CHAPTER 1

INTRODUCTION TO LAW AND LEGAL SYSTEMS IN THE COMMONWEALTH CARIBBEAN

THE NATURE OF THE LEGAL SYSTEM

The study of law and legal systems is a diverse and intriguing subject which cannot be divorced from its proper social context. In the Commonwealth Caribbean, the law and legal systems were born out of the colonial experience. Indeed, the very nomenclature by which the region is known is evidence of this. The notion of a 'Commonwealth' betrays the historical fact of imperialism and gave the region a certain identity, which even today, still survives.

For a description with less emotive connotations, the Commonwealth Caribbean is that part of the globe known as the West Indies.[1] It comprises both dependent and independent democratic States, but the former are now few in number.[2] The independent countries of the region belong to a socio-economic grouping – a loose political community labelled the Caribbean Community (CARICOM).[3] There is a further sub-grouping of the countries of the Eastern Caribbean, known as the Organisation of the Eastern Caribbean States (OECS).

A West Indian identity?

The historical reality of colonialism is perhaps more evident in the study of 'Law and Legal Systems' than in any other legal subject. While the ex-colonies have attempted to fashion new identities since gaining independence, their legal expressions remains largely British, or, at least, neo-colonial. As Sharma JA from the Trinidad and Tobago Court of Appeal explained in *Boodram v AG and Another*:[4]

> . . . even after independence, our courts have continued to develop our law very much in accordance with English jurisprudence. The inherent danger and pitfall in this approach is that, since independence our society has developed differently from the English and now requires a robust examination in order to render our Constitution and common law more meaningful.[5]

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1 Although the Republic of Guyana is not strictly speaking part of the Caribbean, but part of South America, it is usually included in the term 'Commonwealth Caribbean'. Bermuda is similarly included, as is Belize, although the latter is part of Central America. The term 'Caribbean' should be taken to mean the Commonwealth Caribbean. Likewise, the term 'West Indies' is used synonymously with 'Commonwealth Caribbean'.

2 These include Montserrat, the Cayman Islands, Bermuda, Anguilla, Turks and Caicos and the British Virgin Islands.

3 CARICOM further embraces the dependent territories as Associated States, and more recently, countries in the Caribbean which are not part of the Commonwealth, such as Suriname and Haiti. An exception is Montserrat which is a full CARICOM member although still a dependent territory. There are current initiatives toward formal economic integration and more formal political ties, but the principle of autonomous self-government for each one of these States is likely to be retained. The system of government identified in the region, the Westminster Parliamentary system, including its traditions of political and legal Conventions, follows closely the model set out by Britain, the former coloniser of the Commonwealth Caribbean.

4 (1994) 47 WIR 459.

5 At p 470.

Turn toward other foreign law?

More recently, Commonwealth Caribbean courts and jurists have sought to resort less to English jurisprudence, turning instead to legal thought and infrastructure from elsewhere, such as Europe and North America. The emphasis on North American and European jurisprudence is most pronounced in constitutional adjudication, largely perhaps because of the absence of a written UK Constitution and consequent jurisprudence upon which to lean. However, these foreign solutions still deny our own creativity and experience.

The convergence toward North American models of legal systems is also seen in the recent adoption of case management, court practices and rules borrowed from North America, with the aim of making court adjudication more efficient. Further, we have already seen a high degree of Americanisation of the region, aided no doubt, by geographical proximity and the dominance of American television and pop culture. That same television is a medium for transmitting models of justice, such as televised trials, racially constructed juries, new rules of evidence, and changing the locations of juries to avoid bias. These may challenge long-held assumptions about the right (English) way of doing things. Perhaps the day is not too far away when we will be electing judges!

Some options which may be borrowed from the American legal system seem more attractive than others. Contingency fees, for example, may be suitable in societies such as ours where many citizens find the cost of justice to be prohibitive and where legal aid is scarce. It may also have the effect of speeding up the process, by encouraging legal counsel to be more time-efficient.[6] In addition, as discussed in Chapter 18 ('Specialised Courts, Tribunals and Functions'), it has been argued that multicultural societies such as ours should be accurately reflected in the composition of our juries, a position which has been resisted under the traditional English jury system, but adopted in the US.

Similarly, access to court trials on television, a medium which is wholeheartedly embraced in the region, may encourage more inclusion in the adjudication system, in societies whose peoples have traditionally felt that formal channels of justice were closed to them or alienated from them. This is not a panacea, however, as television trials also have great potential to distort truth or sensationalise litigation.

The plantation paradigm

Noted economists, historians and sociologists have described the region as 'plantation societies',[7] a reference to the fact that the territories were once shaped by the dictates of the great sugar plantations. The plantation paradigm best explains the 'persistent poverty' of the region, both in terms of economics and legal innovation.[8]

The legal systems of the region cannot, therefore, be described as endogenous. The greatest divergence of this colonial outlook can be seen to be the advent of written

6 See the Cayman Islands case of *National Trust for Cayman Islands v Planning Appeals Tribunal Central Planning Authority and Humphreys (Cayman) Ltd* [2002] CILR 59 (Grand Court, Cayman Islands).

7 Beckford, G, *Persistent Poverty: Underdevelopment in Plantation Economics in the Third World*, 1972, New York: ISER.

8 See *ibid*, for the economic theory on persistent poverty.

Constitutions, in particular, Bills of Rights, again a product of independence. Yet, even here, we cannot say that there is complete originality. The written Constitutions of the Caribbean borrowed heavily from international human rights instruments, and were constructed with much less indigenous input than is usually expected of such defining documents.

The battles between different imperialist powers, while challenging periodically the dominance of the English common law, did not allow the development of a unique West Indian law in the interplay and consequently did not undermine the exogenous nature of the law. The region still awaits the revolution which will force capitulation of these essentially non-West Indian strains of legal dominance.

It appears that we are successful legal civilisations if we judge ourselves by how admirably we have retained and maintained the English jurisprudence that we inherited or, more accurately, was thrust upon us. However, we have exhibited failure in our inability to put our own stamp, our own face, on our justice. Ultimately, law is meant to reflect society and to engineer society. Yet our law still looks very alien and foreign to many.

Striving to be West Indian

The region's law and legal systems are still 'striving' to be West Indian. Apart from deviations from Westminster-style democracy, as evidenced by the written Constitutions, there have been experiments with socialism and democratic socialism in at least three countries: Jamaica, Guyana and Grenada. In the latter two nations, the impact of these political changes extended to their Constitutions.[9] In Grenada, the change was profound, even including a suspension of the Constitution under a revolutionary government, with a substantial change to the court structure which necessitated complex jurisprudential questions about State legitimacy.[10]

In addition, while the base of the law and legal systems remains the common law, the detail of that law has been changed according to the social, political and economic needs of the region, albeit not substantially enough in the eyes of many.

The vulnerabilities of the legal system to socio-political realities

In our examination of Commonwealth Caribbean law and legal systems, what we find is that there are common denominators in the many subject areas in this book. They are: issues of political and cultural sovereignty, economic sustainability and even of economic survival. These underline the vulnerable status and place of small developing countries in the world. An important thread running through our analyses is the extent to which small, poor, developing nations such as those in the region, have the freedom and the flexibility to fully define the legal systems therein. This may, at first blush, seem to be an alarmist, rather extreme position, but upon closer examination, we shall see that there are important truths and realities to be ascertained.

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9 In Guyana, eg, the Constitution declared the country to be a socialist State and proclaimed the 'right to work'.

10 Under the Peoples Laws of 1979. See the discussion of the Grenada experiment in Chapter 16 ('The Privy Council'), Chapter 17 ('The Renewed Initiative Towards a Caribbean Court of Justice') and Chapter 18 ('Specialised Courts, Tribunals and Functions').

When we speak of difficulties in defining and shaping the legal systems in the region, we are not, of course, speaking of the kind of legal displacement that can occur when one country invades or intervenes in another smaller, weaker, country. That brings its own dynamics and is certainly something which occurred very early in our legal history, although the existence of the legal and political systems of the original peoples is hardly even acknowledged.[11] Instead, legal displacement may be far more subtle and may even be welcomed with open arms. Indeed, in some cases, it is self-perpetuating.

Economic and political sovereignty and the impact on law

The region's economic and political sovereignty is clearly not untouched by the dictates of larger States. For example, CARICOM was threatened with economic retaliation by the US for not voting to excuse the US from the jurisdiction of the International Criminal Court as it requested.

These political realities may have implications for the kinds of laws which we put into place. For example, they have had practical impact in the urgency with which the region has had to implement laws against terrorism. Such initiatives have hefty economical implications. While they may not be undesirable objectives in themselves, they do demonstrate the extent to which legal changes in policy may be dictated from outside of the region and the often low priority given to pressing issues of law reform in favour of external priorities. Often, these are not choices, but imperatives.

These vulnerabilities were born out of the colonial, imperialist construct in which law had an important part to play. This function of the law is the subject of the following chapter. Here, we note merely that law in the region has also served as a powerful tool of underdevelopment and dependency. Some would argue that it even cemented the economic servitude of the former colonies by notions of property that guaranteed the continued ownership and even the monopoly of vital sectors of the economy to the former colonial masters. Its notions of property and compensation were further used in the French West Indies to perpetuate unjust notions of ownership of human beings when Haiti, the first independent black nation, was made to pay millions in compensation to France for the 'loss' of the former slaves as property. This payment lasted for over 200 years, contributing to Haiti being the poorest nation in the Western hemisphere.[12]

PLURALISTIC SOCIETIES – RASTAFARIANISM AND BEYOND

The societies in the Commonwealth Caribbean have often been described as 'pluralistic'.[13] This is taken to mean that there are several diverse ethnic, religious and class groups existing within these societies. While these groups make up one society, their cultural and social differences can still be identified.

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11 Nor did the legal systems of early European conquerors like the Spanish, French, Portuguese or Dutch endure, except in isolated cases such as in St Lucia and Guyana.

12 See Chapter 2 ('The Historical Function of Law in the West Indies – Creating a Future from a Troubled Past'), for a further discussion of this within the context of Reparations.

13 See, eg, Smith, MG, *The Plural Society in the British West Indies*, 1965, Los Angeles: California UP, who first applied the term to West Indian society. Bishop Tutu of South Africa described Trinidadians, and, by extension, West Indians, as 'rainbow people'.

Despite this sociological classification, with few exceptions, such pluralism is not evident within the law and legal systems of the region. From a legal perspective, the Commonwealth Caribbean can be seen as a homogenous entity, joined by strong British legal ties. The major deviations are the hybrid legal systems of St Lucia and Guyana, discussed below. Yet even these hybrid systems do not seriously challenge the homogeneity of Commonwealth Caribbean law and legal systems. Within each country's legal system, homogeneity is also evident.

