The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism

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Keywords

Rule of Law – British Overseas Territories – Imperial Constitutionalism – Colonial Laws Validity Act – Falkland Islands – Chagos Islands

Abstract

The scale of the injustice inflicted upon the Chagossians by the United Kingdom is self-evident, but their legal route to redress has proven opaque and fraught with difficulty, as illustrated by the House of Lords' majority decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453. This disconnect is, nonetheless, inherent in the UK's constitutional order. Constitutions outline the operation of governance orders, with constitutionalism injecting substantive principles into this picture, developing the relationship between the holders of power and those subject to its exercise. But not all constitutionalising projects are devoted to the same ends. The legal saga of the Chagossians throws into sharp relief the disparity between the imperial constitutionalism which was constructed to organise the governance of the United Kingdom's colonial possessions in the mid-nineteenth century and the principles which supposedly underpin its liberal democracy in the twenty-first. The denial of substantive protections for a

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colonised community against unchecked and oppressive exercises of executive power sits uneasily with the prevailing understandings of the United Kingdom's constitutional arrangements, even though the constitutional architecture of the British Empire was designed to achieve this very end. Drawing upon archival material which highlights how differently the Chagossians were treated from 'settler' communities such as the Falklanders, our paper reassesses the Chagossians' legal struggle in light of the hurdles that this bifurcated constitutional order places in their path, and the significant impacts of their efforts to navigate these barriers to justice upon this constitutional structure.

Introduction

The British Empire's continuing influence over constitutionalism within the United Kingdom's (UK's) contemporary governance order is easily underestimated. Few UK constitutional theorists continue to dwell on the distinction between settled, ceded and conquered colonies,[1] upon the relationship between the Empire's colonies and the UK which ultimately came to be conditioned by a 'mid-Victorian web of statutes',[2] or even upon the European Convention on Human Rights' colonies clause.[3] It is not simply that the imperial constitutional project, given effect by such measures, has lost much of its contemporary relevance since the winding up of much of the British Empire; from the nineteenth century

[1] For a previous generation of constitutional scholarship the Empire was very much regarded as a constitutional laboratory, see I. Jennings and C.M. Young, *Constitutional Laws of the British Empire* (Clarendon Press, 1938). Malgoldi's re-examination of Jennings' work flags up how coverage of Jennings' work on constitutionalism in colonial contexts has been 'almost completely absent from accounts of his life and work' by UK constitutional scholars; M. Malagodi, 'Ivor Jennings's Constitutional Legacy beyond the Occidental-Oriental Divide' (2015) 42 JLS 102, 103.

[2] P. McHugh, '"The Most Decorous Veil which Legal Ingenuity can Weave": The British Annexation of New Zealand (1840)' in K. Grotke and M. Prutsch (eds), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (OUP, 2014) 300, 306. See, for late nineteenth-century discussion of a range of the UK's colonies W. Anson, *The Law and Custom of the Constitution* (3rd edn., Clarendon Press, 1908) vol. II, pt. II, 58-96.

[3] European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953), Art. 56. This provision was examined D. Kritsiotis and A.W.B. Simpson, 'The Pitcairn Prosecutions: An Assessment of Their Historical Context by Reference to the Provisions of Public International Law' in D. Oliver (ed), *Justice, Legality and the Rule of Law: Lessons from the Pitcairn Prosecutions* (OUP, 2009) 93, 126.

onwards the Empire was deliberately developed as a constitutional project which was substantially offset from 'domestic' UK constitutionalism as an 'external dimension' to its constitutional order.[4] But this distinct manifestation of 'transnational' constitutionalism has never completely gone into abeyance.[5] Indeed, with regard to the remaining British Overseas Territories, the imperial constitution continues to provide an awkward counterpoint to prevailing domestic constitutional orthodoxy.[6]

In this contribution we examine how the Chagossians' legal campaign against their expulsion from the British Indian Ocean Territory (BIOT), and the Crown's subsequent denial of their rights of return in light of the defence interests generated by the military base on Diego Garcia, has exposed and challenged some of the most controversial aspects of imperial constitutionalism.[7] Our previous work on the Chagos litigation sought to explain some of the more supine judicial responses to the Crown's actions in light of its imperial rationalisation of the Chagossians' treatment.[8] In this contribution we turn to address how the Chagos litigation was shaped by, and has in turn reshaped, the nature of imperial constitutionalism. We first unpack the clash of constitutional paradigms inherent within the Chagossians' treatment, examining the precepts of the imperial constitutional order applicable to the BIOT. As we demonstrate, the Crown came to rely upon the leeway granted by imperial constitutionalism to justify the Chagossians' treatment in the 1960s and 1970s. But as the second part of this contribution highlights, this approach exacerbated tensions within the imperial constitutional order, and became difficult to sustain in light of how

[4] For a careful analysis of some of these connections, see T. Poole, *Reason of State: Law, Prerogative and Empire* (CUP, 2015) 17.
[5] See D. Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 OJLS 751, 752-753.
[6] See C. McLachlan, *Foreign Relations Law* (CUP, 2014) 21.
[7] Many of the contemporary sources refer to the settled population of the Chagos islands up to the 1970s and their descendants as the Ilois, but this term attracted 'pejorative connotations' following the islanders' expulsion and subsequent poverty in Mauritius (See *Chagos Islanders v Attorney-General* [2003] EWHC 2222 (QB), [10] (Ouseley J)). We therefore use the label Chagossians for this community, which many of the islanders have adopted to maintain a direct association with the Chagos Islands, except were original sources discussing the 'Ilois' are directly quoted.
[8] T. Frost and C.R.G. Murray, 'The Chagos Island cases: The Empire Strikes Back' (2015) 66 NILQ 263.

differently the Falklanders were treated by comparison to the Chagossians. Although the Foreign and Commonwealth Office (FCO) would continue to exploit the imperial constitution to prevent the Chagossians' return, these antimonies obliged officials to re-evaluate and repackage the Crown's actions. This shift was, however, more presentational than substantive. Not that substantive change could ultimately be avoided, for the final part of our contribution demonstrates the crucial role played by the Chagossians' campaign in the UK's Courts' subsequent (and ongoing) reshaping of the imperial constitution.

The Divide between UK Domestic and Imperial Constitutionalism

The differentiation of the arrangements covering an imperial centre and its colonies is an established, if not celebrated, theme within constitutional discourse on empire.[9] It is as old, at least, as Thucydides account of Pericles' warnings to democratic Athens about the consequences of holding its wider empire 'like a tyranny'.[10] Even in the British Empire's prime, amid concerns over the fate of the ancient empires of Athens and Rome, the impetus to separate and delimit the imperial project from the UK Constitution loomed large in statecraft.[11] The assertions of raw power permitted under imperial law were marginalised within more refined accounts of the UK's constitutional order. Little of Dicey's *Introduction to the Study of the Law of the Constitution*, for example, is devoted to the relationship between the UK and the colonies, beyond repeatedly asserting Parliament's sovereignty over

[9] See P. Fitzpatrick, *The Mythology of Modern Law* (Routledge, 1992) 107 and N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003) 35.

[10] Thucydides, *History of the Peloponnesian War* (C.F. Smith, trans., Heinemann, 1980) 2.63. See D. Teegarden, *Death to Tyrants!: Ancient Greek Democracy and the Struggle against Tyranny* (Princeton University Press, 2013) 15-56.

[11] See, for example, J. Morley, *The Life of Richard Cobden* (Chapman & Hall, 1879) vol. II, 361, as discussed in D. Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton UP, 2016) 126. For further examples of the concern of imperial practices polluting the legal systems of the 'home countries' see R. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP, 2005) 473.

the colonies.[12] Later editions of his work glanced over the self-governing colonies in its introduction, in an avowed effort to promote a civilising and liberal vision of the Empire.[13] Beyond the predominantly white-settler populations of those colonies, however, his account of the interplay between enabling and disabling features within the UK's governance order was largely 'irrelevant' in other colonial governance contexts.[14] The Crown Colonies were addressed in *Law of the Constitution* only indirectly, for example in the context of his coverage of martial law.[15] This focus demonstrates the degree to which Dicey, like many other nineteenth-century theorists, sought a 'vast, secure and strong empire but one with a relaxed legal accountability of authority'.[16]

The constitutional order within the British Empire was thus bifurcated (even as it claimed to be 'undivided'[17]); in Seeley's famous dictum the UK found itself acting in a manner which was 'despotic in Asia and democratic in Australia'.[18] The UK and its settler colonies, in other words, maintained constitutional systems underpinned by a range of fundamental principles 'as the birthright of every subject, so wherever they go they carry their laws with them'.[19] Depending on the ethnic and racial make-up of such a colony, such

[12] See R.A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (University of North Carolina Press, 1982) 150. For discussion of more recent examples of quintessentially 'English' constitutional narratives, see Poole (n.4) 10.

[13] A.V. Dicey, *An Introduction to the Study of the Constitution* (8th edn, first published 1915, Liberty Fund, 1982) xlii-liv.

