



The Role of British Colonial Powers in Hindering the Development of the Rule of Law

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Remarks
by
The Honourable Mr Justice Adrian Saunders, President of the Caribbean Court of
Justice
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In several English-speaking Caribbean states judicial power at an apex level is still grounded in a legacy rooted in the colonial past. Of course, the independent Caribbean States and their leaders are well placed vigorously to pursue the eradication of these vestiges of colonial rule. They *do* have that prime responsibility. However, it is also true that the United Kingdom, which approved the UN's Declaration on the Granting of Independence to Colonial Countries and Peoples, should also support and certainly not undermine the efforts of Caribbean States. In this brief presentation, without prejudice to the importance of the former notion, I focus deliberately only on the latter aspect.

Throughout the colonial era and even following the independence of Anglophone Caribbean states, the court that heard all their final appeals was the Judicial Committee of the Privy Council or JCPC. Appeals were heard by the most senior judges in the UK. Although the formal threshold for appealing in civil and constitutional cases was extremely low, the JCPC was never really overwhelmed with cases. The main reason for this is that it was, and it remains to this day, frightfully expensive to process an appeal before the JCPC.

Partly to address the serious anomaly of Caribbean States being independent but still outsourcing their final domestic appeals to be heard by British judges, at the beginning of this century, the independent States in the Caribbean commenced efforts to replace the JCPC with the Caribbean Court of Justice. They did so by creating an international treaty – The Agreement Establishing the CCJ. Trinidad and Tobago, Jamaica along with Belize, Guyana,

Barbados and the small EC States ratified this Treaty. The new court would have both an appellate jurisdiction and a jurisdiction similar to that enjoyed by the ECJ. Some States entered reservations to the appellate jurisdiction. Neither Trinidad and Tobago nor Jamaica entered any such reservation. The bulk of the funding for the establishment and running of the new court was provided by those two countries. The seat of the court is in Trinidad and Tobago. The judges for the court are selected by a Commission that has always had Jamaican nationals serving on it.

There were obvious domestic statutory and constitutional processes that needed to be followed to accede to the CCJ's appellate jurisdiction. However, as a matter of international law^[1], a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations.

To date, five states (Barbados, Guyana, Belize and the two EC States of Dominica and Saint Lucia) have fulfilled their treaty obligation to de-link from the JCPC and utilise the CCJ as their final court of appeal. By not following suit to date, the States of Trinidad and Tobago and Jamaica (by far the most populous of the English-speaking Caribbean States) are currently in breach of their respective treaty obligation.

In 2003, the then government of Jamaica attempted to put in place the domestic constitutional mechanisms to carry into effect that State's treaty commitment. There was nothing in the Jamaica Constitution to preclude the parliament of Jamaica, by ordinary majority, to end appeals to the JCPC. The Jamaican parliament therefore enacted a package of legislation to substitute the CCJ for the Privy Council in all references in the country's Constitution.

The passage of this package of legislation became embroiled in domestic politics. There was a court challenge. The Jamaica Court of Appeal judges found nothing wrong with the legislation. The case was appealed further to Jamaica's final court, the Privy Council itself.

The obvious irony here in the Privy Council being asked to determine for itself the validity of Jamaican legislation aimed at ending appeals to it could not be ignored. And so, the JCPC asserted in its judgment¹ that it had no interest of its own in the outcome of the appeal and that its only interests were to serve the people of Jamaica. Having so stated, the judgement claimed that the Privy Council was known to be wholly immune from executive or parliamentary pressure; that while the safeguards to ensure the independence of the judges of the CCJ were admirable, there was nevertheless a risk, however fanciful, that the governments of the states parties to the CCJ Agreement might amend the CCJ Agreement so as to weaken the independence of the CCJ; and that therefore, the Privy Council was obliged to strike down the package of legislation on the basis that the parliamentary procedures taken to enact them did not conform to the requirements for amending Jamaica's Constitution.

