ESTABLISHING THE CCJ BY ORDINARY LEGISLATION

BY

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In a very recent commentary, Mr. Donovan Jackson, a very prominent member of the Jamaica Bar, has raised a profoundly important issue regarding the establishment of the proposed Caribbean Court of Justice (the CCJ) by ordinary legislation passed by a simple majority of the Jamaica Parliament. I gather that a Bill has been tabled in Parliament for the establishment of the Court. However, I have not seen the draft legislation, so I am unable to comment on it directly. But given that Mr. Jackson's question is of such importance for Jamaica and, indeed, the entire region, I thought I would offer a friendly rejoinder to his paper.

Mr. Jackson's argument is simply this. The CCJ, replacing the Privy Council, would become Jamaica's highest *constitutional* court. This means that the CCJ would be sitting as Jamaica's highest appellate court with jurisdiction to review decisions of a constitutionally entrenched Court of

Appeal and Supreme Court. He therefore argues that the establishment of the CCJ would be unconstitutional because the ordinary legislation, by which it is proposed to establish the CCJ, seeks to confer on that court final appellate jurisdiction over the Court of Appeal, which is entrenched in the Constitution of Jamaica and comprised of Judges protected by the Constitution. If this were permitted, he continues, it would mean that a court set up by ordinary legislation, passed by a simple majority in Parliament, would be in a position to review and overturn the decisions of an entrenched court, which such legislation could not lawfully impact.

Mr. Jackson believes that a possible response to his constitutional query is that: "[Our] Founding Fathers did not see it fit to entrench the Privy Council, and, therefore, the Constitution allows the Government to abolish the right of appeal to the Privy Council by a simple majority in Parliament. Moreover, since this is the method prescribed in the Constitution, to hold a referendum would be contrary to the constitutional provisions."

In denying, however, that the Privy Council may be removed as Jamaica's highest appellate court by a simple majority in Parliament, Mr. Jackson states: : "The Judges who make up the Judicial Committee of the

Privy Council have always been appointed in a manner consistent with the Judicial Committee of the Privy Council Act (since 1833), which is designed to protect and ensure their independence and impartiality. A Court set up by a$ simple majority in Parliament, however well intentioned, does not. The simple reason being that *any* future Government, could with their simple majority, amend or repeal the legislation setting up the Court to the detriment of the citizens of this country, who currently enjoy the protection offered by the entrenched Supreme Court and Court of Appeal and the right of appeal to the Privy Council from the decisions of these courts."

"It could not be permissible, [therefore], as a matter of constitutional law, for a simple majority in Parliament to take onto itself the power to remove the Privy Council and to establish the CCJ in its stead. Such legislation would not be constitutionally valid. To simply abolish the right of appeal to Privy Council with a simple majority would deprive citizens of a right to appeal to a Court which, at our independence, was comprised of judges selected by a certain process in the UK, and who enjoyed a certain level of independence and who sat on appeal from an entrenched Court of Appeal whose judges enjoyed certain constitutional protection."

Mr Jackson finds the support for his position in the landmark decision in *Hinds* v. *The Queen* (1976). On the authority of *Hinds*, he believes, the CCJ, established by ordinary legislation, would lack constitutional validity, "given our existing constitutional provisions."

The *Hinds* case involved the establishment of the Gun Court at the height of a wave of gun crimes in the 1970's. One of the provisions in the Gun Court Act, by which that Court was established, concerned the establishment of a mandatory sentence of detention at hard labour at the Governor General's pleasure for convicted persons. The Governor General was required to act in accordance with the recommendation of a Review Board consisting of five members. The majority of the members of the Review Board were not required to be members of the Judiciary. The Chairman was, however, required to be a Judge of the Court of Appeal or the Supreme Court. It means, then, that the majority of the Review Board were not persons appointed in accordance with Chapter VII of the Constitution, which relates to the appointment of persons exercising judicial powers.

Lord Diplock, who delivered the decision of the Judicial Committee,

remarked on the separation of powers principle, which is a fundamental principle of all Westminster-model constitutions, of which the Jamaica Constitution is an example. He noted that "The chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary, which are designed to assure to them a degree of independence from the other branches of government."

"What, however, is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution."

When, therefore, under a constitution on the Westminster model, a law is made by the parliament which pourports to confer jurisdiction on a court described by a new name, the question whether the law conflicts with the provisions of the constitution dealing with the exercise of judicial power does not depend on the label which the parliament attaches to the judges

when exercising the jurisdiction conferred on them by the law whose constitutionality is impunged. Rather, the question must be: What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Do the method of their appointment and the security of their tenure conform to the requirements of the constitution applicable to judges who, at the time the constitution came into force, exercised jurisdiction of that nature?

