time to do their job properly, and in which judges are encouraged to work in a collaborative way, pooling ideas and working together to create the best judgments we can.

When I sit on the Privy Council, I am conscious that we are a group of judges from the UK who do not generally have significant experience of living and working in the jurisdictions we serve. As a result, depending on the nature of the case, we may need to be informed about those attitudes and conditions. In the past, senior judges from a number of other jurisdictions sat on the Privy Council when those countries had it as their highest court of appeal. For example, there was a more or less unbroken presence of a judge from India on the Privy Council from 1912 until 1949, when India established its own apex court.[16] Judges from outside the UK by no means always sat on cases from their own jurisdiction. For example, Sir Edward Zacca, who was at one time the Chief Justice of Jamaica and later the President of the Court of Appeal of the Bahamas, sat on the Privy Council between 1993 and 2004 in a number of cases from the Bahamas, the British Virgin Islands, Barbados, Trinidad and Tobago and Mauritius, as well as some cases from Jamaica.

Having the benefit of the opinion of a judge with direct experience of local conditions can only enhance the quality of the Privy Council's decision-making. I have therefore asked the UK government to consider a proposal to invite senior judges from outside the UK to sit with us again on the Privy Council. This is not currently possible in relation to most of the Privy Council jurisdictions under the legislation which governs appointments.[17] The exceptions include judges of the Eastern Caribbean Supreme Court, the High Court of Trinidad and Tobago and the Supreme Court of Jamaica, who can sit on the Privy Council if they are first appointed as Privy Counsellors.[18] At present, none of the judges from these jurisdictions are Privy Counsellors, but I am hopeful that that position may change before long. In the meantime I and my colleagues pay the greatest attention to the understanding of local conditions explained by the local court of appeal, and by local counsel who appear before us.

That helps explain why it is important that the judges who sit on the Privy Council pay close attention to the decisions of the courts in the proceedings below us when deciding the

[16] Rohit De, "'A Peripatetic World Court': Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council" (2014) 32 Law and History Review 821 at 838.
[17] See the Judicial Committee Act 1833, section 1(2).
[18] See the Judicial Committee Amendment Act 1895, section 1(1) and the orders made under it, including the Judicial Committee (Trinidad and Tobago) Order 1966/1405, the Judicial Committee (Eastern Caribbean Supreme Court) Order 1992/2664 and the Judicial Committee (Jamaica) Order 1992/2665.

appeals that come before us. The Privy Council has made it clear that it "should not pronounce upon what are or may [be] issues of considerable constitutional importance without having the benefit of the opinion of the [local] Supreme Court or the Court of Appeal upon them."[19]

For example, in the *Shawn Campbell* appeal I discussed earlier, the appellants had advanced another argument, which was that their convictions should be quashed because they were obtained in breach of the Charter of Fundamental Rights and Freedoms contained in the Jamaican Constitution.[20] The appellants invited the Board to lay down new principles as to how the Constitution should be interpreted, but their submissions on these points, to the effect that the Charter should be interpreted in accordance with the approach taken to some other constitutional charters around the world rather than as a charter of rights specifically for Jamaica, had not been made before the Court of Appeal in the proceedings below. This meant that the Privy Council did not have the benefit of the views of the Jamaican judiciary on these issues. Given the Privy Council's conclusion that the appellants' convictions should be quashed on the ground of juror misconduct, there was no need to decide the question of constitutional interpretation in order to allow the appeal. Accordingly, the Privy Council concluded that "consideration of these constitutional issues should be deferred to another occasion on which the Board may be assisted by the views of the Jamaican judiciary."[21] This does not mean that the Privy Council should always defer to the local courts. As I have explained, in *Shawn Campbell*, the Privy Council overturned the Court of Appeal's decision on the issue of juror misconduct. However, our judgments should be informed ones, reached, where possible, with the benefit of the analysis of the local judiciary.

When we sit in the Privy Council, we always display the flag of the jurisdiction from which the appeal before us is being brought on the flagpole in the court room. This helps to remind everyone in the court that we are sitting as the highest appellate court of the jurisdiction to which the flag belongs, and we are applying the laws of that jurisdiction.[22] Usually they have a common law system, and their law is similar if not identical to that which we apply in the UK. But sometimes, those laws – and the values that underpin them – might differ from those

[19] *Vencadsamy and others v The Electoral Commissioner and others* [2011] UKPC 45, para 58 (Lord Clarke).
[20] Enacted by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
[21] *Shawn Campbell*, note 7 above, para 62 (Lord Lloyd-Jones).
[22] See *Ibralebbe v The Queen* [1964] AC 900 at 921-922 (Viscount Radcliffe).

that prevail in the UK. These cases have required us to grapple with complex issues, including the death penalty[23] and gay rights,[24] among others.