[14] M. Lobban, 'Habeas Corpus, Imperial Rendition, and the Rule of Law' (2015) 68 CLP 27, 54.

[15] Dicey (n.13), 185. Although Lino establishes, through a painstaking evaluation of Dicey's thinking on the Empire as a constitutional order in his other writings, that 'Dicey was never entirely clear about the constitution's territorial bounds', the differences between these writings and the more influential *Law of the Constitution* only serves to emphasise the distinction between the Empire and the UK Constitution; Lino (n.5), 760.

[16] Kostal (n.11), 482. Dicey's support for empire was conditioned by what he saw as the need for the UK to have the capacity to respond to external threats; 'In an age … of huge military States … [t]he day of small States appears to have passed. We may regret a fact of which we cannot deny the reality.' A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd edn, first published 1914, Liberty Fund, 2008) 323.

[17] R. Ekins, 'Constitutional Principle in the Laws of the Commonwealth' in J. Keown and R.P. George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP, 2013) 396, 404.

[18] J.R. Seeley, *The Expansion of England* (first published 1883, University of Chicago Press, 1971) 141. See D. Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860-1900* (Princeton University Press, 2009) 108-113.

[19] W. Blackstone, *Commentaries on the Laws of England* (first published 1765-69, University of Chicago Press, 1979) Introduction, ch 4, 104-105. See Anson (n.2), 76.

principles could be reduced in practice to a little more than a tincture of the UK's domestic constitutionalism.[20] This was not replicated within conquered or ceded colonies. In such territories the early phases of British imperialism were managed under the principle laid down in *Calvin's case*[21] and affirmed in *Campbell v Hall*,[22] whereby the pre-existing legal order persisted after the UK claimed sovereignty over a territory, but was liable to be overlaid by new laws imposed by imperial administrators.[23] Within Crown Colonies a common feature of their governance remained 'the irresponsibility of the executive to a representation, in any form, of the people of the colony'.[24] Indeed, granting a Crown Colony a representative assembly changed its character, curtailing the Crown's ability to legislate by Order in Council.[25] It was enough that colonised peoples gained the 'protection' of the British Empire, under imperial constitutionalism allowed the Crown to define the nature of that relationship.[26]

How the Crown should use these sweeping legal powers within Crown Colonies was debated at length between the seventeenth and twentieth centuries.[27] Many of the major protagonists in this debate were, nonetheless, united by their chauvinistic regard for the UK's modes and institutions of governance. Part of the vision of adherents to liberal imperialism was to "civilise" the legal orders of Crown Colonies by outlawing barbarous practices and imposing in their place a common law system and rules which they regarded as self-evidently superior to other legal orders.[28] More utilitarian voices emphasised instead that common law rules were more familiar to colonial administrators than the pre-exiting legal order, and

[20] See L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press, 2016) 51.
[21] *Calvin's case* (1608) 77 ER 377, 398.
[22] *Campbell v Hall* (1774) 98 ER 848, 897 (Lord Mansfield).
[23] See G. Loughton, '*Calvin's Case* and the Origins of the Rule Governing Conquest in English Law' (2004) 8 Australian Journal of Legal History 143, 159-161 and Poole (n.4) 11 and 152.
[24] Anson (n.2), 64.
[25] See *Campbell v Hall* (n.22), 898.
[26] See Benton and Ford (n.20) 85. As our earlier work addresses, the expulsion of the Chagossians from the BIOT sunders any notion that their relationship with the UK involves reciprocal obligations; Frost and Murray (n.8) 285-286.
[27] See Bell (n.18), 211-362.
[28] See R.J.C. Young, *Colonial Desire: Hybridity in Theory, Culture and Race* (Routledge, 2005) 27 and K. Mantena, *Alibis for Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2010) 22-30.

emphasised that alterations to a legal order should be to facilitate administration of a colony for the benefit of the Empire as a whole.[29] Neither of these accounts held out the prospect of the Crown Colonies being governed in accordance to the constitutional values prevailing within the UK; '[t]he British Constitution was to be found in no other part of the world but in this country'.[30] As subsequent constitutional developments have enriched the UK's domestic constitutional order its divergence from the remnants of the UK's imperial constitutional order has become ever more apparent. In the domestic context executive action became increasingly constrained by respect for a range of fundamental principles, whereas in the imperial context a 'thinner rule of law' often persists.[31] As a result, although UK governance came to be channelled through liberal and democratic constitutional mechanisms, its remaining colonies (or British Overseas Territories as they have been re-badged[32]) were preserved as a constitutional space apart, permitting the Crown to more freely pursue imperial interests.

The expulsion of the Chagossians from the BIOT and their legal campaign for a right of return therefore exposes ingrained paradoxes within the UK's intertwined and yet divergent constitutional orders. One landmark moment in the Chagossians' litigation, the 2008 House of Lords' majority decision in *Bancoult*, is regularly presented as an affront to the principles underpinning the UK Constitution.[33] The majority judges were not, however, hoodwinked by clever advocacy on the FCO's behalf into neglecting key tenets of the UK's constitutional order.[34] Nor were they manoeuvred into a position of determining the case according to the precepts of imperial constitutionalism, under which the ministers hold all of

[29] See Benton and Ford (n.20) 77-78.
[30] H. Brougham MP, HC Debs, vol. 20, col. 616 (13 Jun 1811). See J. Epstein, *Scandal of Colonial Rule: Power and Subversion in the British Atlantic during the Age of Revolution* (CUP, 2012) 275-276.
[31] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067; [2000] EWHC 413 (Admin), [56] (Laws LJ).
[32] British Overseas Territories Act 2002, s.1(1).
[33] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453. See S. Juss, '*Bancoult* and the Royal Prerogative in Colonial Constitutional Law' in S. Juss and M. Sunkin, *Landmark Cases in Public Law* (Hart, 2017) 239, 253.
[34] A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (OUP, 2013) 55.

the cards. Instead this case saw the House of Lords attempt to meld the two streams of constitutional jurisprudence. With the Court riven by divisions over this task, the resulting judgment does not provide a coherent account of a combined constitutional order. Some of the firewalls established by imperial constitutionalism to minimise the exposure of the colonial authorities to legal challenge were breached, but enough remained in place to thwart the Chagossians. This outcome requires us to examine why imperial constitutionalism proved so resilient, even in the face of twenty-first century constitutional values.

The Falkland Islands Dilemma

The late imperial conduct of successive UK Governments threw up many unedifying contradictions. A matter of days after the UK Government concluded a belated and mean-spirited deal to compensate the Chagossians for their enforced expulsion in early 1982, Argentina invaded the Falkland Islands, and comparison between the UK's dealings with the two groups of islanders became inevitable. Even as fighting raged on the Falklands, UK diplomats warned that Argentina was seeking to capitalise on the comparison. In the words of one urgent telegram from the UK Embassy in Madrid, '[t]he Argentinian claim that in contrast to the Falkland Islands case, 1200 people were removed from Diego Garcia and not consulted is gaining currency'.[35] In response the Foreign Secretary, Francis Pym, recapitulated the justifications for the Chagossians' treatment which had been developed in the 1960s.[36] The Chagossians 'were essentially transit workers on copra plantations employed on a contract basis' and that on the closure of the plantations they 'were given the choice of having their contracts terminated and being returned to Mauritius or being transferred to

[35] UK National Archives, FCO 31/3461, Telegram Number 313 of 1 June 1982 (Madrid 011545Z to Priority FCO).
[36] For an explanation of the original justifications for the expulsions from the BIOT, see Frost and Murray (n.8), 268-272.

plantations on other islands in the British Indian Ocean Territory' and 'the British Government helped financially over their settlement'.[37]

These were old lies and half-truths, reheated by force of necessity. The employment status of the islanders said nothing about the fact that the islands had been home to many of them for generations, and did not disclose that ministers had simply ordered the islands cleared; officials had neither sought the islanders' agreement nor overseen the manner of their removal by the plantation managers.[38] Even as Pym responded to these concerns, little of the putative financial assistance had been paid out to the Chagossians, more than a decade after they had been expelled from the BIOT. The Foreign Secretary at least had the good grace to recognise the deceit inherent in this for-public-consumption account of the Chagossians' treatment. Indeed, the FCO continue to be so unsettled by Pym's lack of equivocation that the final paragraph of archived diplomatic note remains redacted on grounds of the risk it poses to the UK's international relations.[39] The note is, however, repeated in a later file which the FCO's assessors only partially redacted, revealing Pym's unvarnished appraisal of the Crown's actions:

> During the period in question, no British officials were resident on Diego Garcia, which was administered from Seychelles. No reliable records exist on what transpired between the local plantation managers and the Ilois when the plantations were closed and we doubt if any consultation that took place went beyond offering the Ilois a choice of destination. Certainly, remaining on Diego Garcia would not have been an

[37] UK National Archives, FCO 31/3461, Restricted Telegram from Francis Pym (FCO) to Immediate Certain Missions and Dependent Territories (Guidance Telegram Number 117 of 3 June 1982).
[38] See D. Snoxell, 'Expulsion from Chagos: Regaining Paradise' (2008) 36 Journal of Imperial and Commonwealth History 119, 124.
[39] Freedom of Information Act 2000, s.27(1).

