Should the Commonwealth Caribbean Abolish Appeals to the Privy Council?

Professor Leslie Thomas QC

26th May 2022

In a previous lecture in this series, I talked about the constitutions of the Commonwealth Caribbean countries and the effectiveness of the human rights guarantees contained in those constitutions. Today I want to talk about a topical and controversial issue in the Commonwealth Caribbean. That is whether Caribbean countries ought to replace the Judicial Committee of the Privy Council with the Caribbean Court of Justice as their highest court.

The Judicial Committee of the Privy Council

First of all, let's take a look at the Judicial Committee of the Privy Council. What is it, and why does it exist?

The jurisdiction of the Judicial Committee of the Privy Council originates from the power of medieval English kings to administer justice with the advice of their council. Over time, the House of Lords became the highest court in England itself. But the King with the advice of the Privy Council served as the highest court for the Channel Islands, which were ruled by the English Crown but were not part of England. As England acquired colonies and protectorates abroad, the Privy Council also served as the final court of appeal from colonial courts.

The modern jurisdiction and powers of the Judicial Committee were prescribed in the Judicial Committee Act 1833, which is still in force.

The composition of the Judicial Committee as we know it today dates from 1876. The Appellate Jurisdiction Act 1876 established the Lords of Appeal in Ordinary, or Law Lords, who sat in the House of Lords as life peers to hear appeals from the English, Scottish and Irish courts.[1] By the same Act, the Law Lords were also to sit as members of the Judicial Committee of the Privy Council, to hear appeals from other parts of the British Empire.

As the British Empire expanded greatly during the nineteenth century, so did the jurisdiction of the Judicial Committee. By the early twentieth century it was the highest court for a quarter of the world's population.[2]

In the 1930s and 1940s, certain parts of the British Empire, known as the "Dominions", became increasingly self-governing. These included Canada, Australia, South Africa and New Zealand. The 1931 Statute of Westminster gave the Dominions new powers, including the power to abolish appeals to the Privy Council.[3]

In 1949, Canada became the first Dominion to abolish appeals to the Privy Council. Later the same year, India, which was in the process of becoming fully independent from the British Empire, also abolished them. South Africa abolished them in 1950. But Australia retained them until 1986, and New Zealand retained them until it established its own Supreme Court in 2003.[4]

---

[1] David Pannick, "'Better that a horse should have a voice in the House [of Lords] than that a judge should' (Jeremy Bentham): replacing the Law Lords by a Supreme Court," *Public Law* 2009, Oct, 723-726

[2] Daniel Clarry, "Institutional judicial independence and the Privy Council," *Cambridge Journal of International and Comparative Law* 2014, 3(1), 46-76

[3] *Ibid*.

[4] *Ibid*.

In the post-war decades, many territories which had been British colonies achieved independence within the Commonwealth. Some of these kept the British monarch as head of state, represented by a Governor-General, which are known as "Commonwealth realms": for example, Jamaica and Antigua and Barbuda. Others became republics with a president as head of state: for example, Dominica and Trinidad and Tobago.

The Judicial Committee continues to serve as the final court of appeal for many independent Commonwealth countries. It also serves as the final court of appeal for British Overseas Territories, such as Bermuda, the Cayman Islands, Anguilla and Montserrat. And it serves as the final court of appeal for the three British Crown dependencies, namely Jersey, Guernsey and the Isle of Man.

The Constitutional Reform Act 2005 abolished the judicial functions of the House of Lords within the UK and replaced it with a new UK Supreme Court. However, the Judicial Committee was left intact. Since then, the Justices of the UK Supreme Court sit as the members of the Judicial Committee.

Generally, the court system has three levels. Cases are heard in the first instance by the local superior court of the relevant country or territory, which may be called the High Court, the Supreme Court, or in the case of the Cayman Islands the Grand Court. Appeals from that court are brought to the local Court of Appeal. In the Eastern Caribbean, several countries and territories share the Eastern Caribbean Supreme Court, consisting of a shared High Court and Court of Appeal. Appeals from the local Court of Appeal are brought to the Judicial Committee.

Formally speaking, in respect of countries which have the Queen as head of state, the Judicial Committee serves as an advisory body to the Queen. At the end of each judgment the Judicial Committee "humbly advises Her Majesty" to allow or dismiss the appeal. However, this is purely a formality. In reality the Queen plays no role.

The Caribbean Court of Justice

So that's the Judicial Committee of the Privy Council. What is the Caribbean Court of Justice?

