

UNIVERSITY OF THE WEST INDIES LL.B. PROGRAM
COLLEGE OF THE BAHAMAS
FACULTY OF LAW

THE SOURCES OF LAW IN THE COMMONWEALTH CARIBBEAN

The term 'source of law' describes the origin of law. There is a distinction to be made between 'legal sources' 'historical sources', and 'literary sources' of law. The latter concept merely speak to where legal principles can be found or accessed, for example, in a law report. A 'legal source', with which this worksheet is primarily concerned refers to that which gives law its authority. There are several legal sources in the Commonwealth Caribbean. These are:-

1. *The Constitution*
2. *Case-law or Judicial Precedent and the principles of the Common Law*
3. *Legislation*
4. *International and Regional Law and Precedent*
5. *Custom and Convention*

In contrast, the concept of an historical source refers to the causative factors behind a legal principle, taking into account historical origin and development. Within the context of the Commonwealth Caribbean, the 'historical source' can be gleaned from the colonial process whereby the English common law and equity were transplanted to the region by the process of reception. In contrast, the historical source of law in England is English custom..

GENERAL READINGS

- Antoine, R. M.B. *Law and Legal Systems in the Commonwealth Caribbean*,
Cavendish, London, 1998, Ch. 5 - 11
- Walker & Walker *The English Legal System Butterworths*, London, Ch. 1,3 & 6

PART A - LEGAL SOURCES

1. **THE CONSTITUTION**

The Constitution might be considered to be the most important and primary source of law in the Commonwealth Caribbean. This is because all other sources of law, be it ordinary legislation, judicial precedent or custom must be measured against its norms or guiding principles to assess their validity. As such, the Constitution is the supreme law of the land.

Commonwealth Caribbean jurisdictions thus conform to the legal, political philosophy of constitutional supremacy. As such, they have deviated from the pure Westminster Model, where there is no written constitution, and parliamentary sovereignty obtains.

The Constitution as a legal source, is thus of prime importance in assessing the direction of political and legal thought in the region. It can be viewed as a symbol of independence, a catalyst for change and an aid to the development of the legal system.

The student is not expected to have an in depth knowledge of Caribbean Constitutional Law, as this is a subject in Semester 2. Rather, the focus should be on the importance of the Constitution as a source of law.

1. **THE CONSTITUTION - Features of Commonwealth Caribbean Constitutions**

- (a) **Supremacy of the Constitution**
- (b) **Separation of powers provisions**
- (c) **Entrenchment provisions**
- (d) **Lays foundation for Executive and Legislative powers**
- (e) **Provisions for Independence of the Judiciary**
- (f) **Savings Law Clauses**
- (g) **Bills of Rights which are sometimes interpreted as creating new rights**
- (h) **Provides for redress where rights are violated**
- (i) **Lays the foundation for Judicial Review**

Additional Reading - Read at least two (2) of the following:

- Alexis F. "Changing Caribbean Constitutions". Introduction and Ch. 1 and 2
Phillips, Sr. Fred "West Indian Constitutions" Ch. 1XC
Carnegie, A.R. "The Constitution as Protection of Human Rights in the Commonwealth Caribbean" (1985)
Barnett, L.G. "The Constitutional Law of Jamaica", pp 260-270
De Merieux, M. "Fundamental Rights in Commonwealth Caribbean Constitutions", UWI 1992 Ch. 1 esp. pp 6 - 11 Ch. 2 pp 21-25

You must examine the Constitution of The Bahamas.

A.G. v Girard and The St. Lucia Teachers' Union - Unreported Civil Appeals Nos. 12 & 13 of 1986 (Jan 25, 1988)

Thornhill v. A.G. (1981) A.C. 61 (P.C.)

Collymore v.A.G.(1967) 12 WIR 5

Maharaj v A.G. (1978) 2 All E.R. 670 (1979) A.C. 385

Min. Of Home Affairs v Fisher (1980) A.C. 319 (P.C.)

Nasralla v D.P.P. (1967) 2 AC 238 (P.C.)

Hobbs et al v. R (1994) CLB 45

Smith et al v. Bahamas Hotel Union(1985) No. 105 of 1985, Supreme Court of The Bahamas

Hinds v. R (1976) 1AE 353 361

2. **EQUITY AS A SOURCE OF LAW**

The common law legal tradition is dual in structure. On the one hand, there are the rules of the Common Law or 'legal' rules. On the other, there are the principles of Equity. Both streams of law have binding legal effect. However, equitable remedies are not available as of 'right', but are discretionary. These two streams of law originated from separate English Courts and have maintained their distinct character. The raison d'être of Equity was to correct the harshness and rigidity of the Common Law.

Antoine R.M. Supra, Ch. 8

Kodilinye G. 'The Law of Trusts in the West Indies, Cases and Commentary' (1991) Ch. 1, pp 18-189; 37 - 38

Williams G. 'Learning the Law' ch. 2

2. EQUITY AS A SOURCE OF LAW

(A) The Nature of Equity

Hubbard v Vosper (1972) 2 Q.B. 84
Levy v Levy (1952) 79 CILR 5
Duchess of Argyll v Duke of Argyll (1967) Ch. 302

(B) New Developments in Equity

Re Vanderbilt's Trusts (No.2) (1974) Ch. 269 at p. 322.
Anton Piller v Manufacturing Processes Ltd. (1976) Ch. 55
Mareva Compania Naviera S.A v. International Bulkcarriers S.A.
(1975) 2 Lloyd's Rep. 509

3. CUSTOM AND CONVENTIONS

Antoine, R.M. Supra, Ch. 9
M. DeMerieux "Conventions in West Indian Constitutions" (1982) 31 ICLQ 263
"The Codification of constitutional conventions in the Commonwealth Caribbean"
(1982) 32 ICLQ 263
Sir Roy Marshall "West Indian Land Law; Conspectus and Reform" (1971) 20: 1 S.E.S.1
K.D. Anthony *The Mixed Legal System of Saint Lucia: Its Establishment and Decline*
Vol 2, Ph.D., 1985 at pp 751 - 756
Eden and Eden v R (1952 - 79) CILR 406
Sabga v Solomon (1963) 5 W.I.R. 66
Wik Peoples v State of Queensland (1997) C.L.B. 201; (1996) 141 ALR 129

4. REGIONAL AND INTERNATIONAL LAW AS A SOURCE OF LAW

In the Commonwealth Caribbean, International Law is particularly influential in the field of Human Rights. Consider the influence of decisions from international judicial bodies upon Caribbean Commonwealth Jurisprudence: Is International Law justiciable? Are international precedents' binding?

Antoine, R. M. Supra, Ch. 10
Peters v Marksman (1997) 2 Carib L.B. 91
Pratt and Morgan v Jamaica UNHRC Communication Nos. 210/1986 and 225/1987 decided April 6, 1989.
Fisher v A.G. of The Bahamas, Unreported Privy Council Appeal No. 53 of 1997, decided 12 December, 1997, P.C.
Compare with:
Pratt and Morgan (1993) 43 W.I.R. 340 (1993) 4 ALL ER 769 (P.C.)
Richards v A.G. (1992) 44 W.I.R. 141 (follows *Pratt and Morgan*)

Optional Reading

Antoine, R.M.B. "The New Right of Legal Representation - A Comparative Approach"
(1992) vol. 12. No. 2 Oxford Journal of Legal Studies p. 284
Antoine, R.M.B. "Opting Out of the Optional Protocol" (1998) C.L.B 30
Tavita v Min. of Immigration (1994) N.Z. L R 257
Consider whether international norms may obtain where they conflict with the law of the land or the constitution.

PART B. - LITERARY SOURCES

V. Newton *Commonwealth Caribbean Legal Systems: A Study of Small Jurisdictions*, Publications,
Bridgetown, Barbados, 1988, Ch. 4 pp 54-72.

