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# Extraterritorial Courts and States: Learning from the Judicial Committee of the Privy Council

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EXTRATERRITORIAL COURTS AND STATES:  
LEARNING FROM THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

by

HAROLD AVNON YOUNG

Under the Direction of Amy Steigerwalt, PhD

ABSTRACT

In 2015, South Africa withdrew from the International Criminal Court asserting United Nation's Security Council bias in referring only African cases (Strydom October 15, 2015; Duggard 2013) and the United Kingdom reiterated a pledge to withdraw from the European Court of Human Rights, asserting that the court impinges on British sovereignty (Watt 2015). Both are examples of extraterritorial courts which are an important part of regional and global jurisprudence. To contribute to our understanding of the relationship between states and extraterritorial courts, I examine arguably the first and best example of an extraterritorial court, namely the Judicial Committee of the Privy Council (JCPC). Drawing on 50 British Commonwealth states, this dissertation explores the factors influencing the decision to accede to an extraterritorial court and why some states subsequently opt to sever ties. I build on Dahl's

theory (1957) that the nation's highest court interacts with the governing coalition and, for the most part, serves as an ally and uphold its policies. I argue that that governing coalition wants the final appellate court that they most expect to be an ally and extend this expectation to extraterritorial courts. As a result, the governing coalition looks at the court more critically. States may change or abolish the jurisdiction of the court if it undermines or seems likely to undermine state policy. Examining this phenomenon across the British Commonwealth provides comparative insights into how governing coalitions may view extraterritorial courts.

INDEX WORDS: appeals; extraterritorial court; governing coalition; colony; final appellate court; critical juncture; empire; independence, Judicial Committee of the Privy Council; jurisdiction; policy; political environment; state

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HAROLD AVNON YOUNG

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## **DEDICATION**

I dedicate this dissertation to my parents, Lester and Celia. Their wisdom and love provided the foundation on which my life and this work are built. Also, I dedicate this to my friend and mentor, Susan Terry, for her unwavering support. They all left this world too soon.

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## 1 INTRODUCTION

Located in The Hague in the Netherlands and established by the Rome Statute in 1998, the International Criminal Court (ICC) came into effect in 2002 and currently has 123 signatory states (International Criminal Court 2015a). It is tasked with adjudicating cases involving “persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes” (International Criminal Court 2015b, para.1). The U.N. Security Council is dominated by the veto power wielded by the five permanent members (Strydom 2015). Individuals can be referred to the court and tried when the state refuses or is unable to prosecute to do so itself.

Extraterritorial courts are part of the ongoing interest in regional and global efforts to foster law and order by adjudicating disputes and responding to challenges to policies set by nation-states. The relationship between extraterritorial courts and states is of great importance because these courts challenge traditional ideas of state sovereignty and the role of courts in the policy-making process. Traditionally, states create a domestic judicial system with a state high court sitting at the apex of this judicial system. These courts are usually constitutionally authorized, and their structure and processes (including the selection of judges and budgetary matters) are determined by a combination of national constitutional and statutory law. Most important, the decisions of these courts provide the final word for legal disputes within the country’s borders. Conversely, extraterritorial courts are located outside state borders yet exercise jurisdiction over cases originating in the states that accede to the court. In other words, the extraterritorial court can have jurisdiction in multiple states but is not under the direct administrative control of any single state.



While the constitution and administration of final appellate courts in other jurisdictions are not monolithic, there is a reasonable comparison to be made with the role played by the U.S. Supreme Court in policy-making and that in other states. States can decide on the appointment mechanism, number, and terms of service of the judges, as well as the jurisdiction and funding for domestic courts. Further, most common law jurisdictions include the power of judicial review comparable to that of the U.S. Supreme Court (Andrade 2001; Tushnet 2004). But not all states have a domestic final appellate court over which they retain administrative control. There are some states with constitutional ties to an extraterritorial judicial entity which then serves as the court of last resort. Not all extraterritorial courts, however, are the same. On the one hand, member states exert a significant degree of control on the ECJ (Alter 1998). Further, the ECJ is part of the growth of European law which is central to the broader process of European integration (Garrett et al 1998). The World Trade Organization (WTO) also has a judicial function to hear disputes among member nations (World Trade Organization 2015), and the International Court of Justice (ICJ) adjudicates issues that supersede states' domestic jurisdiction making decisions in accordance with international law (International Court of Justice n.d.). Finally, the Inter-American Commission on Human Rights is an institution of the Organization of American States (OAS) that adjudicates individual claims of human rights violation in signatory states to the American Convention on Human Rights (Organization of American States 2011).

Developing countries have repeatedly complained about the asymmetry of power in the U.N. Security Council in that it influences its referrals to the ICC (Strydom 2015). That body has referred three situations: Darfur, Sudan, and Libya (International Criminal Court 2015c). The case that attracts the most criticism involves the sitting Sudanese President, Omar Hassan al-

Bashir, who was accused of war crimes and genocide. It should be noted that although Sudan is not a signatory, many other African states participated in negotiating the Rome Statute and have generally supported the ICC. In October 2015, South Africa withdrew from the ICC, asserting bias on the part of the United Nation's Security Council in referring only cases originating in Africa to the ICC (Duggard 2013; Strydom 2015). Led by South Africa, the African criticisms of the ICC charge that the ICC has "lost its direction" (Strydom 2015, para. 1) pointing to the fact that the Security Council has referred cases from Sudan and Libya while situations such as those in Syria and Israel have not been referred. The suggestion is that there is a distinct bias against Africa (Duggard 2013). Since the establishment of the ICC, only black Africans, particularly high-level officials and politicians (du Plessis, Maluwa, and O'Reilly 2013), have been charged (BBC 2015).

There is a two-pronged response by African states to the ICC. First, in 2009 the African Union expanded the jurisdiction of the African Court on Human and People's Rights (ACHPR) to include international crimes of genocide, war crimes, crimes against humanity, and several transnational crimes including terrorism, piracy, and corruption. Of the 53 members of the African Union, 26 states have ratified the new protocol (African Court on Human and People's Rights n.d. a). To date, the ACHPR has adjudicated 24 cases with 30 cases pending (African Court on Human and People's Rights n.d. b). Some observers suggest that this new protocol was a step toward undermining the ICC (du Plessis, Maluwa, and O'Reilly 2013). The court gave African states more control over the extraterritorial court in general and over the cases that were referred to it for adjudication:

According to the Protocol (Article 5) and the Rules (Rule 33), the Court may receive complaints and/or applications submitted to it either by the African Commission of Human and Peoples' Rights or State parties to the Protocol or African Intergovernmental Organizations. Non-Governmental Organizations with

observer status before the African Commission on Human and Peoples' Rights and individuals from States which have made a Declaration accepting the jurisdiction of the Court can also institute cases directly before the Court. (African Union n.d., para. 4)

This is an interesting development because there is not a complete disavowal of extraterritorial courts, but instead the replacing of one extraterritorial court for another. It may indicate that states are not generally opposed to extraterritorial courts but are sensitive to perceived bias of the courts and how their policies are constrained by the court. The second response in Africa has been at the state level, such as when South Africa officially withdrew from the ICC in October 2015. An announcement by Obeded Bapela, head of South Africa's governing African National Congress (ANC) international relations commission, followed a vote on the matter (Laing 2015). Bapela stated, "The principles that led us to be members remain valid and relevant. However, the ICC has lost its direction unfortunately and is no longer pursuing that principle of an instrument that is fair for everybody" (Laing 2015, para. 4). The issue surrounding the referrals and actions of the ICC are also expected to be on the agenda for the next African Union Summit in 2016, where withdrawal from the ICC is forecasted to attract wide support from member states (Laing October 11, 2015).

The European Court of Human Rights (ECtHR) is another exemplary extraterritorial court. The ECtHR is part of the ongoing process of European integration under the banner of the European Union (E.U.). Established in 1959, this court has adjudicated 10,000 cases from individuals and states for alleged violations of the European Convention on Human Rights (Council of Europe 2014). One state that has expressed misgivings about continued membership of the ECtHR is the U.K. In 1998 the U.K. Parliament, then dominated by the governing Labour Party, ratified the European Convention on Human Rights. On the other hand, the manifesto of the Conservative Party had pledged to sever ties with the ECtHR and make the U.K. Supreme

Court of Judicature the final appellate court in all human rights cases (Travis 2015). In June 2015, Prime Minister Cameron from the governing Conservative Party was cited by Watt (2015) for refusing to back away from the pledge to withdraw the U.K. from the ECtHR. Prime Minister Cameron claims that the court's decisions impinge on British sovereignty (Watt 2015). Further, he refuses to rule out abandoning the European Convention on Human Rights unless the U.K. is able to win the right to veto decisions of the ECtHR. In addressing the U.K. Parliament, the prime minister stated:

Let me be very clear about what we want, which is British judges making decisions in British courts..... If we can't achieve what we need – and I'm very clear about that when we've got these foreign criminals committing offence after offence and we can't send them home because of their right to a family life – that needs to change. And I rule out absolutely nothing in getting that done (Watt 2015, para. 7)

However, when questioned directly by Andrew Mitchell, another Member of Parliament from the Conservative Party, Prime Minister Cameron stated that there are no immediate plans to abandon the ECtHR (Watt 2015).

This contentious issue arose following a series of decisions by the ECtHR that denied the U.K. the right to deport suspected terrorists (Travis and Watt January 17, 2012; Pearson 2015). The political environment in 2015 with the Conservative Party in power is quite different from that under the Labour Party when Parliament ratified the Human Rights Convention in 1998. Further, the unfavorable decisions of the ECtHR came at a time when the governing Conservative Party had publicly expressed its policy objective of limiting the jurisdiction of the ECtHR in the U.K. Nevertheless, no action has been taken because there is discord in the governing coalition. For example, a conservative member of the House of Lords, Lord Mackay of Clashfern, who served under previous conservative Prime Ministers Thatcher and Major, states that this course of action would send the wrong signal to Europe (Bowcott 2015). There

was also discord in other elite circles. Scottish First Minister Nicola Sturgeon said any move to scrap the HRA will be resisted in Scotland (Simpson September 24, 2015). Lord Mance, a judge on the U.K. Supreme Court of Judicature, defends the contributions of the ECtHR to British law while other judges decry the ECtHR as undermining democracy in the U.K. (Henley 2013). Incidentally, Lord Mance was also a Law Lord of the JCPC. It is evident, therefore, that while the Conservative Party traditionally loathes the ECtHR (Henley 2013), the decisions of the court and political environment have not served to coalesce the political will of the governing coalition to change the status quo. It may also speak to the persistence of the institution once in place and, like the European Court of Justice (ECJ), its role in the integration of the European Union (Garrett, Keleman, and Schultz 1998).

The implications of a possible U.K. withdrawal from the ECtHR is not lost on observers outside of the U.K. Prince Zeid Ra'ad Al Hussein of Jordan, the U.N.'s High Commissioner for Human Rights, states that a U.K. withdrawal would be "profoundly regrettable" (Bowcott 2015, para. 2). A former prosecutor with the ICC and South African Judge, Richard Goldstone, states that it would be a disappointing precedent for the U.K. to set. He concedes that "It would enable some autocratic set of leaders around the world to say, why should we be bound by international law if this great font of democracy, the United Kingdom, is pulling out?" (Elgot 2015, para. 13).

These are just two examples of the tensions that currently exist between states and extraterritorial courts. For states with extraterritorial courts, the domestic appellate courts are the last wrong in the judicial hierarchical structure before a possible challenge before the extraterritorial court over which the governing coalition has no administrative leverage. As courts play an important role in adjudicating challenges to state policies, the decision to accede to an extraterritorial court seems an affront to state sovereignty and a potential constraint on state

policy making. Thus, why do states accede to such courts, and what may lead states to later sever ties with them?

To answer these important questions, I begin with the assumption that judges, as well as courts, must be understood as part of the political and judicial decision-making process; Shapiro (1964, 16) refers to this notion as “political jurisprudence.” A central issue for all states, therefore, is the organization of the judiciary and the role it plays in policy-making and furthering the “peace, order and good government” (POGG) as a feature of constitutional rule (Yusuf 2014, 1) and state sovereignty. As challenges to policies deemed necessary for POGG percolate up the judicial hierarchy, legitimization of those policies by the judiciary is an important issue (Dahl 1957). Slaughter (2000; see also Garrett et al 1998) points to the interactions of national courts with extraterritorial courts. This is exemplified by the national courts of Germany, France, and the U.K. They follow precedents established by the ECJ, which has the effect of co-opting “the support of the domestic courts” (Garrett et al, 150). As the highest forum for legal challenges, therefore, an extraterritorial court functioning as the final appellate court can play a crucial role in policy-making.

In the context of the British Empire, the colonies had no voice in the role of the JCPC, for a modern state to choose an extraterritorial court as its nation’s highest court of appeals is an extraordinary situation. State sovereignty is linked to autonomy and can be defined as having particular capacities or powers that can be utilized without the consent or approval of another (Brown 2002). Relying on an extraterritorial court appears to be outside the modern notion of state sovereignty. Since courts play an important role in governing a state and adjudicating disputes, the decision to retain an extraterritorial appellate institution such as the JCPC seems counterintuitive and an affront to state sovereignty. Elden (2006) asserts that modern states are

anchored by three fundamental canons. They are “the notion of equal sovereignty of states, internal competence for domestic jurisdiction and territorial integrity” (11). These canons capture the tenets of sovereignty and the importance having the domestic institutions needed for supporting the state. The final appellate court is one such important institution. When decisions in the lower courts are appealed, the ultimate interpretation of constitutional elements and the adjudication of laws generally rest with a final appellate court (Aronson 2009). This renders the final appellate court a natural target of the other branches of government charged with making public policy. Capturing the role of the U.S. Supreme Court, Dahl (1957) stated:

To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is a political institution...for arriving at decisions on controversial questions of national policy. (p. 279)

For independent states, the JCPC’s function is not imperial but national, with any limitations on its jurisdiction prescribed by each state’s constitution (Beth 1977). While the JCPC can rely on cases from other jurisdictions as precedents, it is not part of a broader system or process of integrating the states. States have no control over any aspect of the JCPC other than the constitutional power to limit or abolish the jurisdiction of the court. Creating a domestic final appellate court, however, gives the state control over important aspects of the court including the selection of judges, terms of service, jurisdiction, and budget. This brings the adjudication of national policy within the state with the goal of making the court a more reliable partner in the national governing coalition. It is important, therefore, to understand more clearly why a state would accede to an extraterritorial court. The aim is to better understand these phenomena by examining why a newly sovereign state shedding British colonial rule and emerging onto the international stage would choose to retain the JCPC over which it has no leverage, rather than to create a domestic final appellate court.

The legitimizing process and the question of the compatibility of the JCPC with state sovereignty are exemplified in *M. B. Ibralebbe alias Rasa Wattan & Another v Queen* (1963). The JCPC addressed these issues on the behest of the Attorney General of Sri Lanka. The court is asked to address the issue as raised in a 1963 appeals case in Sri Lanka by Chief Justice Basnayake. Chief Justice Basnayake appears to challenge the existence of the JCPC's jurisdiction to hear appeals, asserting that the fact that Sri Lanka gained independence in 1947 automatically severed ties with the JCPC. The JCPC argues that the right of appeal was a prerogative offered by the British monarch to an independent state and that the parliament of Sri Lanka possessed the constitutional power as a sovereign state to modify or terminate appeals to the JCPC. Kelly (1994) notes that, "there was nothing in the independence instruments to exclude the prerogative in relation to the Privy Council jurisdiction" (108). This point was not lost on the JCPC when it asserted that since its jurisdiction had not been specifically abolished by the parliament, the right of appeal persisted after independence. Cox (2002; 2001) conversely challenges the notion that New Zealand's sovereignty is compromised by having a court such as the JCPC as the final appellate court. He argues that it is actually a sign of political maturity. As these debates highlight, the decision of a state as to whether or not to retain the JCPC as the highest appellate court raises important questions about judicial power, state sovereignty, and the role of the judiciary in the national policy-making process.

The ACHPR, ECtHR, and the ECJ are not without precedent. Possibly the first and best example of an extraterritorial court is the Judicial Committee of the Privy Council (JCPC). The JCPC is the British colonial extraterritorial court created to serve as the final appellate court for all cases originating from British colonies. The JCPC was the final appellate court for the British Empire and was retained by some former colonies upon gaining independence from the U.K. In



effect, some newly independent states declared that the highest court in the land would be a colonial institution over which the new governing coalition had no administrative control, and which is staffed by British judges and housed in London. Examining the case of the JCPC, I look at important junctures in history when British Commonwealth states make decisions about the state's final appellate court.

With one important exception, the new governing coalition assumed authority of all of the governing institutions of the state. India is a good example. Just after midnight on August 15, 1947, the last few bars of "God Save the King" faded into the night. The Union Jack was replaced by "Tiranga," the national flag of India (Mapsofindia 2015), marking the official end of British colonial rule. The magnitude of the prowess of British colonial expansion can be captured by one fact. As of 1947, the U.K. with a population of 49,520,000 (Populstat 2006a) had ruled the Indian colony with a population of 345,520,000 (Populstat 2006b) for almost 100 years. India was the crown jewel of the British Empire, and her emergence as an independent state signaled the start of the post-World War II process of British decolonization (Sharples 2003). In his inaugural address, Prime Minister Jawaharlal Nehru stated, "It is a fateful moment for us in India, for all of Asia and for the world. A new star rises, the star of freedom in the East. A new hope comes into being, a vision long cherished materialized" (CiteHR n.d., para. 13). The Indian constitution provided that the final appellate court would continue to be the colonial court, the JCPC. India's choice was not unique. The British Empire included territories in Africa, Asia, the Americas, Europe, the Pacific, the Middle East, and the U.K.'s internal colonies (Ireland, Wales, and Scotland). At independence 32 of the 61 colonies (52 percent) retained the JCPC at independence. There are currently 14 overseas territories and colonies that still retain the jurisdiction of the JCPC (The Commonwealth 2015).

The relationship between the JCPC and the British Commonwealth, therefore, provides an appropriate case study. Why do many states shedding British colonial rule choose to retain the JCPC as the highest court of appeal? More generally, how can we explain why a state would ever accede to an extraterritorial court? Drawing on 50 former Commonwealth states, this dissertation explores what factors influence the decision accede to an extraterritorial court and why some states subsequently may opt to sever ties. I build on Dahl's theory (1957) that the governing coalition wants the nation's highest court to serve as an ally and uphold its policies. He asserts that the U.S. Supreme Court is part of the national policy making process and, for the most part, generally shares the policy views of the majority in the U.S. congress. I argue that this is not coincidental and that states not only choose the final court of appeal that they most expect to be an ally, but also extend this expectation to extraterritorial courts. While states may perceive some benefit when acceding to an extraterritorial court, the governing coalition will abolish the jurisdiction of the extraterritorial court if it undermines or seems likely to undermine state policy. Examining this phenomenon across the British Commonwealth provides comparative insights into how states may view and interact with existing or proposed extraterritorial courts.

The JCPC is an example of an extraterritorial court with broad appellate jurisdiction serving multiple states. It serves as the final appellate court for many former British Commonwealth states with the states having no role in the appointment, number, or terms of service of the judges, nor fiscal responsibility for the court (Howell 1979; Swinfen 1987). The JCPC hears appeals of decisions reached by a state's lower appellate court in cases based on domestic policies and statutes with the authority to affirm, vary, or overrule the domestic courts' decisions. Further, the JCPC's jurisdiction is not necessarily limited to any particular area of law

nor constrained in its authority to adjudicate disputes between individuals or governments within the British Empire or those Commonwealth states that retain the right of appeal (Mohr 2011).

How the JCPC participates in and influences the domestic jurisprudence is evident the decisions handed down by the court. In *Thakur Persad Jaroo v Attorney-General of Trinidad and Tobago* (2002), Lord Hope of Craighead follows the precedent established by Lord Diplock in *Kemrajh Harrikissoon v Attorney-General of Trinidad and Tobago* (1979) against abuse of the constitutional motion in criminal cases where there is a parallel remedy. The same point is made again in *Hinds v Attorney-General of Barbados* (2001) where Lord Bingham of Cornhill also reiterates a position taken by Lord Diplock in *Kemrajh Harrikissoon v Attorney-General of Trinidad and Tobago* (1979). This is an example of the influence of precedents linking the interpretation of the constitutions of different jurisdictions over an extended period of time. It also demonstrates the JCPC's influence on the stability and continuity in these common law jurisdictions.

This research is distinct from the current literature. Courts outside the U.S. have only been analyzed sporadically, and there is a need for macro or institutional analysis (Hönnige 2011). This research, based on the case of the British Commonwealth, provides a starting point for better understanding how states may respond to other existing and new extraterritorial courts. It is important to understand what states expect of an extraterritorial court, and how changes in the political environment of the state and decisions of the court influence the state's governing coalition. This is important because of the increased attention to the role and importance of judicial institutions as a part of democratic institutionalization (Huntington 1991; O'Donnell 1973) and globalization (Slaughter 2000).

While I examine what factors influence the choice of final appellate court, some of the extant literature looks at the economic effects of the choice. They find that the type and duration of colonial rule significantly influence the subsequent economic development or prosperity of the state (Acemuglo, Johnson and Robinson 2001, 2002; Crosby 1986; Gerring et al 2011; Grier 1999; Lange 2004, 2009). This literature does not distinguish between the factors that influence the choice of the final court from other institutions after independence, however, and thus does not really provide insights into the governing coalition's expectations of the court as part of state governance. Voigt et al (2007) focus on the courts and compare the resulting economic outcomes of states that retained the JCPC at independence with those that replaced that court. This research demonstrates a potential causal link between retaining the JCPC and positive economic outcomes for those states. However, it does not help us understand states' choices to retain the JCPC at independence. The positive economic outcomes are identified after the fact with no evidence that the governing coalition made the decision with that expectation. The gap in our understanding of factors that influence the actual decision to retain the extraterritorial court in the first place remains unfilled. To ascertain whether the governing coalition is likely to view the JCPC as a reliable partner or likely to undermine the state's goals, I empirically examine the effect of several factors of colonial rule on the choice of final appellate court. This will better inform our understanding what contributed to the perception of the court and the decision regarding its status.

### **1.1 Purpose of the Study**

At independence, Commonwealth states made dissimilar decisions with regard to the right of appeal petitions to the JCPC that existed under British colonial rule. My examination of the history of these new states shows that not only did the decision at independence vary, but

also how long ties were retained by those states that did retain the JCPC. Examining the state's choice at independence to retain this extraterritorial judicial entity or to establish a national final appellate court will provide initial insight into why a state would choose the apparent compromise to sovereignty as defined by Brown (2002).

First, this examination will increase our understanding of the factors that influence the states acceding to an extraterritorial court. Using the case of the British Commonwealth, I describe proxies for the influence of colonial rule on a state's decision of whether or not to abolish appeals to the JCPC at independence. In other words, at this juncture, how constrained is the governing coalition by colonial influences of the U.K.? This addresses the path dependent nature of institutional change and the factors that may influence any change. The persistence of the JCPC as the final appellate court for the new state is influenced by the strength of the colonial ties between the U.K. and the former colony. The strength of the influence frames the governing coalition's perceptions of the JCPC. These perceptions include whether the reliability of the JCPC brings prestige and legitimacy to the state.

Second, my research seeks to increase our understanding as to why some states decided to change the court while others continue to use the court, perpetuating the apparent affront to sovereignty. I find that the governing coalition is likely to respond to unfavorable decisions of the extraterritorial court by abolishing its jurisdiction and that this response is most likely when there are changes in the domestic political environment that galvanizes the political will to act. This is more likely to occur when the state becomes less democratic or when the governing coalition embodies a new vision for the state which makes the extraterritorial court incompatible with the preferred policies. In these circumstances the governing coalition seeks to ensure that the final appellate court is a reliable partner in event their policies are challenged.

Third, this dissertation will contribute to our understanding of how governing coalitions view extraterritorial courts in the context of changing domestic political environments. Countries that have a domestic final appellate court have established a judicial institution over which they have control as part of the policy-making governing structure. How they view other existing and emerging extraterritorial courts will be influenced by their perception of the status of the court and the role it plays when the policies of the governing coalition are challenged. My research informs what contributes to their perception of extraterritorial courts in deciding to accede, how the state responds an extraterritorial court when it hands down unfavorable decisions and how changes in the domestic political environment influence the relationship between the state and the court.

## **1.2 Summary Outline**

In the remainder of the dissertation, I examine the choice of final appellate courts in former British colonies, with an eye toward understanding the expectations and responses of states to extraterritorial courts. In Chapter 2, I present an abridged history and role of the JCPC in the British Commonwealth. In Chapter 3, I lay out my theory of high court choice and state-building. I build on Dahl's theory (1957), focusing on the U.S. Supreme Court, that national governing coalitions desire a high court which will act as an ally to uphold its policies. I extend his theory to argue that governing coalitions in all countries recognize the important role played by courts in national policy-making; therefore, decisions about court structure and design seek to reinforce this role in ways that benefit the governing coalition. I argue further that states not only choose the final court of appeal that they most expect to be an ally but the governing coalition may galvanize the political will to change a court that undermines or seems likely to undermine

their policies. I then apply this theory to the case of former British colonies and the decision of whether or not to retain ties to the JCPC.

Using historical path analysis, I identify two possible critical junctures at which new states emerging from British colonial rule make important decisions about judicial structure and the goal to have an ally in the final appellate court: (a) at independence and (b) at a later juncture when the attitude of the governing coalition towards the extraterritorial court may change. First, at independence, all newly independent states must design a new government, including the structure of the courts. Former British colonies had to decide whether or not to retain the JCPC as the new nation-state's highest court. I argue that colonial environmental factors significantly influence whether the newly established governing coalition viewed the JCPC as an ally or obstacle to policy implementation, thus influencing their choice of court at this first critical juncture. Second, later changes in the political environment may lead to a disconnection with the JCPC after independence. If the governing coalition does not continue to perceive the JCPC as a reliable partner, a second critical juncture may be reached, and the JCPC will be replaced with a domestic final appellate court. The next two chapters empirically examine each of these critical junctures.

Chapter 4 investigates the British Commonwealth, which provides a study on how states respond to an extraterritorial court over an extended period. In this chapter, I analyze the factors that influence the choice of the JCPC as the final court of appeal in 50 former British colonies at the time of independence. Independence represents the first critical juncture when the new national leadership had the opportunity to participate in making the choice of final appellate court. This chapter presents evidence that former colonies are strongly influenced by their colonial legacies when designing their new, independent judiciaries. In particular, the length of

time a state experienced colonial rule, presence of a law school prior to independence, whether the leader at independence was educated in the U.K. and the type of colonial rule are important components of the colonial legacy that exerted influence of the governing coalition. My findings suggest that the stronger the influence of colonial rule the more likely it was that the state would retain the JCPC at independence. Of the 50 states in my research, 30 states retained the JCPC. These 30 states vary significantly in size, population, GDP per capita and geographic location.

After independence a second critical juncture may arise, as some states may subsequently decide to abolish appeals to the JCPC and replace it with a domestic final appellate court. Chapter 5 thus assesses the factors that are likely to influence a state to sever ties with the JCPC after independence. Utilizing a novel dataset of JCPC decisions for 28 states that retained ties to the JCPC post-independence, I find that the decision to sever ties later is a function of changes in the political environment, which alters the view of the governing coalition about the decisions of the JCPC.

Chapter 6 presents case studies of three states: The Gambia, New Zealand, and The Bahamas. These are three of the 28 states in the sample used in Chapter 3. The three states are geographically dispersed with varying socio-economic characteristics. More importantly for my research, however, is that all three had long democratic traditions after independence with high levels of political freedom and civil liberties (Freedom House 2014a). The political environments have supported multi-party elections, freedom of the press (Freedom House 2014a; Polity IV Project 2013), and steady levels of economic growth (The Maddison-Project 2013). Finally, each retained the JCPC for over three decades after independence. The Gambia and New Zealand retained the JCPC at independence only to later abolish appeals in 1998 and 2005, respectively, while The Bahamas retained appeals to the JCPC as of January 1, 2015. I trace changes in the



political environment and salient decisions of the JCPC that I assert influenced their decision to subsequently abolish the right of appeal to the JCPC. Conversely, I assert that The Bahamas did not experience any shift in the political environment sufficient to shift perceptions of the JCPC enough to abolish appeals. This approach provides the basis for a more detailed and nuanced examination of the veracity of my theory and earlier quantitative analysis in the context of three states. My findings indicate that changes in the political environment and decisions against the policies of the governing coalition in all three states contributed to the ultimate decision to abolish appeals to the JCPC and establish a domestic final appellate court.

Chapter 7 concludes with a discussion of the implications of my theory based on my findings that history is important in choice of institutions and that the governing coalition is sensitive to decisions of the final appellate court. In the context of their political environment, states will consider the level of control they have before acceding to other extraterritorial courts. Based on this, I suggest avenues for future comparative research on structure and the performance of current extraterritorial courts.

## **2 THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (JCPC)**

### **2.1 Introduction to the JCPC**

To understand the significance of the JCPC and the significance of the decision to retain this extraterritorial court, it is important to delve into its origins and how it came to be such an important part of British colonial rule. The JCPC is a part of the Privy Council, which is a large advisory body that advises the British monarch in the performance of many ceremonial and substantive functions assigned by the parliament (Privy Council n.d.). Drawing its members from the Privy Council, the JCPC performs an important substantive function and derives its jurisdiction originally from a custom based on the medieval Curia Regis (the King's Court) or

councilors to the king (Merriam-Webster 2015a). Its appellate jurisdiction through the JCPC is based on the theory that the monarch is the ultimate source and distributor of justice, but by 1660 this power only extended to overseas territories under British rule (Burns 1984). Justice is administered via the hearing of civil and criminal appeals from lower court decisions originating states, colonies, and overseas territories.

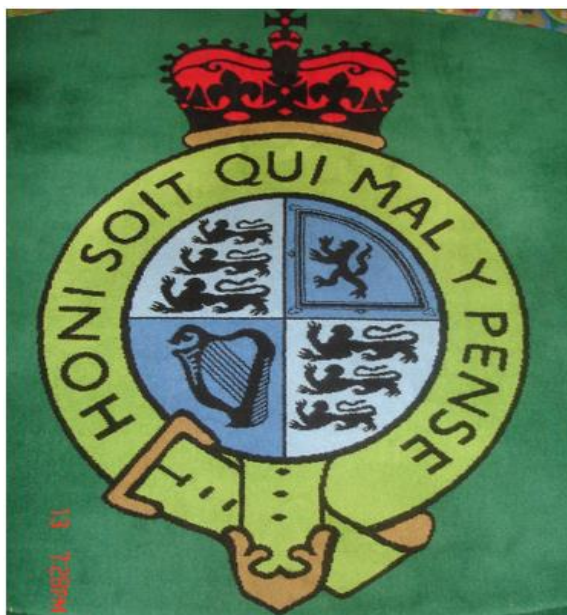
The modern roots of the JCPC were a product of British legislative action and practice starting with the Judicial Committee Act 1833. On becoming Lord Chancellor, Lord Brougham introduced legislation that instituted a number of important features, thus creating the modern JCPC and replacing the standing committee referred to as the old Appeals Committee (Howell 1979). First, Law Lords had to be lawyers by profession unless otherwise specified by the monarch. Second, it established procedures and functions that were exercised independently of the monarch, giving this JCPC all the attributes of a court: power to call witnesses, deliver peremptory orders, mandate appearance, administer oaths and affirmations, punish perjurers, direct trials or retrials, subpoena documents, determine court costs, and punish contempt of court (Burns 1984).

Until 1844, the JCPC had no power to hear appeals without the granting of leave from a colony's court of appeal, usually comprised of the governor and the executive council. The Judicial Committee Act of 1844 (The National Archives n.d.) enlarged access to the JCPC for the appeals of British subjects from overseas territories. Under the Appellate Jurisdiction Act of 1876 (The National Archives n.d.), the Law Lords became the permanent judges of the court, and the JCPC evolved into the most important committee of the Privy Council. Today, anyone who holds or has held high judicial office in the U.K. or a Commonwealth country may be

eligible for selection by the Lord Chancellor (Minister of Justice and member of the Prime Minister's cabinet) and the Prime Minister (Malleon 1999).

There are two classes of appeals to the JCPC. First, there is appeal by special leave from the JCPC itself as a right extended by royal prerogative, which may grant leave when the lower court does not have the right or has refused to grant leave. Second, appeal lies to the JCPC when granted by the lower court (Burns 1984; Robert-Wray 1966). It is clear that what is formally described as an advisory body to the monarch possesses all the trappings of an appellate court of law. Further, no monarch has ever ignored the advice of the JCPC in any case. Currently the twelve Law Lords, sitting in panels of five or seven, preside over both criminal and civil appeals in London and are entirely supported by the taxpayers of the U.K. The modern legislative underpinnings leave little doubt of the judicial nature of the JCPC (Burns 1981).

The development of the JCPC was part of the growth and consolidation of British colonial rule around the world, and it served as the final appellate court for the British Empire (Howell 1979; Swinfen 1987). 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” (Mohr 2011, 126). The exceptional reputation and lofty position of the court in the British Empire is encapsulated in its regal motto “Honi Soit Mal Y Pense” or “shame on him who thinks ill of it” (see Figure 2.1)



**Figure 2.1 Motto of the JCPC - “Honi Soit Mal Y Pense”**

As the British established colonies in Africa, the jurisdiction of the JCPC grew accordingly with the authority of the Privy Council. For example, in 1886 the Settlement of Lagos (later the capital of the colony of Nigeria) was separated from The Gold Coast Colony (later the colony of Ghana) by the Order in Council (Privy Council provisions in the Letters Patent of January 13, 1886). The Order also provided for right of appeals from the new Supreme Court of Lagos to the JCPC (Mwalimu 2007; Stafford and Wheeler 1901). The contribution of the JCPC to the jurisprudence of the colonies and the Empire cannot be understated. Records of all cases adjudicated by the JCPC from 1809 to 2015 are available in the database of the British and Irish Information Institute (2014). For example, starting in 1858 when India became an official colony until its independence in 1947, the JCPC handed down approximately 3,750 decisions. A total of 347 Malaysian cases were decided during 86 years of colonial rule (1826 to 1957). With the start of decolonization in 1931, the JCPC continued to play a role in the British Commonwealth as independent states retained the JCPC as the final appellate court. Despite the

decline, this caseload is not insignificant. With a peak of 119 cases in 1931, the JCPC adjudicated an average of 52 appeals per year from 1932 to 2014. The branches of law on appeal are broad and important with fundamental principles being adjudicated (Robert-Wray 1966). Examples of this diversity include extradition requests; constitutional challenges to the death penalty; libel cases involving politicians; eminent domain; personal injury and issues involving provincial versus federal power. Further, the cases originate from jurisdictions with diverse legal histories and systems.

Over the years it has been asked for final rulings and interpretations of many different kinds of law, from Roman Dutch law in appeals from South Africa, to pre-revolutionary French law from Quebec, and Muslim, Buddhist and Hindu law from India. (Judicial Committee of the Privy Council 2015, para. 2)

This rich and diverse history contributes to the positive reputation and the continuing role and influence of the JCPC in the common law legal system shared throughout the British Commonwealth. While colonies had no choice in the establishment of the JCPC as their final appellate court, newly independent states and their governing coalitions did have this choice during the process of decolonization when the colony gained independence.

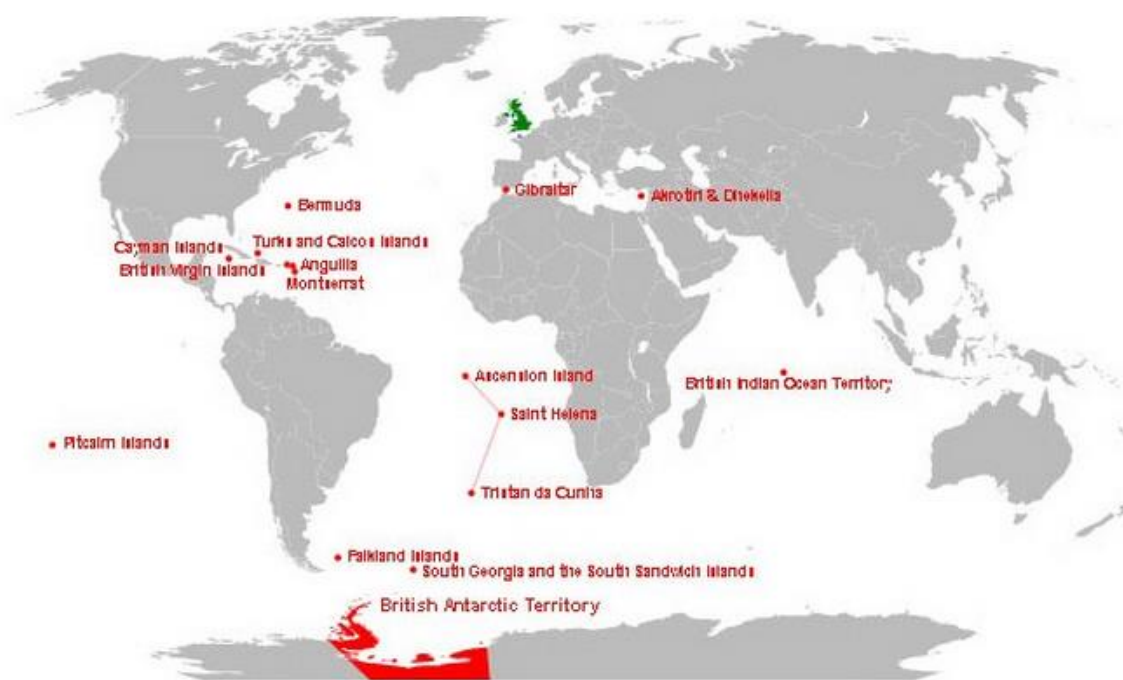
## **2.2 Decolonization and the Persistence of the JCPC**

Decolonization launched the process of moving a colony to an independent state. Of importance for this dissertation is the fact that during this process the emerging governing coalition could decide whether or not the JCPC would continue as the final appellate court or be replaced by a domestic final appellate court at independence. 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). Needless to say, Smith's assertion was derided both in the U.K. and in the colonies. This call, however, foreshadowed the process of decolonization that unfolded gradually after 1900. Although four colonies were granted

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), exercised the option to immediately sever ties with the JCPC in 1931.

The process of decolonization accelerated after World War II. Starting with India in 1947, the U.K. introduced onto the world stage a plethora of new countries in Africa, Asia, and the Caribbean. The process unfolded relatively quickly continuing after India with Pakistan, Burma, and Sri Lanka (Ceylon), and with the termination of the U.K.'s mandate in Palestine. This was followed by the end of British rule in the Gold Coast (Ghana), Nigeria, Sudan, and Malaysia. By 1963, Cyprus and nine other African states had gained independence (Watts 2010). The process started in the Caribbean with Jamaica in 1962, followed by 11 other states. These states formed the regional organization known as the Caribbean Free Trade Association CARIFTA in 1973, which evolved into the Caribbean Community or CARICOM (Caribbean Community Secretariat 2011a). While most constitutional and institutional ties were severed at independence, arguably the most influential institutional bond between the U.K. and the former colonies was the common law legal system. Some states such as Tanzania, Pakistan, and Sierra Leone abolished appeals to the JCPC at independence. Yet, despite the gradual process of decolonization that unfolded after World War II and the states establishing new regional ties, the JCPC continued to play a role in policy-making as part of the governing coalition in many independent states. The JCPC continued to be part of the judiciary in many small states such as the island states in the Caribbean, but also in large and populous states such as Malaysia and Sri Lanka in Asia, The Gambia in Africa, and some Pacific states. 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, still retain ties with the JCPC 52 years and 22 years after independence, respectively. Today, there are 14 remaining “British overseas territories: 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” (Passportia 2015, para. 2) that comprise the British Empire. The British Commonwealth has 53 member states from “Africa, Asia, the Americas, Europe, and the Pacific” regions (The Commonwealth 2015, para. 1).



**Figure 2.2 The British Empire in 2015 © (The Commonwealth, 2015)**

A preliminary review provides more insight into the relationship between the sample of 50 states from the British Commonwealth and the JCPC. A comparative review reveals that based on this choice, states can be placed in the three distinct groups displayed in Table 1.1. The

absence or presence of change puts the states on varying trajectories of institutional choices suitable for analysis to better our understanding of what influences the governing coalition and the relationship with an extraterritorial court.

Fifty former colonies are represented in Table 2.1. Group 1 is comprised of the 20 colonies (40 percent) that abolished all appeals to the JCPC at independence. This group does not include the 13 North American colonies that became the United States because they did not emerge as separate independent countries. Further, the independence of the 13 colonies in 1776 pre-dated the more formal and modern JCPC established later as part of the expansion of British colonial rule. 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.

**Table 2.1 The Status of the JCPC in Each State at Independence**

<b>Group</b>	<b>Relationship with JCPC</b>	<b>States</b>
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 (17 states)	Australia, Barbados, Belize, Canada, Guyana, Fiji, India, Gambia, Ghana, Kenya, Malaysia, New Zealand, Nigeria, Singapore, South Africa, Sri Lanka, Uganda
3	Retain appeals to JCPC (13 states)	Antigua & Barbuda, Bahamas, Brunei, Dominica, Grenada, Jamaica, Kiribati, Mauritius, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, Trinidad & Tobago, Tuvalu

It is only after independence that the new governing coalition is directly impacted by the decisions of the final court of appeal. The decisions of the court can influence the governing

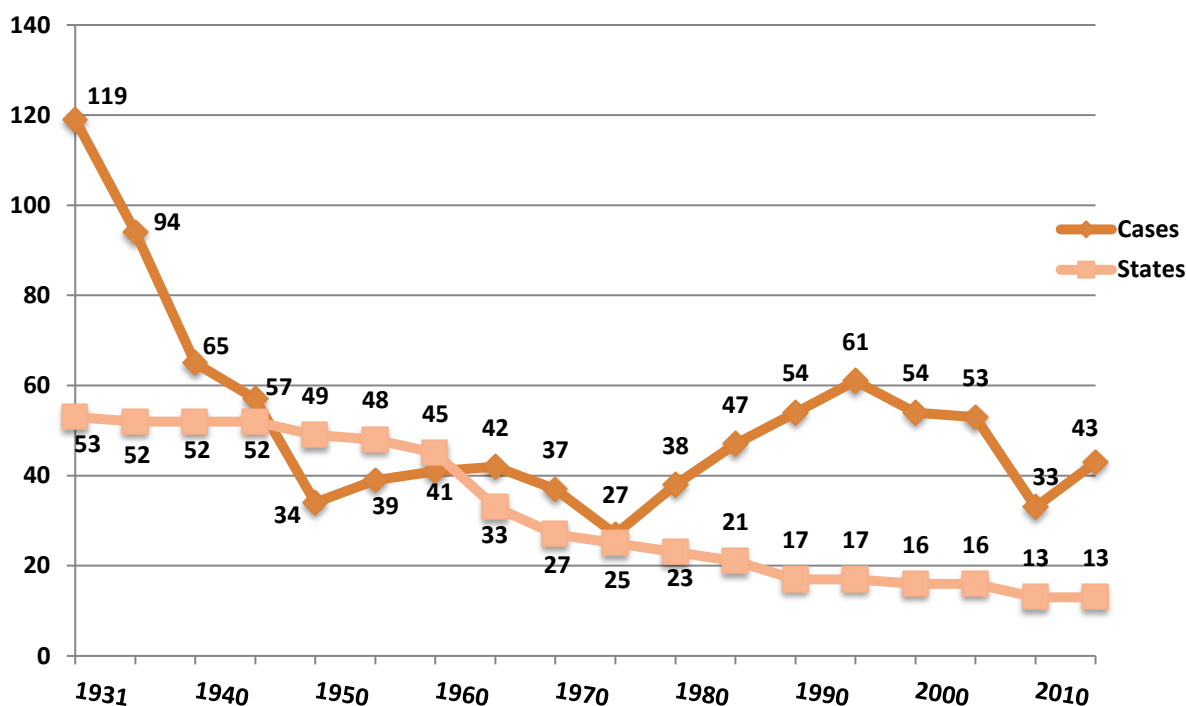


coalition's perception of the court as a reliable partner. In Group 3 are the 13 former colonies (26 percent) that as of January 1, 2015, still retain the JCPC as the final appellate court. These differences point to competing approaches in governance and policy-making by sovereign states and to how states may view this extraterritorial court as a partner in policy-making and the approach to state sovereignty.

