2 Judicial Independence – Final Appellate Court Establishment

The decline of appeals to the Privy Council

As has been demonstrated above, the Commonwealth of British nation states thus preserved their right to appeal to the Privy Council. Over time, however, as these states came to believe in the need to assert their own judicial path, such appeals proceeded along an inexorable road of decline. This decline was expressed through the varying routes taken towards judicial independence by these Commonwealth countries.

The 1931 Statute of Westminster[2] gave enablement to the discontinuance of appeals to the Privy Council. That legislation applied to the *'Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland'*[3]. The removal of the application of the 1865 Colonial Laws Validity Act to the laws *'made after the commencement [the Colonial Laws Validity Act] by the Parliament of a Dominion'*[4] set the stage. Canada was the first to make de-linking movements, commencing in 1933 and ending by 1949. Upon gaining independence, India ceased appeals to the Privy Council in 1947, and this was followed by the gradual withdrawal of Ceylon, now Sri Lanka, and Africa. Malaysia abolished appeals in 1984 and Australia in 1986. In 1989, Singapore only reserved appeals to the Privy Council for death penalty cases, and by 1994 had fully ceased all appeals. The Gambia finally removed this jurisdiction with its 1997 Constitution, which provided for its Supreme Court to replace the Privy Council.

This book will examine the pioneering efforts of Canada and will investigate the crossing made by Australia from Downing Street to its own High Court in Canberra. The new millennium has also brought actions in New Zealand and the Caribbean to the fore, and these too will be analysed. Particularly for the Caribbean, this text comes at a time when the focus on best practices, coupled with the indigenous needs of a final court, has operated to produce the ultimate product deemed appropriate for the region's citizenry.

There have been strenuous arguments in the respective countries and regions, both for and against the removal of appeals to the Privy Council. At the time of writing, these arguments are particularly focussed in the new establishments of New Zealand and the Caribbean. However, similar sentiments have been consistently put forward over the decades. Former Registrar of the Privy Council, DHO Owen[5] writing as Registrar in 1994

2 (UK) 22 Geo. V, c.4.

3 Section 1.

4 Section 2(1). Section 2(2) further provided that *'No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the round that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion'.*

5 Extracted from his 1994 article 'The Judicial Committee of the Privy Council'. DHO Owen was Registrar from 1983–1998.

examined two contrasting arguments. He quoted the statement in 1937 of former Australian Prime Minister Sir Robert Menzies:

> *'The appeal to the Privy Council is one of the few remaining formal links between the various parts of the British Commonwealth of Nations … appeal to the Privy Council means that we preserve some broad uniformity of legal decision on matters of law which are common to the whole Empire, such as the Common Law and the general principles of Equity…'*

He equally presented the position of the Chief Justice of India in 1965:

> *'Since India won freedom, Indian legislatures have been ceaselessly working to bring about social and economic justice in the country, and in the attempt by the legislatures to make laws with a view to solving the problems of poverty and unemployment they are always trespassing on fundamental rights… Every time we in India are called upon to consider the various constitutional effects of legislative enactments… we ask ourselves is it a reasonable invasion required for the public good. These are issues which would be alien in English court, but they are particular to the written Constitution of India.'*

The opposing positions continue to inform the actions of interest groups in those countries and regions seeking to consolidate their final court establishment. The political arguments and the constitutional amendments that some countries are required to undertake also form part of the equation, the solution to which depends on political will being in tandem with the desire for judicial determination at an indigenous level.

The case of Canada

Canada attended the Commonwealth meetings, which lent greater understanding to the first route taken by a Commonwealth 'Dominion' in its final court establishment[6]. Canada as a Dominion was created in 1867 by the British North America Act. By Section 92(14), legislative jurisdiction lay with the provincial governments regarding the constitution, maintenance and organisation of the civil and criminal courts, including civil procedure. The central government, on the other hand, had responsibility for the judiciary. Utilising Section 92 of the British North America Act, in 1875 Canada established its Supreme Court:

> *'The Parliament of Canada, may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.'*

This move, it was envisaged, was to seek uniformity in the jurisprudence and law[7].

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6 The 2006 Commonwealth meetings were attended by Madame Anne Roland, Registrar of the Supreme Court of Canada. She submitted her paper to inform this text: 'A Canadian Perspective: The Birth of a Court of Final Appeal and Its Current Operations'.

7 An Act to Establish a Supreme Court and a Court of Exchequer, for the Dominion of Canada, SC 1875, c.11.

The Supreme Court was composed of five puisne judges, including two from the province of Quebec. Civil appeals would lie from the highest courts of the provinces.

The ensuing stage was for Canada to secure the Supreme Court as a final appellate one, thus abolishing appeals to the Privy Council. This attempt was made by amendments to the 1875 Act. A first amendment to this effect, preventing appeals from the provinces reaching the Privy Council, was defeated. A second amendment was introduced in Section 47 of the Act as follows:

> *'47. The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard. Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative.'*

The argument used to frustrate this proposed amendment when sent to England for royal sanction, was that the Judicial Committee of the Privy Council was not a 'Court of Appeal', but a court of prerogative. In 1887, the Canadian Parliament passed An Act to Further Amend the Law Respecting Procedure in Criminal Cases[8], altering the Criminal Code and giving the Supreme Court of Canada final say in all criminal matters. However, the Criminal Code amendment was tested in the case of *Nadan v The King [1926] AC 482 (PC)*. Nadan's case held that the Criminal Code was *ultra vires* in its attempt to remove the right of appeal to His Majesty in Council in exercise of the royal prerogative. This had the effect of nullifying the amendment to the Criminal Code, since it was determined by the Privy Council that His Majesty's right was retained to secure justice of his colonial subjects. The Judicial Committee Act of 1884, granting prerogative appeals, coupled with the Colonial Laws Validity Act of 1865[9], essentially stopped colonies from legislating any laws deemed repugnant to imperial legislation.

At the 1926 Imperial Conference, discussions ensued regarding the independence of dominions and the ability to determine their own constitutional arrangements. This culminated in the Balfour Declaration, with the recognition that judicial appeals should be determined by parts of the 'Empire' thus affected. This sentiment, as it was interpreted by Canada, was possibly given statutory confirmation in essence in the 1931 Statute of Westminster. Section 2 of that law removed the application of the Colonial Laws Validity Act of 1865 to any law made after its entry into force. It equally provided that no law shall be void or inoperative on the basis that it is repugnant to the law of England.

In 1933, Canada removed criminal appeals to the Privy Council by an Act[10]. When tested in British Coal Corp. v R [1935] AC 500, unlike Nadan v The King[11], the Privy Council affirmed the removal of this bar in criminal matters.

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8 1886, 51 VICT., c.43, s.1.

9 Ibid, p.11.

10 23 & 24 GOE. V, c.53 & 17.

11 *Supra.*

Abolition of civil appeals took more time, particularly as the provinces of Canada were in charge of their civil law and procedure fortunes (as has already been noted). In an advisory opinion of the Supreme Court of Canada in 1940, it was *held* that Canada had the right to bar all appeals to the Privy Council[12]. The war distracted the appeal of this decision to the Privy Council itself, but growing arguments for Canada to assert its independence brought the debate to the fore. In the Senate it was argued:

> *'It is abundantly clear from the results achieved that our nation was in a position to promote her own interests and to attain her full development under the impetus of her own decisions. If our statesmen excite the admiration of the whole world, and are listened to with attention in the Council of Nations, it is equally true that the progress brought about by their internal policies are a source of astonishment to the world… We are taking today a further step towards the autonomy necessary to present political status to Canada. The independence of our judiciary of our country is as necessary as her legislative and executive independence. It would be childish to believe that we could not find in our own country Canadians qualified to assume the responsibility of judging and deciding our own issues finally, definitely and exclusively'*[13].

There were differing views occasioned by such fundamental change. Writing in 1950, it was observed[14]:

> *'…Many Canadians felt that the objectivity and disinterestedness of the distant Privy Council assured an impartiality of constitutional interpretation that might not be secured in Canada. Moreover, many of those who were most jealous of provincial rights were pleased with the increase of provincial powers that had resulted from Privy Council decisions and were fearful that a Canadian court of final jurisdiction might reverse this trend.'*

However, the 1949 Supreme Court Act[15], amending its 1875 legislation, implemented the abolition of all appeals to the Privy Council:

> *'54. (1) The Supreme Court of Canada shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive…*
>
> *(3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all other orders, rules or regulations made under the said acts are hereby repealed in so far as the same are part of the law of Canada.'*

Cases which were being heard prior to this legislation were still allowed to proceed to appeal, with the last case submitted to the Privy Council being *Ponoka-Calmar Oils v Wakefield [1960] AC 18.* With somewhat of a protracted struggle, Canada, as a 'Dominion', completed its road to judicial independence.

