

**UNIVERSITY OF THE WEST INDIES
COLLEGE OF THE BAHAMAS
FACULTY OF LAW
LAW AND LEGAL SYSTEMS**

THE NATURE AND FUNCTIONS OF LAW

It is difficult to define law and even more difficult to be concise about its functions. To some, the natural theorists like Aquinas, it mandates a moral value system. To others, the positivists like Austin and Kelsen, it is merely the set of rules, 'posited' or emanating from the legitimate sovereign however defined.

GENERAL READINGS:

- Antoine, R.M.B. *Law and Legal Systems in the Commonwealth Caribbean*,
Cavendish, London, 1998; Chapter 1
- Funk, D.A. *'Seven Major Functions of Law'* Offprint from (1972) 23-2 Case
Western Reserve Law Review, 257
- Allot, A *The Limits of Law*, Penguin, England, 1971 pp 9-23
- Fuller, Hon L. *Anatomy of the Law*, Penguin books, 1971, P. 9-59

N.B. ** You may find a synopsis of theories on the nature of law in any book on Jurisprudence, such as Lloyds, *Jurisprudence*

LAW AS SANCTIONS AND COMMANDS - PRIMARY RULES AND SECONDARY RULES

- Hart, H. *The Concept of Law*, pp 1 -17
- Antoine, R.M.B. "The Reintroduction of the Cat-O-Nine Tails in Barbados - A Tale of
Woe", [1991] vol. 1 Carib L.R.
- Mitchell v DPP (1985) LRC (Const) 127, (1985) 32 WIR 241 (PC)*

LAW AS A MORAL FORCE

- Devlin *The Enforcement of Morals*, Oxford University Press, 1965, chaps 1-3
- Hart, H.L.A. "Positivism and the Separation of Law & Morals" (1958) 71 Harv. L.R. 593
- Fuller, Hon.L "Positivism and Fidelity to Law - A Reply to Professor Hart (1958)
71 Harv.L.R. 630
- "*The Morality of Law*", 1969, London, Yale UP
- Thomas, E. 'The Rule of Law' in *Commonwealth Caribbean Legal Essays*, UW1, 1982

R v Gibson (1991) 1 All ER 439 C.A.

Shaw v DPP [1962] A.C. 220; (1961) 2 All ER 446, H. L. 2 WLR 897
Kneller v DPP (1972) 3 WLR 143; (1975) A.L. 435; (1973) 2 ALL ER 446
A.G. v Girard and the St. Lucia Teachers' Union (Unreported) Civil Appeals Nos. 12 and 13 of 1986, decided Jan 25, 1988: Digested in (1991) 1 Carib L.R. 90.

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THE HISTORICAL FUNCTION OF LAW IN THE COMMONWEALTH CARIBBEAN

In the formation period of West Indian societies, the law played a unique role in instituting and maintaining the slave system. Historians, sociologists and legal scholars maintain that this historical foundation has left an indelible scar on West Indian society and the legal system.

- Shahabuddeen, M. 'Slavery and Historiographical Rectification' Guyana Commemoration Commission, Georgetown, 1984
- Goveia E 'Change and Stability in a W.I. Slave Society' in "*Slave Society in the British Leeward Islands*", 1969
- Haynes, J 'Slavery and the Law' Offprint from International Anniversary of the Abolition of Slavery in the Anglophone Caribbean, Guyana, 1984.
- Curtain, P. Two Jamaicas, Harvard University Press, Cambridge, 1955, pp 125-135
- Marshall, T. Post Emancipation Adjustments in Barbados 1838-1876, in "*Emancipation - A Series of Lectures*", UWI, Barbados, 1984, p.89-92.

PLURALISTIC SOCIETIES AND THE NATURE OF LAW

West Indian societies are described as pluralistic societies, meaning that they are made up of diverse ethnic, social and religious groups. To what extent is this pluralism reflected in the law?

Mohammed v. Moraine and Another (1995) 49 WIR 371
Henry v Henry (1972) 4 WIR 64

Hindu Marriage Act 1992 - Trinidad and Tobago
Muslim Marriage and Divorce Act 1980 - Trinidad and Tobago
Carib Reserve Act 1978 - Dominica

LAW AS AN INSTRUMENT OF CHANGE AND SOCIAL REFORM

- Liverpool, N.J. O 'Towards Reform in Commonwealth Caribbean Property Law' in *Commonwealth Caribbean Legal Essays*, UWI, 1982
- Marshall, R. 'The Role of Law in the Process of Change' 1984 Sir Winston Scott Memorial Lecture
- Antoine, R.M. B. "Law and the Caribbean Man - Social Engineering in a Caribbean Context' (1986) Student Law Review

QUESTIONS

1. "Morality must always be part of the law." Discuss
2. What are the main functions of law in a society? What were the historical functions of law in West Indian society?

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**LOCATING LEGAL SYSTEMS IN THE LEGAL INSTITUTIONS OF THE
COMMONWEALTH CARIBBEAN**

Using the traditional classification of legal systems into legal traditions or families, we can easily identify the dominant legal tradition in the Commonwealth Caribbean as the Common Law legal tradition imported from England from which it originated. Yet this does not give us the total picture. There are significant mutations, such as the hybrid legal traditions in St. Lucia and Guyana. Further, when we consider that the classification exercise attempts to describe the fundamental and unique characteristics of the system, we find other substantial influences on our legal systems, born out of the pluralistic and cosmopolitan nature of our societies.