QUESTIONS

1. In what ways can we improve the inclusion of custom as a source of law?
2. How influential is international law and regional law on legal systems in the Commonwealth Caribbean?
3. "The Constitution is the most important source of law". Discuss

UNIVERSITY OF THE WEST INDIES LL.B. PROGRAM
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FACULTY OF LAW
LEGAL SOURCES - JUDICIAL PRECEDENT AND LEGISLATION
PART A

JUDICIAL PRECEDENT

Antoine, R.M.B. *Law & Legal Systems in the Commonwealth Caribbean*, 1998, Ch. 7
Burgess, A.D. "Judicial Precedent in the West Indies" (1978) W.I.L.J. 27
Walker & Walker *The English Legal System*, or
Elliot & Quinn *The English Legal System*, Longman 1996, ch. 1

The Common Law Legal tradition, to which we belong is defined by case law which incorporates the doctrine of judicial precedent. The doctrine is based on the Latin maxim 'stare decisis et non quieta movere' (usually shortened to 'stare decisis') which loosely translated means: 'stand by what has been decided and do not unsettle the established' or 'let the decision stand'. In our study we are concerned about two main questions:

- (a) *What is the nature of the doctrine of precedent; and*
- (b) *In what way has the doctrine operated in the Commonwealth Caribbean?*
Has it operated with its own peculiarities and has it contributed to or undermined the development of a Caribbean jurisprudence?

THE NATURE OF THE DOCTRINE OF JUDICIAL PRECEDENT

Precedents are two types:-

- (a) *binding* precedent, and
- (b) *persuasive* precedent

The doctrine depends on a hierarchy of courts. Central to the doctrine is the idea that judges do not create law but merely find and declare the law in decided cases or precedents - *The Declaratory Theory* (see below).

Binding Precedent - *This is a precedent from an earlier case which must be followed by a court of inferior (or in some cases the same) level even if the judge in the later case does not agree with the legal principle.*
London Tramcars Co. Ltd. v London C.C. (1898) A.C. 375 @ p. 379

Persuasive Precedent - can be either '*obiter dicta*', or decisions of courts inferior in the hierarchy, or decisions
of other Commonwealth and foreign courts.

Certain concepts are instrumental in defining the doctrine.

- (i) The *ratio decidendi* (the binding element or legal principle in the case);
- (ii) **Obiter Dicta** - Statements of law which are not binding but 'by the way' or which are based on hypotheses or immaterial facts.
Central London Property Trust Ltd. v. High Trees Ltd. (1947) KB 130 at p 133
Peters v. Marksman (1997) 2 Carib. L.B. 13, p. 91

If the facts are sufficiently similar, the precedent set by the earlier case is **followed**, and the law applied in the same way to produce a decision.

Binding precedent may be avoided by a subsequent court in a number of ways. This allows flexibility within the common law.

(i) **Distinguishing** - The process of 'distinguishing' is probably the major factor in enabling the doctrine of precedent to remain flexible and adaptable. Cases are distinguished on their facts. Where the facts of the case before the judge are significantly different from those of the earlier one, then the judge distinguishes the two cases and need not follow the earlier one.

To illustrate how fine a distinction may be drawn between ostensibly parallel factual situations, see two (2) well-known cases concerning the tort of conversion. In England v Cowley [1873] LR 8 Ex. 126 the defendant refused to allow the plaintiff to remove goods from his, the defendant's, premises. This was held not to be conversion since there was no absolute denial of title. This case was distinguished by the Court of Appeal in Oakley v Lyster [1931] 1 KB 148 in which the defendant refused to allow the plaintiff to remove material from his, the defendant's, land and, in addition, asserted his own title to the material. This was held to be an act of conversion, the assertion of title apparently making the denial of title absolute.

See also Balfour v Balfour [1919] 2 KB 571 and Merritt v Merritt [1971] 1 WLR 1121

(ii) **Overruling** - An example of overruling was seen in Pepper v Hart [1993] when the House of Lords ruled that *Hansard* (the record of what is said in Parliament) could be consulted when trying to decide what certain words in an Act of Parliament meant. This decision overruled the earlier decision in Davis v Johnson [1979] when the House of Lords had held that it could not consult *Hansard*.

However, in Jones v. SOS for Social Services (1972) A.C. 944 at p. 1026 the House of Lords declined to overrule one of its own previous decisions although a majority were of the opinion that the ratio of the earlier decision was wrong. Overruling is nevertheless a rare event because under strict legal theory, the common law is viewed as a body of law existing from time immemorial. New rules cannot, therefore, be created. Until 1966 the House of Lords was regarded as traditionally bound by their own decisions. But in 1966 the Lord Chancellor issued a Practice Direction saying that the House of Lords was no longer to be bound by its previous decisions. This important Practice Direction represents an important philosophical change for all superior courts in the Commonwealth Caribbean region.

A rare example of the House of Lords overruling its own decisions was the decision in R. v R [1992] 1 AC 599 that rape within marriage is a crime, which overturned a legal principle that had stood for centuries. See also Re Pinochet Ugarte [1999] where the House of Lords stated that it had the power to reopen an appeal where, through no fault of his or her own, one of the parties has been subjected to an unfair procedure.

According to **The Declaratory Theory** of the common law, however, the existing rules of the common law have existed from time immemorial. Hence the common law cannot be changed, but merely restated correctly. Consequently, the judge's function is not to create or change the common law, but solely to find the correct statement of law and declare it. This notion that judges do not create law, but merely declare it, can be exposed as somewhat of a **legal fiction**, or at least, a misinterpretation of the judge's role. The theory has created difficulty in the overruling process for the practical effect of this theory is that where a decision is overruled by a higher court, it is decreed to be based on a misunderstanding of the law. The earlier incorrect legal principle is deemed never to have existed. The logical consequence is that judicial overruling operates **retrospectively**, as opposed to the overruling by statute which operates **prospectively**.

Miliangos v George Frank Textiles (1976) A.C. 443

The attitude toward overruling has now been liberalised but is still approached with caution.

Practice Direction (Judicial Precedent) House of Lords (1966) 1 W.L.R. 1234

A.G. of St. Kitts & Nevis v. Reynolds (1979) 43 W.I.R. 108 (P.C.) at p. 123

Pratt and Morgan (1993) 43 W.I.R. 340

(iii) **Reversing** - If the decision of a lower court is appealed to a higher one, the higher court may change it if they feel the lower court has wrongly interpreted the law. Clearly when a decision is reversed, the higher court is usually also overruling the lower court's statement of the law. The process of overruling must, however, be carefully distinguished from the process of reversing a decision. A decision altered on appeal is said to be "reversed". Reversing differs from overruling in that the former affects the **decision** in the case whereas the latter only affects **the rule of law** upon which the decision is based.

(iv) **Statements of law made per incuriam**

These are statements reached through a 'lack of care', for example, where counsel fails to bring relevant legislation to the judge's attention.

Young v Bristol Aeroplane Co. Ltd (1944) K.B. 718

A.G. of St. Kitts & Nevis v Payne (1982) 30 W.I. R. 88

Morell v. Wakeling (1955) 2 QB 379 @ p. 406

THE HIERARCHY OF COURTS - Under the doctrine of judicial precedent, higher courts bind lower ones. So it is that the Courts of Appeal in the Commonwealth Caribbean are bound to follow the decisions of the Privy Council or the Caribbean Court of Justice. In general, Courts of Appeal are bound by their own earlier decisions. There are exceptions such as decisions from the Criminal Division in a Court of Appeal or a suspicion of injustice. Vieira v Winchester (1966) 10 W.I.R. 400

The State v Gobin & Griffith (1976) 23 W. I. R. 256

The Privy Council does not operate according to the pure theory of the doctrine of precedent thus it will not consider itself bound by its previous decisions. Nkambule v. R. (1950) A.C. 379

Fisher v. AG of The Bahamas Unreported PC Appeal No. 53 of 1997, The Bahamas

DIFFICULTIES IN THE OPERATION OF THE DOCTRINE OF PRECEDENT IN THE COMMONWEALTH CARIBBEAN

The requirement of an hierarchy of courts has not been met efficiently in the Commonwealth Caribbean, causing difficulty in the operation of the doctrine. Are courts from other Commonwealth Caribbean jurisdictions within the hierarchy if the case goes to the shared Privy Council?

