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The Birthright of Englishmen

by Mr Justice B.H. McPherson CBE

From the first settlement in Virginia in 1607 until the retrocession of Hong Kong in 1997, the British overseas empire spanned just 10 years short of four centuries. It is remarkable that it was only in the last quarter of that period of four hundred years that British governments first adopted a systematic policy of extending English law to the colonies and possessions under their control.

Other colonial powers of Europe managed the matter rather differently. The vast Spanish empire was governed by a compilation of some 16,000 rulings on particular questions submitted to the imperial council in Madrid. In default the law of Castile was applied. The trading settlements of the United Provinces in Batavia, America and the Cape were ordered to apply the Roman Dutch law of Holland. Its remnants survive in South Africa and Sri Lanka. In 1663 King Louis XIV decreed that Canada and the French possessions of the West Indies should use the Custom of Paris as their law.

England did nothing but make it more, rather than less, difficult for its colonies to adopt the English legal system. It was a matter that ranked high on the list of grievances of the colonists in the American Declaration of Independence.

There were several different ways in which English law could be extended to possessions overseas had it been chosen to do so. One was to invoke the powers of the imperial Parliament. As a matter of history, there were only three occasions when the British Parliament legislated directly to impose a legal system on any of the colonies abroad. Ironically, the first of these was not to introduce English law but, by the Quebec Act of 1774, to restore French civil law to the captured province of Canada. The other two instances were when English law was applied to Newfoundland in 1794 and to eastern Australia in 1828 by the Australian Courts Act in 1828. In both cases it was done only because there was a constitutional doubt about the competence of the colonial legislature to take that step itself.

It was not until as late as 1890 that a systematic policy was adopted of extending English law to places under British control. Curiously, the method then used was for the Crown to make Orders in Council under the Foreign Jurisdiction Act of 1890. In that way, English law was applied to Uganda, Kenya, Zanzibar, Nyasaland (Malawi), and
Northern Rhodesia (Zambia) in Africa, and to the islands of the Pacific under British rules.

The Foreign Jurisdiction Acts and its predecessor of 1846 call for some explanation. In the 16th century, the nations of Europe succeeded in extracting from the Sultan of Turkey treaties or "capitulations" authorising them to establish consular courts in territories under his rule in order to administer justice according to their own laws to their nationals trading in the Turkish empire. In the case of British subjects, this practice evolved into an institution with the grand title of "Her Britannic Majesty's Supreme Consular Court in the Dominions of the Sublime Ottoman Porte". Sitting at Constantinople, it dispensed justice according to English law to British subjects and others throughout the Sultan's empire, including Admiralty law in the Straits of the Dardanelles.

From 1864 a comparable Supreme Court for China, Japan and Korea sat in Shanghai. It was so busy that in the 20 years from 1900 there were more appeals from it to the Privy Council than from anywhere else except Canada. A similar system of treaties entered into by the East India Company with the Mogul Emperor set in train the events that were to establish English law as the common law, first in the Presidency towns of Bombay, Madras and Calcutta, and ultimately in what are now India, Pakistan, Bangladesh, Burma, Malaysia and Singapore.

Elsewhere there were three methods by which English law could become the law of the overseas plantations and colonies. Almost everywhere, it was the result of colonial legislation specifically adopting English law locally. That is true of at least 45 out of the 50 states of the United States, as well as the West Indies, and much of Canada. In the remaining few American States, English law seems to have been adopted judicially, leaving only Louisiana, like Quebec, with French civil law but English criminal law, as the odd man out.

That was the primary method by which English law was received overseas. The second method by which English law might become the local legal system was through the exercise by the Crown of its power to legislate for conquered territories. The prime example of this was the Royal Proclamation of October 1763. The Treaty of Paris, which ended the Seven Years War in February 1763, left Britain as the greatest single maritime and trading power in the world. Among the colonial trophies collected by the victor in 1763 were French North America and the French islands in the West Indies.
including Granada, St Vincent, Dominica and Tobago, as well as the whole of Spanish Florida. To all of these, the English legal system was extended by a single prerogative legislative act in the form of the Royal Proclamation of 1763.

The Crown was able without the assistance of Parliament to make laws for conquered territory because of the decision in Calvin's Case in 1608. What Calvin's Case established was that the King (meaning the English government) could legislate for any territory that was acquired by conquest or treaty of cession. In Campbell v Hall in 1774, Lord Mansfield added the critical proviso that the Crown's power to legislate was exhausted once a representative assembly was established, or even in that case of Grenada, simply promised to the local inhabitants. Once that had happened the Crown could no longer legislate for such a colony Campbell v Hall was therefore the first landmark on the road to colonial independence.

The next great accession of territory to British rule came as a result of the French Revolutionary and Napoleonic Wars. Great Britain acquired the island of St. Lucia in the West Indies (after which the University of Queensland campus is named), and also Mauritius and Seychelles from France as well as Trinidad from Spain, and Guyana, Ceylon and the Cape from the Dutch. Strangely, on this occasion, the Crown did not apply English law to any of these conquests, but left them in possession of their own legal systems.