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12 See *Re Privy Council Appeals [1940] 1 D.L.R. 289* (Canada Supreme Court).

13 Canada Senate (1949) *Official Report of Debates*, 18 October 1949, at 130 (Hon. Paul Henri Bouffard).

14 See William Livingston, assistant professor, University of Texas, *64 Harvard Law Review*, p.109.

15 13 GEO. VI c. 37.

Australia's abolition

Australia's participation at the various Commonwealth meetings allowed sharing and insight into the country's route to Privy Council abolition[16]. The Commonwealth of Australia commenced its existence in 1901 under a federal written constitution. Section 71 of the constitution vests judicial power in a federal supreme court to be called the High Court of Australia. The Australian Constitution infused its Commonwealth Parliament with the power to abolish appeals to the Privy Council from all Australian courts in matters of federal jurisdiction. Australia executed this mandate in 1903, 1968 and 1975.

In 1903, the Judiciary Act was passed, pursuant to Section 77 of the Constitution to limit appeals directly from state courts to the Privy Council in which federal jurisdiction was involved, and that such cases should be submitted to the High Court instead. By 1968, with the passage of the Privy Council (Limitation of Appeals) Act, appeals regarding federal and constitutional matters were abolished. This legislation also terminated any appeals to the Privy Council emanating from a federal court (other than the High Court) and from a territory supreme court. This 1968 legislation was contested in the Privy Council in *Kitano v Commonwealth [1976] AC 99,* where it was *held* that the legislation validly exercised the power of limiting appeals under Section 74 of the Constitution.

The 1975 Privy Council (Appeals from the High Court) Act effectively abolished all remaining appeals to the Privy Council. That was not without some dispute, as this law was challenged in the High Court where it was dismissed. In *Viro v The Queen [1978] 52 ALJR 418,* the High Court *held* unanimously that it was no longer bound by decisions from the Privy Council and *'was free, while according due respect to those decisions, not to follow them, more especially in matters of Australia law and Australian conditions'.* [17] Appeals from the supreme courts of the federal states in non-federal matters were still allowed[18]. In an *inter se* matter, the High Court could grant a certificate allowing the appeal and this effectively retained the Privy Council and the High Court as two final courts.

The position by 1986, which offered a dualism of appeal possibilities regarding non-constitutional matters, was captured in the following statement:

> *'[The] eleven years between 1975 and 1986… saw a bizarre situation of dualism – and potential conflict – at the apex of the Australian hierarchy of courts. Unsuccessful litigants in the state Supreme Courts could choose to appeal either to the High Court or to the Privy Council, each an ultimate court of appeal: thus, in different cases, both ultimate courts might decide the same issue, potentially with opposite results. This gave rise to delicate problems of precedent and judicial comity… [L]ogically… the dilemma was insoluble'*[19].

16 The Commonwealth meetings were attended by Australian delegates who submitted papers to inform this book. They were as follows: 2003 meeting attended by Ms Sandra Power, Assistant Secretary, Attorney-General's Department, Australia – 'Australia's Experience in Abolishing Privy Council Appeals'; and 2006 meeting attended by Mr Christopher Doogan, Chief Executive and Registrar of the High Court of Australia – 'Reflections On The History And Operations Of The High Court of Australia'. The High Court of Australia also hosted meetings in 2005.

17 H Renfree (1984).

18 See *Southern Centre of Philosophy Inc v South Australia [1979] 54 ALJR 43.*

19 Blackshield, Coper and Goldring (2001), p.560.

To this end, a suite of legislation by Australia, in conjunction with the United Kingdom, secured the High Court of Australia as that country's final court by 1986. This involved the enactment of the Australia Acts by six state parliaments, the Commonwealth Parliament and the United Kingdom Parliament. The six state parliaments enacted legislation to request and consent to the 1986 Australia Act (UK). For its part, the Commonwealth of Australia equally enacted the Australia (Request and Consent) Act 1985, entreating the United Kingdom to pass the 1986 Australia Act (UK). The legislation was in essence a 'request' to Her Majesty for the appropriate legislation to be passed by the United Kingdom Parliament to give effect to the Australian Acts. The United Kingdom passed the desired legislation. There exists a provision in the Australian Constitution requiring leave of the High Court for appeals to the Privy Council in certain matters. This leaves a theoretical residual right, which the High Court has said it will not exercise. As a consequence, the final appeal to the Privy Council was submitted from Australia in 1987.

Ultimately, Australia believed that it was inimical to the assertion of independence that appeals should lie outside its territory. Its road to the establishment and assertion of its High Court replacing the Privy Council, though gradual, was decisive. Further, the Constitution of the Commonwealth of Australia was sufficiently enabling in its ability to allow its parliament to enact the requisite laws to secure its High Court as the ultimate tribunal for the country. This was, then, a fairly straightforward path and passage.

New court in New Zealand

New Zealand's examination of its road to an indigenous final appellate court is interesting, as was amplified by its participation in the Commonwealth meetings[20]. As a 'Dominion', several decades ensued between its ultimate removal from the Privy Council and that of its sister 'Dominion', Australia. It is perhaps this thinking that was expressed by the Hon. Margaret Wilson, Attorney-General of New Zealand, at the opening of the Supreme Court of New Zealand on Thursday, 1 July 2004 in Wellington:

> *'Australia and Canada may, of course, lay claim to beating us to the post. In fact we are about the last to leave the Privy Council. Australia and Canada were not only the first to adopt the Statute of Westminster but also the first to abolish appeals to the Privy Council'* [21].

20 Commonwealth meetings were attended by New Zealand delegates who submitted papers to inform this text. They were as follows: the 2003 meeting was attended by Hon. Margaret Wilson, Attorney-General, Associate Minister of Justice, Associate Minister for Courts – 'Preparatory Steps to be Taken so as to Achieve a Smooth Transition in Removing The Jurisdiction of the Judicial Committee of the Privy Council'; and the 2006 meeting was attended by Rt Hon. Justice Peter Blanchard, a Judge of the New Zealand Supreme Court – 'Challenges Faced by the Judiciary in Establishment of the New Zealand Supreme Court'; Justice Noel Anderson, a Judge of the Supreme Court of New Zealand – 'The Challenges Facing New Courts'; Mr Andrew Hampton, General Manager, Higher Courts, Ministry of Justice of New Zealand – 'The Supreme Court of New Zealand: The First Three Years'. The Supreme Court of New Zealand hosted meetings in February 2006 and papers were presented by: Mr Patrick McCabe, Principal Policy Adviser, Ministry of Justice of New Zealand – 'Developing the Supreme Court Policy'; Rt Hon. Justice Blanchard – 'A Commentary on the Supreme Court Rules'; Mr Gordon Thatcher, Registrar of the New Zealand Supreme Court – 'Implementation of the Supreme Court Act, 2003 – Business Requirements'; Mr Terence Arnold QC, Solicitor-General of New Zealand, Ms Cheryl Gwyn, Deputy Solicitor-General and Ms Tania Warburton, Associate Crown Counsel – 'Judicial Appointments and Other Issues'.

21 *The New Zealand Law Journal*, August 2004, p.290.

Being the 'last to leave the Privy Council' must apply to those countries defined earlier as being 'Dominions'. Of course, as will be discussed later in this book, the struggle is not yet over for the Caribbean countries (the West Indies) their not being Dominions, but ex-colonies, which still to varying degrees submit appeals to the Privy Council.

The advantage of leaving the Privy Council later rather than sooner was further articulated by the Hon. Margaret Wilson:

> *'However, in the development of legal systems, sometimes being second or even almost last does have some advantages. In the development of the Supreme Court, we have been fortunate in being able to draw on the different models of final appellate courts in a range of Commonwealth countries'* [22].

The challenges faced by New Zealand in the initial years revolved around the number of judges to effectively staff the court of a colony. New Zealand was settled relatively late by the British. Though a vast land mass of two islands, its geographical distance militated against robust population growth in the early years. New Zealand achieved self-governing status in the 1850s, and in 1907 it became an independent Dominion. By 1947, the country achieved full independence when the 1931 Statute of Westminster was ratified.

Hon. Justice Noel Anderson explains that New Zealand's first judges were English lawyers, and until the 1860s there were too few judges to form an appellate court[23]. By the 1860s there were then adequate court judges to form a divisional appellate court, and in 1862 a Court of Appeal came into being. The judges were from what was the Supreme Court, which was renamed the High Court in 1980.

