The Cook Islands and the Privy Council

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With the 1981 changes to provisions of the Cook Islands Constitution relating to appeals to the Privy Council, and the pending appeal to the Privy Council from the decision of the Cook Islands Court of Appeal in Clarke *v.* Karika, *appeals to London from Pacific island states are a matter of great interest. Alex Frame writes here of the relationship of the Privy Council to courts of the Cook Islands from earliest times till the present day. The data presented also has relevance to the judicial systems of other Pacific states.*

A survey of the relationship between the Privy Council and the Cook Islands must distinguish five periods: 1888-1901, 1901-1915, 1915-1965, 1965-1981, 1981-1984.

I. 1888-1901: BRITISH PROTECTORATE

During this time appeal by special leave was very probably available at least from 1893 with the promulgation of the Pacific Order in Council[1] which appears to extend to the Cook Islands. This conclusion is, however, entirely academic.

II. 1901-1915

Following the extension of the boundaries of the Colony of New Zealand to include the Cook Islands in 1901,[2] the New Zealand Parliament enacted the Cook and Other Islands Government Act 1901.[3]

That Act provided in section 3(2) that:

> There shall be an appeal from the decisions of the High Court of the said islands to the Supreme Court of New Zealand and thence to the Court of Appeal of New Zealand . . . .

It is clear that the rights of appeal from the New Zealand Supreme Court and the New Zealand Court of Appeal to the Privy Council under the 1860 and 1871

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1 Pacific Order in Council 1893 (Imp.) See Vol. VIII, *Statutory Regulations and Orders and Statutory Instruments,* p.597. Article 88 of the Imperial Order provided that the decision of a Court of Appeal under the Order shall be subject to appeal to Her Majesty in Council. The Order contemplated that the Court of Appeal should be sited in Fiji.

2 By combined effect of the Imperial Order in Council of 13 May 1901 (SR-O-S1) Revised to Dec 13, 1948, Vol xvi, p.862) and the New Zealand Proclamation of 10 June (See App. J.H.R. 1901, A-3G) bringing the Imperial Order into force.

3 1901, No. 44, Amended by 1902, No. 34, and 1903, No. 89.

Orders in Council referred to in the preamble to the 1910 Imperial Order would have applied equally to causes arising in the Cook Islands. Furthermore, of course, appeal by special leave would have been available in any case. It is important to note also that at least since 1901, and the inclusion of the Cook Islands within the Colony of New Zealand, the general Imperial statutes dealing with the jurisdiction and practice of the Privy Council (in particular the Judicial Committee Acts of 1833 and 1844) were in force in the Cook Islands.

This follows from the elementary rule that Imperial enactments contemplating, expressly or by necessary intendment, application to the colonies were in force in those colonies and could not be derogated from by colonial legislation. In this connection it is noted that the Judicial Committee Act 1844 empowered the Queen in Council to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of Justice, within any British Colony or possession abroad. The 1901 New Zealand Act which provided for the Cook Islands could not have avoided that conclusion, even expressly, because of the doctrine of repugnancy as it then stood under section 2 of the Colonial Laws Validity Act 1865 (Imp.).

In 1910, in accordance with a policy of harmonising practice throughout the Empire, new conditions of appeal to the Privy Council were provided. For New Zealand these took the form of the New Zealand (Appeals to the Privy Council) Order 1910 (Imp.).[4] Rule 2 of the 1910 New Zealand Rules will be seen to provide for appeals "as of right" in cases indicated by the value of the cause and at the discretion of the Court of Appeal or Supreme Court in other cases. It appears clear that these Rules were in force in respect of Cook Islands causes in 1910 and would have authorised appeals to the Privy Council in the same way as with New Zealand causes.

III. 1915-1965

In 1915 the New Zealand Parliament enacted the Cook Islands Act 1915.[5] This attempt to codify the law relating to the Cook Islands, which greatly modified the schematic 1901 Act, provided for appeals from the High Court in Rarotonga to the Supreme Court of New Zealand but introduced an express guillotine of the appellate process at that point. Section 170 provided that: "There shall be no appeal to the Court of Appeal from any decision of the Supreme Court of New Zealand on an appeal from the High Court".

