

The Caribbean Court of Justice and its Appellate Jurisdiction: A Difficult Birth

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Geoffrey Robertson, who has represented a number of appellants in death penalty appeals from the Caribbean, has described the profound sense of dislocation he experienced when appearing as counsel before the Privy Council in such cases:

“One side of the amphitheatre is taken up by rows of law books, the other has high windows overlooking Whitehall. The parade of black taxis and red buses passing Big Ben reminds the visitor that he or she is located precisely at the epicenter of what was once the British Empire. What is bizarre, however, is that the concentrated legal minds in this room must all imagine they are in another country. If they look out this window they must see the pitted roads and slum housing of downtown Kingston, or the open sewers of Belize . . . This is a court which is jurisprudentially orbiting in space, landing one day in Antigua, another in Trinidad.”¹

The Caribbean Court of Justice (“CCJ”), which was inaugurated in April 2005, is intended to put an end to this anomaly. For those countries which have ratified its appellate jurisdiction the CCJ will replace the Judicial Committee of the Privy Council as the final court of appeal in civil and criminal matters,² and matters which touch upon the interpretation of the ratifying countries’ constitutions.³ In addition, the CCJ will have an original jurisdiction to deal with disputes concerning the interpretation and application of the revised Treaty of Chaguaramas,⁴ which is intended to regulate trade

and economic relations within the Caribbean Community (“CARICOM”).⁵ This dual jurisdiction reflects the conjoined aims of its architects: to promote greater economic integration in the region by establishing a single market and economy, with the CCJ occupying a role within CARICOM, similar, though not identical, to that of the European Court of Justice within the European Community⁶; and to complete the process of independence, which began with Jamaica and Trinidad and Tobago in 1962. For so long as the Privy Council remained the final court of appeal for Commonwealth Caribbean countries, it was argued, legal sovereignty remained vested in the former imperial power.

While there is a broad consensus within the region about the CCJ’s original jurisdiction, its position as the region’s final appellate court is, however, still far from secure. Four out of the twelve independent countries in the region—Antigua, The Bahamas, St Kitts, and St Vincent—have refused to ratify its appellate jurisdiction. Indeed, at the time of its inauguration, only two of the remaining eight countries, Guyana and Barbados, were in a position to refer appeals to the CCJ. In both Trinidad and Tobago and Jamaica, the two most populous countries in the region and the countries from which the CCJ would expect to receive most of its caseload, the governments have been unable to achieve the requisite majority in their Parliaments to enact the legislation necessary to give domestic effect to the appellate jurisdiction of the CCJ.

This article considers how this impasse has been reached and why the CCJ has failed to win universal approval for its appellate jurisdiction within the region. The article is in two parts. The first part chronicles the events leading up to the establishment of the CCJ and explores the combination of legal, historical and political factors which contributed to the delay in abolishing the right of appeal to the Privy Council. The second part examines the debate surrounding the CCJ; evaluating the claims made on behalf of the CCJ by its supporters and assessing the concerns which have been expressed by opponents of the CCJ: with regard to its funding; the independence of its judges; its entrenchment within the constitutions of the ratifying parties, and its identification with the operation of the death penalty in the region.

Background to the establishment of the CCJ

Though the idea of replacing the Privy Council with a regional court of appeal was first discussed by the Heads of Government of the Commonwealth Caribbean at their annual meeting in 1970, it was a full 35 years before the idea was finally realised. This is a much longer gestation period than is the norm for former colonies of the United Kingdom, where abolition of the right of appeal to the Privy Council generally coincided with, or followed shortly after,

¹ G. Robertson, *The Justice Game* (Vintage, London, 1999), p.85.

² Agreement Art.XXV, para.4 (henceforth references to Articles are to the Articles of the Agreement, save where otherwise expressly indicated).

³ Art.XXV; para.2(c) and (d).

⁴ Treaty establishing the Caribbean Community (CARICOM) 1973.

⁵ The CCJ’s original jurisdiction extends to all the independent Commonwealth Caribbean countries, with the exception of The Bahamas; to Montserrat, which remains an overseas territory of the UK; and to Suriname and Haiti.

⁶ D. Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence* (Caribbean Law Publishing Company, Jamaica, 2004), p.42.

independence.⁷ In view of the importance which the timing of the decision to abolish the right of appeal to the Privy Council has assumed in the debate about whether the CCJ is intended to serve primarily as a "hanging court" (which is examined in more detail below) it is worth reflecting at this point on the reasons for this delay and attempting to identify the factor or factors which eventually galvanised the Heads of Government to take decisive action to establish a regional appellate court.

Reasons for delay

The process of decolonisation

The transition from colonial rule to independence in the Caribbean Commonwealth was not accompanied by the same degree of rupture as had taken place in other former British colonies, such as Ireland, India, or Kenya, where independence was preceded by a sustained period of insurrection.⁸ As Darwin notes, by comparison with their possessions in Asia, Africa and the Middle East, the British seemed to regard their Caribbean territories with a degree of indifference and, even, as a financial burden on the British purse.⁹ By the time that Caribbean politicians pressed for independence, they were, in effect, pushing at an open door. For Commonwealth Caribbean politicians themselves, independence was not intended to signify an abrupt departure from the colonial past.¹⁰ The constitutions that were adopted upon independence, which were based on the "Westminster model",¹¹ were intended to preserve as much as possible of the status quo; including the Queen as the Head of State. There was, in any event, no indigenous pre-colonial past to evoke; language, tradition, sport and new patterns of post-war migration linked the region to Britain.¹² At the time of independence, there was not the same pressing desire to establish a distinctive and separate post-colonial identity as existed, for example, in Ireland and India: and, therefore, no immediate demand upon the region's governments to sever all links with the former colonial power.