This does not mean that areas of legal divergence between the various countries which make up the Commonwealth Caribbean do not exist. While the countries share the inheritance of the common law as the basic law, there are differences in socio-political and economic policy which are reflected within the law. In the main, these will have been effected through legislation and not case law. A good example would be the differences between offshore law countries and non-offshore law countries in the region, discussed below (p 13). As expected, there will be substantial differences in areas like foreign investment law, international tax law and company law. Another useful example is the area of labour law, which is traditionally a field that is considerably influenced by a country's particular economic and ideological orientation. Some countries, notably Trinidad and Tobago, the Bahamas and Antigua, have deviated significantly from the original common law in the industrial relations aspect of the law.[14]

Thus, while the societies of the region may be termed 'pluralistic', they are not generally recognised as containing clearly identifiable minorities. Groups which can be identified in the society and, to a limited extent, under the law, include religious and ethnic groups such as the Muslims and Hindus. These groups have a strong presence in Trinidad and Tobago and Guyana. Two other religious-social groups are worthy of mention. These are the Rastafarians and the Shango Baptists or Orisha followers.[15] The other identifiable grouping is the indigenous peoples, often called Amerindians, the original peoples of the region. These are considered separately.

These plural groups are not, however, given any or adequate recognition by the law and legal systems, even where they form significant groups in the society.

Hindus and Muslims – ethnic and religious groups

East Indians make up over 40 per cent of the populations of Guyana and Trinidad and Tobago[16] and have retained significant aspects of their culture and customs. Yet they are anglicised in the eyes of the law, with only token recognition. For example, as discussed in Chapter 3 on 'Legal Traditions', provision is made for the legality of Hindu and Muslim marriages in conformity with their respective religions.[17]

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14 See Chapter 21 ('Alternative Dispute Mechanisms – Arbitration, Negotiation and Commissions of Inquiry') for a discussion on some of these divergences.

15 The latter is a religious group which follows African religious practices, although there is evidence that these practices have mingled with Christianity.

16 Central Statistical Office, Trinidad and Tobago, 2006. Muslims originally belonged to East Indian ethnic groups. More recently, however, persons of Afro-West-Indian heritage may also be identified as Muslims (often called 'Black Muslims').

17 See such Acts as the Hindu Marriage Act 1992 and the Muslim Marriage and Divorce Act 1980 (rev) of Trinidad and Tobago. Jamaica also makes provision for this under the Hindu Marriage Act 1973.

We can be sceptical about the acceptance of Muslims or Hindus by the legal culture even where the laws acknowledge them as identifiable groups. In a fascinating case from Trinidad and Tobago, *Mohammed v Moraine and Another*,[18] the reluctance of the law to fully recognise and accept these other cultures was demonstrated. A Muslim student was suspended for wearing her Muslim mode of dress, the hijab, to school instead of the prescribed school uniform. In judicial review proceedings challenging the decision, the court seemed to take a non-committal stance on the issue of religious plurality or discrimination. It found that the relevant regulations under the Education Act had been construed too rigidly and that the School Board had taken irrelevant considerations into account in its decision, such as the school's tradition and the student's loyalty to the school.[19] However, it failed to find that the applicant's constitutional rights to equality and against non-discrimination had been violated. This is a surprising result even if the interpretations of those particular constitutional provisions are controversial.[20] More significantly, the court engaged in no real discussion about the rights of a significant socio-religious group within the society.

Sagar also points to:

> . . . the conflict between the Hindu marriage system and the legal provisions.
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> Thus, where personal law allows a separation via a family council decree, the law does not recognise this – while the Hindu is free to remarry according to personal law, under the law it is polygamy.[21]

The case of *Henry v Henry*[22] further underlines this conflict within the law. Here, the 'wife' of one such union was held to be unmarried, for the purposes of the Maintenance and Separation Act.

The Rastafarians

Similar problems accrue to Rastafarianism, despite it being a significant cultural and religious phenomenon in the entire Commonwealth Caribbean and one which has had a tremendous impact the world over. Indeed, the law can hardly be said to have accepted the proponents of Rastafarinism when, not too long ago, at least one country placed on its statute books legislation which permitted the shooting of Rastafarians on sight. The Prohibited and Unlawful Societies and Associations Act, No 32 of 1974 of Dominica, commonly called 'The Dread Act'[23] because of the labelling of the Rastafarians as 'Dreads' in the Schedule, made certain societies, identifiable by 'their mode of dress or manner of wearing their hair',[24] in particular, the Rastafarian community, unlawful.[25] Infamously, section 9 provided:

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18 (1995) 49 WIR 371. See also the discussion on 'The Religious Legal Tradition below' in Chapter 3 ('Legal Traditions – Types of Legal Systems in the Commonwealth Caribbean').

19 It also found that the Board had failed to take relevant considerations into account, such as the psychological effect on the pupil.

20 See the discussions in Chapter 7 ('The Written Constitution as a Legal Source') and Chapter 3 ('Legal Traditions – Types of Legal Systems in the Commonwealth Caribbean').

21 Sagar, K, 'Law and custom in the West Indies with special emphasis on East Indians', 1978, unpublished thesis, University of the West Indies.

22 (1972) 20 WIR 524.

23 The Act is still on the statute books but is not enforced.

24 Section 2.

25 Section 3.

> No proceedings either criminal or civil shall be brought or maintained against any person who kills or injures any member of an association or society designated unlawful, who shall be found at any time of day or night inside a dwelling house.

The Act further provided that any Rastafarian or other member of a prohibited society could be arrested without warrant[26] and they were prohibited from holding public office.[27]

The statute betrays intolerance to cultural and religious diversity which is perhaps not typical in the region, but nevertheless indicative of the strong adherence, legally and culturally, to dominant social groupings. It is nonetheless remarkable that the Act has never been challenged for unconstitutionality.

Rastafarians have also experienced problems before the courts in proclaiming their separateness from other groups in order to lay claim to some notion of legal identity. In particular, the courts have been reluctant to accept Rastafarianism and its distinct set of beliefs as a religion recognised and protected under the law.

In *Forsythe v DPP and the AG of Jamaica*,[28] for example, the appellant who was a Rastafarian was arrested for the possession of ganja and dealing in ganja under the Dangerous Drugs Act. He sought Constitutional redress, on the ground that the Act contravened his Constitutional right to the enjoyment of his freedom of conscience in the practice of his religion as a Rastafarian, since using ganja was a part of the sacrament and essential practices of his Rastafarian faith. The court dismissed the application, albeit on the ground that the Dangerous Drug Act had been saved by the Constitution and was enacted in the interests of public health. The reasoning, in particular, the latter element of public health, is somewhat suspect, given that the court refused to consider the health benefits or otherwise of ganja and further, did not balance the use of ganja with any harms perceived. Further, the court relied on a UK precedent which was not on Constitutional law and did not take into account the impact of a written Constitution enshrining rights of religious freedom.

Rastafariansm was in an even more precarious position in the Cayman Islands, in the case of *Grant and Chin v The Principal of John A Cumber Primary School et al.*[29] In this case, a schoolboy was expelled from school because of his failure to comply with school rules which prohibited him from wearing his hair in 'dreadlocks'.[30] His parents challenged the decision on the ground that his freedom to practice his religion was being infringed. The Grand Court inquired into whether Rastafarianism was a religion, and came up with a negative.[31] It viewed Rastafarianism more in the nature of 'socio-political movement than a religion'. More importantly, in attempting to define a religion it emphasised an approach which relied on faith and worship of a particular God or deity.[32]

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26 Section 5.

27 Section 16.

28 (1997) 34 JLR 512.

29 (1999) CILR 307.

30 A characteristic hairstyle of the Rastafarians where hair is left uncut and uncombed.

31 As Cayman Islands does not have a Bill of Rights, the case had to be argued on judicial review grounds, in particular, the unreasonableness of the decision, as well as a breach of the International Human Rights Convention.

32 As demonstrated in *R v Registrar General, ex p Segerdal* [1970] 3 All ER 886, at 892.

An alternative approach is one which recognises religion where it embodies beliefs which are sufficiently separate and distinct (the functional approach). In *Chin*, the court acknowledged both approaches. However, it seemed to have difficulty in placing Rastafarianism as a religion under the theistic approach. It also found that there had been no discriminatory treatment.

One rationale for this decision was because the Treaty Rights upon which Chin relied were not directly enforceable in domestic law. The court, however, had to concede that the wearing of dreadlocks was 'central and fundamental to a Rastafarian's perception and expression of himself as such'. The decision is, however, not encouraging to a pluralistic approach.

However, in the same year as *Chin*, a Barbadian court seemed to suggest that Rastafarian religious beliefs should be accepted by the courts. In *Hinds v AG and Superintendant of Glendairy Prison*,[33] a prisoner of the Rasta persuasion sought an injunction to restrain the Superintendant of Prisoners from cutting his hair, on the ground that the growing of locks was a fundamental tenet of his religious beliefs. While Hinds lost his case on its facts, not having notified the prison authorities that he was of the Rasta faith,[34] the implicit suggestion was that had he given such notification, his religious beliefs as a Rasta would have been legitimate in the eyes of the law and could be protected.

It is doubtful however, whether such recognition will be given more than token effect in the eyes of the law. Concessions, such as the right to proclaim Rastafarianism on oath or to wear dreadlocks, may be made. However, as seen in later chapters, issues which conflict with majority norms of the society in a more profound way, such as the use of marijuana, are more problematic.[35]

The Orisha or Orisa

The Orisa, or Orisha Shango Baptists, an African-West Indian religious/cultural grouping found everywhere in the region, although not conforming in nomenclature, have fared somewhat better than the Rastafarians, at least in one country. In 1991, after years of intense lobbying, the Parliament of Trinidad and Tobago gave them legal recognition by enacting the Opa Orisha (Shango) of Trinidad and Tobago (Incorporation) Act.[36] The aims and objectives are:

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33 Civ Appeal No 20 of 1997, decided 30 September 1999, CA, Barbados.

34 The court pointed out correctly that a person could wear a Rasta hairstyle without belonging to the Rasta religion.

35 See Chapter 3 ('Legal Traditions – Types of Legal Systems in the Commonwealth Caribbean'), Chapter 10 ('Custom as a Source of Law') and Chapter 7 ('The Written Constitution as a Legal Source'). Cf *R v Hines and King* (1971) 17 WIR 326 (CA), where the Jamaican Court of Appeal recognised Rastafarianism as a religion or 'faith' and the attendant right to swear an oath in the name of Rastafarianism. In *Re Chickweche* (1995) (4) SA 284 the Zimbabwe Supreme Court also recognised Rastafarianism as a religion. Rastafarianism has also been recognised by the United Nations as one of the religions of the world.

36 They now also have their own religious public holiday, the subject of which allegedly caused the downfall of one government when it refused to grant it. See also the Orisa Marriage Act, Chap 45: 04, Act 22 of 1999 of Trinidad and Tobago and the Orisa Movement of Trinidad and Tobago (Incorporation) Act of 1981 of Trinidad and Tobago. Up to 1999, in Trinidad and Tobago, laws such as the Summary Offences Act, Chap 11:02, especially ss 64(2) and 65, effectively discriminated against these African religions by banning lighted torches, drums and blow-horns in public places.