This structure continued with intermittent possibilities of a permanent court being raised in 1907, 1913 and in the 1940s. It is thought that during those years, the establishment of such a court was not supported by the judges. However, the major law societies gave their support by the late 1940s, as did by then some judges. By 1957, the Judicature Amendment Act established the permanent court. The judicial structure was also revised. In 1980, the Magistrates' Court was renamed the District Court, with an enhanced civil jurisdiction, as well as acquiring an indictable jurisdiction. This resulted in a swelling of criminal appeals, with a consequential restructuring of the Court of Appeal. The Court of Appeal was thus reorganised by statute on a divisional system. Appeals were heard by a three-judge division, comprised of one or two High Court judges, nominated by the Chief Justice after consultation with the President of the Court of Appeal, and currently now, with the Chief High Court Judge. Therefore, prior to New Zealand's departure from the Privy, its court hierarchy existed as illustrated in the diagram below[24]. The diagram indicates that appeals from the Court of Appeal were final with regard to appeals from the Employment Court, Youth Court, Environment Court and most family law proceedings.

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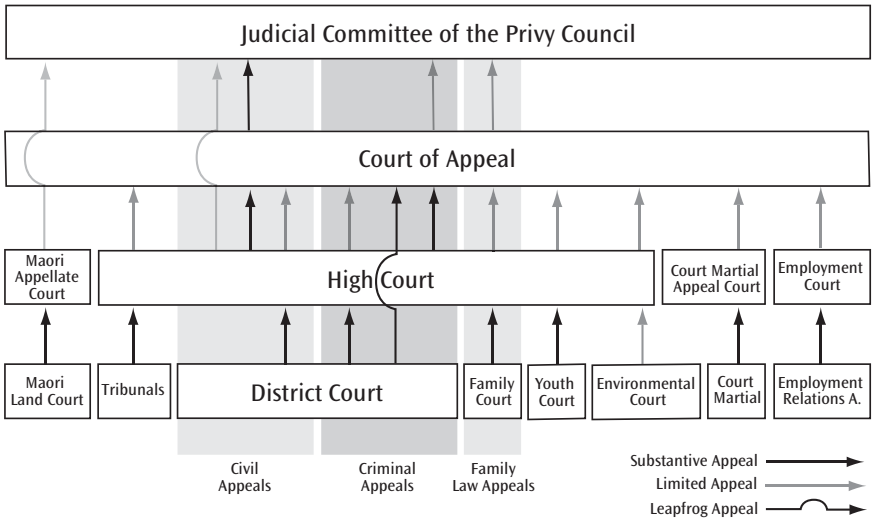
22 Ibid.

23 'The Challenges Facing New Courts', Op cit. Hon. Justice Noel Anderson DCNZM was President of the Court of Appeal of New Zealand and at the time of writing is a Judge of the Supreme Court of New Zealand.

24 Presented at the 2003 Commonwealth meeting.

Figure 2.1: Overview of New Zealand appellate structure



This chart represents principal routes of appeal only. It does not reflect the present hierarchy of New Zealand Courts, nor is it a substitute to reference on relevant statutes

Criminal appeals to the Privy Council from New Zealand were limited, since the Privy Council historically only heard criminal cases in matters where criminal jurisprudence would be threatened[25].

The position regarding criminal appeals from the West Indies will be discussed later. With respect to civil appeals from New Zealand, these used to lie to the Judicial Committee of the Privy Council where the consideration involved was at least 5,000 New Zealand dollars (NZ$), and only a small number of appeals were made to the Privy Council at any rate[26]. Statistics show that between 1990 and 1994, the Privy Council heard 33 appeals, 17 of which were successful. By 1995-1999, out of 48 appeals submitted to the Privy Council, only 11 were successful. In 1999, while the Court of Appeal was hearing 508 appeals, only ten went to the Privy Council, of which eight were dismissed.

The diagram also illustrates that included in the courts are the Māori Land Court and the Māori Appellate Court, from which appeals, though rare, may find their way to the Privy Council. The importance of this relates to the role of the Māori people in New Zealand's history. When Captain James Cooke re-discovered New Zealand in 1769, the first New Zealand settlers had already been established there between 800 and 1300 AD. In the ensuing centuries, these first inhabitants, mostly migrants from Eastern Polynesia, developed their culture – known as Māori. The Treaty of Waitangi was signed on 6 February

25 By 2003, only nine out of more than 280 New Zealand appeals to the Judicial Committee had been criminal appeals.

26 Hon. Margaret Wilson, Attorney-General, 'Reshaping New Zealand's Appeal Structure Discussion Paper', available at: www.beehive.govt.nz [accessed 16 June 2008].

1840, and is regarded by the Māori as a guarantee of their rights. The Māori Land Court, which initially came into being by virtue of the Māori Affairs Act of 1953, is a court of record pursuant to the Māori Land Act of 1993, and has jurisdiction in terms of Māori land issues. Appeals from the Māori Land Court lie to the Māori Appellate Court. The High Court is enabled to review decisions from both courts and, on rare occasion, appeals would lie to the Privy Council.

Understandably, therefore, the Māori expressed their concerns with the removal of the Privy Council. They have been granted assurances:[27]

> *'During previous discussions on this issue Māori have raised concerns about the effect that ending appeals to the Privy Council may have on the relationship established between the Crown and Māori under the Treaty of Waitangi. This Government is committed to working with Māori to ensure that any change to the appeal structure of the courts will not change the protection of Māori interests under the Treaty of Waitangi.'*

It is the great attention to detail paid by New Zealand as it prepared to establish its indigenous final appellate court that indeed indicates the examination of earlier courts as models. In addition to drawing on other experiences, however, New Zealand was also sensitive to its cultural and racial history to prepare a court that would be representative of all. The legal and political processes are equally reflective of these steps.

The maturation of New Zealand's judiciary over time would lead to the inevitable examination and emotional desire for the pursuit of judicial independence from the Privy Council. Justice Anderson explains:

> *'It is inevitable that as a nation learns to stand on its own feet it will become curious about, then inclined towards and then determined to achieve, independence in all aspects of its governance. But in New Zealand the pace was slow in respect of judicial governance. The limited professional resources of a recently-settled and under-populated nation made it inevitable that New Zealand would look to the Privy Council in order to invoke the notional royal intercession. The practical and fiscal implications for litigants of appealing to a body sitting 20,000 kilometres away scarcely need elaboration'*[28].

Indeed, it has been noted that the idea for New Zealand to abolish appeals to the Privy Council has been around for more than 100 years when then Chief Justice, Sir Robert Stout mooted it[29]. By 1903, dissatisfaction was articulated in *Wallis v Solicitor-General, Protests of Bench and Bar [1903] NZPCC 730; 1 NZLRCC 84*, when the Chief Justice declared that the Privy Council was not knowledgeable of the statutes, conveyancing terms or history of New Zealand.

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27 'Report of the Advisory Group Replacing the Privy Council – A Report to Hon. Margaret Wilson, Attorney-General and Associate Minister of Justice', *Op cit.*

28 Anderson (2006) 'The Challenges Facing New Courts', *Op cit.*

29 See: 'The History of the Supreme Court', available at: www.courtsofnz.govt.nz/about/supreme/history.html [accessed 17 June 2008]

Apart from judicial disenchantment with the Privy Council, political input towards the move of abolition became increasingly vocal. Between the 1980s and the 1990s, successive government administrations echoed the call for the removal of appeals to the Privy Council. However, members of the bar and law societies held differing views, which had to be taken into account.

By 1994, the New Zealand Cabinet requested the Solicitor-General to report to a committee of cabinet on issues of the constitution, history and jurisprudence, among others, relating to the availability of appeals to the Privy Council. Arguments in support of and against Privy Council abolition were canvassed in the report. Further, consultations ensued between the Solicitor-General, the presidents of the law societies and bar associations of New Zealand, along with the Chief Justice and President of the Court of Appeal. Following the submission of the Solicitor-General's report in 1995, the New Zealand Courts Structures Bill was introduced into parliament in 1996 to remove the jurisdiction of the Privy Council. This move was not successful due to a 1996 Coalition Agreement between the political parties at the time.

The final thrust was given a new life in 2000 when the Labour/Alliance government resolved to re-visit the existence of the Privy Council in the jurisprudential life of New Zealand under the guidance of then Attorney-General, Hon. Margaret Wilson. As she reported at the 2003 Commonwealth Expert Group meeting:

> *'I sought to broaden the issue to examine the future shape of New Zealand's appeal structure, by asking: 'what is appropriate for New Zealand's appeal requirements in the 21st century?'*

At the 2003 Commonwealth meeting, Hon. Margaret Wilson outlined the considerations for New Zealand's search for a suitable alternative to the Privy Council. Contemplation was given to the implications of such a change for the appellate structure as whole, ensuring that transitional arrangements would provide for a smooth transition. In examining the form for a suitable alternative, the experiences of Australia, Canada, India, Hong Kong and the Caribbean were referred to. In the case of India and Hong Kong, new courts were established, as was proposed for the Caribbean. Australia and Canada's passage had utilised the existing highest court as the final appellate court. To this end, New Zealand proceeded in its investigation. The steps that followed involved the release of a discussion paper in 2000, which explored three options for final appellate court establishment as follows:

- Remove all rights of appeal to the Privy Council and replace it with the Court of Appeal as New Zealand's final appeal court;
- Provide two levels of appeals within the Court of Appeal, the second level being a full Court of Appeal bench; or
- Create an appeal division from within the High Court, with appeals to the Court of Appeal by way of leave only.

