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## Independent Jamaica Council for Human Rights Ltd and Others v Marshall-Burnett Case (Privy Council UK)

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## **Independent Jamaica Council for Human Rights Ltd and Others v Marshall-Burnett (Privy Council)**

*P Sean Morris*

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### **A. Background**

- 1 In *Independent Jamaica Council for Human Rights (1998) Ltd and Others v Marshall-Burnett and Another (Jamaica)* Privy Council (3 February 2005) (UK) (hereinafter ‘*Jamaica Constitutional Case*’), the Judicial Committee of the Privy Council (JCPC) held that the entrenched provisions of the Constitution of Jamaica can be amended by the Parliament providing that the procedures in Section 49 of the Constitution are met (see Jamaica Constitution Order in Council: 23 July 1962 (Amended to 2011)). The decision reinforces the sovereignty of the Jamaican Constitution over that of the Jamaican Parliament. The decision voids the three bills that the Jamaican Parliament passed that would have abolished appeals to the JCPC and replaced it with the **Caribbean Court of Justice (CCJ)**. According to the JCPC, the CCJ did not guarantee the same protection that are entrenched in the Jamaican constitution. The CCJ was established in 2001 by Caribbean heads of states and came into operation in 2005 as a regional appellate tribunal for the **Page: 1**  
**Caribbean Community (CARICOM)**.

### **B. Facts of the Case**

- 2 In 2004 the Jamaican Parliament passed a trio of legislations implementing the CCJ (The Caribbean Court of Justice (Constitutional Amendment) Act 2004, Act 20 of

2004; The Caribbean Court of Justice Act 2004, Act 21 of 2004; and, The Judicature (Appellate Jurisdiction) (Amendment) Act 2004, Act 19 of 2004). The bills were to (1) abolish the JCPC as the final appellate court and replace the JCPC with the CCJ, (2) to implement in Jamaican law the international agreement establishing the CCJ, and (3), substituting the Director of Public Prosecution (DPP) right of appeal to the JCPC in criminal matters with the right of appeal to the CCJ. The parliamentary procedures used to adopt the bills faced legal action at the Jamaican Supreme Court while the bills were still going through Parliament. The Supreme Court dismissed the challenge as premature. However, the Jamaican Court of Appeal heard the case on the merits but rejected the challenge. On 30 September 2004, the Governor General gave ascent to the bills, but the appellants appealed to the JCPC, and as a result, there was an undertaking that the bills would not enter into force until after the proceedings at the Privy Council.

### **C. Procedural Issues: Entrenched versus Deeply Entrenched**

- 3 At the outset, the Privy Council cautioned that it was a question of whether the procedural means set out in the Constitution had been met when the three bills were passed. Specifically, at issue were the *entrenched* and *deeply entrenched* provisions of the Constitution and the appropriate methods to amend those provisions (→ *Page: 2 entrenched clauses*). Section 110 of the Constitution provides for a right of appeal to the Privy Council, and the first bill, the CCJ Constitutional Amendment Act 2004, altered Section 110. Section 49 in general set out the entrenched and deeply entrenched provisions of the Constitution. Section 49(3) and (4) sets out how deeply entrenched provisions can be amended, including through a referendum after the amending legislations have been approved by two-thirds of members of each house (*Jamaica Constitutional Case*, para. 10). To amend the entrenched provisions of the constitution, as set out in Section 49(2) requires the same procedures for the deeply entrenched provisions, except that there would be no need for a referendum. The other provisions of the Constitution are also subject to amendment by a majority vote by members of the House of Representatives and the Senate, but there are also safeguards in Section 54(1) from amending those provisions.
- 4 The Jamaican Supreme Court which has been in operation since 1880 is entrenched in the Constitution, and so is the Court of Appeal, in operation since 1962. However, appeal to the Privy Council, as set out in Section 110, is not entrenched, and only requires a majority vote in Parliament, if need be, to repeal. If that had been the case, then the entrenched Court of Appeal could constitute the ‘supreme judicial authority’ given that its ‘constitutional position is buttressed by safeguards’ (*Jamaica Constitutional Case*, para. 16) designed to guarantee independence. The appellants argued that the creation of the CCJ would not enjoy the entrenched provisions of the Supreme Court and the Court of Appeal. Furthermore, they submitted that the