Advantages of the Privy Council

The attractions of retaining the Privy Council as a final appellate court were three-fold. First, it was paid for by the British government. This would have been a particularly important consideration for the governments of newly independent countries, coping with many competing demands on the public purse. Secondly, it was composed of judges of the highest calibre, appointed by the British government. While this latter feature might in other circumstances

have been considered a disadvantage, for a long time after independence it worked in the Privy Council's favour. In the eyes of the Caribbean public, which was deeply sceptical about the influence exercised by politicians over the local judiciary, the judges of the Privy Council were regarded as being immune to the influence of local politicians and, hence, "incorruptible".¹³ Thirdly, until the 1990s, the Privy Council adopted a generally deferential approach towards constitutional adjudication. For example, in cases which involved a challenge to the constitutionality of local legislation, the Board applied a presumption of constitutionality in favour of local legislation wherever issues of public policy were concerned.¹⁴ Such a presumption could only be rebutted if it could be shown that no reasonable member of the local legislature could reasonably have believed that the legislative provision being challenged was reasonably necessary in the public interest: thereby establishing what was, in effect, a *Wednesbury* standard of review¹⁵ in cases where the constitutionality of local legislation was in issue. In cases involving allegations of interference by the executive with a right guaranteed by the constitution, the Board usually deferred to the superior knowledge of the local judiciary as to whether the alleged interference could be justified by reference to local conditions¹⁶; applying what was, to all intents and purposes, a "margin of appreciation" very similar to that applied by the European Court of Human Rights.¹⁷ While this approach has been heavily criticised by some commentators in this country,¹⁸ it ensured that the Board generally, though by no means always, managed to avoid antagonising the region's governments in politically contentious cases.

Even if the Board had been jurisprudentially disposed to adopt a more interventionist approach it was, in many cases, prevented from doing so by the inclusion of saving laws clauses for existing laws in the independence constitutions of the majority of Commonwealth Caribbean countries. Such clauses are of two kinds. The first, a partial savings clause, which exempts forms of punishment that were lawful prior to independence from being scrutinised on the ground that they violate the constitutional guarantee against inhuman or degrading treatment or punishment.¹⁹ The second, a general saving laws clause, which exempts all pre-independence laws from scrutiny on the ground that they violate any of the rights guaranteed by the constitution.²⁰ Thus, challenges to the constitutionality of the death penalty regime in *de Freitas v Benny*²¹ and *Riley v Att.-Gen. (Jamaica)*²² were both rejected on the ground that

¹³ *Jamaicans for Justice*, "Guide Sheet on the Privy Council and the Proposed Caribbean Court of Justice", available from www.jamaicansforjustice.org.

¹⁴ *Hinds v R.* [1977] A.C. 195, p.224B and *Att-Gen v Antigua Times Ltd* [1976] A.C. 1633A-B.

¹⁵ *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 K.B. 223.

¹⁶ *Bell v DPP* [1985] A.C. 937, 953B-H.

¹⁷ *Handyside v UK* (1976) 1 E.H.R.R. 737 at [48].

¹⁸ See, e.g. L. Blom-Cooper and C. Gelber, "The Privy Council and the Death Penalty: A Study in Constitutional Change" [1998] E.H.R.L.R. 386.

¹⁹ See, e.g. *Constitution of Jamaica*, s.26(8).

²⁰ See, e.g. *ibid.*, s.17(2).

²¹ [1976] A.C. 239.

²² [1983] A.C. 719.

⁷ See D. Swinfen, *Imperial Appeal: the Debate on the Appeal to the Privy Council, 1833-1986* (Manchester University Press, 1989).

⁸ See discussion in B. Simpson, *Human Rights and the End of Empire* (Oxford University Press, 2001).

⁹ J. Darwin, *Britain and Decolonisation: The Retreat from Empire in the Post-War World* (Macmillan Education, London, 1988), p.217.

¹⁰ *Jamaica Hansard* 1961-62, p.719, cited by T. Munroe, *The Politics of Constitutional Decolonization: Jamaica 1944-62* (The University of the West Indies, Jamaica, 1983), p.150.

¹¹ A parliamentary democracy based on the separation of powers.

¹² Darwin, *fn.9* above, p.220.

the death penalty was authorised by laws in force at the time of independence. While hanging as a punishment has, since the days of independence, come to be viewed as repugnant to human rights in other parts of the Commonwealth, it has always enjoyed a high level of support among the Caribbean public. The Privy Council's acceptance of the limitations imposed on its jurisdiction by these saving laws clauses and its refusal, before the 1990s, to interfere with the operation of the death penalty regime in the region thus only served to enhance its reputation amongst the Caribbean public.

Problems associated with regional institutions

It would have been very difficult, if not impossible, for any single country in the region to establish an appellate court which could hope to match the Privy Council in terms of its resources and the calibre of its judges. The only alternative was for the independent countries of the region to pool their resources and establish a regional court of appeal, but this was always going to be a very difficult proposition. The Commonwealth Caribbean has perhaps the largest conglomeration of small island states in the world.²³ The majority of these countries are separated by vast expanses of sea, while Guyana and Belize are part of South and Central America respectively. There are also significant economic differences within the region. Measured in terms of Gross Domestic Product ("GDP") and GDP per capita, Barbados and The Bahamas compare reasonably favourably with some first world countries. By contrast, Belize, Guyana, and Jamaica are amongst the poorest countries in the western hemisphere.²⁴ Past efforts at regional integration, through organisations such as the Caribbean Free Trade Association and CARICOM, had met with only limited success.²⁵ With the possible exception of the University of the West Indies, there was simply no tradition within CARICOM of building viable regional institutions.

The catalyst for change?

Though periodic attempts were made to revive the interest in establishing a regional court which had been first expressed by the Heads of Government at their meeting in 1970, the manifest advantages of retaining the Privy Council as a final court of appeal, set against the considerable strategic and logistical hurdles that would have to be overcome in order to establish a regional court, ensured that these attempts were treated, in the words of one local commentator, "either as an intellectual debate for academic gratification or as a political or administrative exercise for the agenda of regional meetings".²⁶

It might, therefore, have reasonably been predicted that the resolution of the Heads of Government of CARICOM at their conference, in 1988, to

²³ P.K. Menon, "Regional Integration: A Case Study of the Caribbean Community (CARICOM)" (1995) 5 *Caribbean Law Review* 85.

²⁴ Based on statistics available from the World Bank, *At a glance*, available from www.worldbank.org.

²⁵ Menon, fn.23 above, pp.101 and 121.

²⁶ H.A. Rawlins, "The Privy Council or a Caribbean Final Court of Appeal?" (1996) 6 *Caribbean Law Review* 235, p.236

take steps to establish a regional court of appeal would never have been acted upon, but for the convergence of two elements at the beginning of the 1990s: the first, the publication of the Report of the West Indian Commission, *Time for Action*, which concluded that regional prosperity could only be achieved through greater economic integration; the second, the delivery of the Privy Council's judgment in *Pratt and Morgan v Att.-Gen. (Jamaica)*,²⁷ which signalled the start of a steady decline in the popularity of the Privy Council among the region's legal and political elites.

