

Final Appeals:
Options Open to CARICOM Member States

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Introduction

The Caribbean Law Institute Centre (“CLIC”) conceptualized, and over the past year executed, a program of “country visits” by a 2-person Team to Member States of the Caribbean Community. The purpose of these visits was to stimulate discussion on acceptance of the appellate jurisdiction of the Caribbean Court of Justice (“CCJ”).

The Team, consisting of Professor Simeon McIntosh and I, visited 10 of the 12 CARICOM states participating in the CARICOM Single Market and Economy, (“CSME”) namely: Belize (March 9-12, 2009); Grenada (May 14-15, 2009); Antigua and Barbuda (November 26-28, 2009); Jamaica (January 20-23, 2010); St. Vincent and the Grenadines (February 11-13, 2010); Dominica (February 18-19, 2010); Suriname (March 7-11, 2010); St. Kitts and Nevis (March 25-27, 2010); St. Lucia (March 31-April 1, 2010); and Trinidad and Tobago (April 14-15, 2010).

The other two CSME participants, Barbados and Guyana, had previously accepted the CCJ’s appellate jurisdiction. They were therefore spared a visitation by the CLIC Team.

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During our visits, Professor McIntosh and I met and had discussions with a wide cross-section of persons including: presidents; governors-general; prime ministers; ministers; attorneys-general; leaders of the opposition; presidents of bar associations; civil servants and public sector employees; academics; the general public; and the media.

From our observations, it seems fair to report that in none of the countries was there implacable opposition to joining the CCJ appellate jurisdiction. Rather, there were different perspectives on the options for making the CCJ the final court of appeal. Some of these perspectives were held because of policy considerations. Others were dictated by the need for fidelity to the constitution reinforced by the Privy Council decision in *Independent Council for Human Rights (1998) v Hon. Syringa Marshall-Burnett* [2005] UKPC 3. In that case, it will be recalled, the Jamaican legislation which attempted to accept the appellate jurisdiction of the CCJ was struck down on the basis that it had not satisfied the necessary constitutional requirements.

Marshall-Burnett itself recognized that Jamaica had completed the necessary constitutional process for bringing to an end appeals to the Privy Council, but the legislation was nevertheless struck down because it attempted simultaneously to accept the CCJ as the final court of appeal by what the Privy Council decided was an improper constitutional procedure. Having found that the Jamaican Act was sufficient to abrogate its jurisdiction, it is interesting that the JCPC nonetheless considered that it had competence to rule on the further and subsequent question of the CCJ's acceptance.¹

¹ In *Marshall-Burnett* the Privy Council accepted, in the absence of argument to the contrary that the provisions of The Caribbean Court of Justice (Original Jurisdiction) Act, 2005 (Act 17 of 2005) (Jamaica) abrogating the jurisdiction of the Privy Council were not severable from the provisions substituting the Caribbean Court of Justice. But as my distinguished colleague, Professor A.R. Carnegie has argued, it is difficult to reconcile this position with the recent decision in *Suratt & Ors v. The Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2007] UKPC 55, where legislation considered by the

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Putting that matter aside, for present purposes, it has to be said that the readiness of the Privy Council to recognize the legislative termination of Caribbean appeals to is not confined to *Marshall-Burnett*. Twenty years earlier, *Mitchell v DPP* [1986] AC 73 provided a remarkable precedent from the Organisation of Eastern Caribbean States (“OECS”) on successfully delinking from the Privy Council. In that case, the JCPC decided that the post-revolution Parliament of Grenada had properly passed legislation confirming termination of the Privy Council jurisdiction under the People Revolutionary Government (“PRG”) regime. The correctness of this decision was recently reaffirmed by the Privy Council in *Bernard Coard v Attorney-General of Grenada* [2007] UKPC 7.

It is admitted that these three cases (i.e., *Marshall-Burnett*, *Mitchell* and *Bernard Coard*) are all illustrative of the first stage of acceptability of delinking from the Privy Council; not the second stage of acceptance of the CCJ jurisdiction. However, it is not insignificant that Barbados’ transition from the Privy Council to the CCJ was unchallenged; and neither was Guyana’s migration contested. There is every indication, too, that recent legislation in Belize, has succeeded in redirecting that country’s final appeals from the JCPC to the CCJ.

