

Common Law Constraints: Whose Common Good Counts?

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I

1. In May 1865, when the Colonial Laws Validity Bill was introduced, common law constraints¹ on the power to legislate for colonies existed by reason (i) of common law rules, and (ii) in many cases by reason of statute. These constraints had been recalled to the attention of HMG, and the new Colonial Secretary, the lawyerly Edward Cardwell (who a few years later would reform and rationalize the British Army), not so much by the maverick Boothby J. in Adelaide as by the opinions of the Law Officers of the Crown in London in 1862, 1863 and 1864, reinforced by the Judicial Committee's ruling of 20 March 1865 in the cause célèbre, *Re Colenso, Lord Bishop of Natal*.²
2. (i) (a) In settled colonies, common law rules stated in *Campbell v Hall* (1774) and reaffirmed in *Colenso* disqualified the Imperial/UK Crown (as distinct from Parliament) from legislating for any purpose during the effective existence of a local representative legislature, and even in the absence of such a legislature disqualified the Crown from ordinary³ legislation.⁴

(b) In conquered or ceded colonies (and therefore, since 1843, in protectorates⁵), common law rules stated in *Campbell v Hall* disqualified the Crown from legislating "contrary to fundamental principles".⁶

¹ As is evident, the phrase is ambiguous, since a constraint defined, in its content, by principles or rules of common law may be imposed either by common law or by statute or other governing instrument.

² 3 Moore Privy Council Cases (n.s.) 115 at 148-54. Argued over four days in December 1864. The constraints in question were all on the *power* of the Crown to legislate for colonies by prerogative instrument, and the argument of counsel turned on the applicability or otherwise of *Campbell v Hall*: see e.g. 132. A draft of the CLVA was sent out from London to at least the Australian colonies in late November 1864 (O'Connell & Riordan 73); I do not know whether that draft extended its provisions on repugnancy to Orders in Council.

³ As distinct from constituent.

⁴ *Halsbury's Laws* 6 (2003) paras 822-823

⁵ And in protected states. See 6 & 7 Vict. c. 94 and para. 5 below.

⁶ 1 Cowp. 204, 209, Lofft 655, 741-2; 98 ER 1048, 896 (KB, whole court, after being argued four times).

3. (ii) In some settled colonies, including South Australia, the Imperial statute authorizing a local representative legislature to make laws for the peace, order and good government of the colony did so subject to the proviso that “no such law should be repugnant to the law of England”.⁷ Asked by the Secretary of State whether that proviso entailed that an Act of the colonial legislature would be “invalid if ...contrary to the principles of British law which [a colonial judge] deems fundamental”, the Law Officers replied Yes. Asked whether it further entailed invalidity where the colonial Act was different from rules “in force in England, though not properly described as fundamental principles of British law”, they replied No. Asked whether they could “suggest any principle which would regulate the distinction between fundamental principles... and non-fundamental rules or customs of legislation”, they replied “We are unable to lay down any rule to fix the dividing line between fundamental and non-fundamental rules of English law.”⁸ The despatch from the then Colonial Secretary, the Duke of Newcastle, communicating this to the Governor of South Australia underlined the imperial government’s firm subscription to the opinion that colonial Acts are “void” not only if repugnant to an Act of the Imperial Parliament intended by that Parliament to apply to the Colony” but “also void if contrary to any of those essential principles of what may be called natural jurisprudence, which, as modified by the ideas and institutions of Christianity, have been adopted as the foundation of the existing Law of England.”⁹
4. All this language and doctrine of constraint by “fundamental principles” is manifestly taken over into the domain of settled colonies and their legislatures from the regime announced in *Campbell v Hall* for the domain of conquered/ceded colonies and Orders in Council for their governance. Nor was this conscious carrying-over a mere invention of the Law Officers of 1862, or of Boothby or the lawyers of the South Australian government and legislature who wanted to

⁷ 13 & 14 Vict c. 59 s. 14: see O’Connell & Riordan 61. Roberts-Wray suggests that even in the absence of such provision, the constraint or limitation of power was regarded, before 1865, as “implied” in the grant of legislative powers even to a representative legislature in a settled colony: *Commonwealth & Colonial Law* (1966), 400.

⁸ Opinion of William Atherton A-G and Roundell Palmer S-G, 12 April 1862, first published in *Correspondence Relative to Mr Justice Boothby* (April 1862) C. 3048 [6056] 3048, *Parl. Pap. 1862* vol. 37, paper 113, p.70.

⁹ C. 3048, p. 67 (24 April 1862), stating the Colonial Secretary’s expectation that the Law Officers’ opinion will command the general assent of colonial lawyers, and its “entire accordance with the views of Her Majesty’s Government”.

dismiss Boothby.¹⁰ In *Bank of Australasia v Nias* (1851), for example, the Queen’s Bench had not questioned counsel’s contention that a statute of the settled colony of New South Wales “repugnant to the laws of England, or to natural justice” would be “void”.¹¹

