

Mr. Justice Winston Anderson, “Treaty Making in Caribbean Law and Practice:

The Question of Parliamentary Participation”

The University of the West Indies Faculty of Law
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Your Honours

Distinguished guests

Fellow students of the law

Ladies and gentlemen

Introduction:

When Ms Robinson and later Dr Berry asked me to participate in this Workshop Series I must confess that I experienced some trepidation. For one thing I would be following the incomparable Professor Ralph Carnegie, the icon of legal scholarship in the Commonwealth Caribbean. We are still bewildered and dislocated by the loss of the professor a few weeks ago. Happily, he left us only *after* he had discharged his commitment to this Workshop Series: a gesture typical of the great man.

I also experienced apprehension because I have always feared that any re-evaluation of my published work would reveal glaring errors of omission and commission in both style and substance. And I would hate to admit to these shortcomings in this place, the Faculty of Law’s Moot Court, which holds some of my most cherished memories as an academic. So, it was with some foreboding that I recently reviewed the piece selected for this

evening: “*Treaty-Making in Caribbean Law and Practice: the Question of Parliamentary Participation*”.

As it turns out, I need not have been bothered; my anxieties were entirely misplaced. Having read the piece again, I remain thoroughly impressed with it and unabashedly committed to the arguments it presents. I am fortified in these views, too, because Dr. Berry’s brilliant review appears largely to be in agreement with the views I expressed in 1998.

It appears we both agree (and Dr. Berry will correct me if I am wrong on this) that the formal rules on treaty-making have been woefully neglected in our governance arrangements; that representative democracy argues for a role for our Parliaments in treaty-making; and that constitutional enactment of this role would enhance the rule of law in our societies. I propose to say a few words about each of these ideas.

Neglect of formal rules on treaty-making

I do not expect to encounter much resistance to my first postulate that in our region, i.e., the Commonwealth Caribbean, there is an almost intolerable neglect of formal rules on treaty-making. The constitutions and legislative enactments in our twelve independent Commonwealth Caribbean States are almost all innocent of any mention of the treaty-making power. There are two exceptions. My 1998 paper discussed the Ratification of Treaties Act of Antigua and Barbuda which gave parliament a role in ratifying certain treaties; three years after my paper was published, and whether or not influenced by its publication, the Constitution of Belize was amended to give specific powers and functions to the Senate in respect of ratification of treaties.

And that is about it. I have seen isolated instances where treaty-making is mentioned in specific legislation: for example, statutes relating to maritime boundary delimitation and fisheries. But aside from the provisions in Belize and in Antigua and Barbuda there appears to be no *generalized* legislative treatment of the treaty-making function in our region.

This is, in my view a serious failing and it has the effect that the rules on treaty-formation must be found and assembled from ancient common law principles regarding the royal prerogative. As I pointed out in 1998, and as Dr. Berry agrees, these common law principles mean that the Queen could validly conclude treaties for any of the nine “constitutional monarchies” which vest executive power in Her Majesty. I am not sure I entirely agree with what I understand to be Dr. Berry’s position i.e., that the evolution of constitutional conventions that restrict the Imperial treaty-making power may be the answer. Such conventions (which I concede may already obtain) would operate at the national law level, leaving intact the international law competence to conclude the treaty. As I said in 1998:

“The fact that Her Majesty is, by convention, most unlikely to attempt to exercise the treaty making power is rather beside the point. Symbolism is particularly important here since treaty making does more than create rights and obligations for the State and the individual. It is also the best means by which a society contributes to the establishment of international norms for the governance of all humanity. As such the mechanism of treaty making necessarily reflects the indigenous concerns and juridical nature of the society contributing to the formation of the agreement. To devolve the society’s power of treaty making upon an individual who resides outside the territorial boundaries of the State and who takes no part in the daily life of that society necessarily indicates that the society has devalued its part in the law making process.”

