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The Ties that Bind: How Domestic Politics Influence Ties with Extraterritorial Courts—A Study of the JCPC

Cover Page Footnote

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The Ties that Bind: How Domestic Politics Influence Ties with Extraterritorial Courts—A Study of the JCPC

During the last half century, extraterritorial courts and the number of acceding states have markedly increased. As Robert Koehane notes, better theories of domestic politics are needed to bridge the gap between external and internal environments in a systematic way.¹ Therefore, it is important to better understand the relationships between the extraterritorial court and the state. This paper posits that the governments of those states will seek a change or disengage from the extraterritorial court if they perceive a disconnection between themselves and the extraterritorial court. The perception of such a disconnection is influenced by changes in the political environment that make the state more sensitive to decisions that are unfavorable to it. To test this theory, this paper examines arguably the first and best example of an extraterritorial court, namely the Judicial Committee of the Privy Council (JCPC). An examination JCPC decisions where the state is a party to the appeal in the context of different political environments demonstrate that unfavorable decisions in themselves do not move the state to abandon the court. Conversely, favorable decisions do not perpetuate access to the JCPC. These findings suggest that the decisions of the court are not sufficient cause for the state to abandon the court. This work is a first step in broadening our understanding of the linkage of states and extraterritorial judicial institutions in the context of domestic political environments.

State sovereignty is linked to autonomy and can be defined as possessing specific capacities or powers that can be utilized without the consent or approval of another.²

Extraterritorial courts are institutions that states accede to and delegate decision making

authority.³ This effectively outsources a judicial function traditionally considered a part of the domestic domain. Relying on an extraterritorial court as an appellate court for an independent state is fundamentally incompatible with the modern notion of sovereignty.⁴ Recognition of the need for more research into the connection between domestic and international politics goes back at least fifty years, with the call for development of a *linkage theory* that is supported by a research agenda on national-international flows of influence. The absence of such a theory was due both to the lack of communication between those who specialize in national politics, those who specialize in international relations and the radical revision of the standard conception of politics that this theoretical approach would entail.⁵

Exemplary of the need to better understand the link between the domestic political environment and relationships with extraterritorial courts follows a series of decisions by the European Court of Human Rights (ECtHR) denying the United Kingdom (U.K.) the right to deport suspected terrorists.⁶ The 2015 political environment—with the Conservative Party in power—was quite different from that of 1988, under the Labour Party when Parliament ratified the Human Rights Convention in 1998 and acceded to the ECtHR. Furthermore, the unfavorable decisions of the ECtHR came at a time when the governing Conservative Party had publicly expressed its policy objective of limiting the jurisdiction of the ECtHR in the U.K. However, discord in the governing coalition has led to no action being taken. In June 2015, Prime Minister Cameron from the governing Conservative Party was cited by Watt for refusing to back away from the pledge to withdraw the U.K. from the ECtHR.⁷ Prime Minister Cameron claims that the court's decisions impinge on British sovereignty.⁸ Furthermore, he refuses to rule out abandoning

the European Convention on Human Rights unless the U.K. can win the right to veto decisions of the ECtHR. When questioned directly by fellow Conservative Party Member of Parliament Andrew Mitchell however, Prime Minister Cameron stated that there are no immediate plans to abandon the ECtHR.⁹

Lord Mance, a judge on the U.K. Supreme Court of Judicature, defends the contributions of the ECtHR to British law while other judges decry the ECtHR as undermining democracy in the U.K.¹⁰ Incidentally Lord Mance was also a Law Lord of the JCPC. It is evident, therefore, that while the Conservative Party traditionally loathes the ECtHR,¹¹ the decisions of the court and political environment have not served to coalesce the political will of the governing coalition to change the status quo. It may also speak to the persistence of the institution once in place and, like the European Court of Justice (ECJ), its role in the integration of the European Union.¹² The JCPC is a relic of the British Empire. It is an extraterritorial court to the extent that states delegate legal decision-making authority to a court outside the physical jurisdiction with the states having no direct control over the composition or administration of the court seated in London.

The Judicial Committee of the Privy Council

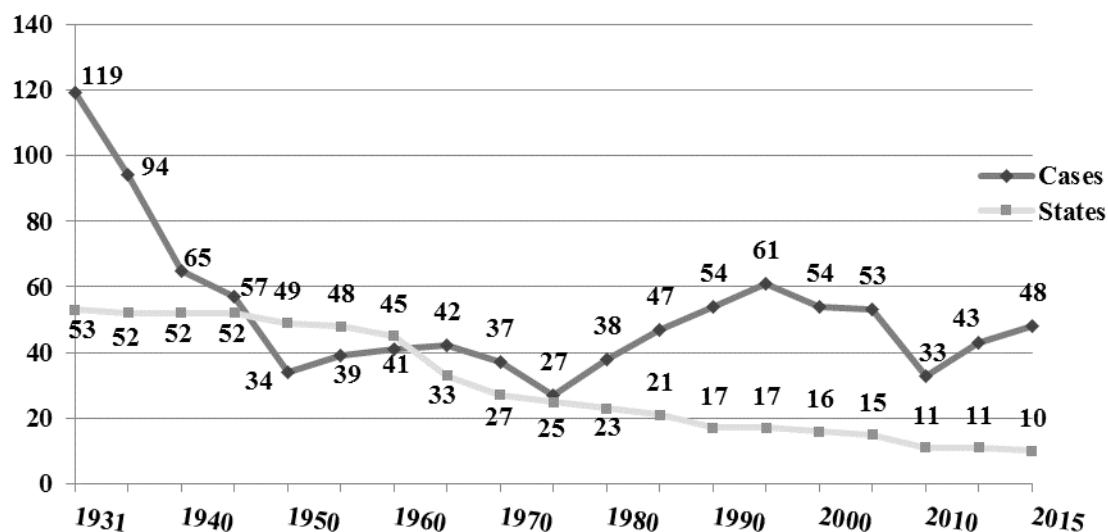
With roots dating back to the twelfth century, the modern JCPC is the product of British legislative action by Lord Chancellor Brougham who introduced the Judicial Committee Act 1833, which created the modern JCPC (The Judicial Committee replaced the Appeals) Committee.¹³ Formally described as an advisory body to the monarch, the JCPC possesses all the trappings of an appellate court of law. Appeals are heard by special leave from the JCPC as a

right extended by royal prerogative or when granted by the lower court.¹⁴ The JCPC is not just of historical significance but illustrates the importance and prominence in the jurisprudence of the British Commonwealth.¹⁵ The branches of law on appeal are broad and important, with fundamental principles being adjudicated.¹⁶ Examples of this diversity include extradition requests, constitutional challenges, libel cases, eminent domain, personal injury, and issues involving provincial versus federal power.