Time for Action

In an effort to restore CARICOM's fortunes, the Heads of Government resolved at their annual conference, in 1989, to appoint the West Indian Commission to look at ways of renewing and strengthening the region's commitment to economic integration by revising the original Treaty of Chaguaramas. The Commission's Report, which was published in 1992,²⁸ made a number of suggestions for revising the Treaty. Most significantly, for present purposes, the Report endorsed the earlier decision of the Heads of Government to establish a final court of appeal in the region, and expressly linked this to the broader need to promote regional integration:

"[T]he case for a CARICOM Supreme Court, with both a general appellate jurisdiction and an original one, is now overwhelming—indeed it is fundamental to the process of integration."²⁹

This was because:

"Its knowledge and understanding of regional problems, language and culture, coupled with its identification with the very ethos of the Caribbean Community, at once invests it with intrinsic qualities which the Privy Council, despite its great learning, does not and can never hope to possess."³⁰

Following submission of the Report, a Task Force was appointed by the Heads of Government to work on developing a CARICOM Supreme Court, but for a number of years little, if any, progress was made; though the idea continued to merit an "honourable mention" at meetings of the Heads of Government.³¹ Indeed, work in earnest does not appear to have commenced until 1999, when the Heads of Government appointed a Preparatory Committee to develop the draft agreements that would give effect to the original and appellate jurisdiction of the CCJ.³² Two years later, all the necessary documentation had been prepared, and the Heads of

²⁷ [1994] 2 A.C. 1.

²⁸ *Time for Action: Report of the West Indian Commission* (University of West Indies, Kingston Jamaica, 1992).

²⁹ *ibid.*, p.499.

³⁰ *ibid.*

³¹ Pollard, fn.6 above, p.201.

³² Sir David Simmons, "The Caribbean Court of Justice: An Historic Necessity", Address to 13th Commonwealth Law Conference, available from www.caribbeancourtofjustice.org.

Government were finally able to ratify the Treaty establishing the CCJ at their conference in February 2001. This chronology suggests that between 1992 and 1999 little pressure was placed by the Heads of Government upon the Task Force to complete its remit, but that when the Preparatory Committee was appointed in 1999 it applied itself with a new sense of urgency, which resulted in completion of all the necessary documentation within two years. An examination of relations between the Privy Council and the Heads of Government during this period helps to explain the reason for this urgency.

Pratt and Morgan

In *Pratt and Morgan* a nine-strong panel of the Privy Council overturned almost two decades of its own jurisprudence by declaring that prolonged delay in carrying out the death penalty violated the appellants' constitutional right not to be subject to inhuman and degrading treatment or punishment, and commuted their sentences to life imprisonment. In determining what period of delay would constitute inhuman and degrading treatment or punishment, the Board allowed two years for completion of domestic appeal procedures³³; a further 18 months was allowed for the completion of petitions to international human rights bodies, such as the Inter-American Commission of Human Rights ("IACHR") and the United Nations Human Rights Committee ("UNHRC").³⁴ Henceforth, delays in excess of five years would be deemed presumptively unconstitutional.³⁵

As Laurence Helfer notes, in his illuminating study of the backlash which followed the decision in *Pratt and Morgan*, the Board's ruling had an immediate effect on criminal justice systems throughout the region.³⁶ Jamaica was obliged to commute the sentences of 105 prisoners who had already been on death row for five years. Trinidad and Tobago commuted the sentences of 53 death row inmates and Barbados commuted nine death sentences.³⁷ In addition, local appellate courts were obliged to put other cases on hold in order to concentrate on appeals in capital cases to ensure that they were completed within the two-year deadline.³⁸

Not surprisingly, the decision to interfere with the operation of the death penalty was not popular with local politicians. The perception that the Privy Council was intruding upon matter of strictly local concern was further compounded by two decisions on appeal from Trinidad and Tobago, *Glen Ashby v The State*³⁹ and *Guerra and Wallen v The State*,⁴⁰ in which the

Board issued conservatory orders, staying the appellants' execution pending the determination of their appeal by the Privy Council, thus pre-empting the eventual decision of the Court of Appeal of Trinidad and Tobago. The actions of the Privy Council in the above cases were later described by the Chief Justice of Trinidad and Tobago as "incomprehensible"⁴¹ and "an unnecessary affront to the local Court of Appeal".⁴²

In the meantime, the wholly unrealistic deadline of 18 months for completion of appeals to human rights bodies set by the Board in *Pratt and Morgan* was resulting in a dramatic increase in the number of petitions that were being presented by condemned prisoners to the UNHRC and to the IACHR.⁴³ Before *Pratt and Morgan* there was not a single example of either the UNHRC or the IACHR completing appeals within an 18-month time-frame; the reality was that petitions were taking twice and sometimes three times this length of time to be completed.⁴⁴ As lawyers for condemned prisoners quickly recognised, the delays that accompanied appeals to these bodies, which invariably exceeded five years, meant that it was possible to force Caribbean governments to commute the death sentences imposed upon their clients simply by invoking these international appellate processes. In *Bradshaw v Att.-Gen. (Barbados)*⁴⁵ these difficulties were explained to the Privy Council and a request was made on behalf of the Government of Barbados for the period of five years to be extended to take account of the time taken by the IACHR and UNHCR in dealing with petitions: alternatively, for the period of time relating to appeals to these bodies to be excluded in computing the five-year period. This request was, however, rejected by the Board, which suggested that the government's predicament could be avoided if only the domestic appeal process were expedited.⁴⁶

Confronted with the Board's refusal in *Bradshaw* to accede to a request to extend the period for completing appeals to international human rights bodies, a number of governments⁴⁷ began to issue "instructions" to the IACHR and UNHRC: unilaterally prescribing time-limits for the determination of petitions by these bodies, following which the executions of appellants would not be further postponed. These "instructions" and the decision to proceed with executions before determination of the petitions if the government's deadline was not met, were the subject of a quartet of appeals to the Privy Council,⁴⁸ culminating in *Lewis v Att.-Gen. (Jamaica)*⁴⁹ in which the Board held that to execute condemned prisoners while their petitions were pending

³³ *Pratt and Morgan* [1994] 2 A.C. 1, p.34H.