It bears emphasis that those provisions pertaining to the higher judiciary are deeply entrenched in the Constitution and, therefore, any alteration thereto must be according to the procedures specified in the Constitution, which, in some cases, might include "a direct vote of the majority of the people themselves."

"The manifest intention of these provisions is that all those who hold any salaried judicial office in Jamaica shall be appointed on the recommendation of the Judicial Service Commission and that their independence from political pressure by Parliament or by the Executive in the exercise of their judicial functions shall be assured by granting to them such degree of security of tenure in their office as is justified by the

importance of the jurisdiction that they exercise."

In the event, therefore, the ordinary legislation by which the Gun Court was established, and which purported to vest in the Review Board such judicial powers that were appropriate to tenured judges of the Supreme Court or the Court of Appeal, would have effected an amendment to certain deeply entrenched provisions of the Constitution. Mr Jackson's point, therefore, is that in view of the fact that the CCJ is to exercise appellate jurisdiction of the higher judiciary in Jamaica, then its constitutional validity would depend exclusively on its comportment with those constitutional provisions pertaining to the appointment of the judiciary.

On this particular point, it would seem that Mr. Jackson is eminently correct. But his argument, I believe, goes much deeper. He wishes to state that the very removal of the Privy Council as Jamaica's highest court of appeal would also be unconstitutional, because he believes that the right of appeal to that body is *virtually* on par with the right of a citizen to be tried by a constitutionally valid court. Thus he writes:

"If a separate Act was passed by a simple majority to

abolish [appeals to] the Privy council, the question arises whether it would be recognized as constitutional. If it were recognized as valid, the reality is that the Privy Council's substantive judicial function would be lost, though the jurisdiction of the Privy Council could not in my view be completely ousted, having regard to the fact that the Queen remains Head of State."

Queen of Jamaica (?)

"My view is that such an Act passed by a simple majority, for the single purpose of abolishing the right of appeal to the Privy Council, would be equally unconstitutional, as a simple majority would be removing a court which sits in review of the decisions of an entrenched court, and which that simple majority would not itself have the power to affect. It could not be permissible, as a matter of constitutional law, for a simple majority in Parliament to cut away the final appellate tier of our judicial system which sits on appeals from an

> entrenched court ... In *Hinds* the relevant provisions were struck down for convicted persons who were entitled to have their sentences determined by the 'protected' judiciary as opposed to the Review Board. What of the innocent persons who wish to retain the Privy Council for the time being?"

He relies on certain language in *Hinds*: "Section 110(1) of the Constitution which grants to litigants wide rights of appeal to Her Majesty in Council but only from decisions of the Court of Appeal, clearly proceeds on an assumption as to the effect of S.103 [which provides for the establishment of the Court of Appeal]. Section 110 would be rendered nugatory if its wide appellate jurisdiction could be removed from the Court of Appeal by an ordinary law without amendment of the Constitution".

This language, however, lends no support to Mr Jackson's position. For this language is not a judicial pronouncement by the Privy Council regarding the Jamaican Parliament's ability to remove that body as Jamaica's final appellate court. Rather, by that language, the Privy Council

was addressing a specific problem raised in *Hinds*.

The Privy Council was merely stating that in view of the fact that the Court of Appeal was established to exercise appellate jurisdiction in all substantive civil cases and in all serious criminal cases; and in view of the fact that the Privy Council was vested with appellate jurisdiction over decisions of the Court of Appeal, then the right of appeal to the Privy Council would have been rendered nugutory if a significant part of the Court of Appeal's appellate jurisdiction were taken away and conferred on judges who did not enjoy the security of tenure which the Constitution guarantees to judges of the Court of Appeal.

So we are left to consider the question whether Jamaica may remove the appellate jurisdiction of the Privy Council by ordinary legislation. The answer to this question depends on whether the *right* of appeal to the Privy Council is itself entrenched in the Constitution as a fundamental right.

I would think that Mr. Jackson has in fact conceded that the right of appeal to the Privy Council is not entrenched by his acknowledgement of what he calls "the knee jerk response" to his position: "Our Founding

Fathers did not see fit to entrench the Privy Council, [therefore], the Constitution allows the Government to abolish the right of appeal to the Privy Council by a simple majority in Parliament."

