

1 History of Appeals to the Judicial Committee of the Privy Council in London

Location of the Judicial Committee of the Privy Council

The history of the British Empire is well documented and its revision is not within the scope of this book. That Empire's global expanse could often be grasped when explained in terms of the sun never setting on it. Of course like any parent, the British Empire left its indelible genetic marks in critical areas of the legislative, executive and judicial arms of doing business in its former colonies.

The judicial branch of its legacy has enjoyed the greatest longevity in the form of appeals to the Judicial Committee of the Privy Council (or Her Majesty in Council) as a court of final jurisdiction for former colonies of the British Empire.

The Judicial Committee of the Privy Council (JCPC) sits at number nine Downing Street in London, although this does not have to be the case. In *Ibralebbe v The Queen [1964] AC 900 at 922*, it was reported that Lord Haldane in *Alex Hull & Co. v M'Kenna [1926] IR 402, 404*, stated, in relation to the Privy Council that it is '*not a body, strictly speaking, with any location*'.

In the latter part of 2006, the Judicial Committee of the Privy Council went to hear matters in the Bahamas, a member of the Caribbean Community that has indicated that it will not be embracing the appellate jurisdiction of the Caribbean Court of Justice. Thus it will not be replacing the Judicial Committee of the Privy Council, as will be discussed below. This has raised questions of whether, with the decline of the Judicial Committee of Privy Council on the horizon, this itinerant move may have been intended to reduce the potential for such demise.

Jurisdiction of the Privy Council

The statutory authority of the Privy Council derives from the 1833 Judicial Committee Act, which lays the basis for its constitution and court procedure. The Privy Council used to be the final appeal court for several independent Commonwealth countries in exercise of its overseas jurisdiction, and it continues to be so for several others. It maintains this position also for dependencies, as a part of its domestic jurisdiction¹.

The Privy Council's overseas jurisdiction is at the heart of the examination of this book. The table below indicates the present status of appeals to the Judicial Committee of the Privy Council or to the Judicial Committee of the Privy Council, Her Majesty in Council (JCPC-HMC) as it obtains today.

1 The JCPC has domestic jurisdiction over the Crown Dependency islands of Jersey and Guernsey, as well as appeals on staff matters from the Isle of Man. It also exercises some jurisdiction in matters of devolution in relation to certain 1998 Acts, viz: The Scotland Act; The Government of Wales Act and The Northern Ireland Act. Various other aspects of appeal arrive at the Privy Council, such as those arising from the Royal College of Veterinary Surgeons and the General Medical Council; the Church Commissioners of the Church of England; Ecclesiastical Courts; the Prize Courts; and the Courts of Admiralty. However, these will not be examined here.

Table 1.1: The present status of appeals to the Judicial Committee of the Privy Council (JCPC) or to the Judicial Committee of the Privy Council, Her Majesty in Council (JCPC-HMC)

Territories / States	JCPC	JCPC-HMC
United Kingdom Overseas Territories and Crown Dependencies		Anguilla; Bermuda; British Virgin Islands; Cayman Islands; Falklands Islands; Gibraltar; Jersey; Guernsey; Isle of Man; Montserrat; St Helena and dependencies; Turks and Caicos Islands; Pitcairn Islands; South Georgia and South Sandwich Islands; British Antarctic Territory; and British Indian Ocean Territory
United Kingdom's Sovereign Base Areas		Akrotiri and Dhekelia in Cyprus
Associated States of New Zealand		Cook Islands and Niue
Independent Republican States	Dominica; Mauritius; and Trinidad and Tobago Kiribati if the case involves matters of constitutional rights; Brunei where the Sultan and the Queen agree that the JCPC hears the case and reports to the Sultan	
Independent Monarchical States		Antigua and Barbuda; Bahamas; Belize; Grenada; Jamaica; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; and Tuvalu

At this point it is appropriate to note that while many use the term ‘the Judicial Committee of the Privy Council’, there must be awareness of the precise nomenclature. The Judicial Committee of the Privy Council may sit, in certain circumstances, as ‘Her Majesty in Council’. While overseas dependencies always submit to ‘Her Majesty’, independent states may also have to submit to ‘Her Majesty’, depending on whether these states chose the republican or monarchical streams of government.