What does need to be emphasized is the requirement that we get our governance arrangements in order in the area of treaty-making. It is well understood that treaties have an enormous effect on subjects such as diplomatic immunity; the work of international organizations; international trade; intellectual property rights; human rights; the environment; law of the sea; and regional integration, to name a few, and that these agreements have a corresponding potential for impacting the lives of our Caribbean

citizens. This must surely argue that rules for treaty-making should occupy center stage in our constitutions.

Finally, on this point, it is important to remind ourselves that the Commonwealth Caribbean lags behind much of the rest of the world in our neglect of the formal rules on treaty-making. As is well known the constitutions in countries which accept that international law is automatically part of national law, (the so-called “monist” countries), often make express provision for treaty-formation. This is the case in Haiti and Suriname, the two civil law countries of our Caribbean Community, where the constitutions grant power to the President to enter into international agreements but requires that such agreements must first be accepted by the respective national assembly (Article 103 of the Suriname Constitution; Articles 98 (3) and Article 139 of the Constitution of Haiti).

Similar constitutional provisions obtain in other States such as¹ Czechoslovakia, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Portugal, and Sweden. In some countries, Denmark for example, parliament is required to appoint from among its members a Foreign Affairs Committee and the Government is obliged to consult with this Committee before accepting treaties. In some countries, Finland for instance, parliament must be consulted and must give its agreement before the State may withdraw from a treaty. In the United States² the Constitution requires that the Senate must approve every treaty by at least a two-thirds vote before that treaty may be accepted by the President.

Even in the Commonwealth World, of which Commonwealth Caribbean forms a part, there are often specific rules allowing for parliamentary involvement in treaty acceptance, although these rules are not normally found in the constitution but rather in accepted practice or in legislation. This is the case, for example, in the United Kingdom where the

¹ See: “The Role of the Parliament in the Ratification of International Treaties and Agreements” prepared by The Knesset- Research and Information Center and presented to the Constitution, Law and Justice Committee, July 10, 2003.

² See Arabella Thorp, “Parliamentary Scrutiny of Treaties”, International Affairs & Defence Section, House of Commons Library, UK, Last updated 25th September, 2009 pp 34- 36.

Ponsonby Rule established the practice since 1924 that all politically important treaties must be laid on the Table of both Houses of Parliament for 21 days prior to their ratification by the Executive. This practice has been supplemented from time to time by legislation, including the important European Parliamentary Elections Act 1978.

Some version of the *Ponsonby Rule* is to be found in most of the major Commonwealth countries outside the Caribbean notably: Australia, Canada, New Zealand, and South Africa. The most recent restatement of the rule in Canada was in January 2008 when the federal government announced a policy to further enhance parliamentary participation in the ratification process. All treaties between Canada and other states or entities would be tabled in the House of Commons for 21 days before ratification. The Clerk of the House was to distribute the full text of the Agreement accompanied by a memorandum explaining the primary issues at stake, including primary obligations, any national interest concerns, federal/provincial/territorial considerations, implementation issues, a description of any intended reservations or declarations, and a description of consultations undertaken.

Parliamentary involvement in treaty making and representative democracy

I will now say a few words on the relationship between parliamentary involvement in treaty-making and representative democracy. It has been accepted for hundreds of years in England that under the royal prerogative treaty-making is solely reserved to the Executive. Where the treaty entails alteration of domestic law then Parliament may become involved in passing the required legislation. This point has been made time and again, perhaps most emphatically by Lord Atkin in the Privy Council case of *Attorney-General for Canada v Attorney-General for Ontario*: (1937); and Lord Oliver of Aylmerton in the House of Lords in *Maclaine Watson v Department of Trade* (1989).

I do not mean to pick a fight with these learned Law Lords but from the perspective of our discussion this evening, I have the difficulty that they do not immediately suggest any

need for parliamentary participation in treaty-making. The Law Lords were focused on describing the separate roles of the executive and legislative branches of government in treaty-making and treaty-implementation; thus they tend to reinforce the rigid dualistic tradition of English common law.