The Caribbean Court of Justice, or CCJ, was established by an international agreement which entered into force in July 2003. It was set up in Trinidad and Tobago in 2005, with two main functions. First, it was to resolve disputes between member States of the Caribbean Community, or CARICOM. Second, it was to replace the Privy Council as the highest court for members of the Caribbean Community.

However, adoption of the CCJ as the highest appellate court has been slow. By 2009, only two states had adopted it as their highest court: Barbados and Guyana. A third state, Belize, joined them in 2010. In 2012 the Prime Minister of Trinidad and Tobago proposed adopting the CCJ as the highest court for criminal appeals only, while keeping the Privy Council for civil appeals. But this proposal turned out to be fraught with difficulties, as explained by John Jeremie SC writing in the Law Quarterly Review.[5] For example, what would happen if a criminal appeal happened to raise constitutional issues? Trinidad and Tobago has still not adopted the CCJ as its highest court, although one more state, Dominica, did so in 2005. In Antigua and Barbuda and Grenada, the voters rejected proposals in 2018 to replace the Privy Council with the CCJ.

At present, therefore, only four countries in the region have the CCJ as their highest court: Barbados, Guyana, Belize and Dominica. The rest have all retained the Privy Council as their highest court.

The CCJ Controversy

So why is the CCJ so controversial?

On the one hand, supporters of the CCJ often argue for the necessity of breaking away from colonial rule and establishing a "distinctively Caribbean jurisprudence".[6] The argument was summed up eloquently by the Guyanese politician Sir Shridath Ramphal in a 2009 public lecture, quoted by Jeremie:

> *""It is almost axiomatic that the Caribbean Community should have its own final Court of Appeal in all matters. A century old tradition of erudition and excellence in the legal profession of the Region leaves no room for hesitancy. Ending the jurisdiction of the Judicial Committee of the Privy Council was*

[5] John S Jeremie, "The Privy Council and the Caribbean," *Law Quarterly Review* 2013, 129 (Apr), 169-172

[6] See for example: Ezekiel Rediker, Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice, 35 Mich. J. Int'l L. 213 (2013).

actually treated as consequential on Guyana becoming a Republic 39 years ago. I am frankly ashamed when I see the small list of Commonwealth countries that still cling to that jurisdiction—a list dominated by the Caribbean. Now that we have created our Caribbean Court of Justice in a manner that has won the respect and admiration of the common law world, it is an act of abysmal contrariety that we have withheld so substantially its appellate jurisdiction in favour of that of the Privy Council—we who have sent Judges to the International Court of Justice, to the International Criminal Court and to the International Court for the former Yugoslavia, to the Presidency of the United Nations Tribunal on the Law of the Sea; we from whose Caribbean shores have sprung in lineal descent the current Attorneys General of Britain and of the United States.

This paradox of heritage and hesitancy must be repudiated by action—action of the kind Belize has just taken to embrace the appellate jurisdiction of the CCJ and abolish appeals to the Privy Council. It is enlightened action taken by way of constitutional amendment, and Belize deserves the applause of the Caribbean Community—not just its legal fraternity. Those countries still hesitant must find the will and the way to follow Belize—and perhaps it will be easier if they act as one. The truth is that the alternative to such action is too self-destructive to contemplate. If we remain casual and complacent about such anomalies much longer we will end up making a virtue of them and lose all we have built."[7]

More concisely, as the Caribbean constitutional scholar Simon McIntosh put it:

"[S]o long as we remain the 'subjects' of the British Crown with its Judicial Committee as the apex in the hierarchy of our legal system, it is to be expected that our constitutional discourse would reflect a cluster of values, intellectual orientations and practices that carry a distinct British cast…Our constitutional conversation is carried out in a 'foreign' voice. We are either silenced or are constrained to speak within the institutions and traditions of interpretation of the colonial constitutions that have been imposed on us."[8]

So why, then, have most states not adopted the CCJ as their final court of appeal? The first thing to say is that proposals for constitutional reform in the Commonwealth Caribbean are usually rejected. Commonwealth Caribbean constitutions are generally strongly entrenched and can only be amended by means of a referendum, which in some countries requires a supermajority. This makes it very difficult for a government to pass constitutional change without opposition support, which is usually not forthcoming. As Derek O'Brien pointed out in 2018, out of the eight constitutionally mandated referendums held in the Caribbean region from independence to 2018, in only one of them has a government been successful in securing a majority for its proposals for constitutional reform. O'Brien argues that:

"There are many factors at play in determining the outcome of a referendum but the one common denominator in the region is political partisanship and a culture of political tribalism and political adversarialism that has much to do with the 'winner takes all' nature of the Westminster model of government that prevails in the region, rather than the perceived objections to the recognition of the authority of the CCJ."[9]