Identifying a Legal System

- Brierley, David R & J. *Major Legal Systems in the World Today (3rd ed) Stevens, London 1985*
Zweigert & Kotz,II *An Introduction to Comparative Law, Volume 1, N. Holland Pub. Amsterdam,*
1977
Raz, J. *The Concept of a Legal System, Clarendon Press, Oxford, 2nd Ed. 1980*
Antoine, R.M.B *Commonwealth Caribbean Law and Legal Systems, Cavendish, London*
1998 ch. 2 & 3

Hybrid Legal Systems in the Commonwealth Caribbean

- Anthony, K. "The identification and classification of mixed systems of law"
in Kodilinye and Menon (eds.) *Commonwealth Caribbean Legal*
Studies, Butterworths, London, 1992
Anthony, K. "The Viability of the Civilist Tradition in Saint Lucia" in Landry and
Caparros (eds), *Essay on the Civil Codes of Quebec and St. Lucia 33*
Ramsahoye, F. "Roman Dutch and Roman Law in Guyana" (Unpublished
Mimeo) 1983
Campbell, C. "The Transition from Spanish Law to English Law in Trinidad
Before and after Emancipation" (1989) 3.3. *The Lawyer*, 15
Smith, T. B. "The Preservation of the Civilian Tradition in Mixed Jurisdictions"
in A.N. Yionnopoulos (ed.) *Civil Law in the Modern World*,
Louisiana State University Press, US 1965, p.3

Ramamugh & Another v. Hand in Hand Mutual Life Insurance & Others (1992) 47 WIR 198
The St. Lucia Civil Code

Pluralism and Other Influences on our Legal Systems

West Indian societies are described as pluralistic societies, meaning that they are made up of diverse ethnic, social and religious groups. To what extent is this pluralism reflected in the law?

Sagar, K. "Law and Custom in the WI" (Unpublished Thesis) 1978
Smith, M. G. The Plural Society in the British WI, LA 1965

Mohammed v. Morraïne (1995) 49 WIR 371
Henry v. Henry (1972) 4 WIR 64
The Muslim Marriage and Divorce Act 1980 - Trinidad and Tobago
The Hindu Marriage Act 1992 - Trinidad and Tobago
The Carib Reserve Act 1991, Dominica

For comparison with the US scenario, see:

Osakwe, C. "Louisiana Legal System: A Confluence of Two Legal Systems
(1986) Am L. Comp. L. 29

QUESTIONS

1. Explain the notion of a hybrid legal system. Does it merit a separate category of classification in the Commonwealth Caribbean?
2. Does the notion of a 'pluralistic society' add any important variety to our legal systems?

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**ORIGINS AND EVOLUTION OF LAW IN THE LEGAL INSTITUTIONS OF THE
COMMONWEALTH CARIBBEAN**

THE RECEPTION OF LAW AND ITS HISTORICAL CONSTRUCT

The study of Commonwealth Caribbean law and legal institutions requires an appreciation of the historical experiences of slavery and colonialism. Both events have shaped not only the direction and physical manifestations of our law but have contributed to many of what today are perceived as 'deficiencies' in the legal system. Not least of these is the accusation that our law and legal system still suffers from 'a colonial mentality' i.e. is not independent, assertive and relevant enough for our peculiar social circumstances.

The English Common Law was received by the Commonwealth Caribbean countries as a result of colonialisation. Civil law was also received but the doctrine of reception is largely concerned with the common law. Some theorists prefer to use the term "transplantation" or "imposition" to describe this process the doctrine has more than historical value, for, as we shall see, it addresses the question, at what point do certain laws received or imposed cease to have validity.

The General Theory of Reception

Antoine, R. M. B.	<i>Commonwealth Caribbean Law and Legal Systems</i> , Cavendish London, 1998, chps. 4 & 1
Morrison, D.	"The Reception of Law in Jamaica" (1979) 2 WILJ 43
Patchett, K. W.	"The Reception of Law in the WI" (1973) JLJ 17
Burgess, A.D.	"Judicial Precedent in the West Indies" (1978) WILJ 27

Reception or Imposition?

Nyali v A.G. (1955) ALL ER 646 @ 653
Kaadesevaran v A.G. (1970) AC 1111 @ 1116

The process of reception was directly related to whether colonies were settled or conquered. In general, the transplantation process was more complex in conquered colonies.

Levy & Wood v. Administrator of the Cayman Islands (1952-79) CILR 42
R. v Vaughan (1769) 4 Barr 2492
Campbell v Hall (1770) 1 Comp.

The Date of Reception

Blades v Jaggard (1961) 4 W1R 207
Shillingford v. A.G. of Dominica (1967) 12 W1R 57
Jemmot v Phang (1963) 6 W1R 36
Persaud v Plantation Versailles (1970) 17 W1R 107
The Declaratory Act, ch. 4 [1987] Revision of the Statute Laws of The Bahamas

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The Local Circumstances Rule

Although a court may be bound to English statute which was received, that statute may be modified or ignored if local circumstances or conditions demand it. In such a situation, the statute is deemed unsuitable for the particular jurisdiction.

Brett v. Young (1882) 1NZLR 264
Cooper v Stuart (1889) 14 App Cas 286
Maxwell v. Maxwell (1941) 2 DLR 655
A.G. v. Stewart (1817) 2 Mer 143 35 ER 895
Leong v Lim Beng Chye (1955) A.C. 665

The Historical Precepts of WI Law

Shahabuddeen, M.	<i>The Legal System of Guyana</i> , Georgetown, Guyana, 1973
Marshall, T.	"Post Emancipation Adjustments in Barbados 1838-76" in <i>Emancipation 1 - A Series of Lectures</i> , 1984, Barbados
Williams, E.	"Slavery and the Plantation System" in <i>The Negro in the Caribbean</i> , 1944, Manchester, Ch.. 1

QUESTIONS

1. Evaluate the historical functions of law in WI society. How has this impacted on modern society? What similarities do you see exist with the North American experience?
2. Of what relevance is the doctrine of reception in contemporary legal systems?