The development of the JCPC was part of the growth and consolidation of British colonial rule around the world and served as the final appellate court for the British Empire.¹⁷ This rich and diverse history contributes to the positive reputation and the continuing role and influence of the Commonwealth's common law legal system. Newly independent states, however, did have the power to determine their status at independence. Commissions were established primarily to provide expert advice on constitutional issues in addition to proposing and drafting entire constitutions.¹⁸ Colonial and local elite comprised these commissions and supported the legislative assembly. Of the fifty former colonies, thirty adopted the JCPC as the final appellate court. As states emerged from colonial rule, the number of states served by the JCPC and the number of cases both declined. With a peak of 119 cases in 1931, the JCPC adjudicated an average of fifty-two appeals per year from 1932 to 2014. Starting with the year the Act of Westminster came into law (1931), Figure 1 displays trends over time as the number of states decline and the corresponding change in the number decisions from 1931 to 2014. The number of cases includes the states, colonies, and territories that continue to retain the JCPC. The

steep drop in the annual number of cases from 119 in 1931 to thirty-four in 1950 occurred when Canada and India replaced the JCPC in 1948 and 1950, respectively.

Figure 1: The number of JCPC cases from 1931 to 2015 and the number of states



Although the number of countries declined from forty-eight in 1955 to ten (plus colonies and dependencies) in 2015, the number of cases per annum increased from thirty-nine in 1955 to forty-eight in 2015, illustrating a continued reliance on the JCPC. This review of the JCPC cases shows an uptick in appeals in death penalty cases from the Commonwealth Caribbean with a high point occurring in 1995 (sixty-one cases). Despite the gradual decline in the number of states, those remaining access the JCPC more frequently.

Court – State Dynamics

The final appellate court is the last judicial forum reviewing legal challenges, and its place in the hierarchy is well established. The court lends legitimacy to the policies of the dominant majority, which Robert Dahl describes as the “lawmaking majority in Congress.”¹⁹ This legitimizing role makes the judiciary an important participant in the national decision-making process²⁰ and is itself a “national policy maker.”²¹ Martin Shapiro refers to this notion as “political jurisprudence.”²² As challenges to policies deemed necessary for ‘peace, order and good government’ (POGG) percolate up the judicial hierarchy, legitimisation of those policies by the judiciary is an important issue.²³ POGG is linked to relationships between domestic and extraterritorial courts as states balance their interests. Robert Putman describes the entanglement of domestic (second image) and international (third image) politics as “two-level games.”²⁴ At the national level, domestic groups pursue interests by pressuring government to adopt favorable policies. In his seminal work on the interaction of the second and third images, Peter Gourevitch cogently delineated the three inter-related domains: 1) the impact of international system on domestic structure (second image reversed); 2) domestic structure as a variable explaining foreign policy; and 3) the links between domestic and international politics.²⁵ Though research samples common law jurisdictions, the finding logically extend to civil law jurisdictions. The desire to have an ally in the court, as Dahl suggests, is not linked to the type of legal system.²⁶ This premise relies on the final appellate court decisions having the same effects regardless of the type of legal system and the response depends on the will of the governing coalition in the political environment regardless of legal system.

In the context of the British Commonwealth, Voigt, Ebeling and Blume compare the resulting economic outcomes of states that acceded to JCPC at independence with those that replaced that court.²⁷ While there might be some general international political advantage via a legitimizing effect of the JCPC, little evidence exists that the government perceived or expected any other specific accrued benefit. Literature on the JCPC does not distinguish between the factors that influence the choice of the final court and does not truly provide insights into the government's relationship to the court as part of governance. Eric Posner and John Yoo suggest that extraterritorial tribunals are only effective if states appoint judges and the tribunals' themselves and fear of state retaliation.²⁸ Therefore, the courts deliver judgments that reflect the interests of the state. Helfer and Slaughter²⁹ assert that the tribunals function under 'constrained independence' operating within a "set of legal and political constraints."³⁰ Still, those findings do not improve our understanding of why some states abandon an extraterritorial court while others, despite unfavourable decisions, remain engaged with the court.

Though the separation of powers doctrine provides the courts some insulation for decision making, governments have some influence over judicial appointments and administrative control. The state, however, has no direct influence over judicial appointments or administrative control over the extraterritorial courts. If the government perceives a disconnection with the court, an option is to withdraw. It is arguable that states sever ties when they perceive the court as incompatible with the policy goals of the government. This potential juncture is a function of changes in the political environment that increases the disconnection between the government and the extraterritorial court. Former President of the New Zealand

Court of Appeal, Sir Thaddeus McCarthy summarized the importance of the political will affect change. In 1976, he expressed no doubt that the questions surrounding severing ties with the JCPC “are ultimately political questions.”³¹ This paper suggests that states that experience political changes are more likely to disengage from the extraterritorial court. This research provides comparative insights and increases our understanding of how domestic politics influence the decision concerning the status of the extraterritorial court. Ultimately, these findings suggest that changes in the political environment are significant in the decision to sever ties with an extraterritorial court.

Tracing the conditions for change

Using states from the British Commonwealth, this paper explores the dynamics between each state and the JCPC. In this research, an extraterritorial court is broadly defined as one that convenes outside the acceding state which has no direct control over the composition or administration of the court. Acceding to the JCPC, therefore, puts the adjudication of legal challenges beyond the control of the government. In this context, the JCPC is arguably the first and best example of an extraterritorial court.

The geographic distribution of Commonwealth states means that the JCPC sitting in London is not without some financial consequences. While states provide no direct financial support to the JCPC, the cost of litigant access from disparate parts of the world may be impediment enough to motivate abandoning the court.³² The literature reveals no causal link between state wealth and the status of the JCPC. Further, using GDP as a proxy, a descriptive analysis reveals that states above the sample average GDP have a stronger tendency to retain the

JCPC than those states below the sample average. This tendency may indicate that the costs of accessing the court is not a significant consideration.

