

CHARTING THE ROUTE FROM THE PRIVY COUNCIL TO THE CARIBBEAN COURT OF JUSTICE

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The direction already chosen

The original jurisdiction is already in place

The discussion does not take place in a vacuum. The present position is that, by being parties to the Revised Treaty of Chaguaramas, the independent OECS states are already bound by the original jurisdiction of the Caribbean Court of Justice. Article 211 of the Revised Treaty of Chaguaramas is as follows:

ARTICLE 211: Jurisdiction of the Court in Contentious Proceedings

1. Subject to this Treaty, the Court shall have compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty, including:
 - (a) disputes between the Member States parties to the Agreement;
 - (b) disputes between the Member States parties to the Agreement and the Community;
 - (c) referrals from national courts of the Member States parties to the Agreement;

- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.
2. For the purpose of this Chapter, “national courts” includes the Eastern Caribbean Supreme Court.

Present inconvenience of staying out of the Appellate Jurisdiction:

Although those states have not signed on to the Appellate Jurisdiction of the Caribbean Court of Justice, and in so doing are exercising a policy freedom which the treaties leave open, there is at least one difficulty with not doing so while being bound by the original jurisdiction.

That difficulty relates to the referral obligation. Article 214, “Referral to the Court” provides “Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.” Article 211.2 provides “2. For the purpose of this Chapter, “national courts” includes the Eastern Caribbean Supreme Court.” There is no reference in either provision to the Privy Council.

If all the CARICOM member states had accepted the appellate jurisdiction of the Caribbean Court of Justice, those provisions would have been sufficient. No doubt they were left that way to prod member states into such acceptance of the appellate jurisdiction: to specify the Privy Council might have fortified those who wanted to resist the changeover, by being able to argue that the Revised Treaty itself contemplated the indefinite perpetuation of the jurisdiction of the Privy Council.

As it is, the survival of the Privy Council jurisdiction in most member states poses a problem for the referral jurisdiction. The jurisdiction needs, of course, to be implemented by national legislation, and I have seen a provision in St. Vincent and the Grenadines legislation incorporating the referral jurisdiction into that state’s law (I do not claim to have examined the question of the sufficiency of existing national legislation). If a national court does the referral and applies the decision of the CCJ, there is nothing to deal with the situation if the dissatisfied party appeals to the Privy Council. But obviously the referral jurisdiction only makes sense if the interpretation is applied at the Privy Council level also. Of what use is a decision based on a referral at the level of the Eastern Caribbean Supreme Court if, on an appeal, the Privy Council can approach the

interpretation point without the constraint of referral, and dispose finally of the matter using the non-referred interpretation?

The problem can arise even if the Court does not consider that referral is required under the terms of the Revised Treaty of Chaguaramas. Consider the following “hypothetical”, to use American law school language. Xavier sues Yvette in a case before the Eastern Caribbean Supreme Court. At the high court level, the court decides in favour of Xavier on the basis that the Revised Treaty of Chaguaramas was irrelevant to the determination of the matter, contrary to Yvette’s argument. The Eastern Caribbean Court of Appeal then dismisses Yvette’s appeal. On appeal to the Privy Council, the Privy Council decides that the Courts below were wrong, and that the matter does depend on the interpretation or application of the Revised Treaty. The Privy Council is under no obligation to refer the matter, and so does its own interpretation of the Revised Treaty.

The result would defeat the well-known objective of Articles 211 and 214 of the Revised Treaty, that of ensuring uniform and consistent interpretation of the Revised Treaty in all the CARICOM jurisdictions. That Privy Council interpretation would bind the Eastern Caribbean Supreme Court according to its rules of precedent. And in the next case in which the interpretation of the Revised Treaty *in pari materia* with *Xavier v. Yvette*, the Eastern Caribbean Supreme Court would no doubt refer the matter, but it would, if the Caribbean Court of Justice gave an interpretation contrary to that of the Privy Council, have to follow *Xavier v. Yvette* and not the CCJ’s interpretation. The purpose of the Treaty would have been frustrated.

This problem should in principle be capable of being solved by national legislation filling the gap left by the treaty. The Privy Council is required to apply the national law of the relevant jurisdiction in a case before it. Legislation governing the procedure in the Privy Council might, however, be problematic.