³⁴ *ibid.*, p.35G.

³⁵ *ibid.*, p.35H.

³⁶ L.R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes" (2002) 102 *Columbia Law Review* 1832.

³⁷ Sir David Simmons, "Judicial Legislation for the Commonwealth Caribbean: The Death Penalty, Delay and the Judicial Committee of the Privy Council" (1998) 3 *Caribbean Law Bulletin* 1, p.6.

³⁸ M.A. de La Bastide, "The Case for a Caribbean Court of Appeal" (1995) 5 *Caribbean Law Review* 401, pp.402-403.

³⁹ Unreported. Reasons for decision delivered July 26, 1994.

⁴⁰ Unreported.

⁴¹ de La Bastide, fn.38 above, p.414.

⁴² *ibid.*, p.417.

⁴³ The number of petitions grew from between 3 and 15 per annum between 1989 and 1993 to between 22 and 28 per year between 1994 and 1999. See Helfer, fn.36 above, p.1878.

⁴⁴ Helfer, fn.36 above, p.1876.

⁴⁵ [1995] 1 W.L.R. 936.

⁴⁶ *ibid.*, p.943D.

⁴⁷ The Bahamas, Jamaica and Trinidad and Tobago.

⁴⁸ The first three cases to be heard were *Fisher v Minister of Public Safety and Immigration* (No.2) [2000] 1 A.C. 434; *Thomas v Baptiste* [2000] 2 A.C. 1; *Higgs v Minister of National Security* [2000] 2 A.C. 228.

⁴⁹ [2000] 3 W.L.R. 1785.

before international human rights bodies violated their constitutional rights to due process and to the protection of the law.

A number of commentators have concluded that it was the cumulative pressure of these cases that caused the Heads of Government to sever their countries' links with the Privy Council.⁵⁰ As the preceding chronology demonstrates, this may be something of an oversimplification; the decision to abolish the right of appeal had clearly been taken, if not decisively acted upon, before judgment was delivered in *Pratt and Morgan*. However, the Board's refusal to accommodate the governments' requests to extend the time period of five years to allow for demonstrable delays in completing petitions to the IACHR and UNHRC, followed by its declaration that the time-limits which the governments had sought to impose for the completion of appeals to these bodies was unlawful, may serve to explain why the process leading up to the establishment of the CCJ was accelerated following delivery of the judgment in *Thomas*. As Helfer observes:

"Even for established national courts, this approach might be criticised as politically inastute; but it was especially poor politics for a postcolonial court adopting a new rule that mapped perfectly onto a legal fault line dividing former colonies from the old empire."⁵¹

The debate surrounding the CCJ

In many respects the debate which has taken place in the region surrounding the appellate jurisdiction of the CCJ reflects the contours of the debate in a number of other Commonwealth countries which have abolished the right of appeal to the Privy Council: with arguments about access to justice and sovereignty and independence at the forefront.⁵² However, there are two key elements which distinguish the debate in the Commonwealth Caribbean from debates which have taken place elsewhere, most recently for example, in New Zealand: the first is the experience of colonial rule, which for Caribbean countries was markedly different from that of other predominantly "white" colonies such as Canada, Australia and New Zealand, and continues to haunt the Caribbean imagination; the second is the complicating shadow that has been cast by the retention of the death penalty by all of the independent countries in the region.

The case for the CCJ

In discussions about the need to assert legal as well as political sovereignty, the CCJ has been vested with an almost totemic force. As noted by Sir David Simmons, the Chief Justice of Barbados:

⁵⁰ See J.B. Knowles, "Capital Punishment in the Commonwealth Caribbean: Colonial Inheritance, Colonial Remedy?", in P. Hodgkinson and W. Schabas, eds, *Capital Punishment: Strategies for Abolition* (Cambridge University Press, 2004), pp.282, 305.

⁵¹ fn.36 above, p.1889.

⁵² See, e.g. Ramsahoye, "A Caribbean Court of Appeal for Caribbean Peoples"; Jackson, "Appeals to the Privy Council—Problems and Prospects"; White, "Jettison the Judicial Committee: You T'ink it easy?"; Alexis, "The Case Against WI Appeals in the UK Privy Council"; Hyatali, "Towards a West Indian Jurisprudence" (1975) 7 *Caribbean Affairs* 35.

"The independence of the states of the region will not be complete, is not complete, when our constitutions entrench a foreign tribunal as our final court of appeal. It is inconsistent with independence: it is an affront to our sovereignty and the sovereignty of independent nations. You may say this is an emotional argument, but these psychological considerations are important and the symbolism is not to be discounted."⁵³

The psychological boost to national pride that would be given by establishing a final court of appeal within the region has also been described by Rex Nettleford, a member of the West Indian Commission, thus:

"It is thought that the [Privy Council], however flawed, remains to many better than anything we can design for ourselves . . . A West Indian Court of Appeal is therefore a necessary institutional manifestation of our will to self-respect and self-esteem."⁵⁴

Concerns about self-respect and self-esteem are linked to the baleful influence of colonialism, and the Privy Council's association with the former colonial power has been identified by the Caribbean jurist, Simeon McIntosh, as central to the argument for establishing a regional court of appeal:

"[S]o long as we remain the 'subjects' of the British Crown with its Judicial Committee as the apex in the hierarchy of our legal system, it is to be expected that our constitutional discourse would reflect a cluster of values, intellectual orientations and practices that carry a distinct British cast . . . Our constitutional conversation is carried out in a 'foreign' voice. We are either silenced or are constrained to speak within the institutions and traditions of interpretation of the colonial constitutions that have been imposed upon us."⁵⁵

While it would be impossible within the space of this article to do full justice to the richness and complexity of McIntosh's arguments, his central premise can be stated succinctly: if constitutional interpretation gives utterance to and expression of a nation's constitutional identity, permitting the Privy Council to remain as the ultimate interpreter of the independence constitutions of the Commonwealth Caribbean allows the former imperial power to serve as the defining agent of its collective identity.

As the former Chief Justice of Trinidad and Tobago, the Honourable Mr Justice de la Bastide, notes, the interpretation of the region's independence constitutions also involves the exercise of a powerful judicial discretion by a group of judges who are both physically and culturally remote from the countries over which they are exercising jurisdiction. Reflecting on a number of the Privy Council's more controversial decisions, commencing with the judgment in *Pratt and Morgan*, he observes that:

⁵³ Quoted in S. McIntosh, *Caribbean Constitutional Reform* (Caribbean Law Publishing Company, Jamaica, 2002), p.266.