The feedback from the discussion paper indicated the desire for both an intermediate and a final appellate court. This thus gave the go ahead to proceed to de-link from the Privy Council. Included in these endeavours were discussions with the Māori, whose importance has been discussed earlier, as well as taking into account expressions from business communities.

By 2001, an advisory group had been appointed. The group was chaired by the Solicitor-General, Mr Terrence Arnold QC, and included senior legal practitioners and leaders of the Māori community. Sir Ivor Richardson, then President of the Court of Appeal, was a special adviser. The terms of reference included advising government on the purpose, structure, composition and role of a final appeal court and how that court would reflect *Te Ao Māori* (the Māori World). It should be noted that the group was not requested to advise on the desirability of removing appeals to the Privy Council, but to comment on how a court of final appeal above an intermediate appellate court might be[30].

The advisory group concluded that replacing the Privy Council with a Supreme Court of New Zealand would improve accessibility to New Zealand's highest Court; increase the spectrum of matters to be considered by that new court; and would enhance understanding of local conditions by judges of the new court.

On 14 October 2003, the Supreme Court Act[31] was passed. It came into force on 1 January 2004, and thus created the Supreme Court of New Zealand. Its stated purpose makes reference to New Zealand as a nation with its unique ingredients to be observed through a judiciary of its own making:

'3 (1) The purpose of this Act is –

(a) to establish within New Zealand a new court of final appeal comprising New Zealand judges –

- *to recognise that New Zealand is an independent nation with its own history and traditions; and*
- *to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions; and*
- *to improve access to justice'.*

Subsection (c) of the Act then ended *'appeals to the Judicial Committee of the Privy Council from decisions of New Zealand courts.'*

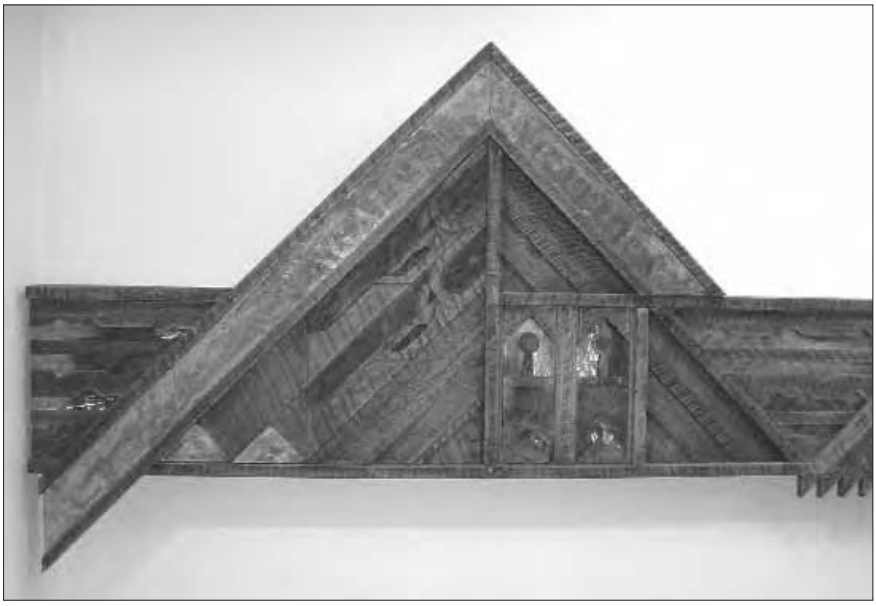
The appointments for the Supreme Court's first composition of judges were taken from the senior members of the Court of Appeal. There is no equivalent of a Judicial Services Commission to make these appointments, but instead rests in the nation's confidence in promoting its judges through the hierarchy.

At the opening ceremony of the Court, its first Chief Justice, the Rt Hon. Dame Sian Elias, GNZM remarked that New Zealand's aspiration for justice were expressed in February 1840 at Waitangi and that the Supreme Court furthered those very aspirations[32].

30 See 'Report of the Advisory Group Replacing the Privy Council' (2002). Available at: http://www.crownlaw.govt.nz [accessed 24 June 2008]

31 2003 No.53.

32 See 'Opening of the Supreme Court of New Zealand'. The New Zealand Law Journal, August 2004.



Plaques on the walls of the Supreme Court of New Zealand reflecting Te Ao Māori

New Zealand's journey to its new court was complete. It was not passage of many twists and turns. Its unitary statehood gave it a relatively easy transition when compared to those of its siblings Canada and Australia, which had to accommodate the provincial and federal jurisdictions respectively. New Zealand had to initially contend with a small population and the need to foster belief in the ability of its judges to do the job. Further, the fundamental interests of the Māori and the reservations of the law societies and bar associations were integral in reaching some consensus. Infused in this was the country's political will, which while wavering in the 1990s, positively reasserted itself in the millennium. Importantly, New Zealand was not fettered by a constitution or pre-1931 Statue of Westminster to cause eruptions of any obstacles along its way.

Although spoken in 1987, the words of Lord Cooke of Thorndon would have still transmitted the resonance of self-belief as the Supreme Court of New Zealand came into being:

> *'…New Zealand law has now evolved into a truly distinctive body of principles and practices, reflecting a truly distinctive outlook. Commonsense dictates the inevitable result. The differences have reached the stage where the last say in the decisions of our case law… cannot sensibly be left to a remote body with little connection with New Zealand or touch for New Zealand issues… We must accept responsibility for our own national legal destiny and recognise that the Privy Council appeal has outlived its time. Not to take the obvious decisions now would be to renounce part of our nationhood'* [33].

33 Sir Robin Cooke (1987), pp.182-83.

The Caribbean's court challenge

Writing in 1994, former Registrar of the Privy Council, DHO Owen[34], expressed that the Privy Council was no longer the force it used to be, but predicted that appeals would last until the 21st century and would *'…then come mainly from the West Indies'* [35].

Decline of appeals and petitions to the Privy Council

Statistics indicate that there has been a steadying decline in appeals and petitions finding themselves before the Privy Council, as indicated from the tables below[36].

There has been an overall decrease in the total number of petitions for special leave to appeal heard in the Caribbean. By 2005, this number had fallen by 47 heard cases as compared with the number of cases heard in 1998. Of the 38 cases heard at the Judicial Committee of the Privy Council in 2005, 13 were criminal cases whereas 25 were civil. Some countries, for instance Jamaica and Trinidad and Tobago, have experienced significant declines in the total number of petitions heard before the Privy Council. Jamaica's decrease went from 13 cases in 1998 to 6 in 2005. Trinidad and Tobago has experienced a drastic decrease from 44 to 7 cases heard in the Privy Council during that same period (see Tables 2.3 and 2.4, respectively).

Table 2.1: Judicial Committee of the Privy Council – appeals entered and disposed of, showing results, 1998

	Appeals disposed of after a hearing						
Courts from which appeals were brought	**Number of appeals entered**	**Judgement dismissed**	**Varied**	**Allowed**	**Without a hearing**	**Total**	**Appeals pending at the end of the year**
Antigua and Barbuda	1	1	-	1	-	2	1
The Bahamas	4	4	-	-	-	4	2
Barbados	2	-	-	-	-	-	3
Belize	3	-	-	3	1	4	2
Bermuda	2	-	-	1	-	1	2
Brunei	1	1	-	1	-	2	-
Cayman Islands	2	1	-	1	-	2	2
Gambia	-	-	-	1	1	2	-
Gibraltar	1	1	-	-	-	1	1
Grenada	-	1	-	1	-	2	-
Jamaica	11	1	-	8	-	9	11
Jersey	-	-	-	1	-	1	1
Mauritius	4	1	-	2	-	3	3
New Zealand	8	4	-	1	1	6	5
St. Christopher and Nevis	1	-	-	-	-	-	1
St Lucia	3	-	-	-	-	-	3

34 Owen (1994) *Op cit.*

35 *Supra.*

36 Taken from www.privy-council.org.uk [accessed 17 June 2008].

The Caribbean is in the throes of removing jurisdiction from the Privy Council, taking a road fraught with many obstacles. This, in fact, might arguably be the toughest battle yet for final appellate court establishment.

