Independence, Access to Justice, and the Patriation of New Zealand’s Final Court of Appeal:

An Investigation into the Legal and Constitutional Consequences of the Replacement of the Judicial Committee of the Privy Council with a Supreme Court

A thesis presented in partial fulfilment of the requirements for the degree of Master of Arts in Politics at Massey University, Manawatū Campus, New Zealand.

Robert Stanley Lyon
2014
Abstract

This thesis was an investigation into the consequences of the Supreme Court Act 2003. The main purpose of the research was to assess the extent that the Supreme Court reform has achieved its objectives. In addition, the project explored the constitutional significance of the reform. Two main themes, based on the purposes of the Supreme Court legislation, were chosen as focal points for the research. These themes were a) whether the patriation of the final court has promoted New Zealand’s legal and constitutional independence and b) whether the Supreme Court reform has improved ‘access to justice’.

The present study employed a mixed research design that combined both quantitative and qualitative data gathering and analysis techniques. The primary research method was the document analysis of the leave judgments and substantive judgments of the Privy Council and the New Zealand Supreme Court. Five document analyses were conducted during the course of the research. These analyses compared the two courts on, inter alia, the extent that they cite cases from various jurisdictions and on the range and volume of appeals that they heard. In addition, in-depth case studies were conducted on selected judgments in order to assess the approach of the Supreme Court to precedent. Finally, the current project drew on official sources and various secondary sources, especially the extra-judicial writings of senior judges from Australia, New Zealand, and the United Kingdom.

Three key findings emerged from this investigation. Firstly, it appears that patriation has improved ‘access to justice’. In terms of leave arrangements and jurisdiction, the new Supreme Court is more accessible than the Privy Council. It also hears a much higher volume and broader range of appeals. Secondly, the present study found evidence that patriation has led to changes in the legal sources that are cited by the final court. In particular, the Supreme Court cites more New Zealand jurisprudence and a broader range of overseas case law than the Judicial Committee. Moreover, the citation of English jurisprudence, although still substantial, has declined relative to the citation of cases from these other jurisdictions. Finally, in terms of its constitutional significance, the Supreme Court Act, when considered in the context of New Zealand’s overall constitutional development, can be viewed as completing the century-long process of updating, consolidating, and patriating the major elements of New Zealand’s constitution.
# Table of Contents

Abstract ....................................................................................................................... ii  
Table of Contents ............................................................................................................ iii  
Acknowledgments ........................................................................................................... vii  
List of Tables and Figures .............................................................................................. viii  

1) Introduction and Research Overview ........................................................................ 1  
   1.1 The Constitutional Significance of the Supreme Court Act ................................. 1  
   1.2 Objectives and Themes of the Supreme Court Legislation ..................................... 3  
   1.3 Overview of the Research ..................................................................................... 5  
      1.3.1 Research Objectives ....................................................................................... 5  
      1.3.2 Methodological Approach ............................................................................. 5  
          1.3.2.1 Analysis of Court Judgments ................................................................. 6  
          1.3.2.2 Official Statistics .................................................................................... 6  
          1.3.2.3 Secondary Sources .............................................................................. 6  
          1.3.2.4 Limitations of the Data Collection Techniques ...................................... 7  
      1.2.3 Thesis Structure ............................................................................................ 8  

Part One: Background to the Supreme Court Legislation  
Section Overview ........................................................................................................... 10  

2) Political, Social, and Legal Context ........................................................................... 11  
   2.1 The Growing Desire for Reform ......................................................................... 11  
      2.1.1 Attitudes toward the Privy Council ............................................................ 11  
          2.1.1.1 The Legal Profession and the Judiciary .......................................... 11  
          2.1.1.2 Māori Perspectives .......................................................................... 13  
          2.1.1.3 The Political Will for Change ......................................................... 15  
      2.1.2 Social, Legal, and International Developments .............................................. 16  
          2.1.2.1 Legal and Cultural Nationalism ....................................................... 16  
          2.1.2.2 Ideology and Republicanism ........................................................... 17  
          2.1.2.3 Commonwealth Developments ...................................................... 18  
   2.2 The Patriation of the Final Court ........................................................................... 20  
      2.2.1 Previous Attempts at Abolishing the Privy Council .................................... 20  
      2.2.2 The Supreme Court Act .............................................................................. 21  
          2.2.2.1 Prelude to the Supreme Court Bill ............................................... 21  
          2.2.2.2 Parliamentary Process ................................................................. 22  
   2.3 Summary ............................................................................................................ 23  