parliamentary procedure followed was not that mandated by the Constitution for amendment of an entrenched provision ... [I]t would make a mockery of the Constitution if the safeguards entrenched to ensure the integrity of legal process in Jamaica could be circumvented by creating a superior court enjoying no such constitutional protection (*Jamaica Constitutional Case*, para. 16).

- 5 For the appellants, what mattered was the ‘the substance of the law’ and ‘not the form’ (ibid.), and therefore, the three bills ‘impliedly alter entrenched provisions of the constitution’ and did not follow the constitutional procedures for altering entrenched provisions.

#### **D. The Decision**

- 6 The Privy Council held that the Jamaican Constitution was sovereign, and the three bills were invalid under the Constitution. The Privy Council began its analysis by agreeing with *Kariapper v Wijesinha*, Privy Council [1968] AC 717, 743 (UK), that the words ‘amend or repeal’ also by implication meant ‘alter’ (*Jamaica Constitutional Case*, para. 19) and then turned to the question of whether the proper constitutional procedures were followed or if the CCJ Agreement was different. If different, the Privy Council reasoned, then ‘the effect of the legislation is to alter, within the all-embracing definition in Section 49(9)(b) ... [and] an important function of a constitution is to give protection against governmental misbehaviour, and the three Acts give rise to a risk which did not exist in the same way before’ (*Jamaica Constitutional Case*, para. 21). According to the Privy Council, the test to determine whether the three bills followed the correct constitutional procedures was a matter of substance:

[T]he test is not whether the protection provided by the CCJ Agreement is stronger or weaker than that which existed before but whether, in substance, it is different, for if it is different the effect of the legislation is to alter, within the all-embracing definition in Section 49(9)(b) .... The Board is driven to conclude that the three Acts, taken together, do have the effect of undermining the protection given to the people of Jamaica by entrenched provisions of Chapter VII of the Constitution (*Jamaica Constitutional Case*, para. 21).

- 7 It should at once be pointed out that the Privy Council stated that the Jamaican people could abolish appeal to Her Majesty in Council as ‘they are fully entitled to take appropriate steps to bring its role to an end’ (para. 4) providing that the appropriate constitutional procedures for amendments are followed. The ruling can be characterized as a victory for ‘constitutional sovereignty’ when measured against the Westminster model of → *parliamentary sovereignty*. In that sense, what the ruling did was to put a dent into the limits of the law-making powers of the Jamaican Parliament as a democratically elected body. Moreover, the ruling was just one in a long line of judgments that displayed the rocky relationship that sovereign countries have with the Privy Council who still enjoy a right of appeal (see also → *constitutional adjudication of the Privy Council*).