Second, I analyze 26 of the 30 states (Group 2 and 3 in Table 2.1) that retained appeals to the JCPC after independence. Subsequently, 15 of those states (58 percent) abolished appeals at different times with 11 states (42 percent) retaining the JCPC as of January 1, 2015.

As states emerged from colonial rule, therefore, there was a decrease in the number of states served by the JCPC and a decrease in the number of cases adjudicated. Figure 1.2 displays the decline in the number of states over time starting in 1931 (Act of Westminster) and the corresponding change in the number of cases disposed of by the JCPC from 1931 to 2014. 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 13 in 2014, the number of cases per annum actually 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. It also speaks to the reputation of the JCPC and the reliance the states have on this extraterritorial court, despite the apparent contradiction with the ideal of sovereignty. As discussed earlier, the understanding of state sovereignty and the

linkage to political autonomy (Brown 2002) is contradicted by the reality that many new states emerging from colonial rule retained the right of appeal to JCPC.



**Figure 2.3 The Number of JCPC Cases from 1931 to 2014 and the Number of States**

Using the British Empire and the Commonwealth states as case studies, this dissertation examines the decisions of the governing coalition as the states emerge through the process of decolonization and the status of the JCPC after independence. My research covers a period of approximately 360 years, beginning with the declaration of the earliest British settlements as colonies and culminating with colonies that attained independence and the right to determine the fate of the relationship with the JCPC. The 14 territories that are currently British colonies and dependencies are not included. This is an important and appropriate case for both theoretical and methodological reasons. First, the size of British Empire provides a large number of states to study, as well as important similarities and variations across states. The states in the sample share the British common law system, use of English as a common language, and colonial history and

socio-economic ties with the U.K. However, they also vary in important ways: land area, population size and density, demographic location, and socio-economic conditions.

Second, the British were the first to recognize and enforce differing styles of imperial rule (Fisher 1991). My research, therefore, can examine the influence of differing political environments. The British goal was to impose efficient and effective rule and avoid resistance where possible. While British colonial holdings can be described in five broad groups listed in the next sections, they tried to individualize each colony's institutional framework to best adapt to the specific circumstances. The first three groups represent states that gained independence after varying periods of colonial rule and experienced direct or indirect formal colonial rule are as follows: (a) settled colonies; (b) dependencies; and (c) the special case of India. The next two groups, where the U.K. exercise control over the territories without formal colonial rule is as follows: (d) protectorates and (e) mandated territories. Though the period of colonial rule varied from state to state, these groupings provide a uniform framework to establish comparable periods of analyses from which to justify my sample of states.

(a) The first group, settled colonies, is exemplified by Canada, New Zealand, Australia, and also the 13 American colonies that declared their independence from the U.K. as the United States of America in 1776. Crosby (1986; Veracini 2013) describes settled colonies as those where settlers tried to replicate European institutions, emphasizing private property and checks on government. Haslam (1972) points out that an early association of the British Diaspora in New Zealand led to the natural constitutional practice of enabling appeals to the JCPC with the transposition of the legal system by colonists in a most distant part of the Empire. For them, with large British settler and insignificant indigenous populations, there was nothing artificial about placing the seat of ultimate appeal in London as the center and capital of the Empire. It is safe to

also extend this view to both Canada and Australia. A sub-group of colonial holdings was the original Caribbean colonies including Barbados and Jamaica. These were primarily plantation colonies lacking indigenous populations, with small British settler populations and large African slave labor forces. British institutions permeated all these colonies, resulting in what was later characterized as carbon copies of British constitutional practice (Juegensmeyer 1964) or what is generally referred to as the ‘Westminster Model’;

(b) Dependencies were colonies governed by British imperial policy, which included defense and foreign relations. This group includes colonies such as Malaysia, Kenya, and Nigeria, where the purpose of colonial administrations was to transfer as much of the resources of the colony to the colonizer as possible (Crosby 1986). In these colonies with large indigenous populations and small British settler populations, colonial officers supported miniscule administrative-legal institutions concentrated in the capital with little interaction with the indigenous population, therefore permeating very little infrastructural power (Porter 2012; Mann 1984);

(c) The special case of colonial India includes geographic areas that were drawn into the colony via various means. Areas that were under the administration of local kings were incorporated by agreement or force. Known as the native or the princely states, the defense and foreign policies of these areas were entirely controlled by the British during that period, but they did enjoy a substantial degree of self-rule in internal administration. Unlike other colonies, India did not have a single appeals court until 1938 when the Federal Court of India was created under the Government of India Act of 1935 (Gadbois 1963; De 2012). As a result, India was described as “mixed colonial state” (McCartney 2015, 187). On gaining independence in 1948, all areas were integrated into an independent Indian state with a standardized administration and legal

system (Iyer 2010). Although members of the British Commonwealth, Pakistan which was originally part of the Indian colony, and Bangladesh which was originally part of an independent Pakistan (Haus 2015), are both excluded.

The last two groups are territories that experienced British rule without the formal colonial status but via the status of protectorate or mandate. No territories from these groups are included in the sample of states as they were never recognized as formal colonies by an act of the British parliament but are included here so as to provide a contrast with the first three categories.

(d) Protectorates such as Aden, Nyasaland, and Somaliland were territories with no properly organized internal government. The British, therefore, not only controlled external matters, such as defense and foreign relations, but also established internal legal and administrative institutions. Britain's involvement in their protectorates was roughly equivalent to its involvement in the colonies without the status of a formal colony (Lange 2004; 2009);

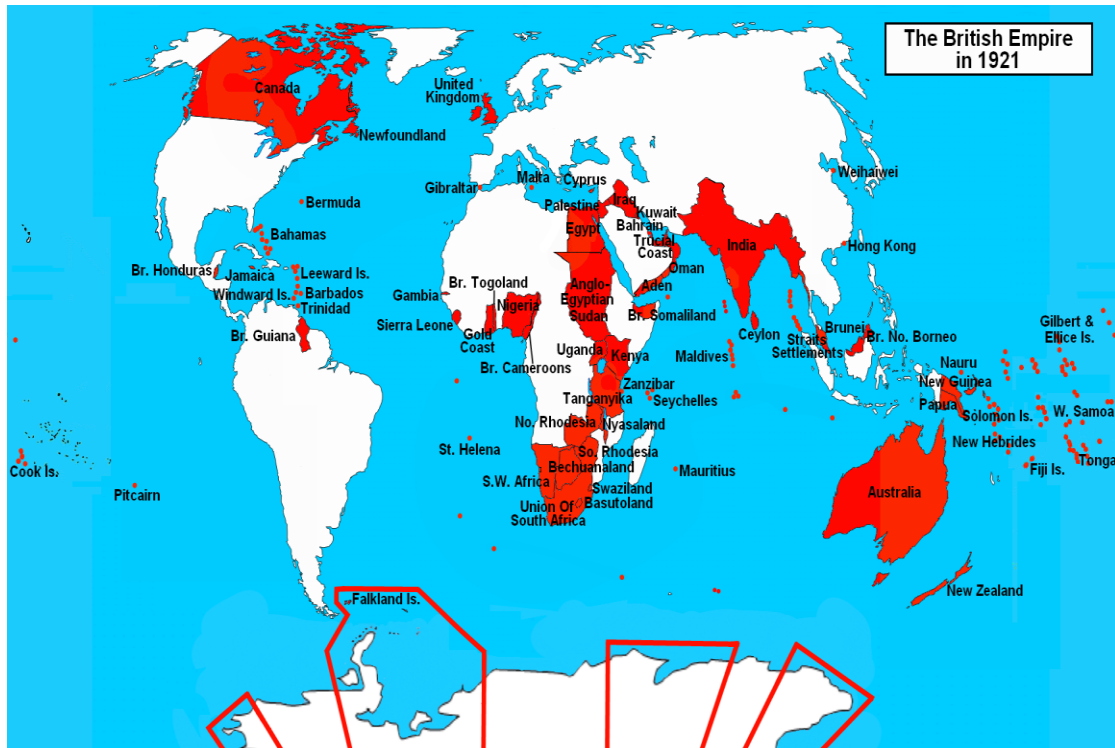
(e) Mandated territories such as Palestine, Iraq, and Transjordan were administered by the British Empire via a mandate from the League of Nations and were never formal colonies. These territories only experienced administrative rule for a relatively short period of time (Lange 2004; 2009). Fieldhouse (2006) characterizes these as collaborations being between the imperial power, the existing local institutions, and the elite after the fragmentation of the Ottoman Empire. As a result, they are not included in this research.



**Figure 2.4 The British Empire in 1746 © (Oxford Culture Mania, 2015)**

Third, the growth of the empire reflected the replication of British institutions in territories where no traditional/customary institutions existed, the local institutions were erased, or British institutions were superimposed on traditional institutions in colonized territory. Their effectiveness in replicating or superimposing institutions not only contributed to the number states available for analysis, but also increased suitability for comparative research. The existence and persistence of a signature colonial institution such as the JCPC was a phenomenon unobserved in other post-colonial states that emerged from other empires, such as the French or Spanish Empires. The effectiveness of the colonizing process was exemplified by the growth of the empire from a few islands in the Caribbean seized from Spain, settlements along the eastern seaboard of North America, around the rim of Hudson Bay and Nova Scotia, and a few trading posts on the west coasts of Africa and India in 1746 (Smith 1998; see Figure 1.3) to encompassing twenty-five percent of the world by 1914.

The Empire eventually included large geographic areas of Africa, Asia, North America, and the Caribbean (see Figure 2.4) and its global trade included close links with South America and other areas (Lawrence 1996). The extent and diversity of the Empire and the large number of independent states that emerged during decolonization makes it an appropriate case for analysis.



**Figure 2.5 The British Empire (red) in 1921 © (The British Empire in 1921 n.d.)**  
First, the JCPC is arguably the first and most important example of a single

extraterritorial court that evolved specifically for colonies, as no other colonial power had such a court. Further, I assert that the JCPC is the best example of a modern extraterritorial court. The JCPC is not just of historical significance, but it also illustrates the expedience of such a court and the integral role and influence of JCPC in British Commonwealth (Roberts-Wray 1962). In addressing the influence of the JCPC and the respect it engendered in Australia, the words of the Hon. Justice Michael Kirby (2008) can be easily ascribed to other British Commonwealth states:

First, there was the realistic appreciation that the same personalities substantially constituted both their Lordships' House and the Privy Council, so that a very high coincidence of judicial approach and conclusion was to be expected from each tribunal. 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. (7)

The fact that the JCPC existed for an extended period before and after decolonization presents the opportunity to study both why a country would retain ties with an extraterritorial court and also why it may later decide against retaining the jurisdiction of that extraterritorial court.

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 that some new states did accede to the JCPC at independence. This effectively outsources the final appellate court to the former colonial power in an apparent affront to the traditional understanding of state sovereignty (Brown 2002). There is no denying the judicial experience, quality and the prestige attributed to the JCPC and that for some of the new states continued affiliation with the JCPC conferred some degree of legitimacy to their judicial system. The quality of the JCPC decisions is an important part of its credibility and the high quality of the Law Lords and their decisions is not seriously questioned in the literature. New states having not established an independent reputation for impartial adjudication would benefit from the right to appeal to the JCPC as it increases the credibility of their policy preferences (Voigt et al 2007). This is exemplified by statements by the then Prime Minister Lee Kuan Yew of Singapore that the retention of the JCPC is a sign to the world of a commitment to judicial independence (Seow 1997, Tan 2015). The JCPC allows me to examine the influence of perceptions of the court, reputation, impact of decision making and



the domestic political environment. The JCPC, therefore, having a long and prominent role in the judicial development of colonies and many sovereign states provides an appropriate case study to increase our understanding of the relationship between extraterritorial courts and states. In Chapter 3 I turn to an explication of my theory of the relationship between extraterritorial courts and nation-states.

### **3 THE JCPC AND THE GOVERNING COALITION: A THEORY OF THE ROLE OF THE FINAL APPELLATE COURT**

#### **3.1 Introduction**

The role and influence of the final appellate court, and in particular those courts with the power of judicial review, on the policies of the governing national coalition are still subjects of debate in the extant literature. My research focuses on the final appellate court with judicial review as exemplified in British Commonwealth states. As the highest court in the judicial system, the final appellate court is the last judicial forum to which one may appeal for review of legal challenges. I assert that the governing coalition will want a final appellate court that it expects to be a reliable partner when its policies are challenged in court. In the relationship with an extraterritorial court, the governing coalition may not be just satisfied with working within the existing the administrative structures but may move to completely sever ties with the court.

Courts function as forums for “dispute resolution,” “behavior modification,” “allocation of gains and losses,” and “policy-making” (Baum 2013, 7–8). In other words, they are central to civic engagement about the constitution, laws, and public policy. First exemplified in a modern state by the U.S. Constitution, the establishment of governing institutions and codified rights and responsibilities are now a hallmark of the vast majority of state constitutions. The extant literature discusses the role and administration of the domestic final appellate courts in the U.S.

and other states. Reviewing this literature informs my theory of the governing coalition's expectation of extraterritorial courts. Hamilton's description of the judiciary as the weakest branch of the government (The Federalist Papers #78 in Bickel 1962) notwithstanding, history shows that the power of the JCPC to rule on the constitutionality of policies or to adjudicate disputes with the state is important to the credibility of the national governing coalition, the legitimacy of their policies, and, ultimately, the effectiveness of those policies (Voigt et al 2007).

This shift toward constitutionalism may have encouraged growing involvement of the courts in a broad range of issues, which is animated by an apparent failure or reluctance on the part of legislatures to address important policy issues decisively (Saunders 2010). All legal systems have a court of last resort as the final judicial authority for public policies, effectively making them "devices of centralized policy-making" (Shapiro 1981, 20). In many instances, therefore, the decisions of the final court are the last word on a given matter. The outcome is that the courts become part of the policy-making and legitimizing process. Furthermore, the decisions set the precedents for lower courts and influence the development of domestic jurisprudence (Lupo and Voeten 2011).

Given the courts' role and function as the final appellate court, states care a great deal about courts and how they are structured. Stability and continuity are important to the governing coalition for a number of reasons. First, support from the final appellate court can confer credibility on the government's policies. Not directly subject to popular will, the court may be viewed as an unbiased arbiter of disputes and challenges to the validity of laws and actions of the governing coalition. The view of the court as an unbiased arbiter of conflicts is supported by public opinion surveys. For example, the Maxwell Poll (2005; see also Justice at Stake Campaign 2001) in the U.S. found strong support for the notion that independent judges are

unbiased protectors of constitutional rights. On the other hand, though driven by legal principle, there is recognition that the courts are political institutions (Bailey and Maltzman 2008; Keck 2007). Nevertheless, it is recognized in the extant literature that the U.S. Supreme Court does have the “power to confer constitutional legitimacy” (McKeever 1997, 161) on the policies of the governing coalition (Dahl 1957; Geyh 2006; McKeever 1997).

Second, when the court supports the state, it reduces uncertainty in the society about enforcement of laws (Voigt, Ebling and Blume 2007). In a comparison of African and Commonwealth Caribbean states, Voigt et al (2007) find that states that retained the JCPC experienced higher levels per capita growth indirectly attributable to enhanced state credibility in the realm of property rights enforcement. Third, the court’s support can be particularly important for politically sensitive or controversial policies and can legitimize particularly salient cases (Dahl 1957). Dahl (1957) posits that the “Supreme Court is inevitably a part of the national alliance” that develops and enacts public policy (293). The final appellate court confers legitimacy on: (a) the policies of the dominant majority and (b) the behavior required for the operation of a democracy (Dahl 1957). The court, therefore, is expected to work in consort with the national alliance.

The U.S. Supreme Court is the final appellate court that provides answers to important legal questions that underpin national public policy. The clash between President Roosevelt and the U.S. Supreme Court over key New Deal legislation in the 1930s exemplifies the role and influence of the final court of appeal in public policy. The Supreme Court declared several acts of Congress to be unconstitutional, which stalled the implementation of policies the executive and legislative branches deemed necessary to address the economic challenges facing the United States during the Great Depression. This exercise of judicial review, however, did not go

unaddressed. The power of the executive and legislative branches to replace retiring Supreme Court justices with justices who shared the policy preferences of the elected branches was crucial to resolving the impasse with the U.S. Supreme Court. A threat to enlarge the court and appoint additional justices had the desired effect. Justice Roberts changed his position on the legality of Washington's minimum wage statute challenged in *West Coast Company v. Parrish* (1937) and the Supreme Court subsequently reversed itself and affirmed many key New Deal policies (Carson & Kleinerman 2002; Currie 1987). Whittington (2007) reframes Dahl's position on the U.S. Supreme Court. He characterizes it as being friendly or sympathetic to the dominant majority.

In addition, Geyh (2006) points out that the court rarely used its power of judicial review in ways to precipitate direct conflicts with the legislative and executive branches of government. Between 1789 and 2014, only 177 acts of the U.S. Congress (whole or in part) have been declared unconstitutional by the U.S. Supreme Court (Government Publishing Office 2014). In other words, over time the court took a very pragmatic approach in exercising its power of judicial review (Epstein and Walker 2014). Support by the judicial branch is characterized as increasing the "credibility of the government's promises" (Voigt et al 2007, 88) and presenting a unified position on the policy. In reality, therefore, the governing coalition desires that the final appellate court be an ally against challenges to its policies. As a result, elected officials select judges whose interpretation of the law will not impede the policies of the dominant coalition (Tushnet 2006).

This raises the importance, therefore, of the relationship between the branches of government, including issues such as the process of placing justices on the court, tenure, and jurisdiction. With regard to court appointments, Dahl points out that "Presidents are not famous

for appointing justices hostile to their own views on public policy” (284). This highlights a key point of leverage the elected branches of government have over the U.S. Supreme Court. The procedure for placing justices on a court is widely discussed, and its importance cannot be overestimated (Baum 2013; Moralski and Shipan 1999; Steigerwalt 2010), but is only a part of the spectrum of administrative control that can be exerted by the governing coalition. The power to determine the structure and composition of the final appellate court is, therefore, important to the governing coalition, as it determines the relationship of the court to the other branches of government and defines how the court functions as part of the governing coalition. Dahl asserts that this relationship makes the court a “national policy maker” (565). This legitimizing role makes the judiciary an important participant in the national political and decision-making process (Dahl 1957) led and influenced by the governing coalition. The final court lends legitimacy to the policies of the dominant majority, which Dahl (1957) describes as the “lawmaking majority” in Congress (284). Further, Dahl asserts that “the courts are not long out of time with the policy views dominant among lawmaking majorities of the United States” (285). In other words, democracy requires that the branches of government are generally in step with each other and work to produce public policies, with the courts functioning as “political institutions working with legal tools” (Rosenberg 2001, 619; see also Dahl 1957).

While the important role the final appellate court plays in policy-making is recognized and demonstrated in the extant literature on the U.S. Supreme Court (Casper 1976; Feeley and Rubin 1999; Frymer 2003; Mather 1995; Melnick 1994; McCann 1986; Scheingold 1974), other works argue differently. The significance of this role is disputed by others, including Rosenberg (2008), Delgado (2008) and Klarman (2004). They, along with others, assert that the role is considerably constrained by and dependent upon the actions of the other branches of

government. This position is echoed with regard to extraterritorial courts. In the review of the role of the ECJ in the European Union, Garrett et al (1998) assert that the “spectre of coordinated responses [by a governing coalition] will make the ECJ more reticent to make adverse decisions” (151). Nevertheless, the growing partnership exemplified between the ECJ and E.U. member states and the role of the ICC when states fail to act (Chayes and Slaughter 2000) makes improving our understanding of the relationship between extraterritorial courts as final appellate courts and states even more important.

This interaction of governing institutions is also witnessed in other jurisdictions. The period of emergency in India from 1975 to 1977 during the rule of Prime Minister Indira Gandhi’s ruling Congress Party illustrated this dynamic in another common law jurisdiction. In one decision, the Indian Supreme Court rejected the objections made by the Prime Minister’s legal counsel and found her guilty on charges of corruption, despite admonitions from counsel about the repercussions of not finding in favor of the prime minister. In another decision, however, the court sided with the government’s disregard for the right of habeas corpus (Das 2007) in an attempt to legitimize the actions of the government during the state of emergency. Hirschl (2000) finds that a comparison of specific cases in Israel, Canada, and New Zealand demonstrates that courts rule for the most part in accordance with the policy preferences of the governing coalition. It should be noted, however, that this research was not a comparative study of the actual decisions of the courts, but a qualitative look at specific cases in the context of the political environment in each state. While the governing coalition may not feel significantly challenged by any single contrary decision, over time they may decide to change the court if it does not appear to support the governing alliance or if there is increasing sensitivity to the legal challenges adjudicated by the extraterritorial court. Maintaining this alliance may go beyond

exercising control over the court through mechanisms such as the appointment of judges and delineating jurisdiction. In the case of British colonies attaining independence, the choice of final appellate court enshrined in the constitution is particularly significant. The role of the final appellate court was more than symbolic, as retaining the JCPC preserved a significant tie with the former colonial power.

The abolition of the JCPC and the establishment of a domestic final appellate court to make a total institutional break with the U.K. are in keeping with the concept of the modern state. Each state, however, could maintain the status quo by retaining the JCPC. This choice by the governing coalition may have been an effort at securing their interests with a prestigious court they expected to be a reliable partner. Exemplifying this assertion, Dippel (2014) finds that the political leaders in British colonial settlements voluntarily abolished their locally selected assemblies after the abolition of slavery in the Empire in 1836. This effectively moved the settlements away from a democratic process, albeit with limited enfranchisement, to totally autocratic rule by the U.K. (Borland 1976; Dippel 2014).

In a study of former British colonies in the Commonwealth Caribbean, Dippel (2014) further demonstrates that governing coalitions chose this course of action to protect their interests and preferred policies from the influence of the wider population. As a colony moves towards independence, there is a gradual expansion of voting rights that brings more people into the governing process. The governing coalition, who were cultivated by and had benefited from colonial rule, may naturally feel that their interests are more likely to be protected by the JCPC that is a part of the colonial institutional structure. The role and administration of an extraterritorial court, therefore, are not any less important to the states that accede to the court than if it was a domestic final appellate court. The predominant consideration for the governing

coalition, therefore, is whether the extraterritorial court is likely to uphold their policies when challenged in court. When states use an extraterritorial court as the final appellate court, they effectively relinquish control over this important institution in the state's policy-making and governance structure. The governing coalition risks having a court over which it has no direct control making the final judicial decision on challenges to its policies.

The final appellate courts in British Commonwealth countries can function as a check on the executive and legislature by delivering decisions that run contrary to the policies of the governing coalition. Extending Dahl (1957) beyond the U.S. Supreme Court, I posit that the court's decisions and the political environment are important when legal challenges are made to the state's policies, as the members of the governing coalition want the final court that is most likely to uphold and legitimize its policies. This is held because of the similarities in the historical background reflected in the political and legal institutions. The political environment influences whether states will change that court if it perceives a disconnection with the court. The governing coalition must perceive a disconnection with the court that is enough to galvanize its political will to change the status quo with regard to the final court of appeal. I test this theory at two critical junctures faced by governing coalitions with regard to the JCPC in states that emerge from the British Empire. If at independence it is expected that JCPC will fulfill the role of legitimizing their policies, the governing coalition will maintain the status quo. If, however, at some later point there are changes in the political environment and the governing coalition determines that the decisions of the final appellate court reflect a disconnection with their policies, the final appellate court will be replaced.

Independence, therefore, is the first time the new governing coalition has input on the final appellate court for the new state. It is here that the colonial influence frames the governing



coalition's perceptions of the JCPC as it moves the colony to independence or the first critical juncture. For those states that choose to retain the JCPC at independence the governing coalition is then influenced by the decisions of the court and the political environment which may lead to a second critical juncture. Ultimately, I propose that states will choose the final court of appeal that they most expect to be an ally and reliable partner, and may move to change a court that undermines or seems likely to undermine their policies. The decisions of the governing coalition can be observed at these two possible critical junctures.

### **3.2 Critical Junctures**

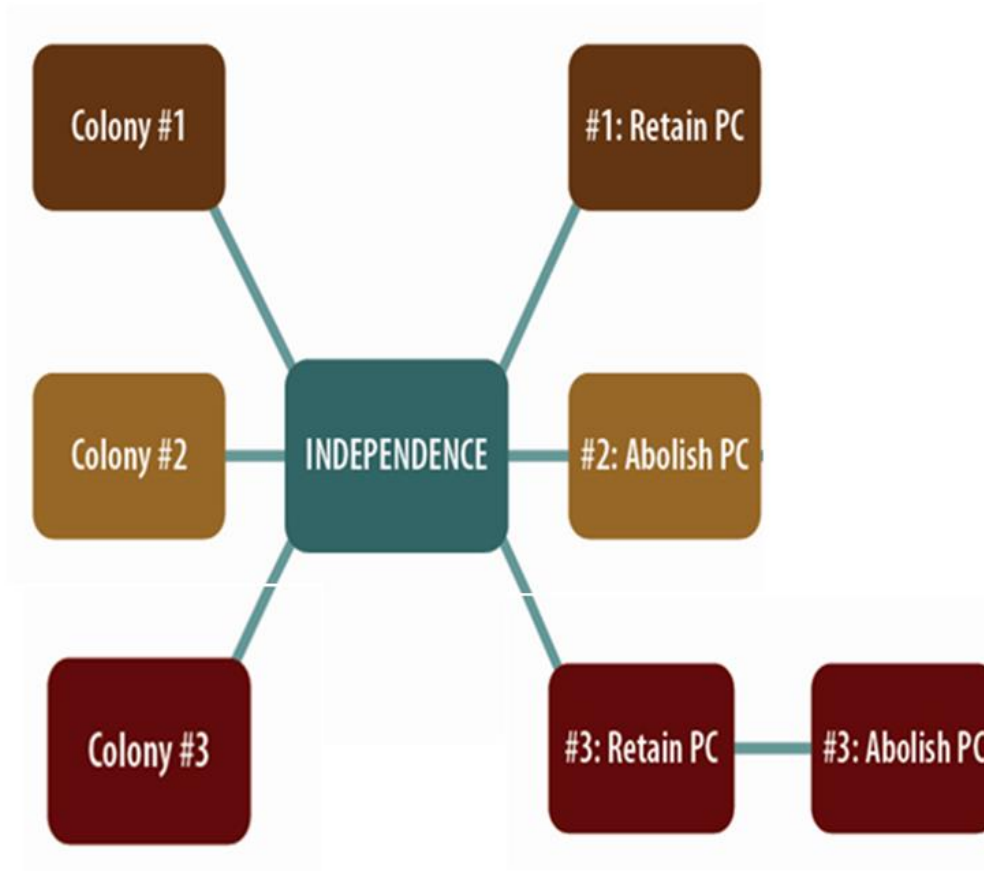
Mahoney (2000) defines a critical juncture as a point when a specific choice is made among two or more options. The juncture may occur after a period of path-dependent stability or continuity and represents a period when a clear change is possible (Capoccia and Kelmen 2007). Here, critical junctures present possible turning points when the court is no longer perceived as a reliable partner in the governing coalition. Existing institutions, however, favor the perpetuation of those institutions; once a state has embarked on a course, it can be difficult and costly to change directions. In other words, history does matter to institutional development and changes (Crouch and Farrell 2004; Pierson 2004). Historical institutionalism uses the concepts of path dependence, critical junctures, and the salience of ideas to frame this course change. More precisely, dependent actions and decisions in the past underpin path-dependent institutional patterns and outcomes (Djelic and Quack 2007; Page 2006). Vergne and Durand (2010) described these historical underpinnings as what links the past and the future. In practical terms, the colonial experience may influence the new governing coalition of the emerging state to retain the right of appeal via the JCPC. The colonial history and effect may constrain the choices and perceptions of the governing coalition with regard to the institutions that are included in the

constitution at independence. Some state leaders may expect that favorable rulings from the JCPC, a court not controlled by them, will grant greater legitimacy than a domestic high court. In the case of the JCPC, understanding what factors perpetuate that colonial institution despite the change in the political environment marked by independence is the key at this critical juncture.

After this first critical juncture, the new state and the governing coalition find themselves in a “new stable institutional equilibrium” (Bernhard 2015, 976). Over time, however, changing conditions and new developments can alter the course of institutional development (Vergne and Durand 2010). Streeck and Thelen (2005) describe this as “incremental change with transformative results” (309). After independence, there may be changes in the political environment and the governing coalition’s view of the JCPC’s decisions sufficient to interrupt that status quo and possibly lead to a second critical juncture. In Chapter 3, I examine the decisions made by the new states at independence, which is the first critical juncture, and in Chapter 4, I examine the circumstances that may lead to a second critical juncture for some states.

The first critical juncture for emerging states occurs at independence, while the second may arise later in the state’s development. Figure 3.1 illustrates three paths colonies may follow in selecting a final appellate court, as well as where the two critical junctures may arise. At the time of independence, 30 of the 50 colonies in group 1 in my sample perceive the JCPC as an ally and reliable partner and retain the court at independence. Group 2 with twenty states, therefore, do not view the court as an ally and reliable partner and abolish the JCPC at independence. The decisions of the new governing coalitions at independence are influenced by the realities of British colonial rule. The colonial experience underpins the path dependence influence on institutional development and changes. The colonial history makes a difference in

making the ultimate break with the colonial power and the common law legal institutions that existed during the colonial period. Of the former colonies in Group 3 that retain the JCPC at independence, some choose to form a new domestic final appellate court at another critical juncture some years later. This juncture is not inevitable, but 17 states abolished the JCPC at various times after independence. I argue that this second juncture is a function of a changed political environment and a disconnection between the policy preferences of the state and the court after independence. In other words, political changes and uncertainty as to whether or not the JCPC will uphold their policies may lead the governing national coalition to view the JCPC as threat to the legitimacy of their decisions (Dahl 1957) or to the new vision for the state. At the point where the governing coalition perceives this discontinuity with the JCPC as an impediment, they may move to abolish the right of appeal. It is important to better understand the factors that influence the perceptions and opinions of the governing coalition about this final appellate court as an institutional partner.



**Figure 3.1 The Critical Junctures for Choosing a Final Appellate Court**

In this section, I discuss each critical juncture in more detail. The closer look at the 50 states reveals a clearer picture of the realities of the colonial experience leading up to independence. With regard to the decision at independence, former colonies fall into three categories: (a) those that abolished appeals to JCPC at independence; (b) those that retained appeals to the JCPC for a period after independence before abolishing the appeals process; and (c) those that retain appeals to the JCPC as of January 1, 2015.

At the first critical juncture at independence, all states must design their new government structures, including the judiciary. Formal deliberations about the constitution for the new state lead to the first critical juncture at independence. Decisions about the judicial structure and the final court of appeal are part of the formal process of developing the constitution the colony will

adopt at independence. This formalizes the framework for the executive, legislative, and judicial institutions to be transferred from the British authorities to the new governing coalition.

Reliance upon an extraterritorial court as the final appellate court for an independent state is fundamentally incompatible with the modern notion of sovereignty (Swinfen 1987). Retaining the JCPC post-independence, in effect, outsources the power of final judicial review to a court over which the state has no control. In The Gambia, this issue was part of the campaign to adopt the new constitution in 1996 that excluded appeals to the JCPC (Senghore 2010). Similarly, New Zealand's 2005 abolition of appeals to the JCPC was an election promise by the Labour Party. On winning the 1999 general elections, the governing coalition led by the Labour Party completed the process culminating in the abolition of the JCPC characterized as an important step in the national development of New Zealand (Wilson 2001). In supporting the establishment of the Caribbean court of Justice for the Commonwealth Caribbean, the former Prime Minister of St. Lucia, the Honorable Kenny Anthony states, "No self-respecting nation should allow its sovereignty to be at large" (Anthony 2003). More than half of all British colonies, however, retained the JCPC at independence. As of January 2015, St. Lucia still relies on the JCPC decades after gaining independence, while states such as Malawi and Zambia abolished appeals to the JCPC at independence. Other states such as Sri Lanka, Malaysia, and Guyana retained the JCPC at independence only to abolish appeals to that extraterritorial court some years later. There are two underlying questions. First, why then did some states emerging from British colonial rule retain the JCPC? The effects and influence of British colonial rule is much debated in the literature (Porter 2012). On one hand, some argue the British rule was a net positive to the territories (Ferguson 2003; Porter 2012). On the other, some scholars maintain that while British colonial rule conferred important institutions and elements of modern

statehood on the former colonies, it was brutal and repressive (Gott 2011; Porter 2012). As with all empires of the past, however, the influence lingers regardless of our normative interpretation. The British Empire is no different, and I assert that the influence is evidenced in the national governing coalition's decision about the final appellate court at independence.

Further, some states that retained the right of appeal at independence only later abolish the right, while others continued to allow appeals to this extraterritorial court. This mutability raises the second question. Why do some states ultimately decide to abolish appeals to the JCPC and establish a domestic final appeals court? I posit that states that retain appeals to the JCPC at independence may later decide to abolish appeals if political changes increase uncertainty as to whether the JCPC will uphold and legitimize the state's policies. A disconnect may emerge over time that leads the governing national coalition to take steps to abolish that right of appeal.

### ***3.2.1 First Critical Juncture: Independence***

The colonial period precedes the first critical juncture at independence. My theory that the role of the final appellate court is the upholding and legitimizing of the policies of the governing coalition presents a better understanding of why some states choose the JCPC as their final appellate court at independence. I test macro hypotheses dealing with structural factors (Rokkan 1966) of colonial rule that influence former British colonies as they emerge as independent states. In reality, the colonial experience encapsulates a variety of factors that affect each state differently in a complex and interactive manner. Length and type of colonial rule, period of independence, legal resources, and leadership each have an important role. The next section reviews the literature and explicates the influences that frame the perceptions of the governing coalition.

The establishment of a colony in territory effectively controlled by British settlers confirms total control by the Colonial Office in London over the political and administrative apparatus of that colony (Borland 1975). It marks the formal integration of the area into the British Empire and establishes the authority of the Crown (Dippel 2014). The legacy of colonial rule is complex (Porter 2012) and its influence multifaceted. The change in formal status embedded the colonial institutions in a colony to varying degrees and the effects of this undeniable legacy are still debated (Ferguson 2003; Gott 2011; Porter 2012). During the colonial period, a governing coalition was developed from the executive, legislative, and judicial branches of government and led by the governing elite. The governing elite or ruling class, which would make up the governing coalition, may include the senior political elite and bureaucrats, the leading members of the liberal professions, the growing bourgeoisie, and the leading members of the security institutions (Markovitz 1987).

Whether the governing coalition viewed the JCPC as a viable partner in the policy-making process of the sovereign state was influenced by the colonial experience which framed the composition and outlook of the governing coalition. For example, the cultural and ethnic makeup of the group varied on whether a colony was “settled” or “exploitative” as defined by Crosby (1986; see also Veracities 2013). Settled colonies were those in which British settlers tried to replicate British institutions with an emphasis on private property and checks on government power (Crosby 1986; McCartney 2015). The largest settled colonies were Canada, New Zealand, and Australia. With relatively small and dispersed indigenous populations, the culture and ethnicity of the local governing elite at independence were inextricably linked to their British heritage. This commonality may support the recognition of shared interests with the JCPC in maintaining the status quo after independence. As Diop (2012) points out, the

institutions and infrastructure of the large settled colonies are steeped in the culture and tradition of the colonial power and designed to maintain the status quo. This broad characterization of that group of former colonies contrasts with exploitative colonies. In colonies such as Kenya, India, and Sierra Leone where the purpose was the movement of resources from the colony to the colonizer (Crosby 1986; Meredith 2005), the characteristics of colonial rule and the effect on the emerging governing coalition varied. In African and Asian colonies where the British settler population was generally very small, the local elite came from the indigenous populations and those of mixed heritage. The new local elite or “a new class of individuals exposed to aspects of European Culture that were super-imposed on the local ethnic cultures” (Diop 2012, 224) emerged as nationalist movements, usually culminating with independence. These colonies saw the rise of a “new bureaucratic class that was nurtured during colonialism,” but which still had a history of tradition and customary courts functioning during colonial rule (Diop 2012, 224). I posit that this made them less attached to an extraterritorial court, such as the JCPC, as the final appellate court at independence.

The Commonwealth Caribbean provides an interesting subset of settled colonies. With the decimation of indigenous populations (Caribs/Gariganu, Siboneys, Tainos, and Arawaks), the colonies were populated primarily by descendants of former slaves. Those of Afro-British ethnicity and later indentured Indian laborers resulted in “cultural heterogeneity” (Pramdas 1996, 9) producing “new native residents” (Pramdas 1996, 15) or in “creolization as a cultural mode of indigenization [that] is often rendered as essentially a single Afro- or Eurocentric standard” (Pramdas 1996, 17). Though exploitative in nature, Caribbean colonies were directly ruled with no indigenous institutions functioning in parallel to the colonial institutions as observed in the



indirect rule exploitative colonies. As with the other settled colonies, this subset of states retains the JCPC at independence.

I analyze the influence in the political environment of British colonial rule on the governing coalition's choice of final court of appeal. Britain and its former colonies provide an important case study as it is the only colonial power to design a single court specifically for legal cases originating within her colonies, as authorized by the Judicial Committee Act of 1844 (Finlay and Walwyn 2008). As observed by Lord Spens, it continued to serve as the "great unifying legal influence" of the British Commonwealth (Hansard May 30 1960, Column 95). The Law Lords on the JCPC viewed themselves as "umpires" of the Empire (Ibhawoh 2013, 6). The role of the court as an umpire continues when the state retains the right to appeal to the JCPC. Variations in structures and procedures notwithstanding, fundamental aspects of the British legal system persist. Important features such the adversarial and writ systems, along with principles such as *stare decisis* (let the case precedent stand), due process, equity, and an appellate hierarchy, are entrenched across common law jurisdictions. The JCPC, however, also upholds differences between British laws and those of the colonies and states. The decisions based on the laws of the respective colony or state reinforces the idea of "otherness," which reinforces the distinction between colonizer and colonized (Ibhawoh 2013, 9). This is particularly evident in states with indigenous populations where customs and traditions are recognized, thereby supporting the tendency of these states to abolish the JCPC at independence. Still, decisions of the JCPC influence the development of common law in every corner of the British Empire (Ibhawoh 2013; Swinfin 1987), and this influence continues in states that retain the JCPC at independence. As heirs to the British common law legal tradition, courts in other former colonies have a comparable role in national governance as described by Dahl (1957), and

there is no reason to believe that the role of the JCPC varies from that of the U.S. Supreme Court. Specifically, therefore, I explore what contributes to the governing coalition that the extraterritorial court will be a reliable partner when its policies are challenged.

In the next section, I consider how in the case of the JCPC the perceptions develop over the colonial period generally and the component activities that are generally part of the decolonization process in which the governing elite participated. The length of official colonial rule was closely linked to the degree to which the colonial institutions became embedded and intertwined within society and the effect on the new governing coalition at independence. Lange (2004) finds that long periods of colonial rule lead to stronger state institutions that are connected to a broad swath of the society. This, he asserts, contributes to colonial and postcolonial development based on societal expectations that institutions contribute to the overall societal wellbeing.

The political environment the local governing coalition experiences influences their ability to identify with governing institutions. This includes their perspective on and degree of identification with the JCPC as a viable final appellate court for the new state. Iweriebor (2011) describes indirect rule having three main institutions,

The native authority made up of the local ruler, the colonials official, and administrative staff; the native treasury, which collected revenues to pay for local administrative staff and services; and the native courts which purportedly administered native laws and custom, the supposedly traditional legal system of the colonized that was used to adjudicate cases. (para.13)

I suggest that the political environment represented by the type of colonial rule – direct or indirect (Lange 2004) – is one influence on the type of final appellate court the state will choose post-independence as the governing elite seek to establish the credibility of the new national governing coalition. I build upon Lange's (2009; see also Fisher 1991; Hirairi 2012) direct-

indirect rule theory but focus solely on the highest court. Direct rule permits local elites to run only the very lowest levels of the colonial administration, while colonial officials perform all other functions. Building on Doyle (1986), indirect rule entrusted extensive governance of the colony to the locals under supervision of imperial governors with both indigenous and colonial institutions functioning in parallel during the colonial period (Lange 2004; 2009). With the introduction of common law traditions, the British still permitted considerable local exceptions in procedures and content in areas such as family, property, and criminal law (Hooker 1975; Mitchell, Ring and Spellman 2013) in some colonies. Recognition of local traditional law placed legal power in the hands of local chiefs (Hooker 1975; Mamdani 1999), who exercised traditional authority over indigenous populations. The chiefs handled many disputes at that level concurrently with the established British common law state level courts that typically supplanted the authority of traditional law. It should be noted, however, that the exercise of this authority was at the absolute discretion of the colonial officials and subordinate native leadership (Iweriebor 2011). At the time of Ghanaian independence in 1957, colonial laws provided for the operation of “Native Courts” in the territories of Togoland, Ashanti, and the Northern Territories that comprised the new state (Harvey 1962, 584). These courts were linked to the colonial legal institutions through three mechanisms:

(1) appeals to higher tribunals within the Native Courts system and in limited instances to an appeal tribunal outside the system; (2) transfers of cases from one Native Court to another or to a Magistrate’s Court; and (3) review and revision of court action by District Commissioners or the Judicial Adviser (585).

In his examination of the Japanese colonial era in Korea (1905–1945), Kohli (1994) also acknowledged the distinction between direct and indirect colonial rule. He finds that the Japanese used both forms of rule by greatly concentrating power in Seoul complemented with a densely bureaucratic periphery, and concludes that this provided the foundation for the

development that occurred in South Korea after the Korean War. The type of colonial rule is closely linked to whether the colonial institutions became embedded and intertwined with the society. This contributes to the persistence of the institution after the end of the Japanese occupation. The governing coalition in colonies exposed to indirect rule experiences a duality of institutional structures as customary and traditional legal institutions operate in parallel. This is in contradistinction to purely colonial institutions existing in direct-rule colonies. Kohli's (1994) findings in Korea underscore the significance of types of colonial rule on state outcomes. The type of colonial rule is likely to influence the choice of institutions post-independence. Indirect rule depends on collaboration with the traditional institutions supported by large indigenous populations that control regions with small colonial administrations isolated in the capital (Lange 2009). Alternatively, direct rule is characterized by dominant colonial institutions that are territory-wide and centralized, producing bureaucratic legal-administrative institutions controlled by colonial officials (Lange 2009). These institutions permeate where there are few or no indigenous peoples supporting traditional institutions. Direct rule is characterized by virtually complete domination of colonial institutions. The national leaders, therefore, view the JCPC as a natural extension of their embedded institutional hierarchy that brings credibility to the judiciary. These states that experience direct colonial rule are more likely to retain the JCPC at independence. The type of colonial rule – indirect or direct – is important to the significant influence on the relationship between the governing coalition and the U.K. Table 3.1 presents the lists of the 24 direct rule colonies and 26 indirect rule colonies from the total sample of 50 states. Of the 24 colonies that experienced direct colonial rule, four (17 percent) abolished appeals to the JCPC at independence. Of the remaining 26 colonies that experienced indirect rule, 16 states (81 per cent) abolished appeals to the JCPC at independence.