⁵⁴ Also quoted in McIntosh, fn.53 above, p.272.

⁵⁵ fn.53 above, p.294.

“[A] number of these decisions, which have extremely important consequences for the community, are really policy decisions, involving the weighing of competing interests and considerations . . . Neither the common law . . . nor statute law can provide a clear and certain answer to every question, and the decisions which a final Court of Appeal is called upon to make in order to fill the interstices are sometimes not very different from those made by a democratically elected Parliament . . . In making such decisions, one is not unearthing some universal verity, but determining what is best for a particular society in the circumstances existing at a certain point in its history.”⁵⁶

It is accordingly essential, he argues, that those who make those decisions have an intimate and first hand knowledge of the society upon whose behalf the decision is made; not only because they will be better informed about the needs of that society, but also because residence in and membership of that society is the most salutary form of accountability.⁵⁷ Being composed of judges who have a close and intimate connection with the countries over which they are exercising jurisdiction, its supporters thus claim that the CCJ will:

“Empower regional jurists to give effect to *regional* standards and values as the laws of the region are interpreted and applied.”⁵⁸ (emphasis added)

However, the reference to *regional* standards and values can also be construed as a form of shorthand for the death penalty; a topic which is never very far from the surface in any discussion about the region’s sovereignty and independence. Sir David Simmons thus portrays the Privy Council’s efforts to regulate the operation of the death penalty in cases such as *Pratt and Morgan* as “a naked usurpation of the legislative function under the thin guise of (constitutional) interpretation”.⁵⁹ Strictly speaking, this is an argument about the separation of powers and the relationship between the judiciary and the legislature; it has nothing to do with the question of whether appeals should be dealt with by the Privy Council, or a regional court of appeal. This has not, however, deterred a number of the CCJ’s supporters from exploiting the emotive force which this argument carries in order to advance their case. Thus, the Jamaican Prime Minister, P.J. Patterson, in his address to the Jamaican Parliament in the debates that preceded the legislation to give domestic effect to the appellate jurisdiction of the CCJ, declared:

“How, as an independent nation, can we countenance judicial legislation? This is not about the flexing of political muscle. It is difficult to escape the conclusion that the ruling in a line of cases beginning with *Pratt and*

Morgan, in the early part of the last decade, have amounted to judicial legislation.”⁶⁰

It is this close association of the CCJ with the operation of the death penalty which has come to dominate the debate about the CCJ and which, ultimately, has compromised its legitimacy in the eyes of its opponents.

Opposition to the CCJ

Though it has become a political issue in some countries, notably Jamaica and Trinidad and Tobago, opposition to the CCJ in the region is not confined to party politics. Both human rights groups, who fear that the abolition of the right of appeal to the Privy Council will undermine the protection of human rights in the region,⁶¹ and local Bar associations, whose fears about the CCJ stem from their members’ daily experience of the deficiencies of their own civil and criminal justice systems,⁶² have denounced the CCJ, as presently conceived. While these groups do not oppose the replacement of the Privy Council with a regional court of appeal in the longer term, their immediate concern is how the CCJ will function as an institution, and its constitutional status after the right of appeal to the Privy Council has been abolished. Will it be adequately funded? Will its judges be sufficiently insulated from political interference? Will it be entrenched within the constitutions of each of the contracting parties so as to prevent governments restricting or eliminating their citizens’ right of appeal to the CCJ by a simple majority vote? Underlying each of these concerns is the pervasive suspicion that, in their determination to avoid the restrictions imposed by the Privy Council on the operation of the death penalty, the Heads of Government wish to create a court which they can shape to their own will.

The following section examines how the Heads of Government have sought to address these concerns in the design of the CCJ, and considers why, despite their best efforts, they have still failed to win unanimous support for the CCJ in the region.

Funding

The record of some regional governments in meeting their financial obligations to CARICOM institutions has been very poor.⁶³ Fears that governments might be equally neglectful in meeting their contributions to the funding of the CCJ have been compounded by the failure of successive national governments to invest in the infrastructure of their civil and criminal justice systems. As the Inter American Development Bank noted in its review of justice systems within the region in 1999:

⁶⁰ See D. Franklyn, ed., *We Want Justice: Jamaicans and the Caribbean Court of Justice* (Ian Randle Publishers, Kingston, Jamaica, 2005), p.71.

⁶¹ Jamaicans for Justice, “The Caribbean Court of Justice: A Twenty-First Century Trojan Horse”, available from www.jamaicansforjustice.org.

⁶² Jamaican Bar Association, “The Condition of our Justice System” (2000, unpublished), available from author.

⁶³ Menon, fn.23 above, p.33.

⁵⁶ de la Bastide, fn.38 above, p.429.

⁵⁷ *ibid.*

⁵⁸ Sir Denys Byron C.J., cited by Hon. Kenny Anthony in an address to Norman Manley Law School, June 28, 2003, “The Caribbean Court of Justice: Will it be a Hanging Court?”, available from www.caribbeancourtofjustice.org.

⁵⁹ Simmons, fn.32 above, p.9.

"Historically, Caribbean governments have not treated justice systems as a sector of importance and, as a result, a disproportionately small percentage of their national income has been allocated to judicial establishment and delivery of judicial services. Inevitably, the judicial infrastructure has weakened over the years to the point where the region's democratic underpinnings run the risk of being affected."⁶⁴

In order to provide the CCJ with a measure of financial stability and guard against political interference with its finances, the Contracting Parties have agreed that the CCJ will be financed through the mechanism of a Trust Fund,⁶⁵ which will be administered by a Board of Trustees whose members are drawn primarily from the private sector and civil society.⁶⁶ The Board is responsible for authorising the provision of the resources capital and operating budget of the CCJ.⁶⁷ A sum of US\$100 million has been invested in the Fund for this purpose.⁶⁸ It is anticipated that this sum, which is based on a 10-year cash flow projection prepared by the Caribbean Development Bank ("CDB"), will be sufficient to guarantee the funding of the CCJ in perpetuity.⁶⁹ However, the Board is required to "review the adequacy of the resources of the Fund, not later than two years after entry into force of the Agreement and thereafter biennially".⁷⁰ If needed, the Contracting Parties can be required to make additional contributions to the Fund where resources are found to be inadequate.⁷¹ The initial investment of US\$100 million has been raised by means of a loan from the CDB, which has entered into loan agreements with each of the Contracting Parties for the repayment of their contribution towards the Trust Fund.⁷² To prevent the Contracting Parties defaulting on the loans, the assessed contributions are charged by law on the Consolidated Fund or public revenues of each Contracting Party.⁷³ Contracting Parties may only withdraw from the Fund provided that all outstanding obligations to the Fund have been settled, though the Agreement is silent on the entitlement of a withdrawing party to be refunded capital from the Fund.⁷⁴

⁶⁴ *Judicial Reform in the Caribbean* (IDE, Washington DC, 1999).

