Privy Council Appeal No. 41 of 2004

Independent Jamaica Council for Human Rights (1998) Limited and Others *Appellants*

v.

(1) Hon. Syringa Marshall-Burnett
and
(2) The Attorney General of Jamaica *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 3rd February 2005

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Steyn
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

*[Delivered by **Lord Bingham of Cornhill**]*

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1. On 30 September 2004 the Governor-General of Jamaica, acting under section 60 of the Constitution, gave his assent to three bills, the broad effect of which was to abolish the right of appeal to Her Majesty in Council and to substitute a right of appeal to a new regional court of final appeal, the Caribbean Court of Justice ("the CCJ"). The key question in this appeal is whether the procedure adopted in enacting that legislation complied with the requirements laid down in the Constitution.

2. The appellants' challenge to the constitutionality of the legislative procedure adopted came before the Full Court of the Supreme Court (Wolfe CJ, Marsh and McIntosh JJ) when the bills were still going through Parliament. That court did not review the

legal merits of the appellants' argument, but struck out the proceedings as premature. In reasons given on 17 May 2004, following a hearing in April, the court held that any challenge should be made after and not before enactment of the legislation. The Court of Appeal (Forte P, Harrison and Smith JJA) did hear argument on the merits of the appellants' challenge, but rejected it for reasons given in judgments delivered on 12 July 2004. The appellants repeat their challenge before the Board. But because the bills have now received the assent of the Governor-General, the argument on prematurity has been overtaken by events, and so is not pursued. An undertaking has been given that the Acts will not be brought into force until this appeal has been determined.

3. This is an appeal of obvious constitutional importance, and two matters should be clearly stated at the outset. First, Dr Lloyd Barnett, speaking for all the appellants, roundly accepted that there could have been no objection to legislation supported by a majority of members of each House of Parliament which simply abolished the right of appeal to Her Majesty in Council and no more. He also accepted that the Parliament of Jamaica could validly have provided, in effect, for the CCJ to take the place of the Privy Council as the ultimate court of appeal from the courts of Jamaica. But this latter object, he submitted, could not, consistently with the Constitution, be achieved by ordinary legislation since it undermined certain provisions of the Constitution which were accorded special protection and could thus be altered only by employing the procedure appropriate for altering such provisions. Thus the argument is not whether the Parliament of Jamaica had power to achieve the object it sought to achieve but whether the procedural means of achieving it followed the procedure required by the Constitution.

4. Secondly, 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.

5. Section 110 of the Constitution (which forms Part 3 of Chapter VII of the Constitution) provides for a right of appeal from the Court of Appeal to Her Majesty in Council. The appeal is in some cases as of right (subsection (1)), in others by leave of the

Court of Appeal (subsection (2)), in others by special leave of the Board (subsection (3)). The Caribbean Court of Justice (Constitutional Amendment) Act 2004, Act 20 of 2004, one of the measures challenged by the appellants, alters this part of the Constitution. It deletes from the heading of Part 3 the reference to Her Majesty in Council and substitutes reference to the CCJ. It deletes section 110 and substitutes a new section which, with some updating of monetary values and some amendment, is to very much the same effect, save that references to the CCJ are substituted for references to Her Majesty in Council. A new section 110A makes plain that there shall be no appeal to Her Majesty from any court in Jamaica by special leave. The Act does not alter section 94(7) of the Constitution, relating to the Director of Public Prosecutions, in which reference is made to the Judicial Committee of the Privy Council. Nor does it alter subsections (5), (6) and (9) of sections 100 and 106 which address the role of the Judicial Committee in the removal of judges of the Supreme Court and the Court of Appeal respectively.