option offered to them, since HMG had adopted a policy that Diego Garcia should be cleared of people.[40]

Despite the success of this subterfuge in the decade since the expulsions concluded, this fabrication was on the cusp of unravelling. In the summer of 1982 the London-based Minority Rights Group revisited the uncomfortable issue of how the Chagossians' enforced expulsion could be justified when an armada had been sent to defend the Falklanders' right to self-determination. The report offered a damning answer to its own question; '[i]t is difficult to escape the conclusion that the chief reason for the "paramount" treatment offered to the Falkland islanders is simply that their skins are white'.[41] The parallel attracted uncomfortable headlines and parliamentary attention.[42] The archival records indicate genuine apprehension as the FCO scrambled to brief ministers on a response; although officials could quibble over particular details, the Minority Rights Group had exposed the FCO's falsehoods regarding the connection between the Chagossians and the islands, over the enforced nature of their removal and over the manifest failures in the financial assistance scheme.[43] The FCO's hurried initial response was simply to state that, in light of the 1982 compensation agreement, there was now '[l]ittle point dwelling on the past'.[44] When that hopeful line failed to stem the tide of questions, the concerned officials recognised that official efforts to distinguish between the treatment of the Chagossians and Falklanders 'have been a bit facile and are

[40] UK National Archives, FCO 31/3462, Restricted Telegram from Francis Pym (FCO) to Immediate Certain Missions and Dependent Territories (Guidance Telegram Number 117 of 3 June 1982) para. 8.
[41] J. Madeley, *Diego Garcia – A Contrast to the Falklands* (Minority Rights Group, 1982) 3. The Falklands comparison was also highlighted in a Granada Television documentary; World in Action, *Britain's Other Islanders* (21 Jun 1982).
[42] See P. Brown, 'Britain's "Savage Treatment of Island People"' *The Guardian* (9 Aug 1982); Editorial, 'We were not all Chagans then' *The Times* (10 Aug 1982).
[43] UK National Archives, FCO 31/3462, W.N. Wenban-Smith, *Draft Submission: The Ilois and the Falklanders* (29 September 1982) para. 5
[44] UK National Archives, FCO 31/3462, Anonymous Note, 'Minority Rights Group Report: Defensive Points' (undated).

insufficiently grounded in fact'.[45] They therefore set out to reinvent the FCO's dealings with the Chagossians, starting by 'quietly drop[ping] arguments based on the proposition that the majority of the Ilois were migratory labourers'.[46] But publically accepting the Chagossians' existence as a distinct community living within the BIOT created a conundrum; 'since the Ilois were not consulted about their wishes, other grounds must be added for the decisions taken'.[47] In short, internationally palatable justifications for the Chagossians' treatment needed to be generated, no matter how ahistorical they would be.

To respond to the new criticisms, these new justifications would have to enable the Crown to distinguish its treatment of the Falklanders and the Chagossians. The official account therefore came to emphasise factors which pointed towards the Falklanders, but not the Chagossians, enjoying a right to self-determination. The essence of this account was two-fold, and it would go on to form much of the official justification for the Chagossians' treatment in subsequent litigation. The first limb of this justification asserts that the Chagossians were not a "people" for the purposes of the law of self-determination 'because they did not possess a sufficiently clear identity and a sufficient number of common characteristics to make them an identifiable social entity'.[48] To advance this claim the FCO had to skirt the Chagossians' unique status as citizens of both Mauritius and citizenship of a British Overseas Territory, by virtue of their continued residence after the BIOT's creation.[49] Instead the UK's commitment to return the islands to Mauritius once they were of no further defence use was used to intertwine the Chagossians interests with those of Mauritius.[50] Self-

[45] UK National Archives, FCO 31/3462, W.N. Wenban-Smith (East African Department) to N.C.R. Williams (Head of UN Department) (29 September 1982) para. 1.
[46] ibid., para. 2.
[47] UK National Archives, FCO 31/3462, W.N. Wenban-Smith, *Draft Submission: The Ilois and the Falklanders* (29 September 1982) para. 5 (emphasis in the original).
[48] UK National Archives, FCO 31/3464, P.J. Roberts (UN Department) to W.N. Wenban-Smith (East African Department) (29 September 1982) para. 5 (emphasis in the original).
[49] Mauritius Independence Act 1968, s.5. UK National Archives, FCO 31/2768, A.D. Watts (FCO Legal Counsellor) to M.W. Hewitt (East African Department) (16 April 1980).
[50] UK National Archives, FCO 31/3463, P.L. Hunt (East African Department), *Draft Submission: The Ilois and the Falklands Islanders* (7 October 1982), para. 6(i).

determination attaches to a people as a whole, and the FCO was effectively maintaining that the Chagossians did not amount to a people but a minority group within the Mauritian people (who had already attained independence).[51]

This approach was bolstered by a new variation upon the old "migrant labour" canard. The FCO accepted that a settled community of Chagossians existed on the islands, but maintained that they had few of the trappings of society which they would expect of a people; they 'were not a settling and self-sustaining community with its own institutions and civil administrations such as were built up over many years in the Falklands'.[52] Ironically, the Falklands colony was so sparsely populated that these institutions were slow to emerge; until the 1970s the Legislative Council was dominated by appointed members and much of the economic life on the islands was controlled by the Falkland Islands Company.[53] In any event, international law accords little weight to a colonising state's perception of a people's readiness to exercise self-determination. Instead the UN Charter imposes the 'sacred trust' upon a colonising state to develop self-government within non-self-governing territories.[54] The UK, of course, had short-circuited these aspirations through the Chagossians' enforced removal, but this opportunistic reliance upon the UK's own failures as a colonising power to develop institutions on the Chagos further undermines contentions that the FCO was ever seriously engaged with the UK's Charter responsibilities towards the BIOT's populace.[55]

The second justification for the Crown's conduct was that even if the Chagossians did enjoy a right to self-determination it was trumped by defence interests:

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[51] See P. Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 ICLQ 867, 876.
[52] UK National Archives, FCO 31/3463, P.L. Hunt (East African Department), *Draft Submission: The Ilois and the Falklands Islanders* (7 October 1982), para. 10(i).
[53] See H. Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Clarendon, 1902) 5.
[54] Charter of the United Nations (1945) 1 UNTS XVI, Article 73.
[55] See S. Allen, 'Looking Beyond the *Bancoult* cases: International Law and the Prospect of Resettling the Chagos Islands' (2007) 7 HRLRev 441, 446.

> HMG, like other sovereign governments, has a primary obligation to ensure the security of its population as a whole; and this consideration must on occasion take precedence over the immediate interests of particular small groups of individuals.[56]

Defence concerns and "the greater community good" were therefore dominant in these evolving official justifications for the Chagossians' treatment. This assertion of imperial interests to the exclusion of the interests of the BIOT's populace was not universally convincing even within the FCO. Legal advice warned that '[i]t is far from clear … that the right to self-determination is subordinate to the defence needs of the central government'.[57] Authorities dating back to Blackstone denied the existence of any executive power of exclusion not explicitly provided by statute.[58] Such an assertion of imperial interests would, moreover, seemingly apply no differently to the Falklanders. If this really was the essential criteria upon which the treatment of the Chagossians turned, then the Falklanders could equally be removed from their homeland against their wishes on this basis if this advanced general defence policy. Some additional ground would therefore be needed to justify this very different treatment.

Imperial Constitutionalism: To Colonise and Divide

In the course of crafting responses to the Minority Rights Group Report no official came close to conceding that racism was at work in the FCO's very different approaches to the community wishes of the Chagossians and Falklanders. FCO officials would subsequently express horror when they were eventually confronted with documentary evidence of the

[56] ibid., para. 10(ii).
[57] UK National Archives, FCO 31/3462, D.H. Anderson (FCO Legal Advisor) to W.H. Wenban-Smith (East African Department) (29 September 1982).
[58] See Blackstone (n.19) Bk 1, ch 1, 137-138.

senior mandarins who had authorised the expulsions of the 1960s and 1970s deriding the Chagossians as 'Men Fridays'.[59] But the imperial constitutional order which they administered nonetheless served to institute and reinforce a narrative of the superiority of settler communities over colonised groups.[60]

Imperial constitutionalism first distinguished between different types of colony based on the manner in which they were created. As we have seen, settled colonies saw the common law accompany settlers overseas, whereas in conquered or ceded colonies the bulk of local law operative at the date the colony became part of the British Empire remained in effect.[61] By the middle of the nineteenth century, however, this supposed common-law inheritance was already being marginalised. The Colonial Laws Validity Act operated to prevent legal challenges through the London courts to the colonial legislation.[62] In the early twentieth century some commentators continued to insist, in spite of this legislation and the 'inheritance' concept only having been explicitly linked to settled colonies, that the common law did have some immediate impact in conquered and ceded colonies, to the effect that 'any laws contrary to the fundamental principles of English law, eg torture, banishment, or slavery, are *ipso facto* abrogated'.[63] This would imply that although much of the law applicable in the Chagos Islands was French in origin right up until the 1980s, some historic precepts within English law (and in particular Magna Carta's prohibition of banishment[64]) were spliced into the legal order as soon as it was ceded to the Crown in 1814. As we shall see, the Chagossians would ultimately be denied even this limited common-law inheritance.