5. Moreover, the Crown’s powers of legislating (whether by Orders in Council, Letters Patent, Commissions, Warrants, Royal Instructions or otherwise) in relation to territories in which it had imperial interests, responsibilities and control were of real and increasing interest in 1865. One week after the royal assent to the Colonial Laws Validity Act we find the assent to the Foreign Jurisdiction Act 1865 amending (in a minor way) the original Foreign Jurisdiction Act 1843. The 1843 Act recites that “doubts have arisen how far the exercise of ... power and jurisdiction [in places, outside Her Majesty’s jurisdiction, where Her Majesty has such power by treaty, usage, sufferance and other lawful means] is *controlled by* and dependent upon *the laws and customs of this realm* and it is expedient that such doubts should be removed.” The means of removing doubts was to enact that in such territories it is lawful for Her Majesty “to hold, exercise and enjoy” the Crown’s jurisdiction “in the same and as ample a manner *as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory*”.¹² So the Crown’s powers in ceded/conquered territory were made the touchstone of its powers in a protectorate, while the limitations on those powers pronounced by all the judges of the King’s Bench in *Campbell v Hall* were being treated as the emergent standard for measuring the limitations on the powers of representative legislatures in settled and (where such legislatures existed) in ceded/conquered colonies *alike*.

¹⁰ Roberts-Wray, *Commonwealth & Colonial Law* 400 says it was “a little surprising”, since the accepted general principle was that colonial laws were not valid if contrary to English law. But this view overlooks the long settled practice of colonial representative legislatures in settled colonies, which often changed the extensive body of law which the settlers were deemed to have brought with them, viz. the whole of the common and statute law of England at the date of settlement except such provisions as were inapplicable to their situation and condition: see the lucid paper “Points of Colonial Law: On the Doctrine of Repugnancy in relation to Colonial Statutes, Law Magazine 51 (1854) 1-11 at 2-3.

¹¹ (1851) 16 QB 717 at 734, per Lord Campbell CJ for the Court. In *Watson’s Case* (1839) 9 A & E 731 at 783, Lord Denman CJ for the Court of Queen’s Bench had similarly proceeded on the assumption that a colonial statute might be “void” because contrary to the “principle” of English law that no one can contract for his own imprisonment.

¹² As the sidenote to this provision, 6 & 7 Vict. C. 94 s. 1 puts it: “The power acquired by Her Majesty in countries out of Her dominions shall be held on the same terms as Her Majesty’s authority in Crown colonies.”

6. Thus it is altogether unlikely that the application of the Colonial Laws Validity Act's main tenet - - forthright abolition of common law repugnancy¹³ - to Orders in Council as well as to representative legislatures was, as the Court of Appeal suggests in *Bancoult (No 2)* [26], merely "included by the parliamentary draftsman ...for completeness, since they too were a source of colonial law."¹⁴ If completeness had been the point, the draftsman would have included within the definition of "colonial law" not only Orders in Council but also other instruments of legislation by the imperial Crown, some of them widely used, such as Letters Patent. The decision to include Orders in Council will have been an act of high policy by the responsible (Liberal) ministers and their supporters in Parliament.¹⁵ Its purpose will have been to abolish the whole repugnancy doctrine in *Campbell v Hall*.¹⁶ As we have seen, that doctrine, though it had been become the standard in (i) settled colonies (where legislative acts of the imperial Crown were relatively rare), had its original canonical pronouncement and application in relation to (ii) ceded/conquered colonies, which in turn had been made, by the 1843 Act, the standard for (iii) all other imperial territories (protectorates and protected states). So (the thinking will have proceeded) these, (ii) and (iii), need to be dealt with. Not by giving the Crown carte blanche. The abolition does not extend to some types of Crown legislative instrument. But the terms of the abolition allow the Crown to come within the new legislative freedom from common law constraints by using the most public and most corporately responsible kind of prerogative act, the Order in Council, in which Her Majesty acts not merely on the advice and counter-signature of a single minister but on the advice of Her council, the symbol of collective responsibility.

¹³ That is repugnancy as a "common law constraint" in either of the senses mentioned in n. 1 above.

¹⁴ Sedley LJ bases this inference on the fact that the Law Officers' published opinions of 1862-1864 make no allusion to the use or validity of prerogative Orders in Council, which were "a source of colonial law". He ignores the fact that the decision to abolish common law repugnancy represented a sharp and major change in the legal and constitutional change in imperial policy, reversing the position publicly affirmed by the Law Officers and the Government, to Parliament, in April 1862 (see n. 9 above). Such a decision cannot have been made without careful consideration of the whole range of legislative powers in and for colonies (and protectorates and protected states). And see n. 15 below.

¹⁵ Among other motives may have been awareness that the long festering situation in Jamaica, erupting (after appeals to the Queen) into ferociously suppressed rebellion in October 1865, would need to be resolved, as it was by the Jamaica Act 1866 (29 & 30 Vict. c. 12, 23 March 1866) by terminating over 200 years of "representative" government and reverting to Crown rule by and under Orders in Council. See Parl. Deb. 3rd ser. Vol. 182 cols 119-34 (13 March 1866).

¹⁶ Strictly, to confine it to a very narrow class of legislation (by the Crown otherwise than by Order in Council) which in practice need never be employed where protection from judicial review is desired.