4 1910 No. 70 (L.3) (Imp). This may be found reproduced (with a 1972 Amendment) as the First Schedule to the Privy Council (Judicial Committee) Rules Notice 1973 (N.Z.) S.R. 1973/181. These will be referred as "the 1910 New Zealand Rules".

5 1915, No. 40. It is known that the New Zealand Solicitor-General, later Sir John Salmond, drafted the Act. For Salmond's precis of the Bill, see New Zealand Parliamentary Debates, Vol. 170 (1914) p. 248, where the Minister in charge of the Bill, Sir Maui Pomare, read Salmond's precis into the record. In particular see, at p.250, Salmond's apparent intention that "the relations so established between the Supreme Court (of New Zealand) and the High Court (of the Cook Islands) are very similar to those now existing between the Privy Council and the Supreme Court . . . "

What then, was the effect of the 1915 guillotine? In *Nelson* v. *Braisby* (No. 3)[6] the Full Court considered that a very similar provision in the Samoa Act 1921 achieved the result that:[7]

> The judgment of the Supreme Court is to be final, and that the Court had no power to grant leave to appeal to the Privy Council . . . . It is of course competent for the appellant to apply to the Privy Council for special leave.

It is submitted that the *Nelson* v. *Braisby* conclusion cannot hold for the Cook Islands situation. First, that conclusion would be to give the 1915 New Zealand Act an effect repugnant to the 1910 New Zealand Rules in so far as it would preclude an appeal directly from the Supreme Court of New Zealand in accordance with Rule 2(c). Section 2 of the Colonial Laws Validity Act 1865 (Imp.) renders void and inoperative any colonial law which is repugnant to any Imperial Act of Parliament or "any order or regulation made under authority of such Act of Parliament". Secondly, the stratagem of preventing access to the New Zealand Court of Appeal and thereby the Privy Council may circumvent the obstacle of the Colonial Laws Validity Act as it stood in 1915, but only in respect of Rules 2 (a) and (b).[8] The position is thus reached that the 1910 New Zealand Rules continued to apply to the Cooks after 1915 although there was no occasion for appeals under Rule 2(a) and (b).

Appeals by special leave continued to be permissible as conceded even in *Nelson* v. *Braisby*.

IV. 1965-1981 — SELF GOVERNMENT

The achievement of full and exclusive legislative power under the 1965 Cook Islands Constitution was accompanied by a continuation of the scheme of the 1915 Act as to appellate structure. The 1965 Constitution provided that appeals should continue to lie from the High Court of the Cook Islands to the Supreme Court of New Zealand but article 63 added that:

> There shall be no appeal to the Court of Appeal of New Zealand from any decision of the Supreme Court of New Zealand on an appeal from the High Court under Article 61 hereof.

However, the 1910 New Zealand Rules continued as part of the law of the Cook Islands for two reasons. First, because Rule 2 (c) was still relevant as to direct appeals from the Supreme Court — although an argument might be advanced that the *Nelson* v. *Braisby* result, criticised above, might have become correct in

6 [1934] N.Z.L.R. 636. The Full Court consisted of Myers C.J. and Reed and Blair JJ. The judgment was an oral one and, accordingly, of limited authority.

7 Ibid.

8 The important distinction must here be drawn between two techniques of inhibiting appeals to the Privy Council other than by special leave. Appeals may be prevented by closing access to the local courts from which appeals to the Privy Council are available under the 1910 Rules. It is conceded that such a technique will be effective even before the demise of s.2 of the Colonial Laws Validity Act 1865. Thus, an Act of the New Zealand Parliament declaring the decision of a court 'final and conclusive' may prevent an appeal to the Privy Council because it prevents access to the Supreme Court or Court of Appeal which are the springboards recognised by the 1910 Rules, not because the Act has negated the Rules.