This study employs causal-process observations to examine how changes in a country's political environment influence the relationship with an extraterritorial court. Robert Yin defines a case study as 'an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident'³³ and maintains that this process better evaluates the hypothesis and offers a deeper understanding not possible with quantitative analyses. Process tracing intrinsically examines the trajectory and sequencing of change as the basis for causal inferences. A within-case comparison of three most different Commonwealth states—The Gambia, New Zealand and The Bahamas—allows one to consider official political party platforms, speeches by party leaders, government initiatives, public statements of opinion leaders, political observers (political scientists, historians and reporters), event timings, and case law. George and Bennett refer to “tipping points” that involves assessing complex causal relationships.³⁴ This examination looks for the points where the political environment is such that the governing coalition has the political will to effect change. A major challenge to this paper's assertions may arise if the extraterritorial court's decisions consistently and decidedly undercut the policies of the governing coalition seeding serious distrust in the government and the domestic judiciary which directly causes the state to abandon the court.

The political environment can be captured in three categories. First, the 'no change' category fits when the state does not experience any change in the political environment when a

new government comes to power with a commitment to the constitution and the continued good governance of the state. With a new government formed after each election cycle, the basic tenets of a free political environment continue with no fundamental change in the state-citizen relationship. Regardless of party, the new government pursues the same broad policies of the previous administration but pledges to improve the quality of governance. In this category, one can expect to observe consistent public policy on the major issues or the inability of the governing coalition to form a national consensus on the issue strong enough to lead to change. This invariably may be demonstrated by the lack of support from the opposition party. For example, in Jamaica and Trinidad & Tobago, this issue has been a political football. Political parties have championed the change only to renege later citing various reasons. Another path is via a national referendum. For example, in St. Kitts & Nevis, a 2015 referendum on constitutional changes which include replacing the JCPC with the Caribbean Court of Justice (CCJ) failed to garner a majority vote. A 2016 referendum in Grenada also failed to win majority support. This study asserts that the status quo will prevail without a national political consensus for change.

Second, the subtle or evolutionary change category includes those governments with a new political ideological (left—right continuum) approach that underpins policy development.³⁵ Changes of this nature can also occur when the major political parties agree on an issue. This agreement is not a significant historical or fundamental event that precipitates a systemic change to the governing institutions or the rights and liberties of the citizens. Changes are enacted with legislative action within the existing political structure.³⁶ For example, in 2004 Jamaica

attempted to abolish the JCPC and replace it with the CCJ. On appeal to the JCPC, the Caribbean Court of Justice Act and the Judicature (Appellate Jurisdiction) (Amendment) Act 2004 were found to be unconstitutional based on a parliamentary procedural error. Another effort was launched in 2015. The constitutional amendment replacing the JCPC passed in the House of Representatives with only the support of the ruling People's National Party, and with the opposition Jamaica Labour Party members voting against the bill. Passage of the bill needs at least one Senator from the opposition party to join the ruling party in favor of the bill. To date there is no real indication that this will happen. One opposition Senator called for the vote to be delayed for at least one year.³⁷ Following the 2016 elections which gave the new governing party (JLP) a one seat majority, the issue has been sidelined. Therefore, the political will has not coalesced to change the status quo. Conversely, following the 1999 election in New Zealand, the new coalition government led by the Labour Party and with the support of the Alliance Party and the Green Party, did not believe that their new domestic and international vision for New Zealand could be realized with the JCPC as a policy-making partner. The governing coalition did invite public participation and a small majority supported the replacement of the JCPC. It was obvious, however, that the passing of the Supreme Court Act of 2003 was primarily driven by the political leadership of the governing coalition parties. Wilson confirms this based on the public's low levels of response: "it was obvious this was not an issue that attracted a great deal of public concern and what concern that was expressed was amongst the elites."³⁸ This paper asserts that evolutionary change will occur within the existing institutional structures when as the national political will coalesces around this policy change over time.

Third, the substantive or revolutionary change category, characterized as “movements of significant structural change,”³⁹ is driven by a major historic or fundamental event. It includes adoption of a new constitution that changes the governing institutions as well as the rights and liberties of citizens. In other words, these changes expand or reduce the range of fundamental constitutional rights.⁴⁰ This is exemplified by comparing the change in Guyana as opposed to Trinidad and Tobago which both promulgated new constitutions. In Trinidad and Tobago, the 1976 Constitution created a republic with the only major institutional change being the replacement of the British monarch as the head of state with a President selected domestically. The Republic of Trinidad and Tobago retains the all other basic tenets of the Westminster Model including the right of appeal to the JCPC. On the other hand, the 1970 constitution (Constitution of The Co-Operative Republic of Guyana of 1970) in Guyana created the Co-operative Republic of Guyana with major institutional changes including; 1) members of parliament seated by proportional representation (Section 60) with no single member constituencies first-past the post winners; 2) creates a National Congress of Local Democratic Organs (Section 79) with along with the new Supreme Congress of the People (Section 82) formed the Parliament; 3) Identifies in the Preamble a state ideology as follows: “BEING MOTIVATED and guided by the principles of socialism”; 4) Section 89 establishes a President as Head of State with executive authority; and 5) Section 123 establishes the court of Appeal as the single appellate court from the High Court (severing ties with the JCPC). Substantive of revolutionary change can also take place via *coup d'état* as witnessed in Nigeria (1966, 1975, 1976, 1983, 1985, 1990, 1993, 1999), Fiji (1987, 2000, 2006), and The Gambia (1996). The result is a drastic change in the institutions and

the relationship with the citizens the promulgated via a new or drastically amended constitutions which can include abandoning the JCPC.

While no change maintains the status quo, substantive and subtle changes can increase the likelihood of the removal of the JCPC as the final appellate court. This distinction provides a first step in demarking two broad categories of change that add nuance to our understanding and a basis for future research on the interactions of domestic politics and extraterritorial courts. The following table displays the thirty states in the three categories that retained the JCPC at independence and the subsequent status of the court.