O'Brien quotes the political commentator Sir Ronald Sanders, in arguing that the principal objective of opposition politicians in both Antigua and Barbuda and Grenada in opposing the CCJ was "to give the governing party a bloody nose". He also argues that:

"…the inclusion of referendum requirements in Caribbean independence constitutions reflected the British Government's determination to preserve the Westminster model of government and the protection of fundamental rights in the post-independence era, having been earlier alarmed by Kwame Nkrumah's actions in Ghana in enacting a new Constitution with a presidential system of government within three years of independence. The super majorities required in the case of the three countries was a further reflection of just how much the British Government distrusted their independence leaders whom they regarded as 'firebrands'."[10]

---

[7] Ibid.
[8] Quoted by Derek O'Brien, "The end of the Caribbean Court of Justice? On failed constitutional referendums in Grenada, and Antigua and Barbuda," *Constitution Net,* 26 November 2018
[9] Ibid.
[10] *Ibid*.

O'Brien regards this situation as a bad thing. He argues that "[t]he case for replacing the JCPC with the CCJ is a very compelling one and if a majority of citizens cannot be persuaded to vote for such a reform it is difficult to imagine which, if any, other constitutional reforms they would support."[11]

But on the other hand, opposition to the CCJ isn't necessarily just stubborn political partisanship. One common argument is about political independence. As we have just heard, Commonwealth Caribbean politics tends to be bitterly adversarial, something which is exacerbated by the winner-takes-all nature of the Westminster parliamentary system. That partisanship often finds its way into the conduct of litigation. Many cases before the courts have a political angle. Frequently, the power struggles between opposing parties are played out in the courtroom and at the ballot box at the same time. And, to a greater extent than in the UK, many Commonwealth Caribbean judges are former politicians. Politicians and judges generally come from the same small local elites. It isn't uncommon for former government ministers and attorneys-general to be appointed to senior judicial roles. By contrast, the argument goes, the Privy Council is completely insulated from Caribbean politics and is not going to be swayed by these matters. Desiree Artesi, a specialist in Privy Council appeals, writes in Counsel magazine that the Judicial Committee's "freedom from political influence and bias" is seen as a "unique selling point" by foreign investors in those territories that retain the Judicial Committee as their highest court.[12]

Desiree Artesi also advances a second suggestion as to why some Caribbean jurisdictions have chosen to retain the Judicial Committee. She highlights the "breadth of cases" dealt with by the judges who make up the Judicial Committee, "embracing a staggering amount of complex law" and "encompassing wide-ranging subject areas." She suggests that "[t]he sheer volume of cases dealt with by a JCPC judge living in a society of 68 million odd people is what gives them the edge." She suggests that a mutual exchange of judicial sittings between the Judicial Committee and the CCJ would be beneficial.[13]

But the proof of the pudding is in the eating. Let's compare and contrast the human rights jurisprudence of the CCJ and the Privy Council and see what conclusions we can reach. We're going to look at two key issues in Commonwealth Caribbean constitutional jurisprudence and compare and contrast the approaches of the CCJ and the Privy Council.

The First Issue: Savings Clauses

One of the biggest flaws in human rights protection in the Commonwealth Caribbean is the existence of savings clauses. Most Commonwealth Caribbean constitutions have a savings clause for existing laws. These clauses, to a greater or lesser extent, immunise laws from constitutional challenge where those laws pre-date the Constitution itself. However, the wording of the clause differs substantially from constitution to constitution. The Privy Council, of course, is not responsible for the existence of these clauses, but it is responsible for interpreting them.

Many of the cases concerning the savings clauses have been about the imposition of the mandatory death penalty for murder. The Commonwealth Caribbean inherited from English law the mandatory imposition of the death penalty in all cases of murder, without regard to mitigating circumstances. The Privy Council accepted in *Reyes v The Queen* [2002] UKPC 11 that the mandatory death penalty constitutes inhuman and degrading punishment, since it has no regard to the offender's individual circumstances. But a major battleground has been whether the mandatory death penalty is protected by the savings clauses.

In *R v Hughes* [2002] UKPC 12 and *Fox v The Queen* [2002] UKPC 13 the Privy Council construed the savings clauses of, respectively, the St Lucia Constitution and the St Kitts and Nevis Constitution. In both cases, the savings clause was narrowly worded. It provided that nothing contained in or done under the authority of any law could be held to be inconsistent with the constitutional prohibition of inhuman or degrading treatment or punishment, to the extent that the law in question authorised any description of punishment that was lawful immediately before independence.