**Table 3.1 Type of Colonial Rule in the 50 Colonies**

<b>Direct Colonial Rule (24 states)</b>		<b>Indirect Colonial Rule (26 states)</b>	
<b>Retain (20 States)</b>	<b>Abolish (4 states)</b>	<b>Retain (10 States)</b>	<b>Abolish (16 states)</b>
Antigua & Barbuda	Cyprus	Fiji	Botswana
Australia	Ireland, Rep. of	Ghana	Lesotho
Bahamas	Malta	India	Malawi
Barbados	Seychelles	Kenya	Maldives
Belize		Kiribati	Myanmar
Brunei		Malaysia	Nauru
Canada		Nigeria	Papua New Guinea
Dominica		South Africa	Samoa
Gambia, The		Tuvalu	Sierra Leone
Grenada		Uganda	Solomon Islands
Guyana			Swaziland
Jamaica			Tanzania
Mauritius			Tonga
New Zealand			Vanuatu
Singapore			Zambia
Sri Lanka			Zimbabwe
St. Kitts & Nevis			
St. Lucia			
St. Vincent & the Grenadines			
Trinidad & Tobago			

The extension and imposition of British colonial rule, therefore, is inextricably intertwined with the institutional development of the colonies and with the perception reliability of the final appellate court as important to the governing coalition. Since colonial influences on this development culminated at independence, it is important to understand how the formal process evolved and how the colonies transitioned to independence. My examination of the 50 former British colonies extends this comparative approach with the focus on this specific institution.

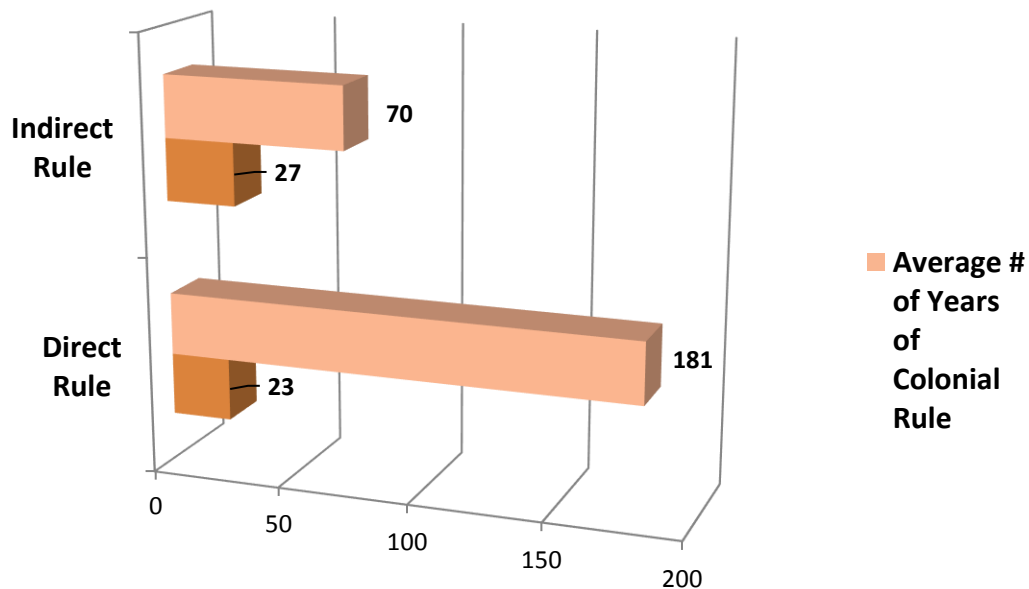
I assert that the duration of colonial rule also influences the choice of the final court of appeal at independence. The average length of colony status for the states included in this research is 121 years. On one extreme there is St. Kitts & Nevis, which was a colony for 360 years before transitioning to independence in 1983 and still retains the right of appeal to the

JCPC at the end of 2015. Zambia, at the other end of the spectrum, was a British colony for only 40 years when it gained independence in 1964 and abolished the right of appeal to the JCPC. The difference may be explained by the lack of indigenous people and institutions on St. Kitts & Nevis which allows the colonial influence to be stronger over the longer period of colonial rule as opposed to the contrary situation in Zambia. The strength of the colonial influence contributed to the decision on the status of the JCPC. Only two of the 20 states (10 percent) that experience colonial rule longer than the average abolished the JCPC. Of the 30 states that retained the JCPC at independence, 13 states (43 percent) experienced shorter than the average length of colonial rule.

The end of colonial rule marks the transfer of governing authority from the colonial power to the new national governing coalition who inherits the governing institutions with the constitutional authority to make public policy. The lengths of colonial rule contribute to the degree to which the institutions become embedded in the colonial society. This increases the familiarity of the new governing coalition with the role of the JCPC as more cases would be appealed during longer periods of colonial rule. This familiarity and longer periods of reliance on the JCPC increase the willingness to accept this colonial institution as part of the governing institutions of the sovereign state. The length of colonial rule contributes to the degree to which colonial institutions including the JCPC are embedded in the governing structures of the state (Lange 2009; 2004; Mamdani 1996). The colonial institutions have been in place longer and are more embedded in the societies (Lange 2009; Mamdani 1996).

Figure 3.2 presents the 50 colonies categorized by the type and average length of colonial rule experienced prior to independence and merely demonstrates the variation in the sample of states. At independence, 16 of the 27 (62 percent) colonies that experienced indirect rule,

averaging 70 years of colonial rule, abolish appeals to the JCPC. Of the 23 colonies averaging 170 years of colonial rule, that experienced direct rule, only three (13 percent) abolish appeals to the JCPC at independence. This shows a greater tendency of indirectly ruled colonies to abolish the JCPC at independence. See Appendix A for the length of colonial rule for each state.



**Figure 3.2 Types and Average Lengths of Colonial Rule in the 50 Colonies under either Indirect or Direct Rule**

I briefly discuss internal self-government and constitutional commissions that contribute to our understanding of the emerging local elite at this first critical juncture. During these processes, important national leaders emerged and led the colony to independence. My review shows that the first prime minister inevitably emerged from these groups of leaders (Appendix B). This is important, as it may contribute to the strength of attachment the governing coalition feels to the JCPC.

During the first phase of the decolonization process, the U.K. grants colonies internal self-government. This process devolves the responsibility for domestic affairs to the locally

elected officials, the emerging national elite, except for the responsibility for defense and foreign affairs, which remain the domain of the colonial power. The process of decolonization brings a shift in authority from the colonial power to the local governing elite and the opportunity to influence the judicial structure. For most colonies, the next step after being granted internal self-government is independence. The length of this pre-independence period varies with each colony but averages 14.25 years, ranging from less than 1 year for Zambia and Tanzania to as many as 75 years for New Zealand. Leading up to and during this period, the emerging national coalition is introduced to or becomes more highly integrated into the governing process and institutions. During this phase, therefore, with devolution of the responsibility for domestic affairs, the nationalist political parties emerge to contest elections. While these groups are neither monolithic nor homogeneous, national leaders do surface to take the reins of domestic governance. The background of these leaders may be significant, as they lead the local governing coalition's participation in the commissions and committees developed as a part of that transition period to work with the U.K. officials on the independence constitution.

The emerging governing coalition also participates in constitutional commissions as the second phase of the decolonization process. These commissions are instrumental in providing the framework for the local leadership to participate in crafting the written constitution adopted at independence, including provisions for the final court. Constitutional commissions are comprised of colonial and local elite and serve principally in a supporting role to the legislative assembly. Their primary function is to provide expert advice on constitutional problems and issues in addition to actually proposing and drafting entire constitutions (Straum 1977). The goals are to develop constitutions that establish or strengthen the political community and to establish or amend the rules governing the state's power (Ghai and Galli 2007). Internal self-government is



anchored in the Westminster model of government and universal adult suffrage, with external and defense matters remaining the responsibility of the U.K. Considering the option of retaining the JCPC or establishing a new domestic final court of appeal is a part of this process. These commissions are significant in moving colonies to internal self-government to independence. This period of self-government culminates with the decision of the governing coalition about the independence constitution, including the status of the JCPC.

Domestic law schools play an important role in the development and practice of law, resulting in the local jurisprudence. Lawyers are also considered to be a part of the local elite and influence attitudes towards the colonial institutions (Kelly 1994). The absence of a law school would indicate closer ties with the U.K., making it more likely that the state would retain JCPC appeals. This has two aspects. First, if a law school exists in the state prior to independence it is likely to increase the number of local lawyers. This would support a larger pool from which judges could be selected for service on the bench. Second, locally trained lawyers may feel less affinity for British institutions than those trained in the U.K. Conversely, the absence of law schools makes the colony more reliant on the U.K. and contributes to the strength of the colonial influence.

As Acemulgo et al (2001) state, therefore, the “colonial experience” is broad and far reaching influencing the development of the colonial settlements and the persistence of institutions (1370). While the colonizer and colonized influence each other, the influence is asymmetrical with the colonial power exerting more influence as opposed to the colonized (Alemagung 2010). Further, “the political, cultural and general polity” left as part of the colonial legacy implanted “neo-colonial nationalist leadership” that led the colony to independence

(Alemagung 2010, 64). These factors contribute to the additive effect of the colonial influence leading up to independence. This leads me to my first hypothesis (H1):

*H1: The stronger the perceptions of reliability, the more likely the governing coalition is to retain appeals to the extraterritorial court.*

In the next section, I discuss the second critical juncture that may arise for those 30 states that retained the JCPC at independence. Seventeen of these states at some point replaced the JCPC with a domestic final appellate court, with 13 states maintaining the status quo as of January 1, 2015.

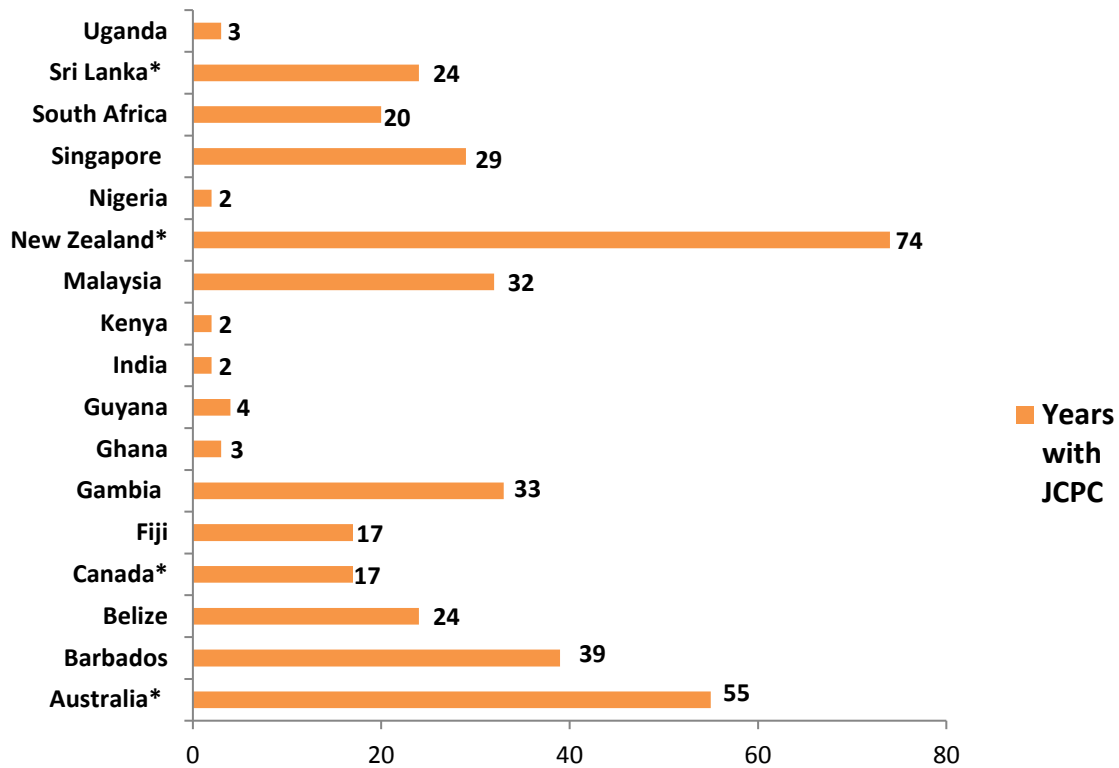
### ***3.2.2 Second Critical Juncture: Post-Independence***

If the JCPC was retained at independence, another critical juncture may have surfaced some years later that led the state to abandon the JCPC and establish a domestic final appellate court. Dahl's (1957) assertion that the courts are integral to the national governing coalition makes the decision about the final court important. In the face of challenges to policies, states seek a high court that will reinforce the policies of the governing coalition. JCPC decisions that go against the state may undermine that goal. The court is, therefore, less likely to be viewed as a partner or ally. As the state has no administrative means to bring the JCPC back into line, as a U.S. president may have the opportunity to do through judicial appointments or the Congress through other administrative and jurisdictional changes, the remedy is to replace the JCPC with a national court over which some administrative leverage can be exerted. I thus argue that states retain the JCPC when they believe the court is likely to support the governing coalition, but sever ties when they perceive the role of the JCPC as incompatible with the policies of the national governing coalition. I argue that this juncture is a function of an increased disconnection between the policy preferences of the state and the JCPC and of a heightened sensitivity to the role of this

extraterritorial court in the domestic affairs of the state. If the JCPC's decisions become increasingly unlikely to reflect the preferences of the governing coalition, this may be viewed as a threat to the legitimacy of their policy decisions (Dahl 1957). At the point where the governing coalition is convinced that this extraterritorial court threatens their policies, they may initiate the process to sever ties. This juncture is not inevitable, however, as evidenced by the fact that 13 states still retain appeals to the JCPC at the end of 2015. I now examine the factors after independence that may influence the emergence of this second critical juncture.

The divergence of preferences may prompt the governing elite to muster the political will to abolish the JCPC. After all, it is tempting for the governing coalition to assume authority over and responsibility for this important institution to increase the reliability of the entire judiciary when challenges arise. This makes unraveling the puzzle as to why states would not assume this constitutional function at independence more pressing and important. States that retain appeals to the JCPC are bound to a final appellate court that is far from the state physically, beyond the administrative control of the governing coalition, and whose judges also serve on the Supreme Court of Judicature in the U.K. From the sample of 50 former colonies, 30 states (60 percent) that emerged from the British Empire retain the JCPC for some period after independence. Of the 30 states, 17 eventually sever ties with the JCPC. Figure 3.3 displays the numbers of years each state retained the JCPC after independence. Arguably, these 30 states are the most interesting and raise the question of why any state would change an institution it previously deemed appropriate. The extant literature does not effectively address the reasons why states that retained the JCPC as the highest appellate court would later abolish appeals to this extraterritorial court. Further, examining this phenomenon will inform our understanding of the path dependent nature of

institutional persistence. This is important as states establish and maintain ties with extraterritorial courts.



\*Westminster Act of 1931 gave Dominions the option of severing ties with JCPC.

**Figure 3.3 Numbers of Years before States Abolish the Right of Appeal to the JCPC Post independence**

Several countries (Ghana, Guyana, India, Kenya, Nigeria and Uganda) retain the JCPC for less than five years after independence. All these states promulgated new constitutions as part of political changes that established republics as a general attempt to further break lingering colonial influence represented by the Westminster model of government adopted at independence (Galligan and Versteeg 2013). These new constitutions also replace the JCPC with a domestic final court of appeal.

I argue that the new governing coalition in each state in this sample expects the court to be a reliable partner and legitimize their policies when challenged. This raises an important

question: What post-independence changes contribute to the disconnection that leads some states to a second juncture? The reality of governing the state in a changing political environment may heighten the national coalition's sensitivity to their inability to leverage this extraterritorial court in their favor. African leaders, for example, who experienced comparatively shorter periods of colonial rule, had more limited experience governing through the "essentially alien structures hastily superimposed over the deeply ingrained political legacies of imperial rule" by the time of independence (Gordon 2007, 62). It was likely that, over time, events and changes in the political environment as well as decisions of the JCPC lead to a disconnection between the state and the JCPC. In other words, when the governing coalition perceives the JCPC as not fulfilling the role of a reliable partner, a second critical juncture may surface. At that point it is more likely that the state will abolish the JCPC and replace it with a domestic final appellate court.

To address this second issue of why some abolish appeals to the JCPC at different times, I theorize that after independence two factors influence whether or not the governing coalition continues to view the JCPC as a reliable partner in the governing coalition. The first factor includes the levels at which the JCPC uphold the policies of the governing coalition. Voigt et al (2007) find that membership of this extraterritorial court has both a statistically and economically positive effect on economic growth, which may be attributable to the right of appeal to the JCPC, and may in turn enhance the credibility of the state. My research goes beyond Voigt et al (2007), who only examine that affect the presence or absence of the right of appeal to the JCPC. To gain insight into the possible influence of extraterritorial court decisions on the state, I will examine decisions in cases originating in states that retained appeals to the JCPC after independence and changes in the political environment. I will present a more nuanced understanding of when the state may be willing to sacrifice any perceived credibility or colonial

attachment to the JCPC and move to abolish appeals by looking at JCPC cases where the state is a litigant. I expect that a detailed examination of JCPC decisions from each jurisdiction will reveal that a higher ratio of appeals in which the JCPC did not support the state's preference indicates a policy disconnection with the governing coalition and reinforces the notion that the court is not a reliable partner. This increases the likelihood that the state will abolish appeals to the court. This leads to my Hypothesis 2 (H2):

*H2: The likelihood of abolishing appeals to the extraterritorial court will increase as the state's level of success before the court decreases.*

Given that the role of the state is not the same in the legal challenges before the JCPC, the sensitivity and responses to the decisions may vary. I therefore look at sub-groups of all the decisions when the state is: (1) the appellant; and (2) the respondent. The state is the appellant in 19 percent of all the cases during the period of study. Of the 26 states, 20 (77 percent) had at least one case in which it is the appellant before the JCPC. When the lower court decision is unfavorable to the governing coalition, the onus is then on the governing coalition to utilize their resources to petition the JCPC and make the case for the appeal. I assert that cases in which the state is the appellant before the JCPC may be particularly important. Having lost at the lower court, the state considers it important to petition the highest legal forum for relief from the decisions of the lower court. Further, losing in the domestic lower court is more publicly visible as that court is physically within the state. Unfavorable decisions may be interpreted as signaling the illegitimacy of the policy. The immediacy of this may make the governing coalition more apprehensive about responding if the reliable final appellate court is uncertain. Focusing on the JCPC's decisions in these cases may be a state barometer of court reliability. The governing coalition may be especially sensitive to the decisions of the court in these cases and may rely on

the JCPC to have a legitimizing effect (Dahl 1957), having failed in the lower court. This leads to Hypothesis 2.1(H2.1):

*H2.1: The likelihood of abolishing appeals to the extraterritorial court will increase as the state's level of success in cases where the state is the appellant decreases.*

Second, changes in the political environment after independence could contribute to the second critical juncture being reached by the state. Many British colonies emerged as states with the Westminster model of government and institutions that were, in many ways, carbon copies of British constitutional practice (Juegensmeyer 1964). Changes in the political environment can evolve in different ways, with not all changes resulting in significant shifts in the status quo or in the relationship between the state and its citizens being reflected in the governing institutions including the courts. These changes can disrupt the institutional equilibrium established at independence. The goal is to better understand what changes will galvanize the governing coalition to move against the JCPC. Some state leaders then change the constitution post-independence to meet the perceived needs of governing; some retain more democratic practices while other become more authoritative. A more authoritarian regime that relies less on democratic legitimacy may feel a greater need for the courts to validate their policy preferences. The literature indicates that courts in authoritarian regimes are not usually independent of the executive branch and may instead be characterized as purely an extension of administrative power for the purpose of implementing ideological or political initiatives (Linz 1975; Tate and Haynie 1993). Retaining the JCPC would not conform to this characterization because the state would not have control over the court and increase the likelihood of severing ties.

Political changes could also be led by changes in the governing coalition that ushered in new visions for the state. These changes may be made via elections, as was evident in New

Zealand in 1999 (Wilson 2000; 2010), or military coups, as occurred in Fiji in 1987 (Tran 2006) and The Gambia in 1994 (Jammeh 2011; Senghore 2010). As a result, the governing coalition may seek control over the final appellate court to minimize the likelihood of successful challenges to their policies and to keep the decision-making process completely within the control of the state. Some states, however, have not experienced changes in the political environment or the changes are not sufficient to influence the governing coalition's perception of the JCPC enough to take steps to abolish the court. This research will increase our understanding of how changes in the political environment influence the governing coalition's decision about continued reliance on the JCPC as the final appellate court. This leads to Hypothesis 3 (H3):

*H3: States that experience political changes are more likely to abolish appeals to the extraterritorial court.*

More authoritarian (less democratic) regimes also may have heightened sensitivity to the fact that the JCPC is supported and staffed in a liberal democracy and former colonial power. The perceived reliability of the JCPC in the political environment of the U.K. may be altered by the political environment of the state and the sensitivity to the courts decisions. The response to the JCPC may be a function of the heightened sensitivity cause by changes in the political environment interacting with the decisions of the court. In other words, unfavorable decisions regardless of the how many may elicit more of a reaction from the governing coalition in less democratic regimes. The decision to sever ties with the court is more likely when unfavorable decisions are handed down by the final appellate court in less democratic political environments. This leads me to Hypotheses 3.1(H3.1):



*H3.1: A less democratic political environment heightens the governing coalition's sensitivity to unfavorable decisions resulting in an increased likelihood that appeals to the extraterritorial court will be abolished if the court hands down unfavorable decisions.*

### **3.3 Competing Explanations?**

A review of the literature identifies three possible factors that help to explain why states might abolish or retain appeals to the JCPC: (a) socio-cultural forces; (b) litigant access; and (c) geography. The research focuses on the states that retain the JCPC at independence then subsequently decide to abolish the right of appeal at different times. Further, the studies are uniformly qualitative and examine a very limited number of states without defining the causal mechanisms that influence the selection of the final appellate court.

#### **(a) Socio-cultural forces**

Another explanation proposed by scholars is the incompatibility of an extraterritorial court with national ethnic customs and traditions (De 2012; Joseph 1985). Cultural and traditional differences are important in several jurisdictions where lower court cases follow customary law (Lange 2009) or native law and custom (Iweriebor 1997). These cases magnify the differences between the JCPC's administration of British common law and the administration of customary and traditional law (e.g., marriage and property rights) by the lower courts in the colonies the experienced indirect colonial rule.

#### **(b) Litigant access**

A primary constraint on litigants accessing the JCPC may be the cost of pursuing an appeal. Taylor (2005) points out that it is not difficult to start an action if one can afford an attorney. Accessing the JCPC, however, is not just a matter of being able to afford an attorney. It also usually burdens litigants with the costs of engaging attorneys in England to shepherd the

process along. Litigants incur added travel costs and inconveniences just to appear before the JCPC (Swinfen 1987), considering the distance between London and many far-flung former colonies. Costs incurred are not only for local representation, travel, and accommodation in London, but meeting U.K. visa requirements for entry into the country (O’Conner and Bilder 2012). Wilson (2000; see also Joseph 1985) concludes that some litigants’ inability to afford the cost of appearing before the JCPC effectively denies the full right of appeal. While acknowledging this added financial burden on litigants, scholars have not established a link between costs of pursuing litigation before the JCPC in London and severing ties with that court. Former British colonies that retain the JCPC after independence are all far away from London and include some of the richest (e.g., Brunei, Canada, Australia, New Zealand) and poorest (e.g., Sri Lanka, Belize, Gambia, Fiji, and India) countries in the world (International Monetary Fund 2008). It also should be noted that the cost of pursuing an appeal before the JCPC places a burden not only on private litigants, but also governments with limited resources. A review of leading economic indicators (e.g., Heston, Summers & Aten – Penn World Table) demonstrates that – with the exception of Australia, Canada, and New Zealand – all former British colonies could be generally classified as developing countries, with many classified as least-developed countries (LDCs) in terms of gross national income, weak human assets, and economic vulnerability (Nations Online Project 2015). It also suggests that even if access was costly and only a few cases went to the JCPC, states expected to benefit from the good reputation of the court. In The Bahamas, which still retains appeals, a former President of the Bar Association of The Bahamas argues in favor of the JCPC as providing assurance of a high quality and impartial legal forum for commercial disputes (cited by Rolle 2012). When New Zealand was deliberating the constitutional amendment that eventually abolished the JCPC, a similar argument was made

by the chairman of the accounting firm Deloitte Touché Tohmatsu on behalf of retaining the JCPC (cited by Story 2001).

### (c) Geography

Not unconnected to costs and credibility, the large geographic distances between the colonies and the U.K. are noted. Hogg (2006) concludes that the JCPC's shifting personnel and distance make it inappropriate as a court of final appeal. In 1943, the question arose as to whether the JCPC half a world away could adjudicate a situation in India better than a national judicial body actually based in India (De 2012). De concludes that the Indian Federal Court established itself partly by claiming a degree of authenticity based on location in India, in contrast to the placement of the JCPC in the U.K.

## **3.4 Summary**

A final appellate court is not just at the apex of the judiciary but an important part of the governing institutions of a state. The governing coalition of the state is most likely to choose the court of appeal it considers the most reliable ally in the face of legal challenges to its policies. Instead of staffing and funding their own final court at independence, some states choose to retain the right of appeal to the JCPC. This choice contrasts with the fact that the states who emerge from colonial rule take responsibility and control of all other governing institutions. The anomaly of an extraterritorial final court of appeal with no domestic institutional controls presents a unique opportunity to gain a better understanding of the effect of the court's decisions and the political environment on the state's relationship with the court. First, this research seeks to gain insight into the factors that influence the choice of court prior to independence. Second, I examine the factors that influence the state's decision to sever ties with the JCPC at some juncture after independence.

In Chapter 4, I examine factors that may influence the persistence of the relationship between states and an extraterritorial court. Using the case of the British Commonwealth and JCPC as an option for the final court of appeal at independence, I explore a critical juncture using quantitative analyses of the factors that influence the choices of the governing coalition of the state at independence. It is at this critical juncture that the new national leadership has the first opportunity to participate in development of the new constitution, which includes the choice of final appellate court. This juncture is critical because it produces a new political and institutional equilibrium in the form of an independent state, which changes its relationship with the U.K. and other states. At independence the constitution comes into effect, under which the new governing coalition pursues policies for POGG of the sovereign state.

## **4 THE FINAL APPELLATE COURTS AT INDEPENDENCE**

### **4.1 Introduction**

At midnight on August 31, 1957, the flag of The Federation of Malaysia replaced the British flag, marking the end of 61 years of British colonial rule. U.K.-educated Tunku Abdul Rahman led the new governing coalition as Prime Minister-elect (BBC News 2015). He declared that “Independence is indeed a milestone, but it is only the threshold to high endeavour – the creation of a new and sovereign State” (The Malaysian Insider 2013, para. 7). However, even though the new governing coalition asserted its independence and sovereignty, Malaysia chose to retain a significant vestige of British colonial rule in the form of the JCPC. Over the next few decades, similar scenes played out in all corners of the British Empire. For many states, the final court of appeal for the new state continued to be a colonial institution completely under the administration of the former colonial power. Despite there being no question about the

adjudicative quality and reputation of the JCPC, retaining such a powerful vestige of colonial rule seems counterintuitive. Why would sovereign states choose this extraterritorial final appellate court?

This chapter examines the factors that may influence some newly independent states to retain ties with the JCPC. I argue that a state's governing coalition will choose the final appellate court it expects to be the most reliable partner in policy-making and the prestige and reputation associated with the court. I further posit that the new governing coalition's perception of the court is influenced by the colonial experience, which influences the path of institutional change. The process of decolonization or dismantling of the British Empire spans many decades. It was a deliberate process involving the transition of authority from the colonial rulers to the local governing coalition. This process, however, did not negate the effects or historical constraints of colonial rule that shapes the governing coalition leading the colony to independence. The discussions in Chapters 2 and 3 provide insights into colonial development and the pre-independence environment which leads to independence. This exemplifies a grouping of interrelated influences that shape the perceptions of the governing coalition and ultimately the decision on the choice of the final appellate court. I therefore hypothesize that the strength of colonial rule encapsulates these interrelated influences which informs decision-making during the period of decolonization about whether the JCPC remains the final appellate court at the first critical juncture: independence.

For the purposes of this research, the end of colonial rule for the dominions is marked by the U.K.'s Westminster Act of 1931, which gave Australia, Canada, Ireland, New Zealand, and South Africa, the option to abolish appeals to the JCPC (Swinfin 1987; see also Roberts-Wray 1962). The critical juncture for all other states is the year of independence, starting with India in

1947 to the most recent, Brunei, in 1984. In this chapter, I empirically test the colonial influences on the choice of final appellate court. The level of colonial influence exerted by the U.K. is operationalized by an additive index of specific features colonial rule discussed in the next section. My findings suggest that level colonial rule experienced by the state is a significant influence on the choice to retain the JCPC at independence with a higher index score pointing to a greater likelihood that the state will retain the JCPC at independence.

This chapter proceeds in the following manner. First, I explain the selection of former colonies for the sample. Second, I present the operationalization of the dependent, explanatory, and control variables. Third, I present descriptive analyses with support of bivariate and multivariable probit regressions used to test the theory on the sample of 50 states. Finally, I present the results of the tests, analyses, and summary conclusions.

## **4.2 Unit of Analysis and Sample of States**

The unit of analysis is the former colony or the state. Fifty former British colonies make up the “risk set,” or sample, from the entire group of colonies and territories in the British Empire (see Appendix C). I analyze 50 former colonies from the year of the official start of colonial rule to the year of independence. In effect, the analysis starts the beginning of British colonial administration with St. Kitts in 1623 and ends in 2014, which would be the last year in this analysis that a colony could gain independence. This spans a total of 391 years. For each, observations are made in the year the colony became an independent state. Importantly, there is the accessibility of fairly high quality data from primary and secondary sources (Gerring et al 2011).

The diversity of the British Empire poses a potential problem for unit homogeneity. This cross-regional comparison of analytically distinct units may cause inaccuracies in the results

(Lange 2009). To increase unit homogeneity, I am partially guided by Lange (2009), who excludes the following categories of colonies: (a) hybrids that merged into other non-British territories; (b) internal colonies or those adjacent territories (for example Northern Ireland) conquered by the English; (c) British Mandates in the Middle East; and (d) other Middle East territories governed by the British for only a very short period of time. Unlike Lange who examined economic outcomes and considered the economic development of Canada, Australia, and New Zealand as distinct from other British colonies, I choose to include, who each had the option to abolish the JCPC under the Westminster Act of 1931. This is appropriate for this research because those states faced the same critical juncture in 1931 as other states in the sample faced at independence. All had the option to abolish ties with the JCPC and establish a domestic final appellate court. The assumption is that for the purposes of this analysis the colonial influences and historical factors at work are similar enough to include them in the risk set. States included, therefore, are only those overseas colonies recognized as part of the British Empire by an act of the British parliament. Table 4.1 presents the independent states included in the sample.

**Table 4.1 The 50 States in the Sample Risk Set**

<b>Sample Risk Set of 50 States</b>				
Antigua & Barbuda	Fiji	Malawi	Ireland, Rep. of	Sri Lanka
Australia	Gambia	Malaysia	Samoa	Swaziland
Bahamas	Ghana	Maldives	Seychelles	Tanzania & Zanzibar
Barbados	Grenada	Malta	Sierra Leone	Tuvalu
Belize	Guyana	Mauritius	Singapore	Tonga
Botswana	India	Myanmar	Solomon Islands	Trinidad & Tobago
Brunei	Jamaica	Nauru	South Africa	Uganda
Canada	Kenya	New Zealand	Sri Lanka	Vanuatu
Cyprus	Kiribati	Nigeria	St. Kitts/Nevis	Zambia
Dominica	Lesotho	Papua New Guinea	St. Vincent & the Grenadines	Zimbabwe

### 4.3 Exploring the Decision to Retain the JCPC at Independence

As discussed in Chapter 3, the predominant consideration for the governing coalition is whether the final appellate court is likely to uphold their policies when challenged in court. The loosening of colonial rule starting in the 1030's, results in a nationalism that results in self-rule during the period leading up independence (Furedi 1994). The governing coalitions emerge from elections contested by political parties that formed out of the nationalist movements during this period. This is observed in all states and clearly exemplified in Belize where The Peoples United Party (PUP) defeated the National Independence Party (NIP) in four elections leading up to independence in 1981. The leader of the PUP, Honorable George Cadle Price, became the first prime minister. I theorize that the new governing coalition at independence desires a final appellate court that will support their policies and contribute legitimacy with the reputation and prestige of the court as they take responsibility for the POGG of the new state. I argue that perception of the JCPC as a reliable partner and legitimizing factor is influenced by the colonial rule experienced by the state. The decision at the critical juncture of independence is whether to retain appeals to the JCPC or establish a domestic final appellate court. I posit that this decision is influenced by the colonial experience of the state, which influences how strong the ties are to the U.K., which then influences the decision.

To test my central hypotheses, therefore, I estimate a multivariable probit model<sup>1</sup>. The Model employs the additive variable (Influence of the Colonial Power) with four control variables. In the next sections I explicate the dependent variable and the independent variables.

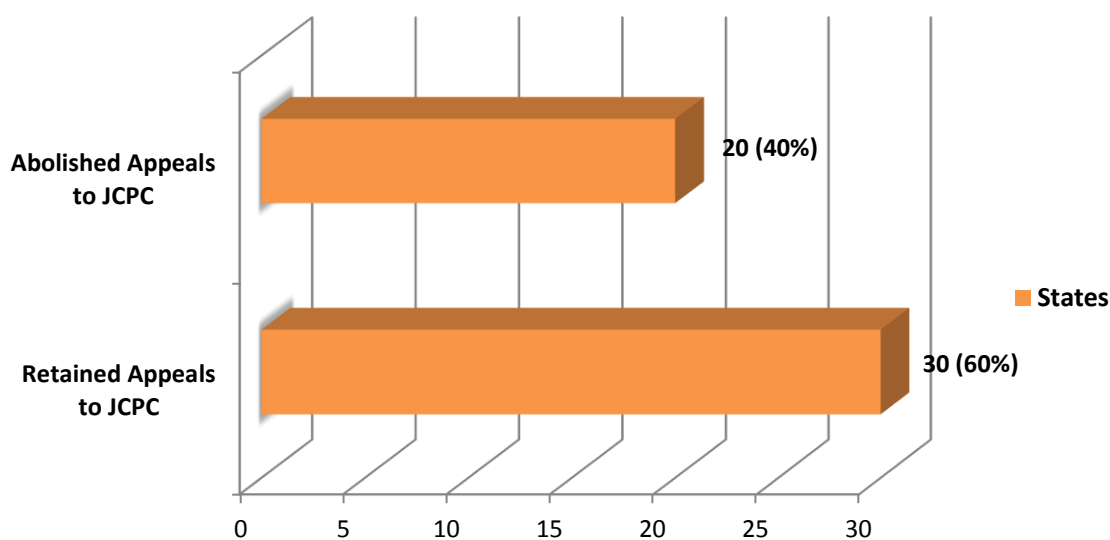
The dependent binary variable for both models is whether the colony retains or abolishes appeals to the JCPC. In reality, the right of appeal to the JCPC is either explicitly provided for in

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<sup>1</sup> The robustness is limited by the size of the N (n= 50). The results are augmented with the descriptive analyses.



the constitution of the state at independence or there is no such provision. In other words, did the “event” occur at independence? The binary variable is appropriate as there is no nuanced variation to be captured. If the JCPC is retained at independence the variable is coded ‘0’ and if abolished it is coded ‘1’. Of the 50 states in the sample risk set, 30 (60 percent) of the states retain the JCPC at independence while 20 (40 percent) of the states abolish appeals to the JCPC. Figure 4.1 separates the risk set into those who retain and those states that abolish the JCPC. (See Appendix D for a complete list of states in each group)



**Figure 4.1 States Retained (30) and Abolished Appeals (20) to the JCPC at Independence**

To examine the decision of the states about whether to retain or abolish the JCPC, I create an additive index variable to capture the effects of colonial rule. The stronger the colonial ties of the newly-independent state to its colonial past and the influence of the U.K., the increased likelihood that the JCPC will be retained at independence. The goal is to capture more effectively the broad concept of colonial rule and its influence on the new governing coalition, which may not be captured by any one single proxy. An additive index is most appropriate when

individual factors do not measure the effect of the entire concept (Ethridge 2002). Based on the additive model in Corley, Steigerwalt, and Ward (2013)<sup>2</sup>, my additive index is scaled zero to four with states that experience the weakest colonial influence at zero and those with the highest scoring four (0-Low; 1-Med-low; 2-Medium; 3-Med-high; 4-High). A higher score reflects a great level of colonial influence on the governing coalitions' perception of the JCPC's reliability and advantages resulting in closer ties to the U.K. This may provide some insight into why the state may accede to an extraterritorial court. The additive indexed variable is comprised of the four discrete factors: (1) Length of British colonial rule, (2) Type of colonial rule, (3) Tertiary education of leader at independence, and (4) Whether or not the state had a law school. I discuss each in this order.

(1) The length of British colonial rule, determined by how long the state experienced formal British colonial rule before independence. This section explores the distribution and central tendency of this factor and shows the correlation between length of colonial rule and the decision about the status of the JCPC as part of the colonial influence. British occupation of a specific territory may have started much earlier. For example, the East India Company (also known as the English East India Company) operated in parts of India starting as early as the 1620s (Encyclopedia Britannica 2015), but India only became a formal British colony in 1858 (CiteHR n.d.). Another example is Belize where British settlers started commercial logging as early as the 1650s (Belize.com 2015; Mwakikagile 2014), but the settlement did not become a colony until 1840 (Borland 1975; see also Mwakikagile 2014). The establishment of an official colony, therefore, signals the inclusion of a specific territory as part of the British Empire. This provides a definitive starting point for calculating the number of years the state experienced

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<sup>2</sup> Additive index utilized to measure “the dynamic legal forces on judicial decision” using five discrete variables to capture different aspects of each case that indicate legal certainty (Corley, Steigerwalt, and Ward, 2013, 69).

British colonial rule (see Appendix E). The total number of years for each colony represents the duration of colonial influence on the local institutional development and is a proxy for how deeply embedded the institution is in society (Grier 1999; Lange 2004). The institutions are more intertwined in the fabric of the society. I expect, therefore, that the influence of colonial rule grows stronger over time making more likely that retaining the JCPC would not be viewed as a threat to the new governing coalition at independence who are more likely to view the link with the U.K. institution as adding credibility to the new state.

Periods of official British rule for each colony varied from as few as 16 years in Myanmar (previously governed as part of the Indian colony) to as many as 360 years in St. Kitts and Nevis. The year of independence and the period of colonial rule from colony to independence for each state in the sample are presented in Figure 3.2. The length of British colonial rule ranges from 15 to 360 years, with an average length of 120.9 years ( $SD = 79.61$ ). Based on the length of colonial rule for each state, I also calculate the average length of colonial rule for the states in each group. Figure 4.3 displays the 50 states disaggregated into four categories with the average number of years of colonial rule. Twenty (38 percent) states with an average of 70 years of colonial rule abolished the JCPC at independence. Seventeen (34 percent) states averaging 106 years of colonial rule retained the JCPC at independence, but abolished appeals at some time after. As of January 1, 2015, 13 (26 percent) states retain appeals to the JCPC. Those states averaged 214 years of colonial rule.

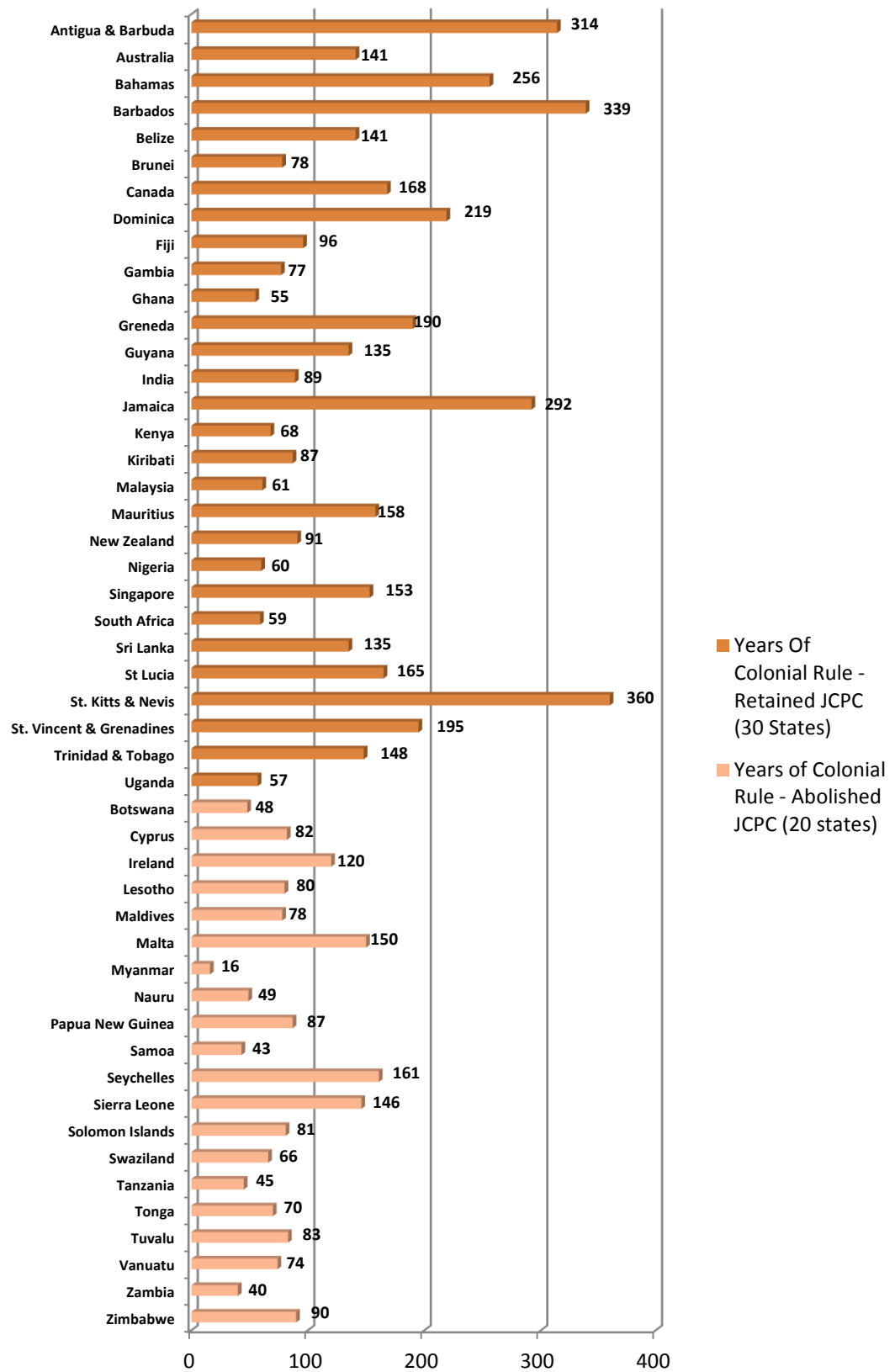


Figure 4.2 Length of British Colonial Rule in Each State

The number of years the state experienced colonial rule is coded as “1” if the state was under colonial rule above and “0” if it was below the sample median of 89 years. When the right of appeal to the JCPC is not abolished, average length of British colonial rule is 148.27 ( $SD = 88.34$ ). When abolished, the average length of British colonial rule is 79.95 ( $SD = 38.55$ ). These findings suggest that the less time a state spends under British colonial rule, the more likely it is to sever ties with the JCPC at independence. There is a central tendency of states below the sample median having experienced colonial ties for a shorter period would have weaker ties with the U.K., and are therefore less likely to retain JCPC appeals. I expect longer periods of colonial rule to have the opposite effect. Over time the governing elite will become more attached to the prestige and reputation of the JCPC increasing the likelihood that the state will retain the JCPC.