Hanover Agencies v Income Tax Commission (1964) 7 W.I.R. 300

Aziz Ahamad v Raghubar (1967) 12 W.I.R. 352

Wigley v Bellot (1965) 9 W.I.R. 193

Jamaica Carpet Mills v First Valley Bank (1986) 45 W.I.R. 278

Bakshuwen v. Bakshuwen (1952) AC 1

Williams v R. (1974) 26 W.I.R. 541

Walker v R (1984) 42 W.I.R. 84 at p. 100

Persaud v Plantation Versailles (1971) 17 W.I.R. 107, p. 132

Also consider whether Caribbean courts should be bound by English precedents.

Jamaica Carpet Mills [1986] *supra*

A distinction may sometimes be made where the English decision is an interpretation of English statute which is identical to a Caribbean statute in issue.

R v. Barbar (1973) 21 W.I.R. 343

A.B. v Social Welfare Officer (1961) 3 W.I.R. 420

Questions

1. What are some of the difficulties in applying the doctrine of precedent in the Commonwealth Caribbean?
2. Explain the essential concepts in the doctrine of precedent.

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LEGAL SOURCES - JUDICIAL PRECEDENT AND LEGISLATION
PART B

LEGISLATION

Antoine, R.M.B.
Walker & Walker
Elliot & Quinn

Law & Legal Systems in the Commonwealth Caribbean, 1998, Ch. 11
The English Legal System, ch. 2 or
The English Legal System, ch. 1

Legislation is an important source of law in the Commonwealth Caribbean. This is primarily because more codification is taking place in the Commonwealth Caribbean and in the common law world. In today's world there is often a need for new law to meet new situations. Clearly the method of judicial law-making through precedents is not suitable for major changes to the law, nor is it a sufficiently quick, efficient law-making method for a modern society. Furthermore, judges are not elected by the people and in a democracy the view is that laws should only be made by the elected representatives of society.

The expression 'legislation' includes all forms of law which is enacted by the pre-established law-making organs of the state according to specific procedures and in specific forms and which do not depend directly on litigation between contesting persons. In all common law countries the term legislation includes the Constitution.

*Questions to be considered are:
What is the nature and role of legislation?
What are the functions of legislation?*

*There are three main forms of legislation, **Acts of Parliament, delegated legislation and autonomic legislation.***

1. **Acts of Parliament** are created by the legislative arm of Parliament. There are two kinds of parliamentary statute:
 - (a) **Private Acts** - those acts which are proposed by a corporation, company or private organisation - affecting only the proposer or sponsor of the Act;
 - (b) **Public Acts** - those acts which are proposed by the people through its representatives in Parliament - affecting the entire nation.
2. **Delegated or Subsidiary Legislation** is created by subordinate or statutory bodies which have specific powers to do so because Parliament has delegated that power to them..
3. **Autonomic Legislation** is created by an autonomous body which has an independent power to legislate for its own members. This power is sanctioned by Parliament, e.g., Bar Councils, Church organisations.

When bodies abuse the administrative decision making power given them through delegated or subsidiary legislation, the judicial process of '**Judicial review**' is granted to the courts to review such actions with a view to providing a remedy to those members of the public who have been affected.

Questions

1. Explain and illustrate how and on what grounds one can challenge subsidiary legislation.
2. "So far as review by the courts is concerned, there is no difference between Parliamentary legislation and delegated legislation."
3. Discuss the ways in which Parliament and the courts can control delegated legislation.

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LAW AND LEGAL SYSTEMS

THE ADMINISTRATION OF JUSTICE

GENERAL READINGS

Antoine, R.M.B
Newton, V.

Law and Legal Systems in the Commonwealth Caribbean, Chs. 13-15
Commonwealth Caribbean Legal Systems: A study of Small Jurisdictions,
Triumph Publications, Bridgetown, 1988 Ch. 5

OPTIONAL READING

Barnett, L.

The Legal Profession and the Independent Administration of Justice.

PART A - THE ORDINARY COURTS

1. **THE STRUCTURE AND COMPOSITION OF THE COURT**

There are three levels of courts in the region:

- (i) Inferior Courts
- (ii) Superior Courts of Record - The High or Supreme Court and the Court of Appeal
- (iii) The Privy Council or Caribbean Court of Justice

Antigua and Barbuda Constitution, ss 122, schedule 2 to the Order, para 7.

Bahamas Constitution, Articles 93, 98, 104

Barbados Constitution, ss 80, 85, 88 as amended by Act No. 17 of 1990.

Belize Constitution, ss 94, 100, 104

Dominica Constitution, ss 106, schedule 2 to the Order paragraph 8.

Grenada Constitution, ss 104, 105

Guyana Constitution, Articles 123, 124, 125, 133

Jamaica Constitution ss 97, 103, 110.

St. Christopher and Nevis ss. 73 and schedule 2 to the Order, paragraph 7

St. Lucia Constitution ss 108, schedule 2 to the Order paragraph 8

St. Vincent and the Grenadines Constitution, ss. 99 and schedule 2 to the Order, paragraph 8

Trinidad & Tobago Constitution, ss. 99, 100, 101, 109

The West Indies Associated States Supreme Court 1967 (U.K), S.I. 1967 No. 223

The West Indies Associated States Appeal to Privy Council Order 1967 (U.K.) S.I. 1967, No. 224

2. **JURISDICTION AND POWERS OF THE COURTS**

- (i) **Inferior Courts** - **Magistrates' Courts**

See, for example

Bahamas	-	Magistrates Jurisdiction and Procedure Act, Cap. 116
Barbados	-	Supreme Court of Judicature Act, Cap. 117
Jamaica	-	Judicature (Supreme Court) Act No. 2 of 1976

- O.E.C.S. States - West Indies Associated States Supreme Court Acts in:
St. Vincent (No. 8 of 1970)
Antigua (No. 26 of 1969)
St. Lucia (No. 17 of 1969)
St. Kitts/Nevis (No. 17 of 1975)
- Dominica - Magistrate's Code of Procedure, Ch. 4. 20
Laws of the Commonwealth of Dominica
- Eastern Caribbean Supreme Court (Dominica) Act, Ch.4.02
Laws of the Commonwealth of Dominica

(ii) **Intermediate Courts**

Jamaica Judicature (Resident Magistrates Act), 1973 Rev.

(iii) **Superior Courts of Record - The High or Supreme Court and the Court of Appeal**

Bahamas Constitution

Hinds v. R. [1977] A.C. 195 (P.C.)

Commissioner of Police v Davis and Another [1993] 4 All E.R. 476 (P.C)

(iv) **The Privy Council or The Caribbean Court of Justice**

See also the Jurisdiction and Structure of the Privy Council on your Privy Council Worksheet. We will further discuss the Privy Council on a separate worksheet.

Note particularly the fact that there is no right of appeal to the Privy Council. The Privy Council, in practice, exercises jurisdiction over a limited category of appeals.

