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# The Magna Carta in the West Indies: Absent Past, Tangible Present

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# ABSTRACT

The Magna Carta has been celebrated as the foundation stone of many constitutional systems and human rights matrices in a variety of countries. However, in the West Indies, it is apparent that the principles of the Magna Carta have not been prominent in the history of the region until the preparation of independence constitutions.

The fundamental challenge lies in the failure of British settlers in the British West Indies to apply the principles of the Magna Carta to all persons in the colonies that were settled, conquered or ceded.

Primarily, the laws that were devised to facilitate slavery and the slave trade in the British West Indies regarded African slaves as property and not as people thereby contravening the principles of the Magna Carta.

All of the major textbooks on Commonwealth Caribbean constitutional law make no mention of the Magna Carta with the exception of Sir Fred Phillips’ Commonwealth Caribbean Constitutional Law (2002 : Cavendish Publishing Ltd., London and Sydney, 356 pp).

The paper will examine the attitude of the British imperial courts and the British Parliament towards slaves and demonstrate the diversion from the Magna Carta in the West Indies. At the same time, it will also show that the principles of the Magna Carta came to be embodied in the human rights’ provisions of independence constitutions and legal systems thereby moving it from an absent past into a tangible present.

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# Introduction

"The whole history of the African population of the West Indies inevitably drives them towards representative institutions fashioned after the British model. Transplanted by the slave trade or other circumstances to foreign soil, losing in the process their social system, language and traditions, and with the exception of some relics of obeah, whatever religion they may have had, they owe everything that they have now, and all that they are, to the British race that first enslaved them, and subsequently to its honour restored to them their freedom. Small wonder if they look for political growth to the only source and pattern that they know, and aspire to share in what has been the peculiarly British gift of representative institutions." **1**

This excerpt from Major Wood’s report best encapsulates the story of how the principles of the Magna Carta came to be included in the later constitutions of the former colonies of the British West Indies and had been excluded before. Major Wood (later Lord Halifax) was expressing a view that confirmed the superiority factor that underscored much of the political thought that drove the slave trade and slavery in the British West Indies.

Such political thought was devoid of any reference to the Magna Carta as the basis for the organization of slave society and its sustenance. Indeed, most of the constitutional law texts on the Commonwealth Caribbean make absolutely no mention of the Magna Carta whatsoever with the exception of Sir Fred Phillips’ Commonwealth Caribbean Constitutional Law. **2**

The significance of this fact is that many constitutional law scholars in the region have not been able to make the connection

between the Magna Carta and many of the human rights features of Commonwealth Caribbean constitutions.

Of the twelve independent states in the region, eleven of them have included a Bill of Rights in their constitutions that is based on the European Convention on Human Rights 1950 and one of them (Trinidad and Tobago) has modelled its Bill of Rights in accordance with the Canadian Bill of Rights 1960.

The influence of the Magna Carta on these two source documents has been well-established. In the case of the Canadian Bill of Rights 1960, the following quotation is useful:

“Magna Carta informed the development of Canada’s Bill of Rights, a federal statute from 1960 that was the earliest written expression of human rights law at the federal level in Canada. The Bill of Rights replaced the unwritten rights implied by the 1867 Constitution Act that the new nation would be created ‘with a Constitution similar in Principle to that of the United Kingdom,’ a statement that indicates Magna Carta, the Petition of Right, and the Bill of Rights are all part of the Canadian constitutional tradition.” **3**

This link between the Magna Carta and the Canadian Bill of Rights 1960 is an important dimension in understanding the link of the Magna Carta to the constitution of Trinidad and Tobago.

Likewise, it is important to note that the European Convention on Human Rights 1950 also has a direct link to the Magna Carta. This is best captured in an essay by Mark Rathbone as follows:

“The European Convention on Human Rights was an international agreement which aimed to establish common standards of human rights in the aftermath of the Second World War and the Holocaust. Yet the fact that British lawyers, notably David Maxwell Fyfe, Conservative MP, later Home Secretary and Lord Chancellor, took a leading role in the drafting of the Convention meant that it was heavily influenced by British legal traditions, including the Magna Carta. There were other historic sources of inspiration, notably the French revolutionary Declaration of the Rights of Man, dating from 1789, the US Bill of Rights, ratified in 1791, and the Universal Declaration of Human Rights, adopted by the United Nations in 1948.