[59] See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 3) [2013] EWHC 1502 (Admin), [59]-[60].
[60] See R. Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 London Review of International Law 81, 104-108.
[61] See A. Twomey, 'Fundamental Common Law Principles as Limitations upon Legislative Power' (2009) 9 Oxford University Commonwealth Law Journal 47, 47.
[62] Colonial Laws Validity Act 1865, s.2 and 3.
[63] Jenkyns (n.53), 6.
[64] Magna Carta 1297, art.29.

These distinct arrangements for legal orders in settled as opposed to ceded or conquered colonies were intended to ensure that the populations in question continued to be governed by familiar law (also maintaining the fiction that settler colonies were always occupying *terra nullius*). But the distinction also fostered a profoundly different approach to governance; settlers 'had a strong sense of their rights and liberties as transplanted Englishmen', and within the settled colonies they expected a concomitant degree of self-government.[65] In settled colonies, therefore, the Crown did not enjoy the power to legislate by Orders in Council and many successful settler colonies had, by the mid-Victorian era, developed into self-governing dominions.[66] In Crown Colonies, by contrast, governance was in the first instance conducted under the royal prerogative by Orders in Council. This system of governance could, however, be displaced. The Falkland Islands, for example, had been recognised as a Crown Colony soon after it was created, but in 1887 Parliament passed legislation authorising the delegation of the Queen's law-making powers to institutions within a settled territory which had previously enjoyed 'no civilised government'.[67] The terms of this legislation expressly excluded conquered or ceded colonies;[68] which would have to be specifically granted some self-governing representative legislature by Parliament. If such a grant was made, the Crown's power to legislate by Order in Council would be displaced, unless explicitly reserved.[69] If it was not, then Orders in Council would almost invariably provide that within a Crown Colony the colonial authorities were permitted broad powers to make regulations for the peace, order and good government (as would be the case in the BIOT).[70]

[65] C. Petley, '"Devoted Islands" and "that Madman Wilberforce": British Proslavery Patriotism during the Age of Abolition' (2011) 39 Journal of Imperial and Commonwealth History 393, 396.
[66] Jenkyns (n.53), 95.
[67] British Settlements Act 1887, s.3 and preamble, replacing earlier Falklands-specific legislation.
[68] ibid., s.6.
[69] *Campbell v Hall* (n.22) 898.
[70] British Indian Ocean Territory Order 1965, s.11(1).

Case law indicates how little these legal powers were constrained by constitutional principles at the height of Empire. In the *Sekgoma* case a tribal chief from the Bechuanaland Protectorate was indefinitely detained outside the Protectorate by proclamation of the colonial authorities who claimed to be concerned about the possibility of violence between rival factions within the tribe if he was allowed to remain free.[71] Although the territory in question was a protectorate and not a colony, legislation granted the High Commissioner comparable powers to those operative within a ceded or conquered colony.[72] Sekgoma's legal representatives argued that even under the broad rubric of powers for 'peace, order and good government' the colonial authorities had no power to act contrary to fundamental constitutional principles by denying habeas corpus. The Court of Appeal, however, refused to find that any such principles constrained official action in the context of a Protectorate (by extension the same approach would apply to a Crown Colony). Kennedy LJ insisted that the High Commissioner's ability to act as he thought was required by peace, order and good government was 'especially just and necessary where, as is the case here, the trustee has to govern a large unsettled territory, peopled by lawless and warlike savages, who outnumber the European inhabitants by more than one hundred to one'.[73] For Michael Lobban;

> The judges' very formalistic interpretation of the law … is perhaps to be explained by their confidence in the probity of the colonial officials, and in their racially informed understanding of the colonial context, which made them think such draconian measures were necessary.[74]

[71] *The King v The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576.
[72] Foreign Jurisdiction Act 1890, s.1.
[73] *The King v The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576, 627. Similar concerns motivated Vaughan Williams LJ who, at 609-10, characterised the Protectorate as a territory in which 'a few dominant civilized men have to control a great multitude of the semi-barbarous' and Farwell LJ who, at 615, insisted that 'acts [such as the Habeas Corpus Act], although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites'.
[74] M. Lobban, 'Habeas Corpus, Imperial Rendition, and the Rule of Law' (2015) 68 CLP 27, 47.

Just as in the self-governing settler colonies, the role played by overarching constitutional principles derived from long-standing statutes and common law rules within the UK's domestic legal orders was therefore being downgraded in Crown Colonies in the late-nineteenth and early-twentieth centuries. The developments in self-governing colonies, however, were intended to limit the interference of London's institutions in the governance of the emerging dominions.[75] The denial of UK constitutional principles in Crown Colonies and Protectorates was, however, to very different ends; it was intended to free colonial governance from constraints which were increasingly regarded as unsuited to the demands of maintaining imperial domination of conquered or ceded lands.

Imperial constitutionalism had developed to categorise conquered or ceded colonies which had not been granted a measure of self-governance as spaces in which the Crown's control was under sustained existential threat. In this context it ensured that colonised populations could be governed as the colonial authorities chose, safe in the knowledge that the courts in London would not intervene and that the colonised population would not have the same access to supportive lobbies in Westminster as settler communities. Writing shortly after the *Sekgoma* decision Dicey felt obliged to admit that 'it may turn out difficult, or even impossible, to establish throughout the Empire that equal citizenship of all British subjects which exists in the United Kingdom'.[76] In short, given the imperative of maintaining control over colonised peoples, equality before the law was off the imperial constitutional agenda. If there was a single overriding difference between the Chagossians and the Falklanders it was that the latter were, in the words of one *Times* editorial, treated as 'kith and kin' by Whitehall

[75] This shift responded to a particular strain of constitutional thought long-prevalent in settler societies, which prioritised a governance order which did not mirror that of the UK, but instead provided for 'the same guarantees of government by consent and rule of law enjoyed in the home islands'; see J. Greene, 'The Jamaica Privilege Controversy, 1764–66: An Episode in the Process of Constitutional Definition' (1994) 22 Journal of Imperial and Commonwealth History 16, 48.
[76] Dicey (n.13), liv.

and Westminster.[77] This factor determined the very different development of the structures of colonial government in both territories, which in turn allowed officials to treat one group as a people deserving of self-government and to grant no say to the other. By the 1980s these distinctions had become so entrenched that the FCO could close its eyes to the underlying role that race played in this distinction.

Little of the FCO archival material from 1982 explicitly conceives of the distinction between the Falklanders and the Chagossians in terms of the divide between settled and ceded colonies. The imperial constitution out of keeping with the spirit of decolonisation and justifications needed to be developed which better reflected the demands of the contemporary international law of self-determination. Imperial constitutionalism was, in short, being airbrushed out of the picture by a generation of FCO officials for whom its tenets had become an embarrassment. The history of colonial governance could even be shrewdly presented as having led astray a previous generation of FCO officials. The department's 1982 advice sought to present those authorising the Chagossians' removal as not having been alive to the implications of the right to self-determination when they acted. Scorn not their simplicity, this excuse goes, for they did not fully appreciate the application of international law to their actions.[78] They were of a different era, and the FCO could now present itself as being 'more sensitive' to issues of self-determination.[79] The FCO need not, as a result, dwell on failings which occurred in an imperial epoch which had passed.

This argument amounted not simply to the introduction of retrospective justifications for FCO actions, but to doctoring the history of the Chagos dispute. In the 1960s imperial constitutionalism and concerns over international law, in the guise of the law of self-

[77] Editorial, 'We were not all Chagans then' *The Times* (10 Aug 1982).
[78] Pre-Charter accounts of international law advanced by many nineteenth-century commentators certainly gave little protection to the interests of 'uncivilised natives'; J. Westlake, *Chapters on the Principles of International Law* (CUP, 1894) 47.
[79] UK National Archives, FCO 31/3463, P.L. Hunt (East African Department), *Draft Submission: The Ilois and the Falklands Islanders* (7 October 1982) para. 9(a).

determination, had meshed in official thinking after the creation of the BIOT. The colony could be administered with scant regard for the Chagossians' interests because it was treated as a ceded colony. And as FCO officials recognised in 1982 their predecessors had explicitly concluded that the Chagossians had to be expelled or else the UN Special Committee on Decolonisation would have had the responsibility for overseeing the UK's governance of the BIOT's colonised population.[80] The ministers and officials who had ordered the islanders' expulsion were therefore acutely aware of the law of self-determination, and of how imperial constitutionalism offered a means to circumvent it. Much as their successors at the FCO might resent it, the precepts of imperial constitutionalism would thereafter become central to their evolving legal justifications for the continued exclusion of the Chagossians.

The *Bancoult* Litigation: Reviving Imperial Constitutionalism?