7. *Bancoult (No 2)* declares an Order in Council void and inoperative because it is contrary to the law of England in its content as well as (given that content) in the circumstances of its enactment [78]. Even when this is finessed as an unlawful *making* (resulting in invalidity), it seems on its face to declare a colonial law void “on the ground of repugnancy to the law of England”, that is, repugnancy to English public law principles determining whether an Order in Council with such a content could be made. Thus the ruling seems directly contrary to ss. 2 and 3 of the CLVA.¹⁷
8. The Court’s principal argument against that conclusion is summarized conveniently in [30]:

Repugnancy as a legislative term means an irreconcilable conflict between two laws. There is no reason to import into the scheme of the 1865 Act any departure from the logical principle that before any question of repugnancy to an Act of the imperial Parliament can arise, a colonial measure has first to be law. If an unconstitutional colonial statute is not law--as manifestly it is not--no question of repugnancy arises. The present dispute, equally, is not about whether the Constitution Order is repugnant to a superior statute or other legal provision but about whether it is law. It is accordingly not barred by the 1865 Act.

Buried in this summary is the thesis articulated in [22], that CLVA’s rule about repugnancy “is one of priority, not of powers”, priority of *valid* colonial laws over otherwise applicable rules of English law other than rules in or under *imperial* Acts of Parliament (that is, only those UK Acts which extend to the colony because “made applicable to such colony by the express words or necessary intendment of any Act of Parliament” (CLVA s. 1)). Similarly para. [26] portrays Boothby J as “making a habit of *disapplying* local legislation”.

9. The operative parts of this argument are mistaken. Boothby J’s habit was of declaring local legislation *void*, on the ground that the South Australian legislature had no *power* to enact laws repugnant to English law (including repugnancy to rules and principles *not* contained in imperial Acts.¹⁸ The Law Officers’ opinions in 1862-4 differ only in

¹⁷ The violation is of s. 2 as well as s. 3 because of the words “and not otherwise” in s.2’s statement of the rule of repugnancy to imperial statute: see *Liyana v R* [1967] 1 AC 259 at 284.

¹⁸ See C. 3048 [6065], p. 55 where Boothby J in August 1861 restates one of his earliest sallies, in 1855, when he declared that the provisions of a Bill about the to be reserved for Her Majesty’s assent were “so opposed to well recognised constitutional principles [about the prerogative] and statutory enactments that their introduction into the Bill is beyond the powers” conferred on the legislature of South Australia. Many other passages in the examination of Boothby J. by a committee of the legislature of the colony evidence the same point, as does the brief

narrowing this to fundamental principles of English law. Nowhere in the historical material relevant to the CLVA's enactment do I see a suggestion that repugnancy to common law did not go to legislative *powers*.¹⁹ Even in relation to repugnancy to imperial Acts, *Winfat Enterprise (Hong Kong) Co Ltd v A-G of Hong Kong* [1985] AC 733 at 747 has the Privy Council saying per Lord Diplock that the CLVA [obviously s. 2] imposes limitations “on the *subject matter of the legislative power*” of the maker of colonial law.²⁰ But the point does not rest on authority. For what lawyer dealing with the CLVA between May 1865 (CLV Bill) and 2006 would have thought that it did not go to power and validity, at least insofar as it set aside common law repugnancy?²¹

11. There is, of course, a distinction between priority in Sedley LJ's sense – superiority in authoritativeness -- and powers. And it is true that if the issue is confined to conflict between two sets of statutory rules, a constitutional provision which, like s. 109 of the

of the Secretary of State to the Law Officers for their opinion of April 1862, see C. 3048 p. 69 = O'Connell & Riordan, 61-2.

¹⁹ Sedley LJ quotes [27] Dicey in order to make the illicit inference from Dicey's silence about Orders in Council that “little, if any, significance was attached to the inclusion of Orders in Council in the category of colonial laws for the purposes of the Act”. (Dicey had little interest in the government of colonies and protectorates without representative legislatures. Those with that responsibility, including those who sponsored the CLV Bill must have “attached” high “significance” to the inclusion of Orders in Council to its protection from common law constraints.) In doing so he discloses that Dicey accepted that the CLVA was to “govern the *validity* of colonial legislation”, and himself summarises the point: “the entire focus was on the *empowerment* of colonial legislatures to do as they thought best, so long as what they did was not repugnant to any imperial enactment.” Quite so (and s. 1 made sure that the “empowerment” extended to colonial laws made by Order in Council). This confirms that priority and power are not mutually exclusive categories.

²⁰ “The words ‘peace, order, and good government,’ it has repeatedly been stated by this Board, ‘connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign.’ Viscount Radcliffe so put it in *Ibralebbe v. The Queen* [1964] A.C. 900, 923. That was said in relation to the independent state of Ceylon; in the case of Hong Kong, which remains a Crown colony, it is subject to *such limitations upon the subject-matter of legislative power* as are imposed by the Colonial Laws Validity Act 1865.”

²¹ Sir Frederick Rogers, permanent Under-Secretary of State in the Colonial Office, top of the BCL class in Oxford, and probable author of the brief to the Law Officers in 1862, had taken a narrower view than they did of the scope of the repugnancy rule. But he, too, regarded it as a rule about power (“competence”). He had earlier (1858) expressed his view by saying although “the doctrine of former times” was that there were “certain fundamental enactments of statute or principles of common law of so binding a nature that the legislation of all British Dependencies must be conformable to them”, that did not reflect reality, as “in practice the tendency has long been to consider Colonial Legislatures as *legally competent* to pass almost any law which they are not precluded from passing by some Imperial Statute intended by Parliament to be binding on the colony,” *with safeguards of disallowance or otherwise if some law manifestly at variance with the fundamental principles were enacted*. [For this transcription and paraphrase of PRO CO 323/87 (South Australia), I am indebted to Mark Leeming and Anne Twomey.]

