Lingering Ties: The Judicial Committee of the Privy Council

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Abstract
What underpins relationships between former colonial states and the Judicial Committee of the Privy Council (JCPC)? Using The Bahamas and The Gambia as case studies, I examine the influence of domestic political environments on the link to the JCPC. My findings suggest that changes in domestic politics make states more likely to sever ties with extraterritorial courts regardless of the court’s decisions.

Keywords: extraterritorial court; political environment; Judicial Committee of the Privy Council; The Bahamas; The Gambia

Introduction

The literature on colonization has long recognized the lingering effects of many forms of European influence in states that emerged during decolonization following World War II. One particularly important legacy of the British Empire is the common law legal system and, in many states, the continued role of the Judicial Committee of the Privy Council (JCPC) as the final appellate court. For the purposes of this examination, extraterritorial courts are broadly defined as courts outside the state, where the state has no direct control over their composition or administration. The JCPC is staffed, administered and funded by the British government which puts it beyond the control of local governments. In this context, the JCPC is arguably the first viable example of an extraterritorial court. The larger question is: why do some states retain ties with de facto extraterritorial courts?

Traditionally, states create a judicial system with a supreme court sitting at the apex. The structure and administration (including the selection of judges, jurisdictions and budgetary matters) are determined by domestic, constitutional and statutory law. Final appellate court decisions provide the last judicial word on legal disputes within the country's borders. Conversely, extraterritorial courts are located outside state borders yet exercise jurisdiction over
appeals originating in the states that accede to the court. In other words, the extraterritorial court can have jurisdiction in multiple states, but it is not under the direct administrative control of any single state and is part of the ongoing regional and global efforts to foster law and order. The relationship between extraterritorial courts and states, therefore, is of great importance as these courts challenge traditional ideas of state sovereignty (Brown\(^1\)) and the role of courts in domestic policy-making (Dahl\(^2\)).

**The Judicial Committee of the Privy Council (JCPC)**

The JCPC has not only historical significance but illustrates the importance and prominence of the court in the jurisprudence of the British Commonwealth (Roberts-Wray\(^3\)). Although its beginnings date back to the 12th century, the modern JCPC is ultimately a product of the Judicial Committee Act 1833 introduced by Lord Chancellor Brougham (Howell\(^4\)). Appeals are heard by special leave from the JCPC itself as a right extended by royal prerogative and when granted by the lower court (Burns\(^5\); Robert-Wray\(^6\)). Despite being formally described as an advisory body to the monarch, the JCPC possesses all the trappings of an appellate court.

The evolution of the JCPC was part of the growth and consolidation of British colonial rule, and it served as the final appellate court for the British Empire (Howell\(^7\); Swinfen\(^8\)). The

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\(^6\) Roberts-Wray, *supra*, note 3.
\(^7\) Howell, *supra*, note 4.
branches of law on appeal are broad and important with the adjudication of fundamental principles (Robert-Wray\textsuperscript{9}) and include extradition requests, constitutional challenges, libel, eminent domain, personal injury, and issues involving provincial verses federal power. This history contributes to the positive reputation and the continuing influence of the JCPC in the Commonwealth’s common law legal system.

Newly independent states, however, did have the power via commissions to determine the status of the JCPC at independence. Comprised of colonial and local elite, commissions served principally in a supporting role to the legislative assembly with expert advice on constitutional issues in addition to proposing and drafting entire constitutions (Straum\textsuperscript{10}). Of 50 former colonies, 30 adopted the JCPC as the final appellate court at independence. As states emerged from colonial rule, therefore, the number of states served by the JCPC decreased, as did the number of appeals. With a peak of 119 appeals heard in 1931, the JCPC adjudicated an average of 52 appeals per year from 1932 to 2014. Figure 1 displays the trends over time as the number of states decline starting in 1931 (Act of Westminster) and the corresponding change in the number decisions from 1931 to 2014. The number of appeals includes the states, colonies, and territories that continue to retain the JCPC. The steep drop in the annual number of appeals from 119 in 1931 to 34 in 1950 occurred when Canada and India replaced the JCPC in 1948 and 1950, respectively.

\textsuperscript{9} Roberts-Wray, \textit{supra}, note 3.

Despite a gradual decline in the number of countries from 48 in 1955 to 12 in 2015, the number of appeals per annum increased from 25 in 1975 to 48 in 2015 illustrating a continued reliance on the JCPC. My review of JCPC appeals shows an uptick from the Commonwealth Caribbean with a high point in 1995 (61 appeals). Despite the gradual decline in the number of states, those remaining access the JCPC more frequently.

What Contributes to Change?