6. The second of the measures challenged by the appellants is the Caribbean Court of Justice Act 2004, Act 21 of 2004. This Act seeks to give effect in the domestic law of Jamaica to an international Agreement Establishing the Caribbean Court of Justice signed at Bridgetown, Barbados, on 14 February 2001, as amended by a Protocol to that Agreement Relating to the Juridical Personality and Legal Capacity of the Court signed at Montego Bay, Jamaica, on 4 July 2003. The Act provides (in section 3) that the provisions of the Agreement shall have the force of law in Jamaica, and empowers the Minister (in section 4) to make such provisions as may be necessary for carrying the provisions of the Agreement into effect. Section 5 of the Act provides:

> "5.-(1) Where any amendment to the Agreement is ratified by the Contracting Parties, the Minister may, upon the coming into force of that amendment, by order amend the Schedule by including therein the amendment so ratified.
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> (2) Any order made under this section may contain such consequential, supplemental or ancillary provisions as appear to the Minister to be necessary or expedient for the purpose of giving due effect to the amendment ratified as aforesaid and, without prejudice to the generality of the foregoing, may contain provisions amending references in this Act to specific provisions of the Agreement.

> (3) Every order made under this section shall be subject to affirmative resolution.
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> (4) Where the Schedule is amended pursuant to this section, any reference in this Act or any other instrument to the Agreement shall, unless the context otherwise requires, be construed as a reference to the Agreement as so amended."

The CCJ is to have an original jurisdiction. It is also to have an appellate jurisdiction, defined as in the new section 110 inserted in the Constitution by the Constitutional Amendment Act. Section 16 provides:

> "A Judge of the Court [the CCJ] may exercise all of the powers and functions of a Judge of the Supreme Court or of the Court of Appeal with respect to the area within its jurisdiction."

Provision is made in section 20 for a Regional Judicial and Legal Services Commission which is to consist of persons appointed in accordance with the Agreement. Under section 21 the Commission has responsibility for making appointments to the office of Judge of the Court, other than that of President, terminating appointments in accordance with the provisions of the Agreement, making a recommendation for the appointment of the President and exercising disciplinary control over the Judges of the Court other than the President. By section 21(5),

> "The proceedings of the Commission shall not be inquired into by any court of law or tribunal."

7. The Agreement and the Protocol, both of which were signed and in due course ratified by a number of Caribbean states, are scheduled to the Act in Parts I and II. It is unnecessary for present purposes to consider the Protocol. Nor need the full effect of the Agreement be summarised. The preamble acknowledges the desirability of entrenching the CCJ in the national constitutions of the contracting states. The President of the Court is to be appointed or removed by the qualified majority vote of three-quarters of the contracting parties on the recommendation of the Regional Judicial and Legal Services Commission. The Judges of the CCJ other than the President are to be appointed or removed by a majority vote of all the members of the Commission (article IV, paras 6 and 7). The Commission is to comprise the President of the CCJ as chairman, and ten members selected or nominated by specified professional,

academic and public bodies. The Commission is to appoint judges of the CCJ other than the President, terminate appointments in accordance with the provisions of the Agreement, and exercise, in accordance with Regulations, disciplinary control over judges of the CCJ other than the President (article V, paras 1 and 3). Article IX governs the tenure of office of judges. The office of a judge may not be abolished while there is a substantive holder of it. The President is appointed for a non-renewable term of seven years or until he is seventy-two, whichever is earlier. Other judges also are subject to the same retirement age. A judge may only be removed from office for incapacity or misbehaviour, and only in accordance with the provisions of article IX. Paragraphs 5, 6 and 8 of article IX provide:

> "5.-(1) Subject to Article IV, paragraph 5, the President shall be removed from office by the Heads of Government on the recommendation of the Commission, if the question of the removal of the President has been referred by the Heads of Government to a tribunal and the tribunal has advised the Commission that the President ought to be removed from office for inability or misbehaviour referred to in paragraph 4.
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> (2) Subject to Article IV, paragraph 6, a Judge other than the President shall be removed from office by the Commission if the question of the removal of the Judge has been referred by the Commission to a tribunal; and the tribunal has advised the Commission that the Judge ought to be removed from office for inability or misbehaviour referred to in paragraph 4.
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> 6. If at least three Heads of Government in the case of the President jointly represent to the other Heads of Government, or if the Commission decides in the case of any other Judge, that the question of removing the President or the Judge from office ought to be investigated, then –
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> (a) the Heads of Government or the Commission shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Heads of Government or the Commission, as the case may be, after such consultations as may be considered expedient, from among persons who hold or have held office as a Judge of a court of unlimited jurisdiction in civil and criminal matters in some part of the

Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court; and

(b) the tribunal shall enquire into the matter and advise the Heads of Government or the Commission, as the case may be, whether or not the President or the Judge ought to be removed from office.

