Clayton Comments

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WILL THE CARIBBEAN COURT OF JUSTICE REPLACE THE PRIVY COUNCIL?

Logic suggests that replacing the Privy Council with the Caribbean Court of Justice (the CCJ) is not a question of whether- but when.

Since the Norman Conquest the Privy Council has been the cabinet through which the monarch governed England. Its jurisdiction was based on the idea that "the King is the fountain of all justice throughout his dominions and exercises jurisdiction in his Council, which acts in an advisory capacity to the Crown": see F Safford and G Wheeler, The Practice of the Privy Council in Judicial Matters (1901) 699-707. In 1900 the Privy Council exercised jurisdiction over one fifth of the globe and a quarter of its population. Now it is an appellate court for 0.1% of the world's population - retained by 14 Commonwealth countries and 10 British Overseas Territories.

The Privy Council's steady decline reflects a reaction to unpopular judgments at home, although these criticisms should be seen as part of a much broader political campaign to achieve independence. For instance, in Webb v Outrim [1907] A.C. 81 the Privy Council considered an Australian tax case which concerned whether a High Court decision would be treated as final under the new 1907 Constitution. A political compromise in enacting the Constitution gave both the High Court and the Privy Council concurrent jurisdiction to hear an appeal. The Privy Council held that no Australian State had the power of independent legislation - because every Australian Act require the Crown's assent. The judgment by Lord Halsbury has been criticised in trenchant terms - he was said to have "surpassed himself in the puerility of some of his reasons and in his fantastic ignorance of the working of a federation under the Crown": see F R Beasley. "Appeals to the Judicial Committee: the case for abolition" [1957] Res Judicatae 78. In Canada the Privy Council provoked fierce condemnation in Nadan v R [1926] AC 48 when it held that the Canadian Parliament did not have power to abolish criminal appeals going to the Privy Council. In Pratt v AG of Jamaica [1994] 2 A.C. 1 the Privy Council held that delay of more than five years between sentencing and execution was prima facie evidence that carrying out the sentence would constitute inhuman or degrading punishment. Its practical implications gave impetus to setting up the CCJ.

The process of abolishing the right of appeal to the Privy Council

Abolishing the right of appeal to the Privy Council is not straightforward. In Ibralebbe v The Queen [1964] A.C. 900 the Privy Council ruled that Ceylonese legislation creating independence did not extinguish the prerogative right to hear appeals existing before independence. Leaving the Privy Council requires amending the constitution, as the Privy Council decided in Independent Jamaica Council for Human Rights v Marshall-Burnett [2005] 2 A.C. 356 when blocking Jamaica's move to join the CCJ.

The process of amending the constitution is sometimes complex and varies from country to country. In Jamaica, s 110 of its constitution creates the right of appeal to the Privy Council. Section 49(1) of the constitution enables the right of appeal to Privy Council to be amended if legislation is passed by both houses. In Trinidad s 109 of the constitution enacts the right of appeal to the Privy Council. The power to amend the constitution under s 54(3) of the constitution requires the amendment to

be supported in its final vote by three-quarters of the House of Representatives and by two-thirds of the Senate. In a number of other countries, the process of constitutional amendments involve a parliamentary vote plus a referendum supported by not less than two-thirds of the turnout: see, e.g. s 38(3) of the Constitution of St Vincent and the Grenadines.

The establishment of the Caribbean Court of Justice

In 2005 the CCJ was set up in Trinidad, partly because of the political reaction to the approach to death sentences taken in Pratt. It has two jurisdictions. In its original jurisdiction, the CCJ interprets and applies the Revised Treaty of Chaguaramas (which established the Caribbean Community (CARICOM), an intergovernmental organisation of 15 member states, 14 nation-states and one dependency, promoting economic integration and cooperation among its members) throughout the Caribbean. It ensures that the benefits of integration are equitably shared, and coordinates foreign policy. CARICOM, but not British Overseas Territories, are entitled to join the CCJ.

The original jurisdiction of the CCJ makes it an international court with compulsory and exclusive jurisdiction in respect of interpreting the Revised Treaty of Chaguaramas. In addition, the CCJ has an appellate jurisdiction and hears appeals as the court of last resort in both civil and criminal cases from those member states that no longer allow appeals to the Privy Council. Barbados and Guyana accepted the CCJ's appellate jurisdiction in 2005, Belize in 2010, and Dominica in 2015.