The fact, however, that in March 1951 Britain was the first country to ratify the ECHR suggests that it sits comfortably within British legal traditions. The ECHR came into force in 1953 and was eventually incorporated into British domestic law as the Human Rights Act in 1998.” **4**

Rathbone’s assertions are very useful for making the link with eleven independent countries in the Commonwealth Caribbean whose Bills of Rights are modelled after the European Convention on Human Rights 1950. Those Commonwealth Caribbean countries are (I) Antigua and Barbuda, (ii) The Bahamas, (iii) Barbados, (iv) Belize, (v) Dominica, (vi) Grenada, (vii) Guyana, (viii) Jamaica, (ix) St. Kitts- Nevis, (x) St. Lucia, and (xi) St. Vincent and the Grenadines.

The fundamental assertion of this paper is that the enactment of human rights provisions in the constitutions of all twelve independent Commonwealth Caribbean countries represents the final culmination of the journey of the Magna Carta and its principles into these constitutions.

There is clear evidence to show that the colonial state that existed in these countries in the centuries before their independence operated on the basis of exploitation, inequality and injustice at different stages of their development, especially prior to the abolition of slavery in 1834.

The existence of the Magna Carta was ignored by British settlers and officials in the British West Indies to the extent that the philosophy of regarding African slaves as property and not as people was a core legal philosophy of the pre-emancipation era. This philosophy was reinforced by case law such as Gregson v Gilbert **5** otherwise known as the Zing massacre.

The status of colonies that were settled, conquered or ceded also had consequences for the manner in which English law was applied in such colonies. The case of Campbell v Hall **6** is significant in this regard as it confirmed the manner in which these colonies would receive English law.

The case of Somerset v Stewart **7** established that slavery could not be practiced in England, but left open the issue of whether it could be practiced in other parts of the British Empire by virtue of the ambiguity of the judgment of Lord Mansfield in this regard.

With such a legal foundation for the evolution of the constitutional structures and ethos of Commonwealth Caribbean constitutions and societies, consideration will be given to the debate about whether the independence constitutions of these countries were evolved or imported.

To this end, there is clear evidence of a difference of opinion on the subject matter based on the public statements of both Dr. Eric Williams (former Chief Minister, former Premier and former Prime Minister of Trinidad and Tobago) and Norman Manley (former Premier of Jamaica).

At a public meeting on 19th July, 1955 in Woodford Square, Port- of-Spain, Trinidad, before he had entered electoral politics, Dr. Eric Williams said:

"The Colonial Office does not need to examine its second hand colonial constitutions. It has a constitution at hand which it can apply immediately to Trinidad and Tobago. That is the British Constitution. Ladies and Gentlemen, I suggest to you that the time has come when the British Constitution, suitably modified, can be applied to Trinidad and Tobago. After all, if the British Constitution is good enough for Great Britain, it should be good enough for Trinidad and Tobago." **8**

What must be understood here is that Williams’ advocacy of the British Constitution in a suitably modified format was his way of saying that the British constitutional formula was one that should be adopted by importation because there was no meaningful indigenous system of government.

Williams’ manner of thinking can be contrasted with his colleague Premier in Jamaica, Norman Manley, who had this to say in the Jamaican House of Representatives in January 1962:

“Let us not make the mistake of describing as colonial, institutions which are part and parcel of the heritage of this country. If we have any confidence in our own individuality and our own personality we would absorb these things and incorporate them into our being and turn them to our own use as part of the heritage we are not ashamed of.” **9**

In 1962, Manley was not speaking about importing the British constitution and converting it into local usage in the way that Williams had advocated in 1955. Rather he was urging that the existing institutions of the colonial era, which evolved as part of Jamaica’s development, should not be regarded as colonial, but rather as indigenous.

Whichever way one may wish to take this, it is clear that the principles of the Magna Carta only emerged at independence in the Commonwealth Caribbean. In the circumstances, one can say that the history of the Magna Carta in the region can best be described as an absent past and a tangible present.