3. Hybrid Offences

Kwante Apata v Roberts (No.2) (1988) 31 W. I. R. 219

Questions

1. Compare and contrast the jurisdiction, personnel and status of the High Court or Supreme Court of any Commonwealth Caribbean territory with that of the Industrial Court of Trinidad and Tobago.
2. Discuss the structure and jurisdiction of the superior courts in any West Indian jurisdiction of your choice. How have the Constitutions enlarged this jurisdiction?
3. "The independence of the Judiciary is the most important characteristic of the Common Law System." Discuss.
4. Describe the existing Court system in any Commonwealth Caribbean state or states of your choice.
5. Discuss the Composition, Jurisdiction and Procedure of the specialised courts in the Commonwealth Caribbean. How do these courts differ from regular courts?

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LAW AND LEGAL SYSTEMS

**THE EFFICIENCY AND APPROPRIATENESS OF
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AS
THE FINAL COURT OF APPEAL IN THE COMMONWEALTH CARIBBEAN**

AIM

As is known by every Commonwealth Caribbean citizen, the Judicial Committee of the Privy Council (Privy Council), which sits in England, is the highest Court of Appeal in the region, with the exception of the Republic of Guyana. This means that it stands at the apex of the administrative system of justice and has the ultimate responsibility or the final word on the definition and flavour of Caribbean jurisprudence. In this worksheet, the student is invited to consider:

- (1) The role and functions of the Privy Council
- (2) The efficiency and appropriateness of the Privy Council in carrying out its role and functions
- (3) Whether the administration of justice might be more adequately served by a Caribbean Court of Appeal replacing the present system?

A Caribbean Court of Appeal has been instituted and is being put into place by some Caribbean countries, notably Barbados and Trinidad and Tobago. The A.G. of T & T has recently commented that the proposed court will have at first, only a limited jurisdiction, restricted to criminal appeals.

GENERAL READINGS

- | | |
|-------------------|---|
| Jackson | "Appeals to the Privy Council -Problems and Prospects" |
| Antoine, R.M.B. | Chapters in Law and Legal Systems. ch.14 |
| Alexis, F. | "The Case against W.I. Appeals in the U.K. Privy Council" |
| Blackshield | The abolition of Privy Council Appeals: Judicial Responsibility and the Law for Australia, ch. 1 - 3. |
| Ramsahoye | "The Judicial Committee of the Privy Council"; Paper presented at the Faculty of Law's Public Lecture Series, 1991 |
| Georges, PT | "Excerpt from the Clifford Sealy Memorial Lecture" (1996) Trinidad |
| Rawlins, H. | Lecture delivered to Harris Memorial Program 1995, published in (1996) Carib. L.R. |
| Price, N.S. | "Constitutional Adjudication in the P.C.", (1986) 35 ICLQ 946 |
| De La Bastide, M. | "The Case for a Caribbean Court of Appeal", Lecture delivered to the Faculty of Law, 1995, published in (1995) Vol. 5 No. 2, Carib L.R. |

OPTIONAL READINGS

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|-----------------|--|
| McIntosh, S. | "A Caribbean Court of Appeal", (Newspaper Clipping), Issue Desk. |
| Antoine, R.M.B. | "The JCPC - An Inadequate Avenue of Appeal for Death Row Prisoners under the Exhaustion of Local Remedies Rule" (1992) Vol. 41 ICLQ, 179 |
| Liverpool, N. | "A Glimpse of the Law, Courts and Legal Education", U.W.I. 1985, pp. 15 -17 |
| Harris | "The Privy Council and the Common Law", Vol. 106 (1990) LQR, 575 |

THE RIGHT TO ABOLISH APPEALS

Commonwealth Caribbean nations do have the right to abolish appeals to the Privy Council, although this may require constitutional support.

Ibralebbe v. R. (1964) A.C. 900
Mitchell v. DPP (1985) 32 W.I.R. 241 (P.C.)

THE RIGHT OF APPEAL

With few exceptions, for example in relation to constitutional motions alleging the violation of fundamental constitutional rights, there is no right to appeal to the Privy Council. Rather, leave is required before the Privy Council can assume jurisdiction. For example, appeals lie at the discretion of the local court where the question is "one of great general public importance". In addition, it can be seen from the cases that the Privy Council is reluctant to exercise its discretion to grant leave to appeal in several categories of cases, thus itself limiting the exercise of its appellate jurisdiction. The result of this is that very few cases actually reach the Privy Council. Thus, the Privy Council has stated that it will not act as a Court of Criminal Appeal unless some serious miscarriage of justice has allegedly occurred.

Re Dillet (1887) 12 A.C. 459 (P.C.)
Esnouf v The A.G. of Jersey (1183) 8 A.C. 304 and 308.
Patterson v. Solomon (1960) A.C. 579
Reid v. R. (1989) 3 All ER 340
Farrindon v R. (1996) 3 W.L. R.

THE PRIVY COUNCIL AND PRECEDENT

In this discussion, we examine whether the decisions of the Privy Council are binding on Commonwealth Caribbean Courts. If so, whether such binding precedent shall apply to all jurisdictions which have retained the Privy Council for final appeals, regardless of whether or not such precedent originates from the same jurisdiction and not another country in the region. For example, would a Privy Council precedent from Antigua bind Barbados? The answer to this is bound up with the "declaratory theory of the common law" which we discussed under the topic "Judicial Precedent". Even more significant is the issue as to whether the Privy Council can legitimately adopt decisions of the House of Lords in England as binding. This seems to be practice if not the principle in Privy Council judgements. Such a practice has clear implications for the development of a jurisprudence which is compatible with West-Indian reality and thinking.

Richards v A.G. (1992) 44 W.I.R. 141
Walker v R. (1984) 42 W.I.R. 84
Tai Hing Cotton Mill Ltd. v. Lui Chong Hing Bank Ltd. (1985) 2 All ER 947 at p. 958
De Lasala v De Lasala (1985) A.C. 546 pp 557-558
Abbot v R. (1977) A.C. 755
King v. R. 12 W.I.R. 268

More recently, we have seen the impact of international norms on English courts including the Privy Council. It would seem that we in the region are now being indirectly bound, not only to English House of Lords cases but to international precedents and principle. Notice the link of the infamous Pratt and Morgan case with previous international decisions.

Pratt and Morgan (1993) 43 W.I.R.
Robinson v. Jamaica, UNHRC Communication No. 223/1987, decided March 30th, 1989

THE JURISPRUDENTIAL APPROACH OF THE PRIVY COUNCIL

In several instances, the Privy Council has demonstrated its ability to adequately adjudicate upon Caribbean problems and issues, particularly in relation to its ability to interpret written Constitutions in the region. In this respect it has often been foremost in the attempt to interpret our written Constitutions 'purposively', often importing new rights into the jurisprudence. Just as many cases however, illustrate the reluctance of the Privy Council to deviate from English Common Law interpretations of legal principle.

Contrast, for example.

Minister of Home Affairs v. Fisher (1980) A.C. 319

Thornhill v. A.G. of T & T (1981) A.C. 61

Whiteman v DPP T & T Privy Council Appeal No. 52 of 1990 (April 17, 1991)

Maraj v. A.G. (1978) 2 All ER 640

Linyavage v R. (1966) 1 All ER 650

with

Robinson v. R. (1985) A.C. 957

Collymore v. A.G. (1969) 2 All ER 1207

Nasralla v DPP 6 W.I.R. 15

The cases also show that the Privy Council can sometimes be out of touch with Caribbean reality and legal policy. Even the doctrine of reception made room for consideration of indigenous societies when it contemplated the "local circumstances rule". Consider the infamous Pratt and Morgan line of cases and the current debate on the death penalty.

Pratt and Morgan (1993) 43 W.I. R.

Remember too that in Madzimbuto v Burke (1969) A.C. 645, the Privy Council was of the view that Britain had the authority to revoke independence! See also....