Table: States in the three categories and the status of the JCPC

| | | Political Environment | | | | | |
|----------------------------|-----------------------|------------------------------|-----------------------|------------------------------|-----------------------|--------------------|--|
| | | No Change | | Subtle Change | | Substantive Change | |
| Retain JCPC (10 States) | Abolish (0 States) | Retain JCPC (0 States) | Abolish (9 States) | Retain JCPC (0 States) | Abolish (9 States) | | |
| Antigua & Barbuda | | | Australia | | India | | |
| Bahamas | | | Barbados | | Ghana | | |
| Brunei | | | Belize | | Gambia | | |
| Grenada | | | Canada | | Fiji | | |
| Jamaica | | | Dominica | | Guyana | | |
| Mauritius | | | Malaysia | | Kenya | | |
| St. Kitts & Nevis | | | New Zealand | | Nigeria | | |
| St. Lucia | | | Singapore | | Sri Lanka | | |
| St. Vincent & Grenadines | | | South Africa | | Uganda | | |
| Trinidad & Tobago | | | | | | | |

The nine states that experienced a substantive change all promulgated new constitutions. Nine states experienced a subtler change and the JCPC was replaced. Six established a domestic final appellate court and four states (Barbados, Belize, Dominica, and Guyana) states replaced the JCPC with another extraterritorial court, Caribbean Court of Justice, which is a part of further regional integration of the Caribbean Community. A review of reports from these four states show that by and large the major political parties supported switching to the CCJ. The development of the CCJ is an area for further study. When there was no change in the political environment, all states remained linked to the JCPC. Grenada is the single anomaly in the commonwealth Caribbean. A *coup d'état* led Maurice Bishop in 1979 removed the JCPC but it was reinstated with the return to parliamentary rule in 1983⁴¹ and the status quo has remained.

Based on the most different method, three states are worth examining: 1) no change—The Bahamas; 2) subtle or evolutionary change—New Zealand; and 3) substantive or revolutionary change—The Gambia. All three emerged as independent states with a Westminster model parliamentary government and common law legal systems with the JCPC as the final appellate court. There is variation in the dependent variable with The Bahamas still retaining the JCPC. The Gambia and New Zealand were two of the sixteen states that retained the JCPC at independence (1965 and 1931 respectively) but subsequently replaced the JCPC with domestic final courts of appeals twenty-one and sixty-four years, respectively, after independence.

Particularly in New Zealand, the settlers tried to replicate European institutions by emphasizing private property and checks on government.⁴² New Zealand is representative of the other states that experience subtle or evolutionary change in the visions for the course of the

state. Conversely, all but one state (Guyana) that experienced a substantive change have large indigenous populations with small British-settler populations. Characterized as indirect colonial rule⁴³, the colonial officers supported modest administrative-legal institutions concentrated in the capital and had little interaction with the indigenous population, therefore permeated very little infrastructural power.⁴⁴ The Gambia is representative of this group that promulgated new constitutions which included replacing the JCPC with a domestic court. Guyana is an outlier as it severed ties with the JCPC in the 1970 constitution but did not replace it until it acceded to the Caribbean Court of Justice (another extraterritorial court) in 2005. This paper will trace how changes in the domestic political environment influences continued engagement with the JCPC and, by extension, increase our understanding of state linkage to extraterritorial courts.

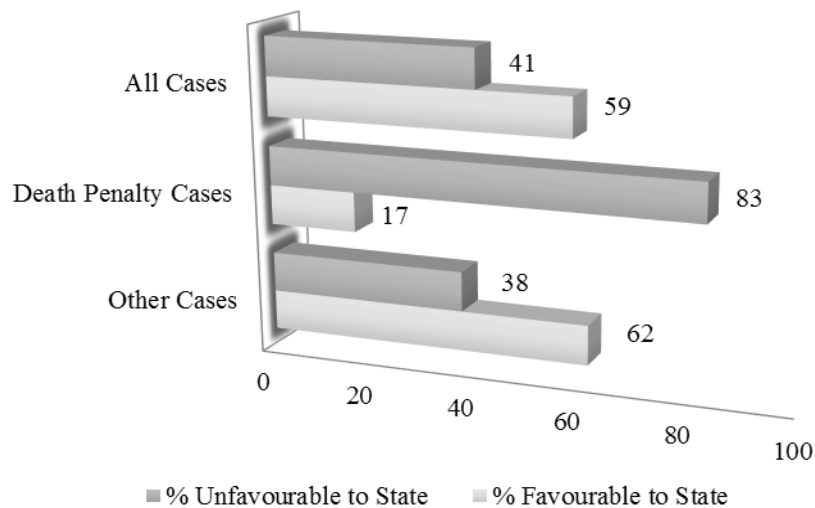
The Commonwealth of The Bahamas

The Bahamas was a colony from 1718 till its independence in 1973. It is one of the nine states that still retain the JCPC.⁴⁵ The two major political parties in The Bahamas, the Free National Movement (FNM) and the Progressive Liberal Party (PLP), have both governed since independence. While the PLP governed from 1973 until its general election loss in 1992, that election as well as subsequent elections, lacked ideological differentiations but was instead driven overwhelmingly by issues of pro-business domestic policies, increasing crime rates, and allegations of official corruption.⁴⁶

While some Bahamians are dissatisfied with the JCPC,⁴⁷ a bifurcated discussion has emerged which resonates in the Caribbean states. First, the JCPC is discussed in the context of the death penalty. Ghany⁴⁸ contends that the JCPC has an agenda in the Commonwealth

Caribbean and concludes that ‘it is now clear that there is an agenda to make it difficult for Commonwealth Caribbean states to carry out the death penalty.’⁴⁹ A review of JCPC decisions between 1973 (Bahamian independence) and 2013 (There are no death penalty appeals to the JCPC from The Bahamas in 1993, 1994, 2014, and 2015) where the state is a party underpins the bifurcated discussion. Calls to replace the JCPC are fueled by decisions against the imposition of the death penalty while the levels success of the state in other cases dampens opposition. Figure 2 displays the percentage of favourable versus unfavourable JCPC decisions in which the state was a party: a) in all cases, the state won 59 percent; b) in death penalty cases, 83 percent of the appeals against the death penalty were successful (or unfavourable to the state); and c) in all other types of cases the state had a higher rate of success with favourable outcomes in 62 percent of those decisions. The unfavourable rate in death penalty cases is 35 percent above the rate in *Other Cases* and 42 percent above the *All Cases* rate. The large variation in outcomes illustrate why there is a focus on death penalty cases.