Australian federal Constitution, declares one set “invalid to the extent of the inconsistency” may reasonably be taken (as s. 109 has been taken) to concern priority, paramountcy, not the power of the inferior legislature or the *vires* of its enactments. But the issue tackled by CLVA ss. 2 and 3 was primarily (i) the elimination of a ruling doctrine of fundamental principles of common law, conceived as pervading the entire imperial constitution and qualifying or eliminating pro tanto the power of the makers of colonial law, and secondarily (ii) the reaffirmation and particularization of the supremacy of imperial statutory law. Here, reference to voidness (and thus to validity), especially as distinguished from and coupled with reference to inoperacy, must be taken to deal squarely with *both* power and priority, at once. In the context of repugnancy to an imperial Act,²² most obviously where this is enacted *after* the colonial law, we will say that the colonial law was within the powers of the colonial legislature or Her Majesty in Council when enacted, but was overridden by (subjected to the priority in authority of) the imperial Act. But then, even in relation to the clash between statutory rules, we can add, with the Privy Council in *Rediffusion (Hong Kong) (1970)*,²³ that during the operation of the imperial Act, the colonial legislature or Queen in Council *have no power* to re-enact the same or other provisions repugnant to the imperial Act – would act in a relevant sense *ultra vires* in doing so. A fortiori, in relation to the common law constraints swept away by s. 3 (and by the “not otherwise” clause of s. 2) of the CLVA; even if some of those who said that such constraints invalidated colonial meant only that they rendered an *intra vires* law inoperative while others meant they rendered it *ultra*

²² When speaking of imperial Acts I of course include orders or regulations made under their authority: CLVA s. 2.

²³ In *Rediffusion (Hong Kong) Ltd v. A-G of Hong Kong* [1970] AC 1136 at 1161,²³ Lord Diplock’s judgment for the Board states that a Hong Kong bill assented to by the Governor but repugnant to an imperial Act will by virtue of CLVA s. 2 “be void and inoperative and *will not be the law of Hong Kong*”. Not cited to the Court of Appeal. Lord Diplock goes on (p. 1162) to indicate why it was sensible for CLVA to speak not of powers (or priority) but of voidness (as well as inoperacy): “In a sense it may be said to be *ultra vires* the legislature of Hong Kong to make a law, i.e., to pass not merely a bill but an Ordinance which [by reason of repugnancy to imperial Act] is void and therefore ineffective. But conduct which is *ultra vires* in this sense is not of itself ‘unlawful.’ Conduct however much it lies outside the legal power of the actor does not give rise to any cause of action on the part of any person unless it infringes or threatens to infringe that person’s legal rights. Such an infringement can only occur when steps are taken to enforce the void Ordinance.”

vires, the point of the CLVA was to eliminate all arguments for judicial review of colonial laws on grounds other than inconsistency with imperial *statutory* law.

12. So the argument summarised in [30] is fallacious. It wrongly assumes that the common law repugnancy doctrine suppressed by the CLVA did not go to constitutionality and validity. Boothby J.'s armoury of argumentation included, explicitly or incipiently, moves just like the Court of Appeal's: if a colonial "law" is contrary, either in the manner of its making or in its content, to a fundamental common law principle, it is no law and so the question whether it is also repugnant to an Imperial statute does not need to arise. CLVA ss. 2 and 3 were not in vain, because the common law doctrine of invalidation of colonial measures for violation of common law constraints *was* a way of deeming a colonial law "void or inoperative on the ground of repugnancy to the law of England". Finding the 2004 BIOT Orders invalid because in violation of English public law requirements of respect for legitimate expectations is subjecting colonial law to scrutiny of a kind that it was well within the purpose of the CLVA to eliminate and well within the terms in which ss. 2 and 3 give effect to that purpose.
13. This can be seen more easily if one attends to the way Sedley LJ in [37] and [38] takes up the mantle of Lord Mansfield in *Campbell v Hall*:

... The underlying principle is that the common law limits the use of the colonial prerogative power to its proper purposes. ...[A]ny Order in Council... would be void and liable to be so declared by the courts... [if], if Lord Mansfield was right in *Campbell v Hall* 1 Cowp 204, ...incompatible with the terms upon which the colony in question has been ceded or surrendered.

38. ... An Order in Council permitting the use of torture to obtain evidence would today fall under the 1865 Act as being repugnant to an imperial statute (the Criminal Justice Act 1988, section 134),²⁴ but even before 1988 the courts of this country would surely have struck it down, whether on the public law ground... that it was irrational in its defiance of accepted moral standards, or on Lord Mansfield's ground in *Campbell v Hall* 1 Cowp. 204, 209 that it was "contrary to fundamental principles". The same would almost certainly be the case with an Order in Council abolishing all recourse to law in a colony or introducing forced labour.