For example, a recent appeal from Bermuda concerned same-sex marriage,[25] which is lawful in the UK. The issue for the Privy Council was whether the law of Bermuda recognises same-sex marriage. Section 53 of the Bermudian Domestic Partnership Act 2018 confines marriage to a union between a man and a woman. Other provisions of the Act allow same-sex couples to enter into a domestic partnership with the same legal effects as marriage. The respondents challenged the validity of the section on three grounds. First, they argued that it was passed primarily or mainly for a religious purpose, contrary to the secular nature of the Bermudian Constitution. Secondly, they argued that it hindered their enjoyment of their belief in same sex marriage as an institution recognised by law. Their argument was that this was contrary to the guarantee of freedom of conscience in the Bermudian Constitution. Thirdly, they contended that section 53 treated them, and others in the same position, in a way that amounted to discrimination on the grounds of creed, which is prohibited by the Bermudian Constitution.

These arguments succeeded before the Bermudian courts, but the Privy Council allowed the Bermudian Government's appeal. The Board agreed, unanimously, that there was no provision in the Constitution which nullified legislation on the ground that it was enacted for a religious purpose. In any event, section 53 was not passed for religious reasons, but rather as a compromise between different opinions in Bermuda as well as to fulfil an electoral promise. We all also agreed to reject the challenge based on discrimination according to creed. Finally, by a majority of four to one, we concluded that the Bermudian Constitution did not extend to imposing a positive obligation on Bermuda to make the law comply with the respondents' belief that Bermuda should give legal recognition to same-sex marriage.

I want to emphasise that these conclusions were based on our interpretation of Bermudian law, not on policy considerations. They had nothing to do with any of the judges' personal views on same-sex marriage, nor did we seek to impose British attitudes to same-sex marriage on Bermuda. As explained in the judgment, we recognised that marriage is an institution with profound religious, ethical and cultural significance, that the historical

[23] *Chandler v The State of Trinidad and Tobago (No 2)* [2022] UKPC 19.
[24] *Attorney General for Bermuda v Ferguson and others* [2022] UKPC 5 ("*Ferguson*") and *Day and another v The Government of the Cayman Islands* [2022] UKPC 6.
[25] *Ferguson,* note 24 above.

background is one of the stigmatisation, denigration and victimisation of gay people, and that the restriction of marriage to opposite-sex couples may create among gay people a sense of exclusion and stigma. There is considerable force in the policy argument in favour of same-sex marriage on the ground that it would accommodate diversity within society. But none of this meant that we could read into the Bermudian Constitution a right to the legal recognition of same-sex marriage. We considered that that was a matter for the Bermudian legislature, to be resolved through its democratic process.

How, then, can one honestly assure the public that cases are not simply decided on the basis of judges' personal views, conscious or unconscious, of desirable social policy, or on the basis of their emotional reactions? As I have explained, we are assisted in this endeavour by the surrounding constitutional and institutional framework, which imposes a number of important safeguards.

Let me describe some of the safeguards our institutional framework imposes. To begin with, the rule of law requires that laws must be administered openly and transparently in the courts. Historically, this has been a challenge for the Privy Council, because of the geographical distance between London and many of the Privy Council jurisdictions. Furthermore, until 2009, Privy Council proceedings took place in the fairly inaccessible Council Chamber at 9 Downing Street.

Things are now very different. The Privy Council sits in Parliament Square across the road from the Houses of Parliament, in the same building as the UK Supreme Court. The building is open to the public, and we have about 100,000 visitors a year. The Privy Council courtroom is usually busy with school and university students and other visitors, as well as the parties and their lawyers. Privy Council hearings are all live-streamed on the court's website and are made available "on demand" afterwards on both the website and the court's YouTube channel. For example, over 55,000 people watched the *Shawn Campbell* hearing live online. This enabled those with an interest in the case in Jamaica and elsewhere – there was a particularly high number of viewers in New York - to see the arguments being put forward by counsel, the questions being asked by the judges, and generally to gain a much fuller understanding of the proceedings than would have been possible in the pre-internet age. We also livestream the delivery of Privy Council judgments in which there is public interest, when the judge who has written the lead judgment gives a short explanation of the court's decision in ordinary language. We try to do that at a time of day when it can be viewed in the relevant

jurisdiction. For example, the *Shawn Campbell* judgment was delivered at 10 am Jamaican time. The Privy Council website provides a brief summary of the factual background and legal issues in every appeal before the court, and the most significant judgments are accompanied by a plain English summary of two or three pages, drafted by our judicial assistants. We are also planning to make the parties' written arguments available online ahead of the hearing. We hope that these initiatives promote clear and accurate media reporting, and make it possible for members of the public to find out more about our work.

I am conscious of the significant expense involved in travelling to the UK from some of the Privy Council jurisdictions. The Privy Council therefore offers online or hybrid hearings, which can sometimes be the most efficient and proportionate option. This also enables us to hear the case at a time when it can be viewed by the public locally. One example was *Framhein*, a case from the Cook Islands concerned with commercial tuna fisheries and the protection of the marine environment in the South Pacific.[26] The Court heard the case online and sat at 7pm UK time, which was 9 am in the Cook Islands. We are also very pleased to be invited to sit in the Privy Council jurisdictions in person. During my time on the court, we have sat in Mauritius, in the Bahamas and most recently in the Cayman Islands. The hearings were well attended by the public, and we also ran a series of meetings with court users, educational events with schools and colleges, and meetings with judges, lawyers, politicians and other community leaders, as well as taking the opportunity to travel around the islands.

