

independence instruments. I have also discussed the various Constitution Commissions which have since 1984 been reviewing the constitutions of the respective jurisdictions. My object is twofold: to acquaint the general reader of what has been taking place in these vital matters and hopefully to prevent any government proposing to engage in constitutional changes from 're-inventing the wheel'. In this respect, it has surprised me greatly, having chaired three of the Commissions, how little the people of one territory know of what has been happening in another territory.

I must specially mention Professor Fiadjoe at the Faculty of Law at Cave Hill as well as former Senior Lecturer in Law, Dr Francis Alexis. I have derived much assistance from the writings of these two publicists.

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My publishers, Cavendish Publishing, have been most efficient and helpful. They deserve highest commendation.

Finally, for any errors or other defects that may have found their way into the text, the responsibility is mine and mine alone. In true Trumanian language: 'The buck stops here.'

SOURCES OF CARIBBEAN CONSTITUTIONAL LAW

In this chapter, we examine the sources of some of the most important aspects of our constitutional law. As is well established, the English Constitution has been largely uncoded, although it is to be found in such statutes as the Magna Carta, the Bill of Rights of 1689 and the Representation of the People Acts. Caribbean Constitutional Law shares these sources and it is to illustrate that fact that, in this chapter, we briefly outline, *seriatim*, the sources of due process of law; the status and powers of the Sovereign; how Parliament is regulated; the operation and status of the judicial system; and citizenship and nationality. We shall then consider the principles on which the reception of English Law is based.

A DUE PROCESS OF LAW

No serious student of constitutional law can fully appreciate the subject unless he reads *Blackstone's Commentaries on the Laws of England*. In Book I, the learned writer outlines the sources of the rights of persons and illustrates the meaning of 'due process' by reference to Magna Carta. Blackstone avers that, with regard to the administration of justice, Magna Carta forbade the denial of justice and its delay to all citizens; fixed the court of common pleas to be held at Westminster; directed assizes to be held in the proper counties; directed the holding of inquests in matters of sudden and unnatural death; and prohibited ministers 'from holding pleas of the crown or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer'. Magna Carta 'confirmed and established the liberties of the city of London, and all other cities, boroughs, towns and ports of the Kingdom ... And lastly (which alone would have merited the title that it bears, of the great charter) it protects every individual of the nation in the full enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers or the law of the land'.¹

Thus when one studies the terms of Magna Carta carefully, one finds that they lay the foundations for the protection of the right to life, the right to personal liberty, the right to the protection of property and the right not 'to be arrested, imprisoned, put out of (one's) freedom, outlawed, destroyed or put upon in any way except by the lawful judgment of (one's) peers or the law of the land'.

The declaration was confirmed by many subsequent laws including a statute, 28 Edw III c 3 (1354) where, for the first time we find the expression 'due process of law' in the following statement:

... no man of whatever estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.

1 *Blackstone's Commentaries on the Laws of England*, 1803, pp 423-24.

In 1628 in a commentary on Magna Carta, Sir Edward Coke identified 'due process of law' with 'law of the land' and, when the Star Chamber was abolished in 1640, the statute abolishing it included a recital that its actions were contrary to due process and out of harmony with the law of the land.

No other phrase of the US Constitution has been involved in more US litigation than this clause, which has recurred in not less than 2,000 cases during the 20th century and which, since 1926, has been referred to in more than 2,000 articles and case notes.²

B STATUS AND POWERS OF THE SOVEREIGN

The Bill of Rights 1688 effectively debarred the Sovereign from suspending laws passed by Parliament or from executing laws not so passed. It deemed such action illegal and of no effect and enacted that no standing army in time of peace was to be maintained except by parliamentary authority. Provision was made under that Act for freedom of speech in debates in the House and for preventing the imposition of excessive bail and of cruel and inhuman punishment. The phrase 'cruel and inhuman', also much canvassed today, was, therefore, first used in Parliament more than 300 years ago and so was the expression 'Bill of Rights'.

The supreme law-making body also passed the Act of Settlement in 1701, providing for succession to the Throne. Laws for securing the liberties of the Church and the subject, together with laws to assist those unlawfully detained by illegal courts for offences other than criminal wrongs, were also passed at the time of Charles I, Charles II, and George III (for example, writ of habeas corpus). That prerogative writ is still much in use today.