⁶⁵ Agreement Establishing the Caribbean Court of Justice Trust Fund (henceforth "Trust Fund Agreement") which entered into force on January 27, 2004.

⁶⁶ Including the Secretary General of CARICOM, the Vice Chancellor of the University of the West Indies and the President of OCCBA. Trust Fund Agreement, Art.VI.

⁶⁷ Trust Fund Agreement, Art.VII.

⁶⁸ Pollard, fn.6 above, p.56.

⁶⁹ *ibid.*

⁷⁰ Trust Fund Agreement, Art.VII.

⁷¹ *ibid.*, Art.IV.

⁷² These contributions have been assessed on a pro rata basis in accordance with the Contracting Parties' contributions to CARICOM, Annex to Trust Fund Agreement.

⁷³ Agreement, Art.XXVIII.

⁷⁴ Trust Fund Agreement, Art.XIX.

Judicial independence

Though the independence constitutions of the Commonwealth Caribbean countries are generally based on the Westminster model,⁷⁵ the drafters were aware that this model, whereby senior judges were appointed on the advice of the Prime Minister with the recommendation of the Lord Chancellor,⁷⁶ would not be suitable in a situation where it is the constitution and not Parliament which is supreme and the judges who hold the balance between the executive and the legislature. In such a situation, a greater separation between the executive and judiciary than existed under the Westminster model would be required.⁷⁷

Commonwealth Caribbean constitutions thus generally provide that judges, other than the Chief Justice, are appointed by the Governor General on the advice of a Judicial Services Commission ("JSC"), and that judges, other than the Chief Justice, can only be removed on the advice of a tribunal of investigation, consisting of a Chairman and no fewer than two other members, selected by the Governor General, acting in accordance with the advice of the Chief Justice. Ultimately, the order for the judge's removal must be referred to the Privy Council before it can take effect.⁷⁸ Despite the existence of these "prophylactic devices",⁷⁹ the Chief Justice remains a political appointee, chosen by the Prime Minister in consultation with the Leader of the Opposition, and can be removed on the advice of a tribunal of investigation, the members of which are selected by the Prime Minister.

There is also considerable scope for political interference with the appointment of other judges through control over the membership of the JSC; half of whom are selected by the Prime Minister in consultation with the Leader of the Opposition. For those countries which are part of the Organisation of Eastern Caribbean States ("OECS") and which subscribe to the jurisdiction of the OECS Supreme Court, the determination of the terms of service of Supreme Court judges, including extensions of a judge's tenure for an additional three years after that judge reaches the retirement age of 62, is within the province of the JSC, but in each case requires the concurrence of the OECS Heads of Government.

The degree of political influence in the appointment and removal of judges which has resulted from these arrangements is a subject of intense debate in the region. Selwyn Ryan, who has made a careful survey of some of the more notorious examples of alleged political interference with the judiciary, concludes that:

"[P]olitical executives in the Caribbean . . . are becoming less tolerant of dissent, less mindful of the traditions of the inherited Westminster

⁷⁵ With the exception of the Constitution of Trinidad and Tobago, which was based on the Canadian Bill of Rights 1960.

⁷⁶ C. Turpin, *British Government and the Constitution* (5th edn, Butterworths, London, 2002), p.56.

⁷⁷ S. Ryan, *The Judiciary and Governance in the Caribbean* (SALISES, Trinidad and Tobago, 2001), pp.9-10.

⁷⁸ See, e.g. Constitution of Jamaica, Ch.VII.

⁷⁹ Ryan, fn.77 above, p.11.

paradigm, and more inclined to use coercive strategies, however, veiled, to get their way.”⁸⁰

Whether or not this is true, it is a belief that is widely held in the region.⁸¹ Conscious of this erosion of trust in the independence of the region’s judiciary, a considerable effort has been made in drafting the Agreement to minimise the scope for political interference in the appointment and removal of the judges of the CCJ.

Thus, the responsibility for the selection and appointment of the judges of the CCJ, with the exception of the President, has been vested in the Regional Judicial and Legal Services Commission (“RJLSC”).⁸² With the exception of the Chairperson, who is also the President of the CCJ, the Heads of Government have no control over the selection of the members of the RJLSC: the majority of whom are drawn either from the legal profession or the legal academy.⁸³ Appointments of judges are made by a majority vote of all members of the RJLSC.⁸⁴ The office of a judge cannot be abolished while there is a substantive holder thereof and a judge may sit until he attains 72 years of age.⁸⁵ There is no provision for extending a judge’s tenure beyond this age in order to avoid the incentive that this might offer to judges to hand down judgments that favour the Heads of Government. A judge may only be removed from office for inability to perform the functions of his office, whether arising from illness or any other cause, or for misbehaviour.⁸⁶ The removal of a judge, other than the President, requires a majority vote of all members of the RJLSC⁸⁷ and must first have been referred by the RJLSC to a tribunal, consisting of a chairman and not less than two other members, selected by the RJLSC.⁸⁸

Separate provision has been made for the appointment of the President, who is appointed by a qualified majority vote of three quarters of the Heads of Government of the Contracting Parties.⁸⁹ There is thus a greater apparent scope for interference by the Heads of Government in the appointment of the President. However, the Heads of Government do not have an absolute freedom of choice and must appoint someone recommended by the RJLSC.⁹⁰ The President of the Court is restricted to one term of seven years or until he attains the age of 72 years.⁹¹ The President may be removed from office by a qualified majority vote of three quarters of the Heads of Government of the

⁸⁰ *ibid.*, p.146.

⁸¹ *ibid.*, p.14. See also Report of Task Force Appointed by Hon. Chief Justice to Enquire into the Structure and Functioning of the Judicial and Legal Services Commission, 2000, cited by Ryan, fn.77 above, p.14.