Imperial constitutionalism framed the facts on the ground in the *Bancoult* litigation. It explained why the settled Falkland Islands had their own institutions whereas the ceded colony covering the Chagos Islands could still be ruled by executive fiat with regard to no more than the interests of 'peace, order and good government'. In these circumstances it can hardly be surprising that when the Chagossians took their fight for a right to return to their homeland to the UK courts the disparity between the distinct constitutional paradigm applicable to ceded colonies and the UK's contemporary constitutional arrangements was thrown into stark relief. But it was only when the dispute returned to the courts that imperial constitutionalism came to play an overt role in the Crown's justifications for these decisions. This section of our account does not attempt to systematically recount the successive rounds of litigation which began in the late 1990s, a task undertaken by others in this volume.

[80] ibid., para. 6(i).

Instead we focuses upon how the Crown resorted to imperial constitutionalist arguments to bolster its case for maintaining the Chagossians' exclusion.

The first instalment of the *Bancoult* litigation saw the Chagossians launch a judicial review challenging the legality of the Immigration Ordinance 1971 which excluded them from the Chagos archipelago. Acting on the FCO's behalf David Pannick QC relied upon multiple aspects of imperial constitutionalism in his defence of this measure. His first argument was that the 1971 Ordinance had been promulgated under the BIOT Order 1965 and was therefore the work of the BIOT authorities and not the UK Government.[81] Second, as the BIOT is a ceded Crown Colony, legislative authority derived from the prerogative, supposedly further limiting the scope for judicial review.[82] Third, questioning this legislative authority on the basis of fundamental constitutional principles applicable within the UK would run contrary to the legislative autonomy granted to colonial law makers under the Colonial Laws Validity Act (provided they did not breach an Act of Parliament in their law making).[83] Fourth, Pannick maintained that the standard imperial formula of authorising legislative acts for 'peace, order and good government' was sufficiently broad to enable the enactment of the Immigration Ordinance.[84] Fifth, human rights grounds were excluded from consideration because the UK had not extended its membership of the ECHR to cover the BIOT.[85] So comprehensive was this panoply of imperial firewalls against the Chagossian claims that the FCO's legal team relegated any discussion of the economic viability of settlement or of national security concerns or treaty commitments to the United States to the tail end of their argument.[86]

[81] *Bancoult* (No 1) (n.31), 1072-1073.
[82] ibid., 1073.
[83] ibid., 1073.
[84] ibid., 1073-1074.
[85] ibid., 1074.
[86] ibid., 1074.

This confidence was to prove misplaced, for the Laws LJ and Gibb J proceeded to displace some of what they perceived to be the outdated precepts of imperial constitutionalism. They first rejected the FCO's attempt to assert the doctrine of the divisibility of the Crown to persuade the Court not to entertain the case. Having identified competing strains in the jurisprudence relating to habeas corpus claims from the Empire reaching the London courts the judges were satisfied that 'this court owns ample jurisdiction to make the order sought in this case'.[87] This refusal to leave the issue to the BIOT Supreme Court was spurred by the recognition that the record established that 'the making of the Ordinance and its critical provision – s.4 – were done on the orders or at the direction of Her Majesty's Ministers here, Her Ministers in right of the government of the United Kingdom'.[88] The Court's second departure from imperial constitutionalism was more abrupt than exercising a discretion to hear a case that some historic jurisprudence called into question. Successive Privy Council decisions had maintained that the formula of granting powers for 'peace, order and good government' should be taken to 'connote, in British constitutional language, the widest law-making powers appropriate to the sovereign'.[89] Gibb J faced down this account, refusing to interpret this wording as 'a mere formula conferring unfettered powers on the Commissioner'.[90] For Laws LJ such a law-making power 'may be a very large tapestry … every tapestry has a border', and good government could not be interpreted to include the exclusion of an entire people subject to its authority.[91]

Some elements of imperial constitutionalism could not, however, be undone by the High Court. Although the division of settled and ceded colonies amounted to an 'arcane

[87] ibid., [28] (Laws LJ).
[88] ibid., [28] (Laws LJ) and [66] (Gibb J).
[89] *Ibralebbe v The Queen* [1964] AC 900, 923 (Viscount Radcliffe) (PC). See also *Riel v The Queen* (1885) 10 App Cas 675, 678 (Lord Halsbury).
[90] *Bancoult* (No 1) (n.31), [69].
[91] ibid., [55].

distinction',[92] the Court ultimately accepted that it was so embedded in the statutes underpinning the imperial constitution that it could not simply be wished away. Magna Carta, as a consequence, did not extend to the Chagos,[93] and settled interpretations of the Colonial Laws Validity Act which the High Court did not consider itself to be in a position to question furthermore blocked claims based upon fundamental constitutional principles (and, by implication, common law fundamental rights).[94] Cautious that 'we are in this case treading in the field of colonial law'[95] the judges explicitly refused to extend the precepts of liberal constitutionalism into any of these aspects of the dispute:

> We should … ourselves affront the rule of law if we translated the liberal perceptions of today, even if they have become the warp and weave of our domestic public law, into law binding on established colonial powers in the face of authority that we should do no such thing.[96]

These aspects of imperial constitutionalism would return to haunt the *Bancoult* litigation.

It is simplistic to draw a direct connection between this decision and that of the House of Lords in *Bancoult (No 2)* eight years later.[97] The second round of *Bancoult* litigation, after all, involved different legal measures and questions which had not previously been litigated, in particular the feasibility of resettlement on the Chagos archipelago's outlying islands, and national security claims that had only been touched upon in the earlier decision. Nonetheless, in many respects the judges hearing this subsequent litigation had to re-tread the debates over the nature of imperial constitutionalism. The second round of litigation was instituted when

[92] ibid., [68] (Gibb J).
[93] ibid., [36] (Laws LJ) and [68] (Gibb J).
[94] ibid., [44] (Laws LJ).
[95] ibid., [42] (Laws LJ).
[96] ibid., [43] (Laws LJ).
[97] Some commentators have been unable to resist the temptation to label the outcome of *Bancoult* (No 1) 'right', and *Bancoult* (No 2) 'wrong'; see Juss (n.33), 270.

the FCO asserted that, following studies which had been instituted in response to the decision in *Bancoult* (No 1), resettlement on the outer islands was not feasible. The FCO therefore promulgated a new constitution of the BIOT and immigration ordinance blocking any right of abode on the Chagos islands.[98] The High Court and Court of Appeal accepted the Chagossian contentions that these new Orders in Council should be struck down, but by a three to two majority the House of Lords upheld the Chagossians' continued exclusion. A range of reasons has been advanced for this outcome, from slick advocacy on the FCO's behalf by Jonathan Crow QC,[99] to suggestions that the majority of the panel of judges were ideologically predisposed towards limited constraint upon official action.[100] There would even be a 2016 challenge on the basis that the Court had been denied access to information important to its decision.[101] We contend that far from the FCO's legal team 're-defining the merits' of the case,[102] the official arguments remained remarkably consistent across the litigation. This case instead covered ground which had not been fully traversed in *Bancoult* (No 1) and the Crown was able to reinforce its submissions in light of newly published research on the imperial constitution. Moreover, although the make-up of the panel was undoubtedly significant, the imperial constitutional background to the decision makes it particularly difficult to apply understandings of judicial behaviour derived largely from the domestic constitutional context. And the Supreme Court, as we shall see, ultimately rejected contentions that the material not put before the House of Lords would have made such a material difference to proceedings as to require the case to be reheard.

To be able to explain the outcome of *Bancoult* (No 2) we instead need to evaluate how the panel of Law Lords engaged with claims predicated upon imperial constitutionalism.

[98] BIOT (Constitution) Order 2004; BIOT (Immigration) Order 2004.
[99] Paterson (n.34), 55.
[100] T. Arvind and L. Stirton, 'Legal Ideology, Legal Doctrine and the UK's Top Judges' [2016] PL 418, 430.
[101] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2016] UKSC 35; [2017] 1 AC 300.
[102] Paterson (n.34), 55.