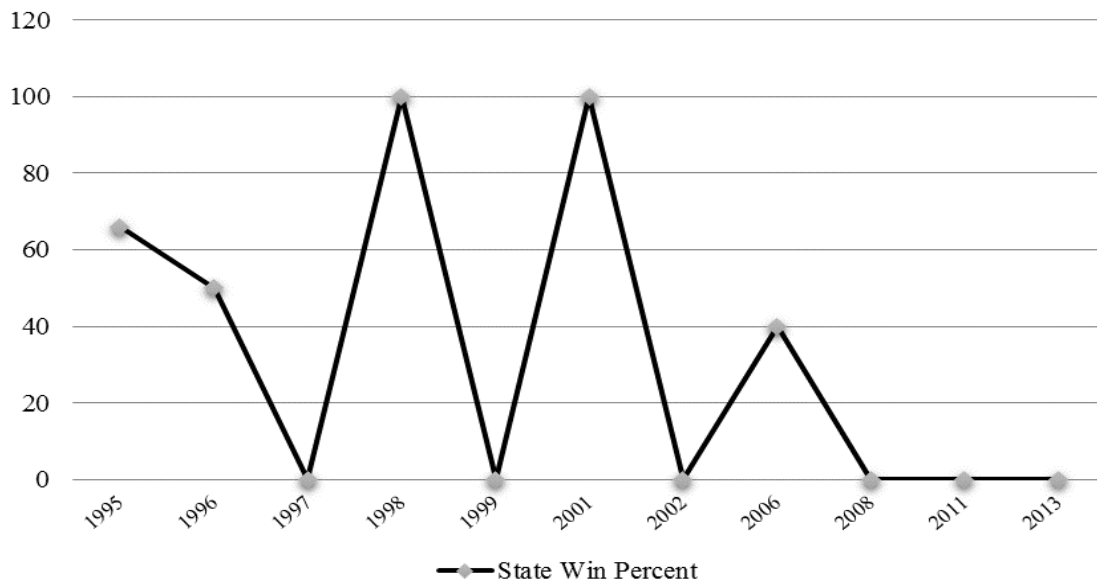
Figure 2: Comparison of success rates for all cases in which the state is a party; death penalty cases and all other cases for The Bahamas



Ghany identifies *Pratt and Morgan v. Attorney General of Jamaica*⁵⁰ as the case where the JCPC turned against the constitutionality of carrying out the death penalty in the Commonwealth Caribbean.⁵¹ Though not about the Bahamian constitution *per se*, the decision in *Maxo Tido v. The Queen* overturned the death penalty sentence handed down by the domestic court of appeals.⁵² A former President of The Bahamian Bar Association, Ruth Bowe Darville, stated, “I think the question of the death penalty needs to be addressed. I think the country is torn by it because we’re in the throes of this crime epidemic as people have labeled it.”⁵³ Darville suggested that the issue of the death penalty be remedied through legislation but with the knowledge that care must be taken not to offend the international community and that any action is linked to the Bahamian economy. In other words, international investor confidence must be balanced with the issue of the death penalty. A compromise proposal to oust the jurisdiction of

the JCPC in death penalty appeals made in a 2014 speech by the leader of the opposition party.⁵⁴ It was just that—a proposal, and one not reflected in the party manifesto. There is no way to predict if any future election victory by the current opposition (FNM) will lead to a change in political environment and clear political will to replace the JCPC. A closer look at the death penalty cases from the Bahamas after *Pratt and Morgan* shows the decrease in the state's success rate in upholding the death penalty.⁵⁵ Cases between 1995 and 2013 present a strong indication as to why this issue would be so prominent in The Bahamas (and the Commonwealth Caribbean). Figure 3 displays the states win-average in death penalty decisions (i.e., JCPC upholding sentence) from 1995 to 2013 with the state losing all cases from 2008 to 2013. JCPC death penalty decisions alone are evidently not sufficient to change the political status quo.

Figure 3: State win rate per cent per year from 1995 to 2013 in death penalty appeals for The Bahamas



Second, this paper addresses the discussion about the value of the JCPC in conferring legitimacy on the judiciary. The former President of The Bahamian Bar Association, Ruth Bowe Darville, supports the retention of the JCPC.⁵⁶ Darville points out that those who advocate for its removal are “treading in very dangerous waters,” as “litigants who come before us with multi-million-dollar cases and who see us as a great financial centre, need assurance that the Privy Council [JCPC] is there.”⁵⁷ In other words, the JCPC legitimizes and reinforces the independence of the judiciary to those with economic interests. Furthermore, *The Bahamas Advantage*,⁵⁸ the newsletter of The Bahamas Financial Services Board, reports that Prime Minister Ingraham reiterated the link between judicial legitimisation and the continued role of the JCPC as the final appellate court. Bahamian attorney-at-law Adrian Gibson challenges the

continued use of the JCPC as an affront to sovereignty and asserts that, “the relevance of the law in local circumstances is best achieved by locals, not regional or far distant courts whose Law Lord’s thinking is not superior to that of the most ethical and scrupulous Bahamian jurists.”⁵⁹ He also notes that the JCPC praised the quality of decisions handed down by the domestic court of appeals and states that “the notion that we can govern ourselves but are not capable of judging ourselves is a non-sequitur this is simply illogical.”⁶⁰

The political environment has not changed enough to precipitate a sufficiently strong reaction to the JCPC to create a political will to abolish appeals. The two major political parties, the Free National Movement (FNM) and the Progressive Liberal Party (PLP), have both led governments after independence with consistently peaceful transitions of power.⁶¹ Like New Zealand, it has not experienced any substantive or revolutionary changes in the political environment and consistently enjoys high levels of political freedom and civil liberties.⁶² Although the JCPC has support to continue as the final appellate court,⁶³ the discourse on this issue is bifurcated. The death penalty decisions have not galvanised political will in the face of support for the court as a legitimizing presence. The government and the opposition differ little on the broad policies that guide The Bahamas. This lack of policy differentiation contrasts with New Zealand where the Labour Party had a different vision for the overall domestic and international policies, and its manifesto pledged to abolish the JCPC and, on winning the next general elections, carried through on that pledge.