> . . . to continue the Orisha traditions and practices as they are known in Trinidad and Tobago and are taught by approved experts of Africa and the African diaspora.[37]

Still, even these flirtations with the law are not enough to suggest that any of these groups are accorded a minority or recognisable status under the law as is done in other plural societies. In the eyes of the law, they are all uniform subjects. As we shall see in a subsequent chapter,[38] even Hindu and Muslim marriage hopefuls must also make concessions to the traditional State law procedures, for their marriages to be deemed legal.

The failure to reflect minority interests in the law

The cases above suggest a failure, or at best, a reluctance to reflect and protect minority interests in the legal system. Such cases are examined in more detail in a following chapter,[39] where we ask whether the legal system accommodates legal pluralism or legal tokenism. In the present context, we note that while our societies may be defined as pluralistic, our law and legal systems exhibit a marked uniformity with respect to their ideological and philosophical stances. Whether we are examining religious or ethnic minorities, or, as we will see in later chapters, issues such as gender or sexual orientation, the law adopts a largely Anglo-Saxon, Christian perspective.[40]

Such a perspective embodies a particular concept of morality and justice. In our next chapter, we will examine how moral and ideological positions inform law and the way in which social and cultural norms shape the law and legal system.

The indigenous peoples

If the law has largely failed to acknowledge the customs and norms of important groups in the society, such as the Muslims and Hindus, it is fair to say that it has almost entirely ignored the original peoples of the region, often called Amerindians. This is no mere historical accident, as one of the policies of the colonial powers was to annihilate and eradicate these peoples. Reception or imposition of law theories blatantly excluded their legal thought processes and institutions and refused to acknowledge that they had legitimate legal systems in place.[41] Indeed, even the nomenclature 'pluralistic' in the sociological literature seldom includes these indigenous peoples within its parameters. Yet there are vibrant indigenous communities in certain countries of the region, notably Guyana, Dominica, Belize, Suriname, St Vincent and

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37 Opa Orisha (Shango) of Trinidad and Tobago (Incorporation) Act 1999, Act No 27, s 3. On the introduction of this law, the Attorney-General, Hon Kamla Bissessar said: 'We felt it best to bring the legislation so that we can erase the discrimination that had been practised against the Orisa faith'. The Prime Minister of the day, Hon Basdeo Banday further explained that the children of Muslims, Hindus, the Orisas, 'were bastardized at birth, because such marriages were not recognised in an Eurocentric Christian society.' *Trinidad and Tobago Hansard,* Tuesday 10 August 1999.

38 Chapter 3 ('Legal Traditions – Types of Legal Systems in the Commonwealth Caribbean').

39 Chapter 3 ('Legal Traditions – Types of Legal Systems in the Commonwealth Caribbean'). See also Chapter 10 ('Custom as a Source of Law') and Chapter 7 ('The Written Constitution as a Legal Source').

40 See, eg, Chapter 7 ('The Written Constitution as a Legal Source').

41 See Chapter 5 ('The Reception or Imposition of English Law and its Significance to Caribbean Jurisdictions').

Trinidad and Tobago. In fact, the only known 'Carib Queen' of the hemisphere resides in the borough of Arima, itself an Amerindian name, in Trinidad and Tobago.

Today, the law acknowledges the existence of indigenous peoples primarily to regulate their habitat on reservations in Guyana, Belize and Dominica.[42] There is a limited concept of self-rule. For example, s 3 of the Amerindian Act of Guyana makes provision for the establishment of Amerindian districts or villages, and s 5 restricts the entry of non-Amerindians to these areas.[43] Yet we may well argue that such laws can perhaps more accurately be described as institutional neglect. Indeed, little is known of the indigenous peoples, even within West Indian society.[44] Intriguingly, as early as 1660, the Amerindians were on reservations in Dominica and St Vincent. These two islands were treated as Amerindian strongholds, reserved to the native populations by an Anglo-French treaty of 1660.[45] This unusual status confused the issue of the reception of English law in Dominica, as it was difficult to determine the relevant date of reception.[46] In 1668, the Amerindians of St Vincent entered into a treaty under which they agreed to be subjects of the British Crown.[47]

This legal myopia may be corrected in the future, given the attention being paid to the rights and customs of indigenous peoples in international law.[48] In May 1998, the Amerindian peoples of the region, in particular, Dominica and Guyana, signed a treaty in Barbados, the Ishirouganaim (Barbados) Treaty 1998.[49] This treaty was drafted with a view to future self-governance. This gives an indication that the original peoples, like their counterparts outside of the region, are no longer prepared to accept an almost invisible status under the law. It reads in part:

> Affirming: that Amerindian peoples are the true landlords of the Western hemisphere and are equal in dignity and rights to all other peoples . . . Concerned: that as Amerindian peoples we have been deprived of our human rights and fundamental freedoms, resulting *inter alia* in our colonisation and dispossession of our lands, territories and resources which have prevented us from establishing our right to development . . . We the descendants of the Amerindian tribal nations first encountered in the Caribbean by Cristofero Colombo in 1492, in our capacities as present day leaders of our peoples, do solemnly declare our determination to achieve a sovereign Amerindian State by 1 January 2005 . . . in our ancestral homeland Ishirouganaim (Barbados).[50]

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42 Under such laws as the Amerindian Lands Commission Act 1966 and the Amerindian Act 1953, chapter 58, as amended 1976, of Guyana, and the Carib Reserve Act 1978 of Dominica.

43 See *D'Aguair v Cox* (1971) 18 WIR 44. The law was challenged as being *ultra vires* the Constitutional protection of freedom of movement, but was saved because it was existing law, being part of the law of Guyana, in force immediately before the 1966 Constitution, since it was enacted in 1952. See Chapter 10 ('Custom as a Source of Law').

44 The West Indian Commission gives the following approximate statistics on the population of the Amerindians in the Commonwealth Caribbean: Belize 26,000; Dominica 3,000; Guyana 41,000; St Vincent and the Grenadines 6,000; and Trinidad and Tobago 400. *An Overview of the Report of the West Indian Commission* B *Time For Action,* 1992, Barbados: West Indian Commission Secretariat, p 128.

45 Burns, A, *History of the West Indies,* 1954, London: Allen & Unwin.

46 See Chapter 5 ('The Reception of English law and its Significance to Caribbean Jurisdictions').

47 *Above,* Burns, fn 45, p 222; Cal SP (Col) 1717 and 1901.

48 Discussed below, Chapter 10 ('Custom as a Source of Law').

49 The treaty is signed by the leaders of the Dominican and Guyanese tribes. I am indebted to Damon G Corrie, fifth hereditary Chief of the Eagle Clan Lokono-Arawak and Speaker of the Grand Council of Village Chiefs of the Pan Tribal Confederacy of the Amerindian Tribal Nation, for promptly making available to me a copy of the treaty.

50 This has not, however, been realised.

The rights of indigenous peoples are now being more fully recognised in international and regional spheres. One important mechanism in this endeavour is by acknowledging and incorporating indigenous historical customs and practices formally into the legal system. We discuss this phenomenon in more depth in Chapter 10 ('Custom as a Source of Law').

NEW AVENUES FOR LEGAL SYSTEMS – THE OFFSHORE LEGAL SUBCULTURE

Recently, new developments have impacted upon the legal systems of several countries in the region. This is the creation of offshore financial centres as a path to development. The offshore financial centre is now an established phenomenon in financial circles internationally. These centres have necessitated changes in the legal infrastructure and outlook of the relevant jurisdictions to cater for the foreign investors whom they serve. This new socio-economic and legal phenomenon can be appropriately described as a legal subculture and creates a level of duality in the legal system. On the one hand, the legal system continues to serve domestic investors with traditional laws. On the other, it has created new, innovative and dynamic laws and legal policy to serve exclusively non-national investors who come mainly from major industrialised countries.[51]

The existence of these offshore laws and innovative financial legal 'products' has propelled its own unique jurisprudence. It is an interesting mix of various legal disciplines such as banking law, the law of trusts, fiscal law, company law and Constitutional law. Also, it incorporates a significant hybrid element due to the originality of several key offshore legal concepts. More important, this offshore law is threatening to significantly impact on the jurisprudence of more orthodox 'onshore' legal concepts. For example, offshore legislatures have changed the traditional rules relating to the trust, such as abolishing the rule on perpetuities or by allowing purpose trusts which defy the common law rule that a trust must have an identifiable beneficiary.[52] Similarly, they have institutionalised new insurance concepts such as captive insurance, created new legislative rules on fraudulent conveyances to more adequately protect assets from creditors and against the enforcement of foreign judgments.[53]

Another important innovation is the extent to which financial confidentiality and privacy are protected under these offshore regimes. They have gone far beyond the common law notions of financial confidentiality as enshrined in the case of *Tournier v National Provincial Bank*[54] and created strict statute-based duties toward financial

51 Examples are financial confidentiality and trust legislation. See the Confidential Relationships (Preservation) Law, of the Cayman Islands, amended 1993 and the Trusts Act 1992, amended 2000 of Belize, respectively. See also the discussion on the offshore financial legal framework's impact on equity, in Chapter 9 ('Equity as a Source of Law'). See, for more in-depth discussion: Rose-Marie Antoine, *Confidentiality in Offshore Financial Law*, 2002: Oxford University Press.

52 See, eg, the Trust Act 1992, amended 2000, s 6, of Belize and the International (Exempt) Trusts Act 1997, s 6, of Dominica. See, also, Chapter 9 ('Equity as a Source of Law'). See too, Rose-Marie Antoine *Trusts and Tax Related Issues in Offshore Financial Law*, 2005: Oxford University Press.

53 The latter seeks to ensure that if a creditor or other claimant in the offshore country obtains a judgment attempting to reach assets in the offshore country, it will not be enforced.

54 [1924] 1 KB 461.

confidentiality. In some instances, these are backed by criminal sanctions. This is all toward encouraging offshore investors and catering to the demands of such investors.[55]

The extent to which these new legal concepts and the consequent jurisprudence are acceptable to the international community is controversial. It has already produced its own tensions and legal conflict, particularly where offshore investors take advantage of favourable offshore tax laws to the detriment of revenue authorities in onshore countries. Yet, despite the taking of countermeasures by onshore countries, the offshore industry in the Commonwealth Caribbean is steadily growing, both in number and innovation. More importantly, for our purposes, these dynamic offshore financial legal systems have made significant contributions to the body of the common law. In some cases, onshore legal systems have opted to emulate these new legal concepts. This has occurred, for example, in Atlanta, Delaware and Colorado in the United States.[56]

THE DEPENDENT TERRITORIES

The law and legal systems of the Commonwealth Caribbean dependent territories must be considered separately from those of the independent territories. While these territories share a colonial heritage and social and economic circumstances with independent Commonwealth Caribbean countries, their law and legal systems do not have an identity of their own, except in a limited sense. It may be thought that the dependent territories are of no interest in this study as they have, in theory, no independent or distinct law and legal system, but this is a false notion. A complex political and legal relationship exists between Britain and its remaining Caribbean territories.

