

The background of the entire page is a light gray gradient, decorated with numerous realistic water droplets of various sizes. The droplets are rendered with soft shadows and highlights, giving them a three-dimensional appearance. They are scattered across the page, with a higher concentration in the top and bottom corners.

# **THE PRIVY COUNCIL HINDERS THE PROGRESS OF LGBTI RIGHTS IN THE CARIBBEAN**

... BY ITS *IRRATIONAL AND PERVERSE* SHIELDING OF ARCHAIC COLONIAL LAWS FROM JUDICIAL SCRUTINY

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NASSAU, 2021

# PARLIAMENTARY V CONSTITUTIONAL DEMOCRACY

## PARLIAMENTARY SUPREMACY

UK LEGAL SYSTEM

Acts of Parliament  
common law



Case law  
Secondary legislation

## CONSTITUTIONAL SUPREMACY

COLONIAL LEGAL SYSTEM

Colonial Laws Validity Act 1865  
[Certain acts of the UK Parliament / orders in council]  
**Colonial Constitutions** – orders in council



**Colonial legislation (i.e. local laws implemented by the colony)?**

I  
N  
D  
E  
P  
E  
N  
D  
E  
N  
C  
E

## CONSTITUTIONAL SUPREMACY

CARIBBEAN NATIONS

Constituent Power  
**Constitutions**



**Colonial legislation?**  
Local legislation / case law  
Secondary legislation

# GENESIS OF CONSTITUTIONS

## UK PARLIAMENT / CROWN

## AUTOCHTHONOUS

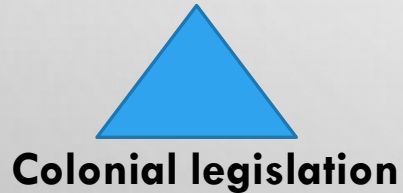
CASE A: COLONIAL SYSTEM

CASE B: BY CONCESSION:

CASE C: BY REVOLUTION

I  
N  
D  
E  
P  
E  
N  
D  
E  
N  
C  
E

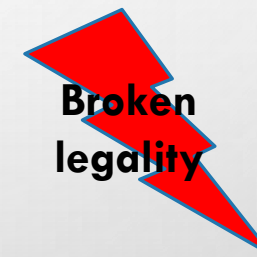
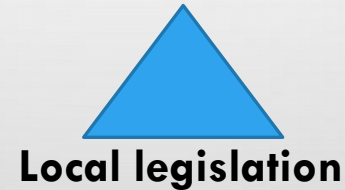
Colonial Laws Validity Act 1865  
Orders in Council  
**Colonial Constitutions**



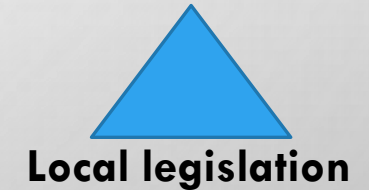
- **CASE B1: CROWN RETAINED**  
CONSTITUTIONAL POWER  
(BRITISH CARIBBEAN)



Order in council:  
Constitution



Constitutional convention  
Constitution



- **CASE B2: CROWN DEVOLVED**  
CONSTITUTIONAL POWER (INDIA  
AND PAKISTAN 1947)

BRITISH AMERICAN COLONIES 1776  
CONSTITUTIONAL CONVENTION 1789

# CASE B1: BARBADOS CONSTITUENT POWER:

## BARBADOS INDEPENDENCE ACT (1966) S 5(1)

### ACT OF THE UK PARLIAMENT

**RETAINED POWER:** “HER MAJESTY MAY BY ORDER IN COUNCIL MADE BEFORE THE APPOINTED DAY PROVIDE A CONSTITUTION FOR BARBADOS TO COME INTO EFFECT ON THAT DAY.”