But even *if* the Law Lords could be read as implying a treaty-making role for parliament that role would be based on the narrow ground that parliament may be needed to provide legislative action where the treaty entails change of existing law. For me, parliamentary participation ought properly to be based on much broader policy grounds of facilitating democratic participation in the process of international law making. This could well mean parliamentary scrutiny even where no alteration of domestic law is required; it could mean parliamentary intervention when the treaty is denounced; and it could well involve institutional developments such as the formation of a Committee of Parliament to consider all international agreements to be accepted by the State.

I made these points in 1998, and the matter was put in more fulsome terms in 2001 by the National Review Commission of India in its Consultation Paper on Treaty-Making under the Indian Constitution:

“There is an urgent and real need to democratize the process of treaty making... In a democracy like ours, there is no room for non-accountability. The power of treaty-making is so important and has such far-reaching consequences to the people and to our polity that the element of accountability should be introduced into the process... [There must be] clear and meaningful involvement of Parliament in treaty-making...”³

I note with great interest Dr Berry’s discussion of whether parliamentary scrutiny as an instrument to democratize treaty-making, has to be done at the domestic level; or whether legislative supervision at say the regional level would be adequate. This has very crucial

³ Paragraph 51

implications for governance in our regional integration movement, as he clearly demonstrates.

This is not a point I had considered in 1998 (perhaps an error of omission?) and I do not propose to explore it in any depth here. Suffice it to say that delegation of parliamentary power to a regional executive or legislative body involves high constitutional law principles as I sought to demonstrate in my previous presentation in this Workshop Series. My paper was then entitled: “The Caribbean Community and Caribbean Constitutions” and was delivered on March 22, 2010.

Finally, any serious discussion of parliamentary supervision of treaty-making must take into account the *degree* of parliamentary involvement. I am thinking here of whether parliamentary approval or ratification would require the vote of merely an ordinary majority or of a qualified majority. Both the Ratification of Treaties Act 1987 of Antigua and Barbuda, and the 2001 Constitutional Amendment Act of Belize may be taken as requiring merely an ordinary majority. However, given that the Executive effectively controls parliament, party discipline generally means that securing an ordinary majority is not a significant obstacle, and therefore does not ensure effective parliamentary supervision.

On the other hand, adoption of the requirement for a qualified majority, say two-thirds as obtains in the United States, could be a serious obstacle to the efficient management of the country’s affairs. An opposition in parliament could withhold its approval to treaties as part of a wider campaign to embarrass the government and frustrate its policies. As I opined in 1998: “The political maturity required to regard foreign affairs as a matter for bipartisan consensus could well be lacking in most [of our] jurisdictions”. This is therefore a matter on which further thought is required.

Constitutional codification of parliamentary involvement and the rule of law

On the final issue to be considered: I remain convinced that the constitutional codification of parliamentary involvement would improve the functioning of the rule of

law. As regards international law it would mean that treaties concluded in violation of the constitutional requirement would probably not be binding on the State (see Article 46, Vienna Convention on the Law of Treaties 1969).

However, for me, the most interesting implications for the rule of law occur on the plane of national law and have to do with the competence of national courts to take judicial notice of treaties as sources of rights and obligations for individuals. Where there is no parliamentary involvement in treaty-making, and no legislation incorporating the treaty, the courts clearly cannot take notice of the international agreement. There are many cases which make this point, sometimes in fields which directly affect individuals such as human rights.

In some instances, ignoring the treaty has proven to be so inconvenient and possibly unjust, that the courts have applied various devices to avoid these results. But recourse to the device of suggesting that human rights treaties may be an exception to the rule regarding unincorporated treaties has been criticized *precisely* because of the negative implications for the established rule of law. In the words of Lord Hoffmann in *Lewis v Attorney-General* (2000) 57 WIR 275 at 309, departure from established precedent in this way meant that, “the rule of law will be damaged and there will be no stability in the administration of justice in the Caribbean”.