Table 2.2: Judicial Committee of the Privy Council – appeals entered and disposed of, showing results, 2005

Country or jurisdiction of origin	Number of appeals entered	Appeals disposed of after hearing			Without a hearing*		
		Dismissed	Varied or allowed in part	Allowed		Total	Appeals pending at end of year
Antigua and Barbuda	2	0	0	2	0	2	2
The Bahamas	11	0	1	1	1	3	16
Barbados	0	1	0	0	1	2	0
Belize	0	2	0	0	0	2	2
Dominica	0	0	0	1	0	1	0
Grenada	2	0	0	0	0	0	2
Jamaica	15	5	0	3	0	8	16
Mauritius	9	1	0	1	0	2	10
New Zealand	3	4	0	2	2	8	3
St. Christopher and Nevis	0	1	0	0	0	1	0
St Lucia	1	0	0	0	0	0	3
St Vincent and the Grenadines	1	0	0	0	0	0	1
Trinidad andTobago	7	9	2	7	0	18	11

*Dismissed for non-prosecution or withdrawn

Table 2.3: Petitions for special leave to appeal – heard, granted and refused, 1998

Commonwealth or other territory	Granted	Refused	Total number heard
Antigua and Barbuda	1	1	2
The Bahamas	-	4	4
Barbados	1	-	1
Belize	4	-	4
Cayman Islands	-	1	1
Grenada	-	1	1
Isle of Man	-	3	3
Jamaica	6	7	13
Jersey	-	3	3
Mauritius	-	1	1
New Zealand	1	2	3
St Lucia	-	1	1
Trinidad andTobago	17	27	44
Total	**32**	**53**	**85**

Table 2.4: Judicial Committee of the Privy Council – petitions for special leave to appeal disposed of during 2005

Country or jurisdiction of origin	Granted	Refused	Total
The Bahamas	3	1	4
Belize	0	2	2
British Virgin Islands	2	0	2
Cayman Islands	0	2	2
Gibraltar	1	0	1
Grenada	0	2	2
Guernsey	1	1	2
Isle of Man	1	0	1
Jamaica	3	3	6
Jersey	0	1	1
Mauritius	3	1	4
New Zealand	2	0	2
Pitcairn Islands	0	1	1
St Vincent and the Grenadines	0	1	1
Trinidad and Tobago	2	5	7
Total	**18**	**20**	**38**

The road to being

The idea of a court to replace the Judicial Committee of the Privy Council for the West Indies has been mooted at varying levels for a considerable period of time. How prolonged a period this has been may be evidenced where *'Researchers have unearthed information which suggests that the idea of a final indigenous court for the Commonwealth Caribbean had its origins as long ago as 1901, in an editorial in the* Daily Gleaner *newspaper of Jamaica'* [37].

Noted Caribbean jurists and intellectuals have repeatedly traced this path, particularly in more recent times as the Caribbean Court of Justice progressed from an idea to reality.

In his seminal work, 'The Caribbean Court of Justice – Closing the Circle of Independence'[38], Duke Pollard, now a Judge of the Caribbean Court of Justice, marks as pivotal, the decision made in 1972 at the Representative Committee of the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) to examine and report on the establishment of a Caribbean Court of Appeal to replace the Privy Council[39]. Sir David Simmons, Chief Justice and President of the Supreme Court of Barbados[40], examines the historical imperatives, as laid down by the prevailing and evolving political, economic and jurisprudential overtones, affecting the islands of the Caribbean, as they transitioned from colonies to independent nations, seeking to regionalise their judicial independence[41]. Hugh Rawlins[42], has equally made his contribution to the assessment of the debate towards a final court.

What is evident is that, like other former colonies, the islands of the Caribbean have held similar aspirations to see an end of the Privy Council as the final court for the region. However, this aspiration has not been without controversy, and becomes a contentious issue that, as has been shown with the situations of the aforementioned countries, presents itself as an inherent feature of any such fundamental move away from the Privy Council.

The chronological events leading to the court may be most effectively credited to its conception of sorts in 1947, at a meeting of British Governors in Barbados. There the establishment of a West Indian regional court as a final appellate court was encouraged. In 1958, with the formation of the West Indian Federation, the Federal Appeal Court was established as one of its constituent institutions. The Hon. David Coore, former Attorney-General of Jamaica[43], opined that though the Federal Court was not final court, and was still subject to the Privy Council, it earned an excellent reputation during its existence. This

37 Simmons (2005).

38 Pollard (2004). Duke Pollard attended the 2003 Commonwealth meeting prior to his becoming a Judge on the Caribbean Court of Justice.

39 Ibid, p.2.

40 Sir David Simmons (at the time Attorney-General of Barbados) chaired the 2003 Commonwealth meeting.

41 *Supra.*

42 Rawlins (2000).

43 Hon. David Coore participated in the 2006 Commonwealth meeting and presented his paper: 'The Caribbean Court of Justice'.

existence was short-lived, however, when the West Indian Federation terminated in 1960 as a result of Jamaica's withdrawal. While, the larger territories of Jamaica, Trinidad and Tobago, Barbados, Belize and Guyana established their own courts of appeal once they attained independence[44], the smaller islands of the Eastern Caribbean (now the Organisation of Eastern Caribbean States – OECS) formed a sub-regional appellate court; this latter court is still subject to the Privy Council[45].

It is at this point that the role of OCCBA becomes important. By 1970, this body had called for proposals to develop a regional court. In a 1972 report justifying this move, the submitted reasons of the OCCBA were:

'1. The removal of this vestigial colonial link is an essential part of the development of an independent Caribbean region;

2. The high cost of pursuing litigation in London inhibited access by the vast majority of citizens to the highest court of their respective countries;

3. While the technical legal expertise of Privy Council Court was of the highest calibre, the unfamiliarity of the judges with the Caribbean life and culture was a factor that would militate against the development of a relevant body of Caribbean jurisprudence; and

4. The experience of the West Indian Court of Appeal justified confidence in the ability of the region to produce jurists of the highest quality' [46].

It should be mentioned that during this period in the Caribbean there must have been some enlightenment to repatriate the judicial arm from the coloniser, since independence had granted to these islands their sovereign legislative and executive branches. It is intriguing that, in line with the sentiments of OCCBA, Guyana made the first move. By Section 8 of the Republic Act, 1970, Guyana abolished the right of appeal to the Privy Council in ordinary civil matters not involving constitutional questions. This move was followed by the Judicial Committee of the Privy Council (Termination of Appeals) Act, 1970, which removed the right of appeal to the Privy Council by special leave. Finally, by the Constitutional (Amendment) Act No.19 of 1973, the right of appeal in constitutional matters was at an end. The Court of Appeal of Guyana then became the country's final court of appeal.

Also concomitant with these developments was the establishment of the Faculty of Law of the University of the West Indies. This institution could only have added to the momentum for a final court, as the recognition of a regional jurisprudence would emerge. This was indeed a period of assessment, which witnessed the advent of constitutional examination and revision. Notably, the Commission on Constitutional Reform, chaired by legendary Caribbean jurist, Sir Hugh Wooding, in Trinidad and Tobago in 1974, recommended that appeals to the Privy Council should cease.

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44 Jamaica and Trinidad and Tobago gained independence in 1962; Barbados and Guyana in 1966 and those of the OECS in the 1970s and 1980s.

45 Justice Adrian Saunders attended the 2003 Commonwealth meeting. At that time he was a Judge of the Eastern Caribbean Supreme Court; at the time of writing he is a Judge of the Caribbean Court of Justice. His paper, reported from the 2003 meeting, explains the OECS court well: 'Strengths and Weaknesses of a Regional Appellate Court and Recommendations for Enhancing Such Court's Effectiveness'.

46 Ibid.

On 4 July 1973, the treaty establishing the Caribbean Community and Common Market (CARICOM) was signed at Chaguaramas, Trinidad and Tobago. This created a regional association of 13 territories of the West Indies[47], which sought to economically integrate and enhance co-operation. Its governing body, the CARICOM Heads of Government, now weighed in on the debate of a regional court establishment, and by 1988 had infused this process with the most dramatic political declarations since the idea was first mooted. At its ninth meeting in Dickenson Bay, Antigua, in July 1988, the Heads, taking the advice of their CARICOM meeting of attorneys-general[48], supported the decision to replace the Judicial Committee of the Privy Council. By 1989, in Grande Anse, Grenada, the Heads mandated the formation of the West Indian Commission, chaired by Sir Shridath Ramphal, former Secretary-General of the Commonwealth Secretariat. *Inter alia,* the terms stated that the Commission:

> *'… should formulate proposals for advancing the goals of the Treaty of Chaguaramas which established the Caribbean Community and Common Market (CARICOM) in 1973'*[49].

At the same time, the members of CARICOM had been recognising the increasing approach of globalisation and the need for a region of small states to be competitive. The widening and deepening of the regional integration movement then resulted in the CARICOM Single Market and Economy (CSME). When it submitted its report, the West Indian Commission, in addressing the matter of the adjudication on the Treaty of Chaguaramas, also viewed the need for withdrawal from the Privy Council and to provide for the CSME and the regional integration that had progressively emerged. To this end, the report concluded:

> *'… we believe that the time is at hand for establishing the Caribbean Court of Appeal – what in an integration context we would prefer to call the CARICOM Supreme Court… the CARICOM Supreme Court with both a general appellate jurisdiction and an original regional one… is fundamental to the process of integration itself'*[50].