(2) The type of colonial rule – direct or indirect colonial rule. This section explores the distribution and the central tendency of this factor. It shows the correlation between the type of colonial rule and the decision about the status of the JCPC as part of the colonial influence. Direct rule is defined as colonial institutions permeating the colony to the exclusion of customary and traditional institutions, with locals only participating at the lower levels of the colonial administration. Indirect rule is defined as having extensive governance of the colony entrusted to the locals under supervision of British governors, with both indigenous and colonial institutions functioning in parallel during the colonial period (Lange 2004; 2009).

**Table 4.2 Average Numbers of Years of Colonial Rule and the Status of Right of Appeal to the JCPC in 50 States**

	Abolished JCPC Appeals at Independence	Retained Ties for a Period before Abolishing JCPC	Retained JCPC Appeals- January 1, 2015
Number of States	20	17	13
Average Years of Colonial Rule	70	106	214

As Iweriebo (2011) points out, the system of courts using native and customary law were established as a pillar of indirect rule. Since the focus is on legal institutions, the indirect-direct rule variable is operationalized using the percentage of total court cases following customary law (Lange 2009). Adopting Lange's definition, the indirect-direct rule is not dichotomous but on a spectrum. The percentage of total court cases adjudicated using customary or traditional law is a proxy for the extent to which the colony experienced the imposition of colonial judicial institutions concurrently with customary and tradition institutions. Table 4.3 displays the percentage of cases adjudicated under traditional and customary law at the time of independence.

**Table 4.3 Percentages of Cases Adjudicated Under Traditional and Customary Law**

<b>Customary Law Cases* = 0% (23 States)</b>			
Antigua & Barbuda	Canada	Jamaica	Sri Lanka
Australia	Cyprus	Malta	St. Kitts & Nevis
Bahamas	Dominica	Mauritius	St. Lucia
Barbados	Grenada	New Zealand	St. Vincent/ Grenadines
Belize	Guyana	Seychelles	Trinidad & Tobago
Brunei	Ireland, Rep of	Singapore	
<b>Customary Law Cases* 1% &gt; 50% (7 States)</b>			
Botswana (43%)	India (49%)	South Africa (39%)	Zimbabwe (40%)
Gambia (27%)	Myanmar (49%)	Swaziland (49%)	
<b>Customary Law cases* &gt; 100% (20 States)</b>			
Fiji (55%)	Malawi (82%)	Papua New Guinea (55%)	Tonga (55%)
Ghana (65%)	Malaysia (60%)	Samoa (55%)	Tuvalu (55%)**
Kenya (59%)	Maldives (55%)	Sierra Leone (81%)	Uganda (80%)
Kiribati (55%)	Nauru (55%)	Solomon Islands (52%)	Vanuatu (55%)***
Lesotho (50%)	Nigeria (93%)	Tanzania (45%)	Zambia (60%)

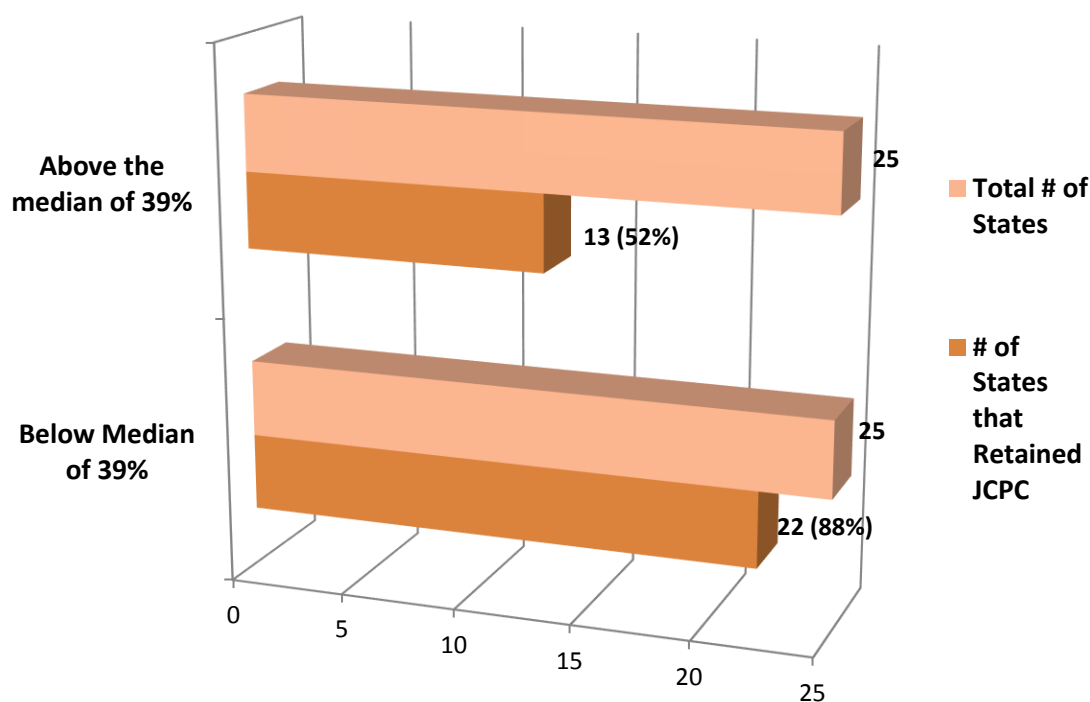
\*Lange, 2009

\*\*Use customary law in village courts for indigenous peoples. Estimates based on the research by Ottley 2002; Brown 1999; Patterson 1995; Zorn 1994.

\*\*\*Buddhist law: Estimate based on the research of Nyo Nyo 2005; Gutter 2001; Kyaw 1994.

This is operationalized by the percentage of total court cases in each colony following customary or traditional law (Lange 2009). I use a continuous variable starting at 0 for colonies where no cases were adjudicated using customary/traditional law to 100 percent if all cases were adjudicated using customary/traditional law of the colony. This variable ranges from 0 to 93 percent, with a median of 39 percent ( $SD = 30$  percent). For example, in Canada, The Bahamas, and New Zealand no cases were adjudicated using customary or traditional law, indicating that only colonial institutions made up the governing structures. In Nigeria colonial and indigenous institutions operated contemporaneously with 93 percent of the cases adjudicated using customary or traditional law. In other colonies such as India and Botswana, the use of customary or traditional law is closer to 50 percent. Figure 4.3 presents the number of states above and below the average of 39 percent that retained the JCPC; the number of states below ten percent that retained the JCPC; the number of states between 10 and 50 percent that retain the JCPC; and the number of states where more than 50 percent of the cases are adjudicated using customary and traditional law retain the JCPC.

In 25 (50 percent) of the 50 states, the percentage of total court cases following customary or traditional law is above the average of 32 percent and thirteen (52 percent) retain appeals to the JCPC at independence. Of the 25 states below the average of 32 percent, 18 states (88 percent) retain appeals to the JCPC at independence. The type of colonial rule operationalized by the percentage of cases adjudicated using customary/traditional law. I coded “1” if the number of cases adjudicated by customary/traditional law is below and “0” if it is above the sample median of 39 percent. There is a central tendency of states that experienced higher levels of indirect colonial rule above the median of 39 percent to replace the JCPC at independence. When the state decides to retain the JCPC, the average percentage of total court



**Figure 4.3 Numbers and Percentages of States Above and Below the Median of 39 Percent that Retained/Abolished the JCPC**

cases following customary law is 0.23 ( $SD = 0.30$ ). When the state decides to abolish appeals to the JCPC, the average percentage of total court cases following customary law is 0.46 ( $SD = 0.26$ ). This shows that the average percentage of total court cases following customary law is significantly higher in the states that abolish appeals to the JCPC. These findings suggest that the higher the percentage of cases adjudicated under customary or traditional law, the more likely it is that the state will abolish appeals to the JCPC. States above the sample average indicate weaker ties with the U.K. as the presence of colonial institutions would be less pervasive in the population and, therefore, less likely to retain JCPC. I expect the opposite effect if the percentage is below the sample average.

(3) As the colony moves toward independence and as part of the decolonization process, the U.K. grants colonies internal self-government under the leadership of the new governing coalition. This section explores the distribution and central tendency of this factor and shows the



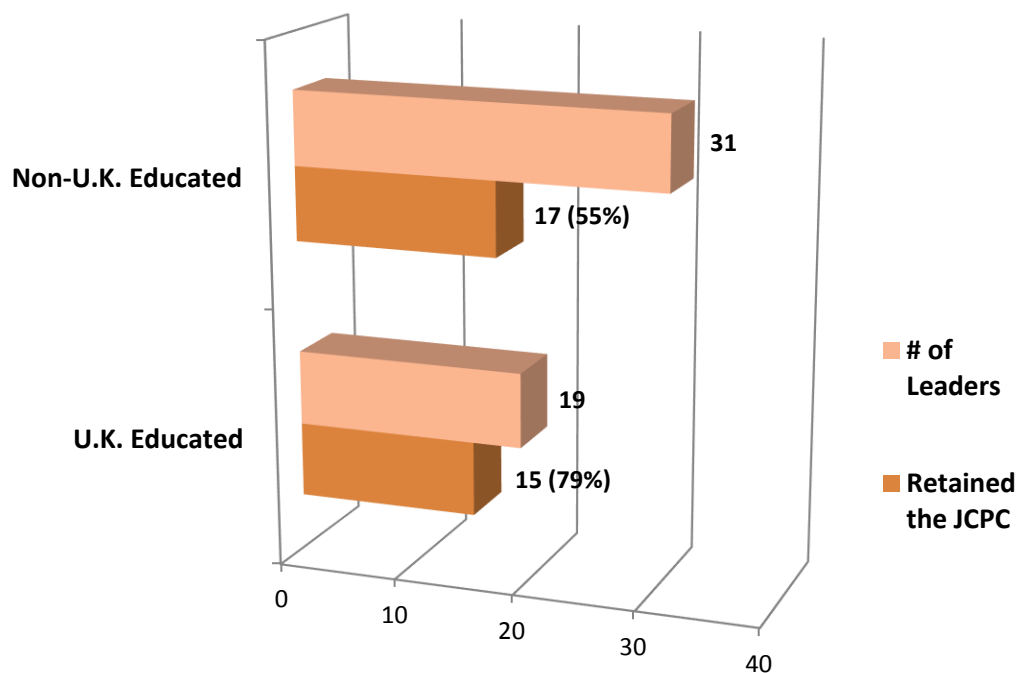
correlation between where the leader received tertiary education and the decision about the status of the JCPC as part of the colonial influence. The leader who eventually becomes prime minister at independence is used as a proxy for an affinity of the governing coalition for British institutions by those leaders educated in the U.K. This variable, therefore, represents whether or not the prime minister of each former colony at independence was educated in the U.K. This control variable is dichotomous for whether the leaders received tertiary or professional education in the U.K. (1) or not (0). Table 4.4 presents whether the first prime minister of each country in the sample received tertiary or professional education in the U.K. Appendix F displays a complete list of prime ministers, tertiary/professional educational background and sources.

**Table 4.4 U.K. Educated and Non-U.K. Educated Prime Ministers at Independence**  
**U.K. Educated Prime Ministers at Independence (19 States)**

Bahamas	Malaysia	St. Lucia	
Barbados	Mauritius	St. Vincent & the Grenadines	
Gambia	Nigeria	Tanzania/ Zanzibar	
Guyana	Seychelles	Trinidad/ Tobago	
India	Sierra Leone		
Jamaica	Singapore		
<b>Non-U.K. Educated Prime Ministers at Independence (31 States)</b>			
Antigua & Barbuda	Grenada	Myanmar	St. Kitts & Nevis
Australia	Ireland, Rep of	Nauru	Swaziland
Belize	Kenya	New Zealand	Tuvalu
Canada	Kiribati	Papua New Guinea	Tonga
Cyprus	Lesotho	Samoa	Uganda
Dominica	Malawi	Solomon Islands	Vanuatu
Fiji	Maldives	South Africa	Zambia
Ghana	Malta	Sri Lanka	

Figure 4.4 displays the numbers of prime ministers who received a tertiary education in the U.K. and the number of states that retained the JCPC. Nineteen states had initial prime ministers who were educated in the U.K. (38 percent). Of those 19 states, 15 (79 percent) retain appeals to the

JCPC at independence. Of the remaining 31 states with prime ministers who were not educated in the U.K., 55 percent (N=17) retain appeals to the JCPC. The difference (24 percentage points) indicates the propensity for those leaders educated in the U.K. to be more inclined to champion the retention of appeals to the JCPC. Further, there is a central tendency of states where the leader was educated in the U.K. to retain the JCPC at independence. A U.K. education may increase the willingness of a new governing coalition to accept an extraterritorial court as a final court of appeal. Returning to lead the colony to independence, these leaders appear more likely to influence the governing coalition to retain appeals to the JCPC.



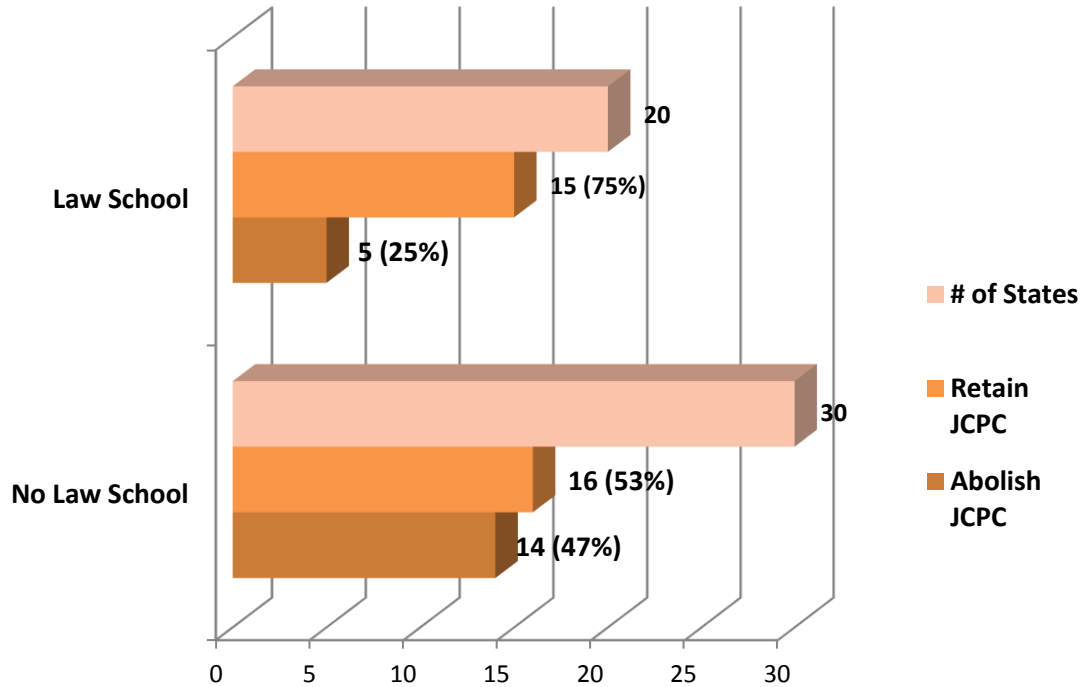
**Figure 4.4 Numbers of Prime Ministers Not Educated, Educated in U.K. and the Numbers of States that Retained the JCPC**

(4)

Domestic law schools play an important role in the development and practice of law, resulting in the local jurisprudence. Lawyers are also considered to be a part of the local elite and influence attitudes towards the colonial institutions (Kelly 1994). In discussing the British colonial

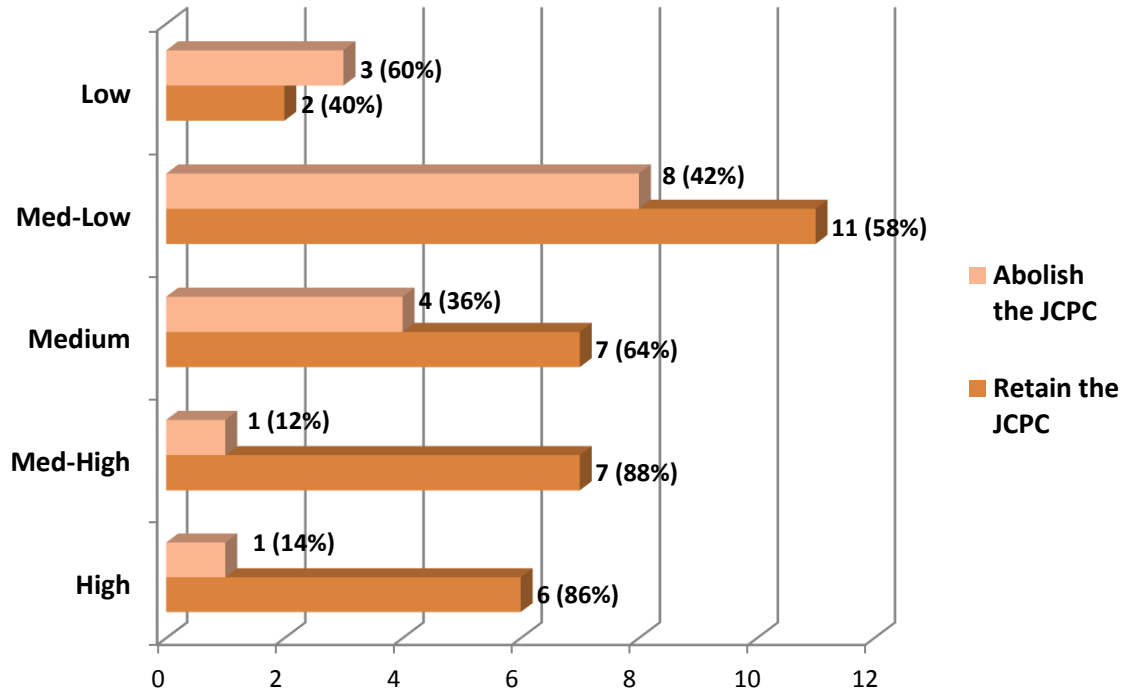
attitudes towards training lawyers, Kelly states of those with lawyers who “qualified in English law, that usually sealed the fate of the Privy Council jurisdiction” (107). The absence of a law school would indicate closer ties with the U.K., making it more likely that the state would retain JCPC appeals. This has two aspects. First, if a law school exists in the state prior to independence it is likely to increase the number of local lawyers. This would support a larger pool from which judges could be selected for service on the bench. Second, locally trained lawyers may feel less affinity for British institutions than those trained in the U.K. Conversely, the absence of law schools makes the colony more reliant on the U.K. and contributes to the strength of the colonial influence. While Kelly is only referring to lawyers educated in the U.K., it may provide some broader support for the result that leaders educated in the U.K. are more likely to want to move away from colonial institutions at independence.

If the state had at least one law school at independence, it was coded as “1” and as “0” if no law school existed. Of the 50 states in the sample, 20 had at least one law school at independence. Law schools contribute to the pool of qualified people for appointment to the bench. Due to distance and costs, relying of law school outside the colony restricts access and limits the number of local people able to attend law school. The presence of a law school, therefore, contributes to the local judiciary and may decrease a perceived need to rely on the JCPC as adding to the credibility of the judiciary. Figure 4.5 displays a summary of the states with regard to the presence/absence of at least one law school and whether the state retained or abolished the JCPC. There is, however, no central tendency of states with law schools to abolish ties with the JCPC.



**Figure 4.5 Distribution of the 50 States Based on the Presence of at Least One Law School and whether or not the JCPC was Retained**

The indexing of these proxies for colonial rule provides me with a single score for each state in the sample. Of those states that experience medium-high (8 states) or high levels (7 states) of colonial influence, 88 percent and 86 percent, respectively, retain the JCPC. Of those states the experience medium (11 states), medium-low (19 states) and low (5 states), 64 percent, 58 percent, and 40 percent retain the JCPC at independence. This indicates the stronger tendency of states at and above the medium level of colonial influence to retain the JCPC. Figure 4.6 displays the results, showing the percentage of states that retain the JCPC at independence at each level of the scale of the additive index.



**Figure 4.6 Percentages and Numbers of States that Retain/Abolish the JCPC at Independence at Each Level of the Scale of the Additive Index**

I estimate a bivariate probit model using the additive indexed variable - *Colonial Influence*. The dependent variable is whether or not the state abolished the JCPC at independence, and the independent variable is the level of colonial influence at independence. The results of a bivariate probit regression displayed in Table 4.5 show that the strength of the colonial influence is significantly ( $p\text{-value} = 0.009$ ) associated with the choice to retain appeals to the JCPC. In other words, this provides further support for my theory that the stronger the colonial influence, the more likely the governing coalition will view the JCPC as a reliable partner in policy-making. Further, the governing coalition view of the prestige and reputation of the JCPC may be enhanced by the stronger colonial influence and increase the likelihood of retaining right of appeal to the JCPC at independence.

**Table 4.5 Bivariate Probit Regression Results of Additive Indexed Variables on the Decision to Retain the JCPC**

<b>Explanatory Variable</b>		<b>p-value</b>
Influence of the Colonial Power (U.K.)	.44176 (.1681)	0.009
<i>Constant</i>	.5215 (.3395)	
<i>Pseudo R-squared</i>	0.1134	
<i>Observations</i>	50	

The first control variable is access to the JCPC. The litigants from disparate regions of the world bear the cost of appearing in a court located in the U.K. These costs may impede both private litigants and the state from accessing the JCPC. The costs may also influence the decision to establish a national final appellate court in an effort to reduce costs and increase access. Access is operationalized using the Gross Domestic Product (GDP) per capita of each colony in the year of independence. The estimate of the GDP per capita for each colony is in U.S. dollars and is calculated in the year of independence (The Maddison-Project 2013). The distribution of GDP per capita of the colonies at independence varies widely, from as low as U.S. \$625.00 in Myanmar to U.S. \$37,806.00 in Brunei at the upper limit. The approach provides a basis to compare the advantage the more prosperous states may have over those less prosperous. Those less prosperous states may view the cost of accessing the JCPC as a barrier that in effect denies access to the highest court. Table 4.6 displays the GDP per capita groups at the time of independence.

**Table 4.6 GCP Per Capita Groups for States in the Year of Independence**


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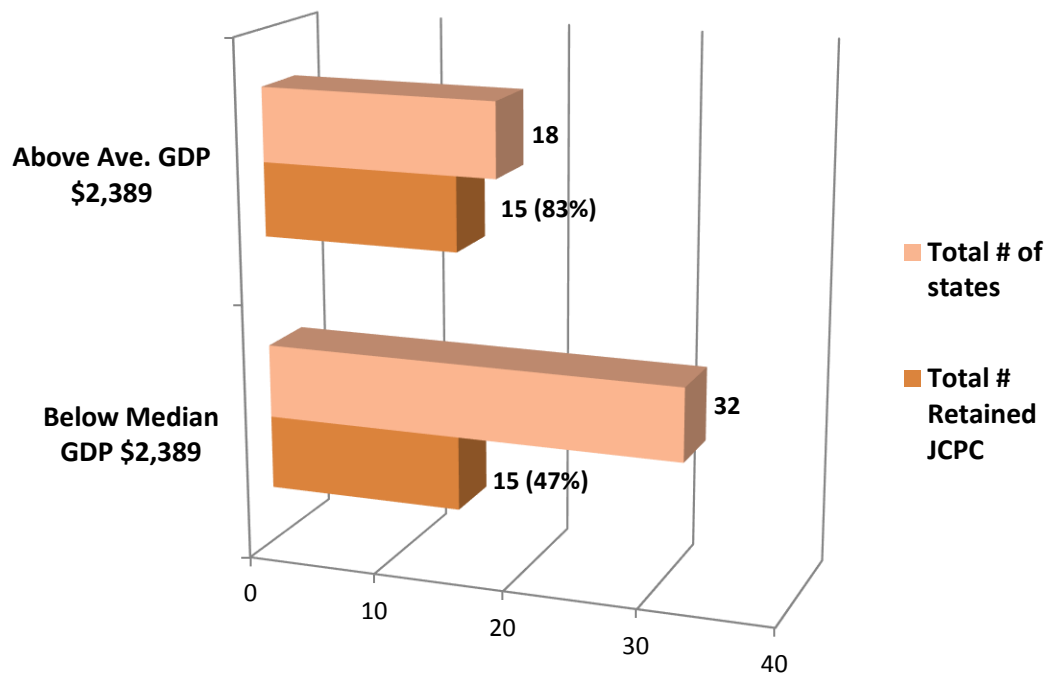
<b>*GDP per Capita &lt; US\$1000 (7 States)</b>			
Botswana	Lesotho	Myanmar	Tanzania/Zanzibar
Guyana	Malawi	Samoa	
<b>*GDP per Capita US\$1,000 &gt; US\$5,000 (32 States)</b>			
Antigua & Barbuda	Ireland, Rep. of	Nigeria	Solomon Islands
Belize	Jamaica	South Africa	Swaziland
Dominica	Kenya	St. Lucia	Tonga
Fiji	Kiribati	Sri Lanka	Tuvalu
Gambia	Malaysia	St. Vincent/ Grenadines	Uganda
Ghana	Maldives	Papua New Guinea	Vanuatu
Grenada	Malta	Sierra Leone	Zambia
India	Nauru	Singapore	Zimbabwe
<b>*GDP per Capita \$5,000 &gt; US\$10,000 (8 States)</b>			
Australia	Canada	Mauritius	St. Kitts/ Nevis
Barbados	Cyprus	New Zealand	Seychelles
<b>*GDP per Capita \$10,000 &gt; US\$20,000 (1 State)</b>			
Trinidad/ Tobago			
<b>*GDP per Capita \$20,000 &gt; US\$30,000 (1 State)</b>			
Bahamas			
<b>*GDP per Capita \$30,000 &gt; US\$40,000 (1 State)</b>			
Brunei			

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\* GDP per capita is calculated in 2012 U.S. dollars for the year of independence

The average GDP per capita for each state at independence is U.S. \$4,197.90 ( $SD = 6042.8$ ) and the median is U.S. \$2,389. This variable controls for any comparative advantage more prosperous states may have over those less prosperous states in bearing the cost of accessing the JCPC. The cost of litigant access from jurisdiction around the world was suggested as an impediment and motivation to abolish appeals to that court (Wilson 2000; Swinfen 1987; Joseph 1985). Figure 4.7 displays the 18 states with GDP per capita above the sample median of U.S. \$2,389) with 15 states (83 percent) that retain the JCPC at independence. Of the 32 states below the median GDP per capita, 15 states (47 percent) retain the JCPC at independence. The

descriptive analysis shows that states above the sample average have a stronger tendency to retain the JCPC than those states below the sample average. This may indicate some relationship between national wealth and retaining the JCPC. The states may associate retaining the JCPC with some continuing economic benefit to be gain from the reputation and prestige of having the JCPC as the final appellate court.



**Figure 4.7 Numbers of States Above and Below the Median GDP Per Capita that Retain the JCPC**

I also control for whether socio-cultural differences reflected in the colonial society influence. A state with a larger British settler population may be more likely to identify with and share socio-cultural ties with the members of the JCPC and the government of the colonial power. By virtue of the preferences afforded to British settlers in leadership positions in the colonial administration, it is assumed that they participate in and exert influence on the decision-making process with regard to drafting of the constitution leading up to independence. This influence would be commensurate with their numbers in the colony and is operationalized as the



percentage of the colonial population represented by British settlers at the time of independence (Barrett 1982). This is the proxy for the strength socio-cultural links between the elite and the perpetuation of colonial institutions.

As seen in Table 4.7, the British settler population comprises an average of six percent ( $SD = 21.5$ ) of the colonies at independence. The median is 0.06. Only five states (10 percent) have settler populations above the average of the median, and all retain the JCPC at independence. Twenty-three (51 percent) of the remaining 45 states with a settler population below the average also retain the JCPC at independence.

**Table 4.7 Percentages Colonial Population Groups Represented by Settlers from the U.K.**

**Settler Pop: <1 percent (44 States)**

Papua New Guinea	Belize	Malaysia	Ireland, Rep of
Sierra Leone	Dominica	Maldives	St. Kitts & Nevis
Tuvalu	Gambia	Malta	St. Lucia
Uganda	India	Myanmar	St. Vincent & the Grenadines
Vanuatu	Grenada	Nigeria	Guyana
Ghana	Jamaica	Singapore	Brunei
Lesotho	Solomon Islands	Sri Lanka	Swaziland
Malawi	Cyprus	Tonga	Zimbabwe
Trinidad & Tobago	Seychelles	Botswana	Mauritius
Kenya	Fiji	Samoa	Nauru
Zambia	Kiribati	Tanzania/ Zanzibar	Antigua & Barbuda

**Settler Pop: >5 percent (1 State)**

Barbados

**Settler Pop: >10 percent (1 State)**

South Africa

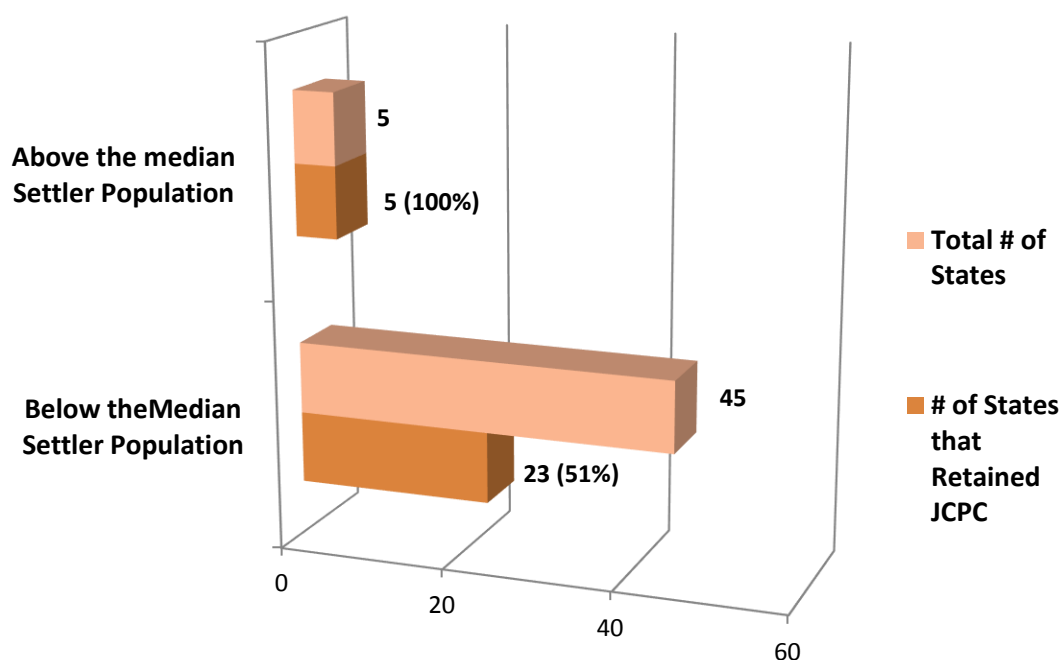
**Settler Pop: >15 percent (1 State)**

Bahamas, The

**Settler Pop: >80 percent (3 States)**

Australia	Canada	New Zealand
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The vast majority of states with settler populations below the average either abolish the JCPC at independence or soon thereafter. There are exceptions, such as Malaysia, which retained the JCPC for 27 years. Also, of the 13 Caribbean states that were former British colonies and have neither significant indigenous or settler populations, 11 (85 percent) retain appeals to the JCPC as of January 1, 2015. This may indicate that there is some influence in states with much higher settler populations, but that other factors are more significant among those states below the average settler population of six percent. Figure 4.8 displays the number of states above and below the average settler population percentage that retained the JCPC at independence.



**Figure 4.8 Numbers of States Above and Below the Median Settler Population that Retained the JCPC**

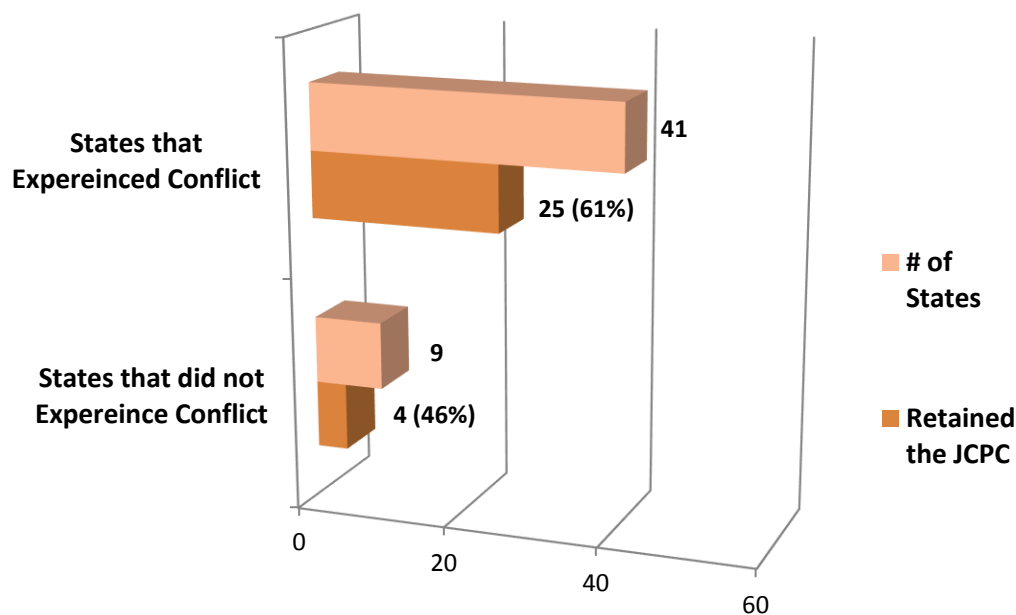
I additionally control for whether the colony experienced armed conflict between colonial authorities and pro-independence movements or political parties prior to being granted independence by the U.K. Associating the JCPC with the colonial rule they resisted, new governing coalitions may be leery of having their policies challenged before a final appellate

court in the capital city of the former colonial power. Pre-independence conflict over policy preferences on the issues of governance and independence, therefore, may lead the post-independence governing coalition to reject the JCPC as a colonial institution and as being not in keeping with state sovereignty. Banks (2013) estimates the level of conflict using weighted conflict measures: assassinations, strikes, guerrilla warfare, government crises, purges, riots, revolutions, and anti-government demonstrations. Appendix L displays the detailed definitions of domestic conflict (DataBanks 2015b). For the purposes of this research, the Banks scores are represented in a binary form (1/0). Any positive Banks scores for conflict are categorized as “1” (Yes), and the absence of pre-independence conflict are categorized as “0” (No). Nine colonies experienced conflict during the five years prior to independence. Table 4.8 presents whether the colony experienced conflict with the colonial authorities leading up to independence.

**Table 4.8 Pre-independence Conflicts (Banks 2012)**

<b>States that did not Experience Pre-independence Conflict (41 States)</b>			
Antigua & Barbuda	Ghana	Myanmar	Tanzania & Zanzibar
Australia	Grenada	Nauru	Tonga
Bahamas	Guyana	New Zealand	Trinidad & Tobago
Barbados	Jamaica	Samoa	Uganda
Belize	Kiribati	Singapore	Papua New Guinea
Brunei	Lesotho	Solomon Islands	Sierra Leone
Canada	Malawi	South Africa	St. Vincent & the Grenadines
Dominica	Maldives	Sri Lanka	Swaziland
Fiji	Malta	St. Kitts & Nevis	Tuvalu
Gambia	Mauritius	St. Lucia	Vanuatu
<b>States that Experienced Pre- independence Conflict (9 States)</b>			
Botswana	Kenya	Myanmar	Zimbabwe
Cyprus	Ireland, Rep of	Nigeria	
India	Malaysia	Zambia	

Conflict with colonial authorities and institutions prior to independence may contribute to the emerging governing coalition's disenchantment with such institutions, including the JCPC. This may contribute to the apparent propensity of those colonies that experience pre-independence conflict to abolish appeals to that court at independence. Nationalist conflicts occurred in the time leading up to Nigerian independence in 1960 and Kenyan independence in 1963 (Global Literacy Project n.d.), as well as Indian independence in 1948 (Chandra, Mukherjee, Mukherjee, Panikkar and Mahajan 2011) and Guyanese independence in 1966 (Intervention and Exploitation n.d.). Figure 4.9 displays the number of states that experienced pre-independence conflict and the number that retained the JCPC in each group. The percentage of colonies experiencing armed conflict (Banks 2013) between colonial authorities and pro-independence movements or political parties prior to being granted independence is 18 percent ( $N = 9$ ). Four of the nine states (46 percent) that experienced pre-independence conflict retained the JCPC at independence. Of the 41 states that did not experience conflict, 25 states (61 percent) retained the JCPC at independence. When the state decides to retain the JCPC, the number of pre-independence conflicts is 4 (13.33%). When the state decides to abolish appeals to the JCPC, the number of pre-independence conflicts is 5 (25%). This shows that the number of pre-independence conflicts is not significantly higher in the states that abolish appeals to the JCPC. This is in line with the descriptive analysis of the correlation with the decision to abolish the JCPC showing weak central tendency in either the group of states that experienced conflicts to retain the JCPC or vice versa. These preliminary results suggest that pre-independence conflict does not indicate a very strong tendency to either retain or replace the JCPC. It suggests that pre-independence conflict does not influence the perception of the any benefit accrued of acceding to the JPC considering the prestige and reputation that it may afford the new state.

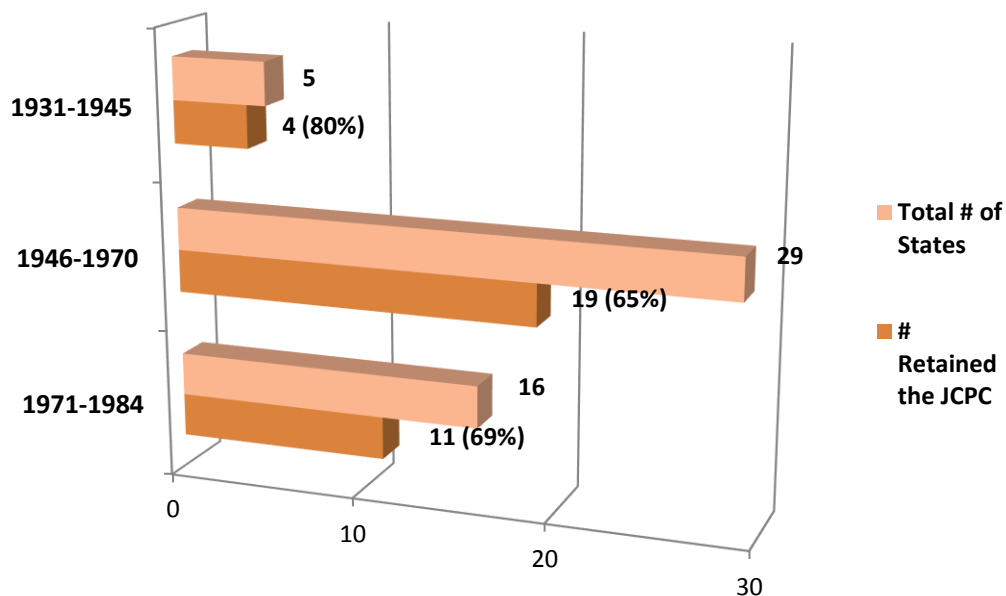


**Figure 4.9 Numbers of States that Experienced Pre-Independence Conflict and States that Retained the JCPC**

Finally, I control for time frame or period during which the state gained independence.

The states gained independence during different periods in history since 1931. For example, the influences on state that gained independence between 1931 (Westminster Act) and 1970, (coded as “1”). This could be considered the primary period during which all European colonial powers were engaged in the decolonization process for the vast majority of the colonies in the empires. During this period, the attraction of an association with the European power may have been different as the decline in the power of the European states on the world stage (Kwon 2010) may make affiliation less attractive and beneficial. With the U.K. no longer a military and economic world power, association through membership in the British Commonwealth was probably sufficient to buttress their international credibility. The states gaining independence from 1971 to 1984 (coded as “2”) would have been received with much less international fanfare, as the states tended to be smaller. Though, the second period coincided with the process of general European decolonization that followed World War II (Fieldhouse 2011) with a plethora of new states

emerge onto the world stage (Springhall 2001) the attraction of the JCPC continued through the third period which ended with Brunei gaining independence in 1984. Further, becoming a sovereign state was much more the norm, and the process routine, with the exception being Zimbabwe in 1980. In 1984, Brunei was the last colony to gain independence and retain the JCPC. Figure 4.10 displays an analysis of the 50 states in the following three periods and identifies a number of states that retained the JCPC at independence: 1947 to 1970, during which 19 of the 234 new states (55 percent) retained the JCPC; and 1971 to 1984, during which 11 of the 16 new states (68 percent) retained the JCPC. During the first period (1931-1946) the tendency among the five states is to retain the JCPC. However, the subsequent periods do not reflect that tendency. In the 45 remaining states, just over half retain the JCPC. These analyses reveal marked tendencies within the period during which the state gains independence and speaks to the influence of the perceived benefit of a perpetuating a significant link with the U.K. through acceding to the JCPC at independence.



**Figure 4.10 The 50 States in the Three Periods with the Number of States that Retained the JCPC at Independence**

Acknowledging the limitations imposed by the relatively small number of states in the sample ( $n=50$ ), I estimate a multivariable probit model with the additive variable (*the length of colonial rule + type of colonial rule + the presence of a law school + whether the first prime minister was educated in the U.K.*) as a proxy for the influence of colonial rule and the five control variables. Table 4.9 presents the results of the multivariable probit model followed by a discussion and analysis of the model. The model was checked for multicollinearity of the predicted variables by observing the variance inflation factor (VIF), Tolerance ( $1 - R^2$ ), Eigenvalues, and Condition Index (CI) for each predictor in the model. If VIF values are large (greater than 10), Tolerance values are small (less than 0.1), Eigenvalues are small (close to zero), or CI is large (greater than 30), then these would be signs of multicollinearity between the covariates. None of the predictors in the models show signs of multicollinearity, as none of the VIFs values exceeded a value of four. The model tests my theory that the stronger the colonial

influence, the more likely the state chooses to retain the JCPC as the final appellate court. The results show that the strength of the colonial influence is significantly associated with whether or not the colony abolishes appeals to the JCPC at independence ( $p = 0.026$ ).

This provides support for my assertion of the factor of length of colonial rule in the overall colonial influence. The longer colonial period contributes to further entrenchment of the institutions in the colonial society. The new governing coalition will be more familiar with the role of the JCPC, increasing the likelihood that it will be considered a reliable and suitable partner after independence. This colonial influence, which includes longer periods of reliance of the JCPC, serves to increase the willingness to accept this colonial institution as a reliable partner in the governing institutions of the sovereign state.