3) Constitutional Development and the Patriation of the Final Court .......................... 25  
   3.1 Overview of Constitutional Development in New Zealand ................................. 26  
      3.1.1 From Colony to Independent Dominion ..................................................... 26  
          3.1.1.1 Early Developments ............................................................ 26  
          3.1.1.2 Dominion Status and Intra-Imperial Constitutional Reform .......... 26  
          3.1.1.3 Acquisition of Full Constituent and Plenary Powers .................... 28  
      3.1.2 Post-War Constitutional Development ......................................................... 28  
          3.1.2.1 Constitution Amendment Act 1973 .............................................. 29  
          3.1.2.2 Royal Titles Act 1974 ................................................................. 29
3.1.2.3 The Nationalisation and Patriation of the Office of Governor-General
3.1.2.4 Constitution Act 1986: An Autochthonous Constitution?
3.2 The Appeal to the Privy Council: A Constitutional Relic?
3.3 The Supreme Court Reform and Constitutional Discourse
   3.3.1 Public Engagement with Constitutional Reform
   3.3.2 The Supreme Court Debate
3.4 Summary

Part Two: The Privy Council and the Supreme Court: A Comparison

Section Overview

4) Structure, Composition, and Function
   4.1 The Judicial Committee of the Privy Council
      4.1.1 The Origin of the Appellate Jurisdiction of the Privy Council
      4.1.2 Structure and Composition of the Judicial Committee
         4.1.2.1 The Judicial Committee Acts
         4.1.2.2 British and Commonwealth Membership of the Judicial Committee
         4.1.2.3 New Zealand Membership of the Judicial Committee
      4.1.3 Jurisdiction and Function of the Judicial Committee
   4.2 The Supreme Court of New Zealand
      4.2.1 Structure and Composition
         4.2.1.1 General
         4.2.1.2 Composition
         4.2.1.3 Overseas Judges
      4.2.2 Role of the Supreme Court
   4.2.3 The Supreme Court Reform and Role of the Chief Justice
      4.2.3.1 The Traditional Roles of the Chief Justice
      4.2.3.2 The Chief Justice and the Supreme Court
   4.3 Summary

5) Jurisdiction
   5.1 Jurisdiction of the Privy Council
      5.1.1 General Provisions
      5.1.2 Restrictions on the New Zealand Jurisdiction of the Privy Council
   5.2 The Jurisdiction of the Supreme Court
      5.2.1 General
      5.2.2 Civil Jurisdiction
      5.2.3 Broadening the Civil Jurisdiction of the Final Court
      5.2.4 Criminal Jurisdiction
      5.2.5 Limits on the Supreme Court's Criminal Jurisdiction
   5.3 Summary: Jurisdictional Differences and Court Accessibility

6) Leave Arrangements
   6.1 Leave Arrangements for the Privy Council
      6.1.1 Appeals from the Court of Appeal
         6.1.1.1 General Provisions
         6.1.1.2 Arrangements in Overseas Jurisdictions
Part Three: The Consequences of the Patriation of the Final Court

Section Overview ................................................................. 74

7) Patriation and the Accessibility of the Final Court ........................................ 75

7.1 Methodological Strategy .......................................................... 75
  7.1.1 Part One: Analysis of Supreme Court Leave Decisions ........................ 75
    7.1.1.1 Aim and Data Collection Method ................................................ 75
    7.1.1.2 Sample .............................................................................. 76
    7.1.1.3 Variables ........................................................................ 76
    7.1.1.4 Data Analysis .................................................................. 77
  7.1.2 Part Two: Comparison of the Privy Council and Supreme Court .......... 77
    7.1.2.1 Aim and Data Collection Method .............................................. 77
    7.1.2.2 Sample ............................................................................ 77
    7.1.2.3 Variables ......................................................................... 78
    7.1.2.4 Data Analysis ................................................................ 78