# Imperial Design and British Presence in the West Indies

The issue of how Great Britain came to acquire colonies in the West Indies is an important part of any discussion about the Magna Carta in the region. Essentially, the Treaty of Tordesillas 1494, concluded between Spain and Portugal, revised a papal bull of 1493 by fixing a line 370 leagues west of the Cape Verde Islands that ceded to Portugal all territory to the east of that line and ceded to Spain all territory to the west of that line. **10**

This partition of the world between Spain and Portugal was soon challenged by other imperial powers. According to Williams:

“On March 5, 1496, Henry VII issued a patent to another sailor, John Cabot, to undertake a voyage of discovery. The date has been called the birthday of the British Empire. Whilst no concrete results were obtained, the patent is of significance. It omitted the words ‘Southern Seas’, thus giving tacit recognition to Spanish and Portuguese discoveries and, to that extent, to the papal document. But its very issuance rejected any interpretation of a partition of the entire world between Spain and Portugal, and was a warning that the English Government regarded ownership as based at least on discovery.” **11**

This approach by Great Britain ushered in an era of overseas exploration that would facilitate the export of English settlers and their values and beliefs to a so-called New World where colonies would be established in the name of the Crown. According to Williams:

“Sir William Cecil (later Lord Burleigh), the Elizabethan statesman, told the Spanish Ambassador to England in 1562 that ‘the Pope had no right to partition the world and to give and take kingdoms to whomsoever he pleased.’ The British Government countered Spanish claims with the doctrine of effective occupation.” **12**

The first method of challenging the Spanish hegemony secured by the Treaty of Tordesillas 1494 by other imperial powers was the use of piracy. This led to a period of plunder and warfare in the Caribbean that is best described by Williams as follows:

“The undeclared war in the Caribbean, in the sixteenth century phrase, ‘no peace beyond the line’, was enshrined in the Treaty of Cateau-Cambrésis of 1559 between France and Spain: ‘west of the prime meridian and south of the Tropic of Cancer….violence by either party to the other side shall not be regarded as in contravention of the treaties.’ The incarnation of this phase of Caribbean history is Sir Francis Drake.” **13**

As the sixteenth century gave way to the seventeenth and the exploits of Francis Drake on the high seas put Great Britain in a better position to challenge Spanish hegemony, it was the commencement of colonisation in the West Indies by Britain that would lead to the export of the Magna Carta to the region. According to Williams:

“It was to permanent settlements in the Caribbean that England and the other European nations turned. In an effort to reinforce one of the expeditions to Guiana, the English made their first attempt to settle in the West Indies, in St. Lucia, in 1605. But the settlement was a failure as a result of the hostility of the Carib Indians. A similar attempt to settle in Grenada four years later failed for the same reason. The Dutch landed on the barren rock of St. Eustatius in 1600, and the Dutch West India Company was established in 1621. In 1623 the English landed in St. Kitts and in 1625 in Barbados.” **14**

The arrival of English settlers in the West Indies would open the door to a prolonged period of colonisation that would later come to include the movement of thousands of persons of African descent to the region from West Africa.

They would come as slaves to work on the sugar plantations as part of what was to become a slave trade that would support the institution of slavery. A triangular trade developed and is adequately described by Williams as follows:

“The combination of the Negro slave trade, Negro slavery and Caribbean sugar production is known as the triangular trade. A ship left the metropolitan country with a cargo of metropolitan goods, which it exchanged on the coast of West Africa for slaves. This constituted the first side of the triangle. The second consisted of the Middle Passage, the voyage from West Africa to the West Indies with the slaves. The triangle was completed by the voyage from the West Indies to the metropolitan country with sugar and other Caribbean products received in exchange for the slaves.” **15**

# The Magna Carta in the British West Indies

The issue of the influence of the Magna Carta on a worldwide scale has been expressed by the Magna Carta 800th Anniversary Committee. This has been challenged by James Melton and Robert Hazell in their co-edited book “Magna Carta and its Modern Legacy” as follows:

“The world is poised to celebrate the 800th anniversary of Magna Carta in 2015. One reason for such a celebration is the Great Charter’s ‘influence’. In the words of Sir Robert Worcester – writing on behalf of

the Magna Carta 2015 Committee – Magna Carta ‘has influenced constitutional thinking worldwide including in France, Germany, Japan, the United States and India as well as many Commonwealth countries, and throughout Latin America and Africa.’ According to the celebration committee, then, Magna Carta has shaped theories of constitutionalism, and perhaps even the contents of constitutions in virtually every corner of the world. Despite the claims of the celebration committee, Magna Carta’s influence is unclear because the term *influence* itself is unclear.” **16**

This line of argument suggests that the Magna Carta has been more influential in the United Kingdom than it has been overseas. In the case of the West Indies, that argument may be substantiated in the colonial past, but there is good reason to believe that the adoption of Bills of Rights at independence based on either the European Convention on Human Rights 1950 or the Canadian Bill of Rights 1960 would confirm the direct influence of Magna Carta.

Writing in the Hazell and Melton co-edited book, Derek O’Brien confirms the absence of the influence of Magna Carta on the legal codes of the slave colonies of the British West Indies. According to O’Brien:

“The idea that English liberty was inextricably linked to English ancestry is particularly helpful in understanding why these settlers did not think twice about denying the freedoms guaranteed by English liberty to the slaves in their midst, who were being imported in increasingly large numbers from West Africa to work on the sugar plantations that sprang up across the region from the mid seventeenth century onwards. Instead, the slave population was governed by a set of laws known as Slave Code Acts. These laws were enacted by colonial assemblies, which were composed mainly of slave owners.

Unsurprisingly, the laws that they enacted were designed to promote the collective interests of the slave owners and offered absolutely no protection or redress to the enslaved population. As we shall see in the next section, these laws were as far removed from Magna Carta and the tradition of English liberty as it is possible to conceive.” **17**

The picture painted by O’Brien captures the complete absence of the Magna Carta in the evolution of slave society in the British West Indies. However, O’Brien does not address the source of the political and social thought that led British settlers in the West Indies to adopt the approach of superiority over the African slaves that allowed the continuation of slave society until emancipation in 1834, nor does he

address the issue of imperial design that led to a British presence in the West Indies.

The sociological insight expressed in the dictum of Major E.F.L. Wood, Parliamentary Under-Secretary of State for the Colonies in his report to the then Secretary of State for the Colonies, Winston Churchill, in 1922 (see fn. 1) is reflective of the philosophy of racial superiority.

O’Brien does not address the phenomenon of racial superiority as the mindset that drove the perpetuation of the legal and political thought that regarded the slaves as property and not as persons. Nor does he address the issue of the economic value of African slaves as the basis for the operation of the slave trade and slavery. While the brutality of the slave codes regarded the slaves as deviant persons who had to be controlled, it was their classification as property that set them apart from the settlers who enslaved them.

The issue of the classification of African slaves as property and not as persons was best captured in the Zong massacre. A good synopsis of the case that became Gregson v Gilbert (see fn. 5) can be gleaned from James Walvin’s book “The Zong” as follows :

“In the last weeks of 1781, the crew of the *Zong*, a Liverpool- registered slave ship, had thrown 132 Africans overboard to their death. The ship was *en route* from Africa to Black River in Jamaica, had overshot its destination and was running short of water. It was reported that the ship’s captain, Luke Collingwood, had ordered the Africans killed, in three batches, in order to reduce the demand for water and to ensure that ‘marketable’ slaves would survive to landfall in Jamaica. The atrocity might have passed virtually unnoticed but for one extraordinary fact : the syndicate of Liverpool businessmen who owned the *Zong* took their insurers to court to secure payment for the loss of the dead Africans. The shipowners were pursuing their claim under well-established protocols of maritime insurance which accepted that enslaved Africans on board the Atlantic ships were insured *as cargo.* Moreover, under certain circumstances, the loss of those Africans could be claimed on the ship’s insurance.” **18**

This summary of the case provides an adequate example of the legal philosophy that informed maritime insurance law at the time, but also confirmed the absence of any Magna Carta influence in those laws. O’Brien mentions the case *en passant*, however, its significance is far more profound in understanding the dichotomy between the foundation of the legal system in England and the application of insurance law in the British colonies and on the high seas.