The report went on to elaborate on the 'Privy Council Dimension'[51], 'The Integration Need' and 'Developing Community Law'[52] aspects. The West Indian Commission believed that the Privy Council made access to justice difficult and hindered the development of indigenous case law in the region. The report further affirmed the belief that a court staffed by distinguished West Indian jurists would foster confidence. Moreover, the report also emphasised the integration process and the role that a regional court had to play. Referring to the CSME, the West Indian Commission proposed that the CARICOM Supreme Court be integral to the interpretation of the Treaty of Chaguaramas, underpinning community law. In this respect, it was viewed that for these purposes the Court should enjoy an original jurisdiction.

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47 The members were the independent countries of Antigua and Barbuda; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; and the British territory of Montserrat.

48 That meeting was held in April 1988, in Dominica. The attorneys-general agreed unanimously to abolish Privy Council appeals and establish a Caribbean Court of Appeal.

49 *The Press*, University of the West Indies (1993), p.4.

50 Ibid, p.498

51 'Report of the West Indian Commission: Time For Action'. Op cit, pp.498-500.

52 Ibid, pp.500-501.

Thus commenced the kernel for the ultimate establishment of what would become the Caribbean Court of Justice (CCJ), as member governments adopted the report of the West Indian Commission and took steps to activate its recommendations. This would be a unique court, *sui generis,* with both appellate jurisdictions, replacing the Privy Council, and an original one, addressing regional integration matters.

The Treaty of Chaguaramas was revised, culminating in nine protocols to amend it. Simultaneously, the Legal Affairs Committee of CARICOM, which was composed of CARICOM's attorneys-general and ministers with responsibility for legal affairs, started the drafting of the constituent instruments to create the Caribbean Court of Justice (CCJ).

In 1999, a CARICOM Preparatory Committee for the establishment of the Caribbean Court of Justice was appointed. On 14 February 2001, the Agreement Establishing The Caribbean Court of Justice in its original jurisdiction was signed by ten Caribbean countries – Antigua and Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St Kitts and Nevis; St Lucia; Suriname; and Trinidad and Tobago. St Vincent and the Grenadines, along with Dominica, signed on 15 February 2003. Suriname, not a former British colony, had become a member of CARICOM on 4 July 1995. This was in keeping with the intention to deepen and widen the integration movement. Haiti soon followed as a member of CARICOM; the country attained provisional membership on 4 July 1998 and full membership on 2 July 2002. The Agreement entered into force on 23 July 2002, when the required number of signatories was received. In April 2005, the CCJ began its life and heralded a new age of Caribbean jurisprudence.

Arguments of resistance

The road to this point was fraught with arguments, as some reasoned that the Caribbean was not yet ready for its own court. The usual slate of arguments, as had been experienced by Canada, Australia and New Zealand, swirled, giving a sense of *déja vu*. It was felt that there was an inadequate pool of indigenous justices to service the court effectively; that there must be absolute protection from any political intrusion; and that the present backlog in the national courts and inadequate systems should be addressed prior to establishing a final court. These concerns had been aired consistently and addressed by the CARICOM Preparatory Committee. In a statement to the Senate, Attorney-General of Jamaica, Hon AJ Nicholson felt that:

> *'Perhaps, the primary question that has been raised in this discourse, in Jamaica and elsewhere, is whether a Caribbean Court will function with the independence and erudition of the Judicial Committee of the Privy Council'* [53].

The most virulent argument, possibly, was that the CCJ would be a 'hanging court' since the retention of the death penalty was unanimous in all Caribbean countries. Polls have consistently shown that the population of the region insists that the death penalty is warranted. Consequently, this punishment had to be kept on the statute books as recognition of the will of the people. In addressing a meeting in June 2003, then Prime Minister of St Lucia, Dr Kenny Anthony, said:

53 Extracted from the *Jamaica Sunday Gleaner*, 29 November 1998, p.8A.

> *'A simple fact is often forgotten. Courts in our legal system do not hang people. It is our parliaments which choose to retain the death penalty as punishment for the crime of murder, not our courts'* [54].

This has been an ongoing debate, one which gathered heat in a series of death-penalty cases determined by the Privy Council. Notable was the Jamaican case of *Pratt and Another v Attorney-General for Jamaica and Another [1994] 4 All ER 769; [1993] 43 WIR 340* and the Barbadian case of *Bradshaw v Attorney-General and Others; Roberts v Attorney-General and Others [1995] 1 LC 260.* These two cases involved applicants who were convicted of murder and sentenced to death. The applicants petitioned to both the Inter-American Commission and the Human Rights Committee, complaining about procedural errors and simply that their human rights were being infringed. Due to the abundant time taken by these tribunals to address the issues, the applicants successfully won an appeal in the Privy Council; this adjudged that it was an inhuman or degrading punishment or treatment to have convicted individuals being held in detention for a period exceeding five years on death row. According to the Privy Council:

> *'if the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not the prisoner who takes advantage of it'* [55].

The decisions made by the Privy Council have notably impacted the Caribbean both socially and legally. Socially, government officials, local judges and some legal elites became disillusioned by the Privy Council's decision, which was viewed as a 'revolutionary' break from past jurisprudence due to its usurpation of Caribbean legislative powers and the 'great dislocation' it engendered in the *'system of the administration of justice*'. This disenchantment was also fuelled by popular opinion, which perceived the Privy Council's decision as an attempt to insert policy, pursuant to European directives, through the vehicle of the law [56].

Legally, the impact of these two Privy Council decisions was significant, giving effect to 105 prisoners in Jamaica; 53 prisoners in Trinidad and Tobago; and nine prisoners in Barbados, all already detained on death row for more than five years, to a prompt commutation to life imprisonment[57]. Furthermore, the Privy Council was also affected by its own decision, since it had devoted a considerable portion of its docket to death-row appeals from Caribbean courts between 1994 and 2000[58]. To address the inordinate delays occasioned by the appeals to the various international organisations, Jamaica and Trinidad and Tobago revised some of their treaty obligations. For instance, Jamaica

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54 Extracted from *The Jamaica Observer*, Monday 30 June 2003, p.1. Available at: www.jamaicaobserver.com [accessed 17 June 2008].

55 *Pratt [1994] 2 AC at 30-33* (discussing decisions from Canada, European Court of Human Rights, India, the United States and Zimbabwe).

56 Simmons, supra (Attorney-General of Barbados asserting that Pratt *'frustrated the desires of Governments in this region to carry out the death penalty' and 'infuriated populations who see their Governments rendered virtually powerless by decisions of legal policy set… by judges sitting in London and applying British and European notions').*

57 Simmons (1998) [hereinafter Simmons (1998), Death Penalty].

58 See Bob Howard and Anne Westcott (2000) reporting statement by the Privy Council judge that 25 per cent of the court's docket is devoted to death-row appeals from the Commonwealth.

withdrew from the First Optional Protocol of the United Nation's International Covenant on Civil and Political Rights (ICCPR), which eliminated the right of individuals to petition the Human Rights Committee[59]. However, Jamaica maintained its membership of the Organization of American States' Inter-American Convention on Human Rights, thereby preserving the right of aggrieved individuals to file complaints with that body. Trinidad and Tobago denounced both the Inter-American Convention on 26 May 1998 and the First Optional Protocol in its entirety on 27 March 2000. Although Guyana had eliminated appeals to the Privy Council in 1970 and thus was not bound by the Pratt case, the country still denounced the Optional Protocol on 5 January 1999. However Guyana re-acceded to the ICCPR's Optional Protocol, with a death penalty reservation identical to the one previously filed by Trinidad and Tobago[60].

As a consequence to the Pratt ruling, the governments requested that:

> *'either the periods of the time relating to applications to the human rights bodies should be excluded from the computation of delay or the period of five years should be increased to accommodate delays normally involved in the disposal of such complaints'*[61].

The Privy Council rejected this request. Accordingly, the governor-generals of Jamaica and Trinidad and Tobago transmitted instructions to the human rights tribunals in an attempt to *'co-operate with the international human rights institutions',* while at the same time retaining the right to impose capital sentences within the time limits set in Pratt. The tribunals refused such instructions[62] because they were perceived to be threats to their authority, and the Privy Council later invalidated them on constitutional grounds[63].

It has been the opinion of many for some time that the Privy Council viewed the retention of the death penalty by Caribbean countries as making their transition from the JCPC that much more difficult. This position is also held by human rights activists in the region. However, the position taken should be weighed against the overwhelming will of the population of the CARICOM states, which is to maintain capital punishment.