The status and powers of the Crown have, over the years, been defined by statute. (See, for example, the Queen Regent's Prerogative Act 1554.) The Sovereign's position in the established Church is likewise provided by the House of Lords Precedence Act 1533 in which the Sovereign is stated to be 'justly and lauffullie hed in erthe, under God, of the Church of Englande'. The Sovereign is also by that same Act declared to be 'supreme governor of this realm ... as well as in all spiritual or ecclesiastical things or causes as temporal'. There is a 1661 Act expressing 'the sole right of the Militia to be in the King' and declaring that the Sovereign has the sole right of command of the armed forces. Thus colonial governors were always described as Governor and Commander-in-Chief of the Armed Forces in the territory they administered at any given time.

C REGULATION OF PARLIAMENT

How were laws to be made? Parliament decided by statute. By an Act of 1322, all laws were to be made by the Crown. On the regulatory side, a 1694 Act prescribed that Parliament was to meet once in every three years, but (even before that) the Petition of Right 1627 had prescribed that taxes could not be levied without its approval while an

Act of 1612 had laid down that parliamentary debates were to be privileged. The Parliamentary Privilege Act 1770 made members free from arrest or imprisonment in civil proceedings. The Meeting of Parliament Acts 1797 and 1799 covered duration, convening, dissolution and prorogation. It is from these Acts that we, in other parts of the Commonwealth, derive so much guidance in drawing up parliamentary rules affecting privilege and freedom from arrest or imprisonment in civil proceedings.

D OPERATION OF THE JUDICIAL SYSTEM

The Judicial Committee Act 1833 not only brought the Privy Council into being but named the courts from which appeals could be brought while the Appellate Jurisdiction Acts of 1876 and 1913 established the composition of the Council. Also, the Judicial Committee (Amendment) Act 1895 made judges from the Dominions and India (who were Privy Councillors) eligible to sit. This position has not changed, except that more and more Commonwealth countries are establishing their own final Courts of Appeal.

The Supreme Court of Judicature (Consolidation) Act 1925 laid down the appointment requirement for *members of the higher judiciary who were disqualified from membership in the House of Commons*. This Act also provided that judges could only be dismissed by an address by both Houses of Parliament. The constitution of the Supreme Court of Judicature (the High Court and Appeal Court) is set out in the Supreme Court of Judicature (Consolidation) Act 1925 as amended from time to time. Reference has already been made to the Judicial Committee of the Privy Council and the position of the Law Lords in the House of Lords will be addressed in Chapter 5, below. But statutory provision was made for Courts Martial Appeals Courts by the Courts Martial (Appeal) Act 1951, in respect of which the judges are appointed by the Lord Chancellor and the courts have the right of appeal to the House of Lords as the final appeal tribunal. The principles implicit in these arrangements have helped to make our judiciary as independent as it has turned out to be.

E CITIZENSHIP AND NATIONALITY

It was the *Calvin* case³ which, following the union between England and Scotland, laid down in 1608 that those who were born in or were otherwise associated with the King's dominions owed allegiance to the King and were his 'subjects'. The principle was thereafter extended to the colonies, whether secured by settlement, conquest or cession. In this respect, a person born in a colony was in the same position as his or her counterpart born in Great Britain or otherwise associated therewith. So long as the doctrine subsisted that the Crown was one and indivisible throughout Her Majesty's domains, this citizenship doctrine held good. What brought about a change was the movement in the Commonwealth relationship away from the single indivisible institutionalised bonds.

The first codification of citizenship in the United Kingdom was attempted in the British Nationality and Status of Aliens Act 1914 which was put on the statute book after

2 See Tarnopolsky, 1974, pp 149-50.

full discussion with representatives of the then Dominions – Canada, Australia, New Zealand and the Union of South Africa.

Eire was the first independent country to break rank with Britain in creating its own citizenship when it passed the Irish Nationality and Citizenship Act 1935 which repealed the 1914 Act and set out the persons who were Eire citizens. That was followed by the Canadian Citizenship Act 1946 which created a Canadian citizenship and opened the way for each Commonwealth country to pass legislation outlining who its citizens were henceforth to be.