This judgment represented a setback for the fledgling CCJ, a court whose transparent mechanisms to secure the independence of its judges from political or executive pressure exceed those enjoyed by any other judiciary, whether in the Caribbean or elsewhere. Moreover, the idea that the governments of the states parties to the CCJ Agreement might amend the CCJ Agreement so as to weaken the independence of the Court is absurd. The Court in its Original Jurisdiction adjudicates disputes between and among the same States Parties. One still hoped, however, that by assisting the decolonisation process the UK and

¹ <https://www.bailii.org/uk/cases/UKPC/2005/3.html>

its agencies would not hinder adoption of the CCJ's appellate jurisdiction. After all, the new court would relieve the most senior judges of the UK of a workload that cuts into the time they can spend on UK appeals. Moreover, de-linking from the JCPC ticks several boxes on the rule of law matrix. Firstly, it affirms the right of Caribbean people to forge their own destiny. Secondly, accession to the CCJ promotes the goal of having Caribbean states, including Jamaica, adhere to the international treaty commitment they made when they ratified the CCJ Agreement. Thirdly, by any reasonable metric, for Caribbean litigants, the JCPC cannot function as effectively as a Caribbean apex court as the CCJ.

This last point has in the past been well recognised by principled Privy Council judges. In 2003, for example, well before the CCJ was inaugurated, Lord Leonard Hoffman, then a senior Privy Council judge, expressed his vigorous approval of the steps then being taken to establish the CCJ. Lord Hoffmann told attorneys in Trinidad and Tobago² that: "A court of your own is necessary if you are going to have the full benefit of what a final court can do to transform society in partnership with the other two branches of government." He conceded that the Privy Council's remoteness from the Caribbean had been a handicap and that the ability of a final court to function as a third branch of government depended upon the sensitivity of its members to what was both necessary and possible, a sensitivity that is naturally lacking among JCPC judges.

It does not appear that these points of principle are embraced, or at least publicly articulated, by the current top leadership of the JCPC. This is a pity because one gets the sense that UK Government policy on this matter is driven or at least deeply influenced by the attitude of its

² See <https://www.jamaicaobserver.com/2003/10/18/privy-council-judge-supports-cci/>

judicial leadership. Based on publicly expressed statements, that attitude appears to vary with the personality and proclivities of each UK Supreme Court President.

Lord Phillips, for example, in an interview with the Financial Times, approached the issue purely from the standpoint of the disproportionate time that he and his fellow senior justices spent hearing Caribbean appeals.³ In the report of that interview, it was stated⁴ that the productivity of UK Supreme Court judges could be doubled if they were not required to spend time addressing Caribbean appeals that are of little or no interest to the people of the UK.

I mentioned earlier that the threshold for appealing to the JCPC is formally low. There is little filtering and so, according to Lord Phillips, some appeals that reach the JCPC actually “wouldn’t even have reached the Court of Appeal if they had originated domestically.”⁵ Lord Phillips, who was, at the time of this interview, President of the then newly established Supreme Court, indicated his intention to limit the time his judges would spend on Privy Council appeals. He proposed two strategies. He would elevate UK Court of Appeal judges to hear some JCPC appeals, and he would consider having 3 instead of 5 judges sit on some Caribbean appeals. He made good on both promises in a few appeals.

Lord Phillips was succeeded first by Lord Neuberger and then by Lady Hale. Both appeared to have moderated their predecessor’s time-saving strategies. In large measure, they adopted a neutral position towards the critical issue of the invidious position of the JCPC, continuing to hear final appeals from countries that have an international treaty commitment to cease

³ See <https://www.ft.com/content/3c5b14a6-a61d-11de-8c92-00144feabdc0>

⁴ Ibid

⁵ Ibid

sending their appeals to London. Under Lady Hale's stewardship, the view taken appeared to be that whether countries moved from the JCPC to the CCJ was a political and constitutional decision and not something on which the judges of the JCPC should publicly express a view.⁶

Today, the position has again shifted. There is currently an intense national discussion in Jamaica about two important constitutional issues relevant to that country's decolonisation process. Firstly, that country's status as a monarchy and, relatedly, the fulfilment of the country's international treaty obligation to accede to the CCJ's appellate jurisdiction. Consensus among the country's two main political parties is required for the achievement of these goals. Both parties have expressed a strong determination that Jamaica should become a Republic. But one party insists that, prior to or at least simultaneously with becoming a Republic, the country should accede to the appellate jurisdiction of the CCJ. As far as I am aware, the other party has not yet publicly indicated whether it wishes to replace the JCPC and, if so, with what. This has rendered discussion on the subject controversial, generating intense, emotive and heated debate in the local Press. It has also produced a stalemate regarding the move to republican status.