The domestic political environment influences the state’s link with extraterritorial courts, and I use the JCPC as the basis of this case study. States that retain the JCPC are bound to a court physically and intangibly in terms of administrative control that is not without some financial implications. Although states provide no financial support for the JCPC, the cost of litigant access (court fees, legal fees, travel and accommodation in the UK) from disparate parts of the world was suggested as an impediment and motivation to abandon the court (Wilson ¹¹;

Swinfen\textsuperscript{12}; Joseph\textsuperscript{13}). The literature, however, reveals no causal link between state wealth and the status of the JCPC. Using GDP as a proxy, my descriptive analysis shows that states above the sample average GDP have a stronger tendency to retain the JCPC than those states below the sample average. I posit that the government of those states will seek a change or disengage from the extraterritorial court if it perceives a disconnection between itself and the court, a perception influenced by changes in the political environment that make the state more sensitive to unfavourable decisions.

Employing causal-process observations, I examine how changes in a country’s political environment influence the relationship with an extraterritorial court. Yin\textsuperscript{14} 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.” Collier\textsuperscript{15} (see also George and Bennett\textsuperscript{16}) maintains that this process better evaluates hypotheses and offers a deeper understanding not possible with quantitative analyses. I conduct a within-case comparison employing two most different former British colonies - The Gambia and The Bahamas.

I aver that the political environment can be captured in two broad categories. First, “no change” is when the state does not experience any change in the political environment as a new government comes to power with a commitment to the constitution and to the continued good

\textsuperscript{12} Swinfen, \textit{supra}, note 8.
governance of the state. While there may be a new government after an election cycle, the basic tenets of a free political environment continue and do not fundamentally change the state-citizen relationship. The new government pursues the same broad policies as the previous government but pledges to do a better job. Second, “drastic or revolutionary change” is characterized as “movements of significant structural change” (Cardoso and Falletto\(^{17}\)) which can include 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 (Grace\(^{18}\); Thoburn v Sunderland City Council\(^{19}\)). Though the process may differ, I assert that “drastic and subtle changes” can increase the likelihood of the removal of the JCPC while “no change” maintains the status quo. This distinction provides a first step in demarking two broad categories of change, adds nuance to our understanding and acts as a basis for future research on the interactions of domestic politics on extraterritorial courts. Table 1 displays 25 developing states in the two categories and the status of the JCPC as of January 1, 2016. When the nine developing states experienced a change, the JCPC was removed. When there was no perceivable change in the political environment only three states abolished the JCPC. For this research, these three states (Barbados, Belize and Guyana) are not addressed because each replaced the JCPC with another extraterritorial court (Caribbean Court of Justice). This is an area for further study.


Table 1 Developing States in the Two Categories and the Status of the JCPC

<table>
<thead>
<tr>
<th>No Change</th>
<th></th>
<th>Change</th>
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<tbody>
<tr>
<td>Retain JCPC</td>
<td></td>
<td>Retain JCPC</td>
</tr>
<tr>
<td>(11 States)</td>
<td></td>
<td>(0 States)</td>
</tr>
<tr>
<td>Retain JCPC</td>
<td></td>
<td>Abolish</td>
</tr>
<tr>
<td>(0 States)</td>
<td></td>
<td>(11 States)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Retain JCPC</th>
<th>Abolish</th>
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</thead>
<tbody>
<tr>
<td>Antigua &amp; Barbuda</td>
<td>Barbados$^{20}$</td>
</tr>
<tr>
<td>Bahamas</td>
<td>Belize$^{22}$</td>
</tr>
<tr>
<td>Brunei</td>
<td>Dominica$^{23}$</td>
</tr>
<tr>
<td>Grenada$^{21}$</td>
<td>Fiji</td>
</tr>
<tr>
<td>Jamaica</td>
<td>Guyana</td>
</tr>
<tr>
<td>Mauritius</td>
<td>Kenya</td>
</tr>
<tr>
<td>St. Kitts &amp; Nevis</td>
<td>Malaysia</td>
</tr>
<tr>
<td>St. Lucia</td>
<td>Nigeria</td>
</tr>
<tr>
<td>St. Vincent &amp; Grenadines</td>
<td>South Africa</td>
</tr>
<tr>
<td>Trinidad &amp; Tobago</td>
<td>Sri Lanka</td>
</tr>
<tr>
<td></td>
<td>Uganda</td>
</tr>
</tbody>
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I employ the most different method or ‘the method of agreement.’ This involves comparing states that are similar in interests which allows me to identify the possible differences that may cause the different outcome. I examine two states as follows: (1) no change in status of

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$^{20}$ Barbados, Belize and Dominica are not included as they selected another extraterritorial court (Caribbean Court of Justice) to replace the JCPC as opposed to an exclusively domestic final appellate court.

