

“The abolition or retention of the Privy Council as the final Court of Appeal for New Zealand: Conflict between national identity and legal pragmatism”

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1 Introduction

The recent announcement by the Attorney-General of New Zealand of a five-judge Supreme Court to replace the Judicial Committee of the Privy Council² represents the penultimate stage in removing the right of appeals to the Privy Council. This has been all but inevitable since the release by the Attorney-General of a discussion paper proposing the abolition of appeals to the Privy Council. While Miss Wilson might like to have all-party political support for her measure, she did not receive whole-hearted support from the legal community³ or from much of the business sector.⁴

Ironically, and perhaps more seriously for New Zealand, the loss of the right of appeal to the Judicial Committee of the Privy Council may proceed from United Kingdom initiatives,⁵ rather than from the choice of the people, Government or legislature of New Zealand.

2 Appeal to the Queen in Council

Appeal from the Court of Appeal of New Zealand to the Judicial Committee of the Privy Council is in constitutional theory appeal to Her Majesty The Queen in Council. This legal theory is reflected in the practice of the Lords of the Judicial Committee of the Privy Council not normally giving individual judgements, but rather collectively delivering an opinion to The Queen.⁶ The process of appealing the judgement of a final court of appeal to the Queen in Council does not strictly amount to the existence of a further tier of appeal within the ordinary judicial hierarchy, but is an appeal directly to the fount of justice.

This is the right of every subject of the Crown. In particular, it formed one of the rights of British subjects which has arguably been guaranteed to the Maori people by the Treaty of

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²Scheduled for implementation by 2004; Press Release, 15 April 2002.

³For the legal community; “Council endorses decisions by Privy Council meeting” 13 Law News (12 April 2001) p 3; “Meeting over Privy Council access sought with Attorney-General” 11 Law News (30 March 2001) pp 1, 5.

⁴Represented by such bodies as the Business Roundtable, the Employers Federation, the Auckland Chamber of Commerce, and the main accounting firms; Irene Chapple, “Law Lords retain their appeal” New Zealand Herald 3 December 2001 D1.

⁵See Le Sueur and Cornes, *The Future of the United Kingdom’s Highest Courts* (2001); Le Sueur and Cornes, *What is the Future for the Judicial Committee of the Privy Council?* (2001).

⁶Although dissenting opinions have been permitted since 1966, see the Judicial Committee (Dissenting Opinions) Order 1966 (SI 1966/No 1100) (UK).

Waitangi 1840.⁷ Many Maori groups appear to have seen the retention of the right of appeals as an aspect of the constitutional link with the Crown. Thus, the right of appeal is not simply the right to an additional judicial tier, it is a link with the Sovereign, however fictitious the link may be.

3 *Tiers of appeal*

The question of tiers of courts is very important, particularly in a unitary state such as New Zealand. It can be argued that justice is served by having an extenuated two-tier system of appeal, though it could be argued that litigation should be brought to a speedy end. Allowing the right of appeal to the Privy Council does allow arguments to develop and mature but there must be a conclusion to appeal rights at some point. An extended appeal system is indicative of a sophisticated legal system.⁸

The opposition to all three original proposals (no appeal beyond the Court of Appeal, a two-tier Court of Appeal, or a two-tier High Court) has been recognised by the Attorney-General,⁹ who subsequently proposed a stand-alone Court of final appeal above the existing Court of Appeal.¹⁰ The stance of most opponents of abolition remains, however, unchanged,¹¹ if only because of concerns about the recruitment of judges of sufficient calibre to fill the proposed new court.

4 *Numbers of appeals to the Privy Council*

It was once fashionable to minimise the importance of the Privy Council to the New Zealand jurisdiction on the grounds that only a handful of appeals were heard from New Zealand. This claim, repeated in the discussion paper, does not bear serious study. On a population basis, and as a percentage of the total number of civil and criminal actions, the number of appeals to the Privy Council from New Zealand is no less significant than the number of appeals to the House of Lords.¹²

5 *Prestige and wisdom of the Privy Council and its judicial independence*

⁷Chapman, “The Treaty of Waitangi- Fertile Ground for Judicial (and Academic) Myth-making” [1991] NZLJ 228 and the rejoinders- McHugh, “Constitutional Myths and the Treaty of Waitangi” [1991] NZLJ 316 and Williams, “Chapman is Wrong” [1991] NZLJ 373.

⁸Though it could be a sign of a lack of coherence or piecemeal development- something which is unlikely given that the system of courts has been subject to more than one comprehensive review; *The Royal Commission on the Courts* (1978)- the Beattie Report; Law Commission, *The Structure of the Courts* (1989) NZLC R7.

⁹Which was rejected by the majority of the 70 submissions received in response to the discussion paper; Chapple, “Law Lords retain their appeal” New Zealand Herald 3 December 2001 D1.

¹⁰Chapple, “Law Lords retain their appeal” New Zealand Herald 3 December 2001 D1.

¹¹Chapple, “Law Lords retain their appeal” New Zealand Herald 3 December 2001 D1.