⁸² Art.V.

⁸³ Art.I.

⁸⁴ Art.IV, para.7.

⁸⁵ Art.IX, paras 1 and 3.

⁸⁶ Art.IX, para.4.

⁸⁷ Art.IX, para.5(2).

⁸⁸ Art.IX, para.6(a).

⁸⁹ Art.IV, para.6.

⁹⁰ *ibid.*

⁹¹ Art.IX, para.2.

Contracting Parties though, as with the President’s appointment, this is subject to the recommendation of the RJLSC.⁹² However, in the case of the removal of the President, the RJLSC must act on the advice of a tribunal set up to investigate allegations of impropriety or inability to perform the functions of President,⁹³ and the Heads of Government retain control over the selection of the chairman and other members of the tribunal.⁹⁴

Constitutional entrenchment

The right of appeal to the Privy Council is enshrined in the constitutions of all the Contracting Parties which have ratified the appellate jurisdiction of the CCJ; with the exception of Guyana, which abolished the right of appeal to the Privy Council when it gained independence in 1970. In all but one case, this constitutional provision is expressly entrenched in the sense that it can only be altered by means of something greater than a simple majority of votes in the legislature.⁹⁵

Under the Agreement, however, a Contracting Party may withdraw from the CCJ at any time by giving three years’ notice in writing.⁹⁶ This has led to concerns that, unless the CCJ is constitutionally entrenched in the same manner as the Privy Council, a Contracting Party could deprive its citizens of access to a third tier appellate court by an executive act of their government, followed by a simple majority vote in Parliament. Accordingly, where governments have introduced legislation to give domestic effect to the appellate jurisdiction of the CCJ, they have been careful to ensure that the legislation simply deletes the reference to the Privy Council in the relevant constitutional provision and replaces it with a reference to the CCJ: thereby ensuring that the CCJ is constitutionally entrenched in the same manner as the Privy Council.⁹⁷

The one exception to this general rule is Jamaica. Under Ch.VII of the Constitution of Jamaica the provisions relating to the status and composition of the higher courts, the Supreme Court and the Court of Appeal, as set out in Ch.VII, are all “entrenched”.⁹⁸ However, s.110, which provides for the right of appeal to the Privy Council, is not so entrenched. This led the Jamaican government to assume that they could introduce the Caribbean Court of Justice Act 2004 (“CCJA”), which is intended to replace the right of appeal to the Privy Council with a right of appeal to the CCJ, by a simple majority: thus rendering the support of the opposition Jamaica Labour Party (“JLP”), which they knew that they could not secure, unnecessary.

⁹² Art.IX, para.6(b).

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ Constitution of Antigua, ss.47 and 122; Constitution of Barbados ss.8(1) and 49; Constitution of Belize ss.69 and 104; Constitution of Dominica ss.42 and 106.

⁹⁶ Art.XXXVII.

⁹⁷ See, e.g. Constitution (Amendment) Act 2003 Barbados.

⁹⁸ To alter these provisions the Bill affecting the alteration must be introduced in the House of Representatives, a period of at least six months must elapse between the introduction of the Bill into the House and its passing by that House, and the Bill has to be approved by the votes of not less than two-thirds of all the members of both Houses. Jamaican Constitution, s.49(3).

This assumption was, however, challenged by both the JLP, and the Independent Jamaica Council for Human Rights ("IJHRC") in *Independent Jamaica Council for Human Rights (1998) Ltd v Att.-Gen. (Jamaica)*.⁹⁹ Whilst acknowledging that the right of appeal to the Privy Council is not expressly entrenched, the appellants nonetheless argued that the effect of replacing the Privy Council with the CCJ was to establish a court of superior jurisdiction, which could overturn decisions of the Supreme Court and the Court of Appeal, but which would enjoy none of the entrenched protection afforded to these courts. In the appellants' submission:

"It would make a mockery of the Constitution if the safeguards entrenched to ensure the integrity of the legal process in Jamaica could be circumvented by creating a superior court enjoying no such constitutional protection."¹

On behalf of the Jamaican government, it was argued that the appellants' fears were groundless since the Agreement includes a number of measures designed to secure the tenure and guarantee the independence of the judges of the CCJ, which were the equal of anything contained in the Constitution. However, as the appellants pointed out, under the terms of the Agreement, these measures could be amended by agreement between the Contracting Parties: and by s.5 of the CCJA 2004 the relevant minister is empowered to give effect to such amendment by an order, which is subject only to an affirmative resolution. The safeguards in the Agreement were thus at the mercy of executive fiat, which would take effect in Jamaican law on no more than an affirmative resolution.

The appellants' submissions were accepted by the Board, which agreed that it would not ultimately be consistent with the regime for the protection of the higher courts under Ch.VII of the Constitution to entrust a power of superior jurisdiction to a new court, which did not enjoy the same level of constitutional protection as these courts.² Accordingly, the Board directed that the procedure appropriate for amending the entrenched provisions of Ch.VII should have been followed.³ The JLP, however, having secured victory before the Privy Council have now gone a step further by insisting that the issue of abolition of the right of appeal to the Privy Council should be decided, not by a two-thirds majority of the Jamaican Parliament, but by a referendum of the whole of the Jamaican people.

The CCJ and the death penalty

It is a curious paradox that while the death penalty is almost universally supported in the region, the close identification of the CCJ with the death penalty has not served to increase public support for the CCJ. The difficulty for the Heads of Government is that, having promoted the CCJ on the back of

the death penalty, their claims about also wishing to improve access to justice, to secure the independence of the CCJ's judges and to empower them to give effect to regional standards and values, have not always sounded wholly convincing.

Thus, while it is perfectly reasonable to contend that locating the court within the region will improve access to justice by encouraging litigants to make greater use of a third tier appellate court by eliminating the cost of travel to the Privy Council in London, the reality is that the vast majority of litigants will remain obliged to make use of the services provided by their national courts, which remain dangerously under-resourced. The Heads of Government have not been able to explain satisfactorily why, if their concern is to improve access to justice, they have accorded priority to funding the CCJ while ignoring urgent demands to improve their own national justice systems. Furthermore, none of the countries which have ratified the CCJ's appellate jurisdiction have made any provision for funding legal representation before the CCJ. The inadequacy of legal aid provision for all classes of proceedings throughout the region has been commented upon elsewhere by the author.⁴ Most worryingly, legal aid is so rarely granted for the type of constitutional motions which would ordinarily be expected to be the main staple of the CCJ's diet that the IACHR and the HRC no longer regard a motion for constitutional relief as an available remedy for the purpose of demonstrating that all domestic remedies have been exhausted.⁵ Those constitutional motions that do make it to the Privy Council do so as a result of the efforts of local human rights groups and lawyers in London working on a pro bono basis. With the abolition of the right of appeal to the Privy Council, lawyers in London will no longer be able to represent appellants on such constitutional motions and there is, at present, no indication that local Bar associations have the resources to fill this gap in representation.