In the midst of this maelstrom, many Jamaicans were surprised that the current President of the JCPC chose to enter the fray by writing an editorial in the country's main newspaper⁷ essentially to refute that newspaper's sentiment that Jamaica should embrace the CCJ. He contradicted the previous statement in the Financial Times made by his predecessor, Lord Phillips, that JCPC cases take up too much of the time of the judges of the UKSC. He did not advert to the fact that Jamaica has an existing treaty commitment to send its final appeals

⁷ <https://jamaica-gleaner.com/article/letters/20231123/letter-day-privy-council-here-serve-jamaicans>

to the CCJ. Indeed, he failed to acknowledge the existence or relevance of the CCJ. He gave assurances of enhancing Jamaican access to the JCPC. These were soon followed by the issuance of new JCPC draft Rules that sought to put in place a filtering system for JCPC appeals that would have had the effect of diluting the right of appeal to a final court presently contained in Jamaica's Constitution. Those draft Rules were later withdrawn in the face of protests.

Continuing to send appeals to the JCPC is harmful to the rule of law in the Caribbean because the volume of appeals that are heard at the apex court level is severely limited. Each of the countries that send their appeals to the CCJ experienced a dramatic escalation in the volume of cases being adjudicated at the level of a second appellate tier. For the ten-year period before and after accession to the CCJ, the increase for Barbados and Belize was in the magnitude of approximately 320% and 144%, respectively. Barbados, a country with 10% of Jamaica's population, had more than twice the number of cases heard by the CCJ than had been heard by the JCPC for Jamaica. The fundamental reason for the paucity of Jamaican cases being heard by the JCPC has to do with the crippling expense.

There are more fundamental issues at play. The role of a final court of appeal is very different from that of an intermediate appellate court. The main role of intermediate courts of appeal is to examine the trial record to discover whether any errors were made and need to be corrected in relation to an individual case. The Court of Appeal corrects the error and usually, that is the end of the litigation. There would invariably be, however, instances where an appeal from the Court of Appeal's judgment to a second appellate tier is warranted because the points of law in issue have implications for the coherence of the law as a whole. The lawyers and judges involved may recognise this as "a hard case"; a case where perhaps the law is uncertain, or a case where interpretation of the law might admit of two or more

equally rational answers. In our common law countries, where a significant body of the law is judge made, a hard case might be one where the prevailing view of the law appears to be way out of step with the ongoing march of an advancing society. In each such case resort is usually had to the apex court. Apex courts make judicial policy decisions. Judges of an apex court should ideally have an understanding of the people and society, and a knowledge of their history, culture, mores and aspirations. If the rule of law is to thrive the apex court cannot simply be a court *for* the Caribbean, it must be *of* the Caribbean, existing as a reflective body that is accessible to all who have hard cases.

When appeals to a final appellate court are choked off the rule of law itself is damaged because the hard cases are left unresolved or insufficiently or inadequately addressed. The cases are legion where the CCJ has heard hard cases in Guyana or Barbados, for example, that in all likelihood never would have reached the Privy Council. But these were cases that made a profound contribution to the development of the law of the respective States.

Caribbean governments, and people who know better, have a responsibility to advocate for the independent Caribbean states to accede to the CCJ. But equally, those who treasure the rule of law, those who genuinely subscribe to the text and spirit of the UN's Convention on Decolonisation, also should follow the lead of Lord Hoffmann and encourage the notion that Caribbean appeals should not in the 21st century be heard in London by British judges who are disconnected from the social, economic and cultural realities of the Caribbean and who are barely invested in the goals and aspirations of the people of the Caribbean.