¹²Lord Chancellor’s Department, *Judicial Annual Report 1999* (2000, available also at http://www.courts.govt.nz/publications/Judiciary_report1999.pdf).

The long history of the Privy Council dictates that it has a high degree of prestige. But its role in the New Zealand legal system is entirely a product of history, and does not depend upon prestige.

New Zealand has no entrenched constitution, no second chamber of Parliament, nor entrenched Bill of Rights.¹³ The Privy Council could be seen, at least to some extent, in substitution for these institutions and assisting in upholding the rights of the individual against arbitrary conduct by the government- and has certainly been seen as such by some Maori groups.¹⁴ This is particularly important given the form that the decisions of the Privy Council take- advice to the Crown.

6 *Costs and savings of the Privy Council*

Considerable expense is involved in pursuing an appeal to the Privy Council, although Court of Appeal hearings are hardly cheap. Frequently the parties will be required to brief English counsel, and it is necessary that the evidence which is submitted to the Privy Council be in a printed form. But the New Zealand taxpayer can avoid some cost as the Privy Council is maintained by the British taxpayer.¹⁵

It remains to be seen whether the replacement of the London-based Privy Council with a Wellington-based Supreme Court will result in savings to litigants. The added cost to taxpayers is unavoidable.

7 *Stare Decisis, Precedence and the Privy Council*

At present the Court of Appeal has felt itself to be strong enough to differ, not only from the House of Lords,¹⁶ but also the Privy Council- although strictly it is bound by its opinions, at least those decided on matters appealed from New Zealand and on all other matters unless they are demonstrably decided on legal situations which have no bearing of the position in New Zealand.¹⁷

The freedom of the judiciary to develop in novel directions in New Zealand is not necessarily hampered by the presence of the Judicial Committee of the Privy Council, which is, after all, a part of the *New Zealand* judicial hierarchy.

8 *Appeals from Common Law jurisdictions to supra-national and international courts*

¹³For a review of the constitution, see Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001).

¹⁴Valuable as an external channel for redress, as well as an appeal to the Crown; Interview with Georgina te Heuheu, 7 December 1999. Examples of such recourse include *New Zealand Maori Council v Attorney-General (New Zealand)* [1994] 1 AC 466 (PC).

¹⁵For details of which see Le Sueur and Cornes, *The Future of the United Kingdom's Highest Courts* (2001) 151-153.

¹⁶By which the Court of Appeal is not bound; *Brooker v Thomas Borthwick & Sons (Australasia) Ltd* [1933] NZLR 1118, 1121 (PC). Though see the judgement of Myers CJ in *Russell v Russell* [1933] NZLR 548, 557.

¹⁷*Bognuda v Upton and Shearer Ltd* [1972] NZLR 741 cf. *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 (HCA).

There is nothing unusual in a country having provision for the decisions of non-domestic judicial bodies apply in domestic case law, aside from the extra-territorial jurisdiction of such as the International Court of Justice,¹⁸ the European Court of Justice,¹⁹ and Court of First Instance of European Communities.²⁰

The Eastern Caribbean Supreme Court (formerly known as the West Indies Associated States Supreme Court), based on St Lucia, hears cases from Antigua and Barbuda, the British Virgin Islands, Dominica, Montserrat, St Christopher and Nevis, St Lucia, and St Vincent. Each state possesses a High Court with a resident judge, and appeals lie to an itinerant Court of Appeal, consisting of a Chief Justice and three Justices of Appeal.²¹

There are now many instances of supranational courts, over most of which New Zealand has little or no influence.²²

9 *Appeals to the Privy Council from other Commonwealth countries*

Many Commonwealth countries retain appeals, including 17 independent Commonwealth countries, as well as 9 dependencies.²³ Appeals were abolished by Ireland in 1932, Canada 1933-49,²⁴ and Australia in 1968 (federal jurisdiction)²⁵ and 1986 (state jurisdictions).²⁶ New Zealand remains a major source of appeals.

Following the lead of their former colonial masters Australia, Papua New Guinea has abolished appeals. However 11 of 16 realms retain appeals- Antigua and Barbuda, Bahamas, Barbados, Belize, Grenada, Jamaica, New Zealand, St Kitts, St Lucia, St Vincent and the Grenadines, and Tuvalu. In addition to these 5 countries which do not acknowledge the Queen as Sovereign retain the appeal. These include the Sultanate of Brunei, and 4 republics- Dominica, Kiribati, Mauritius, Trinidad and Tobago.²⁷

10 *National independence, nationalism and Privy Council*

¹⁸Articles 7, 92-96 of the United Nations Charter, Statues of the International Court of Justice.

¹⁹Article 35, Treaty on European Union; Article 7, Treaty Establishing the European Community, Rome, 25 March 1957.

²⁰Decision 88/591/ECSC, EEC, Euratom, 24 October 1988.

²¹Agreement was reached in principle in February 2001 to replace the Judicial Committee of the Privy Council with a Caribbean Court of Justice; Le Sueur and Cornes, *The Future of the United Kingdom's Highest Courts* (2001) 103.

