The Work of the Judicial Committee of the Privy Council with particular reference to the Turks and Caicos Islands and the wider Caribbean

Second Lecture of the Sir Richard W Ground QC OBE Memorial Lecture Series by the Right Honourable Sir Declan Morgan

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[1] This lecture is delivered in honour of Sir Richard Ground who served as Chief Justice in this jurisdiction from 1998 until 2004 and thereafter as Chief Justice in Bermuda from 2004 until 2012. His lengthy service has left a legacy of work that continues to influence the law here and in the wider Caribbean. It is therefore entirely appropriate that we should honour him in this way and I hope that in doing so his family will appreciate how important his memory is to others.

[2] I am also honoured to have been asked to deliver this lecture. I first met the Honourable Chief Justice Agyemang when we shared a platform at the last Commonwealth Law Conference. The Chief Justice delivered an impressive and well received paper on the independence of the judiciary and subsequently invited me to give this lecture. I was delighted to accept the invitation.

[3] My background is that I have served as a judge for nearly 20 years and was Lord Chief Justice of Northern Ireland from 2009 until 2021. I was then appointed to the supplementary panel of the Supreme Court of the United Kingdom and in that capacity continue to sit in both the Supreme Court and the Judicial Committee of the Privy Council.

[4] This evening I want to discuss the work of the Privy Council. I want to focus in particular on the impact of the Privy Council on the wider Caribbean and then on this jurisdiction. In doing so it is important to bear in mind that the function of the PC is to act as a final appeal court. To address the impact of the court it is necessary, of course, to consider the work of the court, the context within which it issued its judgments and the consequence of those judgments on the communities affected.

The early history

[5] The establishment of the Judicial Committee of the Privy Council was preceded by the work of the *curia regis* or royal council which was established in England around the time of the Norman conquest in 1066. It originally conducted the legislative, judicial and diplomatic business of state. In time many of these functions were transferred into a parliamentary system but the judicial aspect of the Court became the province of members of the royal household and those barons who attended the king, sometimes referred to as the small *curia*.

[6] The arrangements for attendance at the *curia* were flexible and informal and often those attending had no training in law. With the emergence of the British empire the decisions of the *curia* were taking on increasing political and economic importance. The flexibility and informality of the *curia* left it open to manipulation and corruption so that by the early part of the 19th century it was clear that these arrangements would have to change.

[7] The passing of the Privy Council Act in 1833 established the Judicial Committee in broadly the form that we see it today. There have been various incidental amendments to the legislation but membership of the Committee is confined to senior judges who have been appointed to the Privy Council although the anomaly of the Lord Chancellor as both judge and legislator continued to feature for a further 170 years. There are at present about 70 judges authorised to sit in the Privy Council and the members of the panels for the hearings, which invariably comprise a majority of judges serving in the United Kingdom Supreme Court, are allocated by the President of that court.

The work of the Privy Council

[8] The number of cases appealed to the new court were low in the early years but at that stage the wider Caribbean was second only to India in the volume of work. Most of those appeals arose from the Chancery Court and concerned the prioritisation of debts, the administration of estates and the validity of mortgages. It is to be remembered that 1833 was also the year in which the Abolition of Slavery Act was passed and the litigation probably reflected in part the impact of that legislation.

[9] By the middle of the 19th century the volume of appeal work from the wider Caribbean had tailed off. Although the general level of appeal work for the Privy Council had increased substantially, especially from India, the cases from the Caribbean on an annual basis were in the low single figures and generally arose from the administration of estates. That was to remain the position until the end of the second world war.

[10] The end of the war saw an increased focus on human rights. In December 1948 the United Nations adopted the Universal Declaration of Human Rights and in Europe that was followed by the adoption of the European Convention on Human Rights in 1950 which was ratified by the United Kingdom in 1953 and consequently applied to many parts of the Caribbean. As you know the American Convention on Human Rights came somewhat later in 1969.

[11] The focus on individual rights was also matched by the urge for independence and self determination in some of the biggest states in what had been the British Empire. Canada had ended criminal appeals to the Privy Council in 1933. In 1949 it established its own Supreme Court as the final court of appeal in all cases. Similarly India and Pakistan established their own Supreme Courts in 1950 as did South Africa.