Government of Trinidad and Tobago to be unconstitutional was held to be valid at the suit of a private individual against the government. But, if a Government cannot make legislation, otherwise valid, unconstitutional by fully arguing against its unconstitutionality, as in *Suratt*, how can it achieve that result simply by default of argument, as occurred in the *Marshall-Burnett*? Any argument that the Privy Council may assume jurisdiction *forum prorogatum*, in similarity with international tribunals such as the ICJ, can be dismissed given the grave constitutional and international law implications for the vast majority of states which where former appendages of the British Empire have abolished appeals to the Privy Council, beginning with Canada in 1933. A more convincing basis for justifying the Privy Council’s competence over the second stage in *Marshall-Burnett* is that the Act of 2005 may not have been technically effective to abrogate the Privy Council’s jurisdiction either because severance was not possible or because all of the arguments proceeded on the basis that the Act had not been proclaimed.

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Accordingly, there can be no doubt that adherence to the correct constitutional procedure can secure the two stages outlined by *Marshall-Burnett*. There the Privy Council stated:

...it must be understood that the Board, sitting as the final court of appeal of Jamaica, has no interest of its own in the outcome of this appeal. The Board exists in this capacity to serve the interests of the people of Jamaica. If and when the people of Jamaica judge that it no longer does so, they are fully entitled to take appropriate steps to bring its role to an end. The question is whether the steps taken in this case were, constitutionally, appropriate. ²

What then is the appropriate constitutional procedure for transitioning from the Privy Council to the CCJ?

Actually, it appears that there are differing constitutional procedures. Whilst there are common elements there are often different requirements as between the different CARICOM countries. Indeed, there are sometimes alternative procedures within the same constitution. In compendious fashion, we may say that there are three basic procedural requirements which may be stated in the following order of increasing novelty and complexity: Parliamentary action; Referendum; and an Agreement with the UK. A fourth dimension was encountered during one of the “country visits” – the possibility of splitting the appellate jurisdiction of the CCJ to allow for only certain types of appeals to the CCJ. I propose to now consider these matters in turn.

First: Parliamentary Action

The most elemental and ubiquitous requirement in substituting the CCJ for the Privy Council is that legislation be passed in parliament to this effect. Given that the protections afforded the court are often among the most

² *Ibid*, at paragraph 4.

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deeply entrenched in the constitution, it is not surprising that a Bill to amend these provisions must be passed by a clear and decisive parliamentary vote. Passage by a simple majority never suffices; a special majority is always required. The special majority required varies between two-thirds of the House: (Antigua and Barbuda,³ Barbados,⁴ Grenada,⁵ Jamaica,⁶ St. Kitts and Nevis,⁷ St. Vincent and the Grenadines,⁸ and Suriname⁹); and three-fourths (The Bahamas,¹⁰ Belize,¹¹ and Dominica¹²). Occasionally, different minimum majorities are specified as between the two Houses of Parliament, for example, in Trinidad and Tobago,¹³ the legislation must be passed by no less than three-fourths in the House and two-thirds in the Senate.

Two further points are worth noting.

First, there appears to be a correlation between the degree of difficulty to be surmounted in parliament and the requirement for support in a referendum. Speaking generally, where the legislation requires a very high level of support in parliament, a referendum is either not required (as for instance, in Belize,¹⁴ Dominica,¹⁵ and Trinidad and Tobago¹⁶) or the majority required in the referendum is a simple majority (such as, in The Bahamas¹⁷). There are exceptional circumstances where the entrenchment

³ Section 47 (2), Constitution of Antigua and Barbuda, 1981.

⁴ Section 49 (2), Constitution of Barbados, 1966.

⁵ Section 39 (2), Constitution of Grenada, 1973.

⁶ Section 49 (4), Constitution of Jamaica, 1962.

⁷ Section 38 (2), Constitution of St. Kitts and Nevis, 1983.

⁸ Section 38 (2), Constitution of St. Vincent and the Grenadines, 1979.

⁹ Article 83 (3), Constitution of the Republic of Suriname, 1987.

¹⁰ Section 54 (3), Constitution of The Commonwealth of The Bahamas, 1973.

¹¹ Section 69 (3), Constitution of Belize, 1981.

¹² Section 42 (2), Constitution of The Commonwealth of Dominica, 1978.

¹³ Section 54 (3), Constitution of The Republic of Trinidad and Tobago, 1976.

¹⁴ Cf. section 69, Constitution of Belize, 1981.

¹⁵ Cf. section 42, Constitution of The Commonwealth of Dominica, 1978.

¹⁶ Cf. section 54, Constitution of The Republic of Trinidad and Tobago, 1976.