According to Walvin :

“What stunned people about the *Zong* in March 1783 was not simply the murderous brutality of events on that ship, but the incredible legal saga played out in London – *and* the implications of that legal debate. An English jury, sitting under the watchful gaze of the Lord Chief Justice, Lord Mansfield, ‘rendered a verdict wholly favourable to the owners of the *Zong* for the loss of 130-plus slaves at

£30 each’.” **19**

For many scholars, the *Zong* massacre marked a turning point in the debate over the continuance of the slave trade and ultimately slavery itself. Walvin explains as follows :

“”But the *Zong* case offered a totally new approach to the entire business of maritime insurance. Did an insurance policy cover the deliberate killings of Africans ? The *Zong* legal hearings in 1783 revealed the links between the staid world of insurance and the violent world of the slave ships – and, in the process, the matter was transformed. The insistence of William Gregson and his colleagues that they receive compensation for murdered Africans shifted the entire debate from a technical decision about the law of insurance into a public discussion about the very nature of slavery itself. Before 1783, arcane matters of maritime insurance had been the preserve of

specialist legal debate. Now they were thrown into full public and political view.” **20**

Articles 39 and 40 of the Magna Carta confirm their inconsistency with slavery in the British West Indies and the slave trade that lay at the heart of the triangular trade between England, West Africa and the West Indies.

According to Article 39 of the Magna Carta : “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.” **21**

Article 40 of the Magna Carta read as follows : “To no one will we sell, to no one deny or delay right or justice.” **22**

Objectively speaking, the operative words in article 39 would be “free man” which could be used as a justification to separate the legal status of the English settlers in the British West Indian colonies as opposed to the African slaves who were brought to those colonies who would not have been classified as “free men”.

This could account for the differential treatment meted out to slaves under the Slave Codes as highlighted by O’Brien. However, article 40 is very specific insofar as it does not use any classification between those who are regarded as “free men” and those who are not. There is a blanket statement that : “To no one will we sell, to no one deny or delay right or justice.” (see fn. 16).

In respect of conquered or ceded colonies, where the laws of those colonies would remain in force until such time as English law was introduced by the King or Queen in Parliament, there also appeared to be a clear distinction between the European inhabitants and the African slaves in respect of how the law would view them and the way in which the colonial authorities who took control of colonies after conquest or cession in the name of the Crown would regard them.

There was no distinction about whether or not the recognition of slavery (before 1834) and the slave trade (before 1808) would be deemed unlawful. The 1772 case of Somerset v Stewart (see fn. 7) established that slavery was not legal in England, but in the colonies there was no statement in this case that outlawed it.

# British Law in the Colonies

The 1763 Treaty of Paris that ended the Seven Years’ War between Britain, France and Spain made the following declarations at Articles VIII and IX that pertained to the West Indies :

“**VIII.** The King of Great Britain shall restore to France the islands of Guadeloupe, of Mariegalante, of Desirade, of Martinico, and of Belleisle; and the fortresses of these islands shall be restored in the same condition they were in when they were conquered by the British arms, provided that his Britannick Majesty's subjects, who shall have settled in the said islands, or those who shall have any commercial affairs to settle there or in other places restored to France by the present treaty, shall have liberty to sell their lands and their estates, to settle their affairs, to recover their debts, and to bring away their effects as well as their persons, on board vessels, which they shall be permitted to send to the said islands and other places restored as above, and which shall serve for this use only, without being restrained on account of their religion, or under any other pretence whatsoever, except that of debts or of criminal prosecutions: and for this purpose, the term of eighteen months is allowed to his Britannick Majesty's subjects, to be computed from the day of the exchange of the ratifications of the present treaty; but, as the liberty granted to his

Britannick Majesty's subjects, to bring away their persons and their effects, in vessels of their nation, may be liable to abuses if precautions were not taken to prevent them; it has been expressly agreed between his Britannick Majesty and his Most Christian Majesty, that the number of English vessels which have leave to go to the said islands and places restored to France, shall be limited, as well as the number of tons of each one; that they shall go in ballast; shall set sail at a fixed time; and shall make one voyage only; all the effects belonging to the English being to be embarked at the same time. It has been farther agreed, that his Most Christian Majesty shall cause the necessary passports to be given to the said vessels; that, for the greater security, it shall be allowed to place two French clerks or guards in each of the said vessels, which shall be visited in the landing places and ports of the said islands and places restored to France, and that the merchandize which shall be found therein shall be confiscated.