As colonies, these territories are under the sovereignty of the British Crown. Consequently, the UK (Westminster) Parliament retains the right to legislate for them. This concept of sovereignty was described in *Tito v Waddell (No 2)*[57] as 'in the sense of government, power, ownership and belonging'. There is, however, a convention which prescribes that the UK Parliament should not legislate for the colonies without their consent.

The application of Acts of the Westminster Parliament to the colonies is limited by two constraints. First, the statute must expressly state that it is to apply to the colony or colonies, or show necessary intention. Secondly, the application of British imperial legislation is limited by the local circumstances rule[58] to the effect that it can only apply if it is appropriate to the conditions of the colony. Where Westminster legislation applies, it overrides any local statute with which it conflicts.

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55 See, eg the Cayman Islands Act, *op cit,* fn 51.

56 These States offer financial incentives in trusts and banking in similar fashion to offshore financial centres. See, eg, The Qualified Disposition in Trusts Act 1996 of Delaware, the Banking Law of Colorado, Title 11 (Rev), the Spendthrift Trust Act 1999 of Nevada and the Alaskan Trust Act of 1997.

57 [1977] Ch 106.

58 Discussed further in Chapter 5 ('The Reception or Imposition of English Law and Its Significance To Caribbean Jurisdictions'), Chapter 14 ('The Rules Of Statutory Interpretation') and Chapter 8 ('The Common Law and the Doctrine of Judicial Precedent').

This complex scenario on the effect of legislation in the imperial context was explained by the Privy Council in the case of *Al Sabah v Grupo Torras et al*.[59] On a question as to whether UK Bankruptcy law applied in the Cayman Islands, Lord Walker said:

> The enactment of the Colonial Laws Validity Act 1865 ('an Act to remove doubts as to the validity of colonial laws') reaffirmed the superior power of the Westminster Parliament but made clear that colonial laws could depart from any non-statutory rules of common law or equity. The 1865 Act did not in terms refer to the enactment of laws with extraterritorial effect. But most colonial legislatures' had powers . . . to make laws 'for the peace, order and good government' of the territory in question and this implied (but did not clearly define) some territorial restrictions.[60]

His Lordship continued:

> But the Westminster Parliament's supreme legislative competence has in practice been more and more constrained by two factors. One has been an increasingly strong Constitutional convention . . . not to interfere, unasked, in the laws of Commonwealth countries which enjoyed representative government. The other has been the courts' long standing practice, in construing statutes of the Westminster Parliament, of presuming that their intended territorial extent is limited to the United Kingdom, unless it is clear that a wider extent is intended.[61]

In the Cayman Islands, the position is further complicated by the fact that the Cayman Islands was formerly a dependency of Jamaica.[62]

This dependent legal relationship can sometimes create a dilemma in the legal and social consciousness of the citizens who live there. While they may wish to retain their status as British territories, they also want their laws to be more representative of their own social mores, as is the case with the independent countries. As a result, they may resist what they perceive to be legal initiatives by the British which are insensitive to their concerns.

This dilemma was brought to the fore in a rather colourful incident. In late 1997 and early 1998, cruise ships containing tourists who were also homosexuals attempted to land in the Cayman Islands, Bermuda and the British Virgin Islands. Public protests were made against the landing and they were refused entry in the Cayman Islands.[63] The gay tourists complained to the British Government that they had been discriminated against. Approximately two weeks after, the British Government instructed the British Caribbean territories that they would have to remove from their statute books laws outlawing homosexuality. This sparked a great outcry from the dependent territories, where there were 'strong cultural and religious forces . . . opposed to removing any ban on homosexuality'.[64]

On the part of Britain, this is more than a moral issue. The British government has stated its intention to enforce its obligations under the International Covenant on Civil and Political Rights. To allow discriminatory laws on the statute books of British

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59 [2005] 2 WLR 904 (CI).

60 *Ibid*, at para 12.

61 *Ibid*, at para 13.

62 *Ibid*.

63 Editorial, 'Cruise ships under attack from activists' (1998) *The Barbados Advocate*, 17 April, p 15.

64 Caribbean News Agency Report (CANA) (printed copy), 'Britain wants colonies to remove gay sex laws', 26 January 1998, Bridgetown, Barbados.

territories would be breaching those international obligations. The incident thus demonstrates the complexities involved in the legal relationship.

There has also been opposition in the dependent territories to the abolition of the death penalty, long since effected in the UK. In addition, there has been some deviation from orthodox British law both in case law and statute. Once again, the phenomenon of offshore financial centres provides interesting exceptions to the rule on legal uniformity between Britain and her territories, giving rise to perhaps the most substantial deviations in the law and legal systems. With the exception of Montserrat, British Caribbean territories are well-developed offshore financial industries. In fact, the Cayman Islands and the British Virgin Islands are two of the most established and successful offshore financial centres in the world. These dependent territories have been allowed to design and implement laws for their respective offshore regime which differ radically from, and even conflict with, those of the 'mother country', as explained above. One explanation for this legal freedom could be the tremendous financial benefits which accrue to offshore financial centres as a result of this industry.

However, deviation from orthodox English common law is not limited to decisions on the offshore sector. There have been some surprisingly radical decisions from the courts of these dependent territories, most notably from the Cayman Islands and one can discern a desire to define their legal destiny in more distinctly West Indian terms.[65]

REDEFINING LEGAL SYSTEMS

Commonwealth Caribbean law and legal systems are, as we have illustrated, diverse and complex entities, plagued with problems of both a psychological and structural nature. Yet, this is an exciting and appropriate time to be discussing Commonwealth Caribbean legal systems. We stand at the very crossroads of a Caribbean revolution in legal development. At this juncture, as we attempt to define our place in the world, we have several important choices to make, and our future will be determined by the wisdom of those choices. It is an opportune time to create an independent legal philosophy, whilst at the same time, steaming ahead to forge a unified Caribbean identity.

Caribbean legal systems can be said to be at boiling point. Perhaps there has been no other time in our history when every Caribbean man and woman has been aware of, and has had a stake in, the direction in which our laws and legal policies are going. Whether we are speaking about the retention of the death penalty, or the abolition of appeals to the English Privy Council, or the Caribbean Single Market and Economy (CSME), or changes in our offshore financial systems brought about by blacklisting attempts by the world community (which impacts directly on employment opportunities) the Caribbean citizen can relate intimately with and participate directly in these developments and debates. Thus, the Commonwealth Caribbean stands poised at the crossroads of possibility, waiting to exhale.

65 See, eg, *National Trust for Cayman Islands v Planning Appeals Tribunal Central Planning Authority and Humphreys (Cayman) Ltd*, *above*, fn 6, on the question of contingency fees.

Funding justice

Finally, we should note that issues of law reform and legal development, whether we are speaking about jurisprudence, or justice generally, cannot come to fruition without adequate physical infrastructure. For example, our courts need to be adequately funded and supported. This is as true for criminal trials as it is for civil trials and for juvenile justice. As discussed in Chapter 18, often juveniles spend nights in jail with hardened adult criminals because of a lack of special facilities in which to house them. Judicial decisions discussed further in the book,[66] declaring that undue delay on Death Row is unconstitutional, are also significantly fuelled by the lack of resources. Such decisions highlight the need to make the administration of justice more efficient and speedy.

Funding is just as important for finding the legal principles which inform the courts. This necessitates, for example, adequate and efficient law reporting. All of these things are lacking in the region because of our fragile and needy economies, economies further vulnerable to the forces of nature and to international market forces. If Commonwealth Caribbean law and legal systems are to realise their true potential, these difficulties must be overcome.

66 See, eg, Chapter 7 ('The Written Constitution as a Legal Source'), Chapter 12 ('International Law as a Source of Law') and Chapter 8 ('The Common Law and the Doctrine of Judicial Precedent').

CHAPTER 2

THE HISTORICAL FUNCTION OF LAW IN THE WEST INDIES – CREATING A FUTURE FROM A TROUBLED PAST

INTRODUCTION – THE GROUNDINGS OF HISTORY

There is a cruel irony in our study of law in the region. West Indian students of law are taught about Aquinas and law, and morality theories about the function of law in society, but mention is hardly ever made of the important immoral function the law played in much of the history of the Commonwealth Caribbean. This is its role in the infamous slave systems of the region. Indeed, traditionally legal analysts and jurists have not paid much attention to the historical functions of our law. Yet such a perspective is essential to a full appreciation of the values and norm-building precepts that underline law and legal systems in the Commonwealth Caribbean. While the established theories on the role and functions of law in society are important, the historical function of law in our legal system is just as significant. The role and functions of law in West Indian society have deeper dimensions which arise out of this historical connection.

Just as the study of the English common law must examine the historical evolution of that law, so too must the study of West Indian law appreciate the genesis of our own law grounded in slavery and colonialism. The legal thought processes and institutions will only have meaning when this historical perspective is understood. A discussion on the role and functions of law in West Indian society should, therefore, begin with an appraisal of the role and functions of the law and legal system in instituting and upholding the systems of slavery and colonialism which existed previously throughout the region.

The brutality of treatment meted out to black slaves and sanctioned by the law in the West Indies is well known. What is less known is the way in which the judicial system actually worked and the functions it served within that context.

The initiation of law into Caribbean society was within a colonial, imperialist and inequitable framework, as a tool to legitimise the exploitative nature of plantation society. The needs of the colonial settlers did not necessitate law for the organisation of a civilised and humane society and these were only added piecemeal at later convenient dates. Historically, therefore, Caribbean law has been imperialistic, foreign, elitist and oppressive in outlook. It was imperative that the black masses be kept in subordination, without rights and social mobility, in order to sustain the plantation and its metropolitan base.[1] The law continued to struggle to distance itself from this defining characteristic.[2]

Law was thus an instrument of social control and public order in plantation society. 'The slave laws were the most ubiquitous form of public control . . . Their primary function was to maintain the slave system by guaranteeing the economic, social and

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1 Beckford says this about plantation society: 'The survival of the plantation is ensured if capital is in constant supply, land monopolised, the labour force in over supply, and its control standardised.' Beckford, G, *The Caribbean Economy*, 1975, London: Penguin, p 54.

2 See Chapter 5 ('The Reception or Imposition of Law and its Significance to Caribbean Jurisdictions').

racial subordination of the Negroes'.[3] The slave codes in force during the eighteenth century were the result of a long process of careful elaboration. They created an intricate and wide-ranging combination of legal restraints which served relatively simple and narrow ends, for their 'essential objective was the preservation of the public order which was to be secured by denying the slaves the means of escaping from their degraded status as the property of others – and by protecting the whites in their pre-eminent status as a ruling class'.[4]

Trading in slaves was a recognised and legal activity. Slaves were property. The law provided for their sale and purchase like any other chattel.[5] They could even be inherited and willed. If the slave-owner owed debts, they could be used as security or could be levied upon. They could be mortgaged and rented out, all facilitated by the law.[6] Yet, as a piece of property, rather than a person, the slave was incapable of legally possessing property or of legally making contracts.[7] On the basic idea of the slave as property a whole system of laws was built up. Indeed, as discussed below, it has been argued that the slave was the premise for the very creation of 'modern law'.[8]

Yet, slaves, being human beings with intelligent minds, independent will and depth of feeling, were not property in a real sense. Consequently, they rebelled both in spirit and in action. It is precisely because human beings are not chattels that the slave laws had to construct an elaborate and artificial legal machinery of oppression to force the slaves into submission.