Hinds v R. (1976) All ER 353 at 359-361

Mauritius, Société United Docks v. Government of Mauritius (1985) A.C. 585

A. G. v Ryan (1980) A.C. 718

A.G. of the Gambia v Momodou Jopbe (1984) 3 WLR 174 at 183

Bakshuwen's Case (1952) A.C.1

Nkambule v. R (1950) A.C. 379

CONSTITUTIONAL BASIS

Antigua and Barbuda Constitution, ss 47 (5)

The Constitution of The Bahamas, ss 52, 105

The Constitution of Dominica, ss 42, 106

The Constitution of Jamaica, ss 49 (4), 110

The Constitution of Trinidad and Tobago, ss 54 (3), 109

The Constitution of St. Vincent and the Grenadines, ss 38 & Sch. 1 Part 1 (vii) 98

The Constitutional Judicature (Restoration) Act 1991, Act No. 10 (which repeals the provisions of The Peoples Law which abolished appeals to the Privy Council)

SOME MAJOR ARGUMENTS CONCERNING THE ABOLITION OF APPEALS TO THE PRIVY COUNCIL

ARGUMENTS IN FAVOUR OF ABOLITION:

1. The Privy Council was not designed to be a full appellate court. Rather, it should be viewed as a extra-ordinary Court of Appeal. See the issue of limited jurisdiction raised above.
2. Privy Council judges do not have the kind of legal reasoning required to interpret written constitutions because they have been trained in the British tradition of parliamentary sovereignty
3. The Privy Council lacks familiarity with the practicalities of West Indian life. This might be reflected, for example, in the adequacy of damages which should be related to economic conditions, devalued dollar etc.
4. The Privy Council has no real knowledge of the sociological conditions of the region and cannot therefore give informed judicial decisions in important cases. It took many years for example, for the Privy Council to agree to adjudicate on the problem of identification evidence, a problem which had been viewed as a serious one in the region. See *Reid v R. supra*.
5. The political distance of the Privy Council may be disadvantageous, for example, if the government wishes to conduct political social experiments or effect a particular politico/legal policy. Examples include collective land ownership in Grenada during the Revolution. The question of the political will of the people will arise. See also the death row debate. Generally, the Privy Council will be alienated from the political feelings and sympathies of the people. How would this have affected the Abu Bakr and Maurice Bishop Cases, for example?
6. It may be naive to think that the Privy Council is apolitical as regards large issues. Some might argue that conservative, imperialist and even racist thinking might be brought to bear upon Privy Council cases. Remember the Mazimbuto v. Burke Case. Such thinking will not be in the best interests of the region. How would they Privy Council tend to view cases concerning large multi-national interests for example?
7. Arguments in favour of the Privy Council are rooted largely in the dependency syndrome.
8. The argument that replacing the Privy Council would mean cutting ourselves off from the great body of common law and deprive us of the opportunity of contributing to its development is misplaced. This is particularly so in our increasingly communicative world.
9. To say that we do not have sufficiently qualified or competent judges to sit on a Caribbean Court of Appeal merely displays a lack of confidence in our worth and indeed ignores the role of our regional university.
10. The argument in relation to costs is merely evidence of our "freeness mentality". Is "independence meaningless" when we are offered "dependence without charge?"
11. The creation of a Caribbean Court of Appeal will have significant symbolic value in our quest for the meaning of independence.
12. The creation of a Caribbean Court of Appeal will give us room to develop our creativity in relation to jurisprudence and help us to mature as jurists and legal thinkers

ARGUMENTS AGAINST ABOLITION

1. A Caribbean Court of Appeal will be costly. At this time when all of our countries are under severe financial difficulty, it is not practical to institute it. The means does not justify the end. This includes the kind of money necessary to attract high quality judges.
2. Attempts at regionalism have not been successful thus far. The likelihood of success for a Caribbean Court is small.
3. The political distance of the Privy Council is an important advantage. It allows our decisions to be adjudicated more fairly and objectively within the law.
4. How will such judges be chosen, on merit or by quota. The problems with quotas have often created problems in the past, with smaller jurisdictions always being given smaller quotas. Appointment on merit will also mean that some jurisdictions will be left out and may feel wronged.
5. The danger of political interference with the Caribbean Court will always be present.
6. The Privy Council has already demonstrated that it is competent to adjudicate on West-Indian matters, even important constitutional issues. Indeed, at times, the court has been more liberal than we ourselves have been and interpreted our constitutions "purposively" pointing out to us the dynamism of our constitutions.
7. The problem of limited jurisdiction can perhaps be remedied by increasing the jurisdiction of the court.
8. The Privy Council does not compromise our sovereignty or independent status. It is merely a convenient arrangement which is also relatively cheap.

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LAW AND LEGAL SYSTEMS

SPECIALISED COURTS, TRIBUNALS AND JURISDICTIONS

STUDY GUIDE

Specialised courts and other bodies have significant roles to play in our legal systems. They have a more obvious correlation with perceived ills and cultural norms of our society and can differ greatly in jurisdiction and operation from ordinary courts of law.

The term specialised courts, tribunals or jurisdictions describes those jurisdictions which are specific to certain matters. In some cases these specialised functions are not strictly judicial. In this instance they are called 'quasi-judicial functions'. Examples include: industrial tribunals (as opposed to industrial courts). These specialised functions may be carried out by a separate judicial or quasi-judicial entity or may be subsumed under the ordinary courts of law. For example, juvenile courts are often not separate courts of law but merely a division of magistrates courts. There is no logical correlation between specialised courts or functions as seen in the case of ordinary courts which form a hierarchical structure. They are quite diverse and distinct. Therefore, in one jurisdiction specialised courts and functions may include a juvenile court, family court, industrial court, gun court and traffic court. The most recent and perhaps most dynamic addition to the specialised courts family is the Drug Court of Jamaica.

Certain characteristics single out these special entities. These include their tendency to rely on specialised personnel, informal procedure and adoption of norms relevant to the peculiar jurisdiction (e.g. counselling techniques for the juvenile court).

Appeals from these entities will depend on their status, whether an inferior, intermediate or high court. The rationale of their existence is to make their jurisdiction exclusive and relevant to the particular proceeding, thus all matters pertaining to their jurisdiction must go before them. Of course, there are more pragmatic reasons for the creation of such specialised bodies. Was it Adam Smith who said that specialisation was the key to efficiency?

An important difference between special judicial bodies and quasi-judicial or purely administrative bodies is that while the former is subject to the ordinary appeal process, the latter's decisions can be questioned by an ordinary court of law under the process of judicial review.

A. THE JUVENILE COURTS

All jurisdictions in the Commonwealth Caribbean have a court which deals specifically with juveniles - a juvenile court, or a specialised jurisdiction of the ordinary courts which handles this function. Those specialised bodies share a common philosophy, that is, prioritising the rehabilitation of juvenile offenders and putting mechanisms in place for the care of juveniles. Punishment as a central feature of ordinary courts is, therefore, only secondary.

GENERAL READINGS

- | | |
|-----------------|---|
| <i>Antonie,</i> | <i>Supra</i> , ch. 15 |
| R. J. Walker | <i>The English Legal System</i> , 6th ed. Butterworths, London, 1985, at pp 207-209, 461-462, 621-629, 521-528. |
| S. Daly | "Family and Child Law in Trinidad and Tobago", pp 48-57. |
| Liverpool, N. | "Some Laws Relating to Children in Barbados, Antigua & Dominica" |
| S. Mason | "Juveniles in The Barbados Society", in F. Alexis and P.K. Menon (editors). |

ADDITIONAL READINGS

- “The Sentence of the Court - A Handbook for Courts on the Treatment of Offenders”.
(U.K.) 1971 - Supplement on the Children and Young Persons Act 1969 U.K. Home Office.
J. Seymour, “Dealing with Young Offenders” (1988) Ch. 7 - 8, (KB 355 S. 49)
Hackler, J. “Similarities in Juvenile Justice in Different Cultures - Implications
for Developing Countries” p. 24.
Pryce, K. “Juvenile Delinquency in the Caribbean; Causes, Treatment & Control
in Relation to Worsening Economic conditions”.