New Zealand

New Zealand became a British colony in 1840. The Westminster Act of 1931 granted Dominions (Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland) the power to alter their laws without ratification by the UK parliament and, by extension, the authority to abolish appeals to the JCPC. In 2004, New Zealand was the last of the Dominions to abolish appeals to the JCPC. New Zealand is representative of the states that experienced a subtle or evolutionary change in the political environment. These states (Australia, Canada, Malaysia, New Zealand, and South Africa) experienced a consistent political environment punctuated only by a new government's vision that did not include the JCPC. In these states, each parliament passed specific laws to abolish appeals to the JCPC. New Zealand is an opportune case to examine because the political and public process is particularly well documented. While the change was not as substantive as that following the 1994 *coup d'état* in The Gambia, the political environment shifted with the Labour Party's victory.

Serious debates about retaining the JCPC took place in five periods after the Westminster Act of 1931. The first in the 1940s was led by former Chief Justice Sir Michael Myers, whose cabinet report on the future of the JCPC focused on the establishment of "a Commonwealth Court of Appeal."⁶⁴ In 1965, the same idea was resurrected by former Attorney General Josiah Ralph Hanan at the Third Commonwealth and Empire Law Conference in Sydney, Australia but lacked political support in New Zealand.⁶⁵ The third attempt was in 1987 when the Labour Party government (1984-90) proposed abolishing the JCPC at the New Zealand Law Conference.⁶⁶

Richardson asserts that the decision to abandon the proposal was partly influenced by two decisions favourable to the government: 1) In *Commissioner Inland Revenue v. Databank Systems Limited* the JCPC supported the state's regulatory power over financial services⁶⁷; and 2) in *D.J. Butcher v. Petrocorp Exploration Ltd et al* (1991) the court upheld the state's authority to regulate exploration for natural resources.⁶⁸ Richardson concludes that "...the Privy Council has, by its actions, served to foster its continuing links with New Zealand even if that was not its deliberate purpose."⁶⁹ However, decisions unfavourable to the government occurred in 1990 and 1991 which undermined that conclusion.

The fourth attempt was in 1996 when the National Party introduced a bill to parliament to abolish the JCPC. The effort was derailed by the results of general elections in 1996, which forced the National Party into a coalition government with the New Zealand First Party who opposed replacing the JCPC.⁷⁰ This effort was also partially influenced by a favourable decision in *Tainui Maori Trust Board & Others v Treaty of Waitangi Fisheries Commission & Others*,⁷¹ in which the court supported the government's claim of authority to regulate fishing rights.⁷² Finally, a successful move was initiated when the Labour Party came to power in the 1999 general elections.

Freedom House reports consistently high scores for political freedom and civil liberties.⁷³ A subtle change, however, did occur in the political environment in New Zealand in 1999. The changes in New Zealand's political environment were more about the vision for the state and the appropriateness of the status quo regarding the JCPC. The Labour Party won the general elections in 1999,⁷⁴ claiming the center-left of the political spectrum.⁷⁵ The party's manifesto

explicitly included a pledge to replace the JCPC presented a public acknowledgment that the new government did not see the JCPC as an appropriate partner to implement its policies. The Labour Party was supported by the Alliance Party⁷⁶ and the Green Party.⁷⁷ While earlier attempts to muster the political will to abolish the JCPC may have been derailed by favourable decisions, this final attempt was not precipitated by unfavourable decisions but appears to be a strategic move in the changed political environment. In other words, the change in the political environment was enough to push the government to replace the JCPC to harness the legitimising influence of a domestic final appellate court.

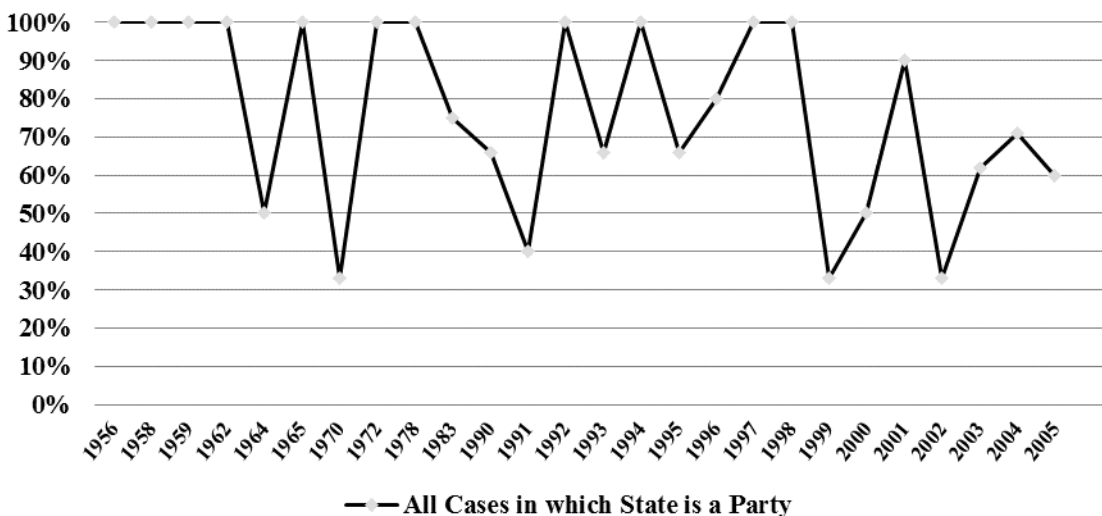
The stage for the public debate was set with the December 2000 release of *Discussion Paper: Reshaping New Zealand's Appeal Structure*,⁷⁸ which outlined the rationale for the change. There are three distinguishable yet interconnected political reasons underpin the government's initiative to abolish appeals to the JCPC. First, the Labour Party espoused a new vision for international policies to redirect its role in the world community. Further, the vision included revisiting the domestic neo-liberal economic policies championed by the more conservative National Party (and its coalition partners) that led the previous government.⁷⁹ The new government intended to pursue a new economic and political agenda that required harnessing the governing institutions, including the judiciary, to effectively develop and implement policies. Wilson's positions reflect the government's view that the JCPC was not the appropriate partner for implementing the new comprehensive vision.