²²The law is, in any event, becoming increasingly globalised; Dr Gordon Cruden in a letter to LawTalk 562 4 June 2001 p 2.

²³Crown Law Office, *Reshaping New Zealand's appeal structure* (2000).

²⁴Pierson, *Canada and the Privy Council* (1960); British North America Act 1949 (12 & 13 Geo VI c 22) (UK).

²⁵Privy Council (Limitation of Appeals) Act 1968.

²⁶Australia Act 1986. For some of the background to this latter move see Blackshield, *Abolition of Privy Council appeals: judicial responsibility and 'The law for Australia'* (1978).

²⁷*Whitaker's Almanack 2000* (2001).

In some countries considerations of nationalism have featured prominently in the abandonment of the right of appeal to the Privy Council.²⁸ It is considered to be an infringement of national sovereignty that a court in another country should be entitled to deliberate upon matters of internal concern. This is the crux of the argument for abolition advanced by the present Attorney-General of New Zealand.²⁹

Yet, many countries make use of various expedients to achieve the best and most cost-effective judicial systems. The Eastern Caribbean countries had a joint Court of Appeal. This was not seen as unduly infringing the independence of the domestic judiciaries, nor does the submission of New Zealand and almost all other countries to the jurisdiction of the International Court of Justice.³⁰

11 Concerns about judicial quality

There have also recently been many who have argued in favour of the Privy Council by criticising the Court of Appeal.³¹

It is ironic that at the time the latest politically-motivated attempt to abolish appeals is being made, the Privy Council itself should provide what its supporters see as a strong argument. In *Harley*,³² the Privy Council advised that the Court of Appeal had shown “a fundamental defect in its reasoning”.³³

This is not an isolated case. Although quality comparisons with the Privy Council are invidious,³⁴ they will occur.

12 Reforms of the highest courts of the United Kingdom- and the possible effect on New Zealand

The reform of the Judicial Committee of the Privy Council may yet occur, not because New Zealand decides to abolish appeals- though a significant number of its cases are heard from this country- but because constitutional changes in the United Kingdom may require this. The advent of Article 6 (1) of the European Convention on Human Rights³⁵ raises the prospect of a challenge to the Law Lords’ positions as members of the legislature. The devolution of

²⁸ Australia and Canada, and many of the newer Commonwealth countries.

²⁹ Crown Law Office, *Reshaping New Zealand’s appeal structure* (2000) 1.

³⁰ There has also been steady growth in the number of international courts, and of their jurisdiction.

³¹ See, for instance, Dr Gordon Cruden in a letter to LawTalk 562 4 June 2001 p 2; Zahir Mohammed in a letter to LawTalk 562 4 June 2001 p 2.

³² *Harley v Robert McDonald Glasgow Harley v Robert McDonald (New Zealand)* [2001] UKPC 20 (10th April, 2001).

³³ *Harley v Robert McDonald Glasgow Harley v Robert McDonald (New Zealand)* [2001] UKPC 20 (10th April, 2001) para 65.

³⁴ Farmer, “The Judicial Process in New Zealand” (2001) 1.

³⁵ Incorporated into United Kingdom law by the Human Rights Act 1998.

legislative and executive functions to new Scottish, Northern Ireland, and Welsh institutions has given the Judicial Committee of the Privy Council new responsibilities.³⁶

The permutations of constitutional reform in the United Kingdom are as likely to lead to the reform or abolition of the Judicial Committee of the Privy Council,³⁷ as the politically-motivated desire of the present Government are to end the right of appeals from New Zealand. In an age of increasing globalisation it must be regretted that the lingering imperial link will have little prospect of survival, whatever the attitude of the New Zealand Parliament.

13 *Conclusion*

After some decades of debate the legal profession and the commercial community in New Zealand have yet to be convinced that there are good reasons why the right of appeal to the Judicial Committee of the Privy Council should cease.³⁸ They remain, generally, convinced that there are many reasons why it should be retained. There may be some political reasons why the right of appeal to the Judicial Committee of the Privy Council should cease, but equally valid reasons why it should be retained. The question is whether legal and commercial considerations, or the concept of national independence, should prevail.

The latest Government proposal, and the discussion paper upon which it is based, fails to offer convincing reasons for abandoning the Privy Council, beyond an assertion of national identity and independence. Making the Privy Council a more obviously New Zealand tribunal would achieve this end. This could be achieved without losing the irreplaceable benefits of continuity, tradition, informed detachment, and expertise of an older and larger society. Arguments for the retention of this legal link are not for sentimental reasons, they are based on realism and efficiency, and a desire to share in a wider legal heritage.

However, New Zealand may find itself, yet again, in the invidious position of making changes to its own institutions or procedures because of decisions taken overseas.

³⁶Scotland Act 1998, Northern Ireland Act 1998, and the Government of Wales Act 1998.

³⁷See Le Sueur and Cornes, *The Future of the United Kingdom's Highest Courts* (2001).

³⁸See New Zealand Business Roundtable, *Appeals to the Privy Council: a submission to the Attorney-General on the Solicitor-General's report on issues of termination and court structure in relation to appeals to the Privy Council* (1995).