As we discuss below, the notion of law in this artificially constructed West Indian slave society was devoid of its humanistic and rational expressions consonant with the functions of law common in more 'normal' societies concerned with justice.

Slavery thus created a duality in law and legal institutions. There was one set of laws and legal institutions for the master and another for the slave. There were even separate courts for the slave, such as that of the fiscal in Guyana, who was a magistrate. These magistrates had jurisdiction to punish offences in a summary way, as the law did not allow slaves to be tried by a jury.[9] They were also not allowed to give evidence against whites in the courts of justice.[10] Similarly, the penalties reserved for slaves were much harsher than those for whites.

Watson recounts some of these inequities in the penal system.[11] Under legislation specifically designed to control slaves, An Act for the Governing of Negroes 1688,[12]

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3 Goveia, E, *Slave Society in the British Leeward Islands,* 1969, New Haven: Yale UP, pp 311–15.

4 *Ibid.*

5 Laws of Jamaica, St Jago de law Vaga, 1792, Vol 11 23 Geo 111 C 14, in Goveia, *ibid.*

6 See Haynes, J, 'Slavery and the Law', in *Proceedings of the International Anniversary of the Abolition of Slavery in the Anglophone Caribbean,* 1984, Georgetown: Guyana Printers, p 78, and *ibid,* Goveia, fn 3, p 312.

7 See, also Reeves, J, 'Slaves considered as property', House of Commons Accounts and Papers, Vol 1 XXV1 (1789) No 646 Part III.

8 See Patricia Tuitt *Race, Law, Resistance,* 2004, Australia: Glass House Press, Chapter 1.

9 Regulations for the Treatment of Servants and Slaves, Arts 6 and 7, made by the Ten on 1 October 1784, British Guiana, Directory, 1825, p 208.

10 See Long, E. *History of Jamaica,* 3 vols, 1774, London: Lowndes, pp 320–36, repr in *Slaves, Free Men, Citizens, West Indian Perspectives,* 1973, USA: Anchor. Even freed slaves during the slavery period could not be tried by jury. Like slaves, they were 'not supposed to have acquired any sense of morality'.

11 Karl Watson 'Capital Sentences Against Slaves in Barbados in the Eighteenth Century: An Analysis' in Alvin O Thompson (ed) *In the Shadow of the Plantation – Caribbean History and Legacy,* 2002, Jamaica: Ian Randle Publishers.

12 Richard Hall, Acts Passed in the Island of Barbados from 1643–1764, London: Inclusive.

Clause XII, 'any criminal act which caused damages in excess of 12 pence' would result in arrest and arraignment before a justice of the peace who would hold enquiry and pass sentence. The law declared that the slaves, being 'brutish', did not merit 'for the baseness of their condition' being tried by a jury of their peers. If the slave was found guilty, the death sentence was to be pronounced and executed.[13]

The death penalty was therefore effected for minor offences without benefit of a jury. Intriguingly, when a slave was executed, the owner of the slave was compensated by law in the form of damages for the loss,[14] such sum not to exceed £25.

In 1739, an amendment was passed to the 1688 Act making provision for owners to appeal the mandatory death sentence, which some believed 'in some instances hath been brought erroneous and many times by the malice or ill-will of the Prosecutor'.[15] Henceforth, mechanisms were put in place to avoid the death penalty, particularly for lesser offences. For example, the parties concerned (in this case the owner of the slave being a party) could attempt to reach an Agreement 'requisite and equitable, for saving the life of such slave or slaves'.[16] Failing such an Agreement, the case could be remitted to the Governor, who had a discretion to reverse or confirm the judgment.

However, many slaves during the period were executed for entirely minor offences, such as for 'stealing a turkey cock valued at 3s. 9d'[17] or for 'stealing bread and provisions worth £1.17s. 6d'.[18] Not surprisingly, offences by slaves against whites were visited by the most draconian punishment and horrific methods of execution, so as to serve as a 'dread and terror to the survivors that they may be deterr'd from perpetuating the like crime for the future.'[19] In such cases, the court did not accept evidence by slaves.[20]

In contrast to this harsh treatment to slaves facing the administration of justice for offences, there were little or no penalties for offences, even murder, committed against slaves by whites. In 1802, an attempt was made to introduce a law making the killing of a slave a felony, but this was defeated in the House of Assembly.[21]

It is suggested that capital punishment was used as a method to eradicate, not crime, in the strict sense, but resistance to the slave system. Such resistance took not only the obvious form of outright rebellion, but more subtle forms of resistance. Watson asks: 'At what point does an act perceived as criminal by the whites become an act of sabotage and resistance by the enslaved black group?'[22] Indeed, even mere 'insolence' was punishable by law.

Nonetheless, capital punishment for minor offences decreased during the period,

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13 Watson, *above*, fn 11, p 198.

14 See Clause XV.

15 Watson, *above*, fn 11, p 199.

16 *Ibid*.

17 The Trial of George Dickes, *ibid*.

18 *Ibid*. Taken from Barbados Council Minutes.

19 Pinfold MSS, Library of Congress, Instructions of Governor Pinfold, 10 March 1763, Watson, *above*, fn 11, p 201.

20 See e.g., the Trial of Peter Archer, *Barbados Mercury and Bridgetown Gazette*, 26 December 1772, Watson, *ibid*, pp 53–58, where the court prosecutor said: '. . . a slave cannot give Testimony, although he should see a Murder perpetuated.' He proceeded to lament the injustices and irrationality of such a practice in the legal system, which he described as '. . . a shutting [*sic*] of the Door against Justice and a Toleration for all crimes whatever.' *Ibid*, Watson, p 203.

21 Watson, *ibid*, p 212.

22 *Ibid*, p 216.

not only because it came to be seen as inhumane, but also because it was an expensive and wasteful way of dispensing justice, especially in places such as Barbados, where slave 'property' was high in financial value.

Obeah Acts and Vagrancy Acts – laws to sustain inequity and dependence

Laws such as the Obeah Acts smacked of the attempts of those in power to further the acculturation process, ridding the black majority of their social identity and dignity.[23] Laws such as these, as well as Vagrancy Acts, considered below, served to ingrain the inequity of the African persona into the social psyche, exacerbating patterns of inferiority and dependency. In the *Fiscal v Willem,*[24] for example, a slave was convicted for an offence based on the *minje mama*, or water mother dance, an Obeah practice.

After the collapse of the slave system (mainly due to the fact that slavery and sugar plantations were no longer profitable),[25] slavery was abolished by the Emancipation Acts of 1833. Yet the law and legal systems continued to reflect the unequal structure of the ex-slave, colonial society. In fact, they were used deliberately to reinforce this structure.[26] Laws such as the Tenancy Acts and Vagrancy Acts, imported from England, served a clandestine function in the West Indies. They helped to force 'idle', jobless ex-slaves, devoid of land, money or opportunity, back on the plantations. They were intended to discourage small landholdings and force labour to remain on the oversupplied market. Under the Vagrancy Acts, for example, innocuous activities such as loitering were criminalised.

One writer has attempted to refute the widely accepted rationale for Vagrancy Acts in the West Indies.[27] He argues essentially that vagrancy laws in the Caribbean were mere replicas of English law, both in content and focus saying:

> The English experience and that of Barbados . . . also gives the lie to suggestions, by some legislators and historians, that vagrancy legislation in the latter country was uniquely conceived by the planter class to repress further newly emancipated slaves . . . They become particularly dangerous if treated as unequivocal fact.[28]

Indeed, it is 'dangerous' to treat assertions as fact unless historically valid. Thus, to prevent an accusation of participating in the 'use and misuse of history [which] was

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23 Obeah is an African religious practice associated with magic. There were several attempts to outlaw it throughout the period.

24 'The Trial of Slave Willem in Berbice for Obeah and Murder of the Negress Madalon', printed by order of the House of Commons, 14 May 1823. Cited in Shahabuddeen, M, *The Legal System of Guyana,* 1973, Georgetown, Guyana: Guyana Printers.

25 See William, E, *Capitalism and Slavery*, 1964, London: Andrè Deutsch, who proved the thesis, now accepted, that the real reason for the emancipation of the slaves lay not so much in humanitarianism but in the fact that the slave sugar plantation system was no longer economically viable.

26 After emancipation, the British Government appointed special justices of the peace with exclusive jurisdiction over the newly freed slaves and ex-masters. Macmillan, W, *The Road to Self-Rule,* 1959, London: Faber and Faber, p 81. See also Bridget Brereton, *Law Justice and Empire – The Colonial Career of John Gorrie 1829*–1892, 1997, Jamaica: UWI Press.

27 Hall, CG, 'A legislative history of vagrancy in England and Barbados', in C*ontemporary Caribbean Legal Issues*, No 2, 1997, Cave Hill, Barbados: UWI.

28 *Ibid.*

of course one of the primary engines for mounting this constant assault on the minds of colonial peoples',[29] it is necessary to set the record straight.

Hall's conclusion may well be inconsistent with the historical data. It appears that the weight of the historical evidence as well as a proper appreciation of law in context is against this new argument, however intriguing.[30] It is no doubt true that the Vagrancy Acts were not indigenous. Indeed, historians have never contended that such Acts were 'uniquely conceived', at least in their form.

Yet, in the same way that it is dangerous to isolate the emancipation laws from the relevant context of the time, which was the non-profitability of slavery, so it is short-sighted, and perhaps naïve, to treat vagrancy laws and other such West Indian legislation, as divorced from their historical social context. This was, in fact, the mistake made by centuries of English history taught in West Indian schools. Eric Williams successfully debunked such myths.[31] West Indian vagrancy laws may have been similar in content and form to English vagrancy laws but their focus and objectives were exceedingly different.

The notion of poverty when applied to the Vagrancy Acts assumes a certain benevolence toward the ex-slave which was simply non-existent.[32] Indeed, just as the Vagrancy Acts were 'borrowed' from England, so were the slave laws borrowed from the *Siete Partidas* of Spain and the *Code Noir* of France. Yet they assumed an entirely different character in West Indian society. It is no longer disputed that black slavery was far more heinous than white slavery. For example, under the *Siete Partidas*, the slave was treated as persona, not property, and the master had duties toward the slaves as well as rights over them.[33]

The fact that vagrancy laws were transported and borrowed from the UK does not mean that they were not imbued with their own social connotations, context and purpose. Class distinctions in the UK and the West Indies may have been similar in some aspects, but was class related to race and was law used continually in the UK, as it was in the West Indies, to subjugate sociological, cultural and legal identity and the very sense of dignity, personhood and statehood? In effect, the black masses were only accorded full citizenship status, the franchise, in the 1950s, since before, only the landed gentry, invariably white or 'light brown', owned property or otherwise met the strict qualifications imposed. What more chilling argument on the law's subversive role is needed?