## BARBADOS INDEPENDENCE ORDER (1966)

### STATUTORY INSTRUMENTS 1966 NO. 1455

HER MAJESTY, BY VIRTUE AND IN EXERCISE OF THE POWERS VESTED IN HER BY SECTION 5 OF THE BARBADOS INDEPENDENCE ACT 1966 ..., IS PLEASED,..., TO ORDER:

- **S 2(1) REVOCATION OF COLONIAL CONSTITUTION**
- S.3 **SUBJECT TO THE PROVISIONS OF THIS ORDER**, THE CONSTITUTION [SET OUT IN THE SCHEDULE TO THIS ORDER ] SHALL COME INTO EFFECT ON THE APPOINTED DAY.
- S 4 SAVING OF COLONIAL LAWS

## CONSTITUTION OF BARBADOS 1966

### THE CONSTITUTION SCHEDULE TO ORDER IN COUNCIL

- IN COMMON LAW, SECTIONS AND SCHEDULES ARE THE MAIN OPERATIVE COMPONENTS OF ANY ENACTMENT, INCLUDING AN ORDER IN COUNCIL.
- THERE IS NO HIERARCHY BETWEEN THEM IN THAT BOTH CONSTITUTE THE LEGISLATOR’S PRONOUNCEMENT OF THE LAW.
- A SCHEDULE, AS BENNION EXPLAINS, IS SIMPLY AN EXTENSION OF THE SECTION WHICH INDUCES IT AND MUST BE READ “IN THE LIGHT OF THE WORDING OF [THIS] SECTION”

### Trinidad and Tobago’s constituent power: Case B1

**Parent Act:** section 5(1) of the West Indies Act 1962

**Order in Council:** Trinidad and Tobago (Constitution) Order 1962 – Statutory Instrument 1962 No. 1875

**Constitution:** the Constitution is set out in the second Schedule to the Order in Council

# TRINIDAD AND TOBAGO: COLONIAL LEGISLATION?

UK IMPERIAL LAW  
Colonial Constitution

31/8/62

## AT ORDER COMMENCEMENT

- S 2(1) **REVOCATION** (COLONIAL LAWS LOSE LEGAL FORCE)
- S 3 **NEW CONSTITUTION COMES INTO FORCE**

Order in council/  
Constitution

## AFTER ORDER COMMENCEMENT

- S 4 **SAVING CLAUSE & POWER OF MODIFICATION**  
(COLONIAL LAWS LEGAL FORCE REINSTITUTED SUBJECT TO BEING CONSTRUED WITH MODIFICATIONS, ETC))

Order in council/  
Constitution

Colonial legislation

Local legislation

Colonial legislation

## THE ORDER IN COUNCIL

- **SAVING CLAUSE & POWER OF MODIFICATION S 4(1)**
  - EXISTING LAWS LEGAL FORCE REINSTITUTED **AFTER** THE ORDER COMMENCEMENT **SUBJECT TO** THE CONDITION THAT EXISTING LAWS **SHALL BE CONSTRUED** WITH THE NECESSARY MODIFICATIONS ETC. TO BRING THEM INTO CONFORMITY WITH THE ORDER.

## THE CONSTITUTION

- **GENERAL SAVING CLAUSE (S 3)**
  - PROVIDE IMMUNITY TO ALL EXISTING LAWS **IN FORCE (AT COMMENCEMENT OF THE ORDER)** AGAINST CHALLENGE FOR BREACH OF THE FUNDAMENTAL RIGHTS OF THE CONSTITUTION.
  - THIS IS AT PERPETUITY

# CASE LAW: MANDATORY DEATH PENALTY

## PRIVY COUNCIL

### ROODAL V T&T [2003] UKPC 78

- MDP IS INHUMAN AND DEGRADING
- IT MUST BE MODIFIED TO CONFORM WITH THE CONSTITUTION (S. 4 ORDER)
- HARMONY IS ACHIEVED BETWEEN THE ORDER (**MODIFICATION**) AND THE CONSTITUTION (**PROHIBITION OF NULLIFICATION**)