In 1948, the British Government passed another British Nationality Act, the effect of which was to divide British citizenship into two divisions, viz, citizenship of the independent countries of the Commonwealth and citizenship of the United Kingdom and Colonies.

In 1962, the Commonwealth Immigration Act was passed with the object of limiting black immigration to Britain: the Act applying to citizens of independent countries and Colonies alike so long as their passports had been issued in the Colonies. But it did not control citizens of the United Kingdom and Colonies whose passports had been issued in England by the British Government.

When faced with the fact that a number of British East African immigrants (who found it untenable to live under Amin's regime) were coming to Britain, the United Kingdom Parliament passed a second Commonwealth Immigration Act with the object of depriving the (East African) British subjects of their citizenship. It was left to the European Commission and the European Court of Human Rights in 1973 to rule that the new Act constituted discrimination on racial grounds, relegating the British East Africans to the level of second class citizens and making them subject to an interference with their human dignity which amounted to degrading treatment under Art 3 of the European Convention on Human Rights which provided that: 'No one shall be subjected to torture or to inhuman treatment or punishment.'⁴

The victory of the East African Asians was, however, a pyrrhic one, since the Act was not revoked: their quota for entry simply being increased so as to permit an acceleration of their rate of entry. But, three years later, they were deemed non-patrials without a right of abode under the Immigration Act of 1971.⁵ Further, in the words of Lord Lester, 'their second class status is reflected in their new definition as "British Overseas Citizens" in the British Nationality Act 1981'.

This 1981 British Nationality Act provided for the continuation of citizens of the United Kingdom and Colonies as well as for three categories of citizens, viz, British citizens, British dependent territories citizens and British overseas citizens. And the title of Commonwealth citizen is given to all these three classes as well as to the citizens of those Commonwealth countries whose Parliament makes provision for those entitled to Commonwealth citizenship.

In Lord Lester's view: 'Many of its provisions are so obscurely drafted that they are not fit to be on the statute book.'⁶ But Lord Denning has painted a rosy picture: 'We are all

patrials. We are no longer in the eyes of the law Englishmen, Scotsmen or Welshmen. We are just patrials. Parliament gave this new man a fine set of clothes. It invested him with a new right. It called it "the right of abode in the United Kingdom". It is the most precious right that anyone can have.'⁷ Whether this 'most precious right' has been enjoyed by black patrials is another question.

F RECEPTION OF ENGLISH LAW

We must now examine how the new legal systems in the Caribbean came to be 'received' locally.

From the 17th century for about 100 years, colonisation was the order of the day in the region – the British, French, Spanish and Dutch fighting many naval battles to capture various territories. The British were the most successful and, since we are considering only former British colonies, it is to the English common law of colonisation that we must look for the basic rules of 'reception' or (as it is sometimes called) 'adoption'.

Even at that primitive stage, every colonial jurisdiction operated under some system of law and never in a vacuum. But such a system was not always a developed one. In such a case, whenever a settlement took place, English law applied.

In many of the Caribbean territories, there were Caribs and Arawaks who lived simple lives without any *recognised* legal systems. It is in such a situation that, in the first half of the 17th century, Barbados, Montserrat, St Kitts, Nevis, Antigua and Barbuda were all 'settled' by Englishmen and Irish; while Trinidad, Jamaica, St Vincent, Grenada, Dominica and St Lucia were 'ceded' by treaty to the British Crown at the end of various wars.

The following common law rules became applicable.

G IN THE CASE OF SETTLEMENT

If a country that was uninhabited or very sparsely inhabited became settled by the British, the common law rule was that those settlers were deemed to have imported English law with them. To quote Professor Peter Hogg: 'English law followed British subjects and filled the legal void in the new territory.'⁸ However, the settlers took with them only such laws as were applicable to their situation – such importation dating from the date of settlement.⁹ This date was in turn interpreted in the courts as the date of 'the institution of a local legislature in the colony'. The law imported included statute law, equity and the common law, but excluded all laws deemed unsuitable to the needs of the particular colony. In the condescendingly quaint words of Sir William Blackstone:¹⁰

⁷ See Lord Denning, 1980, p 168.

⁸ Hogg, 1985, p 23.