$^{21}$ A coup d’État in 1979 removed the JCPC but it was reinstated as part of the re-establishment the Westminster parliamentary system with the U.S. invasion in 1983 (BBC News, Timeline: Grenada (7 August 2012)) <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/country_profiles/1209649.stm> (accessed March 3, 2015).

$^{22}$ George and Bennett, supra, note 16.

JCPC – The Bahamas; (2) change in status quo – The Gambia. A variation exists in the dependent variable with The Bahamas still retaining the JCPC since independence in 1973. The Gambia was one of the 16 states that retained the JCPC at independence (1965) but 21 years after independence replaced the JCPC with domestic final courts of appeals. Though in different regions of the British Commonwealth, they share a history of British colonial rule with a very small British settler population. The colonial officers supported miniscule administrative-legal institutions concentrated in the capital (Porter\textsuperscript{24}; Mann and Roberts\textsuperscript{25}). Both emerged as independent states with a Westminster model parliamentary government and common law legal systems with the JCPC as the final appellate court. The first Prime Ministers, Sir Linden Pindling of The Bahamas and Sir Dawda Kairaba Jawara of The Gambia, led their respective colonies to independence. Pindling won three consecutive elections\textsuperscript{26} and Jawara won six consecutive elections after independence.\textsuperscript{27} Table 2 presents country profiles of population size, economy data, and political environment but both are generally considered developing states.

Table 2: Country profiles

<table>
<thead>
<tr>
<th>Country</th>
<th>Independence</th>
<th>Population28</th>
<th>GDP29</th>
<th>GDP per capita</th>
<th>Political Environment30</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Bahamas, (1973)</td>
<td></td>
<td>388,000</td>
<td>$8.8 Billion</td>
<td>$23,000</td>
<td>Multiple parties with minimal ideological differences; “Free”</td>
</tr>
<tr>
<td>The Gambia, (1965)</td>
<td></td>
<td>1,990,000</td>
<td>$938 Million</td>
<td>$1,697</td>
<td>Multiple parties with minimal ideological differences until 1994 – “Free”; After Coup d’état in 1994 and new Constitution - “Not Free”</td>
</tr>
</tbody>
</table>

The Commonwealth of The Bahamas (The Bahamas)

The Bahamas became a colony in 1718 and gained independence in 1973 but still retains the constitutional right of appeal to the JCPC. It is one of the 11 states31 that retain the JCPC. With some Bahamians are unhappy with the JCPC (Dames32; Toote33), a bifurcated discussion has emerged which resonates in the seven remaining Caribbean states.

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30 Seven other Commonwealth Caribbean states – Antigua & Barbuda, Grenada, Jamaica, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines and Trinidad & Tobago plus Brunei and Mauritius.
31 Seven other Commonwealth Caribbean states – Antigua & Barbuda, Grenada, Jamaica, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines and Trinidad & Tobago plus Brunei and Mauritius.
First, the JCPC is discussed in the context of the death penalty. Ghany\textsuperscript{34} 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.” A review of JCPC decisions between 1973 (Bahamian independence) and 2013\textsuperscript{35} where the state is a party underpins the bifurcated discussion. The JCPC’s failure to affirm the death penalty fuels calls for its replacement. Conversely, the state’s general success in other types of appeals dampens opposition. Figure 2 displays the percentage of favourable versus unfavourable JCPC decisions in which the state was a party: (1) in all appeals, the state won 59%; (2) in death penalty appeals, 83% of the appeals against the death penalty were successful (or unfavourable to the state); and (3) in all other types of appeals the state did much better with a favourable outcome in 62% of those decisions. The unfavourable rate in death penalty appeals is 35% above the rate in Other Appeals and 42% above the All Appeals rate. This shows large variations in outcomes and highlights why the death penalty appeals may be such a point of focus.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Comparison of Success Rates for All Appeals in which the State is a Party; Death Penalty Appeals and All Other Appeals for The Bahamas}
\end{figure}