## PRIVY COUNCIL

### BOYCE V THE QUEEN [2004] UKPC32 MATTHEW V T&T [2004] UKPC 33

#### REVERSED ROODAL ON GROUNDS IRRATIONAL AND PERVERSE

- MDP IS AN EXISTING LAW;
- THE JUDICIARY CANNOT TOUCH THEM, REGARDLESS *INHUMAN OR DEGRADING*”
- THIS IMMUNITY IS COMPLETE

#### PRINCIPLE: COLONIAL LAWS ARE ABOVE THE CONSTITUTION AT PERPETUITY

## CARIBBEAN COURT OF JUSTICE

### NERVAIS V REGINA [2018] CCJ 19 (AJ) MCEWAN V GUYANA [2018] CCJ 30 (AJ)

#### RETURNED TO ROODAL

- **DUTY** OF THE COURTS TO USE FIRST THE *POWERS OF MODIFICATION*
- BESIDES MODIFICATION/ADAPTION THERE ARE WIDE POWERS OF QUALIFICATION /EXEMPTION

#### PRINCIPLE:

- **INCONGRUOUS** THAT COLONIAL LAWS ARE ABOVE THE CONSTITUTION AT PERPETUITY
- **UNACCEPTABLE DIMINUTION OF FREEDOMS, INDEPENDENCE AND SOVEREIGNTY**

Order in council/Constitution

Colonial legislation

Local legislation

Colonial legislation

Order in council/Constitution

Local legislation

Order in council/Constitution

Local legislation / Colonial legislation

# PRIVY COUNCIL'S ERRORS IN LAW IN **BOYCE AND MATTHEW**

- CONFUSE THE ROLE OF THE CROWN IN THE CONSTITUTIONAL PROCESS.
  - **BELITTLE THE UNFETTERED ROLE OF THE CROWN AS CONSTITUENT POWER** AND PREFER THE CONSTITUTIONAL CONFERENCES TO PROVIDE A CONSTITUTION, **WITHOUT ANY LEGAL JUSTIFICATION GIVEN.**
- NEGLECT PRINCIPLES OF STATUTORY INTERPRETATION
  - INTERACTION BETWEEN SECTIONS AND SCHEDULES
- MISUNDERSTAND BREADTH OF THE POWER OF MODIFICATION
  - EXCISING LANGUAGE, ADAPTING IT BY NARROWING THE APPLICATION OF THE LAW AND EVEN ADDING LANGUAGE TO MAKE A LAW CONSTITUTIONAL

# IS THE PRIVY COUNCIL A HOMOPHOBIC COURT?

- **MATTHEW AND BOYCE PROTECT CRIMINALISATION OF LGBTI PEOPLE**
  - HENRY VIII ANTI-SODOMY LAWS PASSED ALMOST 500 YEARS AGO WOULD BE IMMUNE FROM CONSTITUTIONAL SCRUTINY BY THE JUDICIARY OF AN INDEPENDENT NATION IN 2021
  - MANY ANTI-LGBTI LAWS – WOULD FALL INTO THIS CATEGORY AS WELL –
    - AG OF T&T 11 JULY 2021 -<  
[HTTPS://WWW.FACEBOOK.COM/670658045/POSTS/10159057420443046/?D=N](https://www.facebook.com/670658045/posts/10159057420443046/?D=N) >
- **SURRATT V T&T [2007] UKPC 55 – PROVIDES FOR DISCRIMINATION OF LGBTI PEOPLE**
  - CONTRARY TO EGAN V CANADA [1995] 2 SCR 513 / MCEWAN V GUYANA [2018] CCJ 30 (AJ) / BOSTOCK V. CLAYTON COUNTY (GEORGIA) 590 U.S. \_\_\_ (2020)
- **DAY AND BODDEN-BUSH V AG OF CAYMAN ISLANDS (PENDING) – COULD PROVIDE FOR SEGREGATION OF LGBTI PEOPLE – PLESSY V FERGUSON 163 US 537 (1896)**

**IF SO, IS THE BRITISH CROWN BREACHING  
INTERNATIONAL LAW?**