What is more remarkable, there was another complete reversal of policy after World War I. Partly for reasons of administrative convenience, English law was applied to the mandated former German territories in East and West Africa and the Pacific. More accurately, the law of the neighbouring British territory was applied, which is why German New Guinea acquired Queensland law from Papua, and Samoa received the law of New Zealand. After World War II, the Marshall and the Caroline Islands opted for Anglo-American law, having within the previous half century earlier suffered a succession of: (a) the Spanish; (b) the German; and (c) the Japanese legal systems.

The remaining method by which English law was received in English and later British settlements around the world was by the operation of the colonial birthright doctrine. When an Englishman goes abroad, so it was said in 1720, he carries English law with him. If you read the books on this subject and can remember what you learned at law school, you will probably give the credit for the colonial birthright theory to Blackstone. In fact, the authority for this rather romantic notion is to be found in an
Anonymous decision of the Privy Council in 1722, which was not reported until nearly a quarter of a century later. Precisely where this doctrine came from is not altogether easy to say, but it also has a close association with the decision in Calvin's Case in 1607.

When James VI of Scotland became James I of England on Queen Elizabeth's death in 1603, he arrived in London brimful of ideas for a close union of the two kingdoms. Except as regards the union jack (which is said to have been his design) and the royal coat of arms (the lion and the unicorn), his plans were almost completely unsuccessful. A fusion of the Parliaments was rejected in both England and Scotland. So was a merging of the two legal systems. Neither the English nor the Scots Parliament would accept his proposal for a single British nationality.

Defeated in the Parliament on that point, the King turned to the courts of law. A fictitious case was brought before all the judges of England. It concerned an equally fictitious Scot, Robert Calvin, so named because of his religion, who was supposed to have inherited land in Shoreditch on his birth in Edinburgh following the accession of James I to the English throne. If he was an alien, he was at common law not entitled to inherit land in England.

The King, it should be noticed, was himself born in Scotland, which had prompted serious doubts about his right to inherit the English crown. With one dissentient, all the English judges held that Robert Calvin was an English, as well as a Scots, subject of the King. To the lasting dissatisfaction of both, in law Scots became English and English became Scots.

Despite their protestations of loyalty, the judges in Calvin's Case had an ulterior motive. They, and especially that arch Anglophile, Sir Edward Coke, wished to protect English law (that “quintessence of human reasoning”) from royal plans to combine it with Scots law in a single new legal system. The way the judges went about it was extremely subtle. If a King came to the throne by conquest, they said, he could change the laws of the land in the exercise of his prerogative power to legislate. If, however, he came to the throne by the laws of the land, he acquired the Crown of England by right of birth or “birthright”. That being so, he could not alter the common law under which he acquired that birthright without also jeopardising his claim to the throne. Just as he had under common law a birthright to succeed to the throne, so every Englishman had a birthright in the common law, which could not be taken from him. If
therefore the King pursued his plans to unify English and Scots law, he would prejudice his title to the English crown. In consequence, after 1608, the King’s plans for unifying English and Scots law suddenly lost most of their urgency.

*Calvin’s Case* established that a person born anywhere in the King’s dominions, including the colonies, was an English subject. *Ergo*, he was entitled to English law as his birthright. The reasons in *Calvin’s Case* are a strange mixture of medieval feudal law, half-baked Roman and English history, and quotations from the Bible. At one point Coke refers to St. Paul. After his conversion to Christianity the great Apostle, you will recall, paid a visit to the Temple, where he became involved in strenuous disputation with the Jewish religious leaders about the merits of the Christian religion. It became so heated that it led to a breach of the peace, which stopped only when the Roman soldiers arrived to arrest Paul. He was bound and taken off to the police station to be interrogated which, in the Roman way, would be carried out by scourging, with scant respect for the Judges’ Rules.

However, on the way to this interview, Paul let slip that he was a Roman citizen by virtue of his birth in Tarsis, “no mean city”, he called it. Strewnth, said the Roman soldier, I had to pay good money for my citizenship while you got yours free. On arriving at the police station, the guard anxiously whispered news of Paul’s national status to the officer in charge. Both of them were well aware there was an ancient Roman statute (*lex Julia de vi publica*) that forbade Roman citizens from being either manacled or scourged. Paul was set free, leaving the Roman soldiers no doubt hoping they would not be reported to the CJC.

The lesson would not have been lost on English people, who at the time were great readers of the Bible. Racially Paul was not a Roman but a Jew, born not in Rome but in a distant city in Asia Minor under Roman rule, who was entitled to immunity under Roman law simply because by birth he was a Roman citizen. As such, he carried with him the rights of a Roman citizen to other parts of the Roman empire as remote as Palestine. The rights of an Englishman born abroad in the dominions of the King could hardly be less than those of a Roman citizen. Not only did an Englishman carry his law with him when he went abroad, but it was the birthright of every Englishman born in the King’s dominions, whether in England, Scotland, Ireland or the colonies. It was the obstinate refusal of the British government to acknowledge this truth that generated the American War of Independence. No taxation without representation was, they claimed,
the right of every Englishman. So was trial by jury and the benefit of British statutes. Denial of these and other rights of Englishmen are the major complaint put forward in the Declaration of Independence.

The irony of it all is that the Americans rebelled against British government because it was ignoring their legal right to be treated as Englishmen.

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