²⁴ CJA 1988 is in fact an imperial statute only in relation to those territories to which it has been extended, which do not include the BIOT or SGSSI: see SI 1988/2242 Sch.2; SI 1992/1715.

But this parade of *horribilia* -- hypothetical cases violating English public law -- is just a 21st century rewrite of the parade of hypothetical violations of “fundamental principles of English law” assembled for and adopted by the Law Officers in their foundational Opinion of April 1862:

...provisions...contrary to the principles of British law... as by denying the sovereignty of Her Majesty, by allowing slavery or polygamy, by prohibiting Christianity, by authorizing the infliction of punishment without trial, or the uncontrolled destruction of aborigines, etc.

So the purpose of the CLVA extended to liberating the makers of colonial laws – and immunizing their laws-- from judicial scrutiny *even in such cases*.²⁵ Political responsibility and control (a) of colonial representative legislatures to and by their electorates and (b) of the Queen in Council to and by the United Kingdom Parliament and electorate was judged sufficient safeguard.

14. Sedley LJ describes this result as “an Alsatia where the rule of law does not run” [65]. He is referring to the administration of the UK’s remaining colonies in the event that the rule in *Campbell v Hall* – no “new change contrary to fundamental principles” – is not asserted [64]. So he is saying that, from 29 June 1865 down to 16 May 2006 when the Divisional Court quashed the Immigration Order and part of the Constitution Order, the whole Empire, *at least* so far as not ruled by representative legislatures -- was an Alsatia where the rule of law did not run. (And why not also the parts ruled by representative legislatures liberated by CLVA ss. 2 and 3 from the constraints of justiciable “fundamental principles”?) If not a *reductio ad absurdum*, this is at least a severe exaggeration.²⁶ And in any case it overthrows the judgment given legislative force, with full consciousness of the alternatives, in 1865. Legal and political statesmen looked the doctrine of Lord Mansfield in the eye in 1865, after 90 years of application derivatively in settled colonies and directly in ceded/conquered colonies. By Act of Parliament they rejected its postulate that London lawyers and judges should supervise the government of colonial territories by litigious appeal to fundamental principles of English law and natural justice. Certainly after 140 years of

²⁵ See also Mark Walters, “The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law” (2001) 51 U. Toronto L.J. 81-141 at 108-10, 121-9, 133-5, 139.

²⁶ The real Alsatia would be resettlement of the Islands in the form envisaged by Sedley LJ in [71], “without capital expenditure” funded by the UK, and without, apparently, any expenditure on the maintenance of (literally) peace and order in the islands.

peaceful but deliberated reception and reiteration of that legislative judgment,²⁷ respect for the rule of law – of our law -- requires that any reversal of it be by our Parliament, not by judicial reasoning which rhetorically takes but rationally fails the test of history and logic.

II

15. Here we reach the second aspect of the *Bancoult* litigation that I wish to discuss. This aspect transcends, in general and philosophical interest, the courts' mishandling of the CLVA, and also bears directly on the question whether it is desirable to lift the protections from judicial review that are afforded to imperial Orders in Council by CLVA ss. 2 & 3.²⁸ The aspect I have in mind is the courts' mishandling – as I see it -- of the relation between imperial and local common good, a mishandling reinforced by the decision of Lords Bingham, Hoffmann and Hope in *Quark Fishing* to accede to the erroneous argument of counsel – amazingly, counsel for the Foreign and Commonwealth Secretary -- that royal instructions communicated to a colonial governor by that Secretary of State are not acts of the United Kingdom Government and cannot be given in the interests of the United Kingdom as distinct from the interests of the colonial territory.
16. The very first provision of an Act of Parliament granting independence to a dependent territory (now called a British Overseas Territory)²⁹ is that “On and after ...the appointed day Her Majesty’s Government in the United Kingdom shall have no responsibility for the government of” the territory in question.³⁰ As is abundantly shown by Anne Twomey’s

²⁷ See e.g. *Phillips v Eyre* (1870) LR 6 QB 1, where the Exchequer Chamber employed CLVA ss. 2 and 3 to repel an challenge to a colonial Act of indemnity and oblivion for repugnancy to fundamental principle.

²⁸ And the mishandling of the authorities on “peace, order and good government”. For example: Sedley LJ gives prominence and favour to the opinion on that of Street CJ in *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, and mentions the differing views of the other two appellate judges in the cases, but not the thoroughgoing rejection of Street CJ’s “surprising” opinion by a unanimous High Court in *Union Steamship v King* [1988] HCA 55 (1988) 166 CLR 1.

²⁹ The British Overseas Territories Act 2002 makes this change, which it significantly labels a [mere] “change of name”.