Hall also fails to consider the well-documented fears and resistance of the planters as emancipation approached and the loss of their labour supply grew near. In fact, the very apprenticeship period – the initial post-slavery period that allowed the plantocracy to keep the ex-slaves on the plantation for a nominal fee – was a compromise to placate the planters. The ex-slaves were not mere 'vagabonds', or 'idle poor'. They

29 Shahabuddeen, M, 'Slavery and historiographical rectification', opening address delivered at the International Round Table to mark the 150th anniversary of the abolition of slavery in the English-speaking West Indies, 1984, Georgetown: Guyana Commemoration Commission, p 13.

30 He relies mostly on English historical data on the Vagrancy Acts and a passing reference to one West Indian historian.

31 *Op cit,* Williams, fn 25.

32 Hall maintains that they were 'simplistic legislative answers to perceived, contemporary, social mischiefs in the context of poverty', *op cit*, Hall, fn 27, p 22.

33 *Op cit*, Goveia, fn 3.

were valuable labourers who had kept the islands commercially viable for centuries and provided the impetus for Britain's industrial wealth. As Williams so eloquently states:

> These [Caribbean] islands were the glittering gems in every imperial diadem, and Barbados, Jamaica, Saint Domingue (today Haiti) . . . were . . . magic names which meant national prosperity . . . Sugar was King; without his Negro slave his kingdom would have been a desert . . . As Churchill declared – 'Our possession of the West Indies . . . enabled us to lay the foundations of that commercial and financial leadership which, when the world was young . . . enabled us to make our great position in the world'.[34]

While we may agree that the Vagrancy Acts and other similar legislation were instruments of social control, as they were in the UK, it is inaccurate to equate them with similar or even identical legislation in respect to their other functions. Even a vagrant in West Indian society today cannot be equated with the 'vagrants' of that period. Such legislation served a dual purpose. The question of 'social control' was not a simplistic one in the West Indies at this time. Translated, it meant maintaining the pre-emancipation status quo as far as possible. This included other legislative schemes and legal policies and went beyond mere Vagrancy Acts. Curtain recounts the elaborate schemes of the plantocracy to keep the freedman tied to the plantation:

> . . . there was also a demand following emancipation for a 'rural code' that would force the Negroes to work for wages. Here the Assembly had to be careful . . . the Colonial Office was on guard against any direct attempt to re-establish slavery in any other guise. Various coercive or anti-settler laws were passed, but they were hidden as much as possible in innocent-looking enactments. The Police Act, for example, provided . . . for the arrest of any person found carrying agricultural produce without a note of permission . . . This provision was ostensibly designed to prevent 'praedial larceny' . . . but it could be used equally well to prevent the illiterate small settler . . . from marketing his produce . . . Other 'class legislation' was discovered and disallowed by the home government. In this group were the Vagrancy Acts of 1834 and 1839, which were rejected because they extended unduly the legal definition of the offence.[35]

To cement the argument on the true function of these Vagrancy Acts, it is instructive to note that attempts to introduce vagrancy laws were rejected in Guyana by the British Government because they 'showed that the old slave codes exercised a very powerful influence on their structure and character'.[36]

Other attempts to suppress the newly found independence of the black population for the benefit of the elite plantocracy included an intricate 'labour-for-rent' scheme where the freedmen forcefully became tenants at will under such statutes as the Masters and Servants Act 1840.[37] Such involuntary tenants were charged excessively high rents, forcing them to work to pay the high bills, or being charged high rents only if they refused to work on the plantation. The ex-slave was allotted a house

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34 Williams, E, 'Slavery and the plantation system', in *The Negro in the Caribbean*, 1944, Manchester: Panaf Service, p 12.

35 Welch, A, 'Special magistrate's report', Manchester, 29 June 1836, PP, 1837, iii (521–1), 33 in Curtain, P, *Two Jamaicas*, 1955, Cambridge, Mass: Harvard UP, p 130. The control of burial grounds was also used as a bargaining chip for labour.

36 *Op cit*, Shahabuddeen, fn 29, p 74. See, e.g., Ordinance No 16 of 1838. It is not true to suggest that these Acts were imported lock, stock and barrel.

37 See Marshall, T, 'Post-emancipation adjustments in Barbados, 1838–76', in *Emancipation 1 – A Series of Lectures*, 1984, Barbados: UWI, p 91.

and land for which he paid a stipulated rent. However, he had, 'as a condition of renting, to give the estate a certain number of days' labour at certain stipulated wages . . . the labourer, fettered by the system of tenancy at will, is compelled to work . . . He is, therefore, virtually a slave'.[38] Similarly, if the former slaves failed to work on the plantation, their houses could be pulled down and their provision grounds destroyed or they could be evicted.[39]

THE CONTINUATION OF LEGAL PARADIGMS BORN OUT OF SLAVERY

The legal and economic institution which was slavery also helped to institutionalise class and race segregation which today is the focus of those who argue for the divisive nature of West Indian 'plural societies'.[40] In a somewhat vicious cycle, such segregation perpetuated an enduring imbalance within the legal system.

The law continued to be unsupportive of the large black masses. This was mainly because it failed to adapt adequately to the needs of the newly liberated peoples who were landless, powerless, largely uneducated, culturally and psychologically emasculated and still tied to the plantation. The white minority remained the elite and the rulers of West Indian society and continued to view the black masses as plantation labour.

Early accounts of the legal system, and in particular, the administration of justice, reveal that the disadvantaged clearly perceived that justice was out of their reach and that legal personnel were unperturbed about the status quo, even after emancipation. Brereton, in recounting the misdeeds of one Chief Magistrate, Sir Joseph Needham, (1870–85) had this to say:

> Under his long regime of official neglect, complaints about the administration of justice proliferated. The main burden of these protests was that ordinary people felt they had no access to the higher courts, and that the magistrates' courts . . . routinely handed down unfair decisions. 'If we are to judge by appearances and practice', stated a . . . local paper in 1873, 'we have here two distinct laws and customs, one for the favoured few, and the other for the common herd.'[41]

This sentiment was echoed by a villager in 1888: 'When the laws of Trinidad comes in Trinidad we poor fellows don't get none of it, don't hear none at all. When we hear the laws of any case brought before the court we don't know how to speak for ourselves, because we don't hear no laws, for it is hidden from us.'[42] Such a view was expressed more poetically in a calypso[43] by Eagle as late as 1984: 'The rich ones control

38 Sewell, G, *The Ordeal of Free Labour*, 1862, repr 1968, London: Sampson Low, p 32.

39 Smith to Glenelg, 10 September 1838, PP, 1839, xxxv (107), *passim;* Lord Sligo, letter to the Marquess of Normandy relative to the present state of Jamaica, 1839, London, p 16, cited in *op cit,* Curtain, fn 35, pp 129–30.

40 See Smith, MG, *The Plural Society in the British West Indies*, 1965, Los Angeles: California UP.

41 Reported in Bridget Brereton, *Law, Justice and Empire – The Colonial Career of John Gorrie 1829–1892*; 1997, Jamaica: UWI Press, 229–30.

42 Tel 16/4/73: Letter from Diogenes: Royal Franchise Commission (Trinidad) 1888: Evidence of Henry Richardson, Fifth Company Village, 33 in Bridget Brereton, *ibid*, p 230.

43 A form of social commentary in song indigenous to the Caribbean, which originated in Trinidad and Tobago.

the law. The law controls the ones wha poor. So the law and the poor always in a war.'[44]

These historical dimensions of law continue to be reborn in the legal decision-making and institutions of the region. It has imbued West Indian society with deeply conditioned attitudes which often restrict the appropriate development of the law and legal systems. The process of colonisation has been 'like a huge tidal wave. It has covered our land, submerging the natural life of our people'.[45] Whether we are discussing precedent, custom, the Constitution, or the wider society at large, for which law must function, the underlying notions of dependency and inequity are still present in many areas.

The psychological impact and longevity of brutal slave societies also encourages what can be described as feelings of insecurity and even self-hate in our societies and legal systems today. Perhaps this is the reason why today, we still send our final appeals to the Privy Council located in England and so many Caribbean people doubt that we can adjudicate final appeals for ourselves in a just manner. Interestingly, this belief that we could not be trusted to do things right for ourselves was one of the reasons why, upon Independence, we ended up with written Constitutions with entrenchment provisions and saving law clauses, instead of continuing with the pure Westminster model of unwritten Constitutions.

The eminent Caribbean philosopher Franz Fanon describes this state of self-denigration and its causes: 'My body was given back to me sprawled out, distorted, recolored . . . The Negro is an animal, the Negro is bad . . .'[46]

Another relic of our historical architecture is that the law is accused of being alien. This is perhaps because it is identified with the elite and imperial oppression.

Our ex-slave society may thus be described as apathetic in its attitude to law, as a result of the enduring alienation that Caribbean peoples, the governed, feel with those who govern. There is a sense of disconnect, a feeling that we do not and cannot control our own destiny and that our voices are not heard. Although this may be changing in relation to models of government, it is being substituted for the growing feelings of helplessness that so-called Third World countries feel in relation to international economics and politics. In those paradigms, small developing countries have little voice and little control over their destinies. We see this, for example, in the negative way in which free trade law constructs have impacted upon our banana industries, our sugar industries and even our international financial services sector.

The self-styled 'interpreter' of Rastafari doctrine in 1963, speaking on Jamaica, but in a context which could easily apply to the entire region, wrote:

> Jamaica today is independent . . . yet English customs and laws and English instructions still leads us . . . how much voice do we have in saying what laws will pass . . . politics was not the black man's lot but the white man's plot.[47]

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44 'Law and Poor, 1984' in Louis Regis, *The Political Calypso – True Opposition in Trinidad and Tobago 1962–1987*, 1999, USA: University Press of Florida.

45 Kapi, M (Sir), 'The underlying law in Papua New Guinea', Ninth Commonwealth Law Conference, 1990, New Zealand: Commerce Clearing House, p 129.

46 Franz Fanon *Black Skin, White Masks*, Lam Markmann C (trans), 1986, *London, Pluto*, p 119.

47 Bongo Dizzy, 'Voice of the interpreter', in Nettleford, R (ed), *Mirror, Mirror: Identity, Race and Protest in Jamaica*, 1970, Jamaica: Collins and Sangster, p 44.

