An Imperial Court in a Post-Colonial Context

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Date : May 30, 2017

Tracy Robinson & Arif Bulkan, *Constitutional Comparisons by A Supranational Court in Flux: The Privy Council And Caribbean Bills of Rights*, 80 **Modern L. Rev.** 379 (2017).

In this age of Brexit and the existential threats facing the United Kingdom, I find myself drawn to literature addressing the legacy of the British Empire. And in their new article, Constitutional Comparisons by A Supranational Court in Flux: The Privy Council And Caribbean Bills of Rights, Tracy Robinson and Arif Bulkan analyze a vestigial British imperial court, the Judicial Committee of the Privy Council (JCPC), in a post-colonial context. Law professors at the University of the West Indies, the authors examine the JCPC's approach to constitutional interpretation through detailed analysis of its cases addressing Caribbean bills of rights. The article succeeds in highlighting significant questions about the JCPC's legitimacy and function and provides insight into the very serious challenges presented by judging from a distance in a changing jurisdictional landscape.

The Judicial Committee of the Privy Council is a relic of the British colonial empire. During the imperial period, it evolved into the final court of appeal for roughly one quarter of the world's population. Now, it hears appeals from a tiny number of former colonies, current UK territories, and Crown dependencies. The Anglophone Caribbean is at the core of the JCPC's workload: In addition to the six overseas territories in the region, eight of the twelve independent Caribbean states send appeals to the JCPC, having retained its services following decolonization. Yet, rather than acting as an individualized apex court to the numerous intermediate courts over which it has jurisdiction, the JCPC instead has developed into a transnational or supranational court; its binding precedent can be applied across national jurisdictions. Of the 500 or so "Privy Counsellors" (the British cabinet members, politicians, clergymen, etc.) that advise the Monarch as members of the Privy Council, the Judicial Committee is staffed by a judicial subset comprising justices of the UK Supreme Court as well as judges of the various courts of appeal in England and Wales, Scotland, and Northern Ireland. Judges from some Commonwealth countries are eligible to sit on the JCPC, but only a few Caribbean judges have been appointed as Privy Counsellors, and those who were appointed were rarely empaneled on JCPC Boards (the groups of three or five judges that hear cases).

As one can easily surmise from this snapshot description, questions about the legitimacy of this distant and disconnected court were bound to arise, and Robinson and Bulkan's work certainly refreshes those concerns. But rather than engaging in theoretical discussions of independence and accountability, the authors provide a nuanced and fine-grained analysis of the JCPC by looking closely at its output. In detailing the process and content of judicial decision-making through case analysis, they demonstrate the JCPC's penchant for judicial shortcuts and a "lassitude" (p. 411) that calls into question the court's effectiveness. (Although they do not make any prescriptive suggestions, it is clear that they are skeptical about the future of the JCPC.)

The authors focus on the JCPC's interpretation of Caribbean bills of rights—in particular, the role of the prefatory or introductory section to the bills of rights in many post-colonial constitutions. In these charters, a broadly written opening that guarantees many rights often is followed by more detailed provisions protecting specific aspects of those rights or allowing for certain exceptions. In addition, some constitutions include a redress clause, giving individuals the right to apply to court to remedy rights violations. These redress clauses vary in whether they expressly exclude or include violations of the rights referenced in the broad introductory section.

In evaluating the justiciability or the content of an introductory section to a constitution's bill of rights, the JCPC looks to other bills of rights—comparing constitutions to derive meaning. The court relies on this comparative enterprise in lieu

of other types of constitutional interpretation, such as reading the introductory section in light of other textual material within the same constitution. By comparing and classifying constitutions, the JCPC has systematized its approach to interpretation.

This shortcut comes at a cost, particularly when observed against the backdrop of the JCPC's shrinking jurisdiction. For example, the authors describe how a category-creating precedent derived from one constitutional regime maintains its bite in other national contexts—even when the original regime is no longer subject to JCPC review and thus the precedent can never be revisited. This "fossilization of constitutional understandings" (p. 395) directly affects (and appears to stifle) the power and relevance of various rights provisions. In addition, the JCPC's comparative endeavor has little methodological rigor, leading to obvious selection bias. And, most damning, the authors ultimately conclude that the systemization "reduces how much a judge needs to know to function" (p. 383), suggesting a certain judicial weariness with the entire endeavor.

The JCPC's approach may make some pragmatic sense given that many of these "decolonization constitutions" were negotiated documents between colonial governments and the British government. But, as the authors point out, the constitutions' legitimacy therefore derives "less from their founding and more from their stability and interpretation over time" (p. 388). And the JCPC's comparative approach can undermine the vibrancy of the constitutional rights provisions. For example, in a case from Barbados, Boyce v. R. [2004] UKPC 32, the JCPC's decision to evaluate "an older Caribbean bill of rights [Barbados' 1966 Constitution] in light of newer ones inevitably generated a very restrictive interpretation of the former" (p. 391).

This article focuses welcome and deserved attention on a court and a region that are underrepresented in the comparative literature. The authors' broader contribution comes through their careful attention to the court's decisions: Robinson and Bulkan raise serious questions about the trade-off between judicial economy and judicial proficiency at the JCPC—a delicate calculation that is relevant to all courts.

Cite as: Erin F. Delaney, *An Imperial Court in a Post-Colonial Context*, JOTWELL (May 30, 2017) (reviewing Tracy Robinson & Arif Bulkan, *Constitutional Comparisons by A Supranational Court in Flux: The Privy Council And Caribbean Bills of Rights*, 80 **Modern L. Rev.** 379 (2017)), http://intl.jotwell.com/an-imperial-court-in-a-post-colonial-context/.