In both cases the Privy Council held that the savings clause did not prevent them from holding that the relevant law was inconsistent with the Constitution insofar as it required, rather than merely authorised, the judge to impose the death penalty.

---

[11] Ibid.
[12] Desiree Artesi, "The Privy Council and the Commonwealth," *Counsel,* 31 January 2022 https://www.counselmagazine.co.uk/articles/the-privy-council-the-commonwealth
[13] Ibid.

So far, so good. But other Commonwealth Caribbean savings clauses were more broadly worded. In *Roodal v State of Trinidad and Tobago* [2003] UKPC 78 the Privy Council construed the savings clause of the Trinidad and Tobago Constitution, which simply provided that an existing law could not be held to be inconsistent with or in contravention of fundamental rights. It held that although the savings clause protected the existing law, the existing law could be read with modifications, so as to read the mandatory death penalty as a discretionary death penalty. In order to achieve this result, they relied on section 5(1) of the Constitution Act 1976, which was not part of the Constitution but rather part of the instrument that brought it into force. That provision stated that "the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act". The Privy Council used this power in *Roodal* to construe the mandatory death penalty as a discretionary death penalty.

But in *Boyce v The Queen* [2004] UKPC 32 the Privy Council, less than a year later, overruled their own decision in *Roodal.* Having convened a nine-member board for the first time in 150 years,[14] the Privy Council held by a majority that the savings clause in Barbados, which was in the same terms as that in Trinidad and Tobago, protected the mandatory death penalty from constitutional challenge. They held that the modification power, there contained in Article 4(1) of the Barbados Independence Order 1966, could not be used to modify the mandatory death penalty. They applied the same reasoning to the Trinidad and Tobago savings clause in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33. In relation to the Jamaican Constitution, they held in *Watson v The Queen* [2004] UKPC 34 that the Jamaican mandatory death penalty was not protected by the savings clause because it was not an existing law. But they upheld the correctness of the construction of the savings clauses in *Boyce* and *Matthew.*

These savings clauses were of wider application than merely protecting the mandatory death penalty. Some commentators have been scathing about the Privy Council's approach. In a study of LGBT+ equality in the Commonwealth Caribbean, Leonardo Raznovich states that the Privy Council's approach in *Boyce, Matthew* and *Watson* has become a significant barrier to equality, because it held that the general savings clauses provide absolute immunity to all colonial laws from any constitutional challenge. As he pointed out, this means that discriminatory laws criminalising same-sex relationships are equally immunised from challenge.[15]

By contrast, Raznovich notes with approval that the CCJ has now departed from the *Boyce* line of authority. In *Nervais v Regina* [2018] CCJ 39 (AJ) the CCJ overruled *Boyce* in respect of Barbados. The Court memorably said:

> *"The proposition that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status."*

Before going on to say:

> *"The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned."*

And also pointing out that:

> *"The inescapable irony is that in most cases, the rules which it has been said we are bound to apply here in the Caribbean have long since been changed in England, while, on the view that has until now prevailed, we must remain trapped in the colonial past."*

The CCJ decided that a "restrictive interpretation" of the general savings clause should be adopted, and that the courts should, as mandated by the Independence Order, apply the existing laws with such modifications as may be necessary to bring them into conformity with the Constitution.

This decision is plainly to be welcomed. It speaks well of the CCJ's commitment to decolonisation and human rights. And it also illustrates the CCJ's independence from its sponsoring governments.

---

[14] See John S Jeremie, "The Caribbean death penalty saga," *Law Quarterly Review* 2012, 128 (Jan), 31-36

[15] Leonardo J Raznovich, "The Privy Council's errors of law hinder LGBTI rights progress in the Caribbean," *European Human Rights Law Review* 2022, 2, 65-77

Raznovich's point about the relevance of this issue to LGBT+ rights was well made. In *McEwan v Attorney-General of Guyana* [2018] CCJ 30 (AJ), the CCJ applied *Nervais* to strike down a colonial-era law that criminalised cross-dressing. This archaic and discriminatory law had been used to prosecute four transgender women for wearing women's clothes in public. Upon being convicted in the Magistrates' Court, the Magistrate informed them that they were confused about their sexuality and advised them to go to church. They appealed to the High Court and the Court of Appeal and lost. Those courts relied on the conventional wisdom to hold that the savings clause of the Guyana Constitution completely immunised pre-independence laws from constitutional challenge.

Undeterred, they fought their case to the CCJ, where they won. This case illustrates the value of the *Nervais* judgment in expanding the protection of human rights.