JUVENILE TRIALS AND ARREST

The trial of juveniles has certain special features. For example, young children are not presumed to understand the seriousness of an oath. Similarly, young children may not be able to corroborate evidence.

Jurisdiction and Procedure

- Re J. S. (An infant)* [1959] All E.R. 856
R v. Parry [1951] 1 K.B. 590 [1950] 2 All E.R. 1179
DPP v Hester [1973] A.C. 296 [1972] 3 All E.R. 1056
R. v Braiser [1977] 1 Leach 199

Even pre-trial procedures may be different where children or juveniles are involved. For example, see sections in the various legislation which prohibit juvenile offenders from association with any adults and 'hardened criminals' charged with an offence. e.g. sections 3(3), 5 of the B'dos Juvenile Offenders Act, Ch. 138 and section 4 (3) of the Juvenile Offenders Act of Guyana, Ch. 10 - 03

Sentencing

Often, sentencing for juveniles focuses not on punishment, but on rehabilitation and probation.

- Baker v. K* (1975) 23 W.I.R. 463
Raksoon v Ramkissoon 5 W. I. R. 463
R. v Barnett Juvenile Ct. ex parte Barnett, London Borough, (1982) The Times, 1 June 16.
R v. Knight [1980] Crim. L. R. 446
R. v Wright (1972) 18 W. I. R
An example of Care proceedings: *Nottingham L. C. v Q* (1982) 2 All ER 641

Legislation and Treaties

United Nations Convention on the Rights of the Child - Consult the legislation in your country, for example,
Bahamas - Children and Young Persons Act.
Trinidad & Tobago - Children's Act 1925, ch. 46 - 01
Guyana - Juvenile Offenders Act 1931, Ch. 10.03
The Reformatory and Industrial School Act, Ch. 169 (B'dos)
The Training School Act, Dominica Ch. 255
The Juvenile Offenders Act of Barbados Ch. 138 - also Summary Court Acts of the Various Jurisdictions
See also the new Education Act of Barbados which has special provisions for truancy.
*Note that the jurisdiction of juvenile courts is not limited to offences or crimes committed. The court also has jurisdiction over children in need of care, even if found wandering the streets.

B. FAMILY COURTS

GENERAL READING

G. Cumper *Planning and Implementing the Family Court Project*. Jamaica, 1981
The Judicature (Family Court) Act (Jamaica), No. 41 of 1975, rev'd 1995
Family Courts Act (Belize), 1990 CAP 83A
The Family Court Act 1992 of St. Vincent

*Note in particular the jurisdiction in relation to juveniles

C. THE DRUG COURT

Mottley, E. - 'The Drug Court in Bermuda'
Marshall-Harris, F. Lecture Notes on UNDCP and the Formation of Drug Courts

D. THE INDUSTRIAL COURT

Only Trinidad and Tobago and Antigua have fully fledged Industrial Courts. The other jurisdictions handle industrial relations matters by way of industrial tribunals.

R. Chaudhary "Compulsory Arbitration and the Industrial Court
in Trinidad and Tobago" (1977), 26 I.C.L.Q. 381
OR
C. Okpaluba *Essays on Law and Trade Unionism in the Caribbean*, at p. 72, 92

See too: The Industrial Relations Act, 1972 (Trinidad and Tobago)
Sandry Workers v Antigua Hotel & Tourist Associ. (1992) 42 W.I. R. 145
Collymore v. A.G. of Trinidad and Tobago (1967), 12 W.I.R. 5.
Farrell v A.G. of Antigua (1979) 27 W.I. R. 377

D. THE GUN COURT - (in brief only)

Gun Court Act (Jamaica), Revised Laws, 1973
Hinds v R (1977) A.C. 195 (in brief only)

QUESTIONS

1. What is the philosophy of a juvenile court? To what extent is this philosophy reflected in the system of juvenile justice in your country?.
2. How does the United Nations Convention on the Rights of the Child measure up to legislation relating to the child in your country?.
3. Describe the various specialised judicial functions, courts and tribunals in the Commonwealth Caribbean. How do they differ from ordinary courts of law.
4. Discuss the issues that arise in the following situations.
 - (a) Jane, aged 5, and Selmo, aged 10 are found wandering the streets, apparently homeless. The villagers see them but complain that they cannot do anything about it, although they are afraid that Jane and Selmo "will get spoiled by those loose women and thieves lurking about".
 - (b) Bellie, aged 12, and Crapos aged 10 throw stones at Mellie and injure her. They are arrested for assault and thrown in jail. At their trial, they both deny Mellie's story. There is an eyewitness, Jello, who thinks he saw the boys throw stones. They are found guilty and sentenced to 5 years in prison with hard labour.
 - (c) The judge in a criminal trial, refuses to allow Mellie, aged 8 to swear the oath, saying she is too young to testify.

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THE JURY SYSTEMS

A. THE JURY SYSTEM

The efficiency of trial by jury is an ongoing debate. Some view jury trials as an essential feature of democracy, the 'light of freedom', which allows our peers to judge us. Others view such trials as robbing a trial of the opportunity to benefit from judicial expertise, greater education, technical expertise and unemotional adjudication, which, they argue, would characterise trial by judges or legal personnel. Many studies (See Deosaran) have shown the inconsistencies that may occur within jury trials; jurors not understanding the evidence, being too easily influenced etc. Just as many, however, have concluded that juries are only expected to judge fact and not law and the best person to judge the facts, the defendant's character and other such commonsense matters, is the 'common' man.

Required Readings

- Walker & Walker 6th ed. Ch. 11
Baldwin & McCorville "Jury Trials", Clarendon Press, England, 1979, ch. 1.8
Antoine, R.M.B. *Supra* ch. 16
Deosaran, R. **Read at least one of Deosaran's...**
"Trial by Jury - Social and Psychological Dynamics", OR
"Trial by Jury - A Case Study," Trinidad, ISER, OR
"The Future of Trial by Jury - How the System Works", Symposium 1980, UWI, OR
The Jury System in a Post-Colonial Multi-racial Society Problems of Bias, Vol. 21 Br. Jr. of Criminology Oct 1981, 305
DeMerieux, M. "Fundamental Rights in Commonwealth Caribbean Constitutions"
pp 365-368.
Spry, Sir John "Problems of Jury Trials in Small Jurisdictions", Commonwealth Secretariat, London (1985),
Devlin "Trial by Jury", Ch. 4-6
Dashwood, A. "Juries in a Multi-Racial Society", [1972] Criminal Law Review 85

Additional Readings

- Patchett, K. "English Law in the W.I. (1963) 12 ICLQ 931 -35
Denning "What next in the Law" Part 2, pp. 33-35, 59-70
Georges, T. "Is the Jury Trial an Essential Cornerstone of Justice?"
Zeisel, Hans "Dr. Spock and the Case of the Vanishing Women Jurors"

The Law Reform Committee (Jamaica) Report No. 1 of 1974

B. LEGISLATION

Please be familiar with the legislation on the jury in your own jurisdiction which outlines the circumstances under which trial by jury may be obtained. Legislation also describes the qualifications to be met before one can serve on the jury. As a general rule, the law seeks to choose a person representative of the middle (perhaps lower-middle) class of society. As such, job specifications and educational requirements are specified. The legislation also lists exemptions from jury service, which are many in the Commonwealth Caribbean, and is itself a ground for criticism. Exemption include doctors, lawyers, clergyman and those employed in essential services.

