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Introduction

The legal saga of the dispossession of the Chagossian people from their home on the Chagos Archipelago, now known as British Indian Ocean Territory ('BIOT') ended in October 2008 with the House of Lords decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs.*[1] The detail of the case and its impact upon the Chagossian people have been discussed elsewhere.[2] This article focuses on two important aspects of the case: (1) the extent to which 'fundamental common law principles' operate as a limitation on laws applying to colonies; and (2) the effect of the Colonial Laws Validity Act 1865 ('CLVA') upon the power of the Crown to legislate for colonies by Order in Council and whether it has immunised such Orders from judicial review.

The Chagos Archipelago was originally a dependency of Mauritius, which was governed by France from the eighteenth century. Mauritius and its dependencies were ceded by France to Britain in 1814 on the condition that the inhabitants should preserve their religious laws and customs. French laws continued to apply as the local law.[3] In 1965 the Chagos Archipelago was detached from Mauritius by an Order in Council and established as a separate colony with the uninspiring name of 'British Indian Ocean Territory'. A Commissioner for BIOT was established and given executive and legislative power. Diego Garcia, the largest island of BIOT, was leased to the United States as a military base. The company that ran the only business on the islands left and the Chagossians, without employment or supplies, were transferred to Mauritius. An *Immigration Ordinance* made in 1971 by the Commissioner for BIOT prohibited them from returning unless they had a permit.

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[1] [2008] UKHL 61, [2008] 3 WLR 955.

[2] For the facts, see: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 [1]-[74]. See also: Stephanie Palmer '"They made a desert and called it Peace": Banishment and the Royal Prerogative' [2001] 60 CLJ 234; Adam Tomkins 'Magna Carta, Crown and Colonies' [2001] PL 571; and Stephen Allen, 'Beyond the Bancoult cases: International Law and the Prospect for Resettling the Chagos Islands (2007) 7 *Human Rights Law Review* 441. Although now described as a 'British Overseas Territory' rather than a colony, the word 'colony' is used in this article for ease of reference.

[3] *In re Henry Adam* (1837) 1 Moo PC 460, 12 ER 889; Sir Charles Tarring, *Chapters on the Law Relating to Colonies*, (3rd ed, Stevens and Haynes, London, 1906) p 10; and William Forsyth, *Cases and Opinions on Constitutional Law*, (Stevens and Haynes, London, 1869) p 16. French law continued to apply in BIOT until 1 February 1984 when the *British Indian Ocean Territory Courts Ordinance* 1983 came into effect applying the law of England as from time to time to BIOT so far as applicable and suitable to local circumstances and subject to any prerogative Orders in Council applying to BIOT.

This Ordinance was quashed by the Divisional Court in 2000.[4] The Foreign Secretary announced that the Government would not appeal the decision and would work on the feasibility of the resettlement of the Chagossians. The Chagossians were permitted to return to the outer islands (but not Diego Garcia) by an *Immigration Ordinance* made by the Commissioner in 2000. While some visited, none resettled there. The feasibility study was completed in 2002. It found that long-term resettlement would be 'precarious and costly'. In 2004 two new Orders in Council were made by Her Majesty in the exercise of the Crown's prerogative power to legislate. The *British Indian Ocean Territory (Constitution) Order* 2004 and the *British Indian Ocean Territory (Immigration) Order* 2004 (the '2004 BIOT Orders') provided that no person had a right of abode in BIOT and no one could enter or remain there without permission. The validity of these Orders was challenged.

The Divisional Court quashed s 9 of the *British Indian Ocean Territory (Constitution) Order* 2004 and read down s 5 of the *British Indian Ocean Territory (Immigration) Order* 2004 so that permission would not be required by the Chagossians to return to the islands of BIOT, except for Diego Garcia (which remains leased to the United States).[5] The Court of Appeal agreed, dismissing an appeal.[6] The House of Lords upheld an appeal, accepting the validity of the 2004 Orders.[7]

Counsel for the Chagossians argued, amongst other things, that the Crown's legislative powers did not extend to removing the fundamental right of abode. Counsel for the British Foreign Secretary argued, amongst other things, that the courts could not undertake judicial review of the validity of the 2004 BIOT Orders as this had been excluded by the CLVA. Both arguments were rejected by a majority of the House of Lords. This article examines these arguments more closely in their historic context and the adequacy of the judicial response to them.

Fundamental Common Law Principles

The notion that there are some common law principles that are so fundamental that they cannot be overridden has recurred in different guises over the centuries. Fundamental common law principles have at some time been regarded as imposing:

1. a limitation on the power of Parliament to enact laws;
2. a limitation on the foreign laws that may continue to operate in conquered or ceded colonies;
3. a limitation on the prerogative power to legislate for colonies; and
4. a limitation on the powers of colonial legislatures.