Third, the new Labour Party government re-examined the relevance and relationship of the institution to the citizens. Wilson suggests this institution-citizen relationship was best

handled by “the New Zealand community and by judges’ familiar with that community and responsible for the maintenance of the rule of law.”⁸⁰ The elected representatives also viewed the relationship between parliamentary sovereignty and the power of judicial review of the policies as important. The JCPC as the final court with the power of judicial review conflicts with parliamentary sovereignty. Without referring specifically to JCPC decisions, Wilson states that “appeals to the Privy Council [JCPC] seemed increasingly anomalous.”⁸¹ Further, she cites former Chief Justice of New Zealand Robert Stout who in 1904 states, “at present we in New Zealand are, so far as the Privy Council [JCPC] is concerned, in an unfortunate position. It has shown that it knows not our statutes, our conveyancing terms, or our history.”⁸²

Figure 4 displays the varying success rates for all cases in which the state is a party between 1956⁸³ and 2005. The state’s success rate declines slightly before the JCPC. Wilson indicates no displeasure with any individual decision or the history of decision-making by the JCPC. However, she does state that each domestic appellate court decision “accurately reflects the constitutional reality within which the relationship between the courts, the executive and the parliament work.”⁸⁴ That assessment shows confidence in the domestic appellate courts as an institutional partner in implementing the vision of the new government.

Figure 4: New Zealand's success rates for all cases and cases where the state is the respondent between 1956 and 2005.



After a public consultation period including the legal and business communities, no majority consensus existed for or against the proposed change.⁸⁵ Moreover, a 2003 public opinion poll found that 51 percent favoured the Supreme Court Bill replacing the JCPC, but 40 percent knew nothing about the matter.⁸⁶ Though the Labour Party (1984-90) and the National Party (1995-99) had a parliamentary majority and tentatively supported removing the JCPC, it did not happen. In 1999, with a Labour majority in parliament⁸⁷ and a new vision, the government moved forward and prevailed. The Supreme Court Bill became effective on January 1, 2004, and officially abolished any possibility of appeal to the JCPC.

Tracing the change in the political environment, the specified goals and the deliberate process of the government in imposing its will supports the theory that a government expects a

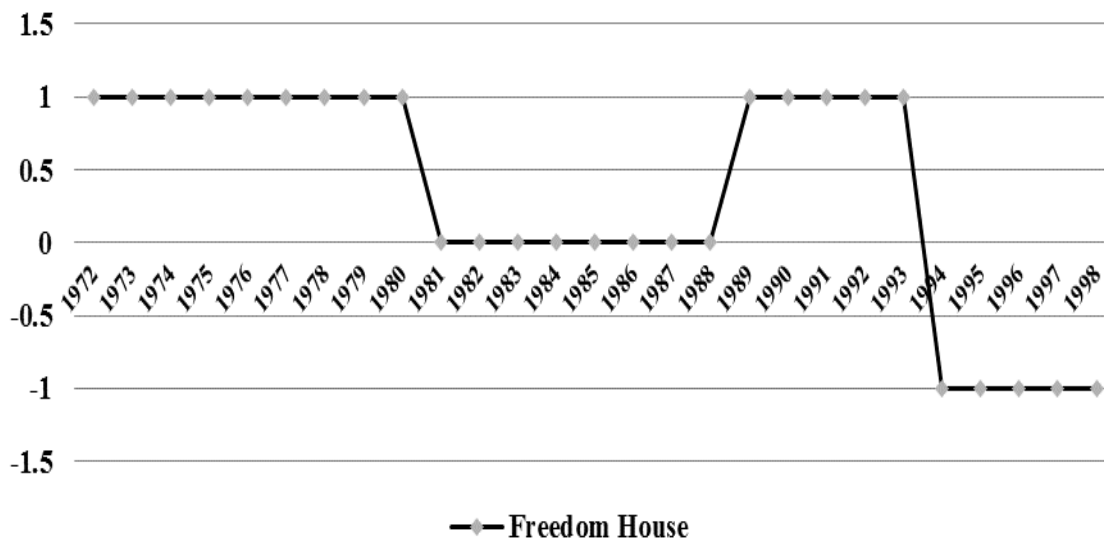
final appellate court to be a reliable partner in the process of producing and upholding public policy. In New Zealand, the changed political environment is not in the form of curtailing civil and political liberties as operationalised by Freedom House or the Centre for Systemic Peace (Polity IV) data. However, significant enough changes existed in the new government's approach in the new political environment to alter the status quo.

The Republic of Gambia (The Gambia)

Formally colonized in 1910, The Gambia gained independence in 1965 with a constitutional system reflecting the Westminster model (The governing institutional structures of the UK underpin the Westminster Model.) It is one of six African states to retain the JCPC. The Gambia's long thirty-three-year-history with the JCPC and the availability of information about the changes in the political environment also make it an appropriate case study. The democratic political environment was relatively consistent for twenty-one years after independence until the substantive or revolutionary change that included replacing the JCPC in 1998 following a *coup d'état* in 1994. Dawda Kairaba Jawara (1965-94) led the post-independence rule of the Peoples' Progressive Party (PPP) through five consecutive elections. That period was generally stable with free elections and respect for civil rights and liberties.⁸⁸ For this study, the Freedom House scores (2014a) act as a proxy for the health of Gambian political environment. The Gambia receives a favourable rating for political rights and civil liberties in fourteen of the twenty-one years reported. Figure 5 presents the annual rating from 1972 to 1998. The Gambia is rated as "free" from 1965 to 1980 and partially free from 1981 to 1988 (This period coincides with the

failed 1981 coup d'état through a 1984-89 federation with Senegal.). Again, rated as free in 1990, it dropped to 'not free' following the 1994 *coup d'état*.

Figure 5: Gambia's freedom house scores from 1972 through 1998 (Freedom House, 2014)



Under PPP's rule (1965-94), one constitutional law case transpired out of the three JCPC cases to which the state was a party. *Attorney General of Gambia v. Momdou Jobe*⁸⁹ was an appeal against The Gambian Court of Appeal decision that declared four provisions (Sections 8 (1) to (4), 9 and 10) of the Special Criminal Court Act (1979) to be *ultra vires* of the 1970 Constitution. The JCPC declared that only Section 8 (5), dealing with the defendant having the burden of proving innocence in cases of dishonesty involving public funds, was *ultra vires* notes the JCPC decision effectively curbs the power of the legislature.⁹⁰ In the political environment at the time, however, it did not result in the removal of the JCPC.