\textsuperscript{35} There were no death penalty appeals from The Bahamas in 1993, 1994, 2014 and 2015.
Ghany\textsuperscript{36} identifies \textit{Pratt and Morgan v. Attorney General of Jamaica}\textsuperscript{37} as the case where the JCPC’s turned decidedly against the constitutionality of the death penalty in the Commonwealth Caribbean. Though not about the Bahamian constitution \textit{per se}, the decision in \textit{Maxo Tido v The Queen},\textsuperscript{38} overturned the death penalty sentence handed down by the domestic court of appeals. A former President of The Bahamian Bar Association, Ruth Bowe Darville, was reported as saying, “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.”\textsuperscript{39} 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 he suggested that any action would be linked to the Bahamian economy. In other words, international investor confidence must be balanced with the issue of the death penalty. This does not discount the direct, albeit narrow, proposal to oust the jurisdiction of the JCPC in death penalty appeals made in a 2014 speech by the leader of the opposition party (Minnis\textsuperscript{40}). 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 would lead to the change in political environment with a clear political will to replace the JCPC. A closer look at the death penalty appeals from the Bahamas after \textit{Pratt and Morgan} shows the decrease in the state’s success rate in upholding the

\textsuperscript{36} Ghany, \textit{supra}, note 34.
death penalty on appeal. Appeals 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 from 1995 to 2013 with the state losing all appeals from 2008 to 2013. Clearly, therefore, JCPC death penalty decisions alone are not sufficient to change the political status quo.

Figure 3 State Win Rate Percentage per Year from 1995 to 2013 in Death Penalty Appeals for The Bahamas

Second, I address the discussion about 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 (Rolle41). Darville points out that those who advocate its removal are “treading in very dangerous waters,” as “litigants who come before us with multimillion dollar cases and they see us as a great financial centre, they need assurance that the Privy Council [JCPC] is there” (as cited by Rolle42). In other words, the JCPC legitimizes and reinforces the independence of the judiciary to those with economic interests. Further, The Bahamas Advantage,43 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

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42 Ibid.
JCPC as the final appellate court. Bahamian attorney-at-law Adrian Gibson\(^{44}\) 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.” Gibson\(^{45}\) also notes that the JCPC praised the quality of decisions handed down by the domestic court of appeals and, furthermore states, “the notion that we can govern ourselves but are not capable of judging ourselves is a non-sequitur this is simply illogical.”

The political environment has not changed enough to precipitate a sufficiently strong reaction to the JCPC to create the 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 (Meditz and Hanratty\(^{46}\)). Like New Zealand, it has not experienced any drastic or revolutionary changes in the political environment and consistently enjoys high levels of political freedom and civil liberties (Freedom House\(^{47}\); Freedom House\(^{48}\)). Though there is support for the JCPC to continue as the final appellate court (Gibson\(^{49}\); Toote\(^{50}\)), the discourse on this issue is bifurcated. The death penalty decisions have not galvanised the opposing forces in the face of support for the court as a legitimizing presence. The government and the opposition differ little on the broad policies that

\(^{44}\) Adrian Gibson, ‘The Notion We Can Govern – but not Judge – Ourselves is Illogical Bahamas!’ Weblog Bahamas (20 December 2009, para. 26).

\(^{45}\) Ibid, para. 24.


\(^{47}\) Freedom House, supra, note 29.


\(^{49}\) Gibson, supra, note 44.

\(^{50}\) Toote, supra, note 33.
guide The Bahamas. This environment 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.

The Republic of Gambia (The Gambia)

Formally colonised in 1910, The Gambia gained independence in 1965 with a constitutional system reflecting the Westminster model.\(^{51}\) It is one of six African states to retain the JCPC. I examine The Gambia because of length of time with the JCPC (33 years) and the availability of information about the changes in the political environment. The democratic political environment was relatively consistent for 21 years after independence until the drastic or revolutionary change in the form of a military *coup d’état* that was followed with the replacing of the JCPC in 1998.

Dawda Kairaba Jawara (1965-1994) led the post-independence rule of the Peoples’ Progressive Party (PPP) through five consecutive elections which was considered a generally stable period with free elections and respect for civil rights and liberties (Perfect\(^ {52}\)). The only unconstitutional challenge was the failed *coup d’état* in 1981 (Country Watch\(^ {53}\)). As a proxy for the health of Gambian political environment, I rely on Freedom House scores (2014) which is an annual comparative assessment of how states perform in the areas of civil liberties and political rights. Based on a 1 to 7-point scale states a rated as “free”, “partially free” and “not free”.\(^ {54}\)

\(^{51}\) The governing institutional structures of the U.K. underpin the Westminster Model.  
Gambia receives a favourable rating for political rights and civil liberties in 14 of the 21 years reported. Figure 4 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.\(^{55}\) Again, rated as free in 1990, The Gambia dropped to ‘not free’ following the 1994 coup d’état.