The second safeguard I would like to highlight concerns the obligation on judges to give reasons for their decisions. This has many aspects. In the first place, judges are obliged to reach their decisions by a process of legal reasoning. Only certain legal kinds of reasons count. Judges are not entitled to decide cases before them for political, moral, economic or other kinds of reasons. Nor can they simply come down on the side of their gut instinct. Rather, as the legal philosopher John Gardner explained, "even in a case which cannot be decided by applying only existing legal norms, it is possible to use legal reasoning to arrive at a new norm that enables (or constitutes) a decision in the case, and this norm is validated as a new legal norm in the process."[27]

What do I mean by legal reasoning? As we have seen, in some of the appeals before apex courts like the Privy Council, the answer cannot be found simply by identifying pre-

[26] *Framhein v Attorney General of the Cook Islands* [2022] UKPC 4.
[27] John Gardner, note 5 above, p. 39.

existing statutory and judicial authorities and applying them to the facts of the case. So, legal reasoning at this level is not only concerned with the legal rules and principles that already apply. It is also about identifying which new legal norms would best match "with the fabric and texture"[28] of the norms that have come before it, including the over-arching principles of justice and procedural fairness which underpin the common law.

This brings me to another aspect of the obligation to give reasons, which concerns the need for my reasons to be ones that will be recognised and respected by my colleagues on the bench. In the Privy Council, appeals are generally heard by panels of five judges, and the process by which judgments are produced is a highly collegiate one, with the judgments often being written by a number of judges working together. After I read the papers before an appeal hearing, I will start to sketch out my preliminary views, at this stage working alone. However, I am soon required to engage with my colleagues. Before the start of every hearing, the judges gather together to share their preliminary views on the case. Immediately after the hearing, we meet again. At this much longer meeting, each judge gives his or her provisional view on whether to allow or dismiss the appeal, together with a summary of their main reasons. Just as verbal sparring and the blow-by-blow dismantling of a paper are not unheard of in universities, a lively combat of ideas takes place between the judges at the post-hearing meetings. We learn a lot from these robust encounters, and we have our minds changed by them. If any judge were to incorporate non-legal reasoning into their analysis, this would be challenged very swiftly. Further exchanges of views take place when the judge or judges who have written the lead judgment share a draft version with the other panel members, generally by email, and make their comments and suggestions. My colleagues' comments invariably improve my drafts and the final version of the judgment is stronger as a result. We all share a commitment to the independence and integrity of the Privy Council's work and our internal processes ensure that we work closely together to try to achieve the best judgment possible.[29]

Most importantly, our reasons are for the public we serve. Court judgments need to be able to demonstrate to the litigants that we have heard and responded to their arguments, and to provide them with a reasoned explanation of our decision so they can understand why we have come down on one side or another. We also need to be able to show that we have reached our judgment for legal reasons, and not for any others. This is particularly critical in judgments

[28] Robert J Sharpe, note 15 above, p. 98.
[29] For a more detailed discussion, see Lord Burrows, "Seven Lessons from Inside the UK Supreme Court", Neill Lecture 2023, pp. 5-7. Available at: Seven Lessons from Inside the UK Supreme Court - Lord Burrows.pdf

given by appellate courts like the Privy Council, where many of the issues we consider matter not only to the parties before us, but also to the wider public.

An important difference between the judicial and legislative branches of government is that judges cannot pick and choose the issues on which they wish to pronounce. We can only decide the cases that come before us, and we have to decide them one way or the other. And in the Privy Council, we can only decide appeals from countries that wish to send cases to us. The larger countries in the Commonwealth, such as India and Australia, long ago established their own highest courts. Some smaller countries, such as Barbados and St Lucia, have also chosen to end their use of the Privy Council, and to send their appeals instead to the Caribbean Court of Justice. Other countries, including independent republics such as Mauritius and Trinidad and Tobago, have chosen to continue using the Privy Council. That is entirely a matter for them. We are pleased to provide a service to those who want it, and we also maintain a friendly relationship with those who do not. For my part, I would echo what was said by Lord Neuberger in 2013: that "we believe that the possibility of using the JCPC represents a valuable contribution to the rule of law"[30] both for particular countries and across the common law world. As the Privy Council continues to evolve, my priority is to ensure that this commitment to justice and the rule of law is felt throughout all the jurisdictions we serve. As judges, it is our vocation to give people a reason to believe that justice is possible. We have a duty to do our best to make justice happen every day, to try to make the world more just for all of our citizens. I am very grateful for the opportunities I have to serve the citizens of Jamaica and the other Privy Council jurisdictions. It is a responsibility that I and my colleagues take very seriously, and an enormous privilege.

[30] Lord Neuberger, "The Judicial Committee of the Privy Council in the 21st Century", 11 October 2013, para 6. Available at: Lord Neuberger gives The The Annual Caroline Weatherill Memorial Lecture, 11 October 2013 (supremecourt.uk)