8. If the question of removing the President or any other Judge of the Court from office has been referred to a tribunal under paragraph 6 of this Article, the Heads of Government in the case of the President, or the Commission, in the case of any other Judge of the Court, may suspend such Judge from performing the functions of his office, and any such suspension may at any time be revoked by the Heads of Government or the Commission, as the case may be, and shall in any case cease to have effect if the tribunal advises the Heads of Government or the Commission that the Judge ought not to be removed from office."

The original and appellate jurisdictions of the CCJ are prescribed in some detail. Subject to the Agreement and with the approval of the Conference of Heads of Government of Member States of the Caribbean Community, the Commission are to determine the terms and conditions and other benefits of the President and other members of the Court, which may not be altered to their disadvantage during their tenure of office. The assessed contributions of the contracting states are to be charged to the Consolidated Fund or public revenues of the respective states (article XXVIII, paras 1, 2 and 3). Reference should lastly be made to article XXXII:

"AMENDMENT

1. This Agreement may be amended by the Contracting Parties.

2. Every amendment shall be subject to ratification by the Contracting Parties in accordance with their respective constitutional procedures and shall enter into force one month after the date on which the last Instrument of ratification or accession is deposited with the Secretary-General (hereinafter in this Agreement referred to as 'the Depositary')."

8. The third measure challenged by the appellants may be more briefly described. The Judicature (Appellate Jurisdiction) Act, enacted in 1962 to take effect on the eve of independence, had provided in section 35, which comprised Part VIII of that Act, that the Director of Public Prosecutions, the prosecutor or the defendant might, with the leave of the Court of Appeal, appeal to Her Majesty in Council from any decision of the Court of Appeal in the exercise of its criminal jurisdiction, if the case raised a point of law of exceptional public importance and it was desirable in the public interest that a further appeal should be brought. The third measure, the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, Act 19 of 2004, amended the 1962 Act to insert a definition of the CCJ, to amend the heading of Part VIII and to amend section 35 by substituting references to the CCJ for references to Her Majesty in Council in the marginal note and the text of the section.

9. While it is true, as Lord Diplock explained in *Hinds v The Queen* [1977] AC 195, 212, that certain important assumptions underlie constitutions drafted on what he called the Westminster model, it 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 practice of the United Kingdom. The governing institutions and practices of the nation were identified and stated in a single instrument, the Constitution. That Constitution was to have the effect, by section 2, that (subject to sections 49 and 50)

> "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."

Thus the Constitution and not, as in the United Kingdom, Parliament is (save in respect of Chapter III of the Constitution) to be sovereign. It was of course foreseen that with the passage of time and the benefit of experience alteration of the Constitution would on occasion be necessary, and the framers of the Constitution took care to grade its provisions so as to require differing levels of popular support depending on the structural significance of the provision to be altered.

10. To alter some provisions of the Constitution, which may be described as "deeply entrenched", section 49(3) and (4) of the Constitution require the bill effecting the alteration to be introduced in the House of Representatives, require a period of at least six months to elapse between the introduction of the bill into the House

and its passing by that House, require the bill to be passed in each House by the votes of not less than two-thirds of all the members of that House and require the bill to be approved by a majority of the electorate. These deeply entrenched provisions are listed in section 49(3). They include section 49 itself, section 2 (quoted above), section 34, providing that there shall be a Parliament of Jamaica consisting of Her Majesty, a Senate and a House of Representatives, sections 35 and 36, governing the composition of the Senate and the House of Representatives, and sections 63(2) and 64(2) governing the frequency of parliamentary sittings and the duration of Parliaments.

11. A much larger class of sections and subsections of the Constitution, listed in section 49(2), have been described as "entrenched" but not "deeply entrenched". To amend one of these provisions, section 49(2) and (4) require the same procedure to be followed as in the case of a deeply entrenched provision, save that the measure need not be submitted to the electorate. All other provisions of the Constitution, neither deeply entrenched nor entrenched, may be amended if supported by the votes of a majority of all members of each House: section 49(4)(b). But even these provisions enjoy some special protection, since all questions not involving any alteration of the Constitution are determined by a majority of the votes of the members present and voting (section 54(1)) and not a majority of all members.