**Figure 4 Gambia’s Freedom House Scores from 1972 through 1998 (Freedom House, 2014)**

Under PPP’s rule (1965-1994), one constitutional law case existed of the three JCPC appeals to which the state was a party. *Attorney General of Gambia v. Momdou Jobe*\(^{56}\) was an appeal against a The Gambian Court of Appeal decision that declared four provisions\(^{57}\) of the Special Criminal Court Act (1979) to be *ultra vires* 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* (Jammeh,\(^{58}\) Senghore\(^{59}\) notes the

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\(^{55}\) This period coincides with the failed 1981 coup d’état through a 1984-1989 federation with Senegal.


\(^{59}\) Jeng, *supra*, note 57.
JCPC decision effectively curbs the power of the legislature. In the existing political environment, however, this ruling 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) (Jeng60). Amnesty International61 reports a pattern of arbitrary arrests and detentions, restrictions on political activities, the movement opposition leaders and harassment of journalists and owners of newspapers in an apparent effort to stifle criticism of the government. 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 (Jammeh62; Perfect63; Gale64). After two years of military rule, Gambians were more than ready for a return to constitutional rule (Senghore65). The August 6, 1996, referendum returned The Gambia to constitutional rule as the Second Republic (Jeng66). 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 decisions after the *coup d’état*, but before being replaced in 1998, are instructive as to the intentions of the government. The state was a party in one of four appeals decided

60 Jeng, supra, note 57.
62 Jammeh, supra, note 58.
63 Perfect, supra, note 52.
65 Senghore, supra, note 58.
66 Jeng, supra, 57.
between 1994 and 1998. In *West Coast Air Limited v Gambia Civil Aviation Authority and Another*\(^67\) (with the state as the respondent), damages were assessed against the state but there was no 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 which provides immunity from legal action to all members and representative of AFPC (Interparliamentary Union\(^68\)), and provides 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 prior to the 1994 *coup*. On joining the opposition, he defied the constraints on political activities (Amnesty International\(^69\)). After his second arrest in 1996, he was held for 10 weeks and released without being charged (Amnesty International\(^70\)). 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 (Interparliamentary Union\(^71\); Mass\(^72\)). In October 1998 and before the JCPC could consider the petition, the JCPC was replaced with the Supreme Court of Gambia (Senghore\(^73\)). This 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, it was inevitable that his persecution would have been laid bare before the court. A JCPC decision in favour of Juwara would have

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\(^{70}\) *Ibid.*

\(^{71}\) Interparliamentary Union, *supra*, note 68.


\(^{73}\) Senghore, *supra*, note 58.
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 move was anticipatory. It was a way to entrench the new political environment and end legal challenges to the extraterritorial court. To reiterate, however, the previous government lost constitutional appeals before the JCPC, but this did not lead to the replacement of the court. The new political environment and public fatigue with military rule precipitated the drastic or revolutionary change by the new government.

**Summary and Conclusion**

Extraterritorial courts exist outside the jurisdiction of any one country and new courts will continue to be in the world community (Specht74). Courts such as the International Criminal Court, the ECtHR, the Caribbean Court of Justice and the African Court on Human and People’s Rights continue to adjudicate an increasing number of appeals contributing to domestic and international jurisprudence. Increasing our understanding of the dynamic relationship between these courts and states is crucial. Examining the JCPC provides an appropriate forum for gaining insight into a major driver of these relationships. The two former British colonies are diverse examples explicated to capture the influence of the domestic political environment (see Table 1). Ultimately, it was the government’s emergent political will in a changed broader political environment that drove the process to abolish the JCPC. Tracing when the political environment changed coincided with the decision to replace the JCPC points to the significance of the domestic political environment.

The Bahamas is an example of where the political environment maintains the status quo regarding the JCPC. 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 death penalty decisions, the conflicting views amongst the elite and the public on that issue stymies the coalescence of the political will against continued reliance on the JCPC. Any discontent with the JCPC decisions on this single issue was not supported by changes in the political environment. The status quo is also supported by those who see the JCPC as a legitimizing presence inspiring confidence in investors.

In The Gambia, previous JCPC decisions were unfavorable to the state, but this did not precipitate the removal of the JCPC in that political environment. The 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 this political environment, the government may have been more sensitive to unfavourable JCPC decisions. My examination suggests that the replacement of the JCPC in 1998 may have been an indirect response to the possibility of the politically charged Jawara appeal reaching the JCPC that would potentially 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, altered 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, I suggest that the response to the JCPC was less about the outcomes, and more about the new political environment and how the government viewed the judiciary.
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. It 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.

The findings do not address the issue of whether there is a link between the domestic political environment and the types of appeals that percolate up through the courts. This examination does, however, offer some support for the assertion of a connection between the domestic political environment and the state’s continued reliance on the extraterritorial court. In other words, ties to the court are less about its performance and more about the perceived domestic needs of the government.

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