In the *Bancoult* case the argument concerned the third category of limitations on the prerogative power to legislate. However, there is significant overlap between these four

[4] *Bancoult* [2001] QB 1067.
[5] *Bancoult* (n 2).
[6] *Bancoult* [2007] EWCA Civ 498, [2008] 1 QB 365.
[7] *Bancoult* (n 1).

categories, not only in establishing what amounts to a fundamental common law principle, but also in ascertaining their source. The authorities used to support one category are frequently drawn from another, and the reasoning for the establishment of one category of limitation is often based upon analogy with another category of limitation. Hence it is necessary to have regard to all four categories to ascertain how they interact and the extent to which they have survived in modern times.

1. Fundamental common law principles as a limitation on the legislative power of Parliament

Most assertions concerning fundamental common law principles are traced back to the words of Lord Coke in *Dr Bonham's Case,* where he said:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.[8]

This view is commonly regarded as having been overridden by the Bill of Rights 1688 (Imp) and the Act of Settlement 1701 (Imp), resulting in full parliamentary sovereignty.[9] Such was the position taken by Lord Reid in *Pickin v British Railways Board.*[10]

The argument, however, continues to be raised, with Sir Robin Cooke breathing some life into it in New Zealand,[11] and the High Court of Australia leaving open the possibility that 'legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law'.[12] Even in the United Kingdom

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[8] (1610) 8 Co Rep 107, 118; 77 ER 638, 652. Note the earlier comments by Lord Coke in *Calvin's Case* (1608) 7 Co Rep 1a, 4b; 77 ER 377, 382, concerning the law of nature as an immutable part of the laws of England. See doubts that Coke CJ ever intended that such conflicts would be justiciable: Mark Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91, 109-11

[9] S de Smith and R Brazier, *Constitutional and Administrative Law,* (Penguin Books, 7th ed, 1994) pp 76-7; Walters (n 8) 112; P W Hogg, *Constitutional Law of Canada,* (Thomson Carswell, 2004) [12.1]. Note that this doctrine survived longer in America: Theodore Plucknett, 'Bonham's Case and Judicial Review' (1926) 40 *Harvard Law Review* 30, 61-68; and S E Thorne, 'Dr Bonham's Case' (1938) 54 LQR 543.

[10] [1974] AC 765, 782. See also: *Logan v Burslem* (1842) 4 Moo PC 284, 296; and *Lee v Bude and Torrington Junction Railway Co* (1871) LR 6 CP 576, 582.

[11] *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (NZ Crt of Appeal), 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 (NZCA), 121; and *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (NZCA), 398. Note that in the latter case Cooke J stated that he did not think that compulsion by torture would be within the lawful powers of Parliament. See also *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (NZ High Crt), where McGechan J at [91] held that the possibility of overriding fundamental human rights should be 'left open in perpetuity'.

[12] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10. Note, however, the rejection by two judges of the notion that 'deeply rooted' common law principles can override legislative power in: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 66 (Brennan CJ) and 76 (Dawson J). See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, [13]-[14] (Gaudron, McHugh, Gummow and Hayne JJ).

the possibility is occasionally mooted that in extreme circumstances the courts might uphold limits on the supremacy of Parliament.[13] However, in no case in recent times in these countries has a statute been held invalid on the ground that it conflicted with fundamental common law principles.

Instead, this notion is reflected in principles of statutory interpretation by which it is presumed that Parliament does not intend to 'overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness'.[14]

2. Fundamental common law principles as a limitation on foreign laws that continue to apply in conquered or ceded colonies

In a conquered or ceded colony the foreign law that existed at the time of conquest or cession continued to apply until such time as it was altered or replaced[15] by a British Act of Parliament or by an Imperial Order in Council[16] (at least until such time as a representative legislature was granted).[17] However, not all foreign laws could continue to apply. The powers and rights of the Crown with respect to the conquered colony had to be recognised and any former law inconsistent with these powers and rights ceased to apply. Hence aspects of British public law (both statutory and common law) were held to apply to conquered or ceded colonies, at least to the extent that they concerned matters of Government, such as allegiance to the Crown and the identification of aliens,[18] the administration of the law,[19] whether the Crown was amenable to the jurisdiction of the courts[20] and the extent of the royal prerogative to legislate.[21]

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[13] *R (Jackson) v Attorney-General (UK)* [2006] 1 AC 262 (HL) [102] (Lord Steyn); [104]-[107] (Lord Hope); [159] (Baroness Hale). See also: Lord Woolf '*Droit Public* – English style' [1995] PL 57, 69; Lord Steyn, 'Comments from the *Lester and Pannick* Book Launch' (2004) 9 *Judicial Review* 107; and A W Bradley and K D Ewing, *Constitutional and Administrative Law* (13 ed, Pearson Longman, London, 2003) p 58.