³⁰ Thus s. 1(1) of the Mauritius Independence Act 1968: “1 *Fully responsible status of Mauritius* (1) On and after 12th March 1968 (in this Act referred to as “the appointed day”) Her Majesty’s Government in the United Kingdom shall have no responsibility for the government of Mauritius.” Correspondingly, the UK government declares to the Secretary General of the UN that Her Majesty’s government in the UK ceased on independence day to have the obligations *and rights which it formerly had as the authority responsible for the administration of the territory* by virtue of any international instrument applicable to the territory: se e.g. as to Mauritius, the documents cited in *Halsbury’s Laws* 6 (1974), para. 830 n. 6.

richly documented work³¹ on the terminating of the dependent status of the Australian States (as distinct from the already long-independent Commonwealth of Australia itself), Her Majesty's Government in the United Kingdom firmly maintained right through the 1970s and 1980s that, even in relation to Australia, the Queen's powers in relation to Australian States must be exercised on the advice of British ministers acting with a view to the responsibilities and interests of *the United Kingdom*.³²

17. Underlying that position is, first, the legal reality and principle that:

*The United Kingdom and its dependent territories within Her Majesty's dominions form one realm having one undivided Crown*¹. This general principle is not inconsistent with the further principle that on the grant of a representative legislature, and perhaps even as from the setting up of courts, a legislative council and other such structures of government, Her Majesty's government in a colony is to be regarded as distinct from Her Majesty's government in the United Kingdom². To the extent that a dependency has responsible government, the Crown's representative in the dependency acts on the advice of local ministers responsible to the local legislature³, but in respect of any dependency of the United Kingdom (that is, of any British overseas territory), acts of Her Majesty herself are performed only on the advice of the United Kingdom government^{4,33}.

This paragraph of *Halsbury's Laws* is specifically approved by Megarry V-C in *Tito v Waddell (No 2)*³⁴ and by Kerr LJ in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta*,³⁵ each of whom is cited in *Quark Fishing*, but without reference to *these* pages of their judgments, so that they are

³¹ I have benefitted greatly from Dr Twomey's draft article critically discussing these aspects of *Quark*.

³² The ministerial second reading speech on the Australia Bill 1986 will have been drafted in the FCO. It states: "The quasi-colonial status of the Australian states meant that, in respect of those states, Her Majesty was Sovereign in right of the United Kingdom. Accordingly, in exercising her powers in relation to the states, Her Majesty has hitherto been formally advised by her United Kingdom Ministers." See Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, New South Wales, 2006), 271. And see pp. 267-9 on the intense legal scrutiny that lay behind this clarity. As Michael McHugh, lately of the High Court of Australia, says in his Foreword (p. vi), the Foreign Office not only acted "on the constitutional theory that only the United Kingdom Government could advise the Crown on State matters" but also "did not hesitate to take into account the political and economic interests of the United Kingdom in determining whether or not to tender advice to the Crown on such matters".

³³ *Halsbury's Laws* 6 (2003) 716

³⁴ [1977] Ch 106 at 231 also 306)

³⁵ [1982] QB 892 at 921-922.

made to support the radically opposed position adopted by a majority of the Lords.³⁶ This position is, as Lord Bingham puts it [12], that in exercising her authority under a provision of the 1985 Order in Council establishing the South Georgia and South Sandwich Islands Territory to give instructions “through a Secretary of State” to the territory’s Commissioner, the Queen “is (and only is) the Queen of SGSSI” and the Secretary of State merely is “in constitutional theory...her mouthpiece and medium”.

18. Every Colonial or Foreign and Commonwealth Office draftsman during the past 200 years would, I am certain, have regarded this “constitutional theory” as a theory defunct since the time of William and Mary.³⁷ The time-honoured phrase used routinely in the SGSSI Order in Council, “such instructions... as Her Majesty may from time to time see fit to give him *through a Secretary of State*”, has gradually superseded its equivalent: “instructions under Our sign manual and signet”. The signet was and is a seal held by the Secretary of State, so the reference to it, like the phrase “through a Secretary of State”, refers to the constitutional theory of responsible government.³⁸ Save in the rare circumstance where she might have to judge for herself who should be her Prime Minister (because likely to command the support of a majority in the elected chamber), the Queen acts only on the advice of a responsible minister, that is, in respect of the

³⁶ The paragraph was also considered in depth by the general editor, Lord Hailsham, who while Lord Chancellor summoned me to his enviable room in Parliament House to discuss it, particularly its allusions to the position of the Queen in relation to the Australian States. He approved the paragraph in the form in which it appears in *Halsbury’s Laws* 6 (1974) (substantially as in 2003). There had been no explicit treatment of the unity and divisibility of the Crown in earlier editions, even in the 3rd ed. of the title by Stanley De Smith (“the doyen of English public lawyers”: Sedley LJ in *Chagos Islanders v. A-G* [2004] EWCA Civ 997, [39]).

³⁷ Alpheus Todd, *Parliamentary Government in the Colonies* ([1880], 1894), 3: “The three leading maxims of the British Constitution, in its modern form [secured by the Revolution of 1688] and developments, are: the personal irresponsibility of the king; the responsibility of his ministers for all acts of the Crown; and the inquisitorial power and ultimate control of Parliament.”

³⁸ Such phrases have been pervasive throughout the constitutional practice of the past 300 years. Thus, to take an example at random, Anson, *Law and Custom of the Constitution* ii (3rd ed. 1907), 51, records that the docket accompanying the warrant to be signed by the monarch and countersigned by a Secretary of State to authorize the affixing of the Great Seal informs the monarch of the character of those letters patent and of the origin of the warrant, concluding “And this warrant is prepared *according to your Majesty’s command, signified by Mr Secretary [name]*” – the docket itself being signed by a Clerk of the Crown. Thus constitutional theory provides that her Majesty’s ministers have a standing authorization from her to advise her by, *inter alia*, preparing for her signature all the instruments expressing her instructions and authorizations (warrants). Ministers take responsibility for her acts *before* those acts as well as after them.