The Heads of Government can also claim, with some justification, that as a result of the measures that have been incorporated into the Agreement there is less direct political influence in the appointment and removal of the judges of the CCJ than there is in any other regional court: including the European Court of Justice and the European Court of Human Rights. However, the judges of the CCJ will have to work in an environment in which the region's senior judges and political leaders have made it clear that they would regard any further interference by the judiciary with the operation of the death penalty to be an unjustifiable usurpation of each country's sovereign legislative powers. It is, of course, difficult to predict how these statements will affect the CCJ's jurisprudence; but, as Patchett has noted, it would be naive to assume that judges in the Commonwealth Caribbean enjoy the same insulation from political interference as judges in the United Kingdom, who "enjoy a prestige and social protection virtually unknown in the smaller nations".⁶ The

⁴ D. O'Brien and J. Epp, "History and Development of Legal aid Services in the Commonwealth Caribbean" (2004) 3 *Journal of Commonwealth Law and Legal Education* 73.

⁵ *Briggs v Trinidad and Tobago*, IACHR Report NC 91/98.

⁶ K.W. Patchett, "Safeguards for Judicial Independence in Law and Practice", in Report of the Commonwealth Magistrates Conference 1975, cited by Ryan, fn.77 above, p.17.

⁹⁹ [2005] UKPC 3; [2005] 2 A.C. 356.

¹ *ibid.*, p.369F.

² *ibid.*, p.371E-H.

³ *ibid.*

scope for harassment and intimidation of the judiciary by governments and their supporters is much more concentrated in the small island states of the Commonwealth Caribbean.⁷ While it is true that the judges of a regional court such as the CCJ may be less vulnerable than judges in municipal courts, it would be misleading to say that they are entirely independent of the Heads of Government. As noted above, the Heads of Government play a significant role in the appointment and removal of the Chief Justice, who is also the President of the RJLSC and is thus a key figure in ensuring the CCJ's independence. Furthermore, while the judges' terms and conditions of service are fixed by the Agreement and cannot be altered to their disadvantage during their tenure of office,⁸ this does not prevent erosion of the value of their entitlements in real terms. Any improvement of these entitlements will require the consent of the Heads of Government.

Finally, the claim that the judges of the CCJ will be *empowered* to give effect to regional standards and values, needs to be treated with a considerable degree of caution to the extent that it ignores the very significant constraints that the saving laws clauses, which are such a prominent feature of so many of the independence constitutions in the region, will impose on their jurisdiction. As the Privy Council recently affirmed, in *R. v Pinder*⁹ and *Boyce v The Queen*,¹⁰ which respectively concerned a sentence of judicial flogging and a law prescribing a mandatory death penalty for murder, the effect of these clauses is to preclude the court from examining the constitutionality of such laws and punishments: even if the court considers that they would otherwise violate the fundamental rights guaranteed by the constitution. This is an issue which goes to the core of the CCJ's jurisdiction in constitutional matters and yet it has been consistently ignored by the Heads of Government: presumably because they are content to have the CCJ's jurisdiction circumscribed in this way. How else to explain the actions of the government of Barbados which, anticipating an unfavourable decision in *Boyce*, had already introduced legislation to amend the Constitution to restrict the powers of their appellate judges: making the imposition of a mandatory death sentence and its execution consistent with the Constitution; blocking references in appeals to a delay in carrying out the sentence and the conditions under which condemned prisoners are being held; and enabling time-limits to be applied to appeals by condemned prisoners to bodies outside Barbados?¹¹

Conclusion

The example of other former colonies within the Commonwealth made it inevitable that, as the independent countries of the Commonwealth Caribbean gained in confidence and political maturity, they would regard the retention

of the right of appeal to the Privy Council as anomalous and inconsistent with their claim to national sovereignty. The process of abolishing the right of appeal to the Privy Council in the Commonwealth Caribbean was, however, complicated by the fact that no single country possessed the resources to establish a final appellate court which could hope to match the Privy Council in terms of the calibre of its judges. The only alternative was to establish a regional court, but past experience of attempts at regional co-operation were not encouraging. For so long as the Privy Council avoided antagonising local sensibilities, the advantages of retaining it as a final court of appeal ensured that there was little enthusiasm for tackling the numerous obstacles that would have to be overcome in establishing a regional court. The equilibrium which preserved the status quo was, however, disturbed in the 1990s by the Privy Council's willingness to review more closely the operation of the death penalty in the region, which was perceived locally to privilege the rights of those charged with capital offences. This altered perception of the Privy Council coincided with the realisation that for the countries of the Commonwealth Caribbean to prosper economically they would have to speed up the move toward regional integration. Thus the idea of a regional court, with both an original jurisdiction to promote economic integration and an appellate jurisdiction which would better reflect local values, was born.

In designing and implementing the CCJ, the Heads of Government have gone a long way in their efforts to address the concerns of their opponents and yet still find themselves in a situation where they are financially committed to maintaining an appellate court with no immediate prospect that its two largest sponsors, Jamaica and Trinidad and Tobago, will submit to its jurisdiction. The decision to conflate the issue of national sovereignty with the death penalty has backfired and the failure to remove the constraints imposed on the CCJ's jurisdiction by the retention of the saving laws clauses has undermined confidence in the more positive role that the CCJ might otherwise play in the development of a regional jurisprudence. Despite the optimism that surrounded its inauguration, the CCJ, unfortunately, still remains a long way off being a truly representative regional appellate court.

⁷ *ibid.*

⁸ Art. XXVIII, para. 3.

⁹ [2002] UKPC 46; [2003] 1 A.C. 620.

¹⁰ [2004] UKPC 32; [2005] 1 A.C. 400.

¹¹ Constitution (Amendment) Act 2002.