As the new immigration restrictions were embodied in a distinct Order in Council the dispute could no longer be boiled down to the determination of whether a colonial official had exceeded his powers. The Divisional Court and Court of Appeal therefore found themselves obliged to wrestle with the Colonial Laws Validity Act in a way that the High Court in *Bancoult* (No 1) had avoided in the *ultra vires* basis for its judgment. In the Court of Appeal Sedley LJ jumped straight into the fray with a contentious[103] assertion that the 1865 Act only protected validly made colonial law against challenge.[104] But he thereafter devoted considerable effort to circumventing the effect of the Act. Sedley LJ insisted that because the ability to challenge the exercise of a prerogative power was not existent when the 1865 Act was enacted,[105] it was therefore open to question whether it should apply in such circumstances.[106] Under the UK's Constitution the 'courts are reluctant to construe any but an unequivocal statutory provision as denying people access to them for the redress of justiciable wrongs'.[107] For the Court of Appeal imperial constitutionalism had been superseded by contemporary domestic constitutionalism,[108] and the time had come to neuter some of its core tenets. When the case reached the House of Lords two of the Law Lords cleaved closely to this approach of applying core constitutional values to invalidate the exclusionary provision in the Immigration Order.[109] Lord Bingham did not so much as pause to deal with the Colonial Laws Validity Act argument; for him it sufficed that he could find

[103] Anne Twomey settled on the description 'inadequate'; Twomey (n.61), 71.
[104] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2007] 3 WLR 768; [2007] EWCA Civ 498, [22] (Sedley LJ). This approach to the construction of an unwelcome statutory exclusion of jurisdiction seems to have been conditioned by the efforts of the House of Lords in *Anisminic* to interpret an ouster clause out of existence; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 170 (Lord Reid).
[105] The general reviewability of the prerogative would not be confirmed until *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
[106] *Bancoult* (No 2) (CA) (n.104)., [24].
[107] ibid., [25].
[108] In particular an implicit allusion to the principle of legality derived from *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400, 412 (Lord Hoffmann).
[109] BIOT (Immigration) Order 2004, s.9.

no prerogative power to exclude individuals from their homeland.[110] Lord Mance followed suit by summarily dismissing arguments about the significance of the 1865 Act. Freed from the shackles of this legislation he maintained that fundamental constitutional values provided a basis for finding the Order invalid; 'the common law position must in my opinion be that every British citizen has a right to enter and remain in the constitutional unit to which his or her citizenship relates'.[111] His own twist on imperial constitutionalism was to maintain that such public law principles should be taken to apply in full to the BIOT, as they would in a settled colony.[112]

Imperial constitutionalism had, however, struck back against this approach, in the shape of John Finnis' critique of the Court of Appeal decision.[113] Finnis' working paper exerted a profound influence over the decisions of the three other Law Lords hearing the UK Government's appeal.[114] On the interpretation of the 1865 Act Lord Rodger[115] and Lord Carswell[116] bought into Finnis' central contention that Sedley LJ's decision 'rhetorically takes but rationally fails the test of history and logic'.[117] Finnis had maintained that on the basis of the 1865 Act the courts could not assert that the Orders in Council were repugnant in light of constitutional principles.[118] Drinking deep from this well of imperial constitutionalism both judges made short work of claims that colonial administrators had acted *ultra vires* the concept of 'peace, order and good government' which had been

[110] *Bancoult* (No 2) (n.33), [71].
[111] ibid., [154].
[112] ibid., [155].
[113] J. Finnis, "Common Law Constraints: Whose Common Good Counts?" (2008) Oxford Legal Studies Research Paper No 10/2008. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628.
[114] The research paper would go on to underpin one of Oxford University's Research Excellence Framework Impact submissions; http://impact.ref.ac.uk/CaseStudies/CaseStudy.aspx?Id=14595.
[115] *Bancoult* (No 2) (n.33), [98].
[116] ibid., [126].
[117] Finnis (n.113), 10.
[118] The speeches of Lord Rodger and Lord Carswell are difficult to follow on this precise issue. Lord Rodger accepted that the 1865 Act prevented the courts from finding a colonial law repugnant to constitutional principle, but asserted, at [103], that this interpretation did not exclude judicial review. This position was, however, muddied by his claim, at [105], to be following Lord Hoffmann on the issue of the 1865 Act. Lord Carswell asserted the applicability of the 1865 Act despite, at [122], accepting that the orders were reviewable, without reconciling these statements.

reaffirmed in the new Constitutional Order as the basis for law-making in the BIOT.[119] Lord Rodger and Lord Carswell were so respectful of Finnis' articulation of imperial constitutionalism that they did not pause to consider that it was within their capacity to alter its terms. Lord Carswell, indeed, went so far as to cloak his decision to strictly apply the terms of the 1865 Act in religious garb as a 'rule of abstinence'.[120] If Sedley LJ consciously side-lined precedents which he considered to have been rendered inappropriate by intervening shifts in constitutional values, these two Law Lords, who formally had much greater scope to innovate, were rather more hidebound in their approach.

With the court split, Lord Hoffmann found himself in a decisive position. He was also influenced by Finnis' arguments regarding the Colonial Laws Validity Act, going so far as to repudiate much of the Court of Appeal's language.[121] But he nonetheless concluded that in this instance the UK courts were engaged in reviewing Orders in Council passed under prerogative powers, and that in such circumstances they were not 'colonial law' protected by the 1865 Act.[122] He therefore found that the Orders were subject to judicial review.[123] Ultimately, however, he refused to accept that they were invalid. In reaching this conclusion he skipped over the historic abuses inflicted upon the Chagossians in the interests of focusing on the 'practicalities of today'.[124] This was an approach directly influenced by Finnis' assault upon the Court of Appeal decision for a 'loss of perspective'; in short that 'quasi-factual' assertions about the Chagossians' loss of homeland had distracted the Court from Crown's responsibility to secure the defence interests of the imperial whole.[125] Lord Hoffmann set out

[119] BIOT (Constitution) Order 2004, s.15.
[120] *Bancoult* (No 2) (n.33), [130] (Lord Carswell); see also [109] (Lord Rodger).
[121] ibid., [39].
[122] ibid., [40].
[123] Twomey questions whether this approach is reconcilable with Parliament's intention in enacting the Colonial Laws Validity Act; Twomey (n.61), 67-69.
[124] ibid., [53]. When the case returned to the Supreme Court in 2016 Lord Kerr was particularly critical of this approach; 'The fact that their removal, when it in fact occurred, was unreasonable cannot, in my opinion, be left out of account in assessing whether the subsequent decision to perpetuate the Chagossians' exile was rational'. *Bancoult* (No 2bis) (n.101), [117].
[125] Finnis (n.113), 16.

to right what Finnis called this 'evil',[126] categorising the Chagossians' current interests as no more than those of public protest and unsurprisingly finding such interests outweighed by 'the defence and diplomatic interests of the state'.[127] Community life on the Chagos islands offered no additional counterweight to support their claims (as it had for Sedley LJ in the Court of Appeal[128]); 'The Chagossians have … shown no inclination to return to live Crusoe-like in poor and barren conditions of life'.[129] The mirroring of the language of the FCO's infamous dismissal of the Chagossians in the late 1960s as 'Men Fridays' underscores how Lord Hoffmann was prepared to just as readily dismiss their interests. Later judges may have emphasised the richness of the Chagossians' community life, but Lord Hoffmann's marginalisation of these interests was, at this juncture, decisive.[130]

The House of Lords majority thereby 'affirmed the utilitarian importance of the imperial interests at stake' in the case.[131] The FCO's 1980s reworking of the official justifications for the Chagossians' enforced exclusion, drawing upon the supposedly backward nature of society in the Chagos and the primacy of imperial defence interests over countervailing community claims, had triumphed. Not that those anguished officials need have bothered to reconstruct the official justifcations on these grounds to win over John Finnis. He had formed his view of the sentimentality of the decisions in *Bancoult* (No 1) and the Court of Appeal based on his reading of the original justifications offered for the expulsions in the 1960s and released in the course of litigation. He found 'more truth' in one 1966 explanation which he endorsed 'than in the judicial rhetoric about loss of homeland'.[132] In doing so Finnis' account of the *Bancoult* litigation became more executive-minded than

[126] ibid., 16.
[127] *Bancoult* (No 2) (n.33), [53]. The other majority judges made it clear that they also accorded overriding weight to the defence and security issues at stake in this case; [113] (Lord Rodger) and [132] (Lord Carswell).
[128] *Bancoult* (No 2) (CA) (n.104), [71].
[129] *Bancoult* (No 2) (n.33), [55]. In light of the dismissal of the Chagossians as "Men Fridays" in the 1960s this turn of phrase is singularly ill-considered.
[130] *Bancoult* (No 2bis) (n.101), [84].
[131] Frost and Murray (n.8), 287. Endorsed by Baroness Hale in *Bancoult* (No 2bis) (n.101), [188].
[132] Finnis (n.113), 17.

that of the executive; he reiterated and gave credibility to debunked claims that the Chagossians amounted to no more than '100 or so second-generation inhabitants' and declared the Chagossians to be no different from other Mauritians long after the FCO had abandoned this conceit.[133] Summarily ending an entire people's way of life so as to avoid UN scrutiny of their treatment as a colonised population became, for Finnis, of no different from relocating a village in Wales to make way for a dam.[134] And once this false premise had taken root in the minds of the majority judges deciding the case then it is little wonder that they could see no place for international law in their thinking[135] and even maintain that no active legal rights were at stake.[136]

The *Bancoult* Litigation (and its Aftermath): Side-lining Imperial Constitutionalism?