The 1994 *coup d'état* ushered in two years of military rule by the Armed Forces Provisional Ruling Council (AFPRC).⁹¹ Amnesty International reported a pattern of arbitrary arrests and detentions, restrictions on political activities, controls on the movement opposition leaders and harassment of journalists and owners of newspapers in an apparent effort to stifle criticism of the government.⁹² The change in the political environment indicates that the government's vision included muting political opposition and consolidating power in the executive. Following the *coup d'état*, that vision was entrenched with a new constitution with provisions for replacing the JCPC.

The AFPC later transformed itself into a political party led by the *coup d'état* leader turned civilian president.⁹³ After two years of military rule, Gambians were more than ready for return to constitutional rule.⁹⁴ The August 6, 1996 referendum returned The Gambia to constitutional rule as the Second Republic.⁹⁵ The new constitution provided for increased executive power over the judiciary and the replacement of the JCPC with the Supreme Court of Gambia.

The JCPC's decisions after the *coup d'état*, but before replacement in 1998, are instructive as to the intentions of the government. The state was a party in one of four cases decided between 1994 and 1998. In *West Coast Air, Limited v Gambia Civil Aviation Authority and Another*⁹⁶ (with the state as the respondent), damages were assessed against the state but were not a legal curb on state power. Under the new constitution, the regime gained more control over the domestic courts and understood the role as a potential ally in its quest for legitimacy. The case involving Lamin Waa Juwara is a much publicised example of the effects of Section 13

of the 1996 Constitution that provides immunity from legal action to all members and representative of AFPC⁹⁷ and the provision for replacing the JCPC in the new constitution (the government did not immediately exercise the power granted in the provision). Juwara served as the Minister of Lands before the 1994 *coup d'état*. On joining the opposition, he defied the constraints on political activities.⁹⁸ After his second arrest in 1996, he was held for ten weeks and released without being charged.⁹⁹ Based on the immunity entrenched in Section 13 of the Constitution, a lower court dismissed claims of human rights violations, and he petitioned the JCPC in August 1998.¹⁰⁰ In October 1998 and before the JCPC could consider the petition, the JCPC was replaced with the Supreme Court of Gambia.¹⁰¹ This change halted the appeal process and any risk of the JCPC handing down a decision unfavourable to the government. If the *Juwara* case had reached the JCPC, inevitably his persecution would have been laid bare before the court. The possibility of a JCPC decision in favour of Juwara would have supported the criticisms of the regime and challenged their policies. In the Supreme Court of The Gambia, the government expected a more reliable partner—one over which it had virtually unfettered constitutional leverage. This anticipatory move entrenched the new political environment and ended legal challenges to the extraterritorial court. It must be reiterated that previous governments lost constitutional cases before the JCPC, but those cases did not lead to the replacement of the court. The new political environment intolerant of challenges precipitated the substantive or revolutionary constitutional change by the government.

There is evidence that extraterritorial courts will continue to emerge in the world community.¹⁰² Extraterritorial courts such as the ICC, the Caribbean Court of Justice (appellate

jurisdiction) and the African Court on Human and People's Rights continue to adjudicate, and other courts emerge around the proliferation of international law, so understanding the linkage to domestic political environments is crucial. Examining the JCPC provides an appropriate forum for gaining insight into the major driver of the relationship between the court and the states. The three states drawn from the British Commonwealth are representative of the three categories explicated to capture the domestic political environment (see Table). Ultimately, the government's emergent political will changed in a broader political environment that drove the process to abolish the JCPC. Tracing when the political environment changes coincide with the decision to replace the JCPC points to the significance of the domestic political environment.

The Bahamas is a clear example of where the government in the current political environment maintains the status quo. The bifurcated nature of the political discourse retards the development of the political will to seriously reconsider the role of the JCPC. Despite the government's sensitivity to the unfavourable decisions involving the death penalty, the conflicting views amongst the elite and the public on that issue stymie the coalescence of the political will against continued reliance on the JCPC.

While the character of the change in the political environment in New Zealand was subtle or more evolutionary, it was clearly articulated and executed by the government. A more detailed examination of the political environment reveals that more nuanced changes in the political environment based on ideological shifts can be important. The election of an ideologically different party that led the new government viewed the JCPC as incompatible with its new vision. This altered view of the JCPC appears not to be linked to the past decisions of the court.

Although they allowed appeals for seventy-four years, once the government was sufficiently motivated, the constitutional change abolishing appeals was realised relatively quickly. The political decision to abolish the JCPC was done by parliamentary action but not with complete overhaul of the governing structures with a new constitution as seen in The Gambia.

In The Gambia, previous JCPC decisions were unfavorable to the state but did not precipitate the removal of the JCPC in that political environment. The substantive change in the political environment was precipitated by a military *coup d'état* and the adoption of an entirely new constitution providing for the replacement of the JCPC. In the changed political environment, the government may have been more sensitive to unfavourable JCPC decisions. This examination suggests that the replacement of the JCPC in 1998 may have been an indirect response to the possibility of the politically charged *Jawara* case reaching the JCPC which would not support the policy of the government. By replacing the JCPC, the appeal process had to be aborted, and the favourable domestic court of appeal decision survived. However, the new constitution changed the governing institutions, the relationship between the state and the citizens, and supported the new political environment. As the state received unfavorable JCPC decisions prior to the change, this paper suggests that the response to the JCPC was less about the decisions and more about the changed political environment.

The findings do not address the issue of whether a link exists between the domestic political environment and the types of cases that percolate up through the courts. This examination does, however, contribute to our understanding of the linkage between the domestic political environment and the status of extraterritorial courts. In other words, the response to the

extraterritorial court is less about the performance of the court and more about the domestic needs of the government coinciding with political will. Despite the historical legacy and reputation of the JCPC, state actions suggest that the ties may be severed when the political will exists regardless of the past court performance. This assertion may force the international community to not only consider the independence of the courts but also how structural and procedural mechanisms such as appointment and tenure of judges, funding, docket control and exit clauses are influenced by and coordinated with the member states. The goal is to buffer the courts from changes in the domestic political environment and enhance the viability of extraterritorial courts.

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