It is demonstrable, in my submission, that a constitutional provision can bind the Privy Council as to procedure: in the law of Dominica and of Trinidad and Tobago, the decision of the Judicial Committee is the dispositive event in the case of an appeal. In the Caribbean monarchies, however, the dispositive event is surely the decision of The Queen taken on the advice of the Judicial Committee. When section 108(1) of the St. Lucia Constitution says, for instance, “An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases”, that is different from the formula in section 106(1) of the Dominica Constitution and section 109(1) of the Trinidad and Tobago Constitution, “An appeal shall lie from decisions of the Court of Appeal to the Judicial Committee as of right in the following cases”.

Privy Council decisions which do not take effect by advising the Queen were around before the Trinidad and Tobago Republican Constitution: in Malaysia, the position of Malaysia's independent monarchy, what happened on independence was that the Judicial Committee advised the Yang di-Pertuan Agong and not the Queen. That device is not, however, used in the cases of Dominica and Trinidad and Tobago, and I once had a conversation with someone who, in his official position, ought to have been "in the know", from which I inferred that whereas it might have been acceptable for the Judicial Committee to advise a sovereign, it would not have been acceptable from the point of view of the British government for the Judicial Committee to be put in the *infra dignitatem* position of advising a mere President.

If one applies the principles inferrable from the Dominica, Trinidad and Tobago and Malaysia position to the instant case, a requirement for the Judicial Committee to refer a matter of interpretation of the Revised Treaty must surely be a less drastic procedural requirement than one addressing the question of the destination of, or requirement for, the Privy Council to advise. If the Dominica and Trinidad and Tobago constitutional provisions can work, and they have been applied many times, then a *fortiori* so should a constitutional amendment from an OECS state requiring referral of a point of interpretation to the CCJ.

The question whether constitution amendment was needed would seem to of importance if the referral were to be imposed on the Privy Council as a procedural requirement. But I suspect that there would be great interest among those distinguished persons present here to know whether the result could be achieved without a constitutional amendment.

To achieve that result, the solution should in principle be possible of dealing with the matter, not as a procedural requirement, but by a rule of substantive law. Any ordinary legislation in an OECS state binds the Privy Council as to the content of the law, provided that the legislation does not infringe the Constitution. I do not yet have a draft example ready to test this thesis.

Of course, accepting the appellate jurisdiction of the CCJ causes the problem to disappear!

The two stages

The *Human Rights Council* case has demonstrated, for all its inconveniences, that there are two aspects of the migration from the Privy Council to the Caribbean Court of Justice. The first stage is that of de-linking from the Privy Council. The second stage is that of accepting the jurisdiction of the CCJ in its appellate jurisdiction.

The two-stage analysis is perhaps commanded by common sense also: it can be inferred from the provisions of section 43(4) of the Dominica Constitution (St. Lucia and St. Vincent and the Grenadines have a parallel provision):

- “4. The provisions of paragraph (b) of subsection (3) of this section shall not apply in relation to any bill to alter-
- (a) Section 106 of this Constitution in order to give effect to any agreement between Dominica and the United Kingdom concerning appeals from any court having jurisdiction in Dominica to the Judicial Committee;
 - (b) Any of the provisions of the Supreme Court Order in order to give effect to any international agreement to which Dominica is a party relating to the Supreme Court or any other court (or any office or authority having functions in respect of any such court) constituted in common for Dominica and for other countries also parties to the agreement.”

To say that there are two stages is not to contest that they may be undertaken simultaneously, as Jamaica tried to do. An overlapping scheme with transitional provisions is also perfectly acceptable, as happened in Barbados. But this treatment analyses them in the sequence canvassed in the *Human Rights Council* case.

Delinking from the Privy Council

The Mitchell case and Grenada

There is already Privy Council authority on the question of de-linking from the Privy Council and which is specific to the OECS. In *Mitchell v. D.P.P.* [1986] AC 73 the post-restoration Parliament of Grenada had passed *nem. con.* legislation confirming the abrogation of Privy Council jurisdiction under the revolutionary regime. The effect of this legislation was challenged on the grounds that the provisions of the West Indies Associated States (Appeals to Privy Council) Order

1967 (S.I. 1967 No. 224) were not validly amended, and that such amendment was necessary in order to terminate the Privy Council's jurisdiction. The Privy Council held that such amendment of the Order was not necessary, since the Order effectively disentrenched the matter by leaving it to the individual countries' law, and that the amendment of the Grenada Constitution by the confirmation legislation was a valid constitutional amendment under the entrenching provisions of the Grenada Constitution.