## **E. Parliamentary Sovereignty versus Constitutional Sovereignty: an Assessment**

- 8 There are three ways to examine the constitutional adjudication of this case. The first is to examine it in light of similar decisions that the Privy Council made in the last century pertaining to current and former jurisdictions of the Court such as Ireland or Canada. Hence, when compared with *Robert Lyon Moore and Ors v the Attorney General of the Irish Free State*, Privy Council [1935] AC 484 (UK) when the Privy Council had to consider whether the Irish Parliament had the authority to amend the article of Agreement for a Treaty between Great Britain and Ireland (Anglo–Irish Treaty (1921))—the rulings are strikingly different. In *Moore v Attorney General*, the Privy Council agreed that legislations passed were not in contravention of the Anglo–Irish Treaty (which is not an act of the Irish Parliament). The Jamaican Constitution, being an Order in Council—and not act of the Jamaican Parliament—does provide for Parliament to amend it, which they duly exercised in the passing of the three bills. However, in this context, it was not a matter of power or authority when compared to *Moore v Attorney General*; it is whether the provisions set out in Section 49 of the Jamaican Constitution are met. This leads me to the second way in which this case can be assessed: the issue of ‘form of the law’ versus that of the ‘substance of the law’. The Privy Council citing *Hinds v the Queen*, Privy Council [1977] AC 195 (UK) reasoned that ‘it is the substance of the law that must be regarded, not the form’ (*Jamaica Constitutional Case*, para. 16). Nevertheless, *Hinds* was different—it was about legislative power for specific crimes—in that it extended the jurisdiction of the Jamaican courts, and therefore, the Privy Council in *Jamaica Constitutional Case* paid attention to substance, in a way, that undermines the development of constitutional authority within Jamaica. In this regard, to uphold the perception, as set in *Hinds* and reinforced in *Jamaica Constitutional Case*, that substance is a higher form of law—over that of the form of law, represents incredulity on how far developments in Caribbean constitutional law are when the final arbiter is not an indigenous judicial institution.
- 9 The third and final issue that can be raised is parliamentary sovereignty versus constitutional sovereignty. Although Jamaica adopted the Westminster model of parliament, there is one noticeable departure. The UK enjoys parliamentary sovereignty where parliament is the supreme lawmaker, and Jamaica enjoys constitutional sovereignty. This is a point the ruling acknowledges:

[I]t is also true that when the people of Jamaica adopted their constitution as an independent nation in 1962 they made certain very significant departures from the constitutional practices of the United Kingdom ... Thus, the Constitution and not, as in the United Kingdom, Parliament is ... to be sovereign’ (para. 9).

Section 2 of the Jamaican Constitution provides that ‘if any other law is inconsistent with this constitution, this constitution shall prevail, and the other law shall, to the extent of the inconsistency, be void.’ But the Parliament failed to recognize the Constitution as sovereign in that the Constitution of Jamaica requires a two-thirds majority in a referendum to amend its entrenched provisions and no such

referendum was held. In addition, in most instances, the two political parties have been wary of putting to popular vote any constitutional matters. Moreover, the government when it passed the three bills did not allow the six-month requirement for the bills to be tabled before Parliament.

## **F. Follow-Up to the Decision**

- 10 At present, Jamaica, like much of the English-speaking Caribbean Commonwealth nations, has two constitutional courts: The Privy Council and the CCJ. The CCJ is unique in that it is a two-tier system with original and appellate jurisdiction. In original jurisdiction, the CCJ can decide on matters relating to the integration block in the region—the Caribbean Community (this equals to an international tribunal for the Caribbean)—whilst its appellate jurisdiction (for all civil and criminal matters) has only four states signed up so far: Barbados, Belize, Dominica and Guyana. In 2015, the Jamaican Government reintroduced the three bills in Parliament (The Constitution (Amendment) (Caribbean Court of Justice) Act 2015; The Judicature (Appellate Jurisdiction) (Amendment) Act, 2015 and The Caribbean Court of Justice Act, 2015). However, the then government changed in a 2016 general election. Presently there are no initiatives to move forward with replacing the Privy Council in Jamaica. The Justice Minister, Senator Mark Golding, who then reintroduced the three bills in 2015, addressed various reasons for the bills' reintroduction. However, in his parliamentary speech of 16 October 2015 he only touched upon one issue from the ruling—the question of referendum that was raised in the Privy Council decision of 2005, and he explained that 'a referendum would be a huge mistake.' Thus, in legal (and political) terms, the constitutional threshold set out in *Jamaica Constitutional Case* would be the subject of political decision and not the people of Jamaica.
11. The decision, like many other decisions from the Privy Council relating to Caribbean jurisprudence has been met with apprehension in some quarters in the Caribbean. On a broader level, there has been the concern that the independence of the CCJ could not be guaranteed as the same level of protection provided by the Jamaican constitution under the entrenched provisions. However, the appointments of judges to the CCJ is the task of an independent body – the Regional Judicial and Legal Services Commission (RJLSC) to minimise any form of political interference.

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