12. Chapter VII of the Constitution, divided into four Parts, is entitled "The Judicature". Part 1 governs the Supreme Court and provides in section 97(1) that "There shall be a Supreme Court for Jamaica …". In fact, as Lord Diplock pointed out in *Hinds* at p 221, the Supreme Court of Jamaica had existed under that title since 1880. It is not necessary to refer to all the provisions affecting the Supreme Court and the Chief Justice. But attention must be drawn to section 100, which deals with the tenure of Supreme Court judges, a very significant matter since the independence of the judges (or, put negatively, the protection of judges from executive pressure or interference) is all but universally recognised as a necessary feature of the rule of law. Subsections (4) to (6) of section 100 provide:

> "(4) A Judge of the Supreme Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so

removed except in accordance with the provisions of subsection (5) of this section.

(5) A Judge of the Supreme Court shall be removed from office by the Governor-General by instrument under the Broad Seal if the question of the removal of that Judge from office has, at the request of the Governor-General, made in pursuance of subsection (6) of this section, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act, 1833, or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the Judge ought to be removed from office for inability as aforesaid or for misbehaviour.

(6) If the Prime Minister (in the case of the Chief Justice) or the Chief Justice after consultation with the Prime Minister (in the case of any other Judge) represents to the Governor-General that the question of removing a Judge of the Supreme Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then –

(a) the Governor-General shall appoint a tribunal, which shall consist of a Chairman and not less than two other members, selected by the Governor-General on the advice of the Prime Minister (in the case of the Chief Justice) or of the Chief Justice (in the case of any other Judge) from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;

(b) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General whether he should request that the question of the removal of that Judge should be referred by Her Majesty to the Judicial Committee; and

(c) if the tribunal so recommends, the Governor-General shall request that the question should be referred accordingly."

Each of these provisions is entrenched under the Constitution, as are the succeeding subsections, which need not be quoted. So also is section 101, which deals with the emoluments of Supreme Court judges: these are to be such as may from time to time be prescribed by or under any law, but they are not to be altered to the judge's disadvantage during his continuance in office and salaries are to be charged on and paid out of the Consolidated Fund.

13. Unlike the Supreme Court, the Court of Appeal for Jamaica was a new court in 1962, and it is the subject of Part 2 of Chapter VII of the Constitution. The court is established and its composition prescribed by section 103, an entrenched provision. The appointment of the President and the other judges is governed by section 104, also an entrenched provision. Section 105, also entrenched, provides for the performance of duties by acting judges. Section 106 addresses the tenure of judges of the Court of Appeal and repeats in subsections (4), (5) and (6), with reference to the Court of Appeal, the provisions of section 100(4), (5) and (6) quoted above. They are again entrenched. Section 107, dealing with emoluments of the judges of the Court of Appeal, is to the same effect as the Supreme Court provision in section 101, but in this instance the section is not entrenched.

14. Part 3 of Chapter VII of the Constitution governs appeals to Her Majesty in Council. The Part contains only section 110, the effect of which before amendment by the 2004 Act has been summarised in paragraph 5 above. This section is not entrenched, a fact upon which the Solicitor-General, representing both respondents, strongly relied.

15. Part 4 of Chapter VII of the Constitution establishes and relates to the Judicial Service Commission. Subsections (2) to (10) of section 111 govern the composition of the Commission and the terms of service and appointment of members. These provisions are entrenched. The puisne judges of the Supreme Court and the judges of the Court of Appeal (other than the President) are appointed by the Governor-General acting on the advice of the Commission: sections 98(2) and 104(2).

16. As already recorded, Dr Barnett for the appellants accepted in argument that section 110 of the Constitution, providing for appeal to the Privy Council, could have been repealed by the votes of a majority of all the members of each House, since section 110 is not entrenched. The result would have been to constitute the Court of Appeal as the ultimate appellate tribunal in and for Jamaica.