Bancoult (No 2) has been called 'pyrrhic public law', with a House of Lords' majority asserting principles (especially that executive actions are reviewable even when taken under prerogative powers) which are not ultimately employed to constrain executive action in the Court's decision.[137] But one of the great agonies of this case is that even if such principles were fully applied, the Chagossians would have gained no more than a pyrrhic victory in legal terms. The UK Government remains the sole owner of all of the property on the Chagos islands and can exercise its title in an exclusionary manner.[138] No matter the manifest weaknesses of the majority decision in *Bancoult* (No 2), imperial constitutionalism provided no more than a supplementary basis for maintaining the islanders' exclusion. That issue

[133] ibid., 17.
[134] ibid., 17.
[135] *Bancoult* (No 2) (n.33), [66] (Lord Hoffmann) and [116] (Lord Rodger). This approach stands in contrast to Lord Mance, who drew upon the Article 73 of the UN Charter in his judgment at [145]. The majority's brusque dismissal of the relevance of international law on colonisation stands as testament to how close their own imperial constitutionalism cleaved to nineteenth-century visions.
[136] ibid., [136] (Lord Carswell).
[137] M. Elliott and A. Perreau-Saussine, 'Pyrrhic public law: *Bancoult* and the sources, status and content of common law limitations on prerogative power' [2009] PL 697.
[138] *Bancoult* (No 2) (CA) (n.104), [71] (Sedley LJ).

notwithstanding, the impact of the *Bancoult* litigation on subsequent litigation arising from the imperial context is worth examining, especially as factual context of the Chagossians' exclusion shifts, opening new opportunities for legal challenge.

The supposed divisibility of the Crown was an important issue in *Bancoult* (No 2). If the Crown was not 'one and indivisible' within the UK and its overseas territories,[139] and ministerial actions could therefore only be justified with regard to the specific colony to which they related, then broader "imperial" defence and security concerns could not have counterbalanced the Chagossians interests. But imperial constitutionalism had fashioned divisibility as a tool which could be invoked at the FCO's discretion; in many cases (including *Bancoult* (No 1)) ministers insisted that the London courts should reject actions on the basis that the divisibility of the Crown meant that they lacked jurisdiction. This development had its roots in tort. Challenges to colonial abuses which had involved actions for damages in tort could be excluded under the Crown Proceedings Act 1947 if they did not involve the Crown as it is constituted in the UK Government.[140] In one such case Megarry V-C went so far as to assert that 'it seems that for some purposes there are as many Crowns as there are independent realms'.[141] In *Bancoult* (No 1), with David Pannick QC's unsuccessful arguments that the court lacked the jurisdiction to hear the case,[142] these "divisibility of the Crown" arguments began leeching into public law challenges to the Crown's actions in the UK's remaining Overseas Territories. Thereafter, in *Quark Fishing*, a majority of Law Lords had relied upon divisibility of the Crown to deny that the removal of a fishing licence applicable to South Georgia and the South Sandwich Islands was an act by UK public

[139] See *In re Johnson* [1903] 1 Ch 821, 833 (HC) (Farwell J); *Theodore v Duncan* [1919] AC 696, 706 (HL) (Viscount Haldane).
[140] Crown Proceedings Act 1947, s.40(2)(b).
[141] *Tito v Waddell* (No 2) [1977] Ch 106, 231.
[142] *Bancoult* (No 1) (n.31), [28].

authorities (even though all actions had been undertaken by the FCO).[143] In the minority Baroness Hale consciously echoed Laws LJ in *Bancoult* (No 1) by characterising official efforts to shield actions taken by the FCO from litigation on the basis that they were done in the name of a particular overseas territory as an 'abject surrender of substance to form'.[144]

Bancoult (No 2) curtailed the FCO's ability to invoke the divisibility of the Crown at will. Influenced by Finnis' writings (which crucially recognised that divisibility of the Crown hindered claims based upon imperial defence), Lord Hoffmann repudiated the position that he had advanced in *Quark Fishing* (that the measures in question in that case had been made solely by the Crown in right of South Georgia and the South Sandwich Islands).[145] As we have seen, he departed from Finnis in subsequently accepting that because such legislation was imperial and not colonial in character, it was therefore reviewable by the London courts notwithstanding the Colonial Laws Validity Act,[146] but this only served to provide a basis for advancing the paramountcy of imperial 'security and diplomatic interests'.[147] His reappraisal of *Quark Fishing* has nonetheless had lasting significance in and of itself, with the courts now accepting that 'even if Her Majesty's government is acting in right of the colony or dependency in question, the courts of the United Kingdom have jurisdiction judicially to review its decisions'.[148] The importance of this shift was demonstrated in the Supreme Court's refusal to accept that claims regarding the divided nature of the Crown restricted its jurisdiction in *Keyu*.[149] This case involved an effort to use the courts to force the UK Government into establishing a public inquiry into the killings of 24 unarmed civilians by a Scots Guards patrol during the Malaya Emergency in 1948. The FCO invoked *Quark Fishing*

[143] *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529, [65] (Lord Hoffmann).
[144] ibid., [95].
[145] *Bancoult* (No 2) (n.33), [48]-[49].
[146] ibid., [40].
[147] ibid., [58].
[148] *R (Barclay) v Secretary of State for Justice* [2014] UKSC 54; [2015] 1 AC 276, [57] (Baroness Hale).
[149] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355.

and maintained that the Court had no jurisdiction to hear the case because the Scots Guards were operating under the governing authority of the then Federation of Malaya, regardless of the extent to which the High Commissioner was taking direction from London.[150] Lord Mance applied such claims to the facts of the case, and noting that the Crown was not sovereign within the Federation of Malaya he concluded that the powers at issue 'must have been given to the King wearing the Crown of, and in the interests of, the United Kingdom'.[151] But he also took the time to debunk the *Quark* position, even though doing so was not necessary to the outcome of the case, expressly affirming Lord Hoffmann's position in *Bancoult* (No 2):

> Lord Hoffmann's revised views about the Crown's position when exercising powers on the advice of United Kingdom ministers in relation to dependent territories and his views about the potentially "amphibious nature" of an order in council relating to such a nature reinforce my conclusion that there is no reason to attempt to justify the Crown's military involvement in the Federation of Malaya in 1948 solely in terms of the Federation's Constitution.[152]

In short, the majority position in *Bancoult* (No 2) provided a foundation for Lord Mance's assertion in *Keyu* that, 'had the other conditions for ordering an inquiry been satisfied, there would be no jurisdictional obstacle to doing so'.[153]

Even after the discouraging outcome of *Bancoult* (No 2) few judges seem to have abandoned the idea of applying UK public law principles to public law cases arising out of overseas and dependent territories, and thereby narrow the gap between domestic and

[150] ibid., [181].
[151] ibid., [187].
[152] ibid., [187].
[153] ibid., [202]. This majority position is, of course, most clearly expressed in the speeches of Lords Mance, Bingham and Hoffmann.

imperial constitutionalism. The boatload of refugees from Iraq, Sudan, Ethiopia and Syria who arrived at the UK Sovereign Base Area on Cyprus in 1998, and who have remained there in 'increasingly squalid' conditions ever since, found themselves drawn into a legal struggle akin to that of the Chagossians both in duration and in its terms being set by imperial constitutionalism.[154] The UK Government acknowledges that the group is made up of refugees, but has spent two decades fighting the application of the Refugee Convention and the ECHR on the basis that they do not cover the Dhekelia base.[155] As with the *Bancoult* litigation, the Crown insists that a desiccated constitutional order, shorn of any such international obligations, has applied since the base areas came into being as part of the treaty granting independence to Cyprus.[156] On this basis the Home Secretary refused to admit the group to the UK, a decision which was subsequently challenged by judicial review. The *Bashir* case[157] turned on whether the international legal obligations applicable to Cyprus as a colony were extinguished on the island's independence or continued to apply to the Sovereign Base Areas. The decision therefore turned on whether *Bancoult* (No 2)'s position that the creation of the BIOT as a 'new political entity' broke the link to any treaties previously applicable to its parent colonies of the Seychelles and Mauritius equally was applicable to the Cyprus bases.[158] Irwin LJ led the Court of Appeal in ruling that *Bancoult* (No 2) could be distinguished. Whereas the BIOT had been 'created by grafting together portions of territories from two different existing colonies'[159] no such break point had existed on Cyprus; independence had shrunk the previous colony to the territory of the sovereign

[154] See the UK Borders Agency's own assessment of the conditions experienced by the group; *R (Bashir) v Secretary of State for the Home Department* [2016] EWHC 954 (Admin), [2016] 1 WLR 4613, [163] (Foskett J).
[155] UN Convention Relating to the Status of Refugees, 189 UNTS 150 (1951).
[156] In contrast to earlier examples of treatment of people seeking asylum at UK overseas territories to which the Refugee Convention did not apply, notably at Hong Kong, the UK's commitment to acting in accord to the spirit of the Convention (see A. Ingram MP, HC Debs, vol. 384, col. 744W (30 Apr 2002)) has waned as the Dhekelia dispute wore on.
[157] *R (Bashir) v Secretary of State for the Home Department* [2017] EWCA Civ 397.
[158] *Bancoult* (No 2) (n.33), [64] (Lord Hoffmann).
[159] *Bashir* (n.157), [52].

base areas.[160] By this neat expedient the Court of Appeal prevented the Crown from once again following a path made possible by the position adopted by Lords Rodger, Carswell and Hoffmann in *Bancoult* (No 2).