United Kingdom and all its dependent territories, only on the advice of the Privy Council or of a Secretary of State responsible to Parliament and the electorate. The phrases used in or in relation to royal instructions to the officers administering the government of colonial territories would have been universally understood as meaning that those officers are subject to the instructions, given in proper form, of the United Kingdom Government, whose responsibilities for all dependent territories, as Independence Acts all remind us, are terminated only on independence.

19. The *Quark* theory is presented³⁹ as an interpretation of the SGSSI Order. But it not only overthrows a well understood drafting convention of great antiquity, a convention which cannot fail to have corresponded with the intention and meaning of the Order. The theory also is incompatible with the basic theory of the (post-1688) constitution. That theory requires that the Queen, in giving instructions to the SGSSI Commissioner, be acting on the advice of a responsible minister. That cannot possibly⁴⁰ be other than a United Kingdom minister, the one who is identified by counter-signature on the face of the instructions. So that minister cannot be merely a “mouthpiece and medium” but is, rather, responsible for the Crown’s act of issuing instructions and is performing an act of government in presenting the draft instructions to Her Majesty with the advice that they be issued, and in promulgating them to the Commissioner if not also to the world. Accordingly the giving of the instructions is an act of Her Majesty in right not only of her dependent territory the SGSSI but also, indeed primarily, in right of the United Kingdom, which forms one undivided realm with all its dependent territories notwithstanding the distinguishability of each territory and each government of each territory.⁴¹ Acts of the

³⁹ Like the argument of counsel for the Secretary of State, [2006] 1 AC 529 at 532 which seems oblivious of the imperial context, and of our state practice down to the present. Counsel for *Quark* led the court in the wrong direction by speaking, 534, as if the Crown in right of a dependent territory acts only in one capacity, that of the United Kingdom. In truth the Crown acts in right of the territory (a) when the governor acts, whether with or without the advice of ministers and equally (b) when the Queen acts in right of the United Kingdom pursuant to the United Kingdom’s authority and responsibility in relation to the territory, such acts being, necessarily, on the advice and responsibility of her UK ministers, that is, the UK Government.

⁴⁰ That is, in relation to the SGSSI. In relation to independent realms, such as Australia, of course, she must act on the advice of ministers in that realm.

Commissioner are acts of the Crown in right of the SGSSI. Acts of the Queen on the advice of a UK minister, in relation to the SGSSI, are acts of the Crown in right of the UK and its dependency the SGSSI.

20. The same is true of acts of the Queen in Council in relation to the BIOT. They are acts of the UK Government in the exercise of its responsibility for the common good – the peace, order and good government – of the United Kingdom and all its dependencies, including but not exclusively the BIOT. The legal doctrine that there is one undivided realm and Crown of the United Kingdom and its dependent territories corresponds to the moral and political reality that the common good of each part is dependent on the common good of the whole. If the UK is conquered or subverted or economically ruined or impoverished, the common good of each dependent territory is more or less radically affected, presumptively for the worse.
21. Since Sedley LJ is willing to speak of the imperial Parliament acting as imperial in 1988, we need not flinch to say that this one undivided realm has an imperial character, and that the acts of Her Majesty in giving instructions to the Commissioner of the SGSSI and the other colonial governors are acts of the imperial Crown. One of the main manifestations of this imperial character has always been the Crown's power – prerogative save where given statutory form -- to disallow the legislative enactments of colonial legislatures assented to in the name of the Crown by the governor of the colony in question.⁴² That power is of course exercised on the advice of UK ministers (sometimes by Order in Council), and is exercisable, of course, not only in the interests of good government of the colony in question but also in the interests of trade within the empire as a whole, or the defence of the whole realm, or the international obligations of the United Kingdom, and so forth. The discontinuance of the exercise of that power in respect of the great

⁴¹ This was all perfectly clear long ago. The balance of distinction and unity is evident, to take one example from thousands, by the statement in the Colonial Secretary's dispatch to the Governor of South Australia of 24 April 1862 (communicated to Parliament and the public in the same week): "By the existing law of *South Australia* I consider such an authority [of displacing a colonial judge] to be entrusted, and very properly entrusted, to Her Majesty acting on the advice of Her Ministers in Great Britain": C. 3048, p. 68.

⁴² *Halsbury's Laws* 6 (1974) para. 1083.

Dominions (Canada, Australia, New Zealand and South Africa) was agreed at the Imperial Conference of 1930 from which emerged the Statute of Westminster 1931.⁴³ Where the power was conferred by statute, an Independence Act may have to repeal or revoke it, as in the Australia Act 1986, s. 8. Otherwise it necessarily lapses by reason of the Independence Act's above-mentioned foundational provision terminating the responsibilities of the HM Government in the United Kingdom.