1947 with the adoption by New Zealand of the Statute of Westminster 1931 (U.K.) and the consequent demise of the repugnancy provisions of the Colonial Laws Validity Act 1865. Support for that view might be found in McCarthy J.'s dicta in *Nunns* v. *Licensing Control Commission.*[9] However, the writer's view is that the continuation of the right to apply for special leave would alone have kept the 1910 New Zealand Rules in force in the Cook Islands albeit in a suspended state. Secondly, Article 77 of the Constitution provided for the continuation of existing law. Needless to say, the empowering Imperial statutes of 1833 and 1944 also continued in force as part of the general law relating to the Privy Council.[10]

The position reached in discussion here thus questions the basis for the view of the learned editors of *Halsbury's Laws of England*[11] that "appeal lies to the Privy Council only by special leave of the Judicial Committee". *Nelson* v. *Braisby* is cited as authority but the writer doubts the correctness of that application of *Nelson* v. *Braisby* as has been argued above.

V. 1981 TO THE PRESENT

With the coming into force of the Constitution Amendment No. 9 (Cook Islands) on 5 June 1981, important changes were made to the judicial and appellate structure of the Cook Islands. In particular, a Court of Appeal of the Cook Islands was created by the new article 56 of the Constitution. The new article 59 rendered decisions of that Court final and removed access to the New Zealand High Court although some transitional provisions were included in section 21 of Amendment No. 9. The exception to the finality of decisions of the Court of Appeal of the Cook Islands was provided by the new article 59(2) which declared:

> There shall be a right of appeal to Her Majesty the Queen in Council, with leave of the Court of Appeal, or if such leave is refused with the leave of Her Majesty the Queen in Council, from judgments of the Court of Appeal in such cases and subject to such conditions as are prescribed by Act.

At least four problems arise from this wording. First, are the 'cases' and 'conditions' to be prescribed only in respect of 'special leave' applications or also in respect of applications for leave of the Court of Appeal? Secondly is it appropriate or possible for the 'special leave 'procedure to be hedged in the way apparently contemplated? Thirdly, what does 'Act' mean in this context? Does it refer to the existing Imperial Orders in Council of 1910 and 1982 or does it

9 [1968] N.Z.L.R. 57, 63.

10 The question arises whether the 1972 Amendment to the 1910 Rules (S.I 1972/1994) and the 1982 Judicial Committee (General Appellate Jurisdiction) Rules Order (S.I.1982/1676) could be regarded as effectively extending to the Cook Islands. The Constitution is silent on the point, although of course it gives a clear answer to the competence of New Zealand Acts and Regulations in similar circumstances. Professor Barton, as he then was, has discussed (and questioned) the effectnveness of U K. Orders to alter New Zealand law after the adoption of the Statute of Westminster in 1947 (see (1974) 6 N.Z.U.L R. 82-87.). Because the Cook Islands has a written Constitution with definition of legislative powers, it is thought that the observations of the Privy Council in *Ibralebbe* v. *The Queen* [1964] A.C. 900 throw further doubt on the legislative competence of the Crown by Order in Council to effect changes to Cook Islands law after 1965.

11 Fourth edition, Vol. 6 para. 922.

require an enactment of the Parliament of the Cook Islands?[12] Fourthly, what effect does article 59 have upon the existing Imperial Orders in Council of 1910 and 1982? Are they pro tanto modified or entirely revoked in respect of the Cook Islands — as would be constitutionally possible by the terms of article 39(3) of the Constitution?

VI. THE FUTURE

These problems can only be authoritatively and conveniently resolved by Act of the Parliament of the Cook Islands.

The preliminary point must arise as to the permissibility of unilateral tampering with the 'cases' in which and 'conditions' under which appeals may proceed to the Privy Council. Although the position was not always free from doubt, it can now confidently be asserted that the shaping of the right of appeal to the Privy Council is within the power of the jurisdiction from which appeals are to lie. The Privy Council itself observed in *British Coal Corporation* v. *The King*:[13]

> The practice had grown up that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their Courts to the King in Council and should fix the conditions on which such appeal should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial Court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was indeed a residuum of the Royal prerogative of the sovereign as the fountain of justice.