Antigua and Barbuda - Jury Act, Ch. 41, as amended by Nos. 18/1986, 18/1989
The Bahamas s. 20(2) of the Constitution, Juries Act, Ch. 47, as amended by No. 11 of 1988.
Barbados - Juries Act, Ch. 78 Revised Laws 1991.
Grenada - Jury Act, Ch. 151 as amended
Dominica - Juries Act, Ch. 5: 70, Revised Laws, 1990, as amended by No. 26/1991
Jamaica - Jury Act, Revised laws, 1973.
St. Kitts and Nevis - Jury Act, Ch. 38 as amended, Nos. 22/1966; 22/1967; 16/1970
St. Lucia - The Criminal Code, Revised (1992), Part III, Arts. 786-841
St. Vincent - Jury Act, Ch. 21, Revised Laws 1990.

C. CASES

The Right to Trial by Jury

See DeMerieux, M. "Fundamental Human Rights in the Commonwealth Caribbean".
at pp. 365-368

There is no right to trial by jury in all cases.

Only the Bahamas has enshrined a constitutional right to trial by jury. As a general rule the jury is available for indictable offences and for some civil matters at the discretion of the judge if good cause is shown. In some instances a defendant may elect not to be tried by a jury, but to be tried summarily. The usefulness of this is that, if convicted, the penalty will be a lesser one, as is appropriate to a summary trial.

In other cases, a defendant may believe that he has a better chance of acquittal by jury trial.

C.O.P. v Davis (1993) 43 W.I. R. I.

Morales v Morales (1962) 5 W. I. R. 235

Police Comm. of Barbados v. Hinds (1959) 2 W. I. R. 305

Lazare v. Wright (1911) 2 Trin. L.R. 23

Ward v James (1960) 1 Q.B. 273 at 203

Challenging the Jury

Juries may be challenged peremptorily (without reason) or for cause. In multi-racial societies, it has been argued that the jury should be selected on the basis of race to avoid prejudice and bias which could violate the principle of a fair trial. Nevertheless, challenging the jury for cause is generally difficult to substantiate and the issue of race does not seem to be one easily proven.

R v Mason (1981) Q.B. 881

R v Kray (1969) 53 Cr. App. R.412

R v Broderick (1970) Crim L.R. 155

Exemptions to Jury Service

Abdool Salim Yaseen and Thomas v. The State (1990) 44 WIR 219

Re Eric Darien (A Juror) (1974) 22 W.I. R. 323

Irregularities leading to Discharge of the Jury or Grounds for Appeal

A juror or the entire jury may be discharged at the discretion of a judge if it appears to him that to continue with such juror/s would seriously prejudice or endanger the fairness of the trial. An appeal court would not lightly inquire into the exercise of this discretion. Several reasons may ground a discharge including talking about the trial, previous knowledge of the trial or the parties to the trial or mere illness.

See also cases on the jury trial in small jurisdictions below:

Crosdale v. R. (1995) 46 WIR 278
R. v Sawyer (1980) 71 Cr. App. R. 28
R. v. Anderson (1961) 3 W.R. 402
R. v Baichandeen (1978) 25 W.I.R. 213
Gibson v R. (1962) 5 W.I.R. 450
R. v Flack (1985) Crim L. R. 160
Chaitlal v R. (1985) 39 W.I. R. 295
R. v Prime (1973) 57 Cr. App. R. 632
R. v Townsend (1982) 1 All ER 509
R. v Spencer (1986) 3 WLR 348

The Verdict

In general, a verdict may only be disturbed if it is found to be unsafe or unsatisfactory. The threshold for determining what is unsafe or unsatisfactory is very high. The burden is on the defence to prove that some material irregularity occurred in the trial which led to a serious miscarriage of justice such as to disturb the verdict. Even if some jury irregularity is discovered in the trial after the verdict, for example, if it was discovered that the juror discussed the case with a witness or had some bias, this may not be sufficient. It must be shown that he would have arrived at another verdict if the irregularity had not occurred. This may be so even if the irregularity would have been sufficient to challenge the juror for cause.

See also the discharge cases (above) on this point

Henry and Emmanuel v. R. (1993) 46 WIR 135
R. v. Clifton Steele (1975) 24 W.I.R. 317
R. v Chapman & Landry (1976) 63 Cr. App. R. 75
R. v. Nembhard (1964) 22 W.I.R. 362
Sauker & Pitt v. R. (1982) 33 W.I.R. 64
R. v Barry (1975) 1WLR 190
R. v Box and Box (1964) 1 QB 430
Lewis-Lashley v The State (1987) 46 WIR 344

Problems with Small Jurisdictions, Pre-Trial Publicity and the Right to a Fair Trial

The problems relating to trial by jury are exacerbated in small jurisdictions like those in the Commonwealth Caribbean. These additional problems include: The increased possibility that jurors may know parties to the trial or have personal knowledge of the facts of the case; more likelihood of pre-trial publicity as events are likely to assume more importance in small localities where such events occur less frequently; less choice in jury selection, which in turn may lead to over use of some jurors and the growth of 'expert' jurors; increased likelihood of community (village) pressures to decide in a particular way as the trial is more intimately connected to the community' whether because of the people involved or the particular office (for example, certain areas may be known for certain activities) and finally, the possibility that small societies are less exposed to liberal and other open influence which may have the effect of increasing tendencies toward racial and class divisions.

The above difficulties may seriously impair the trial process, thereby infringing the constitutional right to a fair trial.

R v. Leare (1995) CLB 445
Gibson v R. (1962) 5 W.I.R. 450 (supra)
Howe v. R. (1972) 19 W.I.R.
Grant v DPP (1981) 3 W.I.R. 252
R. v. Stephens Sup Ct. Case (U.K) No. 2 of 1983 (reported in Spry, supra)
R. v. Liverpool Justices (1983) 1 WLR 119
R. v. Minto - Crim Case No. 1 (1981) 1 Falkland Islands (also in Spry, supra)
R. v. Porter (1965) 9 W.I.R. 1
R. v Kray (1969) 53 Cr App. R. 412

Please refresh your memories on the O.J. Simpson case and the issues pertaining to the jury

Misdirection to the Jury/Misconduct of the Judge/Fact vs Law and Failure to Leave Issues to the Jury.

As juries are arbiters of fact and not law, they are expected to follow the judge's instructions on the points of law which may arise in a trial. Conversely, the judge must leave appropriate issues for the jury to decide. Judges, however, are not infallible and sometimes misdirect the jury. On the other hand, the jury may not understand the judge's directions. Both instances may be grounds for a mis-trial. The fact that jurors are sometimes viewed as under-educated but are expected to understand complex points of law is not helpful to the problem of directions to the jury. In rare cases, the judge may also misbehave, allowing himself to become personal, as we saw in Thomas v R where the judge accused counsel of 'stupidity'. This, too, is grounds for a mistrial, if it affects the outcome of a trial.