The House of Lords' recognition in *Bancoult* (No 2) that the reviewability of prerogative powers extends to 'prerogative legislation in the form of an order in council', is now accepted as a general principle of public law.[161] Drawing upon the 'unanimous' acceptance in *Bancoult* (No 2) that 'the Orders in Council were amenable to judicial review in the courts of England and Wales'[162] Baroness Hale would recognise in *Barclay* (No 2), that even where Overseas Territories or Crown Dependencies are at issue, 'the courts of the United Kingdom do have jurisdiction judicially to review an Order in Council which is made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom'.[163] That the Court declined to strike down the Order in Council at issue in *Barclay* (No 2) speaks to its respect for the 'careful balance between the legislature, the executive and the judiciary' which existed on the Channel Islands in question.[164] Such assertions, even if made in the context of a Crown Dependency rather than an Overseas Territory, do tend to showcase imperial constitutionalism's continuing capacity to divide Overseas Territories based on their levels of institutional development. Those, like the Falkland Islands, which are granted some semblance of internal governance can use these levers to thwart excessive imperial demands.[165] This inexorably brings with it greater levels of self-governance, to the point where (if the colony does not gain independence) the Crown can no longer legislate by Order in Council and the London courts adopt a stance of distant guardian. Those which are not granted such governance structures, including the BIOT,

[160] ibid., [62].
[161] *Rahmatullah v Ministry of Defence* [2017] UKSC 1; [2017] 2 WLR 287, [56] (Baroness Hale).
[162] *Barclay* (n.148), [44].
[163] ibid., [58].
[164] ibid., [47].
[165] See Anson (n.2), 65.

remain yoked to the 'wintry asperity' of colonial law-making by the UK executive.[166] Baroness Hale was nonetheless at pains to note that 'in an appropriate case'[167] even concerns over respect for the remit of the institutions operating in Crown Dependencies would be overridden. This caveat does not speak to a further retreat from applying the principles underpinning the UK's domestic constitution within external settings.

If they are to repair the damage to constitutional values inflicted by the 2008 *Bancoult* decision the London courts have to harness the jurisdictional unity of the Empire (which successive cases have now affirmed) and recognise that within the UK's Overseas Territories imperial interests do not trump any and all countervailing community and individual interests. Of all the judges who grappled these issues in the context of the *Bancoult* litigation, Clarke MR (as part of the Court of Appeal panel in 2007) perhaps came closest to this reconceptualisation of the imperial constitution's operation:

> I would not accept that it [the Crown] must have sole, or perhaps even primary, regard for the interests of the Chagossians. As I see it at present, it should have regard to the interests of both the Chagossians and of the United Kingdom and reach a rational decision on any question which arises for decision. [168]

And the courts will likely still get a further opportunity to reconsider such a course, even after the Supreme Court's refusal, in 2016, to reopen the 2008 decision. In this challenge the Chagossians claimed that the FCO had not disclosed relevant documents containing information likely to have affected the factual basis on which the House of Lords proceeded.[169] The documents in question related to the studies of feasibility for resettlement,

[166] *Bancoult* (No 1) (n.31), [28] (Laws LJ).
[167] ibid., [57].
[168] *Bancoult* (No 2) (CA) (n.104), [122].
[169] *Bancoult* (No 2bis) (n.101), [2] (Lord Mance).

and cast doubt on the impartiality of expert reports relied upon by the House of Lords in 2008. All three majority judges had emphasised the finding that resettlement was unfeasible in their judgments.[170] Even the FCO accepted that the failure to disclose these documents was a breach of the duty of candour,[171] a failure in stark counterpoint to the judicial praise for the 'wholly admirable conduct' of officials in *Bancoult* (No 1) in disclosing all material documents even if they were 'embarrassing and worse'.[172] Although the Supreme Court has the power to reopen its own judgments, the majority refused to countenance this course of action in this case as there was 'no probability, likelihood or prospect (and, for completeness, … also no real possibility)' that consideration of the drafting documents could have caused the court to regard the Secretary of State's reliance on its final conclusions as irrational.[173]

This further setback for the Chagossians needs to be seen in the context of the limited nature of this challenge. Two Supreme Court justices considered that the documents in question 'illustrated the distinct change in emphasis in the prediction of climate changes … [which] bore directly on the question of the feasibility of resettlement'.[174] They champed at the bit to reopen the case and the issue of the lawfulness of the 2004 Orders, but even they acknowledged that '[t]he question for us is not whether the majority got the answer to that question wrong'.[175] For the majority, neither Lord Mance or Lord Clarke had much time for the 2008 outcome; Lord Mance maintained that he had not changed his 'opinion as to what would have been the appropriate outcome of the appeal',[176] and neither had Lord Clarke (having seen the Court of Appeal decision to which he had contributed reversed by the House of Lords in 2008).[177] Instead, they disputed the use of the expedient of re-opening the case on

[170] *Bancoult* (No 2) (n.33), [53] (Lord Hoffmann), [114] (Lord Rodger) and [121] (Lord Carswell).
[171] *Bancoult* (No 2bis) (n.101), [24] (Lord Mance).
[172] *Bancoult* (No 1) (n.31), [63] (Laws LJ).
[173] *Bancoult* (No 2bis) (n.101, [65] (Lord Mance).
[174] ibid., [164] (Lord Kerr).
[175] ibid., [190] (Baroness Hale).
[176] ibid., [2] (Lord Mance).
[177] ibid., [77] (Lord Clarke).

the basis of disclosure issues. Both accepted that the findings of a 2014-2015 resettlement study[178] changed the dynamic of the dispute and opened up the possibility of a fresh challenge to 'the government's refusal to permit and/or support resettlement as irrational, unreasonable and/or disproportionate … by way of judicial review'.[179]

The 2016 decision is not 'the end of the road' for the Chagossians.[180] Indeed, any future litigation will benefit from the weakening of claims that within the Empire distinct constitutional principles predominate. *Bancoult* (No 2) was therefore a watershed moment. Following the furore surrounding that decision, later cases have seen the courts re-evaluate claims predicated upon imperial constitutionalism. If not all have been swept aside, the courts at least appear more wary of such claims than some Law Lords were in *Bancoult* (No 2). And as for the key legal instrument employed in the imperial management of the BIOT, legislation issued under the prerogative, subsequent cases have consistently reinforced *Bancoult* (No 2)'s message that it is subject to challenge on the basis of its adherence to constitutional principles. The majority judgment in *Miller* relied upon Lord Hoffmann's decision to affirm that '[e]xercise of ministers' prerogative powers must … be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament'.[181]

Conclusion

If the prospect of further interminable rounds of litigation (including, potentially, before the International Court of Justice[182]) cannot be a welcome prospect for the Chagossians, their

[178] KPMG, *Feasibility Study for the Resettlement of the British Indian Ocean Territory* (31 Jan 2015).
[179] *Bancoult* (No 2bis) (n.101), [75] (Lord Mance) and [78] (Lord Clarke).
[180] ibid., [78] (Lord Clarke).
[181] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583, [50] (Lord Neuberger).
[182] The Chagossians are supporting Mauritius' efforts to secure an ICJ Advisory Opinion over the legality of separating the BIOT from the colony of Mauritius prior to its independence. See O. Bowcott, 'EU members abstain as Britain defeated in UN vote on Chagos Islands' *The Guardian* (23 Jun 2017). Available at: https://www.theguardian.com/world/2017/jun/22/un-vote-backing-chagos-islands-a-blow-for-uk.

litigation strategy will remain vitally important for as long as the UK Government continues to spurn other avenues for addressing the dispute. In November 2016, the UK Government announced that even in light of the new resettlement study there would be no pilot resettlement of the Chagossians on the BIOT's outer islands on the basis of cost, feasibility, defence and security interests. Ministers also confirmed that the US lease on the Diego Garcia airbase has now been renewed until 2036.[183] These activities demonstrate that an explicitly imperial mind-set has persisted in the FCO through the entire Chagossian saga, dominated by conceptions of protection and the imperial good.[184]

Notwithstanding the apparent intractability of the dispute, the legal backdrop provided by imperial constitutionalism has undoubtedly shifted since 2008. The courts will thus remain a key arena in which the Chagossians can contest their treatment. The jurisdictional issues are now settled and the dubious factual underpinnings of the majority position in 2008 have been exposed. Many of the once-distinct aspects of imperial constitutionalism have been side-lined by courts in recent decisions. Freed from these distractions the Chagossians' litigation will, all but inevitably, return to the core issues of whether law-making in the interests of 'peace, order and good government' can encompass the enforced exclusion of an entire population and of the balance struck between Chagossian interests and the public (meaning imperial) interests asserted by the Crown.[185] In resolving this clash of interests, the assertion of fundamental constitutional principles within what remains of the imperial constitutional order is now long overdue.

[183] A. Duncan MP, HC Debs, vol. 617, col. 11-12W (16 Nov 2016).
[184] See Benton and Ford (n.20), 190-191.
[185] It is beyond the scope of this contribution, but such issues raise the prospect of the application of proportionality outside the context of rights incorporated under the Human Rights Act 1998; see *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] 1 AC 1457, [55] (Lord Carnwath).