22. Similar evidence of the impossibility of the *Quark* theory is afforded by the provisions pervasive throughout the empire and surviving to this day, requiring the colonial governor to reserve his assent to Bills for the signification of Her Majesty's pleasure, usually "through the Secretary of State" – that is, *pace Quark*, on the advice of Her UK ministers. A characteristic provision of royal instructions to governors to reserve bills has included "Any bill of an extraordinary nature and importance whereby Our prerogative or the rights and property of Our subjects not residing in the territory, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced."⁴⁴
23. Against all this and much else, Sedley LJ, relying in part (like the Divisional Court) on *Quark*'s false perspective,⁴⁵ says [67] that "the governance of each colonial territory is in constitutional principle a discrete function of the Crown" in such a sense that acting for "the defence purposes of the Government of the United Kingdom" -- a government responsible for the common good of all its dependent territories – "is not connected with the governance of the Chagos Islands" and so "lies beyond the objects, whether expressed in terms of peace, order and good government or in terms of the legitimate purposes of colonial governance, for which ministers are entrusted by law with the use of the royal prerogative" [68]. It seems clear that his requirement that Orders in Council be demonstrated to the satisfaction of London courts to be in the interests of the dependent

⁴³ *Halsbury's Laws* 6 (1974) para. 841.

⁴⁴ E.g. Royal Instructions to the Governor of Queensland, 10 June 1925.

⁴⁵ See e.g. [62]: "Mr Howell, recognizing that his task would be markedly easier if he were able to say that the orders were made in right of the United Kingdom, contends nevertheless that the interests to which government may have regard, albeit in right of the BIOT, are both catholic and indivisible."

territory goes well beyond the special case of what he calls the “permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being”. He accepts [78] that this is judicial review not simply of “the circumstances of enactment” of the Orders in Council but of “their content”. It is clear that this is precisely the evil against which ss. 1-3 of the CLVA, in their explicit application to such Orders in Council, were aimed.

24. I say “evil” because, although the judicial protection of rights and the rule of law are indispensable elements of the common good, litigation – particularly when it invites judges to consider directly whether “overriding and sufficient reasons” exist for some legislative act -- can involve a loss of perspective inimical to the common good of a realm so large and complex as the empire was and even the United Kingdom with its dependent territories remains. That loss of perspective is evident in the trope on which the judgments in *Bancoult (No. 1)* [2001] QB 1067 and *Bancoult (No. 2)* in the Divisional Court and Court Appeal pivot: that the whole population were being expelled from their homeland and denied “one of the most fundamental liberties known to human beings, the freedom to return to one’s homeland” [71]. This trope, this quasi-factual premise, is I suggest a surrender of substance to form.
25. In legal and moral substance the people in question were at all relevant times inhabitants and belongers of the longstanding colony of Mauritius, and citizens of it from the moment of its independence, some years before their expulsion. They remain citizens, inhabitants and belongers of Mauritius. (They were also British subjects who enjoyed the freedom to move within the vast zone of Britain’s colonies and protectorates, and – any without restriction until 1962 -- to come and dwell in the United Kingdom, a freedom which from the enactment of the British Overseas Territories Act 2002 they have had without restriction.) In substance, about 50 square kilometres of the land of the colony of Mauritius, was with the consent of the colony’s responsible elected ministers, acquired for dedication to military purposes. In form, this was accomplished by paper creation of a new colony, of which the people in question remained unaware until their expulsion to the main part of what in substance was and remained their homeland. I am inclined to

think there is more truth in the following statement by a Commonwealth Office official in 1966 than in the judicial rhetoric about loss of homeland:

Birth has not conferred more right to remain in BIOT to the 100 or so second-generation inhabitants than several generations of occupation might confer on the inhabitants of a village about to be inundated to build a dam; the scale in fact is somewhat less than usual.⁴⁶

Such compulsory acquisitions by exercise of eminent domain usually entail wrenching loss of homeland, in another sense of that ambiguous word, the sense in which a now submerged Welsh village and valley was homeland to the villagers and this or that island in the Chagos Archipelago was homeland to some, certainly a minority, of those required to move away to another part of their Mauritian homeland. The justice of the acquisition, in Wales or the Islands, turns on the fairness with which the different elements of the common good, of the village, the county, the nation and the sometimes of the whole world were held in view by the decision-makers, both in opting for acquisition and in determining the measure and means of compensation.

26. I don't know whether there was fair compensation, though surely there was culpable delay. In the mid-1970s I taught law and the rule of law in Malawi, a territory that had benefited beyond measure (vastly, albeit imperfectly) from imperial rule, with all that rule's imperfections. I used to see the weekly plane from Blantyre to Mauritius flying directly over the university at Zomba. The weekly wage in and around Zomba, for people living and working like the Chagos Islanders in this case, was about 50 pence a week. I do think that the record assembled in the appendix to Ouseley J's 2003 judgment makes disconcertingly evident the lack of balance with which the judgments of the Divisional Court in both phases of the case presented the deliberations of Her Majesty's government about the fate of the Chagos Islands. This lack of balance is compounded, it seems to me, by the Court of Appeal's contemptuous, legal-logic chopping treatment of the defence interests which are responsibly said by HMG (in accord with our principal

⁴⁶ Letter from the Commonwealth Office (Mr Donohoe) to the UK Mission to the UN of 12th August 1966, (4/215)(ND), in para. 72 of Appendix A to Ouseley J.'s judgment in *Chagos Islanders v A-G* [2003] EWHC 2222 (QB).

ally) to require the exclusion from residence in the Islands of people who would reside in the condition of vulnerability regarded with complacency in the London courtroom.⁴⁷

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See n.26 above.