In 2009, St Vincent and the Grenadines voted on a new constitution which included joining the CCJ but with turnout of 43% which did not satisfy the two-thirds requirement. In 2015, the Jamaican House of Representatives voted for the CCJ. In 2016, the Grenada referendum turnout was 32%. In 2018, the Prime Ministers of Grenada and Antigua and Barbuda campaigned to join the CCJ, but referenda voted to retain the Privy Council with very low turnouts - 28% in Grenada and 33.6% in Antigua.

Many see the Privy Council as a colonial anachronism. This is not a new criticism. In 1903 a New Zealand judge, Edwards J, counselled the Privy Council against overturning decisions of "trained lawyers who have spent their lives in the Colony, who know and understand its genius, its laws and its customs, as they cannot hope to know and understand them". In fact, Edwards J was a notoriously controversial judge: see https://teara.govt.nz/en/biographies/3e2/edwards-worley-bassett

My own experience from lecturing in the Caribbean is that many argue for the retention of the Privy Council because of the perceived need to preserve the principle of judicial independence. That concern is fundamental since cases challenging the state, e.g. criminal cases or public law challenges, inevitably, raise sensitive issues.

But problems arising from the absence of countervailing institutions to governmental power are a universal feature of political life, particularly small islands: see the Islands Rights Initiative https://www.islandrights.org/

When I was the United Kingdom's representative to the Venice Commission, (the Council of Europe's advisory body on constitutional law), we regularly wrestled with issues over judicial independence. For example, in 2018 I was one of 5 rapporteurs sent to Malta to "investigate constitutional arrangements, separation of powers and the independence of the judiciary and law enforcement

bodies" following the car bomb assassination in 2017 of Daphne Caruana Galizia. Ms Galizia was a Maltese writer and anti-corruption activist who reported on government corruption, nepotism, patronage, allegations of money laundering and organised crime. 18 months after her death, prosecution had still not been brought against those who planned the murder, although those who carried out the murder had been charged. The Venice Commission opinion recommended an enlarged and more independent Judicial Appointments Committee, an independent Director of Public Prosecutions to bring prosecutions and various changes to strengthen Parliamentary oversight.

Importantly, however, since the Commission published our report, a prominent Maltese businessman, Yorgen Fenech, was arrested. The Chief of Staff, Keith Schembri, resigned his government post on 26 November 2019, and was subsequently arrested by the police for questioning: see "Keith Schembri under arrest, along with Yorgen Fenech's doctor", The Times of Malta. 27 November 2019. It was later announced that Fenech would not be granted immunity to reveal what he knew about the case: see Garside, Juliette (28 November 2019). "Maltese PM's aide accused of being mastermind of Caruana Galizia killing". The Guardian, 3 December 2019. Numerous mass protests were held calling for Prime Minister Joseph Muscat's resignation, in part over his alleged association with Ms Galizia's murder. In January 2020, Mr Muscat resigned.

Concerns about judicial independence

When debating the future of the Privy Council vs the CCJ, debates about judicial independence should, in principle, have a much narrower focus. Responsibility for selecting and appointing CCJ judges (except the President) vests in the Regional Judicial and Legal Services Commission. With the exception of the Chairperson (the President of the Caribbean Court), Heads of Government have no control over the selection of the members of this Commission. The majority of the Commission is drawn from the legal profession or legal academy and appointments made by a majority vote of all members.

Future developments

When the CCJ will overtake the Privy Council is difficult to predict. Nevertheless, the principled justification for this development is compelling.

First, the CCJ's closer connections to potential members means it can fashion legal developments which reflect these deep cultural roots. As the CCJ's first President, Michael de la Baptise argued in 1995, a number of Privy Council decisions, "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": see M.A. de La Bastide, "The Case for a Caribbean Court of Appeal" (1995) 5 Caribbean Law Review 401, p 429.