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59 Optional Protocol Ratifications Chart, *supra 138*, at 226 n.1. Pursuant to Article 12 of the Optional Protocol, *supra 29*, art. 12. Jamaica's denunciation became effective on 23 January 1998, three months after it was filed.

60 Optional Protocol Ratification Chart, supra 138, at 231 n.2. After the Human Rights Committee's decision in Kennedy v. Trinidad & Tobago, Communication No.845/1999, UN GAOR, Hum. Rts Comm., 55th Sess., Supp. No.40 vol.2, at 265–66, UN Doc. A/55/40 (1999), declaring Trinidad's death penalty reservation invalid, Guyana did not denounce the Optional Protocol entirely. Thus, all aggrieved individuals, including those on death row, may continue to file petitions with the Human Rights Committee. As of July 2002, seven petitions were pending against Guyana, although the allegations are not publicly known. See Office High Comm'n Hum. Rts, UN, Statistical Survey of Individual Complaints Dealt with by the Human Rights Committee Under the Optional Protocol to the ICCPR (2002), available at: http://www.unhchr.ch/html/menu2/8/stat2.htm [accessed 17 June 2008] (on file with the Columbia Law Review).

61 Bradshaw v Attorney-General of Barbados [1995] 1 WLR 936, 941 (PC 1995).

62 See, for example, United Nations, Human Rights Committee (1997) Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Jamaica, UN Doc. CCPR/C/79/Add.83 (refusing to follow Jamaica's attempt to 'unilaterally impos[e] timetables' for review of petitions).

63 Lewis v. Attorney-General of Jamaica [2001] 2 AC 50, 85 (PC 2000) (appeal taken from Jamaica); *Thomas,* [2000] 2 AC at 21.

In addressing the January-February 2007 Commonwealth meeting, Professor Albert Fiadjoe[64] said in reference to the Pratt case:

> *'But the truth be said, the Privy Council has also been responsible for some retrograde decisions simply for failing to appreciate Caribbean conditions, history and traditions. I count among such retrograde decisions Pratt v Morgan and the cases of similar reasoning in which the Privy Council offered no philosophical justification for the five-year rule'.*

Indeed, these sentiments, as with others expressed by the various countries overtime, have remained constant – that is, the need for a final court to be fully immersed in the norms and traditions of a country and region. Similar assessments, as shown earlier, were made by Canada, Australia and New Zealand.

The CCJ was in fact granted the opportunity to adjudicate on a matter relating to the death penalty in the case of *AG of Barbados v Joseph & Boyce [CCJ Appeal No. CV.2 of 2005],* which will be examined later.

The court in existence

While all countries have signed on the original jurisdiction of the court, this was still not the end of appeals to the Privy Council for many member states.

As observed earlier, Guyana removed its appeals to the Privy Council beginning in 1970, completing this act in 1973. Guyana, therefore, could move most smoothly on to the appellate jurisdiction of the Privy Council. This was achieved through the enactment of the Caribbean Court of Justice Act 2004. There are constitutional requirements in many of the member states that need to be addressed. For most of the states of the OECS, it is likely that referenda will be required, in addition to a qualified majority vote in parliament, to end appeals to the Privy Council. While Barbados and Jamaica need only a simple majority in parliament, Barbados has, with full government and opposition collaboration, been able to reach this point smoothly, thus signing on to the appellate jurisdiction of the court and removing the Privy Council. This was achieved by The Constitution Amendment Act 2003 – 10; The Caribbean Court of Justice (Amendment) Act 2005; The Constitution (Amendment) Act 2005; and The Caribbean Community (Amendment) Act 2005.

However, such matters have not been so easy for Jamaica. The process of public debate leading to the establishment of the CCJ has often witnessed diverging views. The opposition and government were able to come to agreement as the date for the court's inauguration approached. The opposition party was in support of the CCJ when it was the government of the day, particularly through those pivotal years of 1970 and 1988. Included in this mix were the concerns of members of, amongst others, the Bar Association of Jamaica, who contested Jamaica's attempt to remove Privy Council jurisdiction through the passage of Bills by simple majority.

64 Professor Albert K Fiadjoe is a Professor of Public Law at the Faculty of Law, University of the West Indies, Cave Hill Campus, Barbados. He delivered a paper entitled: 'Analysis of the CCJ's First 18 Months'.

In the 2006 Commonwealth meeting, the Hon. Michael Hylton, Solicitor-General of Jamaica at the time,[65] explained that unlike in the other countries of the region, Section 110 of the Constitution of Jamaica, dealing with appeals to Her Majesty in Council, is not entrenched. In attempting to incorporate the CCJ in its judicial system, Jamaica laid three Bills before parliament in 2003, one of which was to amend the Constitution. The Bills would in effect abolish appeals to the Privy Council; establish the CCJ as Jamaica's final appellate court through a non-entrenching provision; and establish the CCJ in its original jurisdiction. Since these Bills were seeking to amend an non-entrenched section of the Constitution, they were passed by a simple majority in parliament. However, the Leader of the Opposition, and others in the case *Independent Jamaica Council For Human Rights Ltd v S Marshall-Burnett and the Attorney General of Jamaica [2005] 65 WIR* were successful in their appeal to the Privy Council when it was *held* by the Board that the procedure followed by the Government of Jamaica was unconstitutional. Further, the Privy Council ruled that parliament could establish a new final court that is not entrenched, but that the constitutional process to do so must follow the procedure for amending the entrenched provisions of the Constitution. The reasoning of the Privy Council was that if an non-entrenched court was created by parliament that could overrule the decisions of the Supreme Court and the Court of Appeal, and that court was not similarly entrenched, it would undermine the entrenching provisions and effectively amend them. Although it was pointed out to the Privy Council that the Privy Council itself was not an entrenched court in Jamaica's Constitution, the Privy Council returned that *'the independence of the Privy Council and its imperviousness to local pressure had never been in doubt…'*[66].

The three Bills were deemed non-severable and they were thus all struck down. However, the original jurisdiction Bill was revived, since it was not deemed unconstitutional and Jamaica enacted the legislation to participate in the CCJ's original jurisdiction. The way forward to accede to the appellate jurisdiction in Jamaica will require full co-operation between the opposition and the government. Further, in preparation for a referendum, public awareness has to be enhanced. These are both political challenges, but it is hoped that these differences can be bridged. As a large nation of the region, Jamaica's participation in the Caribbean Court of Justice is imperative to ensure the court's viability and encourage its smaller siblings of the OECS to proceed to do likewise. The decision of the Privy Council has retarded the CCJ, as expressed by Sir David Simmons:

> *'The decision of the JCPC has greatly setback the CCJ, which, in the ordinary course, could realistically have looked to Jamaica for a steady supply of appeals'*[67].

65 Contained in the 2006 report is the paper the Hon. Michael Hylton presented, which has informed this text: 'Delinking From The Judicial Committee of the Privy Council: Jamaica's Challenges'.

66 At paragraph 16.

67 Judicial Legislation for the Commonwealth Caribbean: The Death Penalty, Delay and the Judicial Committee of the Privy Council, Op cit, p.89.

Access to justice – the Caribbean Court of Justice vs the Privy Council

The question of lack of access to justice by the citizenry of the Caribbean can no longer be underestimated or conveniently be put aside in arguments for and against the CCJ to replace the JCPC. The decline of appeals to the JCPC may be seen as a measure of the ability to gain access to what is a final court of appeal. The distance of London from the Caribbean capitals and the associated costs of retaining counsel, paying the costs of travel, accommodation and incidentals between a Caribbean capital and London are alone hurdle enough to frustrate access. The wealth-seeking audience before the JCPC will have little difficulty. However, for much of the population, where financial difficulties constitute the daily challenge of survival, the distance of the court acts as a real barrier to access to justice. This is ironically an injustice in and of itself, meted out by the location of the court. Additionally, for a country such as Jamaica, whose citizens require a visa to enter the United Kingdom to attend the JCPC, yet another obstacle to justice is present. The present situation, therefore, is in need of improvement. Should an analogy be given of a citizen needing immediate medical attention and being denied this readily, surely an outrage would ensue. This situation was forcibly brought home to the Jamaican reality in October 2006, as the newspaper excerpt in the text box below explains.

‘Former teacher gets help to appeal case in UK …

Attorney-General and Minister of Justice, AJ Nicholson, has intervened in the case involving Easton Grant, a Jamaican man, who is attempting to represent himself before the London-based Privy Council, but has been refused a visa to enter England. Mr Nicholson yesterday wrote to the British High Commissioner, Jeremy Creswell, seeking a reversal of the decision. Mr Grant, a former teacher at the Montego Bay Community College in St James, is seeking to have his termination of employment deemed illegal. He has so far been unsuccessful, having exhausted the local courts and has been granted leave by the Court of Appeal to take his case to the London Law Lords.