The effect of monarchical and republican streams of independent states

The 1833 Judicial Committee Act provides in Section 3:

‘All appeals... which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from... the determination,

sentence, rule or order of any Court... shall... be referred by His Majesty to the said Judicial Committee of his Privy Council, and that such appeals... shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore... (the nature of such report or recommendation being always stated in open court)'.

The relevance of '*... [Her] Majesty in Council*' in the post-colonial era, relates to those independent former territories that chose to retain the British Monarchy as the 'Head of State'. This monarchical retention may be exemplified by several constitutional provisions of these states.

The Antigua and Barbuda Constitutional Order 1981 declares, for example:

'27 There shall be a Parliament in and for Antigua and Barbuda which shall consist of Her Majesty, a Senate and a House of Representatives.'

It should be noted that Antigua and Barbuda, in common with several others, became independent many years after several of its Caribbean siblings, but replicated those existing constitutional provisions from them. In addition to the legal implications of this retention, there are the political residual aspects, whereby the governors-general in these states are the titular heads of state, representing Her Majesty.

The Antigua and Barbuda Constitutional Order affirms that:

'68(2) Subject to the provisions of this Constitution, the executive authority of Antigua and Barbuda may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.'

As earlier observed, the provisions of the Constitution of Antigua and Barbuda were echoing those that had preceded it throughout the various Caribbean Constitutions, as illustrated by the samples below:

The Jamaica (Constitution) Order in Council 1962:

'27 There shall be a Governor-General of Jamaica who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in Jamaica.'

The Saint Lucia Constitutional Order of 1978:

'59(1) The executive authority of Saint Lucia is vested in Her Majesty.'

In the Pacific, the same retention of the monarchy was a pattern.

The Constitution of Tuvalu:

'48(1) Her Majesty Queen Elizabeth II... is the Sovereign of Tuvalu and, in accordance with the Constitution, the Head of State.'

That executive provision thus constructed the judicial basis for final appeals to Downing Street. Chapter V of the Antigua and Barbuda Constitution, in Section 122 (1), (2) and (3), states that:

'An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council...'

The effect therefore of applying the monarchical retention to the appeal process of the Privy Council relates to the manner in which such appeals have to be in conformity with Section 3 of the Judicial Committee Act. In such instances, a judgment from a monarchical state will have a statement such as the following:

'Their Lordships will humbly advise Her Majesty that the appeal should be [allowed] [dismissed].'

For those ex-colonies that chose the republican route, it thus follows that their appeals to the overseas jurisdiction lie to the Judicial Committee of the Privy Council, and not to Her Majesty in Council. In comparison, the citation for a republican state would read:

'Their Lordships accordingly [dismiss] [allow] the appeal.'

Unlike those samples of constitutions quoted earlier for the monarchical states designating the head of state, those of the republican nations would state in varying degrees as in the examples below:

The Constitution of Mauritius:

'28(1) There shall be a President who shall be the Head of State and Commander-in-Chief of the Republic of Mauritius...'

8.1(1) An appeal shall lie from decisions of the Court of Appeal or the Supreme Court to the Judicial Committee...'

The Constitution of Trinidad and Tobago:

'22 There shall be a President of Trinidad and Tobago elected in accordance with the provisions of this Chapter who shall be the Head of State and Commander-in-Chief of the armed forces...'

109-1 An appeal shall lie from decisions from the Court of Appeal to the Judicial Committee...'

There is really no substantial difference in the appeals process between the monarchical and republican streams of former British colonies. At the end of the day, appeals would still lie to Downing Street, and not to any final indigenous court, until these countries, monarchical or republican, seek to commence and finish the journey of repatriating a final court. As will be shown further, this passage was often a tiresome one for those countries that undertook it, but they were inevitably bolstered by the respective resolve to cut the umbilical cord from Downing Street and to continue with the process of nurturing into maturity on home soil, final appellate courts.