This is no constitutional anomaly, however. A similar situation obtained in Canada with respect to the abolition of appeals to the Privy Council. As Professor Peter Hogg reminds us, the Supreme Court of Canada was not established at confederation, since the Judicial Committee of the Privy Council in the United Kingdom served as the final court of appeal from all British colonies, including those of British North America, and the right of appeal continued after confederation.

However, the Constitution Act, 1867 did provide for the later establishment of a Canadian court of appeal. Section 101 authorized the federal Parliament "to provide for the constitution, maintenance, and organization of a general court of appeal for Canada". Acting under this power, in 1875 the federal Parliament, by statute, established the Supreme Court of Canada.

But the Privy Council's authority over the British North American

colonies was continued for Canada by s.129 of the Constitution Act, 1867. Thus, when the Supreme Court of Canada was established by federal statute in 1875, the right to appeal to the Privy Council was in no way impaired. There were in fact appeals from the Supreme Court to the Privy Council.

However, in 1888, the federal Parliament enacted an amendment to the Criminal Code which purported to abolish appeals to the Privy Council in criminal cases. In 1926, in the case of *Nadan* v. *The Queen*, the Privy Council held the statute to be invalid, primarily because it conflicted with two imperial statutes. After the 1931 Statute of Westminster, however, which conferred on the dominions the capacity to repeal or amend imperial statutes, Canada re-enacted the 1888 statute, and it was held to be valid.

Finally, in 1939, the federal government introduced a bill to abolish the remaining appeals to the Privy Council, and referred the bill to the Supreme Court of Canada for a decision as to its validity. According to Professor Hogg, there was little doubt that s.101 of the Constitution Act, 1867 authorized the abolition of appeals from the Supreme Court of Canada to the Privy Council: that could fairly be characterized as a law in relation

to "a general court of appeal for Canada". This federal statute was upheld in the *Privy Council Appeals Reference (1947)*, where it was noted that the power to establish a general court of appeal for Canada included not only the power to make its jurisdiction ultimate, but also the power "to deny appellate jurisdiction to any other court". The bill abolishing *all* appeals to the Privy Council was passed on December 23, 1949.

The question therefore remains whether the constitutional situation of Jamaica regarding the abolition of appeals to the Privy Council is sufficiently similar to that of Canada that the latter would stand as an outstanding precedent. On this specific question I willingly concede ground to the more learned students of the Jamaica Constitution: Messrs Jackson, Lloyd Barnett, Q.C., Frank Fipps, Q.C. *et al.* I wish to attend to a far more subtle issue raised by Mr. Jackson in his reliance on *Hinds* for support for his proposition that the Jamaica Parliament lacks the constitutional authority to abolish appeals to the Privy Council by ordinary legislation.

I believe that Mr. Jackson wishes to state that, notwithstanding that the right of appeal to the Privy Council may not be an entrenched *right* in the Jamaica Constitution, it has nonetheless become such an important

right to the citizens of Jamaica that it has become a central and *indispensable* part of the very administration of justice in Jamaica. In a word, it has become a matter of the due process of law, which is itself a fundamental and deeply entrenched principle of the Jamaica Constitution.

In *Hinds*, Lord Diplock made specific reference to the separation of powers principle as a fundamental principle of the Jamaica Constitution. However, I have always felt that the more powerful aspect of the opinion was its tacit acknowledgement that the citizens' right of due process was seriously threatened by the establishment of a court whose constitutional validity was in serious doubt.

Due process, as a normative principle of modern constitutional law, means much more than the requirement of stated legal procedures. As a normative principle, due process speaks to the moral legitimacy of the very procedures by which decisions affecting the citizen's life, liberty, and property are made. It speaks to the moral legitimacy of those public institutions that exercise coercive force over people's lives.

As the American philosopher, T.M. Scanlon, argues, the office of the

due process principle is, first and foremost, to protect all citizens against arbitrary government decision making. As such, it is one of the conditions that must be met for the morally acceptable exercise of power. It aims to provide some assurance of non-arbitrariness by requiring that those who exercise authority in fact have the constitutional authority to do so, and can justify their intended actions in a public proceeding by adducing reasons of the appropriate sort and defending these against critical attack.

The argument from due process is not that the "judges" of the Review Board were incapable of rendering legally correct and impartial decisions. Lord Diplock has conceded that much. Rather, the argument is that in our constitutional settlement, we have devised that all governmental denials of life, liberty, and property must draw their moral warrant from the Constitution, whose moral acceptability we have already determined on the principle of separation of powers and the fundamental rights provisions.