Turned down

His case hearing is set for October 30 and 31, but the English High Commission turned down his visa application saying he had not demonstrated that he will return to Jamaica. In his letter to Mr Creswell yesterday, Mr. Nicholson noted that the Judicial Committee of the Privy Council remains Jamaica’s final court of appeal.

‘This, I believe, clearly implies that litigants will have access to their final court without impediment, and should not be denied the right to pursue their appeals to the highest level. To date, Mr Grant has opted to argue his case without legal representation, as is his right: he should be permitted to continue to do so especially before our highest court,’ Mr Nicholson said.’

Source: See the Jamaica Gleaner, 19 October 2006, available at: http://www.jamaica-gleaner.com/gleaner/20061019/news/news6.html [accessed 18 June 2008]

While the above instance has so vividly accentuated the seeming impracticality of being subjected to a final appeal court that is thousands of miles away and for which physical access is determinant upon the issuance of a visa, The Bahamas has moved in another direction for access. Since that country, though a member of the (Caribbean) Community, is not a member of the common market, its attachment to the CCJ is not yet defined. In an unprecedented move, the Privy Council became an itinerant court at The Bahamas's request in 2006, thus consolidating the country's continued attachment to the Privy Council and some may argue and conclude its emphatic rejection of the CCJ. How the Bahamas will seek to specifically clarify or underscore its posture – CCJ or JCPC? – will be an interesting study for the region over time.

The features of the CCJ are particularly designed to grant access to justice across the region. One such major feature is the creation of 'sub-registry' in each contracting member state. Article XXVII.2 of the Agreement Establishing The CCJ provides:

> *'With the concurrence of the "competent authority" of a Contracting Party, the Commission may appoint the Registrar of a superior court in the territory of that Contracting Party to be a Deputy Registrar of the Court'.*

This provision is given expression in the individual legislation of member states enabling the CCJ nationally. The CCJ Appellate Rules, 2005, of Barbados define 'sub-registry' to mean *'The Registry of court office designated by the President or an enactment, as a sub-registry of the Court'.* Further, the Barbados 2003 CCJ Act declares that *'the Registry of the Supreme Court shall be designated a sub-Registry of the Court pursuant to the Rules of the Court'.*

The role of this sub-registry in member states would therefore mean that litigants have access on home soil in terms of filing matters with the CCJ, as their supreme court registries would act as the registry for the CCJ. The deputy registrars in the CARICOM member states therefore assist the registrar of the CCJ in performing the duties and responsibilities of that position.

In February 2007, the Registrar of the CCJ, Ms Paula Pierre, advised of the arrangements of the CCJ in its registry services[68]. She has prioritised the need for the same standards and services in each sub-registry to be consistent with those that obtain at the Seat of the Court. To this end, new rules of court have been put in place in most member states.

Since the inauguration of the Caribbean Court of Justice, and in terms of the appellate jurisdiction of that court, Barbados, one of the two CARICOM countries acceded to that jurisdiction of the CCJ, is in a position to give an assessment on the working of this novel arrangement of a sub-registry.

Statistics[69] from Barbados indicate that since 2005:

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68 Extracted from Ms Pierre's presentation in February 2007 at the CCJ for the Commonwealth meeting.

69 Extracted from presentation of Mrs Maureen Crane-Scott QC, Registrar of the Supreme Court of Barbados and Deputy Registrar of the Caribbean Court of Justice, at the January-February 2007 Commonwealth meetings.

- A total of nine matters have been filed pursuant to the CCJ Appellate Jurisdiction Rules ;
- In 2005, two civil appeals were filed and one application for specific leave was filed; and
- In 2006, two applications for special leave to appeal; one application for leave to appeal as a poor person; one matrimonial appeal; and two criminal appeals were filed.

When compared with the statistics presented earlier to those relating to the JCPC, it will be recalled that in 1998 there was only one (1) grant of special leave to appeal from Barbados.

Independence and security of the Caribbean Court of Justice

Mention was made earlier of the fears of a CCJ being non-independent and subject to political influence. It is with this in mind that Article V of The Agreement Establishing the Caribbean Court of Justice establishes a Regional Judicial and Legal Services Commission (RJLSC). The RJLSC has the following constituent members:

- the president, who chairs the RJLSC;
- two persons nominated from the regional bar association – OCCBA and the Organisation of Eastern Caribbean States (OECS);
- one chair of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years;
- one chair of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years;
- two persons from civil society nominated jointly by the Secretary-General of the Caribbean Community and the Director-General of the OECS for a period of three years following consultations with regional non-governmental organizations;
- two distinguished Caribbean jurists nominated jointly by the dean of the Faculty of Law of the University of the West Indies, the deans of the Faculties of Law of any of the Contracting Parties and the chair of the Council of Legal Education; and
- two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.

The intention of Article V is clear – to subject the appointment of any judges and judicial officers of the CCJ to an independent and fair selection, with as minimal political interference as possible. Duke Pollard[70] states:

> *'In order to buttress the independence of the judges from political control or influence, it was agreed that, unlike procedures in similar institutions, the judges of the Court would not be appointed on the recommendation of Governments*[71] *but on the basis of open competition'.*

70 Pollard and Saunders (2007), *Op cit*, p.223.

71 Article IV(7) of the Agreement Establishing the CCJ.

Several other features secure the tenure of the judges, which include the non-abolition of an office of a judge while there is a substantive holder of the post and their removal from office only to be exercised by the RJLSC on the basis of misbehaviour or inability to perform the functions of the office. The removal of the president will only occur where the Heads of Government of the Caribbean Community execute this action, after recommendations of the RJLSC. Additional examination of the structure of the RJLSC also indicates that inclusion of the private bar was deemed instrumental, yet this is balanced by the role civil society would play.

The role that the Bar Association of Jamaica has played in challenging the method by which accession to the appellate jurisdiction of the CCJ was sought has already been discussed. Given the representation of the regional bar associations (OCCBA) on the RJLSC, one may question how this role will work in practice.

It was seen that the Hon. Dr Lloyd Barnett, Order of Jamaica (OJ), was one of the first members of the RJLSC nominated by OCCBA. Given the voiced opposition to the CCJ at the time, this nomination elicited some attention in the local media:

> *'Despite demanding a referendum on the …CCJ, the Jamaican Bar Association has nevertheless decided to participate in the nomination of persons to the body that will appoint persons to the controversial court'* [72].

In defence of this position, then President of the Jamaica Bar Association, Hilary Phillips, QC, explained that there was no conflict in the positions taken and that:

> *'If there is going to be a court, it is important who is going to sit on that court…'*

This posture was given more ventilation at the January-February 2007 Commonwealth meeting to which the Jamaican Bar Association was invited. Represented by the former President Hilary Phillips, QC, and the current President Mr John Leiba, the meeting was advised that the official position of the Jamaican Bar Association was in support of the CCJ, but that it should be placed before the citizenry in the form of a referendum[73]. As prior discussions have already revealed, this position was based on the outcome of the legal challenges to Jamaica's accession of the appellate jurisdiction of the CCJ.

Dr Barnett in addressing the same meeting in 2007 re-emphasised his position that:

> *'...the appointment process and the constitutional guarantees of security of tenure emphasise judicial independence, but judicial accountability should be developed in a manner which is consistent with the principle of independence'.*

The security of the CCJ's continued existence is concomitant with the independence of the judges. Justices Pollard and Saunders[74], emphasising the uniqueness of the CCJ, addressed the innovative arrangements to secure the court's operations on a financially sustainable

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72 Extracted from The Jamaica Gleaner, Friday 18July 2003, p.1. Available at: www.jamaica-gleaner.com/ [accessed 18 June 2008].

73 See page 7 of the Commonwealth Report on Final Regional Appellate Courts, January-February 2007.

74 Pollard and Saunders (2007), *Op cit.*

Features of the Caribbean Court of Justice courtroom

basis. In this structure, the architects of the CCJ designed its financing to be impervious to any political decision making. This was achieved through arrangements with the Caribbean Development Bank (CBD), a solid institution that negotiated a loan of approximately $US100,000,000 on international capital markets. These funds were then lent to member states to be repaid, attracting interest corresponding to their contributions to the court's budget. It is anticipated that this novel approach will see the CCJ funded beyond the foreseeable future.

Some features of the Caribbean Court of Justice

When in January-February 2007 the Commonwealth meeting visited with the CCJ in Port of Spain, Trinidad and Tobago, the features of the court were brought out in a more palpable manner, being observed on the spot.

At that 2007 meeting, the cutting-edge use of technology by the CCJ was demonstrated. The vision of the court, as has been discussed, is to guarantee access to justice by the citizenry throughout the region. In this context, the role of technology plays an important part. For instance, it is envisaged that some hearings could be heard by satellite, on television screens. Additionally, features to ensure the timely delivery of judgements and access to documents filed, see the use of computers, recording facilities and the use of equipment to facilitate persons who are disabled or with poor vision.