In the important case of *Woolworths (N.Z.), Ltd.* v. *Wynne*[14] the New Zealand Court of Appeal held that the power to legislate for the peace, order, and good government included a power to "regulate and mould the valued right of appeal to Her Majesty in Council".[15] In a powerful judgment, F. B. Adams J., found that a provision in the Justices of the Peace Amendment Act 1946 which permitted the Court of Appeal to give leave to either party to appeal to the Privy Council was fully effective although the Order in Council emanating from Buckingham Palace in 1910 did not contemplate the giving of such leave by the local court.

A second preliminary difficulty arises as to the scope of article 59. Does it contemplate appeals "as of right" of the type provided for in Rule 2(a) of the 1910 New Zealand Rules? At first glance it does not, but, on the contrary, appears only to contemplate appeals with leave of the Court of Appeal. However it is

12 Although 'Act' is defined in the Constitution as 'an Act of the Parliament of the Cook Islands' (Article 1 as affected by Amendment No. 9 of 1981), that definition is subject to the reservation 'unless the context otherwise requires'. Secondly, it is noteworthy that section 22(2) of Constitution Amendment No. 9 does not content itself with referring to 'Act' but specifies 'Act of the Parliament of the Cook Islands'. No doubt a reputable argument could be constructed to the effect that a wider definition of 'Act' might be applicable. However the course of action suggested in this discussion circumvents the problem.

13 [1935] A.C. 500, 511.

14 [1952] N.Z.L.R. 496.

15 Ibid. 527.

necessary to grasp the usage that a Rule 2(a) type of appeal, albeit prefaced by the expression "as of right", is in fact a species of the genus appeal-with-leave. Thus Bentwich observes:[16]

> the Colonial Court or the Court of Foreign Jurisdiction may give leave to appeal to the Sovereign in two sets of cases. First, when the appellant establishes that the suit is a final judgment and is within an appealable amount fixed for the Court by the Order in Council or Ordinance regulating appeals. Secondly, when, though not within the appealable amount or not a final judgment, the question involved in the appeal is, in the opinion of the Court, one which by reason of its great general or public importance or otherwise ought to be submitted to His Majesty in Council. In the first case the local Court cannot refuse the leave to appeal if it is applied for within the prescribed time, and the appellant is willing to fulfil the prescribed conditions. In the second case it is entirely in the discretion of the Court to grant or refuse leave to appeal.

It is thus made clear that, to use the technical term employed by Bentwich, "Appeal by Right of Grant" includes both the Rule 2(a) type and the Rule 2(b) and (c) types and both types are described as "appeals with leave" of the local Court. Accordingly, it seems clear that, notwithstanding the apparent restrictiveness of the languages of article 59(2), it invites the creation of both types of appeal.

In the writer's view it would be appropriate to resolve the various doubts discussed above by Cook Islands legislation which would also provide a single and accessible direction to citizens and their legal advisers by modifying the 1910 Rules which appear as the First Schedule to the Privy Council (Judicial Committee) Rules Notice 1973 (N.Z.).

To comply with article 59(2) of the Constitution the 'cases' and 'conditions' should be 'prescribed by Act'. The need to provide an accessible set of rules and procedures for appeals would be met by providing the grounds for appeal in an Act of the Cook Islands Parliament and the technical detail in the widely available New Zealand Regulations series. The result would be that the 1910 Rules would be, for the Cook Islands, exactly as they are in New Zealand except for the express recasting of Rule 2 of the 1910 Rules. In the event that New Zealand abandoned appeals to the Privy Council and, consequently, sought the revocation of the 1910 Rules, the scheme adopted would not be affected. The Rules would continue in force as part of Cook Islands law whatever their fate as part of New Zealand law.

16 *The Practice of the Privy Council in Judicial Matters* (Sweet and Maxwell, London, 1926) 137.