**Table 4.9 Multivariable Probit Results of Colonial Influence on the Status of the JCPC**

<b>Explanatory Variable</b>		<b>p-value</b>
<i>Colonial influence</i>	-0.5631 (0. 2525)	0.026
<i>Settler population at independence</i>	-0.5242 (0.3574)	0.143
<i>GDP per capita at independence</i>	-0.4264 (0. 7294)	0.559
<i>Pre-independence conflict</i>	-0.2261 (0.5371)	0.674
<i>Time frame of independence 1 (1931-1946)</i>	2.2882 (2.3798)	0.336
<i>Time frame of independence 2 (1947-1970)</i>	.7047 (.4749)	0.138
<i>Time frame of independence 3 (1971-1984)</i>	0 (omitted)	
<i>Constant</i>	.3830 (0.5096)	0.452
<i>Pseudo-R-squared</i>	0.267	
<i>Observations</i>	50	

One element that may be missing from my models is a proxy for the exercise of political influence of colonial and local elites in the process by which the new constitution is written in each colony leading up to independence. This process involves the negotiations between the U.K. government and the local elite, who then lead the governing coalition into independence. Various types of commissions and committees develop as a part of that transition period from colony to independent state. In many cases, a constitutional commission serves principally in a supporting role to the legislative assembly. The primary function is to provide expert advice on constitutional problems and issues, in addition to actually proposing and drafting entire constitutions (Straum 1977). Commissions and the resulting constitutions are products of

constraints and criteria imposed by the creators and the ultimate need for ratification by another body (Elster 1995), such as the local legislative assembly or the British parliament. Nevertheless, the process varies across the Empire. For example, before independence, the Nigeria's elected Nigerian legislature was created through the granting of internal self-government by the Lyttleton Constitution of 1954. Though Nigerian nationalists were part of the process of drafting the constitution starting in 1954 and culminating with the 1958 Constitutional Conference, the legislature never ratified the Independence Constitution, nor was it referred to the Nigerian people via referendum. Instead, it was still imposed by an act of the British Parliament, and under this constitution the JCPC continued to be Nigeria's highest court (Ismail 2010). The extant literature reveals more complex constitutional deliberation over many years leading up to India's independence: The Nehru Report of 1928, the Simon Commission of 1930, the Joint Committee on Indian Constitutional Reform of 1934, the Supru Report of 1945, the Ad Hoc Committee of the Supreme Court of 1947, and culminating with the Independence Constitution of 1947 (Granville 1966). In Papua New Guinea, the domestic legislature in conjunction with the colonial authorities set the stage for transition to independence. The dominant United Party of Papua New Guinea seated seven party leaders along with four members from its ally, Pangu Pati, on the 16-seat Constitutional Planning Committee, which produced constitutional recommendations in the 1974 report. While the report does not provide reasons for abolishing appeals to the Privy Council, it clearly recommends that the Supreme Court be the highest court post-independence (Papua New Guinea Constitutional Planning Committee Report 1974). Lastly, the British government established The West Indian Royal Commission to examine conditions in the colonies in the Commonwealth Caribbean. This commission produced The Moyne Report in 1945. It is arguably the single most significant document in Commonwealth

Caribbean history (Benn 2011) and set the stage for the individual colonies to prepare for independence. Each colony then had a domestic commission that crafted the constitution, with all 13 colonies retaining the JCPC as the final appellate court at independence. Based on this summary review, I conclude that this would be outside the scope of this research, but may be part of future research evaluating the process of developing written constitutions.

#### **4.4 Summary and Conclusion**

In this chapter, I sought to contribute to our understanding of the persistence of institutions or why states may accede to extraterritorial courts. Using the case of the British Commonwealth, I examine why the governing coalition of a state may be influenced to continue being linked to an extraterritorial court such as the JCPC as its final appellate court. The retention of this colonial institution would seem like an affront the sovereignty of the new states. The JCPC, which for all intents and purposes is a British institution, put the final adjudication of legal challenges beyond the administrative control of the governing coalition. Knowing the importance of this court, I argue that states chose the final appellant court they expected to be a reliable partner in the new governing coalition, and that each state's colonial experience influenced the decision of the new governing coalition at independence. This expectation was influenced and constrained by the influence of colonial rule. The analysis in this chapter provides support for the theory developed in Chapter 3. The results indicate that no single proxy can adequately capture the influences of history and colonial experience on the governing coalition. To test my theory, I use a multifaceted approach. First, using the additive index variable (*Colonial Influence*), I found that the colonial experience of the states influenced their decisions about the JCPC at independence. Cognizant of the small-n limitation on the robustness, I tested the hypotheses using multivariable probit models to provide support. In Model 1, I found that the

additive index variable operationalizing the influence of British colonial rule is significantly associated with whether the colony retained appeals to the JCPC. Specifically, when controlling for other factors, as strength of the colonial tie increases, the less likely the colony was to abolish appeals to the JCPC at independence. This finding suggests that strength of colonial rule impacted the expectation of the emerging governing coalition that the JCPC will be a reliable partner by upholding and legitimizing its policies. By creating an additive index to capture the effects of colonial rule on the decision at independence, I demonstrate the influence of colonial rule at the first critical juncture at independence. The results of the bivariate (indicating a central tendency) and the multivariate probit model with the additive index reveal the significance of colonial rule on the decision of the governing coalition at independence. I suggest that this result indicates that the place of the U.K. in the global community and its continued support for the JCPC are of some importance as part of the colonial influence. As the power of the U.K. waned after World War II (Porter 2012), it is suggested that so too did the need to be associated with the former colonial power and the prestige and reputation of the JCPC. The influence of the political environment after independence is examined in Chapter 5.

Second, using Wilcoxon Rank-Sum tests, I explored the individual associations of the length of colonial rule and type of colonial rule, with whether the colony retained or abolished appeals to the JCPC. Results show that when not controlling for other factors, the length of colonial rule and whether a colony experienced direct or indirect rule, are individually significantly associated with whether the colony retained or abolished appeals to the JCPC. These results find support in the descriptive analysis that point to the central tendency of states that experienced colonial rule for longer than the average of 121 years for all states to retain the JCPC. Nineteen (38 percent) states experienced longer periods of colonial rule than the sample

average, and of those 19 states only three (16 percent) abolished appeals to the JCPC at independence. The analysis also indicates that states that experienced direct colonial rule had a tendency to retain the JCPC. In 52 percent (26) of the 50 states, the percentage of total court cases following customary or traditional law was above the average of 30 percent. Of those 26 states, 58 percent (15) of the states replaced the JCPC with a domestic final appellate court at independence.

This result provides support for my theory that characteristics and history of U.K. colonial rule significantly influences the governing coalition's view of the reliability of JCPC as a reliable partner in policy-making for furthering "peace, order and good government" (POGG) as a feature of constitutional rule (Yusuf 2014, 1). The JCPC, as an integral and important part of the British colonial governance, proved to perpetuate its association with the states despite the apparent affront to sovereignty. This exemplifies that the governing coalition is more likely to view an extraterritorial court more favorably when there is perception that the court will enhance its credibility. In other words, such an extraterritorial court would be more acceptable in the eyes of the governing coalition and would increase the likelihood that it would not be considered merely an affront to sovereignty but contribute to its legitimacy.

In the next chapter, I shift my focus to only those states that retain appeals to the JCPC at independence. I theorize that, in the post-independence period, states continue to expect that the final appellate court will uphold and legitimize the policies of the governing coalition. Using split population survival models, I analyze 26 states from Asia, Africa, and the Caribbean. My analyses start at the year of independence until the year ties are severed with the JCPC or January 1, 2015, whichever comes first for each state. Within the risk set of 26 states, 58 percent ( $N=15$ ) abolished appeals and 42 percent ( $N=11$ ) states retained appeals to the JCPC as of

January 1, 2015. My purpose is to better understand what factors after independence influenced the governing coalition to abolish appeals to the JCPC and establish a domestic final appellate court. This will provide greater insight into how states may respond to and interact with other extraterritorial courts as they emerge and develop.

## **5 THE JCPC AFTER INDEPENDENCE**

### **5.1 Introduction**

While independence from colonial rule signaled the emergence of a sovereign state, some states in every region of the British Empire retained a connection to the U.K. via the JCPC as the final appellate court. This phenomenon is observed in large Asian states such as India and Malaysia, as well as small states such as Dominica and Antigua in the Caribbean, and Kiribati and Tuvalu in the Pacific region. The phenomenon also extends to Africa where states such as The Gambia (West Africa), Kenya (East Africa), and South Africa retained the JCPC for 33, three, and 19 years, respectively. If some states retain the JCPC at independence, why may they later decide to abolish appeals to the JCPC and establish a domestic final appellate court?

In effect, the states that retain appeals to the JCPC at independence perpetuate an important institutional vestige of British colonial rule. As the final appellate court, the JCPC retains the ultimate judicial power for disposing legal disputes originating in the respective state or British territory, but with the state having no input or responsibility for appointing the judges, declaring their terms of service, or funding that court (Howell 1979; Swinfen 1987). Despite its limited jurisdiction within the U.K., the JCPC is widely viewed as a “United Kingdom Institution” (Mohr 2011, 134). Defining sovereignty as having particular capacities or powers that can be utilized without the consent or approval of another (Brown 2002), retaining the JCPC is an apparent contradiction to modern understanding of state sovereignty and autonomy. As

discussed in Chapter 4, 30 (60 percent) of the 50 states in the sample retained the JCPC at independence. Of those 30 states, 17 states (57 percent) eventually abolished the right of appeal at some point before January 1, 2015. Why did these 17 states eventually decide to abolish appeals to the JCPC?

I theorize that after independence the state's governing coalition expects the final appellate court to be a reliable and significant partner in the process of policy-making. This expectation is influenced by the level of colonial influence of the U.K. on the individual state as examined in Chapter 4. Developments after independence, however, may influence how the governing coalitions view the continued role of the JCPC. Though not inevitable, the equilibrium established at independence may be interrupted. Changes after independence can change how the governing coalition of the state perceives the reliability of the court and ultimately the willingness to continue the relationship. I assert that the political environment could change the governing coalition's perception of the court and its sensitivity to unfavorable JCPC decisions when policies are challenged. In other words, the governing coalition may become less tolerant of decisions that do not uphold and legitimize its policies. If the governing coalition views the JCPC as less of an ally and more of an obstacle, pressure may surface for the state to sever ties with the JCPC. This is exemplified in the political debate leading up to the 1948 general elections in South Africa. While the tie to JCPC is not singled out in the literature, the entire relationship with the U.K. is intensely debated. Hyam and Henshaw (2003) note that there is a shift in South African attitudes towards the U.K. based on political developments in the U.K. and the Empire in relation to race and race equality: "By the late 1940s many [white] South Africans recognized that British public attitudes, as well as the attitude of the British government under Labour, had become more critical of South African racial policy" (285). The Nationalist Party,

with a decidedly anti-British stance and an apartheid platform, won the 1948 general elections (Hyam and Henshaw 2003). Appeals to the JCPC from South Africa were abolished in 1950, and the governing coalition quickly passed more laws entrenching racial segregation (Commonwealth Network 2015). Arguably, the new governing coalition in 1948 did not want to take the risk of successful challenges to the apartheid policies before a court in the U.K. over which it had no leverage and with which the new governing coalition perceived a disconnection.

I postulate that there are two main factors that may shift the governing coalition's view of the JCPC to one of an obstacle rather than a partner. First, a major function of a state's highest appellate court is to settle not only disputes stemming from state policy, but also challenges to the legitimacy of the policies themselves. If the state believes that the final appellate court is unreliable, support for that court may erode. In the context of the JCPC, a decrease in support may lead to the eventual severance of ties and the establishment of a domestic final appellate court over which it has administrative control. I hypothesize, therefore, that states that receive more unfavorable decisions are more likely to cut ties with the JCPC. The decisions are observed for each state in the sample for each year from independence until the state abolishes the JCPC or January 1, 2015, whichever came first.

Second, while directly after independence most states inherited democratic structures in line with the Westminster Model, the level of democratization in a state may change over time. Less democratic states, and thus more politically repressive states, will also be more suspicious of a final appellate court beyond their control. As a result, if the state becomes less democratic, the likelihood of abolishing appeals to the JCPC will increase. For example, in both Fiji and The Gambia, the military overthrew their elected governments in 1986 and 1994, respectively, resulting in an erosion of democracy and in increasingly authoritarian regimes. Further, within



approximately two years of this regime change both states abolished appeals to the JCPC. I argue that this structural change to the countries' judicial systems are in part a function of both countries wanting to ensure that the nation's highest court is more closely tied to the governing coalition.

This chapter proceeds in the following manner. First, I explain the selection of the 26 states in the sample. Second, I identify and explain the operationalization of the dependent, main explanatory, and the control variables. Third, I present a descriptive analysis and split population survival (SPS) regression models grounded in my theory to test my hypotheses. Finally, I present the results of the analyses and offer summary conclusions.

## **5.2 Unit of Analysis and Sample of States**

As discussed in Chapters 3 and 4, delinking from the colonial power at independence represents the first critical juncture for the emerging sovereign state. The fact that 30 of the 50 states (60 percent) retain the JCPC illustrates the fact that the persistence of this colonial institution in a significant portion of the states is not insignificant. My inquiry in this chapter, therefore, focuses on quantitative analysis of the factors I postulate may influence the governing coalition to sever ties with the JCPC at some point after independence.

I use split population survival models with time-varying covariates to conduct this analysis, with the unit of analysis being country-year ( $N= 673$ ). My analysis examines 26 of the 30 states that retain the JCPC as the final appellate court for some period of time post-independence. The four states not included in the sample are Barbados, Belize, Kiribati, and Tuvalu. Barbados and Belize abolished appeals to the JCPC in 2005 but did not establish a domestic final appellate court. Instead, these states acceded to the Caribbean Court of Justice (CCJ) established in 2001 as part of the deepening regional integration of the Caribbean

Community (Caribbean Court of Justice 2001). While the decision of a state to trade one extraterritorial court for another is an important question in and of itself, it is outside the scope of this project. The micro-Pacific states of Kiribati and Tuvalu were also not included because there is a scarcity of consistent and reliable data on these two states.

Table 5.1 displays the 26 states and the number of years they each retain ties to the JCPC. There are wide variations in the number of years the states retain the JCPC from as few as two years, in the case of Kenya, to as many as 75 years, in the case of New Zealand. Also, this group of states includes the 11 states that still retain the JCPC as of January 1, 2015, of which nine are in the Commonwealth Caribbean (Antigua & Barbuda, The Bahamas, Dominica, Grenada, Jamaica, St. Kitts & Nevis, St. Lucia, Trinidad & Tobago, and St. Vincent & the Grenadines) and one each in Africa (Mauritius) and Asia (Brunei). As discussed in Chapter 3, these eleven states all experienced strong colonial influences as captured by the additive index scores.

**Table 5.1 The 26 States and Number of Years the State Allowed Appeals to the JCPC**

Antigua & Barbuda (28yrs)	Gambia (27 yrs.)	Malaysia (30 yrs.)	St. Kitts & Nevis (32 yrs.)
Australia (56 yrs.)	Ghana (4 yrs.)	Mauritius (47 yrs.)	St. Lucia (37 yrs.)
Bahamas (35yrs)	Grenada (35 yrs.)	New Zealand (75 yrs.)	St. Vincent & Grenadines (37 yrs.)
Brunei (25 yrs.)	Guyana(5 yrs.)	Nigeria (4 yrs.)	Trinidad & Tobago (44 yrs.)
Canada (19 yrs.)	India (3 yrs.)	Singapore (18 yrs.)	
Dominica (47 yrs.)	Jamaica (49yrs)	South Africa (20 yrs.)	Uganda (3 yrs.)
Fiji (19 yrs.)	Kenya (2 yrs.)	Sri Lanka (20 yrs.)	

### 5.3 Severing Ties with the JCPC after Independence

The states that retain appeals to the JCPC at independence may later decide to sever ties and establish a national final appellate court. I argue that this process is more likely if the governing coalition perceives a divergence in policy preferences with the JCPC. The perceived

divergence may result in a reduced likelihood that the JCPC will uphold and legitimize their policies. The will to change the status quo in response to the changed view of the JCPC is influenced by the political environment, which may be such that the governing national coalition will take steps to establish a domestic final appellate court.

The dependent variable is therefore the state-year in which appeals to the JCPC are abolished, or the “event” occurs, in a year between 1931 and 2014. Box-Steffensmeier and Jones (2004) characterize the “event” in history analysis as “a change or transition from one state or condition of interest to another” (8). The binary dependent variable is coded “1” in the year a state abolishes the JCPC and “0” in all other years. Based on the sample of 26 states, Table 5.2 presents the 11 states that retain appeals to the JCPC as of January 2015 and the 15 states that abolished appeals at some point after independence.

**Table 5.2 States that Retained or Abolished Appeals to the JCPC as of January 1, 2015**

<b>Retained JCPC (11 States)</b>		<b>Abolished JCPC (15 States)</b>	
Antigua & Barbuda	Mauritius	Australia	Malaysia
Bahamas	St. Kitts & Nevis	Canada	New Zealand
Brunei	St. Lucia	Fiji	Nigeria
Dominica	St. Vincent & Grenadines	Gambia	Singapore
Grenada	Trinidad & Tobago	Ghana	South Africa
Jamaica		Guyana	Sri Lanka
		India	Uganda
		Kenya	

#### **5.4 Explanatory Variables**

After independence, the governing coalition takes the reins of power and peruses policies enlivening the vision for state governance. The political environment in which policy challenges reach the extraterritorial court is unlike when the state was a colony. As a result, there are different factors influencing the status quo. I posit that there are two primary influences driving

the possible decision of the governing coalition to eventually sever ties with the JCPC: the JCPC's decisions and the state's political environment. I assert that changes in those influences can be significant enough to cause the governing coalition to change the status quo after independence and replace the JCPC with a domestic final appellate court. The choice of the state at this second critical juncture is underpinned by whether the governing coalition perceives the JCPC as a reliable partner in policy-making. I operationalize six independent variables. There are four primary explanatory variables and two control variables. The next section presents how the variables are measured with some descriptive analyses that provide useful information on tendencies and patterns (Laerd Statistics 2013) to aid my analyses using the six SPSS models. Appendix H presents the summary statistics for all of the variables of interest used in testing Hypotheses 2, 2.1, and 3.

The first primary explanatory variable is the percentage of all cases before the JCPC in each year won by the state where the state is a party (respondent or appellant). Analyzing the state-year reveals the level of success the states had in actual cases. All cases adjudicated by the JCPC are available online through the British and Irish Legal Information Institute (2014). From the universe of cases adjudicated by the JCPC, I am interested in all the cases where the state is a party. This represents a broad spectrum of cases involving legal challenges to the policies of the governing coalition on appeal to the JCPC as the final appellate court. Appendix I displays the decisions disaggregated by a total in each of the following categories of cases: (1) constitutional rights; (2) torts/administrative law; (3) criminal law; and (4) "other areas" of law where the state is a party. I review these cases for each state-year between the date of independence and removal of the JCPC or January 1, 2015. The win-rate is calculated based on the total number of cases in each year from zero to 100 percent. The years in which there are no cases are coded as the state

being 100 percent successful. There are of 864 cases originating from the 26 states, and Appendix J displays the total number of cases for each state.

To get a more nuanced picture of state success rates before the JCPC, I disaggregate the average favorable decisions in each state-year by decisions where the state is the respondent (second explanatory variable) and those where the state is the appellant (third explanatory variable). This may provide more insight into whether the governing coalition is more sensitive when it has to respond to a challenge in the final appellate court or when the state is not satisfied with the decision of the lower court and decides to take the case to the final court of appeal. In the latter situation, the state decides that they are significant enough to invest public resources to appeal the decision of the lower domestic court. In these cases, the governing coalition would like to be able to rely on the JCPC to uphold and legitimize its policies. It is almost impossible to say with certainty that any single unfavorable decision leads the governing coalition directly to the decision to replace the JCPC. Mohr (2011) asserts, however, that such decisions sharpen calls for reforming or abolishing appeals to the JCPC:

Examples of decisions of this nature include *Webb v. Outrim* in Australia; *Nadan v. R* in Canada; *Pearl Assurance Co. Ltd. v. Government of the Union* in South Africa; *Wigg and Cochrane v. Attorney General* in the Irish Free State; *Lesa v. Attorney General in New Zealand* and *Pratt and Morgan v. AG of Jamaica* in the Caribbean. (135)

Other specific examples are worth noting and provide some indication of the importance of the JCPC's decision. In 1971, the year before Sri Lanka abolished appeals to the JCPC, three cases are decided, and the state prevails in only one (33 percent). In one case (*The Commissioner of Inland Revenue of Colombo v J. M. Rajaratnam*) where the state is the appellee, the JCPC decision is not in favor the state. In Canada, the JCPC hands down unfavorable decisions in the last two cases in which the state was the appellant. Similarly, in the last five cases before

Malaysia abolishes appeals to the JCPC, there are only two decisions favorable to the state. This might indicate that the state views the unfavorable decisions as an indication of a disconnection with the JCPC.

The fourth explanatory variable is regime type post-independence. The level of democracy has been shown to influence the likelihood of political repression (Davenport 1998) and to potentially curb the possible abusive behavior of political leadership through judicial and legislative restraints (Keith and Ogundele 2007). The type of regime may vary over time after independence on a democratic-autocratic regime spectrum. This independent variable in my models tests whether or not as a regime becomes less democratic over time, the likelihood of the governing coalition abolishing appeals to the JCPC increases. De Bruijn (2014) points out that no single measure “can objectively capture the full range of measurements for a stable, free, and democratic governed country” (9). To improve the operationalization of this variable, I use two data sources: (1) Polity IV (2014) and (2) Freedom House (2013). First, the Polity IV indicator of regime type is based on the Eckstein and Gurr (1975) design. Polity IV produces a single score for each state in each year which ranges from +10 (full democracy) to -10 (full autocracy). The limitation of only relying on this indicator is that states with populations below 500,000 are not included. Of the 26 states in the risk set, eight (Antigua & Barbuda, The Bahamas, Brunei, Dominica, Grenada, St. Kitts & Nevis, St. Lucia, and St. Vincent & the Grenadines) are not included in the Polity IV (2013) project. Second, Freedom House (2014) country ratings assess states on both “Political Rights” and “Civil Liberties.” Both are measured on a one-to-seven scale, with one scored as most free and seven the least. The issue, however, is that Freedom House scores begin in 1972, excluding the periods of interest for three states: Canada (1931-1949), South Africa (1931-1950), and Sri Lanka (1949-1972). Guided by previous work on

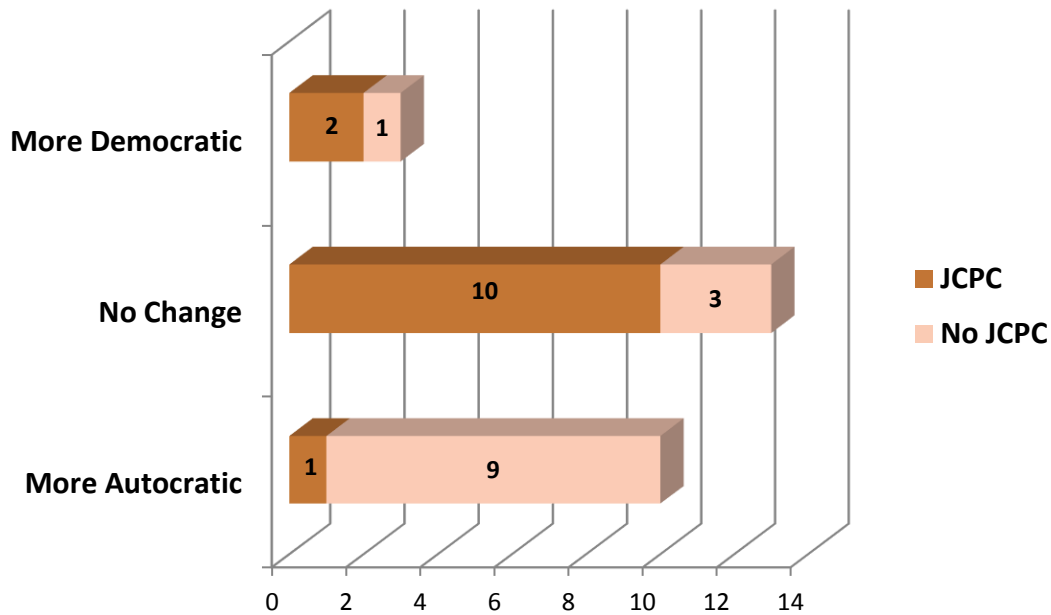
bilateral trade by de Bruijn (2014), I create a new regime type score that utilizes scores from Polity IV Project (2013) and Freedom House (2014) in order to solve data limitations with each existing measure. I develop a “new score” called *Democratization* by mapping the Polity IV scores with those from Freedom House for each year of available data and assigning a value. I assess how each defines its categories, the differences between each, and how changes in the category contribute to the change in score. Those states with a Polity IV rating from 10 to 4 and Freedom House score from 1 to 3 are scored “1” for Free/More Democratic; a Polity IV rating from 3 to -3 and Freedom House score from 4 to 5 are scored “0” for Partially Free/Incoherent; and a Polity IV rating from -4 to -10 and Freedom House score from 6 to 8 are scored a “-1” for Not Free/More Autocratic. Table 5.3 displays how the scores from Polity IV and Freedom House are mapped to produce the new score assigned for each category of the *Democratization Score*.

**Table 5.3 Polity IV and Freedom House Scores Mapped to the New Democratization Score**

	Polity IV Score (-10 to 10)	Freedom House Score (1 to 7)	<i>Democratization</i> Score (1, 0, -1)
<b>Not Free/More Autocratic</b>	-10 $\diamond$ -4	7 $\diamond$ 6	-1
<b>Partially Free/Incoherent</b>	-3 $\diamond$ 3	5 $\diamond$ 4	0
<b>Free/More Democratic</b>	4 $\diamond$ 10	3 $\diamond$ 1	1

Figure 5.1 simply presents a summary of the number of states and whether the JCPC is retained in each of the three new categories. To place a state in a specific category, I merely compare the state’s first *Democratization Score* with the score for the year immediately before the year the state abolishes the JCPC or January 1, 2015, whichever comes first. Of the three states that, over time, become more democratic, two (66 percent) still retain the JCPC. For example, Sri Lanka is one state that becomes more democratic yet abolishes the JCPC. Ten of

the 13 (76 percent) states that exhibit no change still retain the JCPC. The three states with no change – Australia, Canada, and New Zealand – eventually abolish the JCPC. Nine of the ten (90 percent) states that can be broadly categorized as more autocratic abolish appeals to the JCPC. The only state that is less democratic at the end of the research period that retains the JCPC is Jamaica.



**Figure 5.1 Categorization of Regime Change and whether the State Retained the JCPC**

The results in Figure 5.1 indicate the tendency of less democratic states to replace the JCPC, as opposed to those states that become more democratic or remain the same. Since there are states that do abolish the JCPC even though they become more democratic or exhibit no change in the regime, there may be something else occurring in the political environment that is not captured by the using the Polity IV and Freedom House scores. In Chapter 5, I examine this possibility using in-depth case studies of The Gambia, New Zealand, and The Bahamas.



I also utilize two control variables. My first control variable is the level of conflict in each state in each year of analysis. Conflict within the state may influence the governing coalition's perception of how to maintain POGG and the extent to which it needs to exercise control over the judiciary as a part of the governing institutions. The existence and level of conflict is operationalized using DataBanks (2015a; 2015b). This database uses a weighted domestic conflict score that reflects a weighted count of incidents as conflicts. The following incidents of conflict are included in the score: (1) assassinations; (2) strikes; (3) guerrilla warfare; (4) government crises; (5) purges; (6) riots; (7) revolutions; and (8) anti-government demonstrations (see Appendix L). Scores range from 0 to a maximum of 6250 in a country-year for the sample states.

Second, I include a control variable for each state's GDP per capita per country-year. This is a proxy for the fiscal capacity of the government and private litigants to afford pursuing cases before the JCPC in London. Appeals to the JCPC are often critiqued as "a rich man's appeal" (Mohr 2011, 132). Litigants incur added costs and inconvenience to access the JCPC (Swinfen 1987). Wilson (2001) points out that some litigants cannot afford to pursue their case at the JCPC, effectively denying them their full rights of appeal. Less prosperous states may therefore view the costs associated with accessing the JCPC as a barrier that effectively denies access to justice. I therefore control for each state's wealth to examine the comparative advantage more prosperous states may have over those less prosperous states, measured as the Gross Domestic Product (GDP) per capita of each state in each year the state appears in the data. The estimate of the GDP for each state is in U.S. dollars, as valued in 1990 International Geary-Khamis dollars (The Maddison-Project 2013). This method is "the most widely used aggregation method for multilateral comparison of prices and real product" using "purchasing power parities

of currencies and average prices of commodities” (Rao and Selvanathan 1990, 5). The growth in GDP per capita of states varies widely. For example, The Gambia’s GDP per capita only increased from US\$846 at independence in 1965 to US\$851 in 1998 when that state abolished appeals to the JCPC. New Zealand’s GDP per capita, on the other hand, increased from US\$4,475 in 1931 to US\$18,231 in 2005 when that state abolished all appeals to the JCPC (The Maddison-Project 2013). The average GDP per capita for all states during the period of analysis is US\$6448.71. A snapshot of the 15 states the year before they abolish the JCPC shows that four (27 percent) states are above the average. Of the 11 states that retain the JCPC, ten (91 percent) are above the average. This may indicate a tendency of states with fewer resources to abolish the JCPC and, conversely, those with higher GDP per capita to retain. GDP per capita, however, is a rather “blunt” instrument as it does not capture the resources of those in the economic elite (but not part of the governing coalition) who may be more likely challenge the state and want to pursue an appeal to the JCPC. Further, four (Australia, Canada, New Zealand, and Singapore) of the 15 states that abolish the JCPC are among the richest states in the world (World Bank 2013).

## **5.5 Exploring Changes after Independence**

After independence, eleven states in the sample of 26 states do not abolish the JCPC by the end of my research period (January 1, 2015), while 15 states do in some year prior to 2014. As there is a portion of the states that do experience the event, it is appropriate to use a “split population” model design. I utilize the “spsurv” STATA command developed by Jenkins (2001). I use discrete time split population survival (SPS) modeling and time varying covariates (TVCs) to test the above hypotheses about the decision of a state to eventually sever ties with the JCPC post-independence. This approach jointly estimates the hazard rate of both groups of states. The objective is to analyze when the event or “failure” (abolishing appeals to the JCPC) occurs and

what factor contributes to our understanding of what influences the event (Bartels 2003; Fenno 1986). Since I assume that the occurrence of the event or failure is not a function of time and the event does not occur in some states, this non-parametric model is preferred.

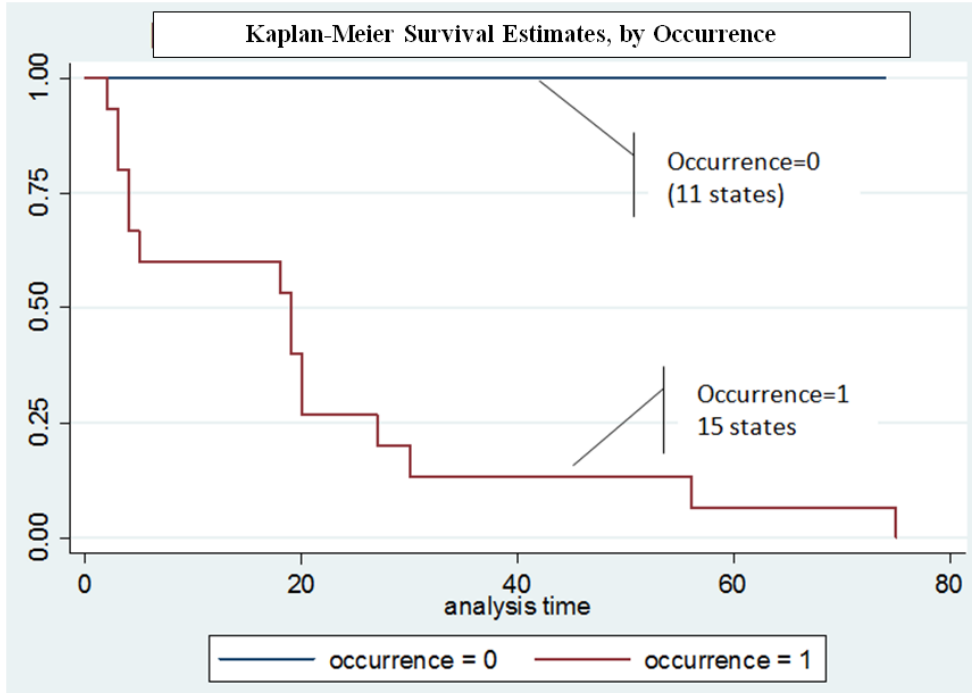
As a partial likelihood model, the SPS model is based on the assumption that there is no information regarding the relationship between covariates and the hazard rate being gleaned from the intervals between successive events (Collet 1994). This is as result of not being directly parameterized with a baseline function or intercept. The benefit of this approach is that it makes better use of available data by ordering events. The start of the analysis is left-truncated at the date of independence for each country. Further, at any time all cases are at risk of failing and the risk set decreases by one, successively dwindling as events occur. The coefficients are parameterized in terms of the hazard rate, so a positive coefficient indicates that the hazard is increasing as a function of the covariate (Box-Steffensmeier and Jones 2004).

While parametric models such as the Weibull, exponential, and Gompertz explicitly account for the “duration dependence or the extent to which the risk of experiencing the event increases or decreases as a function of time...., non-parametric models leave the baseline unspecified or unconstrained as to a specific distribution form” (Bartels 2003, 1). In line with Box-Steffensmeier and Zorn (2001; see also Box-Steffensmeier and Jones 2004), my theory does not allow me to specify a probability distribution for the time until the event occurs. In such cases, the absence of the need to parameterize time dependency is an advantage. Further, these SPS models effectively relax the baseline assumption by “splitting” the observations based on time intervals during the period of analysis with no assumption that the event will occur (Schmidt and Witte 1989).

## 5.6 Results

As exemplified by every region of the Commonwealth, some states that retain appeals to the JCPC at independence later decide to abandon that extraterritorial court and establish a domestic final appellate court. Based on the sample of 26 states, 15 states abolish appeals at some point after independence and 11 states retain appeals to the JCPC as of January 1, 2015 (see Table 4.2). I argue that the decision to replace the JCPC is more likely if the governing coalition perceives a disconnection between the decisions of the JCPC and the state's policies. The perceived divergence may result in a reduced likelihood that the JCPC will uphold and legitimize their policies. Further, the expectation that the JCPC will be a reliable partner may be altered in the context of the changing political environment, prompting the governing coalition to take steps to abolish that right of appeal and establish a domestic final appellate court.

The dependent variable is the state-year in which appeals to the JCPC are abolished, or the "event" occurs, in a year between 1931 and the end of 2014. The Kaplan-Meier graph captures the change in the portion of states that abolish the JCPC over time, and at the same time includes those states that do not abolish the JCPC by the end of the period of analysis. Plotting the estimated survival probabilities (vertical axis) over the time of the analysis produces a survival curve that is displayed as a step function (Goel, Khanna and Kishore 2010). The intervals indicate that a state abolishes the JCPC (occurrence of the event), and the change on the vertical axis (0, 1) indicates the change in the cumulative probability as time passes (Rich et al 2010). Figure 5.2 displays the Kaplan-Meier Survival Estimates by whether the state retained (occurrence = 0) or abolished the JCPC (occurrence = 1). For the states that abolish the JCPC, the cumulative probability is greatest in the first 30 years of the period of analysis and more states abolish the JCPC during that period.



**Figure 5.2 Kaplan-Meier Survival Estimates by whether the State Retained or Abolished the JCPC**

As described in detail in Chapter 2, I theorize that a state's governing coalition expects the final appellate court to support their policies. In my case, I assert that the decision of whether to abolish appeals to the JCPC is influenced by the decisions of that court and the temporal political environment. With the independent variables described, I estimate five SPS models to examine the relationship between the state's decisions to abolish appeals to the JCPC and the decisions of that court and the political environment of the sample states. In the first model, I regress the following: (1) the measure of the state's win ratios in all JCPC decisions decided from each country-year; (2) the dichotomous dependent variable for whether the JCPC is abolished; and (3) the control variables I described earlier. In the second and third models, I employ the variable values for the state win average when the state is the respondent and the win average when the state is the appellant, respectively. In Model Four, I regress both the win average when the state is the respondent and when the state is the appellant. Finally, in model

five I examine the effect of the interactive variable – values for the nature of the regimes over time and the win average in all decisions. I include the same control variables in each model.

In Model 1, I test Hypothesis 2 that the lower the state's win average in JCPC decisions, the more likely the governing coalition's decision to abolish appeals to the JCPC. The result in Model 1 (Table 5.4) show that the percentage of JCPC decisions that favor the state in all decisions while controlling for intra-state conflict and GDP per capita is not significantly associated with the governing coalition's decision to abolish appeals to the JCPC. This result suggests that states are not responding to their relative success rates (including the years when there were no JCPC decisions). The governing coalition may not have considered the years in which there were no JCPC decisions as a "success" or "win." It may simply be that the status quo was maintained because the JCPC failed to attract their attention in those years and may not reflect any particular level of satisfaction with the JCPC. The null hypothesis is therefore not rejected for Hypothesis 2. The absence of any significance of the overall success of the state may suggest that the governing coalition is driven by a more discerning approach to the JCPC decisions. While all cases to which the state is a party involve some aspect of policy, unfavorable decisions may not always galvanize the political will to act. The governing coalitions generally may not perceive all unfavorable decisions as significant enough to pass a constitutional amendment to abolish appeals to the JCPC. To further examine the cases, I disaggregate the sample of cases into those where the state is the respondent and those in which the state is the appellate before the JCPC.

In Model 2, I test Hypothesis 2.1 that the lower percentages of favorable JCPC decisions when the state was the appellate increase the likelihood that the governing coalition will move to abolish appeals to the JCPC. The result in Table 5.4 shows that the percentage of favorable JCPC

decisions when the state was the appellant is significant ( $\beta = -1.235$ ,  $p$ -value, 0.035), with the coefficient indicating the influence is in the predicted direction. To help with the interpretation of the coefficient, it is best to convert the coefficient to a hazard ratio by using exponentiation (Exp). The coefficient corresponds to a hazard ratio of 0.29 (Exp (-1.235) = 0.29), implying that for every one-unit increase in the success ratio of cases where the state is the appellant, there is a 71 percent lower chance of abolishing appeals to the JCPC, while controlling for other factors in the model. The null hypothesis may be rejected for Hypothesis 2.1.

**Table 5.4 Split Population Survival Models 1 and 2**

<b>Explanatory Variables</b>	<b>Model 1</b>	<b>p-value</b>	<b>Model 2</b>	<b>p-value</b>
State Win Average in all Decisions	-0.785 (0.621)	0.206		
State Win Average when State is the Appellant			-1.235 (0.587)	0.035
Democratization Score	-1.462 (0.437)	0.001	-1.445 (0.435)	0.001
State Conflict	0.0001 (0.0003)	0.813	0.00003 (0.0003)	0.916
State GDP per capita	0.0003 (0.00008)	0.714	0.00003 (0.00008)	0.750
<i>Constant</i>	-1.918 (.622)	0.002	-1.531 (0.04)	0.013
<i>Cure Probability</i>	0.11003 (0.1011)	0.043	0.108224 (0.1002)	0.042
<i>ChiSq (df)</i>	11.32	0.045	13.63	0.0181
<i>Observations</i>	673		673	

Based on the disaggregation of the variable for the state win average in all decisions, I explore further the effect of the win average in decisions when the state was the respondent. The

win average when the state was the respondent is not significant in Model 3 (Table 5.5).

Considering the results from the Models 1 through 3, where the success rate of the state is only significant when the state is the Appellant. This may indicate that the governing coalitions are not closely monitoring their success rate in all cases over time before the court. This is an important finding and one I return to in Chapter 6 when looking at cases and the political environment in three specific states.

**Table 5.5 Split Population Survival Models 3 and 4**

<b>Explanatory Variables</b>	<b>Model 3</b>	<b>p-Value</b>	<b>Model 4</b>	<b>p-value</b>
State Win Average when State is the Respondent	-0.9859 (0.630)	0.118	-0.6775 (0.6807)	0.320
State Win Average when State is the Appellant			-1.0437 (0.6181)	0.091
Democratization Score	-1.5232 (0.00008)	<0.0001	-1.4769 (0.4334)	0.001
State Conflict	0.00004 (0.0003)	0.782	0.00004 (0.0003)	0.894
State GDP per capita	-0.00003 (0.00008)	0.682	-0.00004 (0.00007)	0.651
<i>Constant</i>	-1.6755 (0.6758)	0.013	-1.0902 (0.7557)	0.149
<i>Cure Probability</i>	0.11368 (0.1031)	0.045	0.11091 (0.1020)	0.044
<i>ChiSq (df)</i>	11.98	0.035	14.55	0.024
<i>Observations</i>	673		673	

Keeping in mind my theory that the governing coalition is influenced by level of state favorable decisions handed down by the JCPC and the political environment, I interact the

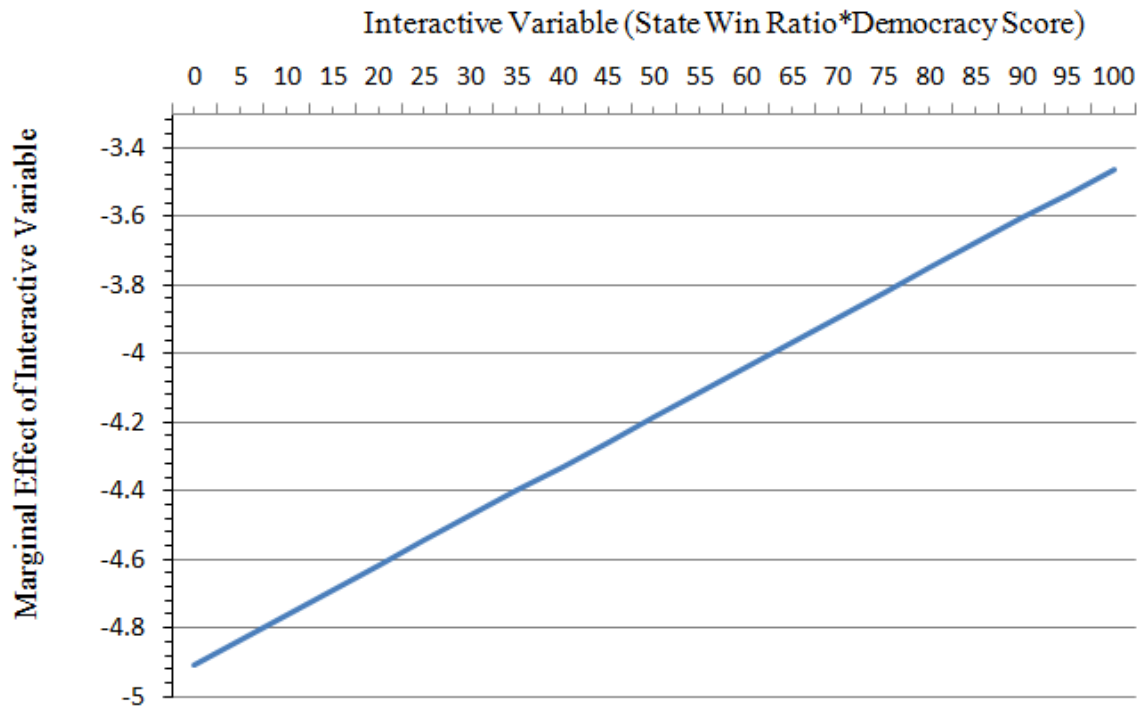


proxies for these two variables. The changes in the political environment make it more likely that the governing coalition will responded to lower levels of favorable decisions by the court. The goal is to gain more insight into the interactive effect of these variables, where the influence of each may be more difficult to determine independently. Model 5 includes the interactive variable *Win Rate Environment* ( $Win\_Ratio * Democratization\ Score$ ). The analysis results employing this new variable, *Win Rate Environment*, and the control variables are displayed in Table 5.6. The *Win Rate Environment* is approaching significance ( $\beta = .01449$ ;  $Exp(\beta) = 1.01$ ;  $p\text{-value} = 0.059$ ). Specifically, for every one-unit increase in the *Win Rate Environment*, there is a one percent higher hazard of abolishing appeals to the JCPC, while controlling for other factors in the model. This may be an indication that the political environment has heightened sensitivity of the governing coalition to the decisions of the court.