**IX.** The Most Christian King cedes and guaranties to his Britannick Majesty, in full right, the islands of Grenada, and the Grenadines, with the same stipulations in favour of the inhabitants of this colony, inserted in the IVth article for those of Canada: And the partition of the islands called neutral, is agreed and fixed, so that those of St. Vincent, Dominico, and Tobago, shall remain in full right to Great Britain, and that of St. Lucia shall be delivered to France, to enjoy the same likewise in full right, and the high contracting parties guaranty the partition so stipulated.” **23**

The protection of commercial property and the grant of religious freedom were significant aspects of this treaty. The treatment of the transfer of Grenada and the Grenadine islands on the same basis as the transfer of Canada from France to Britain was significant as it was the basis of guaranteeing religious freedom as between Catholics and Protestants.

Reference was made in Article IX of the Treaty to Article IV as the basis on which the cession of Grenada and the Grenadines was made from France to Britain. Article IV of the Treaty read as follows :

“**IV.** His Most Christian Majesty renounces all pretensions which he has heretofore formed or might have formed to Nova Scotia or Acadia in all its parts, and guaranties the whole of it, and with all its dependencies, to the King of Great Britain: Moreover, his Most Christian Majesty cedes and guaranties to his said Britannick Majesty, in full right, Canada, with all its dependencies, as well as the island of Cape Breton, and all the other islands and coasts in the gulph and river of St.

Lawrence, and in general, every thing that depends on the said countries, lands, islands, and coasts, with the sovereignty, property,

possession, and all rights acquired by treaty, or otherwise, which the Most Christian King and the Crown of France have had till now over the said countries, lands, islands, places, coasts, and their inhabitants, so that the Most Christian King cedes and makes over the whole to the said King, and to the Crown of Great Britain, and that in the most ample manner and form, without restriction, and without any liberty to depart from the said cession and guaranty under any pretence, or to disturb Great Britain in the possessions above mentioned. His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and most effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the laws of Great Britain permit. His Britannick Majesty farther agrees, that the French inhabitants, or others who had been subjects of the Most Christian King in Canada, may retire with all safety and freedom wherever they shall think proper, and may sell their estates, provided it be to the subjects of his Britannick Majesty, and bring away their effects as well as their persons, without being restrained in their emigration, under any pretence whatsoever, except that of debts or of criminal prosecutions: The term limited for this emigration shall be fixed to the space of eighteen months, to be computed from the day of the exchange of the ratification of the present treaty.” **24**

This particular aspect of the Treaty of Paris is important, because it would become the centerpiece of a groundbreaking legal judgment in 1774 in the famous case of Campbell v Hall (see fn. 6) from Grenada which defined the manner in which English law was to be received in settled, conquered and ceded colonies.

This case arose out of a dispute between a servant of the Crown, William Hall, a tax collector, and the plaintiff, James Campbell, over the payment of a certain tax on sugar in Grenada (a former French colony captured by British forces in 1762 and ceded to Great Britain by France by the Treaty of Paris in 1763 as outlined above).

In delivering the judgment of the Privy Council, Lord Mansfield, said, ***inter alia***, that:

“A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King’s protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there.

Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

The 5th, that the laws of a conquered country continue in force,

until they are altered by the conqueror : the absurd exception as to pagans, mentioned in ***Calvin’s Case***, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty’s further pleasure be known.