The CCJ's approach to constitutional cases has been innovative and dynamic. It extended the scope of the right to protection of law in AG of Barbados v Joseph and Boyce [2006] 69 WIR 104 and Maya

Leaders v AG of Belize [2015] CCJ 15, prompting the Privy Council to mirror its approach in Maharaj v Prime Minister of Trinidad [2016] UKPC 37 and this year, Commissioner of Prisons v Seepersad [2021] UKPC 13.

The CCJ has also interpreted “savings clauses” law restrictively ((Nervais v the Queen [2018] CCJ 19 (AJ), McKewan v AG of Guyana ([2018] CCJ 30 (AJ) which immunise pre constitutional laws from constitutional challenges. The CCJ’s approach is now fundamentally different from the Privy Council. In Boyce v The Queen [2005] 1 A.C. 400 a 9 judge panel split 5/4 (Lords Hoffman, Hope, Scott Roger and Zacca J, Lords Bingham, Nicholls, Steyn and Walker dissenting) and held that death sentences for murder in Barbados under s 2 of the Offences against the Person Act 1994 substantially re-enacted s 2 of the Offences against the Person Act 1868. The 1994 Act was, therefore, an "existing law" for the purposes of the “savings clause” under the Constitution, and necessarily trumped the constitutional right not to be subject to inhuman or degrading punishment. However, Boyce reversed Roodal v State of Trinidad [2005] 1 A.C. 328, a Privy Council decision made only 9 months earlier. In Roodal Lord Bingham concluded that a breach of constitutional right against cruel and unusual treatment or punished was not invalidated as an "existing law" on grounds which Boyce characterised as irrational, ultra vires and inconsistent with the statutory language and purpose.

But the Privy Council too attaches great weight to the local decisions. Consequently, in Maharaj v Petroleum Co of Trinidad [2019] UKPC 21 the Privy Council relied on Trinidad authorities to hold that the justification for refusing to provide information under the Freedom of Information Act required the court have a role itself as primary decision-maker to decide how the public interest factors for and against disclosure of that document are to be balanced. It rejected the proposition that the authority’s decision had to be reviewed on a simple rationality standard.

Secondly, the economic reassurance requiring high legal expertise at the appellate level is not in doubt.

Thirdly, the cost and ease of access of appealing to the CCJ is more straightforward than going to the Privy Council. Although the Privy Council now mitigates these difficulties by televising the hearings and permitting appeals to be heard in the Caribbean like Fisherman and Friends of Sea v Environmental Management Authority [2018] P.T.S.R. 1979 in Trinidad in November 2017. Even so, the ability to access the apex court is likely to be improved if appeals from the Caribbean went to the CCJ.

Conclusion

Although the CCJ will eventually replace the Privy Council, I have no crystal ball to say when. As celebrated jurist Oliver Wendell Holmes once said, “The life of the law has not been logic: it has been experience”: see The Common Law p 1 (1881).

The logic of using a supreme court which reflects regional attitudes and values is extremely powerful. However, experience to date for proponents of the CCJ is not encouraging. Nonetheless, I would question the significance of the recent attempts to expand membership to the CCJ’s appellate jurisdiction.

Sometimes the case for constitutional change takes time to effect. In the UK a committee of our upper house worked as our Supreme Court for many - despite its obvious implications for principles like the separation of powers and rule of law. Consequently, in McGonnell v United Kingdom (2000)

30 E.H.R.R. 289 the European Court of Human Rights decided that close connections in Guernsey between the Bailiff's judicial functions (as President of the Royal Court) and his legislative and executive roles (as Deputy Bailiff he had presided over the States of Deliberation when Detailed Development Plan No. 6 was adopted) meant that he did not have the independence and impartiality required by Article 6(1) of the European Convention. The Appellate Committee of the House of Lords was only changed to the Supreme Court in 2009 as a result of the Constitutional Reform Act 2005

More importantly, any move away from the Privy Council to the CCJ requires broad popular support to give it legitimacy. The desire to 'take back control' from the Privy Council to the CCJ (as the Brexiteers called it during the EU referendum campaign in the UK) can only work if that development chimes with the national mood and aspirations.

This paper is based on a talk Richard Clayton QC gave to the Commonwealth Lawyers Association at the 2021 Conference in Nassau, the Bahamas in September 2021. It will be published on the Constitutional Law Blog on 27 September 2021.

September 2021