Ashby v. The State (1994) 45 W.I. R. 31

Bernard v. R. (1994) 45 WIR 296

Freemantle v R. (1994) 45 WIR 313

Thomas v R. (1992) 44 WIR 76

Bucket v R. (1964) 6 WIR 285

Berry Linton v R. (1992) 41 WIR 241

Senevirate v R (1936) 3 All ER 36

Russell v Scarlett (1960) 21 WIR 343

Sookham v R (1971) 18 WIR 195

Douglas v R. (1988) 40 WIR 393

King v R (1961) 4 WIR 307

Retirement of the Jury

R. v Alexander (1974) 1 WIR 422

QUESTIONS

1. Janal and Elmot are arrested for murder. Janal informs his legal aid counsel that he wishes to exercise his right to choose jury trial. He therefore chooses **not** to be tried by a jury. Elmot, who can afford to pay for an attorney, has his case heard before Janal. During the jury selection process, Elmot's lawyer, on his advise challenges Big Lake as a juror on the basis that Big Lake comes from the same village as the victim and cannot be expected to be impartial during the trial. During the trial, the judge tells Elmot's counsel to "*Hurry up and finish your defence. I have a lunch date, you know you don't have a case*". Elmo's counsel, in his rush, forgets a vital piece of evidence. The judge, in his summing up tells the jury. *Despite the overwhelming evidence which clearly point to the defendant's guilt, I have to inform you that every man must be presumed innocent.*

Elmot is found guilty. He wishes to appeal o the Privy Council, which, he believes, is less biased than the local courts.
Advise Janal and Elmot.
2. "Trial by jury is an outdated and useless system in the Commonwealth Caribbean and should be abolished". "Discuss.
3. "There are too many things that can go wrong in jury trials. As such, it is not the most efficient system for procuring justice". Discuss.

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THE RULES OF STATUTORY INTERPRETATION

The meaning and effectiveness of a statute is only apparent when judges have interpreted it. Often, however this is not a simple exercise. The courts have devised several rules in an attempt to discern the true intention of Parliament as expressed in legislation. In practice, statutory interpretation is not such an artificial exercise as the rules seem to suggest.

GENERAL READINGS

- | | |
|--------------------------|---|
| Crabbe V.C.R.A.C. | <i>Montesquieu and Pepper v. Hart</i> (1996) Carib L. R. 165 |
| Antoine, R.M.B. | <i>Commonwealth Caribbean Legal Systems</i> , Cavendish, London 1998 ch. 12 |
| Arceuil, R.N. | "Hansard Gains Judicial Recognition: <i>Pepper v. Hart</i> " (1994) Students Law Review 184 UWI |
| J. Willis | "Statutory Interpretation in a Nutshell" (1938) 16 <i>Can. Bar Rev.</i> 1 |
| S.H. Bailey and Gunn, M. | Smith and Bailey on the Modern English Legal System, Chap. 6 at pp. 315-361 |

OPTIONAL READINGS

- | | |
|--------------|---|
| Denning | "The Discipline of Law" Butterworths, London, 1979, 9-22 |
| Floissac, V. | "The Interpretation of the Civil Code of St. Lucia" in E. Capros and R.A. Landry (eds) at p. 339. |

1. **The Mischief Rule**

The 'mischief rule' is perhaps the oldest known rule of statutory interpretation. It attempts to look at what defect, or wrong, or 'mischief' Parliament was trying to correct when it enacted the particular statute. This allows the court to ascertain the true intention of Parliament.

Heydon's case (1584) Co. Re. 7a 7b
R. v. George Green (1969-70) 14 W.I. R. 204
Black Clawson v. Papierwerke (1975) A.C. 591 at p. 638.
Vacher v London Society of Compositions (1913) A.C. 107, 117-118

2. **The Literal Rule**

The 'literal rule' presumes that the best way to interpret the will and intention of Parliament is to follow the literal meanings of words. This should apply even where a literal meaning may lead to an apparent absurdity.

R v. Ramsonahai and Duke (1961) 3 W.I.R. 535
Sussex Peerage Case (1844) 11 CL & Fin. 85, 143
Bayley v Daniel 1 T & T Sup Ct. R. 314.
Baptiste v Alleyne (1970) 16 WIR 437
Compare *Hope v. Smith* (1963) 6 WIR 464 **with**
Peters v Marksman and the A.G. (1997) 2 Carib L.B. 95

3. The Golden Rule

The 'golden rule' makes the assumption that Parliament does not intend an absurd result. Where a literal reading of a statutory provision would produce such an absurd result, therefore, judges should replace a literal meaning with a reasonable one.

Grey v. Pearson (1857) 6 H.L. Cas 61, 106

Davis v. R. (1962) 4 WIR 375

Lewis v. St. Hillaire et al (1996) 1 Carib L.B. 119

4. The Contextual/Purposive Approach

In contrast to the above rules, the contextual approach places less emphasis on the actual words of a statute and more on the purpose, aims and context of the legislation. Sometimes this may require going outside the statute itself to find its true meaning. This is a modern approach.

Fraser v. Greenaway (1992) 41 W.I.R. 136

Black Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg A.G.
(1975) A.C. 591 613

Notham v. London Borough of Barnett (1978) 1 WLR 220, 228

R. v. Ayres (1984) 2 WLR 257

Stack v Jones (1978) 1 WLR 231

AG v Prince Augustus of Hanover (1957) AC 436

R v Barnett London Borough Council ex p. Nilish (1983) 2 A.C. 309, 348

Pepper v. Hart (1993) 1 All ER 42 (considered further below)

Pay particular attention to the purposive approach employed in interpreting Constitutions.

Minister of Home Affairs v. Fischer (1980) A.C. 319; (1979) 44 W.I.R. 107

5. Rules of Language

(i) Ejusdem Generis Rule - Powell v. Kempton Park Race Course (1899) A.C. 143

(ii) Noscitur A.Sacis - Penglelley v. Bell Punch Co. Ltd. (1964) 1 WLR 1055

(iii) Expressio Unius est Exclusio - R v Hussain (1965) 8 WIR 65 at p. 88

6. Legal presumptions

The following presumptions always apply when judges are interpreting statute, unless Parliament specifically declares otherwise.

(i) Presumption against changes in the law - Black Clawson case (*supra*)

(ii) Presumption against Ousting the Jurisdiction of the Courts - Bonadie v. Kingston Bd. (1962) 5 WIR 272; Griffith v. Barbados Cricketing Association (1989) 41 WIR 48

(iii) Presumption against altering Vested or Acquired rights - Lileyman v IRC (1964) 13 WIR 224

(iv) Presumption that Penal statutes are construed in favour of the accused.

(v) Presumption against Retroactively

(vi) Presumption that statutes do not bind or affect the Crown unless reference is made to it expressly or by necessity.

(vii) Presumption of Constitutionality - St. Luce v A.G. and Another (1975) 22 WIR 536 at 540
Fausun v A G of T & T (1978) 30 WIR. 360.

7. Internal Aids to Interpretation

The Long Title

Fisher v Raven (1964) A.C. 210

Preamble

Attorney-General v Prince Ernest Augustus of Hanover (1957) A.C. 436

Short Title

Vacher & Sons Ltd. v London Society of Compositors (1913) A.C. 107 at p. 128

Heading

Director of Public Prosecutions v Schildkamp (1971) A.C. 1 at p. 10

Punctuation

Harlow v Law Society (1981) A.C. 124

Side Notes

Stephens v Cuckfield Rural DC (1960) 2 QB 373 at 383

AG v Wood (1988-89) C.I.L.R. 128

8. External Aids to Interpretation

Dictionaries

Munickchand v E. Ranjit (1969) 15 WIR. 30 at p. 34D

Parliamentary Materials

Beswick v Beswick (1968) A.C. 58 at 73-74

Black Calwson Case - supra (1975) 1 All ER 810 at 828 (1975) A.C. 591 to 629

Pickstone v. Freemans (1988) 2 All ER 8803 (1989) A.C. 66

Davis v Johnson (1979) A.C. 264

Hadmor Productions v Hamilton (1982) 1 All ER (1983) 1 AC 191

Pepper v Hart (1993) 1 All ER 42

QUESTIONS

1. Critically analyse the dicta of *Pepper v Hart*. Does it significantly alter the way judges interpret statute?
2. Describe the main rules of statutory interpretations. What do you consider to be a modern approach?
3. How important in the "literal rule" of statutory interpretation in a contemporary context?
4. Discuss the view that judges are moving closer to looking at context in attempting to ascertain Parliament's intention.