¹⁷ Section 54 (3) (2), Constitution of The Commonwealth of The Bahamas, 1973.

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of the court is protected by the lesser requirement for two-thirds support in parliament and yet no referendum is required (for example, Barbados,¹⁸ Jamaica,¹⁹ and Suriname²⁰).

Secondly, there are procedural niceties to be observed. An Act to amend the constitution by substituting the CCJ for the Privy Council must, speaking generally, say that it is in fact amending the constitution.²¹ Where a special majority is required the Speaker must, again as a general rule, attach a certificate to the legislation stating that this majority has been obtained.²²

It is important that the procedural requirements be observed. It is not necessarily safe to rely on the decision in *Mitchell v DPP* [1986] AC 73 where the Privy Council noted that the absence of the Speaker's certificate on the amending legislation had not been argued, and therefore refused to invalidate the legislation on that ground.

For one thing, in reaching this conclusion, the Privy Council made no mention of its decision, given twenty years earlier, in *Bribery Commissioner v Ranasinghe* [1965] AC 172. There the absence of the Speaker's certificate indicated that an essential part of the parliamentary process necessary for amendment was lacking.

For another thing, the Privy Council sought, *ex post facto*, to cure this lapse in *Bernard Coard v Attorney General of Grenada* [2007] UKPC 7. In this case

¹⁸ Cf. section 49, Constitution of Barbados, 1966.

¹⁹ Cf. section 49, Constitution of Jamaica, 1962.

²⁰ Cf. article 83, Constitution of the Republic of Suriname, 1987.

²¹ See, for example, The Bahamas (section 54 (5)); Barbados (section 49 (6)); and Trinidad and Tobago (section 54 (5)).

²² See, for example, Antigua and Barbuda (section 47 (8)); Belize (section 69 (6)); Dominica (section 42 (8)); Grenada, (section 39 (8)); St. Kitts and Nevis (section 38 (10)); St. Lucia, (section 49 (11)); and St. Vincent and the Grenadines (section 38 (8)).

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the Board noted that the Grenadian Parliament had subsequently passed a second confirmatory legislation that had then included the Speaker's certificate.²³

Second: Referendum

The referendum is, by far, the most charged procedure specified in the constitution. This has been so since 1962. Recent events in the eastern Caribbean have not made it any less so. There is the further complication that whilst a simple majority will suffice in some countries (The Bahamas,²⁴ Dominica,²⁵ and St. Lucia²⁶), there is the requirement for a two-thirds majority in others (Antigua and Barbuda,²⁷ Grenada,²⁸ St. Kitts and Nevis,²⁹ and St. Vincent and the Grenadines³⁰). Where two-thirds support is required the specter of failure can loom particularly large should the matter descend into partisan divisions and disagreement.

In two countries, the view was expressed that the referendum, although not constitutionally required, may nonetheless be desirable. This is a matter of policy for the policy-makers, although a few related points cannot escape our notice.

²³ As their Lordships have noted in *Mitchell v Director of Public Prosecutions* [1986] AC 73, that right had been effectively abolished by People's Law No. 84 of 1979. This law had been confirmed after the restoration of constitutional government by Act No. 1 of 1985 and (since there was a doubt about whether that law had been certified as passed by the majorities needed for a constitutional amendment under section 39(2) of the Constitution) confirmed a second time by Act 16 of 1987. The Constitutional Judicature (Restoration) Act 1991, which restored the pre-revolutionary judicial system as from 15 August 1991, also restored appeals to Her Majesty in Council.

²⁴ Section 54 (3) (d) (ii), Constitution of The Commonwealth of The Bahamas, 1973.

²⁵ Section 42 (3) (b), Constitution of The Commonwealth of Dominica, 1978.

²⁶ Section 41 (6) (b), Constitution of Saint Lucia, 1978.

²⁷ Section 47 (5) (c), Constitution of Antigua and Barbuda, 1981.

²⁸ Section 39 (5) (c), Constitution of Grenada, 1973.

²⁹ Section 38 (3) (b), Constitution of St. Kitts and Nevis, 1983.

³⁰ Section 38 (3) (b), Constitution of St. Vincent and the Grenadines, 1979.

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First, none of the countries that have so far acceded to the CCJ's jurisdiction has done so pursuant to a vote in a referendum. Incidentally, it should also be noted that none of our independence constitutions was adopted following approval on a referendum.