⁹ *Blankard v Galdy* (1693) 2 Salk 411. The law of mortmain did not apply to Grenada when it was conquered.

¹⁰ *Blackstone's Commentaries on the Laws of England*, 1803, Book 1, pp 106–07.

⁴ See *East African Asians v United Kingdom* (1973) 3 EHRR 76, E Com HR.

⁵ See Immigration Act 1971, s 1(1).

⁶ Lester, 1989, p 351. Much of the material in this section on Citizenship is drawn from an article by Lord Lester in Inwell and Oliver (eds), 1989, pp 245–60.

[Besides these adjacent islands] our most distant possessions in America, and elsewhere, are also in some respects subject to the English laws. If an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.

However, in the view of Blackstone, those laws should be restricted to such as are 'applicable to their own situation and the condition of an infant colony'. What he refers to as 'the artificial refinements and distinctions incident to the property of a great and commercial people' are neither 'necessary nor convenient' for natives.¹¹ Thus, it has been held that the law of mortmain did not apply to Grenada at the time of settlement.¹²

H IN THE CASE OF CESSION FROM ANOTHER POWER OR CONQUEST

Where a country is conquered or ceded, the *prevailing* law remained. As Blackstone puts it

[In such a case] they have already laws of their own. The King may indeed alter and change those laws.

But, until the Sovereign takes that step, the ancient laws of the country remain 'unless such as are against the law of God as in the case of an infidel country'. When it is a case of conquest, the territory is subject to the control of Parliament which must pass new laws for the governance thereof under the Royal Prerogative. Thus, the pre-existing private (criminal) law remains in force whereas the Crown's prerogative power operates to pass legislation to provide governmental institutions (by way of public law).

The prerogative power, however, comes to an end as soon as a new legislative assembly is given to a conquered territory and, thereafter, Parliament in the United Kingdom would not legislate for such a colony.

Thus, in the famous case of *Campbell v Hall*,¹³ the King issued a proclamation granting an assembly to the Island of Grenada, which had been conquered from France. Later, the King issued a further proclamation imposing an export tax on the inhabitants of the country. This tax was held to be invalid by the Court of Queen's Bench sitting in England, the prior grant of the assembly being held to terminate the King's prerogative to legislate (except with the authority of Parliament).

Our next chapter considers the rule of law.

THE RULE OF LAW

In order to understand this concept, the context in which Professor Albert Venn Dicey first propounded his interpretation of it in 1885 must be examined. We shall then consider how, in Dicey's view, the rule of law was alleged to have controlled the legality of official action. Finally, we shall see how the doctrine has influenced Caribbean constitutional legal thinking to this day.

THE IDEA AS ORIGINALLY STATED

Dicey's thesis as originally stated was much too sweeping and doctrinaire. It was in fact based on a number of misconceptions as to the constitutional and administrative status quo.

In his now famous work – *The Law of the Constitution* – Dicey laid down three fundamental principles, viz:

- No citizen 'is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers of constraint'.¹
- The 'equal subjection' of all classes to one law administered by the ordinary courts.
- 'The result of judicial decisions determining the rights of private persons' before the courts was what, in Dicey's view, was the non-codified rule of law.

But when the three elements are carefully considered, the fallacies implicit in them become manifest.

As regards the lack of arbitrary government, Dicey considered that the English regime provided certainty of the law, non-discretionary powers and equality before the law. In his own words:

With us every official, from the Prime Minister down to a constable or a collector of taxes is under the same responsibility as any other citizen.

On the contrary, he insisted, the French *droit administratif* provided special provisions protecting officials. However, as Professor WA Robson has pointed out, the statement (about the French position) was based on a misinterpretation of French law which did not, in fact, exempt public officials, but simply permitted dignitaries versed in public administration to determine the extent to which officials were liable in any given case.

In answer to Dicey's second assertion that there was an equal subjection in England of all classes to the laws, Robson pointed to the 'colossal distinctions' between the rights and duties of private individuals and those of administrative cadres in England. Indeed, in

¹¹ *Ibid*, p 107.

¹² *AG v Stewart* (1816) 2 Mer 143.

¹³ (1774) 1 Cow 204, 98 ER 1045.

¹ Dicey, 1965, p 188.