Imperial law and the indigenous peoples

Law during slavery was used not only to subjugate the exported African peoples. It, coupled with brute force, also played a considerable part in subordinating the original peoples, the Amerindians, and other indigenous groups. To the extent that these indigenous peoples were deprived of their lands, cultures and way of life, they were subjugated. Nor did the indigenous peoples have the benefit of Emancipation Acts to facilitate the return of their liberties. Even today, the indigenous peoples in the region, as elsewhere in the world, remain marginalised, isolated and powerless. The laws concerning the indigenous peoples reflect this marginalisation.[48]

THE LAW'S RESPONSE TO HISTORY THROUGH SOCIAL ENGINEERING – FROM REFORM TO REPARATIONS

Because of the historical function of the law that we have illustrated, a contemporary role of law must be to attempt to correct the inequities that centuries of enduring the unjust system of slavery and exploitation wrought. Today, it is no longer fashionable to speak of slavery and exploitation. Instead, the appropriate jargon is 'Third World' problems, the 'new world order', poverty alleviation and sustainable development. Yet the underlying reality remains the same, the unfair disadvantage that ex-slave/colonial societies began with.

Nowhere is the unjust disadvantage wrought on West Indian societies more apparent than in the experience of Haiti. Haiti, the first black nation in the New World, fought for and won its freedom from the French colonialists under the famous general Toussaint L'Overture. However, this emancipation was premised on the condition that the peoples of Haiti had to repay millions of dollars in compensation to the French government for the loss of its 'property' in slaves. This, of course was a direct consequence of the unjust legal construct of the African person being considered a chattel, for which loss must be compensated. Many believe that this forced compensation in large measure accounts for Haiti's unenviable status as the poorest nation in the Western hemisphere.[49]

Just as the law played its role in subjugating Caribbean peoples, so must it assist in 'liberating' them and in developing what are still young, developing nations.[50] In view of this, this writer has argued elsewhere that the Caribbean man and judge have an active role to play in 're-interpreting the legal framework to build a more

48 But see new developments in relation to the rights of indigenous peoples, discussed below, Chapter 10 ('Custom as a Source of Law').

49 See Dionne J Miller 'Aristide's Call For Reparations From France Unlikely to Die', Inter Press Service News Agency, 12 March 2004. Former President of Haiti, President Aristide, actually demanded that France pay Haiti over 21 billion US dollars, equivalent to the more than 90 million gold francs Haiti was forced to pay France. 'Historians say that the massive toll that France exacted on Haiti played a large part in the Caribbean country's subsequent descent into start poverty and underdevelopment.' *Ibid,* p 2.

50 Independence was attained for most States during the 1960s and 1970s, making the countries in question exceedingly young nations.

indigenous and just' society.[51] The judge and legislator must perform the role of the 'social engineer':[52]

> . . . the legal engineer should not isolate nor ignore the historical continuum evident in the neo-colonial framework in which we exist, but must actively seek to eradicate this negative phenomenon. Thus, the law must seek to decolonise society, not merely by a 'patchwork' method of attempting to fit inadequate law into a proper social context, but by a conscious propulsion of new law, and indeed, if warranted, new legal systems, to promote a more egalitarian social, economic and political system.[53]

It is in this context that the debate on reparations for the descendants of African slaves for the injustices suffered during slavery must be understood. Undoubtedly, the developed nations of today, in particular, the former colonial nations, built their wealth substantially on the slave societies of the Commonwealth Caribbean and other slave territories. In so doing, they not only raped these lands of financial benefits during slavery, but the unequal financial relationships endured, perpetrating continued and economic exploitation, thus depriving such countries of their true financial status. These essentially political and economic paradigms were facilitated by the law and it remains the law's task to locate mechanisms, such as reparations, in the language of legal compensation and restitution, which will force a fair balance.

Legitimising the concept of reparations

The notion of reparations is not new. It has always been accepted as a rule of customary law that compensation should ensue for a tort or wrong. Ironically, those from whom reparations are sought today, the plantation and slave owners, were paid compensation for their loss of property in the slave upon Emancipation. However, the concept of reparations as used in contemporary jurisprudence embodies not merely a tort or harm, but a wrong imbued with deep immorality and repugnance to basic decency. The concept as expressed in this form was crystallised in the Nuremberg trials as embodied in the Charter of the Nuremberg Tribunal which defined crimes against humanity.

The question of reparations for peoples of the African diaspora is a volatile one. Arguments raised to contest the right to reparations include the legality of the slave trade, the remoteness of the event, the difficulty of identifying those harmed and the huge financial costs involved were a claim to be successful.

In response, a proper understanding of the legitimacy of the law, a concept well understood in international law, reveals that the formal legality of slavery within the domestic sphere does not clothe slave laws with legitimacy. International law, for example, recognises the concepts of crimes against humanity and genocide, for which slavery qualifies. The moral value of law which gives it legitimacy is also lacking in relation to the slave laws.

While slavery indeed happened a long time ago,[54] the principle of remoteness

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51 Antoine, R-M B, 'Law and the Caribbean Man – A Means of Progress. Social Engineering in a Caribbean Context' [1986] Stud LR 24.

52 The concept of social engineering is taken from Pound, R, *Contemporary Justice Theory,* 1940, London: Banton.

53 *Above,* Antoine, fn 51.

54 Slavery was abolished in the Commonwealth Caribbean in 1838.

does not easily defeat a claim. Some heinous crimes, such as murder, have no statute of limitations and remain crimes throughout time. Such is the nature of a crime against humanity such as slavery. Further, there have been other examples of crimes against humanity for which reparations were successfully sought, despite a long period of time between the crime and the claim. Examples include the genocide against the indigenous peoples, for which reparations in the form of land rights, however modest, were paid by the Canadian, US and Australian governments, and reparations for the Jewish Holocaust by Germany and also for the internment of Japanese Americans in the USA during World War II.[55] In these reparations, descendants of the victims were granted the compensation and a similar principle should be used for African reparations. Further, the query on remoteness is not altogether appropriate if we acknowledge that some of the offences instigated by slavery still endure, notably, racial prejudice.

However, the claim for reparations is also accompanied by a pragmatic acceptance of the complexity of identifying precisely the ancestors of the victims of the slave trade who can give evidence of wrongdoing.

Yet, the argument for reparations is grounded in the self-evident truth that all displaced peoples of African heritage in the Commonwealth Caribbean had ancestors who were victims of the slave trade. As such, it is African peoples as a group who should be compensated. Thus, the claim is more in the nature of a class action, on behalf of an identifiable group. The practical result is that the expectation of reparations is not for a defined amount for each victim, but for financial compensation to the African community as a whole. For example, this may take the form of funding for educational and other developmental projects to African communities or nations, such as those in the Commonwealth Caribbean.

As to the sums involved, no doubt they are huge, but treating reparations as a type of class action makes it manageable. In any event, as Lord Gifford, an early advocate of reparations, asserts: 'Once the right to reparations is seen to be soundly established in international law, then ways of doing justice can and will be found. Difficulties of scale or procedure should not be obstacles to justice.'[56]

Ultimately, reparations are not just about compensation in monetary terms or an attempt at restitution. It is also an opportunity to express the moral outrage of the world at this heinous crime which was perpetuated on an entire race of peoples.

Judicial concerns about social engineering

Whether the reform of the law is manifested in politics or property matters, it must be emancipated from its past. In short, the law must be repatriated. Yet, not everyone agrees that the law should engage in social engineering. In *In the Estate of B*,[57] Murphy, J, in holding that illegitimate children could not share in the estate of their natural

55 See, e.g., the Civil Liberties Act 1988, which made restitution to Japanese Americans for the losses caused by the discriminatory actions of the US Government in interning Japanese Americans during the wartime period. The Act specifically recognises the 'fundamental injustice of the evacuation, relocation and internment of US citizens and permanent resident aliens of Japanese ancestry during World War II' and makes 'restitution'.

56 Lord Anthony Gifford 'The Legal Basis of the Claim for Reparations', Paper presented to the First Pan-African Congress on Reparations, Abuja, Nigeria, 27–29 April 1993, p 10. See also below, p 32 for a discussion of 'Reparations and Morality.'

57 [1999] CILR 460 (Grand Court, Cayman Islands).

father's estate according to the 'clear and unambiguous language' of the succession law, had this to say:

> That result may not be fair. It may point to a lacuna in our law. It may not accord with the values and mores of our society in the 21st century. It may even be perceived by some to be contrary to modern morality. Those are not my direct concerns as a judge . . . My function is not that of a social engineer or to impose my own values by creative judicial interpretation. If there is to be reform in this area that is for the legislature, not for the judge.

Certainly, the social engineer's role cannot be strained beyond the reasonable competencies of a statute. But, the law as a social engineer also presupposes a dynamic and socially centred law reform process, involving the Legislature. As Murphy J hints, the social engineering process must involve the Legislature and indeed the entire society.

LOCATING THE CONTEMPORARY FUNCTIONS OF LAW – POSITIVISM, NATURAL LAW AND WEST-INDIAN IDENTITY

Whilst our history has contributed to certain deficiencies in our law and legal systems, this cannot be the only focus of the social engineer. There must be a broader purpose. As with any society, we must be concerned with shaping our law to create a more just society. To the extent that our colonial 'shackles' obstruct this broader objective, they must be broken, whether they be rigid forms, such as precedent, or inappropriate content. Yet the law's purpose must go beyond this narrow objective. This leads us to a more philosophical discussion of the role and functions of law in society. Many distinguished legal philosophers have explored the question of the functions of law in society. However, one stock answer cannot be identified. It depends partly on the view taken of the nature of law.

Legal theorists can thus be divided into two schools of thought, those who adhere to positivism and others who subscribe to the natural law theory. The positivists, like Hart and Austin, merely attempt to define what law is, not what it should be, or its content. The natural law theorists, on the other hand, believe that rules or principles can only legitimately be called law if they conform to an acceptable code of moral behaviour. The proponents of the natural law school of thought include St. Thomas Aquinas[58] and Fuller.[59]

The Grenada revolution and Austin's sovereign

Law might simply be considered as a set of rules within the society. However, this description does not tell us much about the authoritative and coercive nature of a legal rule. John Austin responds by saying that law is different from other rules because it is a 'command' from the legitimate 'sovereign'.[60] This command is backed by sanctions. For the purposes of this theory, we must be able to identify the 'sovereign'.

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58 Aquinas, T (St), *Summa Theologica,* 1942, London: Burns, Oates and Washbourne.

59 Fuller, R, *The Morality of Law,* 1969, London: Yale UP.

60 Austin, J, *The Province of Jurisprudence Determined,* 1954, London: Weidenfield and Nicolson.

This thesis was tested in the Commonwealth Caribbean in the case of *Mitchell v DPP*.[61] Here, the courts had to decide whether a Supreme Court established in Grenada by the People's Revolutionary Government was legally constituted. This involved a larger question, specifically, whether this revolutionary government, which had taken power in a bloodless coup, was the 'legitimate sovereign' in the Austinian sense, such as to confer a legal status on the law and the courts. The case was decided in the affirmative on the grounds of necessity.

A similar question could have been posed in the case of *Phillips and Others v DPP*[62] when, after another coup, this time in Trinidad and Tobago, rebels seized power. Instead, the court was concerned with the validity of a pardon given to the rebels.