**Table 5.6 SPS Split Population Survival Models 5**

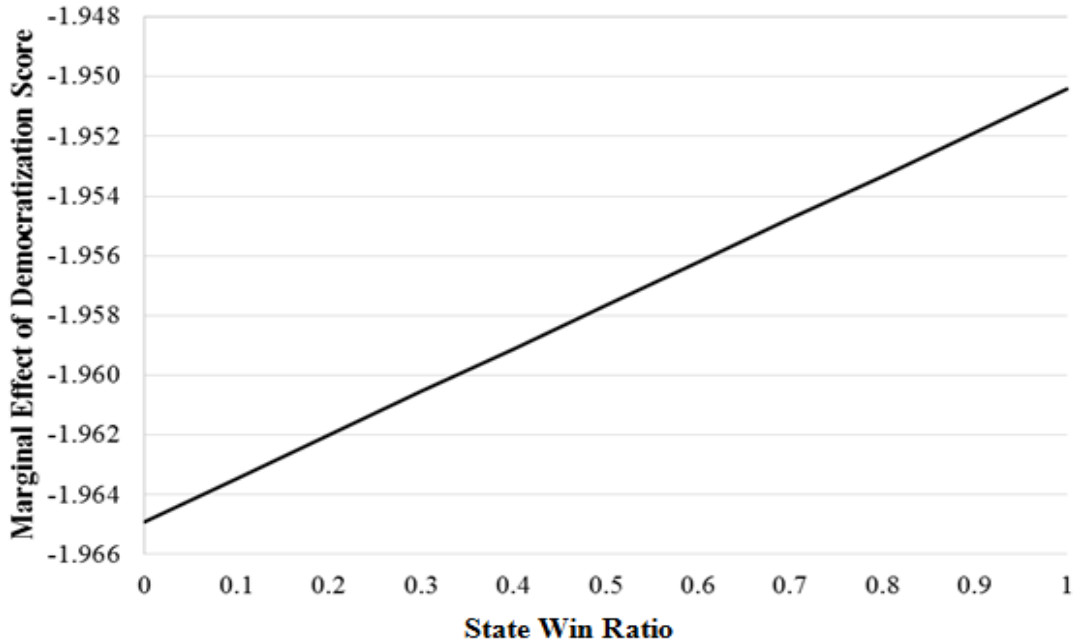
<b>Explanatory Variables</b>	<b>Model 5</b>	<b>p-value</b>
Win Rate Environment ( <i>State Win Average in all Decisions* Democratization Score</i> )	.01449 (.0077)	0.059
State Win Average in all Decisions	-.0159 (0.0065)	0.015
State Win Average when State is the Appellant		
Democratization Score	-1.9649 (0.6289)	0.002
State Conflict	0.00022 (0.0003)	0.418
State GDP per capita	-0.00003 (0.00008)	0.750
<i>Constant</i>	-1.9613 (0.6075)	0.001
<i>ChiSq (df)</i>	13.90	0.031
<i>Observations</i>	673	

The effect of the multiplicative terms (*Win\_Ratio\* Democratization Score*) shows the conditional relationship of each variable when the other is held at “0” (Judd, McClelland and Ryan 2009; Williams 2015). In partially free states (i.e.; when *Democratization Score* is held at 0), a one standard deviation decrease in the level of the regime in terms of democratic scores increase the relative risk that the governing coalition will remove the JCPC by 86 percent ( $\beta = -1.9649$ ;  $\text{Exp}(\beta) = 0.14$ ;  $p\text{-value} = 0.002$ ). Result shows a significant interaction effect between *Win\_Ratio* and *Democratization Score* ( $\beta = 0.01449$ ;  $\text{Exp}(\beta) = 1.0146$ ;  $p\text{-value} = 0.059$ ) at a 94 percent confidence level. Figure 5.3 displays the marginal effect of the interactive variable on the relative risk of abolishing the JCPC.



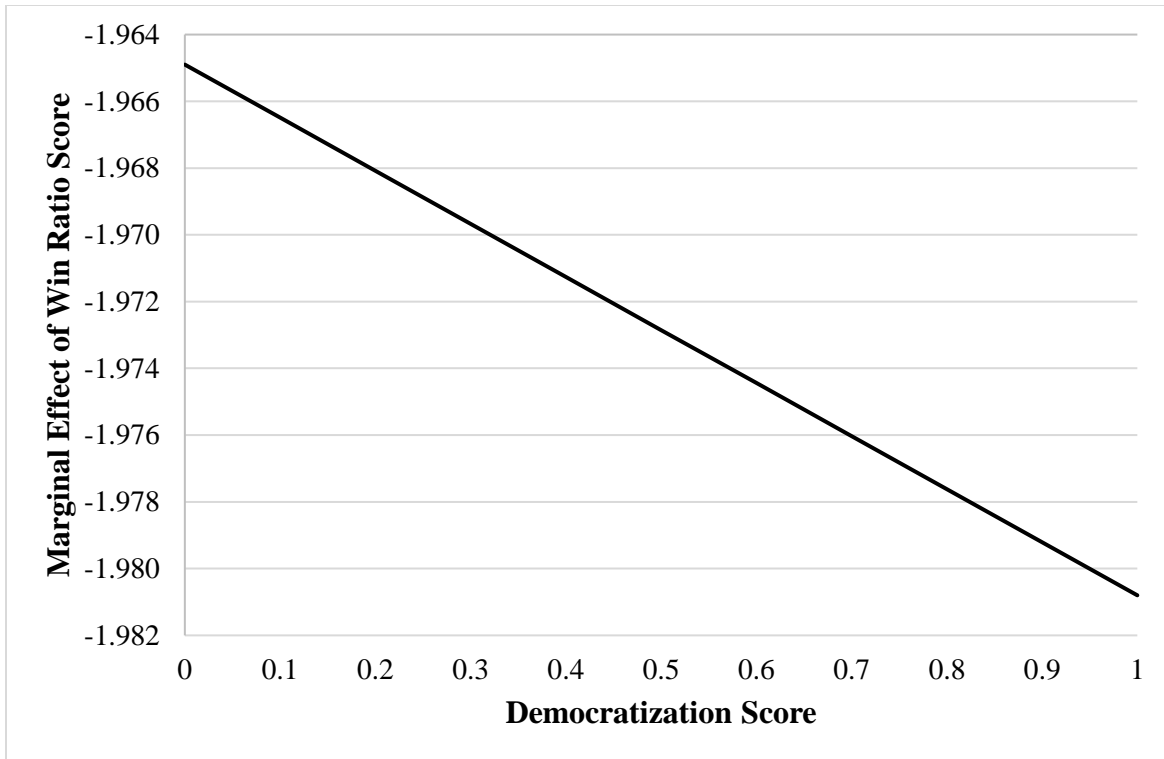
**Figure 5.3 The Marginal Effect of the Interactive Variable on the Relative Risk of Abolishing Appeals to the JCPC**

A significant interaction suggests that the relationship between *Democratization Score* and the hazard of abolishing appeals to the JCPC, changes by *Win\_Ratio* values. Specifically, Figure 5.4 shows the marginal effect of the *Democratization Score* on the hazard of abolishing appeals to the JCPC where the relationship between the *Democratization Score* and the hazard of abolishing appeals to the JCPC can be increasing as *Win Ratio* values also increase. In other words, the effect of *Democratization Scores* on the hazard of abolishing appeals to the JCPC increases as the *Win\_Ratio* values increase. For example, it shows that when win ratio = 0, the effect of democratization score is -1.96. In other words, a 1-point increase in democracy increases the log-odds of the event by -1.96). On the other hand, when win ratio = 1, the effect of democracy is -1.95, so a 1-unit increase in the level of democracy decreases the log-odds of the event by -1.95 (instead of -1.96).



**Figure 5.4 The Marginal Effect of Democratization Score on the Relative Risk of Abolishing Appeals to the JCPC**

Figure 5.5 shows the marginal effect of win ratio as the democratization score changes. When the state win ratio in all cases is at zero percent (i.e.; when *Win\_Ratio* is held at 0), a one standard deviation decrease in the success rate of the state in all decisions increases the likelihood of the governing coalition removing the JCPC by two percent ( $\beta = -.0159$ ;  $\text{Exp}(\beta) = 0.98$ ;  $p\text{-value} = 0.015$ ). The interaction effect itself is rather small here, as the coefficient is little changed regardless of the value of win ratio. In light of the lack of significance of the state's overall level of success in the court's decision as displayed in Model 1, the finding of a marginal effect in the interaction with the political environment is worthy of note. It provides some support for my theory that the political environment does have an effect on how the decisions of the court are viewed and ultimately whether the court itself is perceived as a reliable partner for the governing coalition. Ultimately, the unfavorable decisions of the court are viewed differently when the political environment becomes less democratic.



**Figure 5.5 The Marginal Effect of State Win Ratio on the Relative Risk of Abolishing Appeals to the JCPC**

The variable *Democratization* is significant in all models. There is, therefore, strong support for Hypothesis 3 that the nature of the regime post-independence may underpin the political environment in which it was more likely that the governing coalition would abolish appeals to the JCPC. The results suggest that a decrease in the level of democracy, or increase in autocracy, increases the chances that the court will be abolished. In other words, decreased levels of democracy have a significant negative influence on how the governing coalition views the presence of the JCPC and the options available to those challenging their policies to appeal to this extraterritorial court that is beyond their administrative control. Finally, the results for the control variables (*State Conflict* and *GDP per capita*) are consistently insignificant across all models. The results adhere to expectations and the null hypothesis can be rejected.

The results provide support for my theory that the governing coalitions in more authoritarian regimes seem more sensitive to the presence of JCPC as an extraterritorial court over which they have no control. The governing coalitions in more authoritarian regimes are less likely to want to respond to challenges to their policies before such a court. Continuing appeals to such a court risks not having policies upheld and legitimized. The fact that the results show that the level of success in all cases is not significant leads me to conclude that the governing coalition is more concerned when they feel they have to appeal to the JCPC. In these cases, they are being forced to challenge the decision of a lower court that was not in their favor. Another factor could be that more democratic states are less likely to advance policies that get challenged in court and are less sensitive to the risk of an unfavorable decision when a legal challenge is launched. For example, Singapore is classified as “partially free” by Freedom House (2015; see Appendix M). Of the 20 cases in which the state is a litigant, three cases involve state action against opposition leaders. This may indicate some sensitivity to specific types of cases. Of the 112 cases in New Zealand, which is always classified as “free,” none of the cases involve state action against opposition politicians. I examine this further in Chapter 6.

## **5.7 Summary and Conclusion**

The goal of this chapter is to provide insight into the factors that influence whether the state’s governing coalition will change the final appellate court. The results of the SPS analysis on the 26 states in the sample that retain the JCPC at independence based on the theory laid out in Chapter 2. I examine decisions of the JCPC and changes in the political environment on a democratic-autocratic continuum. I find little support for the significance of the overall success of the governing coalition in JCPC decisions and strong support for the effect of changes in the political environment over time after independence. The models generally perform in the fashion

I expected, considering the theory and the consequent hypotheses. The results generally support the two tenets of my theory. First, that governing coalitions are somewhat responsive to decisions of the JCPC. More specifically, unfavorable decisions when the state is the appellant increases the likelihood the JCPC will be replaced. Second, that the governing coalition's perceptions about that court are influenced by changes in the political environment. These changes may serve to heighten the sensitivity of the governing coalition to court decisions and influence the governing coalition to abolish appeals to the JCPC. However, the evidence is not particularly strong and points to the need to examine the decisions more closely.

My findings have important implications for the long term support and development of new extraterritorial courts. States may be leery of acceding to extraterritorial courts if the perception is that the court will not support its policies. The state will be particularly concerned about how the court is formulated and administered. Understanding the control that it has over domestic courts and its benefits, a court that is not within the control of the governing coalition control may be suspect. Further, if a state does accede then my results indicate that the state will ultimately abandon the court if the court hands down unfavorable decisions, particularly if the case is important to domestic legitimacy and the reputation of the governing coalition. Yet the response to the court is dependent of the domestic political environment. Changes in the governing coalition and political environment may also influence any ongoing commitment to the court. Depending on the judicial branch to uphold and legitimize its policies, domestic access to an extraterritorial court may be viewed with suspicion and the level of tolerance may be lower in less democratic regimes. Ultimately, therefore, the level of skepticism to utilize or willingness to tolerate unfavorable decisions will influence the longevity and vitality of an extraterritorial court.

Further, what these quantitative analyses do not capture is whether changes in governing regimes in democratic states may change the perception of and willingness to continue supporting an extraterritorial court. Tate and Hanie (1993) point out the tendency of autocratic regimes not to favor independent judiciaries. The examination of my sample shows, however, that even strongly democratic regimes such as New Zealand and Australia eventually abandon the JCPC, which is completely independent. Further, the recent South African response to the ICC and the U.K.'s threat to withdraw from the EJC also are informative. This raises an important question of whether other changes in the political environment not captured in this chapter's quantitative analyses could lead the governing coalition to abandon an extraterritorial court such as the European Court of Justice, International Criminal Court, or the Inter-American Commission on Human Rights. With an eye on that additional question, I present three in-depth, single-state case studies in the next chapter.

In Chapter 6, I transfer my focus from a cross-national quantitative analysis to a qualitative analysis using process tracing. The goal is to take a closer look at three states and the effects of JCPC decisions and changes in the political environment. I analyze The Gambia and New Zealand that abolished appeals to the JCPC at different times after independence, and The Bahamas that retains appeals to that court as of January 1, 2015. Selected from the original sample of 26 states, The Gambia, New Zealand, and The Bahamas share a British colonial history, similar legal systems, and an adopted Westminster system of government with the JCPC after independence, but are quite different in many other ways. I examine some unfavorable decisions by the JCPC that challenge the policies of the governing coalition and effects of changes in the political environment that could possibly change the governing coalition's perceptions of the JCPC as a reliable partner in policy-making.



## **6 THE JCPC AND THE GAMBIA, NEW ZEALAND AND THE BAHAMAS**

### **6.1 Introduction**

In examining the case of the JCPC and states at independence from the U.K., it is important to understand why some governing coalitions later decide to replace the JCPC with a domestic final appellate court. The underlying reasoning for the decision has implications for the future of other extraterritorial courts such as the European Court of Justice, International Criminal Court, Caribbean Court of Justice, Inter-American Court of Human Rights, and other courts yet to be developed. Further, it improves our understanding of how the governing coalition may respond to decisions of extraterritorial courts. I posit that the governing coalition of those states will seek a change or disengage from the extraterritorial court if it perceives a disconnection with the court. The perception of such a disconnection is influenced by changes in the political environment that make the state more sensitive to decisions of the JCPC that are unfavorable to the state. Ultimately, therefore, the future success of extraterritorial courts may rest on the domestic political environment of member states. In Chapter 5, the quantitative analyses of the 26 states that retained the JCPC at independence provided little direct evidence of any significant effect of the levels of state success in court decisions, while changes in the political environment were significant in whether the governing coalition decided to disengage from the court. However, there was evidence that the level of success in cases where the state was the appellant did influence the governing coalition. Ultimately, my findings suggest that changes in the political environment are very influential. These changes color the state response to the court's decisions and, depending on the changes, may make states more likely to sever ties with the JCPC.

In this chapter, I employ three states as case studies to further investigate how JCPC decisions and changes in a country's political environment influence the governing coalition's

decision to abolish all appeals to the JCPC. 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). Using causal-process observations, I conduct a within-case comparison on each sampled state leading to the abolition of appeals to the JCPC. As pointed out by Collier (2010; see also George and Bennett 2005), this process can further evaluate the hypotheses and deepen our understanding of the phenomenon not possible with the quantitative analyses, which are better at “measuring observed probability distribution relating measure of an independent variable to measures of an outcome across a large number of cases” (George and Bennett 2005, 224). I extend the analysis in Chapters 3 and 4, providing an avenue for causal inference by guiding a more detailed examination of complex historical events and explaining the individual cases (George and Bennett 2005). I trace how political changes influence the governing coalition’s view of the JCPC and what role, if any, JCPC decisions that are unfavorable to the state play in moving the governing coalition to a second critical juncture. I assert also that the change in the political environment can be subtler than can be captured empirically on the democratic-authoritarian continuum using Polity IV and Freedom House scores.

In this section, I discuss an approach that will aid in capturing the more nuanced changes in the domestic political environment. I aver that the political environment can be captured in three categories – drastic change, subtle change, and no change. For the purposes of this research, I define these three categories as follows: (1) “no change” – the state does not experience any change in the political environment when a new governing coalition comes to power with a commitment to the constitution and the continued good governance of the state. This does not preclude law reform, but does not fundamentally change the relationship between

the state and its citizens. While there may be a new governing coalition after an election cycle, the basic tenets of the change lack ideological differences. The new coalition basically peruses the same broad policies but with a pledge to a better job; (2) “subtle changes” are those that follow the election of a governing coalition with a new vision based on political ideology that underpins new domestic and international policies (Elordi 2000). These are pursued without fundamentally systemic changes to the governing institutions or the rights and liberties of the citizens of the state. While this may also involve constitutional changes, the changes do not fundamentally change the governance landscape (Grace 2015); and (3) “drastic change” includes the promulgation and adoption of a new constitution that fundamentally changes the governing institutions, as well as the rights and liberties of the citizens of the state. In other words, these changes generally alter the relationship between the citizens and the state, or they expand or reduce the range of fundamental constitutional rights (Grace 2015; *Thoburn v Sunderland City Council* 2003). I assert that drastic and subtle changes can lead to the removal of the JCPC, but no change in the political environment maintains the status quo. Table 6.1 displays the 26 states in the three categories and the status of each state with respect to the JCPC.

**Table 6.1 States in the Three Categories and the Status of the JCPC**

<b>Political Environment</b>					
<b>No Change</b>		<b>Subtle Change</b>		<b>Drastic Change</b>	
<b>Retain JCPC (10 States)</b>	<b>Abolish (2 States)</b>	<b>Retain JCPC (1 States)</b>	<b>Abolish (6 States)</b>	<b>Retain JCPC (0 States)</b>	<b>Abolish (9 States)</b>
Antigua & Barbuda Bahamas	Belize	Jamaica	Australia		India
	Barbados		Canada		Ghana
Brunei	Singapore		Malaysia		Gambia
Dominica			New Zealand		Fiji
Grenada			South Africa		Guyana
Mauritius St. Kitts & Nevis St. Lucia St. Vincent & Grenadines Trinidad & Tobago					Kenya Nigeria Sri Lanka Uganda

I examine one state from each category as follows: (1) drastic change – The Gambia; (2) subtle change – New Zealand; and (3) no change – The Bahamas. Through these three case studies, I will show how the nature of the changes in the political environment contributes to our understanding of how the governing coalition responds to the JCPC and, by extension, increases our understanding of how states may respond to other extraterritorial courts. The selection of these three states is partially based on the quality and availability of data and information. Further, the selection of these three cases is both theoretically and methodologically motivated. They are all common law jurisdictions with the JCPC as the final appellate court, as well as Westminster-style democracies with multi-party systems. However, over time, important changes to the political environment occurred in The Gambia and New Zealand, while similar

changes were absent in The Bahamas. I use these three cases to isolate how ensuing changes in the political environment may lead to the specific question of whether to retain the JCPC as the country's final appellate court or to change the judicial structure. While the outcomes in New Zealand and The Gambia differ from that in The Bahamas, all three were multi-party parliamentary democracies for extended periods of time after independence. Importantly, they provide variation on the dependent variable – abolish or retain appeals to the JCPC. The Gambia and New Zealand were two of the 15 states that retained the JCPC at independence but subsequently abolished the right of appeal. The Gambia and New Zealand replaced the JCPC with domestic final courts of appeals 21 and 64 years, respectively, after independence. First, The Gambia is representative of the category of states that experienced drastic change as defined. All these states adopted new constitutions some point after independence that fundamentally changed the relationship between the citizens and the state and included the abolition of appeals to the JCPC. I examine The Gambia because of the availability of domestic and international sources about the changes in the political environment. This democratic political environment was fairly consistent for 21 years after independence, through the drastic change that followed the coup in 1994 and the statements and actions of the new governing coalition vis-à-vis the JCPC. Other states that promulgated new constitutions some years after independence that changed the nature of the governing institutions include Kenya, Ghana, Nigeria, and Uganda (Fombad 2013; Mbaku 1998; Mbondenyei 2013). These states also abolished the JCPC at that time.

Second, New Zealand is representative of the category of states that experienced a subtle change, where all the states experienced a consistent political environment punctuated only by the change in vision by the new governing coalition that did not view the JCPC as a viable

partner. These states amended the constitution to specifically abolish appeals to the JCPC. New Zealand is a good case to examine because the process is particularly well documented. It formally starts with the manifesto of the political party that led the new governing coalition after the 1999 general elections and the public debate that ensued, culminating with legislative action. Finally, The Bahamas is one of the 11 states along with eight other Commonwealth Caribbean states, Brunei, and Mauritius that retain the JCPC as of January 1, 2015. The political environments in these states have remained consistent after independence. The Bahamas is representative of the bifurcated discussion in the Commonwealth Caribbean about the JCPC that emerged around the single issue of the death penalty, with no clear political or public consensus to change the status quo. Brunei and Mauritius are the only two with no substantive public discourse about changing the status quo. With no apparent public discourse in Brunei on the status of the JCPC, its continued role as the final appellate court seems secure for the foreseeable future. Further, the last case to be adjudicated by the JCPC from Brunei was in 2007 (*Bolkiah & Ors v. The State of Brunei Darussalam & Anor*) and involved the head of state, Sultan Hassanal Bolkiah. In a challenge brought by his younger brother, Prince Jefri, the JCPC decided the four billion Pound Sterling suit in favor of the Sultan (Pierce 2007). In Mauritius, *Mauri Garments Trading and Marketing Limited v The Mauritius Commercial Bank Limited* (2015) involved the liability of banks for the economic losses of customers. The JCPC's decision in favor of the banks is described locally as a testament to the Mauritian commitment to international standards and rule of law (Noel and Bhima 2015).

In summary, despite being located in disparate regions of the world with economic and socio-cultural differences, they share a history of British colonial rule, as well as the common law legal system, and emerge as independent states with the Westminster parliamentary system

and the JCPC. In addition, all three states were stable democracies for extended periods after independence. The Gambia and New Zealand effectively abolished appeals to the JCPC in 1998 and 2005, respectively. The Bahamas retains the right of appeal to the JCPC as of January 1, 2015. Table 6.2 presents a summary comparison of the three states.

**Table 6.2 Summary Comparisons of the Three Sampled States**

	<b>Population</b> (World Population Review 2015)	<b>Change in political environment</b>	<b>Total decisions (&amp; % State a party)</b>	<b>Conflict</b>	<b>GDP per capita</b> (World Bank 2013)
<b>The Gambia</b> (Africa) Replaced JCPC	1.97 Million 4,127 Sq. Miles	Drastic change (new constitution)	12 (25%)	no	\$477
<b>New Zealand</b> (Asia-Pacific) Replaced JCPC	4.6 Million 103,734 Sq. Miles	Subtle change (1999 general elections)	179 (63%)	no	\$42,409
<b>The Bahamas</b> (Caribbean) Retained JCPC	388,000 5,382 Sq. Miles	None	53 (45%)	no	\$22,315

In the remainder of this chapter, the goal, therefore, is to better understand the factors that influence the choice of extraterritorial court by tracing the process that led The Gambia and New Zealand to replace the JCPC while The Bahamas has not done so. I trace and analyze the governing coalitions' actions and responses to the JCPC in the context of the political environment. I examine The Gambia, New Zealand, and The Bahamas in that order and present my conclusions.

The Gambia (Figure 6.1) was made a formal British colony in 1910 and gained independence in 1965. It is one of the few African colonies to gain independence after World War II and retain the JCPC. The others are Kenya, Nigeria, and Uganda. Like those states, it has a predominately indigenous population with a very a small British settler population that

dominated the colonial era but transitioned to emergent local governing coalition at independence. The Gambia retained the JCPC for 31 years, which is longer than any other African state. Also, it was a multi-party parliamentary democracy from independence until 1994 when the military overthrew the government by force or a coup d'état (Merriam-Webster 2015b). After the bloodless coup d'état in 1994, it abolished appeals to the JCPC, replacing it with the Supreme Court of The Gambia in 1998 as the final appellate court.

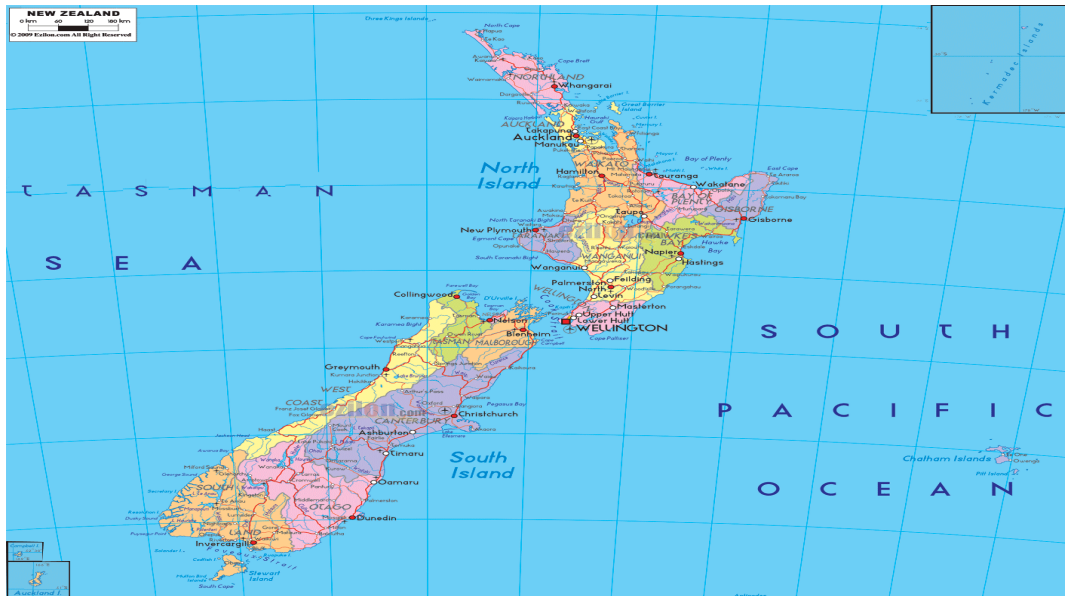


**Figure 6.1 A Map of the Republic of Gambia © (ezilon Maps 2009z)**

New Zealand is a South Pacific state (see Figure 6.2) that became a British colony in 1840. In 2004, it was the last of the Dominions (the others being Australia, Canada, South Africa, and Sri Lanka) to abolish appeals to the JCPC, having retained the JCPC for 74 years after it had the authority to abolish appeals with the passage of the Westminster Act in 1931. Finally, The Bahamas (Figure 6.3) located in the Caribbean became a British colony in 1717 and retains appeals to the JCPC as of 2015. British institutions permeate the state with the JCPC still



in place there today, along with eight other Commonwealth Caribbean states, Mauritius and Brunei.



**Figure 6.2 A Map of New Zealand © (ezilon Maps 2009b)**

During the 31 years with the JCPC, a total of 12 Gambian cases were decided by the JCPC, of which the state was a party to four cases, or 33 percent. Like in other states such as Kenya, Nigeria, Uganda, India, Fiji, Sri Lanka, and Guyana, the JCPC was replaced with a domestic final appellate when a new constitution was adopted. During the 74 years after New Zealand's independence, a total of 179 cases were decided by the JCPC, in which the state was a party to 112 cases, or 62 percent. After the elections in 1999, the Labour Party and Alliance Party coalition abolished appeals to the JCPC, replacing it with the New Zealand Supreme Court as the final appellate court. Like states such as Australia, Canada, Malaysia, Singapore, and South Africa, the abolition of appeals to the JCPC was achieved via constitutional amendments. From Bahamian independence in 1973 to January 1, 2015, the state was a party in 24 cases, or 46 percent – a total of 52 cases decided by the JCPC.



**Figure 6.3 Map of The Bahamas © (ezilon Maps 2009c)**

In Chapter 5, GDP per capita was a control variable and was not significant in any of the six models. These three countries are different, with New Zealand being among the states with the highest GDP per capita and The Gambia among those with the lowest GDP per capita. However, both replaced the JCPC. The Bahamas is positioned between the two and has not abolished appeals to the JCPC. This indicates no particular tendency toward wealth being a factor in judicial change, and lines up with the findings in Chapter 5. Also, considered in Chapter 5 was intra-state conflict (DataBanks International 2015a, 2015b) which also was not significant in any of the models. Even taking into account the bloodless coup in The Gambia, none of these three countries experienced any significant intra-state conflicts.

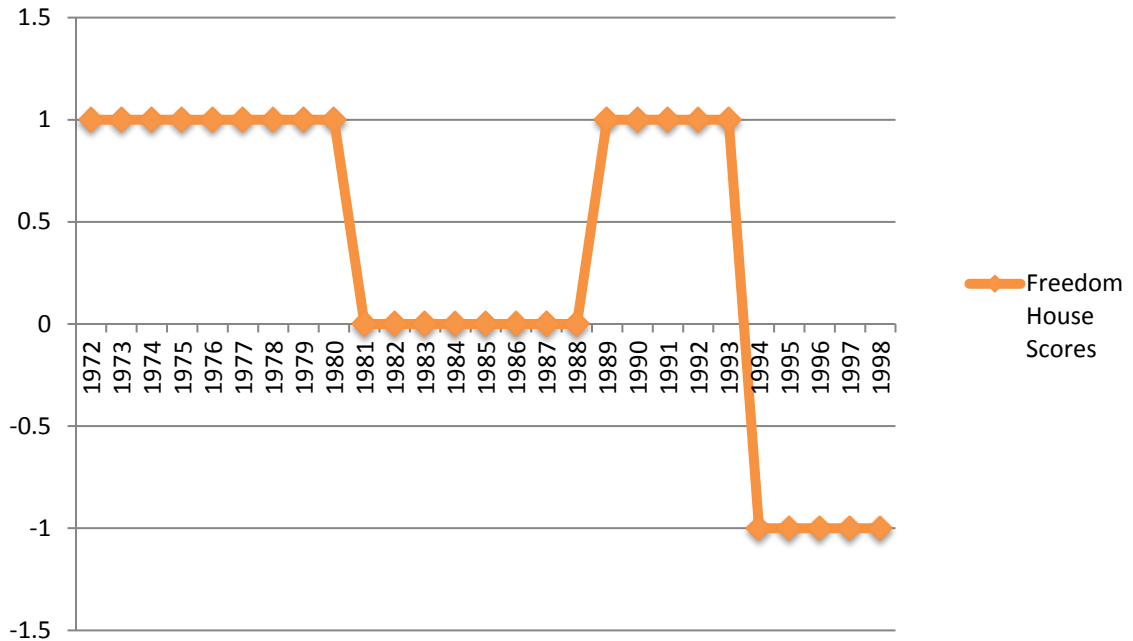
## 6.2 Tracing the Conditions for Change

### 6.2.1 *The Republic of Gambia (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), which 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 (Coleman, 2015). Perfect (2010) describes President Jawara's response to the attempted coup d'état as the only lapse in an otherwise "exemplary human rights record" (57). To gauge Coleman's (2013) assessment of the health of the Gambian democracy, I rely on Freedom House scores (2014a). 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 (see also Appendix K for descriptions) 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 with regard to political rights and civil liberties in 14 of the 21 years reported. Figure 6.4 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 6.4 Gambia's Freedom House Scores from 1972 through 1998 (Freedom House 2014)**

Based on the preceding discussion, The Gambia has enjoyed a fairly consistent period of democratic rule after independence in 1965 until 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. I suggest a number of 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. In Chapter 3, I discussed the literature on the high costs associated with accessing the JCPC (Joseph 1985; O'Conner and Bilder 2012; Swinfen 1987; Taylor 2005). While the costs may be prohibitive 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 perceive a benefit from 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. (as cited in Seow 1997, para. 15)

Of particular importance is the case, *Attorney General of Gambia v. Momdou Jobe*, that was adjudicated by the JCPC before the coup d'état in 1994. This 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 (Merriam-Webster 2015a) 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 as a serious enough challenge to their legitimacy. I suggest that the democratic political environment at the time made the governing coalition less sensitive to the unfavorable section of decision and, therefore, willing to have its

power 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 (Coleman 2013).

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 (Merriam-Webster 2015c) 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 that resulted 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 1994 coup d'état transformed The Gambia from constitutional governance to rule by military decree, to which there was no real legal recourse (Jeng 2013). As many as 70 military decrees were issued by the AFPRC from 1994 to 1996. The transformation of the Gambian political environment is captured in the Freedom House scores

(2014) which rate The Gambia as “not free” (-1) from 1994, which was the year the new governing coalition adopted the new constitution in which appeals to the JCPC were abolished.

After the coup d'état in The Gambia, Amnesty International (1995) provided a picture of the change in governance by the AFPRC led by President Jammeh. The 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 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 a coup d'état leader turned civilian president, Yahya Abdul-Aziz Jemus Junkung Jammeh (Jammeh 2011; Hughes 2000; Perfect 2010; Wolf 1996). The August 6, 1996, referendum returned The Gambia to constitutional rule as the Second Republic (Jeng 2013). The Constitution of the Second Republic provides for the replacement of the JCPC with the Supreme Court of Gambia as the final appellate court. Replacing the JCPC is touted by the governing coalition as an issue of sovereignty and important to reducing the costs of accessing the final appellate court (The Gambia's Independence Golden Jubilee 2015). As Senghore (2010) points out, however, after two years of rule by military decree, Gambians were more than ready for return to constitutional rule. Leading up the first general elections under the 1996 constitution, President Jammeh and the governing AFPRC intimidated and attacked opposition supporters and constrained the media (Perfect 2010). The 2015 Amnesty International Country Report (2015) on the political environment and state of human rights and liberties in The Gambia states:

2014 marked 20 years since President Yahya Jammeh came to power. The authorities continued to repress dissent. The government continued its policy of non-co-operation with UN human rights mechanisms. Successive legislation was passed further restricting freedom of expression and increasing punitive measures against journalists. (para. 1)

While President Jammeh won the subsequent presidential elections held in 1996, 2001, 2006, and 2011, Freedom House does not rate The Gambia as an electoral democracy. The Gambia's democratic freedom scores have declined dramatically since 1993 when Freedom House rated The Gambia as "Free" (1). I highlight the scores in 1993, the year before the coup d'état, to 1998, which is the year following the abolition of the JCPC. In this span of time, The Gambia received a rating of "Not Free" for every subsequent year on record. The Gambia's Freedom House scores in the categories discussed above from 1993 to 1998 are presented in the Figure 6.4. 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 abolishing the right of appeal to the JCPC, tracing the effects of specific decisions of the JCPC between the 1994 coup d'état and leading up the adoption of the new constitution in 1996 is instructive. The cases decided by the JCPC after the coup d'état, but before that court was replaced 1998 as provided for in the 1996 constitution establishing the Second Republic, are instructive as to the intentions of the governing coalition in replacing the JCPC. The state is a party to one of the four cases decided by the JCPC between 1994 and 1998, In *West Coast Air Limited v Gambia Civil Aviation Authority and Another (1998)* in which the state was the respondent, 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 a single contract and probably enough to make the governing coalition resentful of the JCPC for having overturned the decision of the lower domestic court of appeals. The low number of cases could be a reflection of 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 extraterritorial court.

The governing coalition was, therefore, not only aware of the fact that having the JCPC as the final court of appeal was beyond its control, but also that even though only a few cases were adjudicated by that court, the potential existed for unfavorable 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, Saihou Ceesay & Sons Limited V. AMRC* (1994). The actions before the High Court (Gambian trial court) challenged 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 actions of the governing coalition could not be reviewed. 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, Saihou Ceesay & Sons Limited V. AMRC*). Both decisions were handed down prior to the coup d'état in July of 1994, 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 result of this decision was that while the state was not subject to injunctive remedies leaving its power unfettered, it had the option to seek those remedies from the court 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). Section 22(1) (c) (ii) specifically provides for redress in court:

Securing to any person having an interest in or right over the property, a right of access to a court or other impartial and independent authority for the determination of his or her interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any to which he or she is entitled, and for the purpose of obtaining prompt payment of that compensation.

The decisions of the Court of Appeals after the 1994 coup d'état illustrate that the domestic courts may function as reliable partners in the governing coalition by legitimizing its policies. This also confirms to the governing coalition the importance of having such a judicial partner and the risk posed by an extraterritorial court such as the JCPC over which it has no control.

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 with regard to 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) characterizes the events as follows:

Mr. Juwara took the Gambia government to the Privy Council in London. But the Jammeh administration was determined to cover up its dirty linen from being publicly exposed and therefore 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)

This case is particularly important because Jawara was a minister in the former governing coalition that preceded President Jammeh and became a prominent opposition figure whose political activities defied the constraints on such activities imposed by the new governing coalition (Amnesty International 1996). If the *Jawara* case had reached the JCPC, it was inevitable that his persecution at the hands of the governing regime would have been laid bare before the court. A JCPC decision in favor of Jawara would have embarrassed the governing coalition and lend support to the criticisms of the regime by Amnesty International (Human Rights Watch 2016), the Interparliamentary Union (2001), and the annual negative democracy scores by Freedom House (2013) that started in 1994. An example of where the actions of the governing coalition are laid before the JCPC is illustrated in *Joshua Benjamin Jeyaretnam v The Law Society of Singapore (1988)*. The JCPC decision in the Singaporean case embodies the

concerns of The Gambian regime. Jeyaretnam was an opposition party leader (Workers Party) in the 1984 general elections. This general election was significant because it was the first time since independence that any opposition party had won even a single seat in the parliament. Jeyaretnam won one of the two opposition seats. In addition, his party won 41.9 per cent of the popular vote while the ruling People's Action Party saw a 12.9 percent decrease in the share of the popular vote (Elections Department Singapore 2015; Singapore Elections n.d.). Seow (1997) describes Jeyaretnam as the “prime minister’s *bête noire*” (para. 10), or someone particularly disliked (Oxford Dictionaries 2015) by the prime minister. The governing coalition initiated a legal action against Jeyaretnam to force his disqualification from holding elected office. After his successful removal from parliament, Jeyaretnam was also removed from the roll of attorneys. He petitioned and was granted leave to appeal the decision of the Supreme Court that removed from him from the roll. In the decision overturning the lower court, Lord Bridge of Harwich, speaks for the unanimous court and criticizes the government’s treatment of Jeyaretnam:

Their Lordships have to record their deep disquiet that by a series of misjudgments the appellant and his co-accused Wong have suffered a grievous injustice. They have been fined, imprisoned, and publicly disgraced for offences of which they were not guilty. The appellant, in addition, has been deprived of his seat in parliament and disqualified for a year from practicing his profession. Their Lordships’ restore him to the roll of advocates and solicitors of the Supreme Court of Singapore, but, because of the course taken by the criminal proceedings, their Lordships have no power to right the wrongs which the appellant and Wong have suffered. (22)

These comments are widely viewed as directly indicting the integrity of the Singapore judiciary and a clear rebuke of the political environment fostered by the governing coalition (Bell 1999; Seow 1997; Worthington 2001). The Singaporean parliament passed the Constitution of the Republic of Singapore (Amendment) Act retrospectively removing the right of appeal to the

JCPC on disciplinary matters (Bell 1999). The human rights group Asia Watch (as cited by Bell 1999, para. 3) notes that this amendment was designed to effectively erode the judiciary and the Bar Society of Singapore. In November 1993, the Supreme Court of Judicature (Amendment) Act 1993 abolished the remainder of the JCPC's jurisdiction in Singapore (Lim 1993; Tan 2015; Tan and Chan 2001). Tan (2015) asserts that even if Singapore recognizes the benefit of retaining the JCPC as the final appellate court at independence, that delegation of authority is considered expedient and expected to be withdrawn when no longer advantageous. By ending appeals before the case could be heard by the JCPC, the Gambian governing coalition preempted any chance that their actions could be reviewed in the *Jawara* case and, like the governing coalition in Singapore, viewed the relationship with the JCPC as expendable when no longer advantageous (Tan 2015). Like *Jeyaretnam v. The Law Society of Singapore (1988)*, the *Jawara* case from The Gambia may be characterized as the “smoking gun” that provides strong evidence that the perception of a disconnection between the governing coalition and the JCPC resulted in the establishment of a new final appellate court. Under the control of the governing coalition, it was expected to uphold and legitimize their policies with no legal recourse to the extraterritorial court.

In the case of The Gambia, the goal of having a final appellate court as partner in the governing coalition is evidenced not just by the choice of court, but also by the establishment of the constitutional relationship between the executive and the judiciary. Replacing the JCPC with the Supreme Court of Gambia in October 1998 embodies the apparent need of the governing coalition to control the judiciary. Examining the 1996 constitution provides insight into how the governing coalition led by President Jammeh viewed the relationship with the final appellate court. I first examine the provisions for the appointment to and removal of Supreme Court

justices in the 1996 constitution, and then I briefly examine how the governing coalition exercised that constitutional authority over the new Supreme Court of The Gambia.

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 retirement criteria for judges at 65 for the Chief Justice and 70 years for all other judges. Senghore (2010) points out, however, that “the security of tenure of Superior Court Judges is threatened by s. 141(2) (c) of the Constitution, which empowers the President to terminate the appointment of Superior Court Judges in consultation with the Judicial Service Commission” (244). This is, in effect, a “loophole in the relationship between the executive and the judiciary that weakens the latter’s autonomy” (Senghore 2010, 224), as the members of the Judicial Service Commission are appointed by the president. 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 in contrast to a more authoritarian state. Further, more democratic regimes may be less willing to pursue policies that likely to be challenged in court. Authoritarian states lack the legitimacy of elections, making it more likely to want the approval of the courts (Moustafa 2014; Solomon 2007). After ruling by decree for two years, the new governing coalition promulgated the new constitution, which was approved through referendum and established the Second Republic in 1997. The JCPC was replaced with the Supreme Court of The Gambia in 1998, with the presidential authority to dismiss justices after consultation with the Judicial Service Committee, whose members are appointed by the president.

At independence and with the adoption of the 1970 constitution that ushered in the First Republic, the constitutional right to appeal to the JCPC was not an issue for the governing coalition because the level of democracy made the state less sensitive to unfavorable decisions by the JCPC. After 28 years of democratic rule supported by stable institutions (Perfect 2010) and a commendable record on human rights (Coleman 2013), the 1994 coup d'état changed the trajectory of POGG in The Gambia. The Gambia is a prime example of where the change in political environment, introduced with a coup d'état and resulting in an authoritarian state, led to a different perception of the continued role for the JCPC.

The governing coalition's public rationale for abolishing the JCPC was to make the final appellate court more accessible and affordable to Gambians (The Gambia's Independence Golden Jubilee 2015). They presented it as merely a part of the evolution of the judiciary (Asemota 2014). Looking at the unfavorable decisions, the new governing coalition 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 is clear 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. The governing coalition gained leverage over the Supreme Court of The Gambia that it had not enjoyed with the JCPC as the final appellate court. 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.

### **6.2.2 *New Zealand***

Though both The Gambia and New Zealand eventually abolished appeals to the JCPC, the change in the political environment was much more nuanced in New Zealand than in The Gambia. Nevertheless, the move to abolish appeals to the JCPC was no less driven by the will of the governing coalition in a changed political environment. Though by 1907 New Zealand was already a Dominion within the British Commonwealth, the first critical juncture happened when the British Parliament passed the Westminster Act of 1931. The Westminster Act gave all Dominions the option of removing the JCPC as the final appellate court. 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 role of the JCPC in the jurisprudence of New Zealand was never seriously challenged until after World War II.