The Human Rights Council case and Jamaica

The Jamaica C.C.J. case was based on different constitutional provisions - there, the Privy Council considered that its jurisdiction was not entrenched in the Jamaica Constitution other than minimally, but that point is hardly of assistance in the O.E.C.S. context, where the provision of each relevant Constitution would need to be applied, as we discuss later. That case is highly relevant, however, to what I describe as the second stage

The constitutional amendment requirements of stage 1

Ironically, both the *Mitchell* case and the *Human Rights Council* case could be considered to have weaknesses as authority on account of points which do not appear to have been fully argued.

In *Mitchell*, the Privy Council noted that the question of the absence of a Speaker's certificate had not been argued. An obvious possible reading of section 39(8) of the Grenada Constitution was that the Parliamentary majority was not sufficient to amend the Constitution in the absence of the Speaker's certificate, and that evidence of what actually happened in Parliament (or a concession on the matter) could not replace that certificate:

“(8) (a) A bill to alter this Constitution or the Courts Order or section 3 of the West Indies Associated States (Appeals to Privy Council) Order 1967 shall not be submitted to the Governor-General for his assent unless it is accompanied by a certificate under the hand of the Speaker of the House of Representatives (or, if the Speaker is for any reason unable to exercise the functions of his office, the Deputy Speaker) that the provisions of subsection (2), (3) or (4), as the case may be, of this section have been complied with and, where a referendum has been held, by a certificate of the Supervisor of Elections stating the results of the referendum.

- (b) The certificate of the Speaker or, as the case may be, the Deputy Speaker under this subsection shall be conclusive that the provisions of subsection (2), (3) or (4) of this section have been complied with and shall not be enquired into in any court of law."

But the Privy Council seemed to accept the concession as an adequate response to the absence of the Speaker's certificate, and made no reference to its earlier dicta in *Bribery Commissioner v. Ranasinghe* [1965] AC 172: "When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any court of law, it is clearly intending that courts of law shall look to the certificate but shall look no further. The courts therefore have a duty to look for the certificate in order to ascertain whether the Constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment." Had they applied the earlier case, the decision might have been that the absence of that technical requirement meant that the jurisdiction of the Privy Council had not in fact been abrogated.

In the *Human Rights Council* case, the Privy Council accepted in default of argument to the contrary that the provisions of the Caribbean Court of Justice (Constitutional Amendment) Act 2004, Act 20 of 2004 which abrogated the jurisdiction of the Privy Council were not severable from the provisions substituting the Caribbean Court of Justice, although they conceded that the abrogation of jurisdiction procedure had been complied with. But can this implication, that the Government can let legislation which is void only *pro tanto* fall *in toto* simply by default of argument, be reconciled with the recent decision in the *Suratt* case? In that case, legislation considered by the Government of Trinidad and Tobago to be unconstitutional was held to be valid at the suit of a private party against the Government. But if a Government cannot make legislation otherwise valid unconstitutional by fully arguing against its constitutionality, as in *Suratt*, how can it achieve that result simply by default of argument, as occurred in the *Human Rights Council* case?

Of course, the effect saved the jurisdiction of the Privy Council for the future (not in the instant case, since the argument proceeded on the basis that the Act had not been proclaimed) - is this *forum prorogatum*, a special case outside of *Suratt* reasoning? Does this mean the Privy Council accepts jurisdiction by consent, even when local legislation has abrogated the jurisdiction?

But it would go beyond my brief to comment on what we all already know: the Privy Council has in recent years been known to reverse its previous decisions. This led in Barbados to its being accused of not administering the law of

Barbados - raising the issue, which I hesitate to canvass in the presence of Professor McIntosh, given his awesome competence in the subject of jurisprudence, of a demonstration that the American realist position that law is the prediction of judges' decisions is not acceptable. And Barbados obviously has a great affection for the doctrine of precedent. The Revised Treaty of Chaguaramas requires the Caribbean Court of Justice to follow the doctrine of precedent in its original jurisdiction, but Barbados' legislation has applied the same stricture to the appellate jurisdiction also, and I wait with interest to see Professor McIntosh's analysis of that issue. So one problem which cannot become a new problem with the Caribbean Court of Justice is legal uncertainty!