7.2 Results ................................................................................... 78
  7.2.1 Part One: Analysis of Supreme Court Leave Decisions ........................ 78
    7.2.1.1 Overall Trends in Leave Decisions .............................................. 78
    7.2.1.2 Subject Matter of Leave Applications ...................................... 79
  7.2.2 Part Two: Comparison of the Privy Council and Supreme Court .......... 81
    7.2.2.1 Volume of Appeals ................................................................. 81
    7.2.2.2 Range of Appeals ................................................................. 82

7.3 Discussion ............................................................................. 84
  7.3.1 The Supreme Court’s Approach to Leave ........................................... 84
  7.3.2 Comparison of the Privy Council and Supreme Court ......................... 85
    7.3.2.1 Volume of Appeals ................................................................. 85
    7.3.2.2 Range of Appeals ................................................................. 86
  7.3.3 International Comparisons .......................................................... 88
  7.3.4 Summary: Patriation and the Accessibility of the Final Court ............. 89

8) Patriation and the Doctrine of Precedent .................................................. 90

  8.1 Precedent and Patriation: The Expectations of Academics, Officials, and Judges ................................. 91
  8.1.1 Report of the Ministerial Advisory Group ........................................... 91
8.1.2 The Australian Experience ................................................................. 91
8.1.3 Extra-Judicial Comments in New Zealand .......................................... 93
8.2 The Consequences of Patriation for the Doctrine of Precedent ............ 94
  8.2.1 Quantitative Data ........................................................................ 94
    8.2.1.1 Overview and Samples ......................................................... 94
    8.2.1.2 Variables ......................................................................... 94
    8.2.1.3 Results ........................................................................... 94
    8.2.1.4 Summary ................................................................. 95
  8.2.2 Court of Appeal Judgment: R v Chilton ........................................ 96
  8.2.3 Supreme Court Judgments ............................................................... 97
    8.2.3.1 R v Misl ......................................................................... 97
    8.2.3.2 Couch v Attorney-General ................................................. 98
    8.2.3.3 North Shore City Council v Body Corporate 188529 .............. 104
    8.2.3.4 Westpac Banking Corporation v CIR .................................... 104
  8.3 Discussion ....................................................................................... 105
    8.3.1 Approach of the Supreme Court to Precedent ...................... 105
    8.3.2 Attitude of the Lower Courts to Privy Council Authority ........ 106
    8.3.3 Summary: Expectations of the Architects of the Supreme Court Act 107

9) Sources of the Common Law .................................................................... 109
  9.1 Legal Development: International Trends ......................................... 110
    9.1.1 Diminishing Englishness of the Common Law ........................... 110
    9.1.2 Unity of Law ....................................................................... 111
    9.1.3 International Law and Non-Common Law Influences .............. 112
    9.1.4 The Privy Council and Legal Development .............................. 113
      9.1.4.1 The Australian Experience: ‘Australisation’ ...................... 113
      9.1.4.2 The Privy Council in New Zealand ................................ 115
  9.2 A Comparison of Privy Council and Supreme Court Judgments ....... 116
    9.2.1 Overview ............................................................................ 116
    9.2.2 Results ................................................................................ 117
      9.2.2.1 Case Citations ................................................................. 117
      9.2.2.2 Importance of Case Citations .......................................... 118
      9.2.2.3 Non-Judicial Sources ......................................................... 120
  9.3 Discussion ....................................................................................... 121
    9.3.1 English Authority and the Supreme Court .............................. 121
    9.3.2 Diversity in the Sources of the Common Law ............................ 122
    9.3.3 European Influences ............................................................. 123
    9.3.4 Engagement with New Zealand Jurisprudence ....................... 124
    9.3.5 Summary: The ‘New Zealandisation’ of the Law? .................. 125