Though Sir Robert Stout, the longest serving Chief Justice in New Zealand's history, called for the abolition of appeals in 1908 (Cornes 2015), serious debates about the advantages and disadvantages of abolishing the JCPC have taken place in the four 'waves' after the Westminster Act of 1931. The first was in the 1940s led by then Chief Justice Sir Michael Myers, whose cabinet report on the future of the JCPC focused on the establishment of "a Commonwealth Court of Appeal" (Wilson 2010, 12). The same idea surfaced again in 1965, raised by then Attorney General Hanan at the Third Commonwealth and Empire Law



Conference in Sydney, Australia, but the idea did not gather much political support in New Zealand (Wilson 2010). The second attempt was the subject of research by Megan Richardson (1997). In 1987, the Labor Party government (1984-1990) announced a proposal to abolish the JCPC at the New Zealand Law Conference. Richardson asserts that the decision to drop the proposal was partly influenced by the decisions favoring the government in two important cases: (1) *Databank Systems Ltd v Commissioner Inland Revenue* (1990) in which the JCPC supports the state's regulatory power over financial services; and (2) *D.J. Butcher v Petrocorp Exploration Ltd. Et al* (1991) in which the JCPC upheld the state's authority to regulate exploration for natural resources. Richardson (1997) concludes that "...the Privy Council has, by its actions, served to foster its continuing links with New Zealand even if that was not its deliberate purpose" (910).

The third attempt was initiated in 1996 when the National Party introduced a bill to parliament to abolish the JCPC. The effort was derailed by the results of general elections in 1996, which forced the National Party into a coalition government with the New Zealand First Party who 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 influenced by the JCPC's decision favoring the government in *Treaty Tribes Coalition v Urban Maori Authorities & the Attorney General of New Zealand* (1997). In that case, the JCPC decision supports the government's claim of authority to regulate fishing rights. The final and ultimately successful attempt was initiated when the Labor Party came to power in the 1999 general elections.

The next section traces how that fourth attempt unfolded. I assess the factors and events that point to the causal elements underpinning the abolition of appeals to the JCPC and the establishment of the Supreme Court of New Zealand as the final appellate court in 2004. I

discuss 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 influences of the governing elite and the public.

Though not the types of changes seen with The Gambian regime after the 1994 coup d'état, there were changes in New Zealand's political environment in 1999. Although 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), there were clear ideological changes in New Zealand at that time. These changes influenced the deliberate steps taken by the governing coalition aimed at replacing the JCPC. Led by Helen Clark, 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, 87). The Labour Party had a history of liberalism, relying on support from the working class and more inclined to view government as having an important role to play in the society (Markey, 2008). The party's manifesto explicitly included a pledge to abolish appeals to the JCPC, reflecting a public acknowledgement the new governing coalition did not see the JCPC as an appropriate partner to implement its policies. This was reinforced further with the forming of the new government with the Alliance Party. Led by Jim Anderton, the Alliance Party was also ideologically left-leaning (Pearce 1999) and supported the abolition of the JCPC. There was also support from the Green Party (Wilson 2010). On taking office, Prime Minister Clark and her cabinet were very purposeful in the handling of this issue. They tried 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, 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), and after leaving that post she went on to become a professor of Law and Public Policy University of Waikato, New Zealand. In a lecture at Inner Temple in London,<sup>3</sup> Wilson (2010) expounds 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, I examine the official rationales in the *Discussion Paper: Reshaping New Zealand's Appeal Structure* (Wilson 2000) for pursuing this constitutional change to replace the JCPC. I start with the issue of sovereignty. As discussed in Chapter 1, retaining the JCPC, an extraterritorial court and a relic of the colonial era, is an apparent affront to sovereignty. This is particularly true as all other important vestiges of institutionalized colonial rule are shed and the fact that the governing coalition of a new state has no administrative authority over the JCPC. What Wilson (2010) makes abundantly clear, however, is 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

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<sup>3</sup> The Inner Temple is one of only four Inns of Court with the exclusive rights to call candidates to practice law in England and Wales.

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 former Attorney General Wilson but seem not to be the primary focus.

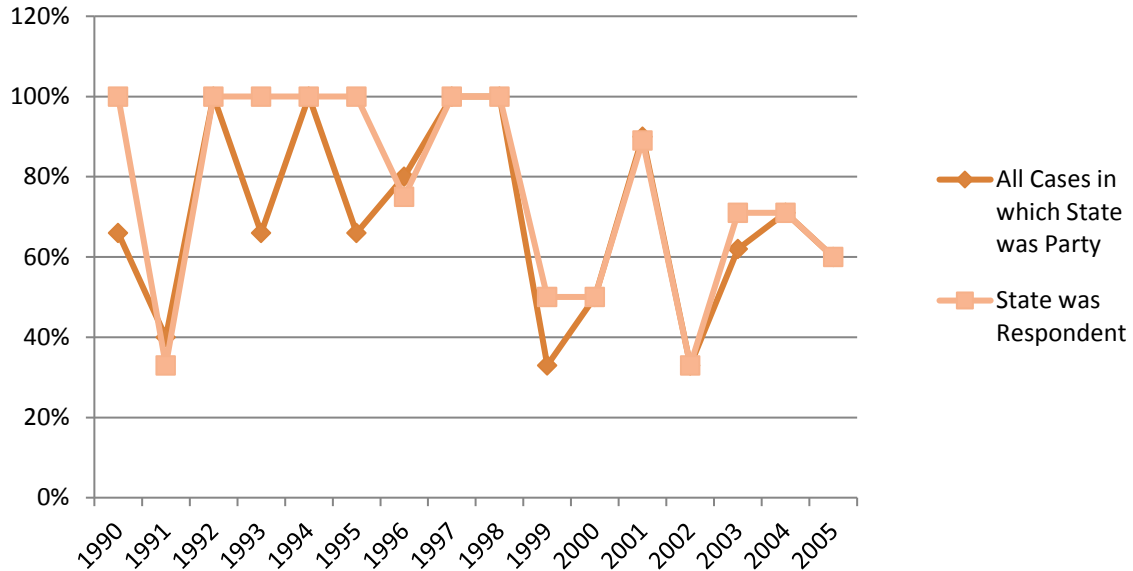
I assert that there are really three distinguishable yet interconnected reasons underpinning the governing coalition’s initiative to abolish appeals to the JCPC and establish a domestic final appellate court. First, the Labour Party, as the leader of new governing coalition in 1999, espoused a new vision 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 (and its coalition partners) that led the previous governing coalition (Wilson 2010). In other words, the new governing coalition intended to pursue new policies that would put New Zealand on a different path from that the previous governing coalition. 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. As noted by Kelly (1994), as the British Empire contracted, business ties weakened and the values of states diverged from that of the U.K. As a result, there was less need for shared legal systems. Wilson (2010), therefore, reflects on the governing coalition’s view that the JCPC was not the appropriate venue to support the new vision. The JCPC was viewed as having a limited role in producing necessary precedents for the following reasons: (1) few cases actually going to the JCPC; (2) 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, 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, 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 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, 11).

Finally, I examine 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 particular 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 understand New Zealand and its realities with the implication being that the domestic final appellate court, staffed with judges from New Zealand, replacing the JCPC would ipso facto or by that fact itself (The Free Dictionary n.d.) be advantageous for New Zealand.

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. 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 6.5.



**Figure 6.5 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, 22). John Hagan, Chairman of Deloitte Touché Tohmatsu, spoke on behalf of his and four other accounting firms. He asserted 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 with regard to commercial cases, and expressed skepticism about the Attorney General’s process of consultation about its domestic replacement (Kerr 2002).

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 were received, and they were evenly split between support for and rejection of the proposal to abolish appeals (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 started with the 1999 general elections victory of the Labour Party with a different vision for New Zealand that was deemed incompatible with a continued role for the JCPC as part of the governing coalition. 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 of the governing coalition parties. Wilson 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 of a moderate change enough to shift the status quo. It influenced the governing coalition to deem the JCPC as not the best or most appropriate partner for implementing their new vision for New Zealand. Margaret 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, 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, 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 change 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, 915; 1976 New Zealand Law Review, 380).

The effect of election results on the political climate in Singapore is again worthy of note. The literature points to the JCPC decision involving opposition leader Joshua Benjamin Jeyaretnam as the tipping point for the governing coalition, resulting in the abolition of the JCPC (Seow 1997; Tan 2015). In the *Joshua Benjamin Jeyaretnam* decision, the Law Lords directly criticize the government’s treatment of Jeyaretnam, and the following year the JCPC was removed as the final appellate court. This was not unlike what occurred in The Gambia, where the Jawara petition to the JCPC was thwarted when the governing coalition abolished appeals to the JCPC. The political decision to replace the JCPC was in service of the governing coalition’s goal of having a final appellate court as a reliable policy-making partner. While the change in the political environment is subtler in New Zealand, the election of the Labour Party with a new vision for the state was enough to move the governing coalition to abandon ties with the JCPC. These two cases exemplify and support my theory that the goal of the governing coalition is to have a court that it can rely on for support when legal challenges to its policies are mounted. In a political environment where the status quo is no longer advantageous, the governing coalition

may galvanize the political will to replace the extraterritorial court with a domestic final appellate court over which it has leverage.

### **6.2.3 *The Commonwealth of The Bahamas (The Bahamas)***

Unlike The Gambia and New Zealand, The Bahamas retains the constitutional right of appeal to the JCPC as of January 1, 2015. Since independence in 1973, The Bahamas remains a parliamentary democracy with general elections every five years, as provided for in the independence constitution. The two political parties in The Bahamas, the Free National Movement (FNM) and the Progressive Liberal Party (PLP), have both led governing coalitions after independence with consistently peaceful transitions of power (Meditz and Hanratty 1987). While the PLP governed from 1973 until its general election loss in 1992, that election as well as subsequent elections, were driven overwhelmingly by issues of domestic economic policies, increasing crime rates that affected the large tourist industry, and allegations of official corruption (Country Watch 2015). The general elections and power transfers from one governing coalition to another were unconstrained and peaceful. Like New Zealand, it has not experienced any drastic changes in the political environment since independence and has received consistently favorable scores for its high levels of democratic freedoms. This is reflected in the Freedom House scores for political freedom and civil liberties exhibiting a high level of democracy in The Bahamas. It has been consistently rated as “free” since independence (Freedom House 2013a, b).

Since independence in 1973, the decisions that draw attention to the question of the status of the JCPC as the final appellate court involve the death penalty. This is an issue that reverberates around the Commonwealth Caribbean. Ghany (2000) contends that the JCPC has an agenda in the Commonwealth Caribbean and concludes that “It is now clear that there is an

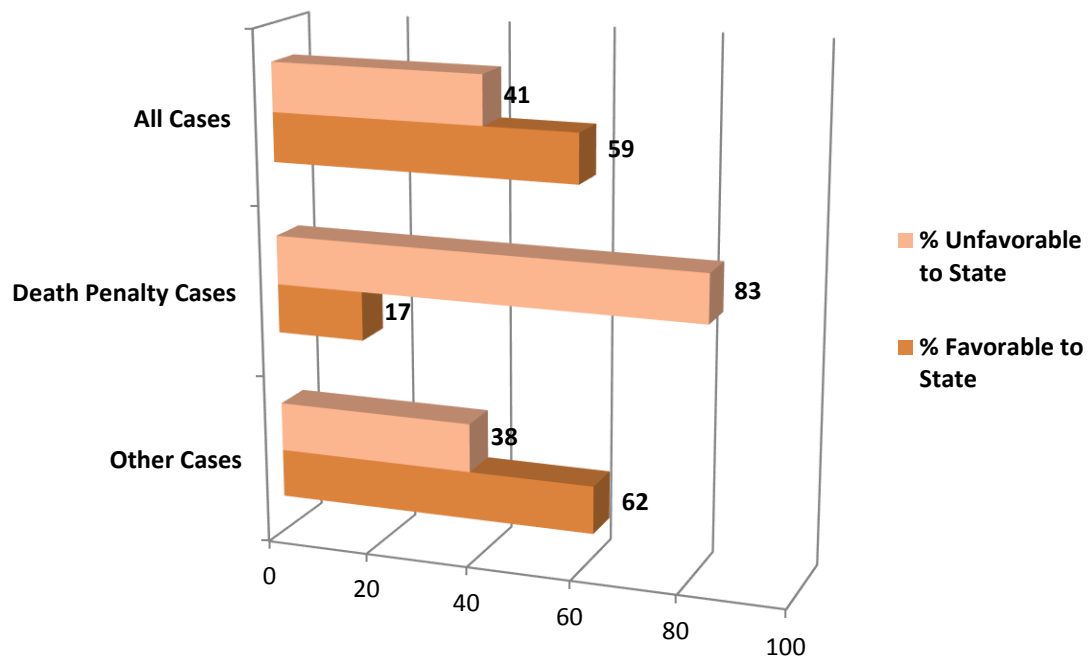
agenda to make it difficult for Commonwealth Caribbean states to carry out the death penalty” (42). There is general public support for the death penalty in the other Commonwealth Caribbean states and unhappiness with JCPC decisions on that issue (Anthony 2003). Bahamians are also unhappy with the JCPC’s decisions (Dames 2011; Toote 2013). Despite support in The Bahamas for the JCPC to continue as the final appellate court (Gibson 2009; Toote 2013), the discourse is bifurcated. The major part of the public discourse focuses on the JCPC and the death penalty, with a separate discussion on the wider role the JCPC in Bahamian jurisprudence. I suggest that this bifurcation in the discourse on any change in the status quo reflects a lack of consensus and will on the part of the governing coalition to change the status quo.

I first address the discussion on the general status of the JCPC. In an interview, the former President of The Bahamian Bar Association, Ruth Bowe Darville, explicitly supports the retention of the JCPC (Rolle 2012). Darville points out that those who advocate the removal of the JCPC 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 center, they need assurance that the Privy Council [JCPC] is there” (as cited by Rolle 2012, para. 4). In other words, the JCPC is needed to demonstrate and reinforce the independence of the judiciary to those with economic interest in The Bahamas. This argument is reminiscent of that used by the sectors of the business community in New Zealand. Further, *The Bahamas Advantage* (December 27, 2007), the newsletter of The Bahamas Financial Services Board, reports that Prime Minister Ingraham reiterated the link between judicial independence and the continued role of the JCPC as the final appellate court. The Bahamian Prime Minister states in his welcoming remarks to the Law Lords convening for the second time in Nassau (the capital city) in 2007 that he:

reaffirmed the government’s commitment to maintain judicial independence in The Bahamas...that the political institutions of parliamentary democracy in The Bahamas are

modeled after Westminster, and its legal and judicial institutions are based on English tradition, which he credited for the stability and prosperity The Bahamas has enjoyed through the years. (para. 3)

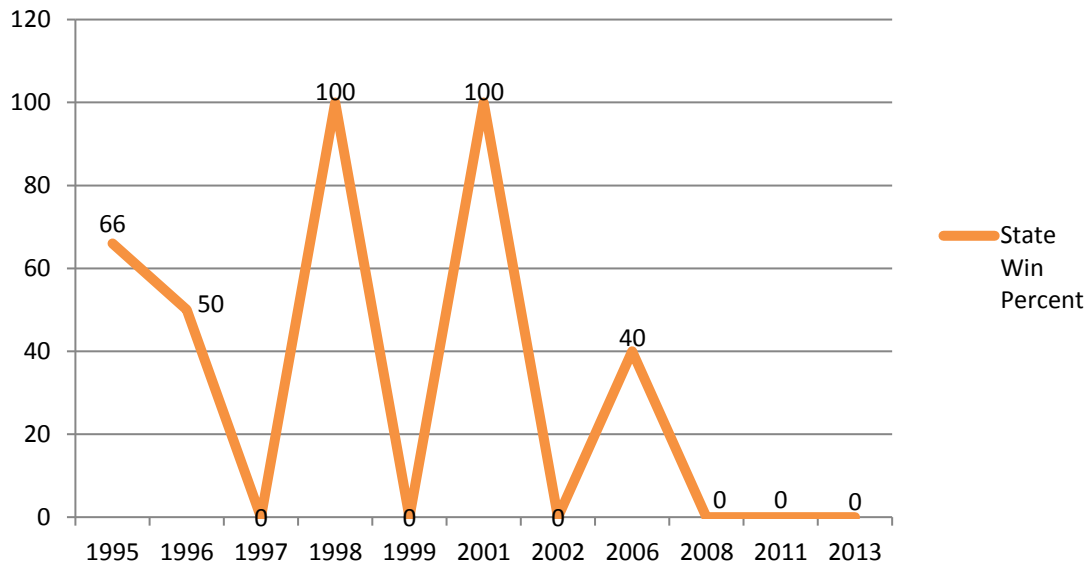
A contrary position is offered by Bahamian attorney-at-law Adrian Gibson (December 2009). He challenges the continued use of the JCPC as an affront to sovereignty and asserts that, “The relevance of the law in local circumstances is best achieved by locals, not regional or far distant courts whose law Lord’s thinking is not superior to that of the most ethical and scrupulous Bahamian jurists.” (para. 26) He also notes that the JCPC praised the quality of decisions handed down by the domestic court of appeals and states that “the notion that we can govern ourselves but are not capable of judging ourselves is a non sequitur this is simply illogical” (para. 24). The most divisive and actively debated issue with regard to the JCPC is that of the death penalty. Of the total of 53 decisions, 18 involve appeals against the death penalty, with the JCPC overturning the sentence in 15 (83 percent) decisions. Figure 6.6 displays the percentage of favorable/unfavorable JCPC decisions for all cases in which the state was a party, with the state winning 59 percent of the cases. In all other types of cases also displayed in Figure 5.6, the state did much better, with a favorable outcome in 62 percent of those decisions. This was 58 percent above the success rate in death penalty cases. This would draw much less attention, and make it less likely that the state would perceive a disconnection with the JCPC. In death penalty cases, however, the results displayed in Figure 5.6 are much different. This shows the variation in outcomes and that the death penalty cases have been such a point of focus where 83 percent of the appeals against the death penalty were successful or unfavorable to the state.



**Figure 6.6 Comparison of Success Rates for All Cases in which the State is a Party; Death Penalty Cases and All Other Cases**

Further, all the death penalty cases adjudicated by the JCPC between 1995 and 2013 present a strong indication as to why this issue would be so prominent in The Bahamas. A closer look at the death penalty cases shows that the decrease in the state's success rate in upholding the death penalty before the JCPC. Figure 6.7 displays the states win average in death penalty decisions handed down by the JCPC. Following the JCPC's decision in *Maxo Tido v The Queen* (2011) to overturn the death penalty sentence handed down by the domestic court of appeals in 2002, a former President of The Bahamian Bar Association, Ruth Bowe Darville, was reported as saying, "I think the question of the death penalty needs to be addressed. I think the country is torn by it because we're in the throes of this crime epidemic as people have labeled it" (as cited by McCartney June 25, 2011, para. 12). Darville suggested that the issue of the death penalty be addressed through legislation, but with the knowledge that care must be taken not to offend the

international community and that any action is linked to the economic well-being of The Bahamas.



**Figure 6.7 The State Win Rate Percent per Year from 1995 to 2013 in Death Penalty Cases**

Religious leaders presented another view of the issue. While Toote (2013) asserts that the majority of the Bahamians supported the death penalty, an important divide existed in the religious leadership. The Anglican Bishop and the Methodist synod came out against the death penalty (Toote 2013). In 2009, the Roman Catholic Archbishop reaffirmed the Church's stance against the death penalty (BahamaCatholic 2009). However, the majority of Baptists, the single largest denomination in The Bahamas at 40 percent of the population, supported the death penalty (Toote 2013).

Only a minority of politicians came out publicly in support of the death penalty (Toote 2013). Not surprisingly, therefore, the reaction of the governing coalition is cautious. It tries to separately address the issues of the death penalty and any calls to completely abolish appeals to the JCPC. In addition, unlike the very public position in favor of abolishing appeals to the JCPC taken by the Labour Party's Manifesto for New Zealand, the approach of the political party



leading the governing coalition and the opposition party reflects the bifurcated approach to the issue of the JCPC. In its Charter of Governance, the governing PLP acknowledged that death penalty decisions of the JCPC constrained the state's ability to enforce the death penalty. Instead of calling for the abolition of the JCPC, it pledged to ensure "that all avenues of appeal are exhausted without delay. Cases that are complete and warrant the death penalty shall be disposed of expeditiously.... fast-tracked to the Supreme Court to ensure that our laws are no longer reduced to bluffs" (Progressive Liberal Party 2011). This was a commitment by the governing coalition to follow the rule of law. It was also a pledge to abide by the JCPC precedent set in *Pratt and Another v Attorney General and Another (1993)* that overturned the death penalty sentence on the grounds of undue delay. The opposition FNM makes two main promises in the party's manifesto. First, it promises to reduce delays in the prosecution of criminal cases (Manifesto '07, 4). Second, in a 2014 speech, the Hon. Dr. Hubert A Minnis, Leader of the Opposition, promises to introduce a bill that would mandate that "an appeal against a sentence of death can only be made to the Bahamas Court of Appeal, and nowhere else" (Minnis 2014, para. 35). Such a constitutional amendment would effectively oust the jurisdiction of the JCPC specifically, but only in death penalty cases. This approach was an effort to recognize voter support for the death penalty, and to retain the JCPC for all other matters to reassure those interested in retaining the JCPC as a hallmark of credibility and independence of the Bahamian judiciary.

The bifurcated discourse about the role of the JCPC in The Bahamas was driven primarily by the single issue of the death penalty, on one hand, and the broader approach of those who advocated the retention of the JCPC as an institution important to the credibility of the Bahamian judiciary, on the other. This took place in a dynamic democracy where the political

leaders were influenced by conflicting positions among the elite and the voting public. The result was a cautious approach to the issue of the continued role of the JCPC and no strong political will to replace the JCPC with a domestic final appellate court. While the governing coalition was sensitive to the JCPC decisions on the death penalty, the fact that the discontent was charged by a single issue made it difficult to ignore other elite forces and interests who favored a continued role for the JCPC.

In The Bahamas, the political environment did not change enough to precipitate a strong enough reaction to the JCPC to create the political will within the governing coalition to abolish appeals. This does not discount the direct, albeit narrow, proposal to oust the jurisdiction of the JCPC in death penalty cases only. This proposal in the 2014 speech by the leader of the opposition party (Minnis 2014) was just that – a proposal, and one not reflected in the party manifesto. There is no way to predict if any future victory by the current opposition (FNM) would lead to the change in political environment and clear political will to replace the JCPC. This is in contrast to New Zealand, which also enjoys a strong democratic tradition. The position of the Labour Party was clear in its manifesto leading up to the 1999 general elections. When the Labour Party took power after the general elections in 1999, the governing coalition had a clear vision for change that it successfully executed. There was no single issue that engaged the elite or the voting public. The change was forged by a political vision for New Zealand in which the JCPC was not considered an appropriate partner in the new governing coalition.

### **6.3 Summary and Conclusions**

Ultimately, it was the goals and political will of the governing coalition in The Gambia and New Zealand that drove the process of abolishing the JCPC in favor of a domestic final appellate court. The motivation of the governing coalition was shaped, in part, by the existence

of an extraterritorial court over which it had no control and by varying degrees of sensitivity to the decisions handed down by the JCPC. The governing coalitions appeared particularly sensitive to unfavorable decisions to the state or the possibility of such decisions and not just the relationship with the extraterritorial court. While there are commonalities among the three states, there are distinct socio-cultural, economic, and political differences articulated in this chapter that make them appropriate selections from the sample of 26 states that retained the JCPC at independence used in Chapter 5. These three cases support my theory that the governing coalition expects the final appellate court to be a reliable partner and will replace the court if a disconnection in policy is broadly reflected in the decisions of the court and if there is a change in the political environment. While in The Gambia and New Zealand the JCPC no longer served the purposes of the governing coalitions, The Bahamas is a clear example where the governing coalition with support from other elites still considers the JCPC a reliable partner and asset to the credibility of the judiciary.

In The Gambia, the drastic change in the political environment was precipitated by a military coup d'état and resulted in the adoption of an entirely new constitution. In the changed political environment, the governing coalition may have been more sensitive to unfavorable JCPC decisions undermining its legitimacy. My examination suggests that the replacement of the JCPC in 1998 may have been an indirect response to the possibility of the politically charged *Jawara* case reaching the JCPC. By replacing the JCPC, the appeal process had to be aborted, and the decision of the domestic court of appeal favorable to the governing coalition remained. However, the adoption of the new constitution changed the governing institutions and the relationship between the state and the citizens.

While the character of the change in the political environment in New Zealand was subtler, it was clearly articulated and executed by the governing coalition. A more detailed examination of the political environment reveals that more nuanced changes in the political environment can also be important. The election of a party with a different ideology and vision for the state led New Zealand to the abolition of appeals to the JCPC. The process tracing approach facilitates examination of the nature JCPC decisions and links them to events within the state. The governing coalition viewed the JCPC as incompatible with its new vision. Once the governing coalition was sufficiently motivated, the constitutional change abolishing appeals is realized fairly quickly, despite having allowed appeals for 74 years. The political decision to abolish the JCPC was done by amendment without the adoption of a new constitution, as seen in The Gambia.

The examination of The Bahamas reveals that while the governing coalition was sensitive to the unfavorable decisions, the discontent was only with JCPC decisions involving the death penalty, with conflicting views among the elite and the public on that issue. Unfavorable decisions on this particular single issue were not enough to threaten the legitimacy of the governing coalition. Further, any discontent with the JCPC decisions on this single issue was accompanied by neither subtle nor drastic changes in the political environment. As a result, there was no nexus between any reaction to unfavorable JCPC decisions and a change in political environment producing a governing coalition with the political will to replace the JCPC with a domestic appellate court.

## 7 CONCLUSIONS

### 7.1 Summary and Major Findings

The primary goal of my dissertation is to examine and contribute to our understanding of the relationship between extraterritorial courts and states. More particularly, it is to suggest explanations for why a state would accede to an extraterritorial court which has the jurisdiction to constrain the policies of the state's governing coalition. I suggest that the state's relationship with an extraterritorial court is underpinned by the prestige and reputation of being associated with the court and the expectation of reliability of the court decisions when the governing coalition's policies are challenged. Accepting the jurisdiction of an extraterritorial court, therefore, is prefaced by that expectation, and if not realized the state would act to remove the jurisdiction of the court. The state's continued relationship with the court is partly influenced by the perceived benefit of being associated with the court. Based on the case study, my examination finds that multiply factors contribute to the perception of the governing coalition. These factors are interconnected contributes to whether the governing coalition is willing to accept this apparent affront to sovereignty and JCPC retain at independence for the perceived benefit and credibility that court could bring to the new state. This suggests that the decision of state to accede to other extraterritorial court is partially influenced by the governing coalition perceiving some benefit. I suggest that the benefit may be garnered by signaling to other states that the state is part of the international community and adding to their legitimacy. My case also provided the opportunity to examine what happens after the state acceded. Among those states that retained the JCPC at independence, the emergence of the political will to subsequently change the status quo is driven in part by the nature of the court 's decisions and the domestic political environment. How then are the decisions of current extraterritorial courts and changes in

the domestic political environment influencing the relationship with member states? Are there implications for current extraterritorial courts?

To the extent that the literature focuses on the JCPC, it is limited to the judicial process and qualitative research on a few states (Weiden 2010). Only focusing on a few states using a single methodological approach does not provide a more general understanding of why states would choose an extraterritorial court as the court of final appeal. Other research focusing on the economic benefits of retaining appeals to the JCPC (Voigt et al, 2007) are post facto and provide no insight into why the states may choose the JCPC at the critical junctures.

Given that the final appellate court has the power of judicial review, this makes the court an important legitimizing legal institution within the governing coalition. The causal logic of my theory is grounded in the goals of the governing coalition having a broad range of public policies supported by the final appellate court as a feature of constitutional rule. I theorize that the governing coalitions want a final court of appeal that can be relied on as a partner in policy-making. When legal challenges are mounded, the governing coalition ultimately wants its policies to be upheld and legitimized by the court. Justice Jallow notes that the “judiciary, therefore, functions to ensure legality, fairness, accountability and objectivity in the process of governing” (as cited by Senghore 2010, 216). The goal of a governing coalition, therefore, is to ensure that the extraterritorial final court of appeal is a reliable partner in the policy-making process of the governing coalition for POGG.

Ultimately, I seek only to better understand the factors influencing the decision of the governing coalition with regard to the final court of appeal as a policy-making institution. We are in era of an increasingly globalizing world with the emergence of new extraterritorial courts. My results suggest that unfavorable decisions of the court can influence the decision to abolish the

jurisdiction of the court. Further, the governing coalition's political will to remove the court is dependent on and shaped by the domestic political environment. Changes in the political environment may be in the nature of the regime on the democratic-autocratic continuum, or more changes in the governing coalition relationship with the people and in the vision for the state may make the extraterritorial court incompatible or a potential liability. The implication is that the role of extraterritorial courts is dependent upon the interests of the state. My findings could have implications for other extraterritorial courts such as the International Criminal Court, the International Court of Justice, the Caribbean Court of Justice and the Inter-American Court on Human Rights. Though the jurisdictions of these courts vary, the policies of states that accede to the conventions that establish these courts are influenced and constrained by the decisions.

The case of the British Commonwealth and the JCPC provides an extended time period, states, and data to examine the phenomenon of extraterritorial courts. In Chapter 1, I introduced extraterritorial courts and two current examples of interactions between states and these courts. In Chapter 2 I then showcased the expansion of the British Empire, the development of the JCPC, and the significant role it played in the colonial enterprise and as an important and arguably the first extraterritorial court. In Canada, for example, the JCPC played an important role in the struggle between the provinces and the central government over the interpretation of the North American Act between 1867 and 1949, when appeals were finally abolished (Johnson 2012; Swinfin 1987; Tuck 2006; 1994). Not only is the choice of final appellate court integral to policy-making and implementation, but also the choice of an extraterritorial court such as the JCPC as a final court of appeal appears to contradict the general understanding of state sovereignty while enhancing the credibility and legitimacy of the new state.

In Chapter 3 I present my theory and hypotheses. I argue that the choice of court is underpinned by the path-dependent effects of colonial rule experienced by the state leading up to independence. This influences the governing coalitions' expectations of this prestigious and reputable extraterritorial court. States, however, can change course after independence. Changing conditions and new developments in the political environment can disrupt the status quo, resulting in institutional alterations. I posit that unfavorable decisions by the court and changes in the political environment create the impetus for the governing coalition to abolish the jurisdiction of the extraterritorial court.

It is important to better understand what factors help shape the decisions of the governing coalition with regard to the JCPC at the critical junctures. Using the JCPC and the British Commonwealth as my case, my mixed methods comparative research focuses on the questions of why states choose this extraterritorial court and what factors influence some states to subsequently decide to change course. In Chapter 4, I analyzed the first critical juncture at independence when the emerging governing coalition had the first opportunity to participate in the decisions about the governing institutions to be enshrined in a new constitution, and in particular the final appellate court. The choice is either to establish a domestic final appellate court or to retain the JCPC as the final court. Large states including Australia, Canada, India, and Malaysia as well as small states such as The Gambia, The Bahamas, Singapore, and Kiribati retained the JCPC. My challenge was to better understand why colonies, on becoming independent of the colonial power, would choose to retain an important colonial institution like the JCPC. This speaks to the issue of the persistence of important institutions that have existed for an extended period of time and the states perception of the institution. I assert that the emerging governing coalition that led the colony to independence represents the change in the



political environment necessary to gain independence from the colonial power. However, in some states the change in the political environment did not result in the severance of all ties with the U.K. Based on the perception of the JCPC, the new governing coalition in some states chose to retain the JCPC, expecting this final court of appeal to support its policies. The decision that resulted in the persistence of this institution was influenced by the strength of the colonial influence that shaped their perception of the JCPC. The quantitative analyses of the 50 states provide some support for my theory – the stronger the ties between the colony and the U.K., the more likely the states were to retain the JCPC. These findings highlight historical underpinnings that link the past and the future (Vergne and Durand 2010). In other words, change is hard and the perception of the governing coalition is shaped by the context. The extended presence and reputation of the JCPC during the colonial period would support the retention of the JCPC and the expectation of the governing coalition that the court would be a reliable partner in policy-making.

In Chapter 5, I asserted that states sever ties with the extraterritorial court when a disconnection develops and there is doubt that their policies will be supported. Of the 30 states that accepted the apparent anomaly of this colonial extraterritorial final appellate court at independence, 19 subsequently abolished appeals, leaving 13 states that maintained the status quo. Though not inevitable, this juncture is the function of the governing coalition's perception of the extraterritorial court influenced by a disconnection that developed over time between the court and the state with a heightened sensitivity to the role of the extraterritorial court in its affairs. If the perception is that the court's decisions become increasingly unlikely to reflect their preferences, the governing coalition may view this as a threat to the legitimacy of their policies (Dahl 1957). I analyze the factors that led the governing coalition of some states to replace that

court while others retain the JCPC. I demonstrate both theoretically and empirically that the governing coalition's decision to abolish appeals at some point after independence is significantly influenced by the decisions of cases adjudicated by the court. Further, it is the changes in the political environment of the state that heighten the governing coalition's sensitivity to the decision. These two factors can provide sufficient political will for the change in final appellate court. The results of the SPS analysis on the 26 states that retained the JCPC at independence generally support the two tenets of my theory. First, governing coalitions are responsive to decisions of the JCPC, and unfavorable decisions increase the likelihood the JCPC will be replaced. Second, changes in the political environment influence actions of the governing coalition. The findings of the quantitative analyses are supported by the qualitative analyses of The Gambia, New Zealand, and The Bahamas explicated in Chapter 6.

In Chapter 6, I conducted a within-case comparison using causal-process observations leading to the abolition of appeals to the JCPC. This involves a closer examination of historical events and how political changes influence the governing coalition. I examined the interactions among the governing elite, public opinion, and how shifts in the attitude of the governing coalition towards the extraterritorial court can lead to the political will necessary for abolition of appeals to that court. The governing coalitions in the three states exhibited differing degrees of sensitivity to the unfavorable decisions of the JCPC. When changes in the political environment heightened political sensitivity to unfavorable decisions, two (New Zealand and The Gambia) of the three states replaced the JCPC. In The Gambia, the overthrow of the democratically elected Jawara government by the military ushered in the autocratic period reflected in Freedom House (2014a) and Polity IV Project (2014) scores. This is similar to events in Fiji in 1987 (Martin 1988). In both cases the new governing coalition abolished the jurisdiction of the JCPC within

two years. In Singapore, opposition election victories led the government to take legal action to expel an opposition leader, Joshua Benjamin Jeyaretnam (Bell 1999; Seow 1997), and to remove him from the roll of attorneys. The governing coalition abolished the jurisdiction of the JCPC following Jeyaretnam's successful appeal to the JCPC in 1988. That JCPC decision also contained scathing criticisms of the Singaporean judiciary and the persecution of Jeyaretnam (Bell 1999; Seow 1997; Worthington 2001).

This qualitative analysis revealed that changes in the political environment on a democratic-autocratic continuum may not capture changes that still influence the position of the governing coalition vis-à-vis the JCPC. In reality, more nuanced changes in the political environment can be important. In New Zealand, the 1999 victory of the Labour Party shifted the vision for New Zealand, which was deemed incompatible with a continued role for the JCPC as the final appellate court (Wilson 2010). In the case of The Bahamas, the political parties contested regular peaceful parliamentary elections since independence in 1973 with the two major political parties campaigning on primarily domestic economic, public safety, and corruption issues (Country Watch 2015; Meditz and Hanratty 1987). In the arena of public safety, a bifurcated response to unfavorable decisions by the JCPC showed a negative response to the single issue of the death penalty while general support for the JCPC remained. The public and elite responses did not produce enough of a change in the political environment. As a result, there was no strong political will to replace the JCPC with a domestic final appellate court.

My results point to some important questions facing the emergence and effectiveness of extraterritorial courts and tribunals. Do extraterritorial courts support the policies of the states? If a state accedes to an extraterritorial court, are they ready to accept unfavorable decisions that constrain national policies? If the findings in Chapters 4, 5, and 6 are correct, the states will be

more likely to accede to an extraterritorial court with the expectation that it is expected contribute to the reputation of the state and be a reliable partner. The states are sensitive to the decisions of the court, which can precipitate a response from the governing coalition and may negate any perceived benefit accrued to their reputation by acceding to the court. Further, the response is influenced by the political environment, and responses can vary depending on the degree of change. It does not require an endogenous shock such as military coup, as seen in The Gambia and Fiji; changes in the majority political party, as in New Zealand and Canada, constitute a significant shift as well. In other words, high levels of democracy do not necessarily insulate extraterritorial courts from the changing expectations of governing coalitions. In the case of South Africa, the victorious National Party in 1948 which championed apartheid policies sensed the changed attitudes in the U.K. and the Empire in relation to race and race equality (Hyam and Henshaw 2003). If those policies were challenged, the National Party seemed to anticipate the possibility of unfavorable decisions by the JCPC. Abolition of that court in 1950 was quickly followed by a series of laws further entrenching the apartheid system (Commonwealth Network 2015).

## **7.2 Implications**

The goal of my research is to better understand the relationship between extraterritorial courts and states. First, extraterritorial courts such as the ECJ and the ICC do not have the 400-year tradition and reputation that contributed to the propensity of former British colonies to retain the JCPC at independence. My findings suggest that how embedded the institution is in the governing structures of the state influences the governing coalition and contributes to the persistence of the institution. The state's governing coalition does pay attention to the decisions of the court, and its ability to tolerate unfavorable decisions or the possibility of unfavorable

decisions is influenced by the domestic political environment. The results of my analysis of the JCPC and British Commonwealth states have two major implications. Second, the strength of the tie between the state and the extraterritorial court is influenced by how long the relationship has existed. In other words, the longer the relationship between the state and the extraterritorial court, the more difficult it is for the governing coalition to marshal the political will to sever ties. However, the longer extraterritorial courts are utilized by the state the less likely the state is to sever ties. Third, the perception of the reliability of the extraterritorial court is influenced by the decisions of the courts and the domestic political environment. Ultimately, therefore, the state's commitment to the continued jurisdiction of the court is based on that expectation that its policies are likely to be upheld and, if not realized, the courts will be considered expendable. The broad implication is that while states remain publicly interested in the jurisdiction of extraterritorial courts and the relationship with the state, their commitment to accepting the jurisdiction of these courts is heavily determined by the states' perception of where their interests lie and whether the courts will support their policies. States seem unwilling to merely push for renegotiation of the administrative and institutional structures but to sever ties with extraterritorial court. This is exemplified by South Africa's withdrawal from the ICC (Duggard 2013) and threats by the U.K. to withdraw from the ECJ (Watt 2015).

### **7.3 Further Questions and Research Opportunities**

The first phase of analyzing 50 states at the first critical juncture of independence supports the claim that colonial rule has a significant influence on the new governing coalition's choice of final appellate court. The second phase quantitatively analyzes the effects of decisions and the domestic environment in 26 states that retained the JCPC at independence. The findings that these factors are significant are further supported by the qualitative analyses of the

experiences of The Gambia, New Zealand, and The Bahamas with regard to the JCPC. My findings support the claim that the decisions of the JCPC in cases to which the state is a party and changes in the political environment have a significant and predictable effect on the choice to abolish appeals to the JCPC and establish a domestic final court of appeal. Nevertheless, as is always the case, there are further questions that remain unanswered and issues unsettled.

Research in this area is no exception. It presents many opportunities for additional research to expand our knowledge about the future of extraterritorial courts and the interaction of these institutions with the governing coalitions in states.

First, based on the case of states having replaced the JCPC, is the domestic final appellate court a reliable partner? In other words, is the new court more likely to uphold and legitimize the policies of the governing coalition? While Tan (2015) points out that the governing coalition in Singapore never lost a defamation or slander case in the lower courts, it is important to determine how governing coalitions fared across multiple jurisdictions. Further comparative cross-national research on the decisions of the courts is needed to determine whether states are more successful before domestic final courts of appeal than they were when appeals went to the JCPC. This also is important as the role of the judiciary goes beyond dispute resolution and into the broad realm of public policy development (Tate and Vallinder 1995; Tate and Sittowong 1989) as a partner of the governing coalition. The emphasis should be on cases where the state is a litigant (appellant or respondent). In other words, are domestic final appellate courts a more reliable partner for the governing coalition than extraterritorial courts? There is a need for more comparative analyses of the actual decisions of the other extraterritorial courts including the Caribbean Court of Justice (CCJ), the Inter-American court of Human Rights (IACHR) and the African Court of Justice and Human Rights (ACJHR). For example, the CCJ replaced the JCPC for three Caribbean

Community (CARICOM) states (Barbados, Belize, and Guyana), and there is the potential for 13 more CARICOM states to accede to the court. With both original and appellate jurisdictions, the CCJ heard its first case in 2007 and has adjudicated 75 cases as of January 1, 2015 (The Caribbean Court of Justice 2015). Has the CCJ been a reliable partner for the governing coalition in the three states that currently use it as the final appellate court?

Second, while the literature on the European Court of Justice (EJC) is increasing, there is a gap in our understanding of the development of extraterritorial courts outside of Europe and the role played in broader regional integration as experienced throughout the European Community (Garrett et al 1998). There are opportunities to increase our understanding of existing extraterritorial courts such as the CCJ, IACHR, and ACJHR. Accepting that institutional structure matter (Robinson 2012), several more questions emerge about extraterritorial courts. What is the structure of the CCJ that makes it a viable extraterritorial court? While agreeing in principle to the CCJ in the Treaty of Chaguaramas in 1973 (Caribbean Community Secretariat 2011b), are there institutional concerns explaining why more CARICOM member states have not acceded to the CCJ? Further, how does the CCJ compare to other extraterritorial courts, and what can we glean from those efforts to design, build capacity, and increase the chances of success of fledgling courts?

Another example is the African Court of Human and People's Rights. Established in 2009, it may not yet have adjudicated enough cases to determine any significant tendencies or trends in its decisions. Additionally, it probably needs more time to build up a reputation and the institutional strengths that can not only encourage more African states to accede, but also increase the likelihood that states will be constrained by its decisions. In addition, there have been other extraterritorial courts in Africa, for example, the East African Court of Appeals

(EACA) that served Kenya, Uganda, and Tanzania. The EACA (1967-1977) emerged from a colonial court of appeal only to be abandoned later by the member states (Harvard Law School Library 2014; Katende and Kanyeihamba 1973). Katende and Kanyeihamba (1973) state that “the reactions of the governments to decisions of the Court have not always been favorable” (52). Further, there is the African Court of Justice based on the Constitutive Act of the African Union adopted in 1999 that is yet to be realized (African International Courts and Tribunals n.d.). Yet, it is important to increase our understanding of what precipitated the development of the court and of the features of the court that may increase the confidence of states in its abilities and independence for current and future courts.

Third, in a world of growing economic interdependence with international agreements and laws impacting domestic laws and governance (Keohane and Nye 1987; Slaughter 2000; 1995), do extraterritorial courts have a role to play in fostering cooperation and economic development? In a comparison of states (former British colonies) that retained with those that abolished appeals to the JCPC, Voigt et al (2007) conclude that the JCPC contributes to investor confidence and economic development. There is a need for more comparative research on cases such as the ECJ and CCJ. Have these extraterritorial courts contributed to the political and economic development of member states? Research is particularly lacking outside of Europe and the ECJ. Besides the CCJ, there is a growing body of decisions from other extraterritorial courts such as the Inter-American Court on Human Rights and the African Court on Human and People’s Rights.

Fourth, my research focuses mainly on changes to the regime and effects on the political environment. The case of New Zealand shows that changes in political ideology are important. The change from the more conservative National Party to the more liberal Labour Party in 1999



did not result in any drastic changes in the nature of the democracy. However, the change did alter the vision of the governing coalition that the final appellate court would be the most appropriate and reliable partner in furthering national policies. The quantitative data does point to the tendency of states to replace the JCPC when there are changes in the nature of the regime. As discussed earlier, nine of the 10 states that experienced changes in the regime did abolish appeals to the JCPC (see Figure 5.1). We need a better understanding of the nature of the changes, with particular emphasis on ideological differences of the political parties, and how that influences the governing coalition's approach to and relationship with the final appellate court, or what Weiden (2010) refers to as "judicial politicization theory" (p. 336).