Very recently, the Privy Council has pushed back. In the recent case of *Chandler v Trinidad and Tobago* [2022] UKPC 19, a nine-member Judicial Committee decided not to follow *Nervais* and *McEwan.* It reaffirmed that the mandatory death penalty in Trinidad and Tobago is saved by the savings clause, reaffirming the correctness of its decision in *Matthew.* As the Board acknowledged in the closing paragraphs of its decision, the mandatory death penalty is recognised internationally as cruel and unusual punishment. In the Board's words, it *"will often be disproportionate and unjust."* But on the basis of the Board's construction of the savings clause, it was constitutional.

The Judicial Committee also pointed out, correctly, that the policy questions posed by the savings clause are not limited to the mandatory death penalty but apply also to other preserved laws which are inconsistent with the higher standards imposed by the Constitution. As we saw earlier, *McEwan* is an illustration of the relevance of this debate in a different context.

Interestingly, the Judicial Committee also said that it did not question the outcome of the decisions in *Nervais* and *McEwan,* each of which, in its view, could be distinguished from *Matthew.* But the practical effect of its decision is not just that the mandatory death penalty remains in force in Trinidad and Tobago, but that the jurisprudences of the Privy Council and the CCJ have now definitely diverged as regards the proper approach to savings clauses.

There's a real difference in the rhetorical style of *Nervais* and that of *Chandler.* The former is an eloquent paean to high constitutional principle. The latter is cautious, conservative, and deferential to precedent. This is not to suggest that *Chandler* is devoid of principle. On the contrary, the Board places great emphasis on the principle of legal certainty, even citing the legal philosopher Lon Fuller, and on the role of the elected legislature. But the two cases definitely reflect different philosophies about the place of the judiciary in a democratic society.

What can we draw from this? In short, the Privy Council and the CCJ have diverged from each other on a fundamental issue of constitutional interpretation, which cuts to the heart of constitutional jurisprudence. More than that, they have diverged in their general approach to constitutional law. In jurisdictions with a general savings clause, we can now expect to see a marked difference in approach between those which have adopted the CCJ as their highest court and those which have not. In the former, we can now hope to see repressive colonial laws toppling like a house of cards. In the latter, we can expect to see the revision of colonial laws left primarily to the elected legislature rather than the courts.

The Second Issue: Preambles

I now want to turn to a second battleground in Commonwealth Caribbean constitutional jurisprudence. As I highlighted in my previous lecture, most Commonwealth constitutions, in the Caribbean and elsewhere, contain a clause at the start of their Bill of Rights that sets out broad statements of principle, with wording such as "life, liberty, security of the person and the protection of the law". They then go on to set out the specific rights protected by the Constitution in the subsequent clauses.

A controversial issue for decades has been whether these initial provisions are merely preambles, or whether they create separately enforceable rights. The Privy Council has tended to take a narrowly textual approach to this question.

The first Privy Council case on this question was the Maltese case of *Oliver v Buttigieg* [1967] 1 AC 115. In that case, the Privy Council held that the relevant provision of the Constitution of Malta was merely a preamble and did not create separately enforceable rights. In reaching this conclusion, Lord Morris placed great emphasis on the fact that the provision began with the word "Whereas". He said that the provision was

"an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow."

By contrast, in the Mauritian case of *Societe United Docks v Government of Mauritius* [1985] AC 585, the Privy Council reached the opposite conclusion in respect of the equivalent clause of the Mauritian Constitution, holding that it did create enforceable rights. The reason for the distinction was that the Mauritian provision was worded differently. Whereas the Maltese provision began with "Whereas", the Mauritian provision began with "It is hereby recognised and declared that".

In addition to the distinction between the "whereas" wording and the "hereby recognised and declared" wording, the other factor on which the Privy Council has placed weight is whether the Constitution itself provides for the section to be enforced. This factor was highlighted in the Bermudian case of *Grape Bay Ltd v Attorney General of Bermuda* [2000] 1 WLR 574.

The narrowly textual approach that began with *Oliver* has been followed by the Privy Council in numerous cases to hold that the equivalent clauses of Caribbean constitutions do not create enforceable rights: for example in Antigua and Barbuda prior to independence in *Attorney-General v Antigua Times* [1976] AC 16, in Dominica in *Blomquist v Attorney-General of Dominica* [1987] AC 489, and in the Bahamas in *Newbold v Commissioner of Police* [2014] UKPC 12.