[12] The effect on the workload of the Privy Council was considerable. In 1949 eighty appeals were dealt with and that was broadly consistent with earlier years. The following year the number of appeals dealt with dropped to 34. During the 1950s the workload of the PC never exceeded 44 on an annual basis and, on several occasions, fell below thirty.

[13] During the 1960s a host of African countries followed suit including Ghana, Nigeria, Kenya, Malawi and Uganda. In the 1970s Ceylon (now Sri Lanka), Malta and Guyana established their own final courts of appeal as did Malysia and Australia in the 1980s, Singapore in 1994 and New Zealand in 2004. Of course, Guyana and Barbados joined the Caribbean Court of Justice in 2005 and Belize, Dominica and recently Saint Lucia have now followed.

[14] Despite this the number of cases dealt with by the PC over the last 15 years continues to average something over 40 per annum and in 2022 reached 58, although that may have been something of an exception influenced by issues over the difficulty in conducting hearings during the pandemic. What has changed, however, is the influence of the Caribbean courts in the work of the PC. Up until the early 1980s the number of cases from the wider Caribbean was generally in the high single figures. It has gradually increased over the years and now cases from the Caribbean comprise more than 50% of the workload of the court. The major contributors to that workload are Trinidad and Tobago and Jamaica.

[15] This concept of a rights-based world found expression in various ways in the Caribbean and among those was the right to freedom of expression. In 1954 the Privy Council gave judgment in the case of Joshua v The Queen [1954] UKPC 42. The appellant had been convicted of causing a public mischief by a speech in which he alleged that the police were storing arms which it was intended should be used against the people when they fought for their rights. At his trial the judge directed the jury that if they were satisfied that he had uttered the words they must find him guilty on the basis that the words tended to undermine public confidence in the police. The Privy Council allowed his appeal. It concluded that it was for the jury as representatives of the citizenry to determine whether the words used and the context within which they were used caused prejudice to the public.

[16] Another area where this concept of rights became prominent was in industrial relations. There had been provision for the appointment of a Board of Inquiry in respect of trade disputes in Trinidad since 1939. In Beetham v Trinidad Cement [1959] UKPC 30 two union members had been dismissed in a cement factory apparently because of their union affiliation. The union sought to represent the men in their application to the company for reinstatement. The company ignored their correspondence.

[17] The Governor was approached by the Minister of Labour for whom the employer's stance was causing political difficulty and the Governor appointed a QC to chair a Board of Inquiry into the trade dispute under the 1939 Act as amended.

The company succeeded in having the appointment annulled before the Supreme Court on the basis that the issue of union recognition did not give rise to a trade dispute. The Privy Council allowed the Governor's appeal giving a wide definition to the term trade dispute including any difference arising from an employment relationship. The entitlement of the union to represent the men in challenging their dismissal satisfied this test.

[18] The following year in another trade dispute case, Bird v O'Neil and others [1960] UKPC 23 the issue was the liability of the trade union for the conduct of those on a picket line who had intimidated persons entering and leaving the picketed premises. Although the individuals guilty of the intimidation were made subject to an injunction, on appeal to the PC the union were successful in having the proceedings against it dismissed. Those taking part in the picket were not the servants or agents of the union and the union had no vicarious liability for them. Where the evidence indicated that the union encouraged peaceful picketing there was no basis for imposing responsibility for those who did not observe the advice.

[19] In that era those cases represented a rebalancing of power in industrial relations between unions and management. The clarity provided by these decisions opened the way to union membership and recognition and a different approach to the working environment.

Criminal cases

[20] There was a considerable increase in the amount of criminal work dealt with by the Board from the mid 1980s onwards. The Trinidad and Tobago case of Mohamed v The State [1990] UKPC 5 was a murder appeal in which the prosecution case was that the appellant had slit the throat of his wife from whom he was separated. Evidence for the prosecution was given by his 13 year old daughter. The trial judge had not conducted an examination to ascertain if she had sufficient understanding of the truth to give sworn evidence. On appeal it was contended that the evidence should not have been admitted and the verdict should, therefore, be quashed.

[21] The Court of Appeal agreed that the evidence of the child should not have been admitted without such an examination but dismissed the appeal applying the proviso that having regard to the admissible evidence in the trial no substantial injustice had occurred. On appeal the issue was what test the Privy Council should apply to the Court of Appeal's conclusion on the proviso. The Board concluded that it should only interfere with the appeal court's conclusion if the court had misdirected itself, considered irrelevant factors or given them a disproportionate weight that was gravely out of proportion to their true value. In that case the appeal court had considered all the relevant factors so the court's conclusion was respected.