Secondly, were the vast majority of the electors in the referendum, (say 90%), to vote to retain appeals to the Privy Council, this could not prevent the United Kingdom government from, nonetheless, terminating Caribbean appeals to Her Majesty's Privy Council. As a matter of legal rights and obligations, as distinct from grace and favor based on colonial ties, support in the referendum for retention of the JCPC is equivalent to a *brutum fulmen*.

Thirdly, where the constitution does not require it, the referendum is not, strictly speaking, part of the constitutional procedure for accepting the CCJ. *It adds nothing to the constitutional legitimacy of the process.* This point has particular resonance given the recent decisions in Belize in the *Alberto Vellos* cases.

Shortly before the Team visited Belize, the distinguished Chief Justice of that country, gave his decision in *Alberto Vellos v Prime Minister and AG*.³¹ That decision upheld the requirement by the Referendum Act that a referendum be held in order to amend the constitution in circumstances where the constitution itself did not require a referendum. During our public lecture in March 2009 I said:

... the possible requirement for a referendum [for migrating to the CCJ] presupposes the correctness of the *Alberto Vellos* (2008) decision which confirmed the constitutionality of the legislative requirement

³¹ In the Supreme Court of Belize, Claim No, 305 of 2008, 28 July 2008.

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for a referendum in circumstances where the constitution makes no such requirement. This is not the occasion to embark on an extensive analysis of that decision, although one is compelled to point out that (1) the doctrine of implied repeal of earlier inconsistent legislation coupled with (2) the supreme law clause making the constitution the supreme law of the land are strong points in favour of finding contrary to the decision in *Alberto Vellos*.

Less than a month ago, on 24th March 2010, the Privy Council gave its decision in *Prime Minister of Belize v Alberto Vellos* [2010] UKPC 7. The Board overruled the Court of Appeal which had confirmed Chief Justice Conteh's decision.³² A referendum was not required to amend the Constitution, in circumstances where ordinary legislation purported to impose this condition.³³ In the particular circumstances of the case, the JCPC found that

³² The Court of Appeal in *Prime Minister of Belize and Attorney General of Belize v Alberto Vellos et al*, Civil Appeal No. 11 of 2008, dismissed the appeal by the Prime Minister and Attorney General against the decision by Conteh CJ.

³³ [2010] UKPC 7 at Paragraph 46: "It was, however, common ground that, under the un-amended Referendum Act, the Amendment Bill could not properly be placed before the Governor-General for his assent until a referendum had been held, and this view appears to have been generally held. Were this view correct as a matter of law, the Board would have concluded that the obligation to hold a referendum was just as much a fetter on the legislative process as if the holding of a referendum was an integral part of the process, and that the provision in the Referendum Act that required a Part II referendum to be held purported to alter the Constitution and was, accordingly, void. The Board has not, however, reached this conclusion. While the obligation to hold a Part II referendum would necessarily be triggered by some stage of the amendment of the Constitution Act, it was possible, as a matter of law, to treat the two processes as independent, so that the process of amending the Constitution Act could proceed in the normal way, whether or not a referendum was held and regardless of its result. This scenario is not attractive, for those who drafted the Referendum Act plainly intended that relevant legislative process should be informed by the views of the electorate. Nonetheless the Board feels constrained to conclude that it was the true state of affairs, for the alternative would be to hold that the requirement to hold a Part II referendum was of no effect at all. Under the Referendum Act the incentive to comply with the obligation to hold a Part II referendum lay in the political fall-out that would follow disregard of that obligation and the effect of proceedings such as those brought by the respondents in this case. The obligation was, of course, one which in an appropriate case could be enforced by proceedings for judicial review. The obligation did not, however, impose a legal fetter on the legislative process." *See also*, paragraph 56.

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the amended Bill presented by the Government did not require a referendum even under the Referendum Act.

Whilst I am gratified that the Privy Council saw its way clear to agree with me on this occasion, its decision in *Alberto Vellos* may not be all that easy to reconcile with its decision in *Mitchell v DPP*. After all, the gravamen of *Mitchell* was to uphold the constitutional *vires* of the legislation passed in the post-restoration Parliament of Grenada confirming termination of the Privy Council jurisdiction under the revolutionary regime. The challenge to this legislation was based on the ground that it had not validly amended the provisions of the West Indies Associated States (Appeals to Privy Council) Order 1967 SI 1967 No. 224 (“1967 Order”) and thus could not terminate the Privy Council jurisdiction. In particular, the applicant complained that there had been no referendum as required by the Grenadian constitution to amend the Order of 1967.