Accepting the Appellate Jurisdiction of the CCJ

The Human Rights Council case and the constitutional requirements

The Human Rights Council case decides that accession to a new court to have jurisdiction superior to that of the present courts requires a procedure for amending the Constitution which satisfies the entrenchment demands of amending the provisions of the Constitution establishing the present Courts, even when the provisions relating to the Privy Council attract a less demanding entrenchment.

Perhaps the requirement may be "at least" - the separation of powers doctrine in *Hinds* was based on the structure of the Constitution as a Westminster model Constitution. It may be that the Human Rights Council case is departing from this view. Paragraph 9 of the judgment opens with the words "While it is true, as Lord Diplock explained in *Hinds v The Queen* [1977] AC 195, 212, that certain important assumptions underlie constitutions drafted on what he called the Westminster model, it is also true that when the people of Jamaica adopted their Constitution as an independent nation in 1962 they made certain very significant departures from the constitutional practice of the United Kingdom." That sounds as though the judgment is limiting the conclusions to be drawn from the "important assumptions".

Even granted the two stages requirement, it may seem at first sight strange that to replace the Privy Council with the CCJ requires an amendment procedure additional to that of abolishing the Privy Council. Grammatically, after all, the natural way to write such an amendment would be to substitute the court for the Privy Council in that section. Of course, the Privy Council has multiple roles in our Constitutions, including the power to dismiss judges. The Jamaica legislation did not try to remove that role of the Privy Council, so the case is not direct authority on what would be required for that purpose.

But it is well-settled law that entrenchment is not a mere grammatical action in that sense. If an amendment to section 8, say, has an effect on section 9, and section 9 is entrenched but section 8 is not, that effect might require an amendment procedure which is sufficient to cover section 9. Were it otherwise, any entrenched clause could be repealed by simply substituting a “notwithstanding anything else in this Constitution” clause for an unentrenched clause.

Some of the argument in the *Human Rights Council* case seemed to address the impermanence, as a matter of law, of the Caribbean Court of Justice. There is no reason, however, why action could not be taken to address the legal impermanence arising from the amendment clause of the CCJ Treaty. If Article 24.1 of the Treaty of Basseterre can proclaim its unlimited duration, why cannot the CCJ treaty do so also? Not that the effectiveness of such a provision cannot be challenged. The consent of states in international law can change anything except a rule of *jus cogens*, and it is difficult to see an institution peculiar to a state or states being protected by a rule of *jus cogens*.

In any case, the treaty amendment argument in the Human rights council case has a subtle implication. The problem was not amendability, as the judgment analysed it, but the ease of treaty amendment under the implementing legislation (*pace* Antigua and Barbuda’s Ratification of Treaties Act). It would therefore be desirable in entrenching the court to abrogate the executive authority over the CCJ Treaty, and to entrench the abrogation. Antigua and Barbuda has the abrogation in certain circumstances, but the substitution of the ordinary Parliamentary legislature procedure even there does not go so far as to require satisfying the constitutional entrenchment process.

But what is entrenchment? Why is not the consent of all the Prime Ministers to amendment a form of entrenchment? (“Every amendment shall be subject to ratification by the Contracting Parties in accordance with their respective constitutional procedures and shall enter into force one month after the date on which the last Instrument of ratification or accession is deposited with the Secretary-General” (CCJ Agreement, Article XXXII:2) Is it obviously more difficult, as the Privy Council’s argument assumes, to get a two-thirds majority than to get unanimity among the Prime Ministers? That point is not addressed by the judgment in the Human Rights Council case: “Dr Barnett is correct to point out that the Agreement may be amended, and such amendment ratified, by the governments of the contracting states, and such amendment could take effect in the domestic law of Jamaica by affirmative resolution.” (para. 21) Here all the OECS could have given them the message, on my interpretation as an outsider of OECS political realities. Entrenchment is a process of slowing down change. I ask

the question, has the need for unanimity among OECS Prime Ministers never had the effect of slowing down decision-making?