Supreme judicial authority would then rest with a body whose constitutional position is buttressed by safeguards carefully designed to protect the process of appointment to the court and the exercise by the court of its jurisdiction against the possibility of executive pressure or interference. Thus repeal of section 110, without more, would not weaken the protection which the Constitution set out to guarantee for the benefit not of the courts themselves, but of the people of Jamaica. What was constitutionally objectionable, Dr Barnett submitted, was to establish a new court to which appeals from the Court of Appeal would lie when the new court would enjoy none of the entrenched protection afforded by the Constitution to the Supreme Court and the Court of Appeal and when the parliamentary procedure followed was not that mandated by the Constitution for amendment of an entrenched provision. Adopting the language of Viscount Simonds in *Attorney-General for Australia v The Queen* [1957] AC 288, 313, echoed by Lord Diplock in *Hinds* at p 219, Dr Barnett said that it 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. He referred to *Minister of the Interior v Harris* (1952) (4) SA 769 (AD) as a case in which a malign government, vexed by a decision of the Appellate Division of the Supreme Court of South Africa, had established a superior High Court of Parliament to neutralise some of its decisions. It was no answer to point to the safeguards contained in the CCJ Agreement, since these enjoyed no constitutional protection in Jamaica and could in any event be amended by agreement of the parties to the Agreement followed by ratification, both of them executive acts taking effect in Jamaican law on no more than affirmative resolution. Nor was it any answer to point out that the right of appeal to the Privy Council was not entrenched in the Constitution, since that was an existing right, the independence of the Privy Council and its imperviousness to local pressure had never been in doubt and it was not clear how the framers of the Constitution could have entrenched the independence of members of the Judicial Committee had they wished to do so. Dr Barnett relied on the principle stated by Lord Diplock in *Hinds* at p 214 – "It is the substance of the law that must be regarded, not the form" – to contend that in substance the three Acts, as they now are, impliedly alter entrenched provisions of the Constitution. It was therefore necessary to employ the procedure appropriate for alteration of an entrenched provision. This was not done, and the three Acts are accordingly unconstitutional and void.

17. The Solicitor-General countered this argument by submitting that neither singly nor cumulatively did the three Acts alter any provision of the Constitution, with the single exception of section 110 which enjoyed no constitutional entrenchment. As it was open to Parliament to repeal that section by the votes of a majority of all members of both Houses, so it was open to Parliament, by the same procedure, to sanction the establishment of a new court to take the place, effectively, of the Privy Council and to exercise in addition a new original jurisdiction. There was no threat to the values protected by the Constitution, since the CCJ Agreement provided safeguards similar in effect to those contained in the Constitution to protect the independence of the higher judiciary of Jamaica.

18. In the Court of Appeal, Forte P rejected the appellants' argument on the merits, holding that the "question of the entrenchment of a new final Appellate Court rests in my view with the policy-makers" and that the provisions of the CCJ Agreement "are clearly aimed at giving 'security of tenure' to the Judges of the [CCJ], which though not included in the Constitution, nevertheless give legislative protection". Harrison JA agreed. He held that "The CCJ, an extra-territorial court, created by the Agreement between Caribbean states, is not sought to be established by nor can it be governed by The Constitution", and he accepted that neither singly nor cumulatively had any of the three bills (as they were at that stage) been presented in contravention of the procedure prescribed by section 49 of the Constitution. Smith JA also agreed, holding the appellants' argument to be without merit, unhelpful and in part misconceived. He concluded on this issue:

> "The Bill seeks to transfer to the CCJ the jurisdiction exercised by the Judicial Committee of the Privy Council by virtue of Part 3 of Chapter VII. None of the provisions in Part 3 is entrenched. The Bill, in my judgment, seeks to have Judges appointed to the Court on substantially the same terms as those laid down in Chapter VII of the Constitution. Accordingly, it was not necessary for the respondents to seek to amend or alter any of the entrenched or deeply entrenched provisions of Chapter VII. As the Solicitor General correctly submitted, it is incorrect to say that the amendments of Chapter VII sought by the Bills require the procedure applicable to the entrenched sections. I hold, therefore, that the respondents have embarked upon the correct constitutional procedure in introducing the Bills."

19. It is clear, in the opinion of the Board, that the present question must be approached as one of substance, not of form, and the approach commended by Lord Diplock in *Hinds* at pp 211-214 is that which should be followed. It is noteworthy that in section 49(9)(b) of the Constitution "alter" is defined to include "amend, modify, re-enact with or without amendment or modification, make different provision in lieu of, suspend, repeal or add to". The Board would accept, as was held in *Kariapper v Wijesinha* [1968] AC 717, 743, that the words "amend or repeal" cover an alteration by implication.