This argument was dismissed by the Privy Council *precisely because*, it was said, the 1967 Order had dis-entrenched the matter by leaving it to the law of the individual country. Amendment of the Grenada constitution by the confirmation legislation was a valid constitutional amendment under the entrenching provisions of the Grenada Constitution.

But if the 1967 Order could have had this effect in *Mitchell*, why, it may be asked, did the Referendum Act in Belize not have an analogous effect in *Alberto Vellos*? The Privy Council did not essay a reconciliation of these two decisions but to be fair, the point seems not to have been argued.³⁴

Third: Agreement with UK

³⁴ It may be that the 1967 Order is of a status higher than that of ordinary legislation.

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The constitutions in four Eastern Caribbean countries all contain a provision permitting avoidance of the referendum requirement where the east Caribbean government reaches an agreement with the UK government in respect of termination of appeals to the Privy Council and the joining of another court, established by international agreement, such as the CCJ.³⁵ These countries are: Dominica, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines.

This is a fascinating provision on several counts. First, it is exactly the reverse of the policy position advocated in some countries. Far from encouraging a referendum not required by the constitution, the provision actually provides a “bye” from needing to have the referendum that is otherwise mandated by the constitution.

Second, the conclusion of the agreement between the relevant Caribbean and UK governments is unprecedented. There are no clear parameters as to what terms are to be included in such a treaty. In these circumstances, the view that the terms should include matters of resource requirements for the continued proper administration of justice cannot be all that far-fetched.

Thirdly, it is interesting that the provision for making a deal with the UK government is possible in only roughly half of the OECS countries even though all the OECS countries share a common supreme court.

Fourth, the very possibility of an agreement with the UK that by-passes the need for a referendum throws up another weakness in the reasoning in the

³⁵ Note Dominica (section 42 (4) (a), (b)); St. Kitts and Nevis (section 38 (4) (a), (b)); St. Lucia (section 41 (7) (a) (b)); St. Vincent and the Grenadines (section 38 (4) (a) (b)). Note: the likelihood that there is a clerical error in relation to the provision in St. Lucia and St. Vincent and the Grenadines. This could be cured it appears by action by the Court: *Russell v Attorney General of St. Vincent and the Grenadines* (1997) 51 WIR 110, at p. 119.

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Marshall-Burnet case. There, it will be recalled, that the Privy Council made much of its perception that the Judges of the CCJ did not enjoy the same level of constitutional protection as the judges of the superior courts of Jamaica.

There is a sense in which a regional court, under the ultimate control of Member States, can never be entrenched in a national constitution in the same way as a purely national court. But this does not necessarily indicate any less protection for the regional court. Indeed, given the mood swings of Caribbean electorates, it is often much easier to amend a constitutional provision requiring support from a qualified majority of parliamentary representatives than it is to achieve unanimity among all CARICOM Heads of Government on the amendment of a regional agreement.³⁶

Accordingly, the Privy Council's assumption that it enjoys a greater status of independence and protection from executive and parliamentary pressure entirely overlooks the countervailing factor that the Privy Council could be abolished at any time by ordinary British political processes, not even requiring legislation. The following question posed by Professor Carnegie, is therefore entirely reasonable:

Why is it to be assumed that it would be easier for a Prime Minister to persuade all other Caribbean Heads of Government to amend the CCJ Treaty than it is to do a deal with the British Prime Minister to abolish the Privy Council?

³⁶ Note the possibility of entrenching the procedural aspects of acceptance, modification, and withdrawal from a treaty which could go some way towards satisfying this requirement. I am grateful to the Honourable Mr. Justice Duke Pollard for drawing this possibility to my attention.

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Four: Splitting the appellate jurisdiction

The presence of the civil law countries of Haiti and Suriname as members of CARICOM has provoked the question of whether it may be permissible to refer only specified categories of appeals to the CCJ. Particularly suitable for such reference would be those types of disputes that could be resolved without need for adjudication on the intricacies of the civil law system. Human rights adjudication immediately comes to mind as one area in which the judges of the CCJ, could readily have recourse to the jurisprudence of international, regional and national human rights' tribunals to settle disputes from the civil law countries. We are, after all, speaking of *human* rights which by their very nature tend to be universal and susceptible to transnational interpretation and not dependent upon the civil law context from which the dispute arose.