[22] That, of course, gives rise to the perennial problem in appeal work. It is not appropriate for judges to intervene because each member of the appeal court may have dealt with the case differently. The caselaw suggests that the "gravely out of proportion" test set a high hurdle.

[23] I want to turn now to another area of the criminal law which has given rise to significant litigation in the Caribbean. In the 1960s a number of Caribbean states adopted constitutions which established an overarching law. The constitutions generally prohibited cruel and unusual punishments. In a number of cases the issue arose as to whether the mandatory death penalty became unconstitutional as a result.

[24] I want to begin with the Jamaican case of DPP v Nasralla [1967] UKPC 3. That was a case in which the appellant faced one count of murder on the basis that he shot and killed an escaping felon whom he was trying to arrest. The jury returned within one hour and unanimously found the appellant not guilty of murder. The judge then directed them to consider manslaughter as an alternative. The jury were unable to agree a majority verdict and were discharged. The case was adjourned.

[25] The DPP appealed to the Privy Council against a subsequent decision of the Court of Appeal holding that the manslaughter case could no longer be prosecuted. The accused relied upon section 20(8) of the constitution which stated that no-one should be retried for any offence of which he has been convicted or acquitted or for any other offence of which he could have been convicted at the trial. Since he had

been acquitted of murder and could have been, but was not, convicted of manslaughter the accused submitted that he was protected by the constitution from a further trial.

[26] Section 26(8) of the constitution provided that no law in force immediately before the appointed day should be held to be inconsistent with the relevant provisions of the constitution. The Board characterised this as a regime for saving existing law from the effects of the new protections of fundamental rights.

[27] Having so found the first issue for the Board was whether section 26(8) operated to preserve not just statutory law but also the common law despite the protection in section 20(8) of the constitution. The Board found no reason to restrict the meaning of the section to legislation only.

[28] The second issue was whether at common law prior to the passing of the constitution a voluntary Bill for manslaughter could have been presented in circumstances where the only count on the indictment was murder of which the accused had been acquitted but the jury disagreed on the alternative of manslaughter. Having reviewed the common law cases the Board concluded that the common law permitted a voluntary Bill to be preferred. The DPP's appeal succeeded.

[29] In 2002 the board dealt with the Belize case of Reyes v R [2002] UKPC 11. That was a case in which the appellant had murdered a neighbour by shooting him. There was some evidence that he suffered from a psychotic condition but there was no evidence of his state of mind at the time of the shooting. He was convicted of murder and sentenced to the mandatory death penalty provided by statute. The constitution of Belize provided that no person should suffer inhuman or degrading punishment or other treatment. The Board on appeal held that the mandatory death penalty offended the constitution and quashed the sentence of death, remitting the case to the Supreme Court to determine the appropriate punishment. He was subsequently sentenced to 40 years imprisonment.

[30] Roodal v The Queen [2003] UKPC 78 was another mandatory death sentence case. Heard in 2003, a five member panel decided by a majority of three to two that the saving provision in the Trinidad and Tobago constitution did not operate to prevent the modification of the existing law imposing a mandatory death sentence and consequently allowed the appellant's appeal and substituted a life sentence.

[31] In 2004 the Board dealt with two mandatory death sentence cases, Boyce v The Queen [2004] UKPC 32 from Barbados and Matthew v The State [2004] UKPC 32 from Trinidad and Tobago. In each case there had been provision for a mandatory death sentence prior to the adoption of the constitution and a constitutional prohibition on cruel and unusual punishments. Each jurisdiction had provided a savings clause in the constitution for existing laws.

[32] In light of some doubts about the correctness of the decision in Roodal the Board convened a nine person panel for the hearing of both cases. A majority of five concluded that the savings clause operated to exclude the constitutional protection from cruel and unusual punishment whereas four members of the panel would have interpreted the savings clause on a broad and generous way so as to make the sentence of death a discretionary decision for the court taking into account the different circumstances surrounding the commission of the offence. The Board noted the arrangements for consideration by the executive of whether to commute the sentence.