If, therefore, my argument is correct that Mr. Jackson wishes to state that, though not entrenched, the right of appeal to the Privy Council has nonetheless become a fundamental *right* on the ordinance of time and circumstance, then he must also show that the investment of final appellate

jurisdiction in the Jamaica Court of Appeal, say, would still not satisfy the fundamental claims of the citizens. As much as one might be sympathetic to Mr. Jackson's position, I sense that enormous difficulties attend it.

First, Mr. Jackson would be hard pressed to argue that, after thirty-odd years of independence, the Court of Appeal is still not ready to have a more decisive voice in the interpretation of the Jamaica Constitution. But more important, in the absence of express language in the Constitution, Mr. Jackson's attempt to give *constitutional* pride of place to the Privy Council could not be supported on the argument from due process. This is because the Privy Council's position at the apex of our legal system is not a matter of constitutional *right*. Consider the case of the U.S. Supreme Court.

Article III of the U.S. Constitution vests the judicial power of the United States in a supreme court and in such inferior courts as Congress may from time to time ordain and establish. On this language, the existence of the Supreme Court is a matter of right. Some commentators have speculated that even the establishment of lower federal courts was a matter *right;* but this would seem more a matter of institutional logic than the correct interpretation of the language of Article III.

What is critical, therefore, is that Congress lacked any discretion regarding the establishment of the Supreme Court and the vesting of the appropriate appellate and original jurisdiction in it. Interestingly, the seminal case in American (and maybe Western) jurisprudence, *Marbury* v. *Madison*, was occasioned partly as a result of Congress's attempt in the 1791 Judiciary Act to vary part of the original jurisdiction of the Court, contrary to the strict letter of Article III.

It was this specific point that gave Chief Justice John Marshall the opportunity to pen an opinion of the Court, that has itself become a canonical text. In articulating the doctrine of judicial review, Justice Marshall denied the power of Congress to tamper with the constitutional grant of its jurisdiction.

In due course, history was to prove Justice Marshall wrong on the very narrow and technical point. It was indeed a minor point that Congress thought it expedient to add to the Court's original jurisdiction. But this could not possibly dispute the compelling force of Marshall's argument; for what he had in fact accomplished in his depth-reading of the constitutional text was the institutional *entrenchment* of the Court, *vis-à-vis* the Executive

and Legislative branches, as a *representative* institution of "*We the People*". In a word, the citizens had a constitutionally vested right to come to *his* Court, in the appropriate circumstances, for redress of their grievances; and Congress, though having the power to regulate, can never take away that right.

Not so the British Privy Council. That body could not possibly enjoy a constitutional position of right in the Jamaican (or West Indian) polity. Like the 'mother' institution it advises - the monarchy - it is *entirely* a British institution, and could not therefore be reconstituted as part of the West Indian political order. On this view, even an express attempt to entrench the right of appeal to the Privy Council might be of doubtful constitutional authority; very much as the attempt to *re-enact* the British monarch as part of the West Indian constitutional order. It would seem, then, in the event, that ordinary legislation would be sufficient to remove the appellate jurisdiction of the Privy Council.

I wish now to return to Mr. Jackson's central point: that the establishment of the CCJ by ordinary legislation would make the Court unconstitutional. Specifically, Mr. Jackson's question is: whether

Parliament can pass ordinary legislation to ratify the proposed Agreement with Barbados and Trinidad and Tobago for the establishment of the Caribbean Court of Justice.

This is necessarily the question, given that the proposed CCJ would be a court of the Commonwealth Caribbean States and not of Jamaica exclusively. The answer to this question therefore turns on where, in the Constitution, the treaty-making power of the State lies. That is to say, if this is a power textually assigned to Parliament, then ordinary legislation may suffice to *bring* the Court to Jamaica.

But since the CCJ would then become the highest appellate court of Jamaica, the question remains as to the constitutional protection that would be afforded a court that, for all intents and purposes, would be Jamaica's highest court of appeal. This would seem to be Mr. Jackson's greatest concern, and correctly so, since the CCJ, unlike the Privy Council, would be a court (partly) established by Jamaica.

On this view, then, Jamaica may solve the constitutional conundrum by treating the matter as one of establishing, *literally*, a final Jamaican Court

of Appeal and thereby follow every constitutional procedure toward that end. To the extent that this is what Mr. Jackson ultimately wants done, I would support him wholeheartedly.

(Finally, I wish to express my personal gratitude to Mr. Jackson for raising this very critical issue, and to Vice-Chancellor Nettleford for bringing it to my attention.)