By contrast, the CCJ has in recent years taken a broader and less black-letter view of the issue. In the landmark case of *Maya Leaders Alliance v Attorney-General* [2015] CCJ 15 (AJ), the Court held that the equivalent provision of the Belize Constitution, section 3, was "not a mere preamble or introduction" but conferred substantive rights. In that case, which concerned the traditional land rights of the indigenous Maya people in Belize, it was held that the Maya could rely on the "protection from arbitrary deprivation of property" conferred by section 3. That right was broader than the protection from compulsory acquisition of property conferred by section 17. Thus, there could be an arbitrary deprivation of property, within the meaning of the Constitution, even where there had not been a compulsory acquisition of property by the State.

The CCJ analysed the same issue more closely in the mandatory death penalty case of *Nervais,* which we looked at earlier. In that case, the CCJ held that section 11 of the Constitution of Barbados conferred separately enforceable rights, notwithstanding that it began with "Whereas". They comprehensively demolished the reasoning adopted by the Privy Council in the *Oliver* line of authority. They firstly noted that the Privy Council's reasoning attributed an unusual reading to the word "preamble". The Constitution of Barbados did have a preamble, but section 11 was not part of the preamble: it was in the substantive portion of the Constitution. They held that the language of section 11 was not aspirational, nor was it a preliminary statement of reasons which made the Constitution or sections of it desirable. They gave short shrift to the reasoning in *Oliver* and *Societe United Docks,* holding:

> *"When one reviews the two sections in the Maltese and Mauritius Constitutions, did they really intend to impute such different meanings as has been attributed to them?*
>
> *It would seem to us that in the Maltese Constitution the word "whereas" could easily have been construed to mean "it is hereby recognised and declared that" or even simply "in light of the fact that". These are meanings normally attributed to the word "whereas"."*

They held that section 11 was not a preamble and that the right to "protection of the law" conferred by section 11 was a separately enforceable right. In short, whether the courts could enforce the fundamental rights to life, liberty and the protection of the law did not depend on the arbitrary fact of whether the draftsman had chosen to use the word "Whereas".

Once again, therefore, the CCJ in its recent jurisprudence has taken a broader and more progressive approach to constitutional rights than has the Privy Council. The distinction drawn by the Privy Council between the precise wordings of the Maltese and Mauritian Constitutions was, arguably, technical to the point of absurdity, and has had an outsize impact on Commonwealth constitutional jurisprudence. For Barbados, *Nervais* has now done away with this black-letter textual approach and replaced it with a broad and purposive approach which, in my view, is far more appropriate to issues of fundamental rights.

Conclusion

I want to close with three concluding thoughts about the CCJ debate.

Firstly, the concerns about the CCJ's independence do not appear to be well-founded. In this lecture we have looked at three cases – *Nervais, Maya Leaders Alliance* and *McEwan* – where the CCJ gave bold and

progressive judgments, expanding the frontiers of human rights protection, and departing from the narrow textual approach of the Privy Council. All three of those cases were decided adversely to national governments. These cases give cause for real confidence in the independence, integrity and quality of the CCJ as an apex Court. Certainly, the jurisprudence provides no evidence that the CCJ is inferior to the Privy Council as a guardian of human rights. If anything, the opposite seems to be true.

Secondly, however, there's often a certain hypocrisy when we hear anti-colonial rhetoric from Caribbean politicians. In many of the cases we've looked at in this lecture, Caribbean governments fought in the courts to keep oppressive colonial-era laws on the books. As we have seen, governments from all over the Caribbean defended the mandatory death penalty in case after case, from *Reyes* to *Chandler.* And in *McEwan* the Guyanese government opposed the appellants' appeal all the way to the CCJ. These are just a few examples among many. We see all manner of human rights abuses happening in the Caribbean, from appalling prison conditions to corporal punishment, to police violence, to the destruction of the natural environment by private developers. We see persistent inequality and poverty which governments are doing nothing to stem.

With this in mind, can it really be surprising that when a government proposes constitutional change and asks the people to vote for it, the people are skeptical? Caribbean people have little reason for faith in their political leaders.

And finally, it's important to note that the ongoing impact of colonialism on the Commonwealth Caribbean goes much deeper than the question of the apex Court. Corporations and investors from outside the region continue to treat the Caribbean as a playground. All too often, the English common law system we inherited serves the interests of the corporate class rather than ordinary working people. In this regard, the recognition of indigenous communal land ownership in the *Maya Leaders Alliance* case ought to be a salutary reminder that there is a better way. Our countries don't have to be playgrounds for the wealthy, our environment doesn't have to be despoiled for profit, and our land doesn't have to be a commodity to be bought and sold. A supreme court, however enlightened, can't bring all the changes we need. Ending colonialism requires a change in our political culture.