Limits of the command theory

As Hart points out,[63] the command theory, while authoritative, makes the erroneous assumption that all legal rules make commands or impose sanctions. There are many laws, which, for example, merely confer rights and are not backed by sanctions.

Hart proceeds to link types of rules with the legal system. He identifies two main sets of rules, primary rules and secondary rules. Primary rules are those which any society needs in order to survive. They forbid the conduct most destructive to the society, such as murder. Even simple societies contain these rules. Secondary rules are those which confer power rather than impose duties. They are divided into three types: rules of adjudication, rules of change and rules of recognition.

The first, rules of adjudication, are designed to allow the society to settle disputes such as legal offences and their sentences. Rules of change are those which promote other new rules. A developing society needs to respond to new situations and these rules accommodate this imperative. Rules of recognition are those which demonstrate the acceptance of the law by the society. They thus spell out which rules in the society have legal force. For example, Hart says, the UK has a single rule of recognition: what the Queen enacts is law. In like vein, we can say that our rule of recognition in the Commonwealth Caribbean is the Constitution, although these simple definitions do not describe accurately judge-made law.

Dworkin[64] rejects Hart's theory on rules on the basis that law contains not just rules, but a set of principles upon which these rules are based. These principles are the guidelines which inform the law but do not propose a solution. One such principle is that no one should benefit from their own wrong. These principles have a certain dimension of weight or importance that rules lack. This enables judges to weigh conflicting principles.

The naturalists and the morality of law

We need also to consider carefully the question of the appropriate functions of law in a society according to the naturalist school of thought. Should law, as the naturalists would have us believe, seek to reflect morality? This question is particularly pertinent

61 [1985] LRC (Const) 127; (1985) 32 WIR 241, PC.
62 [1992] 1 AC 545.
63 Hart, HLA, *The Concept of Law,* 1981, Oxford: Clarendon.
64 Dworkin, K, *Taking Rights Seriously,* 1977, London: Duckworth.

to our appreciation of law during slavery, which by any account, was immoral. Those who argue in the affirmative believe that there is some kind of 'higher law', known as 'natural law' to which we must turn for a basic moral code. There are diverging views on the source of that moral code, however. Some, like Aquinas, argue that it comes from God. Others see it merely as a question of the basic ethics of the society based on reason. The moralists believe that law should not only be moral in itself but should contain rules which prohibit 'immoral behaviour'. The law cannot divorce itself from these moral values.

The belief that law should reflect morality has spurned some interesting cases. In *Shaw v DPP*,[65] for example, the House of Lords upheld a conviction of the offence of a conspiracy to corrupt the public's morals when the defendant published a pornographic book. The Court found that a fundamental purpose of the law was to 'conserve not only the safety and order but also the moral welfare of the State'.[66] Similarly, in *R v Gibson*,[67] a conviction was obtained for the common law offence of outraging the public decency when the defendant artist exhibited earrings made from freeze-dried foetuses.

These decisions have engendered much controversy and have been criticised by those who believe that morality is a private concern and not the business of the law. John Stuart Mill, for example, argues that the law should not impose its concept of morality on individuals. Individuals should be free to choose their own conduct, as long as they do not harm others.[68]

Natural law, morality and our pluralistic societies

Certainly, the morality theories present difficulty. In any society there will be conflicting ideas of what is moral. This is particularly so in pluralistic societies such as ours. Muslims, for example, allow men to have more than one wife, whereas Western civilisation considers this immoral.[69] We have seen already the conflict between the UK and its territories over the issue of homosexuality, which those West Indian communities found to be immoral. Indeed, Commonwealth Caribbean societies may be described as conservative in social outlook. Debates continue to ensue on homosexuality, abortion, prostitution and even contraception. In discussions surrounding the approach to treatment for HIV/AIDS, for example, many continue to oppose giving prisoners and young people contraceptives, or legalising prostitution as a means of regulating such sexual activity, thereby potentially reducing health risks.

Issues such as gender and race equality also straddle the social morality spectrum. Here again, if one is to judge by the formal recognition of the law, the region is well behind many of its counterparts, nor is there consensus on these matters.[70] If the law is to define standards of moral behaviour, how are we to identify those standards? In

65 [1962] AC 220; [1961] 2 All ER 446, HL.

66 See also, *Knuller v DPP* [1973] AC 435, which was a conviction for publishing advertisements to contact others for homosexual purposes.

67 [1991] 1 All ER 439, CA.

68 JS Mill, *Utilitarianism*, 1979, USA: Hackett Publishing.

69 See Chapter 3 ('Legal Traditions – Types of Legal Systems in the Commonwealth Caribbean') for a discussion of relevant cases on polygamy.

70 See Chapter 7 ('The Written Constitution as a Legal Source').

addition, a society's morals change over time. The much talked about issue of the morality of the death penalty is one such example, although one cannot argue that there is consensus on the issue.

Less controversial functions of law include public order, social control, social cohesion, to promote change in the society, to define rights and duties and to balance conflicting interests in the particular society.[71]

When should we obey the law?

Even if we can identify what law is and what it should be, this still leaves the question, 'why do we obey law?' Is it, as Austin thought, because of the sanctions behind it, or is it, as Hart believed, because we accept it? Would we refrain from committing murder if there were no sanctions? Perhaps law is obeyed because it is the most convenient and fair way of organising any society? We may also obey law because we believe that it is right or morally correct.

This last suggestion leads us to an interesting point. Is there an obligation to obey rules emanating from the State which are immoral? There are several examples of these: the Nazi laws of Germany; the apartheid laws of South Africa; and of course, the slave laws which we discussed earlier. These were all legitimised by the relevant Parliaments. But did those laws have moral authority? The people who obeyed such laws may have believed that they were simply obeying the law. Yet they can be brought before international courts, for example, on claims that they have committed crimes against humanity, or genocide, or, as in South Africa, new national courts, for legal violations which are based on a higher moral order. This higher construct is sometimes called the 'rule of law'.[72] It suggests that we only have a duty to obey the law if it is morally just. Rules must conform to acceptable moral standards before we can consider them to be law.

In *Forsythe v DPP and the AG of Jamaica*,[73] for example, the appellant, a Rastafarian, author and Professor at Harvard University, USA, unsuccessfully sought legal validation for the utilisation of ganja as a sacrament of the Rastafarian faith. He argued against the validity of legislation which outlawed ganja in this way:

> That by defining all marijuana possession as 'criminal' . . . must cause ordinary people to loose [*sic*] respect for the law thereby. That a law is valuable not because it is 'the law' but because there is 'right' in it and laws should be like clothes; the Laws should be tailored to fit the people they are meant to serve.[74]

This was recognition not only that law should suit its society, but that it must be based on the moral values of that society which, judging from the lack of success in this case, is demonstrably subjective.

The intrinsic morality or immorality of law also leads us once again, to the discussion of reparations for the slave trade. It is precisely the immoral nature of the laws

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71 See Funk, DA, who argues that there are seven major functions of law. He includes in the list of functions: to legitimise and to allocate power. 'Seven major functions of law' (1972) 23:2 Case Western Reserve L Rev 257.

72 Note that the term 'rule of law' has more than one meaning in the Commonwealth Caribbean. In the constitutional context, it is akin to procedural justice.

73 (1997) 34 JLR 512.

74 *Ibid*, at p 518.

which upheld the slave trade that supports the assertion that these were not legitimate laws. As such, unlawful acts of slavery were perpetrated, which had significant adverse consequences, for which compensation is due.

ROLE OF THE SLAVE IN CREATING MODERN LAW

Our chapter ends as we began, examining closely the role the law played in slavery and the relationship of the slave to the law. However, the historical function of law assumes a different aspect in Tuitt's thesis on the slave and the law. She provides an alternative construct for the historical function of law and indeed, law itself, as the slave and slavery are seen as responsible for the very birth of modern law. Law is portrayed as existing not merely to deny the slave rights. Rather, drawing heavily on a notion reminiscent to relativity theory, Tuitt asserts that the slave, by the very existence of her condition as, in essence, an antithesis to rights, was responsible for creating human rights and indeed modern law.

Marginalised or subjugated groups in society are viewed as enduring and having an integral relation with the 'constitution of the societies, institutions and structures from which they have been ousted.'[75] Law plays an important role both in 'constructing and maintaining these subjugated groups and figures.' Further, the slave figure 'foreshadows' many accounts of other subjugated groups:[76]

> Modern law can, therefore, be best understood through the metaphor or trope of the slave. The slave trope thus stands to represent the function of modern law which . . . serves, rather steadfastly, dominant powers.[77]

The slave was, in fact, one of the 'chief causes' of modern law, for example, the law of contract was derived from the ancient law of chattels.[78] Similarly,

> the slave of the common law produced a notion of universal freedom – a notion subsequently and continually endorsed in law – particularly in the exemplary legal form of contractual relations which she could not enjoy . . . The slave's subjugation in fact and in law concentrated the freedom of other legal subjects. The slave as chattel produced the law of chattels that worked not to serve her but to bind her in subjugation.[79]

However, these subjugated groups are continually 'alienated from the law . . . that they are integral in creating'.

Thus, the slave is seen as the law's protagonist, and one often identified in racial terms. Yet, Tuitt's theory, if brought to its logical conclusion, suggests that oppression is a prerequisite for enlightened law. This is indeed, the very antithesis of Rousseau's Social Contract,[80] which sees rights as grounded in equity and self-preservation. It therefore offers a very base, even brutish explanation for law.

We end this chapter with two calypsos, one composed and sung by slaves of the period, the other by a well-known calypsonian of the contemporary period,

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75 Tuitt, *above,* fn 8, p 2.
76 *Ibid*, p 3.
77 *Ibid,* p 6.
78 *Ibid,* p 11.
79 *Ibid*, pp 14–15.
80 Jean-Jacques Rosseau, *The Social Contract*, 1762, France.

demonstrating a consciousness of slavery and empathy with the slave some 150 years after its abolition:

> Tink dere is a God in a top
> No use me ill, Obisha [ie overseer]
> Me no horse, me no mare, me no mule,
> No use me ill Obisha.[81]

> I'm a slave from a land so far,
> I was caught and I was brought here from Africa.
> Well, it was licks like fire from the white slave master, everyday,
> Ah toil and toil and toil and toil so hard each day.
> I'm dying, I'm crying,
> O Lord, ah want to be free.[82]

81 Reproduced by Matthew Gregory Lewis, *Journal of a West-India Proprietor,* 1834, London in Orlando Patterson, *The Sociology of Slavery* 1973, London: Granada Publications Ltd, 255–56.

82 Dr Slinger Francisco – (The Mighty Sparrow), Spektakula Forum, Trinidad and Tobago, 30 August 1986, cited in Hollis (Chalkdust) Liverpool, *Rituals of Power and Rebellion – The Carnival Tradition in Trinidad and Tobago 1732–1962,* 2001, Chicago, USA: Research Associates School Times Publications/Frontline Distribution International Inc, p 27.