The 6th, and last proposition is, that if the King (and when I say King, I always mean the King without the concurrence of Parliament)

has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles : he cannot exempt an inhabitant from that particular dominion, as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.” **25**

This argument clearly established that in conquered or ceded colonies the existing law remained until altered by the Crown under its prerogative or by the Legislature. The differences where settled colonies are concerned were very clear. According to Sir William Dale :

“1. In a settled colony the basic law was the law of England, because Englishmen carried it there with them, as their personal law. The common law, equity and the statutes were included.

2. But the settlers took with them only so much of the English law as was applicable to their own situation and the condition of an infant colony.” **26**

This view is confirmed by Sir Kenneth Roberts-Wray when he says :

“At common law, British subjects who settle in a country without an organised government carry English law with them; and though the Crown has a constituent power, it cannot make ordinary laws for them. They appear to have some sort of inherent right to expect the Crown to grant them the means to legislate for themselves, but being unenforceable, it cannot be a legal right; and it is submitted below that, if the Crown remains inactive, they have a common law right to provide those means for themselves until the prerogative power is brought into action. These general principles can, it is submitted, apply only to settlers properly so called; they cannot extend to a remote area, for example in the Antarctic, where there are no permanent residents and human beings reside only for short tours of service.” **27**

The reality expressed here is that English law is exportable by settlers to colonies and will have the force of law there. Therefore, Roberts-Wray concludes as follows :

“In a settled Colony, established or recognized by the Crown, the legislature owes its existence and its authority to the exercise of the Prerogative. The Sovereign’s will might be expressed in a charter (Letters Patent) or by instructions to the Governor given by his Commission or otherwise.” **28**

Having established that colonial legislatures were created under certain limitations depending upon whether the colonies in question were settled, conquered or ceded, it is important to note that the question of the competence of these legislatures to function in competition with the Imperial Parliament in London was subsequently addressed in the nineteenth century.

The Colonial Laws Validity Act 1865 **29** came into being out of a response to a number of judgments given by Mr. Justice Boothby of

the Supreme Court of South Australia. While the issues that his judgments raised became the subject of three opinions of the Law Officers on the United Kingdom (25th March and 12th April, 1862 and 28th September, 1864), the Act itself cleared up many doubts about the powers of colonial legislatures.

The long title of the Act was “An Act to remove Doubts as to the Validity of Colonial Laws” and the preamble to the Act read as follows :

“Whereas Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty’s Colonies, and respecting the Powers of such Legislatures, and it is expedient that such Doubts should be removed :…..” **30**

This Act introduced the concept of repugnancy as a basis to void any law enacted by a colonial legislature if that law was repugnant to British law. That doctrine would remain in place until the Statute of Westminster 1931 **31** when it was removed for the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

This alteration emerged out of resolutions adopted at two Imperial Conferences that were held in 1926 and 1930. Section 2 of the Statute of Westminster read as follows :

“2. – (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.” **32**

This particular collection of words would come to represent the template that would be used in many Independence Acts for various former colonies of Great Britain when they became independent.

Indeed, section 2 of the Statute of Westminster can be found almost word-for-word in sections 1 and 2 of the First Schedule of the Trinidad and Tobago Independence Act 1962. **33**

A part of the independence arrangements for former colonies of Great Britain was the removal of the doctrine of repugnancy to British law in respect of the powers of the Parliaments that were created in these former colonies.

In many respects, the doctrine of repugnancy to British law prevented the legislature of any colony from making any enactments or introducing any measures that would have violated the Magna Carta and its principles in any British colony.

# Adoption of Magna Carta Principles

The adoption of the Magna Carta principles into the constitutions of the independent Commonwealth Caribbean countries did not happen by direct acknowledgement. Instead, these principles have come to

the region through the adoption of the principles contained in either the European Convention on Human Rights 1950 or the Canadian Bill of Rights 1960 suitably modified for insertion in the constitutions of the respective countries adopting them.

Commonwealth Caribbean law books are devoid of references to the Magna Carta in their indices with the exception of Sir Fred Phillips’ Commonwealth Caribbean Constitutional Law (see fn. 2). The most recently published book on constitutional law in the Commonwealth Caribbean, namely the second edition of the book Changing Caribbean Constitutions by Dr. Francis Alexis in 2015 **34** makes no mention of the Magna Carta in its 671 pages.