The issues also stem much deeper and wider than matters of just law and justice. There appears to be a wind of change blowing through the Commonwealth Caribbean and it's beginning to pick up (rapidly): for example, the vocal and public condemnation of the legacies of "colonial-era ideologies", as did the Bahamas National Reparations Committee (BNRC), the Advocacy Network in Jamaica and the indigenous Maya people of Belize in a joint open letter published at the end of March 2022 in response to the Duke and Duchess of Cambridge's recent tour. Of the Caribbean. The Caribbean coalition united to push for slavery reparations from Britain and to remove the Queen as head of state in each country, with its letter reading:

> *"We stand united in rejecting the so-called charm offensive tour of the Caribbean undertaken by William and Catherine, the Duke and Duchess of Cambridge, which is in sharp opposition to the needs and aspirations of indigenous peoples and people of African descent in the Caribbean,"*
>
> *"We stand united in condemning Britain's savagery in enslaving our ancestors, the coarse indecency of colonial exploitation, the brutality of its enforcers, and the enduring legacies of impoverishment and colonial-era ideologies that have damaged and continue to damage our people, our society and our economy."*
>
> *"Going forward, we will stand stronger, united in our call for reparatory justice and in supporting the roadmap for redress laid out by the CARICOM Reparations Commission. We will stand strong, united in our celebration of the resilience of Caribbean people who have accomplished much since our independence, against the odds, and we commit to continuing in this tradition in tackling contemporary challenges, rooting out all vestiges of our post-colonial past and empowering our people to achieve more."*[16]

The joint open letter came as the prime minister of Jamaica stated that his country intends to move on to become a republic[17], while a government committee in the Bahamas called on the British Monarchy to issue

---

[16] See: Nadine White, "Jamaica, Belize and Bahamas groups unite in reparations, republic push after Royal visit" (The Independent, 29 Maarch 2022) https://www.independent.co.uk/news/world/americas/jamaica-belize-bahamas-royal-family-b2046354.html

[17] Nadine White, "Jamaican prime minister tells Prince William: 'We intend to be an independent republic'" (The Independent, 23 March 2022) https://www.independent.co.uk/news/world/americas/jamaica-republic-prince-william-

"a full and formal apology for their crimes against humanity".[18] The Belize government also said that its People's Constitutional Commission would be consulting on becoming a republic, with Henry Charles Usher, minister for constitutional and political reform, telling MPs that:

> *"The decolonisation process is enveloping the Caribbean region … Perhaps it is time for Belize to take the next step in truly owning our independence. But it is a matter that the people of Belize must decide on."*[19]

As Professor Philip Murphy, of the University of London's Institute of Commonwealth Studies, said:

> *"There are profound sensitivities around the legacies of colonialism and slavery [but] the Foreign Office doesn't quite get it."*[20]

Professor Rosalee Hamilton, Coordinator of Advocates Network in Jamaica, said on the topic of Jamaica's history of resistance to oppression and colonial domination, that:

> *"The colonial legacies that are perpetuated in policies, laws and institutional arrangements that encourage conformity to norms and practices, are ill-suited for the modern world".*
>
> *"It is time to dismantle the last vestiges of our colonial institution, and the ideological underpinning of racism, discrimination and inequality that persist in the world today,"*
>
> *"And we must do so by severing ties with the Queen as our head of state as well as the Privy Council. Also, root out all forms of colonial trappings that have held us back".*[21]

The People's National Party Youth Organisation in Jamaica, speaking on the need to cut ties with the Privy Council, said in March. of this year:

> *"The anachronistic system of appeals to the JCPC has no place in Jamaica's judicial system and makes a mockery of our independence,"*
>
> *"This is the lowest hanging of all fruits when it comes to constitutional reform and the modernisation of the Jamaican society."*
>
> *"If the Government is sincere about completing our independence and truly wants to send a signal in our 60th year, the prime minister must instruct the necessary officers to bring the required bills to Parliament for debate and passage."*[22]

References and Further Reading

Judicial Committee Act 1833

The Appellate Jurisdiction Act 1876

David Pannick, "'Better that a horse should have a voice in the House [of Lords] than that a judge should' (Jeremy Bentham): replacing the Law Lords by a Supreme Court," *Public Law* 2009, Oct, 723-726

Daniel Clarry, "Institutional judicial independence and the Privy Council," *Cambridge Journal of International and Comparative Law* 2014, 3(1), 46-76

---

kate-visit-b2042465.html

[18] Rachel Hall and Amelia Gentleman, "'Perfect storm': royals misjudged Caribbean tour, say critics" (The Guardian, 25 March 2022) https://www.theguardian.com/uk-news/2022/mar/25/william-and-kate-caribbean-tour-slavery-reparations-royals. For an overview of important sovereign apologies, some relating to the transatlantic slave trade and colonialism, see: Daniella Stoltz and Beth Van Schaack, "It's Never Too Late to Say "I'm Sorry": Sovereign Apologies Over the Years" *Just Security*, 16 March 2021 https://www.justsecurity.org/75340/its-never-too-late-to-say-im-sorry-sovereign-apologies-over-the-years/

[19] See: Nadine White, "Belize signals intention to remove Queen as head of state following royal visit" (The Independent, 26 March 2022) https://www.independent.co.uk/world/belize-queen-caribbean-head-of-state-b2044585.html

[20] Rachel Hall and Amelia Gentleman, op. cit.