Again, one of the difficulties of the judgment in the Human Rights Council case is the assumption accepted that the Privy Council itself enjoys a superior status of independence from local pressures than the CCJ: "From these Jamaican courts an appeal lay to this Board which, although enjoying no entrenched protection in the Constitution, was known to be wholly immune from executive or parliamentary pressure in any jurisdiction from which appeals lay and whose members were all but irremovable." (para. 20) There was no reference whatever to the countervailing factor that the Privy Council could be abolished at any time by the ordinary British political process, a disadvantage which the CCJ did not share. There was no reference to the fact that the Privy Council can include (and does include) a Jamaican former judge, who is acknowledged to be personally capable of resisting local pressure on account of his integrity, but obviously the mere protection of his pension is hardly as impressive an institutional protection of his independence as is that which obtains for a judge of the CCJ. Again, it must be an underlying assumption that it would be politically easier for a Prime Minister of Jamaica to persuade all the other Caribbean Prime Ministers to amend the treaty than to do a deal with the British Prime Minister to abolish the Privy Council. That may or may not be true at various times, but is hardly an assumption of the judicial notice category, as is implicit in the judgment.

Again, it is interesting that the substance-not-form argument was used to emphasise the independence of the Privy Council, but was discounted in relation to the CCJ, notwithstanding the admission that the fears in relation to the CCJ were based on legal technicality and not on substance.

Of course, litigation is litigation. To win a case, you do not emphasise to a judge his or her own unsuitability to be a judge. For the Privy Council to argue by implication that they are disinterested, since they willingly acknowledge that they can be fired by abolition of their jurisdiction, may be less impressive when that argument is accompanied by the conclusion that no one else can be put in their place! Yes, there is a constitutional procedure to do so, but substance-not-form can be applied to that possibility also.

The levels of entrenchment in the OECS

The analysis in the Human Rights Council case depends in many aspects, of course, on the levels of entrenchment or otherwise in the Jamaica Constitution. But it does seem to lay down that accession to the CCJ requires compliance, in principle, with the amendment procedures which would be appropriate for the

provisions establishing the Courts and protecting the independence of the judges.

In Jamaica, the Privy Council conceded that stage 1, the de-linking, attracted no entrenchment (other than the minimal requirement that a majority of all the members of the relevant House of Parliament, and not merely of those present and voting, should support the measure). In the OECS independent states, however, there is no category of unentrenched provisions such as exists in Jamaica, which require merely a majority of all the members of Parliament. In Jamaica, although some provisions of the Constitution are protected by a referendum requirement, the judicial provisions are not in that category. In the OECS independent states, those provisions, subject to what follows in relation to Dominica, St. Kitts/Nevis, St. Lucia and St. Vincent and the Grenadines, do attract the protection of the referendum requirement. The entrenchment requirement seems at all relevant stages to be one level more stringent in the OECS states than in Jamaica.

In some jurisdictions of the OECS (Dominica, St. Kitts/Nevis, St. Lucia and St. Vincent and the Grenadines, but not Antigua and Barbuda or Grenada), the position in relation to removal of the jurisdiction of the Privy Council seems to depend on agreement with the United Kingdom. Given such agreement, removal of the jurisdiction of the Privy Council does not require a referendum (see section 43(4)(a)). The subsection which follows seems also to permit accession to the CCJ without a referendum (43(4)(b)). The entire subsection in Dominica reads as follows:

- “4. The provisions of paragraph (b) of subsection (3) of this section shall not apply in relation to any bill to alter-
- (a) Section 106 of this Constitution in order to give effect to any agreement between Dominica and the United Kingdom concerning appeals from any court having jurisdiction in Dominica to the Judicial Committee;
 - (b) Any of the provisions of the Supreme Court Order in order to give effect to any international agreement to which Dominica is a party relating to the Supreme Court or any other court (or any office or authority having functions in respect of any such court) constituted in common for Dominica and for other countries also parties to the agreement.”

In Grenada, as determined in the *Mitchell* case, a referendum is not required. It appears, however, that a referendum may be required in Antigua and Barbuda.

Where accession to the CCJ is concerned, a referendum seems to be required in Antigua and Barbuda and Grenada. In the other states, a referendum would not be required if the necessary amendment were confined to the Supreme Court Order, since the CCJ Agreement would seem to satisfy the requirements of section 43(4)(b) of the Dominica Constitution.

Insofar as this analysis in relation to stage 2 suggests that a referendum may not be necessary in most OECS jurisdictions, there is the possible problem that amendment of the Supreme Court order might not catch all the possible sections of the Constitution which are relevant. This analysis requires a quite laborious investigation which I have not done.

The political challenge

Once it is conceded, as it may have to be regretfully, that accession to the appellate jurisdiction does require constitutional amendment, that poses a political challenge. The Prime Ministers here know that they know more than I do about the politics of constitutional amendment. It is therefore your unique challenge to manage the political process so as to bring about the constitutional amendment.