Consideration is being given to this possibility in Suriname and in that process questions are being addressed concerning whether a new legal instrument would be required or whether the existing treaty could be interpreted as permitting, in effect, partial acceptance of the appellate jurisdiction.³⁷

³⁷ Note that this is conceptually close to the situation prevailing in many Caribbean constitutions where some matters (such as election petitions) stop at the Court of Appeal level and cannot be taken on appeal to the Privy Council: *see*, for example, section 44 (6) and (8), Constitution of Antigua and Barbuda, 1981; section 40 (6) and (7), Constitution of The Commonwealth of Dominica, 1978; section 37 (6) and (7), Constitution of Grenada, 1973; section 36 (6) and (7), Constitution of St. Kitts and Nevis, 1983; section 39 (7) and (8), Constitution of Saint Lucia, 1978; section 36 (6) and (8), Constitution of St. Vincent and the Grenadines, 1979; section 52 (3) and (4), Constitution of The Republic of Trinidad and Tobago, 1976. Note: section 46 (2) of the Constitution of Barbados does not state expressly that, "no appeal shall lie from the Court of Appeal". Indeed determinations as to the person's membership of the Senate are made by the High Court whose decision "shall be final". For membership in the House of Assembly determinations are made by "such authority or authorities as may be prescribed by any law in force in Barbados" and therefore, need not be made by the High Court; section. 86 (3) of the Belize Constitution provides that no appeal shall lie if the Supreme Court "refuses" to grant leave - the implication is that an appeal may lie if leave is granted by Supreme Court; section 51 (5) of the Constitution of The Bahamas does not state expressly that no appeal shall lie from the Court of Appeal; section 44 (1), Constitution of Jamaica does

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Conclusion

By way of conclusion it may be said that the questions raised, particularly in Suriname, about the splitting of the appellate jurisdiction, may prove to be largely irrelevant.

The decision on the acceptance of the appellate jurisdiction of the CCJ may have already been effectively³⁸ overtaken in Suriname and the other 11 CARICOM states participating in the CSME, as far as legal questions affecting the interpretation and application of the Revised Treaty are concerned. This is by virtue of the referral obligation on national courts and tribunals, enshrined in the Revised Treaty and also legislated into national law.

Under this obligation, national courts and tribunals, hearing domestic cases, must stay those proceedings and refer all issues involving the interpretation or application of the Treaty to the CCJ for determination before delivering judgment. This is very similar to the preliminary reference procedure provided for in the Treaty Establishing the European Union which was used in the foundational cases of *Van Gend en Loos*³⁹ and *Costa v Enel*⁴⁰ to establish the juridical nature of the regional community, and the relationship of the national legal orders to it.

This referral procedure, which, to repeat, is incorporated into the domestic law of all Member States, obliges national adjudicators to resolve relevant disputes in accordance with the ruling of the CCJ. From this perspective, it is arguable that the Privy Council is one of those national adjudicators in as

not state expressly that “no appeal shall lie from the Court of Appeal. *See* equivalent in Suriname Constitution, Article 68, which does not say anything about election petitions.

³⁸ I am intending by this word to put aside the question of constitutional challenge for present purposes.

³⁹ Case 26/62 [1963] ECR 1.

⁴⁰ Case 6/64 [1964] ECR 585.

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much as it is bound to apply the national laws of the country from which the appeals come; these laws include the referral obligation.⁴¹

Even if this view was correct, and to be fair I should say that I have not discussed the constitutional implications in this short paper, it would still be the case that serious work remains to be done. The referral obligation only catches CARICOM and CSME issues. Matters falling outside of the Revised Treaty would not be included notably, most criminal matters, would still end in appeals to the Privy Council.

In any event, splitting the appellate jurisdiction between the CCJ and the Privy Council by reference to the referral obligation may not be desirable. It becomes akin to either splitting hairs (risking a minefield of ever decreasing bases for distinctions) or splitting the atom (risking the mushroom clouds of constitutional litigation). Surely, the known and safer way of deliberate constitutionally sanctioned amendment is to be preferred.

My paper will be available on the Table at the back of the room immediately following this event. Please be gentle with your comments. My email address is included for any suggestions you may care to give to continue the discussion.

Thank you.

⁴¹ Nothing in *Marshall-Burnett* (2005) necessarily suggests any undermining of this proposition, although the Jamaican legislature, *ex abundante cautela*, appears to have attempted to cater for this possibility in The Caribbean Court of Justice (Original Jurisdiction) Act, 2005 (Act 17 of 2005) (Jamaica). *See further*: Winston Anderson, *The Original Jurisdiction of the Caribbean Court of Justice: Ensuring the Integrity of CARICOM Law and the Stability of the Caribbean Community*, (Anata Publishers Inc., 2010).