[33] The controversy over the imposition of a mandatory death sentence was not, however, over. The Caribbean Court of Justice addressed the issue in Nervais v The Queen [2018] CCJ 19. The principal argument accepted by the court was that section 11 of the Constitution of Barbados gave rise to justiciable rights and that the following fundamental rights set out in sections 12-25 of the constitution provided detail in respect of some of those rights. The mandatory death sentence deprived the citizen of the protection of law guaranteed by section 11(1)(c). Since section 11 was not caught by the savings provision in section 26, which only applied to sections 12-23, it could be modified pursuant to section 1 to comply with section 11(1)(c). Accordingly, the mandatory death penalty could be modified to become

discretionary. The CCJ went on, however, to conclude that the savings clause was "an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights". Since it was repugnant to the constitution as an unacceptable feature of the colonial past it could be modified to make the punishment by death discretionary.

[34] The latest pronouncement in this controversy is the decision of the Privy Council in Chandler v The State [2022] UKPC 19 on appeal from Trinidad and Tobago. A nine person panel was convened to determine whether to alter the position of the Privy Council on this issue. In a unanimous judgment the Board declined to change its position relying on the principle of *stare decisis*. It noted that the savings clause applied to all existing laws and that the interpretation adopted by the Board had been the basis upon which the citizens of Trinidad and Tobago had conducted their affairs.

[35] The Board acknowledged that it was for CCJ to develop its own jurisprudence for the countries for which it is responsible and that in doing so it was free to differ from the approach of the Privy Council. It pointed out that the decision in Nervais was distinguishable from the Board's decision in Matthew as the constitution of Trinidad and Tobago did not have an equivalent to section 11 outside the reach of the savings clause. It acknowledged, however, that the reasoning of the CCJ differed from that of the Board in Matthew. On the point about the reach of the colonial past the Board noted that the 1976 constitution in Trinidad and Tobago was adopted by an independent people as it transitioned to a republic.

[36] Whether or not there will be more to say on this I do not know but the controversy over the mandatory death penalty has been ongoing for more than 20 years. It is clearly a matter of the utmost importance. Each final court is of course entitled to take what it considers to be the appropriate interpretation of the constitutional provisions for which it is responsible, but it is unfortunate that on an issue of such importance the Board and the CCJ have reached different conclusions.

Recent Civil litigation

[37] I have already noted the considerable increase in workload from the Caribbean since the mid 1980s. A great deal of that was consequent upon increased economic activity in this region which brought with it an increased need for clear regulatory principles. That included clear guidelines on the role of the court.

[38] Examples of that were two cases in the 1980s, Wallace Enterprises v Rolle [1985] UKPC 3 from the Bahamas and Industrial Chemicals v Ellis [1986] UKPC 18 from Jamaica. In each case the appeal court reversed the findings of fact of the trial judge and the Privy Council reinstated the first instance decisions noting the great respect which is due to findings of fact made by the trial judge. That mirrored the conclusion in Mohamed on the criminal side.

[39] The range of civil work dealt with by the Board over the years has been considerable. Property disputes of various kinds have been to the fore but other critical issues to public and private life have required determination.

[40] By way of example in its recent caselaw the Board dealt with the availability of disability benefits in The Permanent Secretary and others v Ruth Peters [2023] UKPC 23. In Maharaj v The Cabinet of the Republic of Trinidad and Tobago [2023] UKPC 17 the Board was faced with a dispute over the terms of office of elected councillors and aldermen following legislation to review the operation of local government.

[41] Traille Caribbean v Cable and Wireless Jamaica [2023] UKPC 19 was a dispute between companies involved in the telecommunications industry. Traille was an intermediary arranging the transfer of international calls. Cable and Wireless were the network provider. The issue concerned the obligation under the contract between them to pay telephone call tax and the liability of the intermediary on an undertaking in damages given to obtain a mandatory injunction requiring the network provider to enable the intermediary to have access to the network.

[42] Attorney General of Trinidad and Tobago v Transalvage Enterprises Ltd [2023] UKPC 26 was a procurement appeal concerning the consequence of a failure to utilise the prescribed statutory mechanism of the Central Tenders Board in a contract for a harbour development scheme. It was agreed that the failure to use the CTB

mechanism rendered the contract void and the question was, therefore, whether a claim for unjust enrichment could be defeated on the basis that it stultified the policy of the Central Tenders Board Act 1961. The Board upheld the quantum meruit claim but there was a lively dissent from Lord Briggs!