Similarly, the decision by the CCJ in *Attorney-General v Boyce and Joseph*, that the doctrine of legitimate expectation meant that the unincorporated American Convention on Human Rights produced legal effects in Barbadian law has attracted significant academic discussion, as followers of this Workshop Series would know only too well. Had the Barbados parliament given legislative approval to the Convention there would have been less room for arguing that the legislative will of the people had not been engaged.

As Dr Berry suggests in his review, I *do* think that it should be clearly spelt out that codification of parliamentary involvement has a legislative effect, so as to avoid the need

to litigate whether the treaty has force in domestic law. Unfortunately, this matter is not specifically addressed in either of our two pioneering Caribbean states i.e., Belize and Antigua and Barbuda. However, our sister States of Haiti and Suriname, make clear that the effect of parliamentary ratification or acceptance is that the treaty becomes part of domestic law.

This would not, of course, solve all the issues surrounding the applicability and implementation of treaties. In some respect further legislation may still be required. But the courts are very familiar with notions of “self-executing” provisions of treaties (which can be applied without more) and “non-self-executing” provisions (which require further legislation). In short, they have the tools to apply the treaty once it is clear that it has effect in the domestic sphere.

Miscellaneous considerations

For the sake of completeness, I mention two final miscellaneous points. *First*, it follows from my position that where Parliament has considered and approved a treaty that the requirement for participatory democracy has been fulfilled and the courts ought therefore to be competent to implement the “self-executing” provisions of the treaty. That position must be juxtaposed with the decision of the Antigua and Barbuda High Court in *Linton v Attorney General of Antigua and Barbuda* (2009). In this case the Court decided that it could not have recourse to the Revised Treaty of Chaguaramas Establishing the Caribbean Community because the Act by which Parliament had given effect to the treaty had not been brought into force.

Undoubtedly an Act only comes into force on its own terms, so that the Antiguan Act incorporating the Revised Treaty could not have properly been regarded as part of domestic law until the Minister had appointed the day for its coming into force in accordance with section 1. The question that remains for decision is whether the *treaty* by virtue of parliamentary ratification and passage of the legislation could produce legal effects in the domestic sphere notwithstanding the formal status of the Act. I offer no

comment on this because I sincerely hope that another occasion will present itself when this question can be considered.

Secondly, it could be argued that the supremacy of representative democracy represented by parliamentary involvement in treaty-making sits uncomfortably with a recent trend. Increasingly, courts are being directed by legislation and even the Constitution to take into account treaties that have not been subjected to parliamentary scrutiny. Perhaps the best example of this development is Article 39 (2) of the 2003 Amendment to the Constitution of Guyana:

“In the interpretation of the fundamental rights provisions in this Constitution a court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights.”

This provision is laudable in that it enables Guyanese courts (including the CCJ when it sits as the final appellate Court of Guyana) to consider human rights treaties without having to resort to some of the criticized stratagems of the past. But apart from the fact that the meaning of having “due regard” to these treaties is not immediately obvious, the absence of parliamentary involvement does raise some concerns, from the point of view of my 1998 paper. Again, I would want to leave this for current academics to follow up, if they consider the matter worthy of the effort.

Conclusion

In conclusion let me say that I concede that the question of parliamentary participation in treaty-making is an obscure area of our governance arrangements (what my daughter at the back would possibly call a boring area of the law). But I hope I have said and repeated enough to instigate some interest in the issue. This is an area, after all, which is located at the interface between our national society and the international community and one that is considered by a large number of countries as important to the democratic process.

I am pleased to report that the proposals for constitutional reform in Grenada have taken virtually all of my suggestions on board. For the first time in Caribbean Constitution-making, a Chapter is dedicated to international law in general and treaty-making in particular. The proposed Chapter XVI deals in detail with all of the points covered in my paper in 1998.

Naturally, I am very impressed with the proposed Chapter XVI (I am not sure if I said that I had a hand in its creation during my previous life as an academic!). I sincerely hope that this Chapter survives the rigors of the consultation process and that one day it will be joined by similar Chapters in reformed constitutions in the other States of our Commonwealth Caribbean.

Thank you.

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