[21] https://goodnewsjamaica.com/2022/03/30/joint-press-conference-of-advocate-groups-respond-to-royal-charm-offense-tour/

[22] https://jamaica.loopnews.com/content/sever-ties-uk-based-privy-council-pnpyo-urges-govt

The 1931 Statute of Westminster

John S Jeremie, “The Privy Council and the Caribbean,” *Law Quarterly Review* 2013, 129 (Apr), 169-172

Ezekiel Rediker, Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice, 35 Mich. J. Int'l L. 213 (2013).

Derek O’Brien, “The end of the Caribbean Court of Justice? On failed constitutional referendums in Grenada, and Antigua and Barbuda,” *Constitution Net,* 26 November 2018

Desiree Artesi, “The Privy Council and the Commonwealth,” *Counsel,* 31 January 2022 https://www.counselmagazine.co.uk/articles/the-privy-council-the-commonwealth

Reyes v The Queen [2002] UKPC 11

R v Hughes [2002] UKPC 12 and *Fox v The Queen* [2002] UKPC 13

Roodal v State of Trinidad and Tobago [2003] UKPC 78

Boyce v The Queen [2004] UKPC 32

John S Jeremie, “The Caribbean death penalty saga,” *Law Quarterly Review* 2012, 128 (Jan), 31-36

Matthew v State of Trinidad and Tobago [2004] UKPC 33

Watson v The Queen [2004] UKPC 34

Nervais v Regina [2018] CCJ 39

Leonardo J Raznovich, “The Privy Council's errors of law hinder LGBTI rights progress in the Caribbean,” *European Human Rights Law Review* 2022, 2, 65-77

McEwan v Attorney-General of Guyana [2018] CCJ 30

Chandler v Trinidad and Tobago [2022] UKPC 19

Oliver v Buttigieg [1967] 1 AC 115

Societe United Docks v Government of Mauritius [1985] AC 585

Grape Bay Ltd v Attorney General of Bermuda [2000] 1 WLR 574

Attorney-General v Antigua Times [1976] AC 16

Blomquist v Attorney-General of Dominica [1987] AC 489

Newbold v Commissioner of Police [2014] UKPC 12

Maya Leaders Alliance v Attorney-General [2015] CCJ 15 (AJ)

Nadine White, "Jamaica, Belize and Bahamas groups unite in reparations, republic push after Royal visit" (The Independent, 29 March 2022)

https://www.independent.co.uk/news/world/americas/jamaica-belize-bahamas-royal-family-b2046354.html

Nadine White, "Jamaican prime minister tells Prince William: ‘We intend to be an independent republic’" (The Independent, 23 March 2022) https://www.independent.co.uk/news/world/americas/jamaica-republic-prince-william-kate-visit-b2042465.html

Rachel Hall and Amelia Gentleman, "‘Perfect storm’: royals misjudged Caribbean tour, say critics" (The Guardian, 25 March 2022) https://www.theguardian.com/uk-news/2022/mar/25/william-and-kate-caribbean-tour-slavery-reparations-royals.

For an overview of important sovereign apologies, some relating to the transatlantic slave trade and colonialism, see: Daniella Stoltz and Beth Van Schaack, "It’s Never Too Late to Say “I’m Sorry”: Sovereign Apologies Over the Years" *Just Security*, 16 March 2021 https://www.justsecurity.org/75340/its-never-too-late-to-say-im-sorry-sovereign-apologies-over-the-years/

Nadine White, "Belize signals intention to remove Queen as head of state following royal visit" (The Independent, 26 March 2022) https://www.independent.co.uk/world/belize-queen-caribbean-head-of-state-b2044585.html

Rachel Hall and Amelia Gentleman, op. cit.

https://goodnewsjamaica.com/2022/03/30/joint-press-conference-of-advocate-groups-respond-to-royal-charm-offense-tour/

https://jamaica.loopnews.com/content/sever-ties-uk-based-privy-council-pnpyo-urges-govt