[43] I have mentioned these cases only because they demonstrate the variety and complexity of the Board's work and the importance of decisions in these areas for civil administration and the encouragement of commercial activity.

Turks and Caicos

[44] There has been a marked change in the number of appeals from the Turks and Caicos to the Privy Council in recent years. Between 1996 and 2008 there were only three cases heard on appeal by the Board from this jurisdiction. Kellar v Williams [2000] UKPC 4 concerned directions to a liquidator as to the treatment of a fund. Bay Hotel and Resort Ltd v Cavalier Construction [2001] UKPC was an unsuccessful attempt to overturn an arbitration award in a construction contract dispute and Kellar and another v Williams [2004] UKPC 30 was a dispute about costs arising from two pieces of drawn-out litigation including the case of the same name referred to earlier.

[45] The position between 2009 and 2023 is markedly different with a total of 16 cases dealt with by the Privy Council during that period. On analysis of the cases eight were concerned with disputes over the development and use of land, six were concerned with various aspects of regulation, one concerned the status of a company pursuing a winding up and one case was criminal.

[46] The regulatory issues were varied. One case in 2009 concerned a challenge to the terms on which the appellant was appointed to the position of chair of the Public Service Commission. In 2010 consideration was given to the construction of the legislation providing for the charges for access to the electricity grid. A 2012 case challenged the lawfulness of the publication of adverse findings in a report commissioned by the Governor.

[47] In 2014 the issue was the nature the licence granted to a telecommunications operator to use certain frequencies. In 2015 issue was unsuccessfully taken with the tenure of a judge appointed to hear a criminal trial. In 2021 there was a challenge to emergency regulations dealing with hearings during the Covid pandemic and in the same year the powers of the Integrity Commission to require the production of documents on an informal investigation were clarified.

[48] The point to be made about these cases is that they demonstrate the existence of an economy which is engaged in the development of the necessary infrastructure for economic development and the corresponding role of the courts in ensuring confidence that such economic development takes place within lawful boundaries. The regulatory cases also provide clarity to the powers and constraints of the constitutional, legislative and economic structures designed to support the community.

Challenges

[49] Many aspects of our lives are being threatened by challenges that have emerged and strengthened during this century. Crime has now become globalised with cybercrime forming an increasing proportion of criminal activity. That affects not just individual citizens who may have their identity or data stolen but also large public and private organisations facing ransom demands because of viruses infiltrating their systems.

[50] Drug crime has become endemic. It has spawned a network of national and international organised crime groups leading to violence and death on our streets. Too many of our children have been groomed into participation in these organisations. It is an increasing rather than decreasing problem and it is being managed rather than being solved.

[51] The way in which financial services are delivered is unrecognisable. Binding contractual relations can now be established through Blockchain and transactions involving financial derivatives may have huge financial consequences. Title to property, either fixed or moveable, may depend on the ownership of a piece of

computer code. Distinguishing between fact and fake news is problematic. This lecture may have been composed by AI!

[52] Climate change is already having an impact on the movement of people and is likely to increase substantially. There are international conventions governing how some of the consequences of these movements should be accommodated but as we have seen in some jurisdictions the courts and legislators may find themselves in disagreement.

[53] The mechanisms for dispute resolution have also been changing. The influence of soft law whether from the United Nations and its committees or international courts such as the European Court of Human Rights and the Inter American Court of Human Rights has increased. In commerce there has been the emergence of specialised final courts in commercial matters in places like Singapore, Dubai and Kazakhstan and of course Caricom was instrumental in establishing the Caribbean Court of Justice in this area.

[54] The challenges are considerable but as a final court of appeal the Privy Council has demonstrated its longevity through past periods of major disturbance. It has demonstrated flexibility through the pandemic, and it has developed IT systems to enable greater communication and access to information. Its judges have shown independence and determination to uphold the rule of law most recently in the domestic litigation over Brexit and the United Kingdom's proposals on migration. It is financially supported by the UK Government and is not a drain on the finances of those who use it.

[55] This is not a comparative exercise. The Privy Council has recognised that the CCJ must develop its jurisprudence as it sees fit. I merely wish to record the high level of service which the PC has provided and continues to offer to many parts of the Caribbean. It is a final court of appeal in which the public can have confidence.