10) Conclusion ............................................................................................ 126
  10.1 Consequences of the Supreme Court Reform .................................. 126
    10.1.1 Jurisdiction, Leave Arrangements, and Access to Justice ........ 126
    10.1.2 An Indigenous Legal System? ................................................ 127
      10.1.2.1 The Composition of the Final Court ............................... 127
      10.1.2.2 The Legal Consequences of Patriation ......................... 128
  10.2 The Supreme Court Act and the Constitution .................................. 129

References ............................................................................................... 131
Table of Cases ......................................................................................... 134
Acknowledgements

This research project was undertaken whilst I was an inmate at Wanganui Regional Prison. Such an environment is not conducive to tertiary study (let alone post-graduate research) and there were times during the research process when obstacles and restrictions (some anticipated, and some utterly unforeseen) threatened to derail work on this thesis. I would, therefore, like to acknowledge those people whose help and support were crucial to the completion of this research project.

Firstly, I would like to thank my research supervisor, Associate Professor Richard Shaw. His timely advice, and suggested reading material, helped me to get this project back on track when I was in danger of losing focus. I am also grateful for his assistance in dealing with difficulties in my enrolment, for arranging for the submission of this work, and for his patience as I plodded along, sometimes very slowly, working on this research.

I also wish to acknowledge Massey University’s excellent distance library service and, especially, the often anonymous, but ever helpful librarians who have helped me to track down the 300-odd Privy Council and Supreme Court judgments that were used in this investigation.

Thirdly, I am grateful to the staff and management of Wanganui Prison for permitting me to undertake this research. In particular, I was fortunate enough to have been granted access to a computer for the duration of this research project. Sadly, however, recent policy changes now mean that other prisoners will be denied the resources and opportunities that I have enjoyed. I especially wish to express gratitude to those individual Corrections Officers who went out of their way to help me access the information and materials that I required, especially during those times when the Department itself was not so accommodating.

Finally, I wish to thank my mother and father, Cherie and Stewart. Their continued support, not just in study, but throughout my incarceration, has helped to motivate me to better myself and to look to the future with a renewed hope.
List of Tables and Figures

Tables

Table 7.1 Categories of Law ................................................................. 76
Table 7.2 Proportion of Successful Applications for Different Types of Case ............................................. 80
Table 7.3 Civil verses Criminal Appeals by Final Court ................................................................. 82
Table 7.4 Proportion of Appeals from Different Categories by Final Court ........................................ 83
Table 7.5 Average Number of Cases per Year from Different Categories by Final Court ....................... 83
Table 7.6 International Comparison of the Proportion of Successful Leave Applications ....................... 88
Table 7.7 International Comparison of the Number of Appeal Judgments by Final Court ..................... 89

Table 8.1 Citation of Privy Council Precedent by Final Court of Appeal .............................................. 95

Table 9.1 Dependent Variables ........................................................................................................... 116
Table 9.2 Comparison between the Privy Council and Supreme Court on the Proportion of Judgments Citing Case Law from Selected Jurisdictions ......................................................... 117
Table 9.3 Average Number of Case Citations per Judgment by Final Court ........................................ 117
Table 9.4 Approval of English Case Law by Final Court ...................................................................... 118
Table 9.5 Disapproval of English Case Law by Final Court ................................................................ 119
Table 9.6 Approval of Australian and Canadian Case Law by Final Court ............................................ 119
Table 9.7 Disapproval of Australian and Canadian Case Law by Final Court ....................................... 119
Table 9.8 Approval of New Zealand Case Law by Final Court ............................................................ 120
Table 9.9 Disapproval of New Zealand Case Law by Final Court ......................................................... 120
Table 9.10 Comparison of the Supreme Court and Privy Council on the Proportion of Judgments Containing Non-judicial Citations ............................................................................. 120

Figures

Figure 7.1 Supreme Court leave applications by year ........................................................................... 79
Figure 7.2 Number of civil and criminal leave applications granted by year ......................................... 80
Figure 7.3 Proportion of civil and criminal leave applications granted by year ....................................... 80
Figure 7.4 Privy Council and Supreme Court appeals disposed by year ............................................... 81