In an era of increasing globalization and regional integration, the emergence and continuing relevance of extraterritorial courts does not seem to be in doubt. An institution of the Organization of American States (OAS), the Inter-American Commission on Human Rights had 1,955 petitions and cases pending from 34 states in 2014, which was 37 percent more petitions and cases than in 2006, from 30 states (Inter-American Commission on Human Rights 2014). The Caribbean Court of Justice has been functioning since 2005. Although only three members of the Caribbean Community (CARICOM) have acceded to the court, 81 cases have been adjudicated between 2005 and 2015 (Caribbean Court of Justice 2015). Other regional organizations have also discussed extraterritorial courts, including an International Islamic Court of Justice as envisioned by the Organization of Islamic Conference (Romano 2013); the Arab Court of Justice was discussed by the League of Arab States (Romano 2013); and the Mercado Común del Sur (MERCOSUR) is developing a framework for the MERCOSUR Court of Justice as part of the process of integration by Argentina, Bolivia, Brazil, Paraguay, Uruguay, and Venezuela (full members) along with Chile, Peru, Colombia, and Ecuador (associate members)

(Vervaele 2005). The ECJ and ECtHR remain the most successful examples of modern extraterritorial courts. They have evolved over a long period of political peace among E.U. member states (Romano 2013). These developments exemplify the growing importance of extraterritorial courts around the world and the need to intensify and expand the research on their relationships with states.

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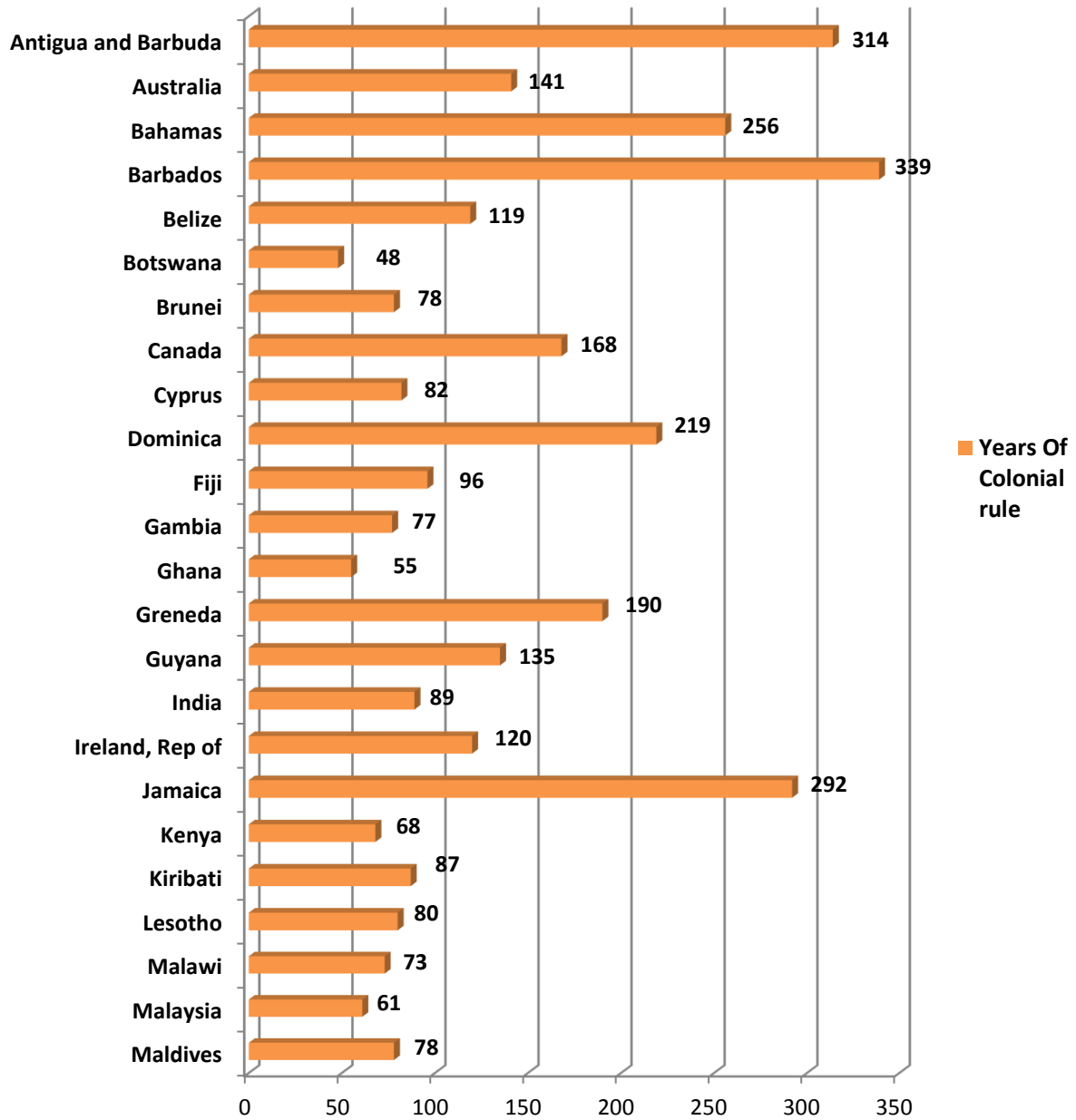
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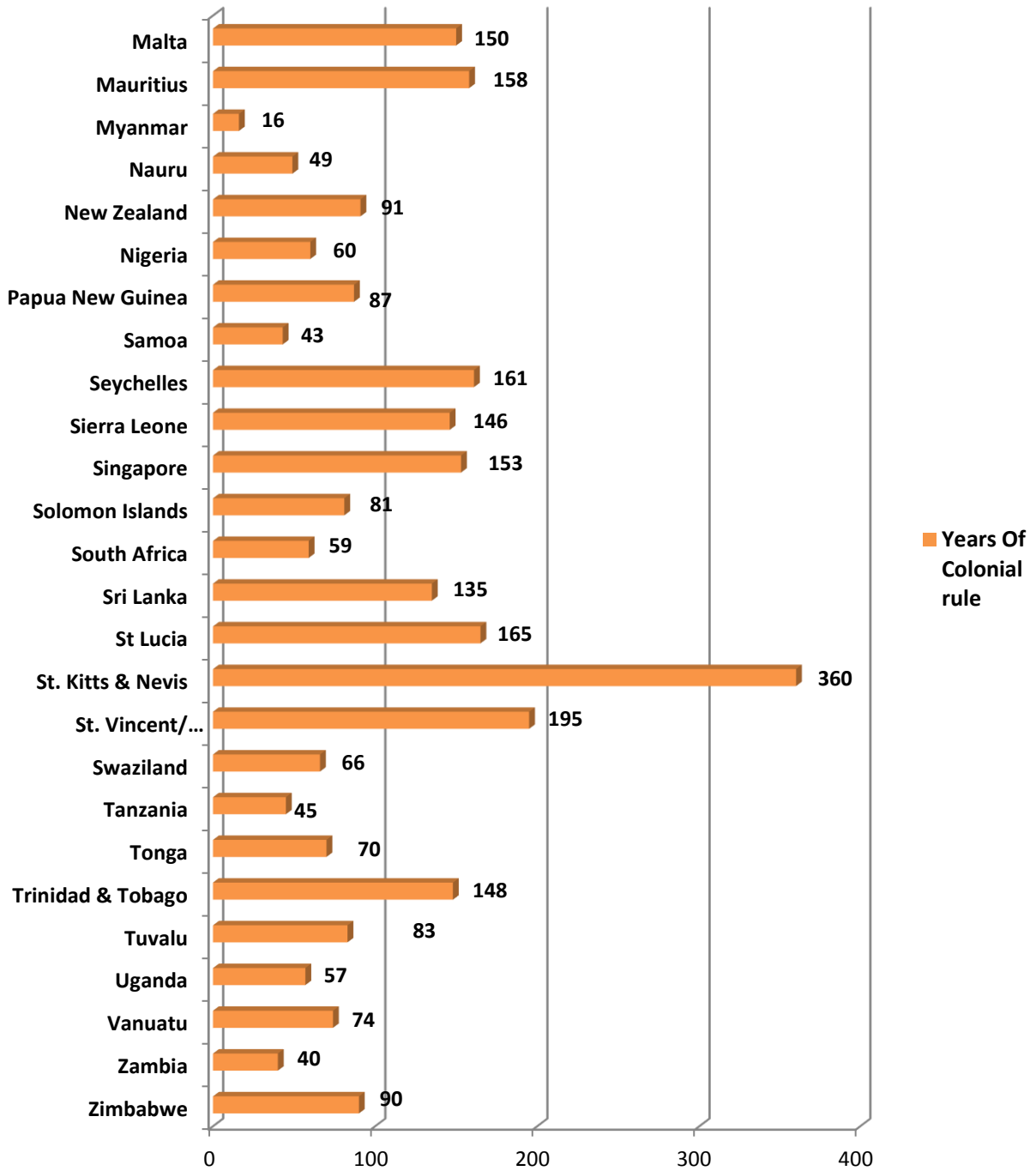
*West Coast Company v. Parrish*. 300 U.S. 379 (1937). Retrieved from

<https://supreme.justia.com/cases/federal/us/300/379/case.html>

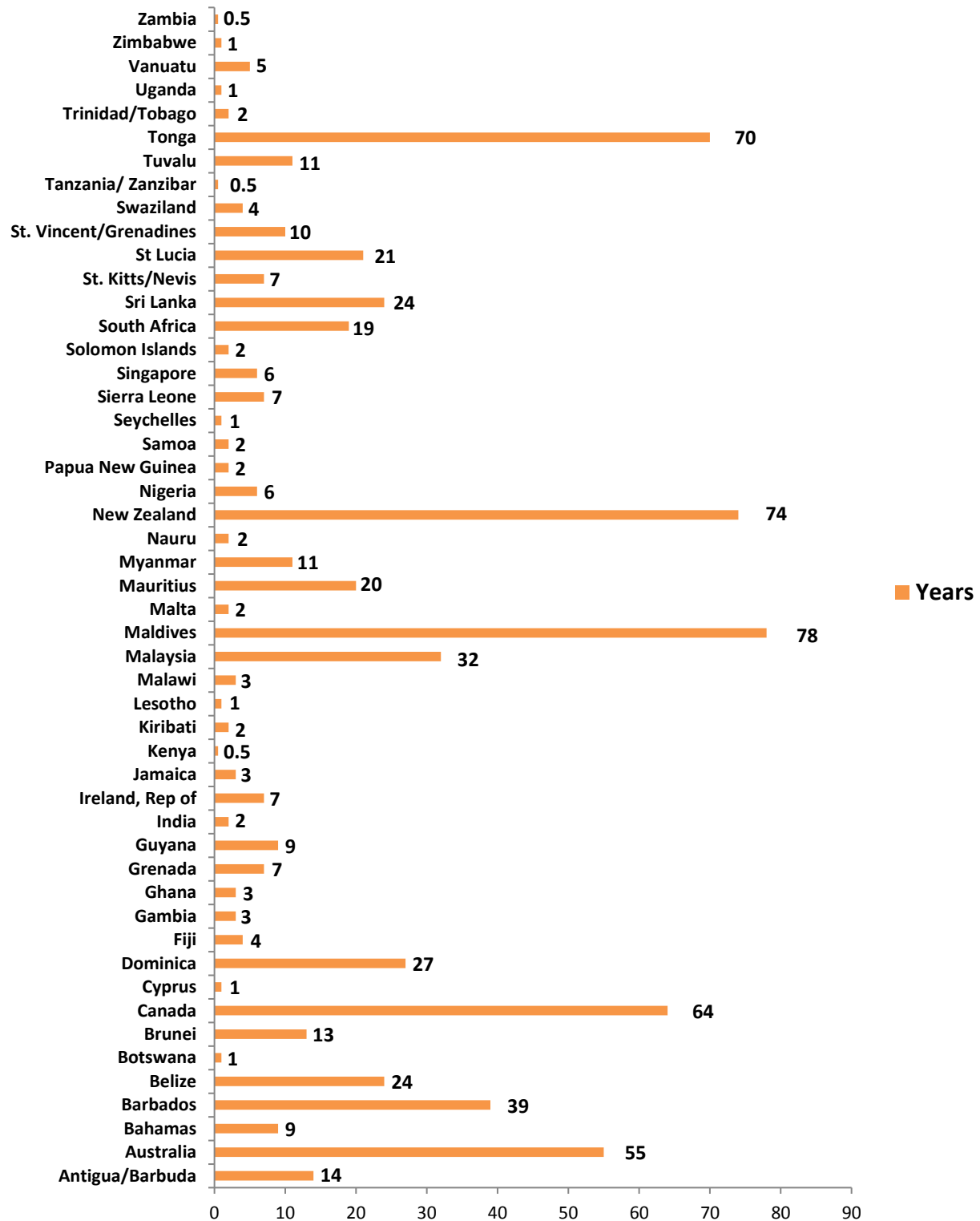
## APPENDICES

## Appendix A: The length of colonial rule for each state in the sample





## Appendix B: Length of self-government prior to independence for the 50 states





### Appendix C: Colonies excluded and sets included for analysis

<b>Excluded from Analysis</b>	<b>Included in Analysis</b>	
<i>Hybrids</i>	Antigua & Barbuda	Myanmar
Cameroon	Australia	Nauru
Somalia	Bahamas	New Zealand
Yemen	Barbados	Nigeria
	Belize	Papua New Guinea
<i>Internal Colonies</i>	Botswana	Rep. of Ireland
N. Ireland	Brunei	Pakistan
Wales	Canada	Samoa
Scotland	Cyprus	Seychelles
	Dominica	Sierra Leone
<i>Mandate Territories</i>	Fiji	Singapore
Iraq	Gambia	Solomon Islands
Jordan	Ghana	South Africa
Palestine	Grenada	Sri Lanka
	Guyana	St. Kitts/Nevis
<i>Middle East</i>	India	St. Vincent/ Grenadines
Egypt	Jamaica	Swaziland
Kuwait	Kenya	Tanzania/ Zanzibar
	Kiribati	Tuvalu
	Lesotho	Tonga
	Malawi	Trinidad & Tobago
	Malaysia	Uganda
	Maldives	Vanuatu
	Malta	Zambia
	Mauritius	Zimbabwe

**Appendix D: The 30 states that retained appeals and the 20 states that abolished appeals to the JCPC at independence**

<b>Retained Appeals to JCPC (30 states)</b>			<b>Abolished Appeals to JCPC (20 states)</b>	
Antigua & Barbuda	Guyana	Sri Lanka	Botswana	Samoa
Australia	Fiji	St. Kitts & Nevis	Cyprus	Seychelles
Bahamas	India	St. Vincent & the Grenadines		Sierra Leone
Barbados	Jamaica	St. Lucia	Lesotho	Solomon Islands
Belize	Kenya	Trinidad & Tobago	Malawi	Swaziland
Brunei	Kiribati	Tuvalu	Ireland, Rep. of	Tanzania/ Zanzibar
Canada	Malaysia	Uganda	Maldives	Tonga
Dominica	Mauritius		Malta	Vanuatu
Gambia	New Zealand		Myanmar	Zambia
Ghana	Nigeria		Nauru	Zimbabwe
Grenada	Singapore		Papua New Guinea	
	South Africa			

**Appendix E: The year of independence; number of years as a colony and when state retained JCPC at independence (The Commonwealth 2015)**

<b>Country</b>	<b>Year of Independence</b>	<b>Years as colony</b>	<b>JCPC Post-Independence</b>
Botswana	1966	48	No
Cyprus	1960	82	No
Ireland, Rep of	1931	120	No
Lesotho	1966	80	No
Malawi	1964	73	No
Maldives	1965	78	No
Malta	1964	150	No
Myanmar	1948	16	No
Nauru	1968	49	No
Papua New Guinea	1975	87	No
Samoa	1962	43	No
Seychelles	1976	161	No
Solomon Islands	1978	81	No
Swaziland	1968	66	No

Tanzania & Zanzibar	1964	45	No
Tonga	1970	70	No
Vanuatu	1980	74	No
Zambia	1964	40	No
Zimbabwe	1980	90	No
Antigua & Barbuda	1981	314	Yes
Australia	1931	141	Yes
Bahamas	1973	256	Yes
Barbados	1966	339	Yes
Belize	1981	119	Yes
Brunei	1984	78	Yes
Canada	1931	168	Yes
Dominica	1978	219	Yes
Fiji	1970	96	Yes
Gambia	1965	77	Yes
Ghana	1957	55	Yes
Grenada	1974	190	Yes
Guyana	1966	135	Yes
India	1947	89	Yes
Jamaica	1962	292	Yes
Kenya	1963	68	Yes
Kiribati	1979	87	Yes
Malaysia	1957	61	Yes
Mauritius	1968	158	Yes
New Zealand	1931	91	Yes
Nigeria	1960	60	Yes
Sierra Leone	1961	146	Yes
Singapore	1965	153	Yes
South Africa	1931	59	Yes
Sri Lanka	1948	135	Yes
St. Kitts & Nevis	1983	360	Yes
St. Lucia	1979	165	Yes
St. Vincent & Grenadines	1979	195	Yes
Tuvalu	1979	83	Yes
Trinidad & Tobago	1962	148	Yes
Uganda	1962	57	Yes

**Appendix F: The 50 states, prime ministers, whether educated in the U.K. and sources**

<b>Country</b>	<b>Leader</b>	<b>U.K. Educated</b>	<b>Source</b>
Antigua/ Barbuda	Vere Bird	No	<a href="http://caribbeanheroes.com/index.php/30-the-right-doctor-honourable-vere-cornwall-bird-sr.html">http://caribbeanheroes.com/index.php/30-the-right-doctor-honourable-vere-cornwall-bird-sr.html</a>
Australia	Edmond Barton	No	<a href="http://www.britannica.com/EBchecked/topic/54441/Sir-Edmund-Barton">http://www.britannica.com/EBchecked/topic/54441/Sir-Edmund-Barton</a>
Belize	George Cadle Price	No	<a href="http://www.belize.com/george-price-belize.html">http://www.belize.com/george-price-belize.html</a>
Canada	Richard Bedford Bennett	No	<a href="http://www.pc.gc.ca/APPS/CP-NR/release_e.asp?bgid=557&amp;andor1=bg">http://www.pc.gc.ca/APPS/CP-NR/release_e.asp?bgid=557&amp;andor1=bg</a>
Cyprus	Archbishop Makarios II	No	<a href="http://www.britannica.com/EBchecked/topic/359142/Makarios-III">http://www.britannica.com/EBchecked/topic/359142/Makarios-III</a>
Dominica	Patrick Roland John	No	<a href="http://thecommonwealth.org/our-member-countries/dominica/history">http://thecommonwealth.org/our-member-countries/dominica/history</a> <a href="http://www.lennoxhonychurch.com/heritage.cfm?Id=83">http://www.lennoxhonychurch.com/heritage.cfm?Id=83</a>
Fiji	Ratu Sir Kamisesse Mara	No	<a href="http://www.britannica.com/EBchecked/topic/363718/Ratu-Sir-Kamisesse-Mara">http://www.britannica.com/EBchecked/topic/363718/Ratu-Sir-Kamisesse-Mara</a>
Ghana	Kwame Nkrumah	No	<a href="http://www.britannica.com/EBchecked/topic/416674/Kwame-Nkrumah">http://www.britannica.com/EBchecked/topic/416674/Kwame-Nkrumah</a>
Grenada	Eric Matthew Gairy	No	<a href="http://www.britannica.com/EBchecked/topic/223562/Sir-Eric-Matthew-Gairy">http://www.britannica.com/EBchecked/topic/223562/Sir-Eric-Matthew-Gairy</a>
Ireland, Rep of	William T. Cosgrave	No	<a href="http://www.britannica.com/EBchecked/topic/139138/William-Thomas-Cosgrave">http://www.britannica.com/EBchecked/topic/139138/William-Thomas-Cosgrave</a>
Kenya	Jomo Kenyatta	No	<a href="http://www.britannica.com/EBchecked/topic/315185/Jomo-Kenyatta">http://www.britannica.com/EBchecked/topic/315185/Jomo-Kenyatta</a>
Kiribati	Leremia Tabai	No	<a href="http://www.commonwealthofnations.org/commonwealth/eminent-persons-group/">http://www.commonwealthofnations.org/commonwealth/eminent-persons-group/</a>

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Lesotho	Leabua Jonathon	No	<a href="http://www.encyclopedia.com/topic/Joseph_Leabua_Jonathan.aspx">http://www.encyclopedia.com/topic/Joseph_Leabua_Jonathan.aspx</a>
Malawi	Hastings Kamuzu Banda	No	<a href="http://www.britannica.com/EBchecked/topic/51447/Hastings-Kamuzu-Banda">http://www.britannica.com/EBchecked/topic/51447/Hastings-Kamuzu-Banda</a>
Maldives	Muhammad Fareed Didi	No	<a href="http://www.antimoon.com/forum/t14871.htm">http://www.antimoon.com/forum/t14871.htm</a>
Malta	Giorgio Borg Olivier	No	<a href="https://vassallohistory.wordpress.com/prime-ministers-of-malta/dr-giorgio-borg-olivier/">https://vassallohistory.wordpress.com/prime-ministers-of-malta/dr-giorgio-borg-olivier/</a>
Myanmar	U Nu	No	<a href="http://www.britannica.com/EBchecked/topic/421460/U-Nu">http://www.britannica.com/EBchecked/topic/421460/U-Nu</a>
Nauru	Maggabi DeRoburt	No	<a href="http://www.britannica.com/EBchecked/topic/158640/Hammer-DeRoburt">http://www.britannica.com/EBchecked/topic/158640/Hammer-DeRoburt</a>
New Zealand	Joseph Ward	No	<a href="http://www.britannica.com/EBchecked/topic/635777/Sir-Joseph-Ward">http://www.britannica.com/EBchecked/topic/635777/Sir-Joseph-Ward</a>
Papua New Guinea	Michael Somare	No	<a href="http://www.polymernotes.org/biographies/PNG_bio_somare.htm">http://www.polymernotes.org/biographies/PNG_bio_somare.htm</a>
Samoa	Fiame Faumuina Mataafa	No	<a href="http://www.encyclopedia.com/topic/Samoa.aspx">http://www.encyclopedia.com/topic/Samoa.aspx</a> <a href="http://en.wikipedia.org/wiki/Fiame_Mataafa_Faumuina_Mulinu'u_II">http://en.wikipedia.org/wiki/Fiame_Mataafa_Faumuina_Mulinu'u_II</a>
Solomon Islands	Peter Kenilorea	No	<a href="http://www.parliament.gov.sb/index.php?q=node/238">http://www.parliament.gov.sb/index.php?q=node/238</a>
South Africa	Louis Botha	No	<a href="http://www.britannica.com/EBchecked/topic/75099/Louis-Botha">http://www.britannica.com/EBchecked/topic/75099/Louis-Botha</a>
Sri Lanka	Don Stephen Senanayake	No	<a href="http://www.britannica.com/EBchecked/topic/534303/D-S-Senanayake">http://www.britannica.com/EBchecked/topic/534303/D-S-Senanayake</a>
St. Kitts/ Nevis	Kennedy Simmonds	No	<a href="http://historicbasseterre.com/hs_persons.asp?HSID=5&amp;PID=11">http://historicbasseterre.com/hs_persons.asp?HSID=5&amp;PID=11</a>
Swaziland	King Sobhuza II	No	<a href="http://www.britannica.com/EBchecked/topic/550819/Sobhuza-II">http://www.britannica.com/EBchecked/topic/550819/Sobhuza-II</a>
Tuvalu	Toaripi Lauti	No	<a href="http://self.gutenberg.org/articles/toaripi_lauti">http://self.gutenberg.org/articles/toaripi_lauti</a>
Tonga	Taufa 'ahau Tupou IV	No	<a href="http://www.britannica.com/EBchecked/topic/1017392/Tupou-IV">http://www.britannica.com/EBchecked/topic/1017392/Tupou-IV</a>

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Uganda	Milton Obote	No	<a href="http://www.britannica.com/EBchecked/topic/423934/Milton-Obote">http://www.britannica.com/EBchecked/topic/423934/Milton-Obote</a>
Vanuatu	Father Walter Lini	No	<a href="http://www.britannica.com/EBchecked/topic/342449/the-Rev-Walter-Hayde-Lini">http://www.britannica.com/EBchecked/topic/342449/the-Rev-Walter-Hayde-Lini</a>
Zambia	Kenneth Kaunda	No	<a href="http://www.britannica.com/EBchecked/topic/313461/Kenneth-Kaunda">http://www.britannica.com/EBchecked/topic/313461/Kenneth-Kaunda</a>
Zimbabwe	Robert Mugabe	No	<a href="http://www.britannica.com/EBchecked/topic/396102/Robert-Mugabe">http://www.britannica.com/EBchecked/topic/396102/Robert-Mugabe</a>
Bahamas	Lynden Pindling	Yes	<a href="http://www.britannica.com/EBchecked/topic/460896/Sir-Lynden-Oscar-Pindling">http://www.britannica.com/EBchecked/topic/460896/Sir-Lynden-Oscar-Pindling</a>
Barbados	Grantley Adams	Yes	<a href="http://www.totallybarbados.com/barbados/About_Barbados/Local_Information/People/Barbados_Prime_Ministers/1st_Premier_of_Barbados_045_Sir_Grantley_Herbert_Adams/">http://www.totallybarbados.com/barbados/About_Barbados/Local_Information/People/Barbados_Prime_Ministers/1st_Premier_of_Barbados_045_Sir_Grantley_Herbert_Adams/</a>
Botswana	Seretse Khama	Yes	<a href="http://www.britannica.com/EBchecked/topic/316195/Sir-Seretse-Khama">http://www.britannica.com/EBchecked/topic/316195/Sir-Seretse-Khama</a>
Brunei	Hassanal Bolkiah	Yes	<a href="http://www.britannica.com/EBchecked/topic/72165/Haji-Hassanal-Bolkiah-Muizzaddin-Waddaulah">http://www.britannica.com/EBchecked/topic/72165/Haji-Hassanal-Bolkiah-Muizzaddin-Waddaulah</a>
Gambia	Dawda Kairaba Jawara	Yes	<a href="http://www.britannica.com/EBchecked/topic/301838/Sir-Dawda-Kairaba-Jawara">http://www.britannica.com/EBchecked/topic/301838/Sir-Dawda-Kairaba-Jawara</a>
Guyana	Forbes Burnham	Yes	<a href="http://www.britannica.com/EBchecked/topic/85663/Forbes-Burnham">http://www.britannica.com/EBchecked/topic/85663/Forbes-Burnham</a>
India	Jawaharlal Nehru	Yes	<a href="http://www.britannica.com/EBchecked/topic/408232/Jawaharlal-Nehru">http://www.britannica.com/EBchecked/topic/408232/Jawaharlal-Nehru</a>
Jamaica	Norman Manley	Yes	<a href="http://www.britannica.com/EBchecked/topic/362449/Norman-Manley">http://www.britannica.com/EBchecked/topic/362449/Norman-Manley</a>
Malaysia	Tunku Abdul Rahman Putra Alhaj	Yes	<a href="http://www.britannica.com/EBchecked/topic/912/Tunku-Abdul-Rahman-Putra-Alhaj">http://www.britannica.com/EBchecked/topic/912/Tunku-Abdul-Rahman-Putra-Alhaj</a>
Mauritius	Seewoosagur Ramgoolam	Yes	<a href="http://www.encyclopedia.com/doc/1G2-3435000151.html">http://www.encyclopedia.com/doc/1G2-3435000151.html</a>

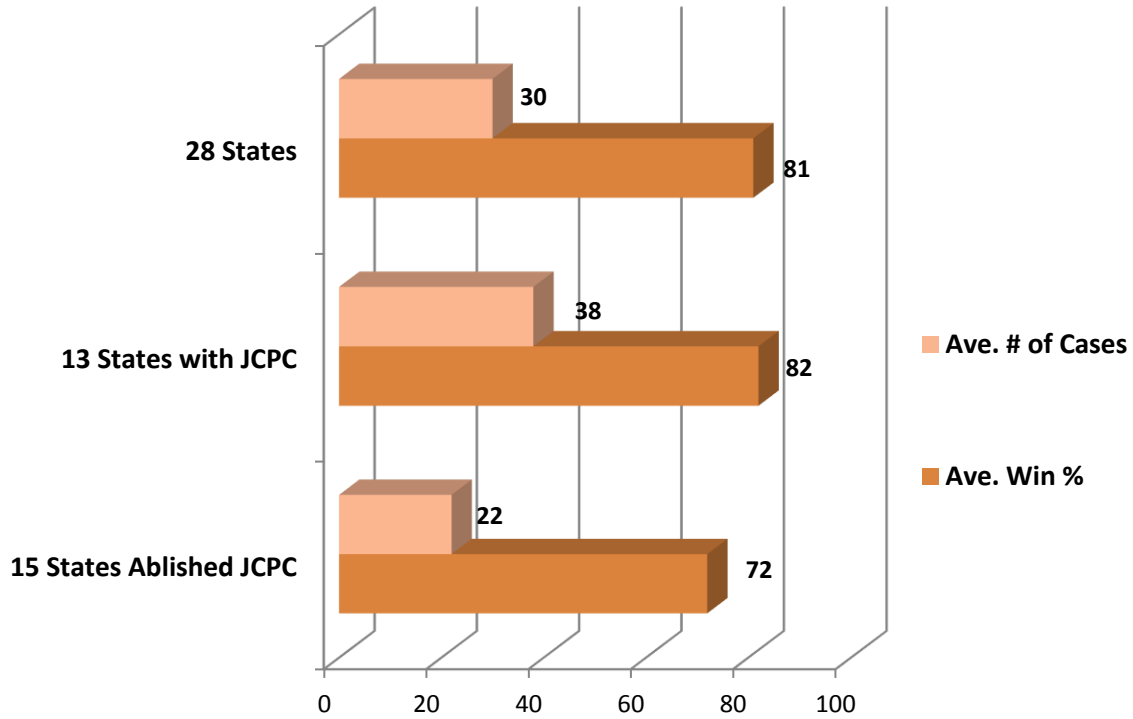
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Nigeria	Abubakar Tafawa Balewa	Yes	<a href="http://www.britannica.com/EBchecked/topic/50151/Sir-Abubakar-Tafawa-Balewa">http://www.britannica.com/EBchecked/topic/50151/Sir-Abubakar-Tafawa-Balewa</a>
Seychelles	James Richard Mancham	Yes	<a href="http://jamesmancham.com/biography.php">http://jamesmancham.com/biography.php</a>
Sierra Leone	Milton Margai	Yes	<a href="http://www.britannica.com/EBchecked/topic/364553/Sir-Milton-Margai">http://www.britannica.com/EBchecked/topic/364553/Sir-Milton-Margai</a>
Singapore	Lee Kuan Yew	Yes	<a href="http://www.britannica.com/EBchecked/topic/334621/Lee-Kuan-Yew">http://www.britannica.com/EBchecked/topic/334621/Lee-Kuan-Yew</a>
St. Lucia	John George Melvin Compton	Yes	<a href="http://archive.stlucia.gov.lc/primeminister/former_prime_ministers/john_g_m_compton/biography.htm">http://archive.stlucia.gov.lc/primeminister/former_prime_ministers/john_g_m_compton/biography.htm</a>
St. Vincent/ Grenadines	Milton Cato	Yes	<a href="http://www.embsvg.com/History_of_SVG.htm">http://www.embsvg.com/History_of_SVG.htm</a> <a href="http://self.gutenberg.org/articles/milton_cato">http://self.gutenberg.org/articles/milton_cato</a>
Tanzania/ Zanzibar	Julius Nyerere	Yes	<a href="http://www.britannica.com/EBchecked/topic/423105/Julius-Nyerere">http://www.britannica.com/EBchecked/topic/423105/Julius-Nyerere</a>
Trinidad/ Tobago	Eric Williams	Yes	<a href="http://www.britannica.com/EBchecked/topic/644344/Eric-Williams">http://www.britannica.com/EBchecked/topic/644344/Eric-Williams</a>

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**Appendix G: The average number of cases and percentage in favor of state for the 26 states and disaggregated for the 11 states the retain and the 15 states that abolished appeals**



**Appendix H: Summary statistics the independent and control variables**

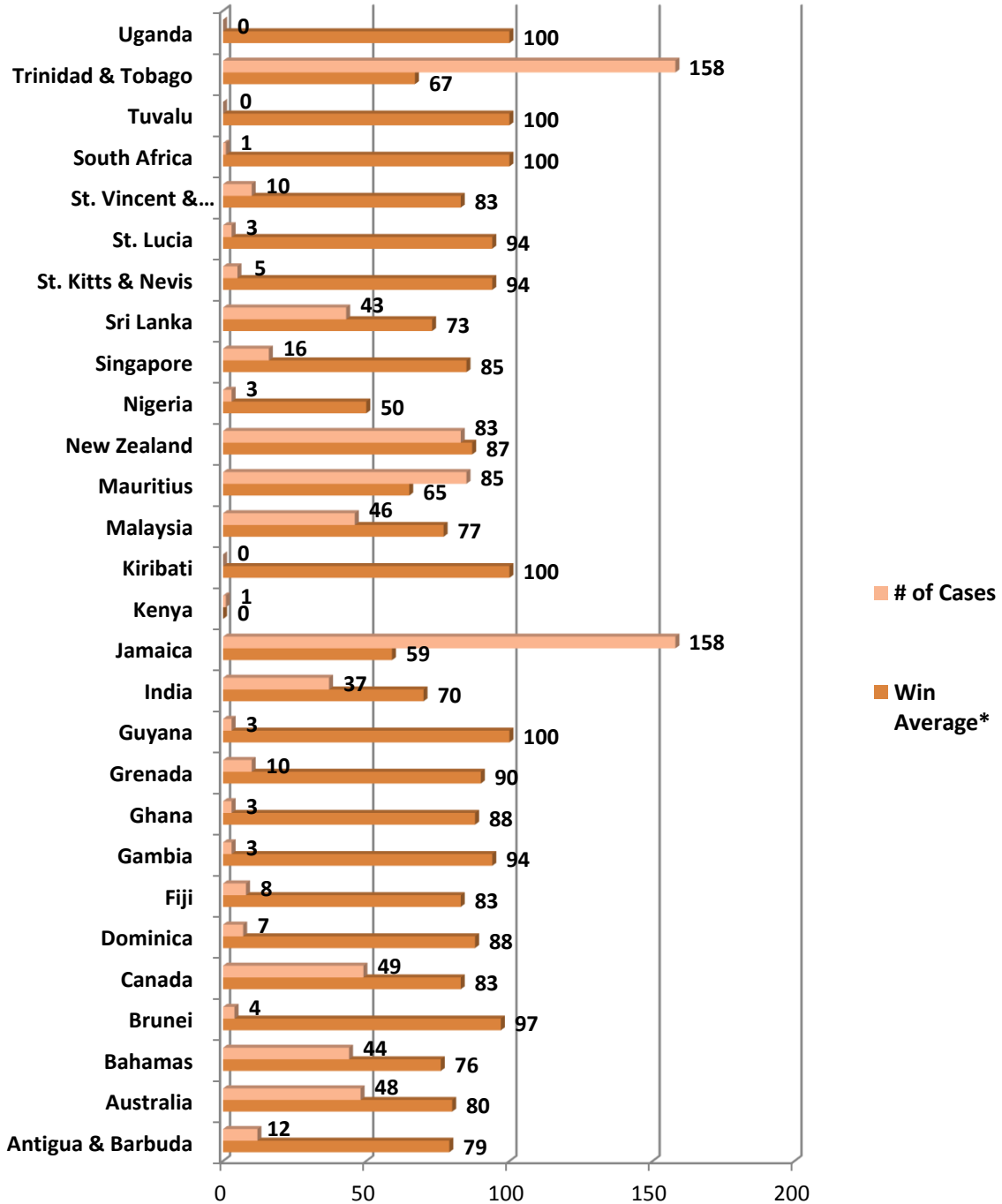
Variable	Obs.	Mean	Std. Dev.	Min.	Max.
State Win Ratio in all cases	673	0.78	0.36	0	1
State Win Ratio when state is the appellate (salient)	673	0.88	0.31	0	1
State Win Ratio when state is the respondent	673	0.81	0.34	0	1
State conflict	640	224.08	704.90	0	6312
State GDP per capita	673	6448.71	3803.20	617	21314
Democratization	<b>N</b>	<b>%</b>			
Free	568	85.80			
Partially Free	62	9.37			
Not Free	32	4.83			



**Appendix I: JCPC Decisions disaggregated by a total in each of the following categories of law: (1) constitutional rights; (2) torts/administrative law; (3) criminal law and (4) “other areas” of law**

	<b>Category of Law</b>	<b># of Cases</b>
1	Constitutional/individual rights	225
2	Torts/administrative law	168
3	Criminal law	330
4	“other areas” of law	142
	<b>Total</b>	<b>865</b>

**Appendix J: The number of cases and the percent in favor of each state between the date of independence and removal of the JCPC or January 1, 2015, whichever came first**



\*If there are no cases in a year the win average is 100% indicating that there were no legal challenges to state policy at the JCPC

**Appendix K: Freedom House categories of democracies, human rights scores and civil liberties scores (Freedom House 2014)**

**Political Rights and Civil Liberties Ratings** – A country or territory is assigned two ratings (7 to 1) – one for political rights and one for civil liberties – based on its total scores for the political rights and civil liberties questions. Each rating of 1 through 7, with 1 representing the greatest degree of freedom and 7 the smallest degree of freedom corresponds to a specific range of total scores.

**Free, Partly Free, Not Free Status** – The average of a country’s or territory’s political rights and civil liberties ratings is called the Freedom Rating, and it is this figure that determines the status of Free (1.0 to 2.5), Partly Free (3.0 to 5.0), or Not Free (5.5 to 7.0)

*POLITICAL RIGHTS*

- 1** – Countries and territories with a rating of 1 enjoy a wide range of political rights, including free and fair elections. Candidates who are elected actually rule, political parties are competitive, the opposition plays an important role and enjoys real power, and the interests of minority groups are well represented in politics and government.
- 2** – Countries and territories with a rating of 2 have slightly weaker political rights than those with a rating of 1 because of such factors as political corruption, limits on the functioning of political parties and opposition groups, and foreign or military influence on politics.
- 3, 4, and 5** – Countries and territories with a rating of 3, 4, or 5 either moderately protect almost all political rights or strongly protect some political rights while neglecting others. The same factors that undermine freedom in countries with a rating of 2 may also weaken

political rights in those with a rating of 3, 4, or 5, but to a greater extent at each successive rating.

- 6** – Countries and territories with a rating of 6 have very restricted political rights. They are ruled by one-party or military dictatorships, religious hierarchies, or autocrats. They may allow a few political rights, such as some representation or autonomy for minority groups, and a few are traditional monarchies that tolerate political discussion and accept public petitions.
- 7** – Countries and territories with a rating of 7 have few or no political rights because of severe government oppression, sometimes in combination with civil war. They may also lack an authoritative and functioning central government and suffer from extreme violence or rule by regional warlords.

### *CIVIL LIBERTIES*

- 1** – Countries and territories with a rating of 1 enjoy a wide range of civil liberties, including freedoms of expression, assembly, association, education, and religion. They have an established and generally fair legal system that ensures the rule of law (including an independent judiciary), allow free economic activity, and tend to strive for equality of opportunity for everyone, including women and minority groups.
- 2** – Countries and territories with a rating of 2 have slightly weaker civil liberties than those with a rating of 1 because of such factors as limits on media independence, restrictions on trade union activities, and discrimination against minority groups and women.
- 3, 4, 5** – Countries and territories with a rating of 3, 4, or 5 either moderately protect almost all civil liberties or strongly protect some civil liberties while neglecting others. The same

factors that undermine freedom in countries with a rating of 2 may also weaken civil liberties in those with a rating of 3, 4, or 5, but to a greater extent at each successive rating.

- 6** – Countries and territories with a rating of 6 have very restricted civil liberties. They strongly limit the rights of expression and association and frequently hold political prisoners. They may allow a few civil liberties, such as some religious and social freedoms, some highly restricted private business activity, and some open and free private discussion.
- 7** – Countries and territories with a rating of 7 have few or no civil liberties. They allow virtually no freedom of expression or association, do not protect the rights of detainees and prisoners, and often control or dominate most economic activity.

#### **Appendix L: Definition of domestic conflict (DataBanks 2015b)**

<b>Variable</b>	<b>Domestic Conflict Event Data Definition</b>
Anti-government Demonstrations	Any peaceful public gathering of at least 100 people for the purpose of displaying or voicing their opposition to government policies or authority, excluding demonstrations of a distinctly anti-foreign nature.
Assassinations	Any politically motivated murder or attempted murder of a high government official or politician.
General Strikes	Any strikes of 1,000 or more industrial or service workers that involve more than one employer and are aimed at the overthrow of the present regime.
Guerrilla Warfare	Any armed activity, sabotage, or bombings carried on by independent bands of citizens or irregular forces and aimed at the overthrow of the present regime.

Major Government Crises	Any rapidly developing situation that threatens to bring the downfall of the present regime – excluding situations of revolt aimed at such overthrow.
Purges	Any systematic elimination by jailing or execution of political opposition within the ranks of the regime or the opposition.
Revolutions	Any illegal or forced change in the top government elite, any attempt to such a change, or any successful or unsuccessful armed rebellion whose aim is independence from central government.
Riots	Any violent demonstration or clash of more than 100 citizens involving the use of physical force.
Weighted Conflict Measure	The specific weights are variable. As of October 2007 the values entered were: Assassination (25), Strikes (20), Guerrilla Warfare (100), Government Crises (20), Purges (20), Riots (25), Revolutions (150), and Anti-government Demonstrations (10). Multiply the value for each variable times the specific weights; multiply that sum of products by 100 and divide the result by 8.

### Appendix M: Freedom House scores for Singapore from 1972 to 1998

	<b>Respecting political rights: High (1) to Lowest (7)</b>	<b>Protecting civil liberties: High (1) to Lowest (7)</b>	<b>Freedom Score: Free (1); Partially Free (0); Not Free (-1)</b>
1972	5	5	Partially Free
1973	5	5	Partially Free
1974	5	5	Partially Free
1975	5	5	Partially Free
1976	5	5	Partially Free
1977	5	5	Partially Free
1978	5	5	Partially Free
1979	5	5	Partially Free

1980	5	5	Partially Free
1981	5	5	Partially Free
1982	4	5	Partially Free
1983	4	5	Partially Free
1984	4	5	Partially Free
1985	4	5	Partially Free
1986	4	5	Partially Free
1987	4	5	Partially Free
1988	4	5	Partially Free
1989	4	4	Partially Free
1990	4	4	Partially Free
1991	4	4	Partially Free
1992	4	5	Partially Free
1993	4	5	Partially Free
1994	4	5	Partially Free
1995	5	5	Partially Free
1996	4	5	Partially Free
1997	5	5	Partially Free
1998	5	5	Partially Free

## Appendix N: Maps

Exilon Maps. (2009a). The Political Map of Gambia. 1:24,000. Retrieved from

<http://www.ezilon.com/maps/africa/gambia-maps.html>

Exilon Maps. (2009b). The Political Map of New Zealand. 1:60,000. Retrieved from

<http://www.ezilon.com/maps/oceania/new-zealand-maps.html>

Exilon Maps. (2009c). The Political Map of The Bahamas. 1:6,000. Retrieved from

<http://www.ezilon.com/maps/caribbean/bahamas-maps.html>