20. Chapter VII of the Constitution established a regime which provided, in respect of the higher Jamaican judiciary, as put by Lord Diplock in *Hinds* at p 219,

> "that their independence from political pressure by Parliament or by the executive in the exercise of their judicial functions shall be assured by granting to them such degree of security of tenure in their office as is justified by the importance of the jurisdiction that they exercise."

This independence was assured by the provisions enacting (*per* Lord Diplock, p 219) that

> "They can only be removed from office upon the advice of the Judicial Committee of Her Majesty's Privy Council in the United Kingdom given on a reference made upon the recommendation of a tribunal of inquiry consisting of persons who hold or have held high judicial office in some part of the Commonwealth."

From these Jamaican courts an appeal lay to this Board which, although enjoying no entrenched protection in the Constitution, was known to be wholly immune from executive or parliamentary pressure in any jurisdiction from which appeals lay and whose members were all but irremovable.

21. The three Acts do not, singly or cumulatively, weaken the constitutional protection enjoyed by the higher judiciary of Jamaica. The question is whether, consistently with the constitutional regime just described, a power to review the decisions of the higher courts of Jamaica may properly be entrusted, without adopting the procedure mandated by the Constitution for the amendment of entrenched provisions, to a new court which, whatever its other merits, does not enjoy the protection accorded by the Constitution to the higher judiciary of

Jamaica. In answering this question the 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 regime established by Chapter VII. The Board has no difficulty in accepting, and does not doubt, that the CCJ Agreement represents a serious and conscientious endeavour to create a new regional court of high quality and complete independence, enjoying all the advantages which a regional court could hope to enjoy. But Dr Barnett is correct to point out that the Agreement may be amended, and such amendment ratified, by the governments of the contracting states, and such amendment could take effect in the domestic law of Jamaica by affirmative resolution. The risk that the governments of the contracting states might amend the CCJ Agreement so as to weaken its independence is, it may be hoped, fanciful. But 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. 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. From this it follows that the procedure appropriate for amendment of an entrenched provision should have been followed.

22. It remains to consider whether the provision abolishing the right of appeal to the Privy Council may be severed from the other provisions of the three Acts and given effect if the other provisions are not. The familiar test is that formulated by Viscount Simon in *Attorney-General for Alberta v Attorney-General for Canada* [1947] AC 503, 518:

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

Fitzgerald CJ, sitting in the Supreme Court of Ireland, adopted a similar test in *Maher v Attorney-General* [1973] I.R. 140, 147, where he said:

> "But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive

> independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity."

In the present instance Parliament legislated not simply to revoke the right of appeal to the Privy Council but to replace it with a right of appeal to the CCJ. From statements made to the Senate by the Attorney-General on 1 and 2 July 2004, and by the Prime Minister and the Minister for Foreign Affairs to the House of Representatives on 27 and 28 July, it is clear that the three measures were seen as "connected" "companion measures" intended to be part of a single, interdependent scheme. The bills were presented as a package. On the material now before the Board it would not appear to have been the intention of Parliament to revoke the right of appeal to the Privy Council without putting anything in its place, and this provision cannot therefore be severed. This is a conclusion which the Solicitor General expressly declined to challenge.

23. At the invitation of the Board, the parties made written submissions on the steps to be taken to achieve the result sought by the Government if the appellants' submissions were to be accepted. The Board is grateful for the helpful response to its invitation, but is mindful that this question has not been the subject of consideration or decision by the lower courts and concludes that it should not seek to rule on this issue in these proceedings.

24. In the result, the Board will humbly advise Her Majesty that the appeal should be allowed and a declaration made that the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, the Caribbean Court of Justice (Constitutional Amendment) Act 2004 and the Caribbean Court of Justice Act 2004 were not passed in accordance with the procedure required by the Constitution and are accordingly void. The Board notes that no order for costs was made by the Supreme Court and the Court of Appeal and invites written submissions on the incidence of costs before the Board within 21 days.