There is a debate that O’Brien engages about the issue of the influence of the Magna Carta in the Commonwealth Caribbean. He engages this debate on the following grounds :

“In the post-independence era, the legacy of English liberty bequeathed by the original settlers has continued to define and shape the rights and freedoms of Commonwealth Caribbean citizens by restricting them to their pre-independence incarnation. Not only has this undermined the normative force of the Independence Constitutions, but in so doing, it has evoked a source of law that is inextricably associated with the colonial era and slavery.” **35**

Here O’Brien relies too heavily on the link between British settlers and the link to the era of slavery to undermine the reliance on the Magna Carta that was largely ignored in the pre-emancipation period to make his point.

O’Brien does not make the connection between the influence of the Magna Carta on either the European Convention on Human Rights 1950 or the Canadian Bill of Rights 1960 and their adoption in the independence constitutions of the twelve independent countries of the region.

Reliance on the slave trade and slavery narrative causes him to miss the incorporation of the Magna Carta principles in the Bills of Rights of these countries which goes beyond the issue of English common law and its reception in the legal systems of these countries.

The fact that all of the independent countries of the Commonwealth Caribbean, with the exception of Trinidad and Tobago, adopted the model of the European Convention on Human Rights 1950 raises the question of why did Trinidad and Tobago deviate in its adoption of the Canadian Bill of Rights 1960 model for its independence constitution.

This came about as a consequence of proposals advanced by the Bar Association of Trinidad and Tobago at the Meeting of commentators on the Draft Constitution at Queen’s Hall over the period 25th-27th April, 1962. The President of the Bar Association at that time, Mr. (later Sir) Hugh Wooding made a plea at the Queen’s Hall Conference for the adoption of the Canadian Bill of Rights, suitably amended, to replace the model of the European Convention on Human Rights that was included in the Draft Constitution for Trinidad and Tobago’s Independence.

Mr. Wooding said, inter alia :

“Surely if we find that the principle or the form or the contents of the Canadian Bill of Rights is such as can be acceptable generally, we can adapt it to circumstances. We can surely adapt the thing as at the present time this Draft Constitution has taken a number of its provisions from precedents which have gone before. We have adapted things, amended them, added certain things, deleted certain things, and in the same way we can take the Canadian Bill of Rights and adapt them to suit us, and I do not see why we should be limited to choosing the Canadian Bill of Rights as it is or refusing to consider it altogether. I put forward, on behalf of the Bar Association, that it should be taken as a model, and it should be used as a means whereby we can help to shape our thinking in the matter, modifying it to the extent that may be necessary, and remembering also that this Canadian Bill of Rights is something which came into existence in 1960 and forms no part of the Constitution of Canada.” **36**

The proposals advanced by Mr. Wooding and the Bar Association of Trinidad and Tobago were considered by the Cabinet, together with other proposals made at the meeting. The Chairman of the Queen’s Hall Conference made the following statement at the commencement of the proceedings on Friday 27th April, 1962 :

“I am happy to be in a position to inform you, on the authority of the Cabinet, that your written comments and your suggestions made in this Hall have received preliminary consideration. Further detailed consideration will of course be given to them but already certain decisions have been taken. These decisions are that at the Joint Select Committee to begin on Monday the Government representatives will propose :…..(c) the substitution for Chapter II of a Bill of Rights along the lines of the Canadian Bill of Rights with appropriate modifications including the introduction of safeguards. (Applause).” **37**

This extract from the verbatim record of the Queen’s Hall Conference is crucial to an understanding of how Trinidad and Tobago deviated from the European Convention on Human Rights 1950 and

adopted the model of the Canadian Bill of Rights 1960 for its Bill of Rights in its independence constitution. The above quotation marks the exact moment of transfer from one model to the other and that change was retained throughout the Joint Select Committee that considered the revised draft constitution (9th-16th May, 1962) as well as the Marlborough House Conference that considered the Independence constitution (28th May-8th June, 1962).

It is through these bills of rights that the principles of the Magna Carta worked their way into Commonwealth Caribbean constitutions as opposed to any reliance on English common law.

# END NOTES

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