[14] *Potter v Minahan* (1908) 7 CLR 277 (High Court of Australia) 304. See also: *R v Secretary of State for the Home Dept; Ex parte Simms* [2000] 2 AC 115 (HL) 131; *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 (HL) [27]; and *Jackson* (n 13) [159].

[15] *Calvin* (n 8) 17b, 398. See also: William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1745) Vol 1, s 4, p 105; and Alpheus Todd, *Parliamentary Government in the British Colonies*, (2nd ed, Longmans Green and Co, London, 1894), p 215.

[16] The law of a conquered colony could also be altered by other acts of the Crown, such as proclamations or letters patent made under the Great Seal: *Jephson v Riera* (1835) 3 Knapp 130, 152-3; 12 ER 598, 607.

[17] *Campbell v Hall* (1774) 1 Cowp 204; *Abeyesekera v Jayatilake* [1932] AC 260 (PC) 264; *Sammut v Strickland* [1938] AC 678 (PC) 701.

[18] *Donegani v Donegani* (1835) 3 Knapp 63, 85; 12 ER 571, 580; and *Adam* (n 3) 470; 12 ER 889.

[19] *Ruding v Smith* (1821) 2 Hag Con. 371, 382; 161 ER 774, 778; and *Abbott v Fraser* (1874) LR 6 PC 96, 106-7 (Bageley J).

[20] *Stella Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC) 721 (Lord Reid); and *Union Government (Minister of Lands) v Estate Whittaker* [1916] AD 194 (Sth African Supreme Court of Appeal) 203.

[21] *Abbott* (n 19) 106-7; *Sammut* (n 17) 697. See also: B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007), p 119; and *Bancoult* (n 1), [155].

It was not the case that all British public law applied in conquered colonies. It was only those aspects that were necessary to support the authority of the sovereign.[22] For example, it was held that the law in Mauritius (including BIOT) after it was ceded concerning the identification of aliens was necessarily British law, but the law concerning the rights and liabilities attaching to the status of alien remained the French law.[23]

In addition, there was a separate principle first recognised in 1608 in *Calvin's Case*. There Lord Coke stated that 'if a Christian king should conquer a kingdom of an infidel, and bring them under his subjection, then *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity but against the law of God and of nature contained in the Decalogue' and that rules of natural equity should apply until new laws were applied to the colony.[24]

Lord Mansfield later rejected this distinction between Christian and infidel laws as an 'absurd exception' which 'in all probability arose from the mad enthusiasm of the crusades' and which is 'wholly groundless and most deservedly exploded'.[25] Nonetheless, the distinction held sway for a time and formed the root of a developing principle. In *Blankard v Galdy* it was noted that the laws of infidel countries do *not* cease upon conquest. Rather, only those that are against the law of God cease to apply and are replaced by the 'rule of natural equity'.[26] A different report of the same case drew a more precise distinction, noting that conquest of an infidel country would result in its laws concerning religion ceasing to operate but would not affect its laws touching the government.[27] The Master of the Rolls later expanded on the principle, noting that the foreign laws of a conquered country 'shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se,* or are silent; for in all such cases the laws of the conquering country shall prevail.'[28]

The question of the application of foreign law in a conquered colony arose again in *Fabrigas v Mostyn.*[29] The question was whether the Governor of Minorca, a conquered colony, could imprison and banish a person without trial, as permitted by the law of Minorca but not by the law of England. Here the Christian/pagan distinction was irrelevant because the applicable foreign law was the law of a Christian country, Spain. Instead the court looked to fundamental principles of a constitutional nature. Lord Chief

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[22] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (Butterworths, London, 1820) p 25.
[23] *Adam* (n 3) 470, 893. For another example, see: *Kodeeswaran v Attorney-General (Ceylon)* [1970] AC 1111 (PC) 1117-8.
[24] *Calvin* (n 8) 17b, 398. See also: *Dutton v Howell* (1693) Show Parl Cas 24, 31; 1 ER 17, 21, and Blackstone, (n 15) 105.
[25] *Campbell v Hall* (1774) 20 State Trials 239, 323 and 325.
[26] (1693) 2 Salk 411, 412; 91 ER 356, 357. See also *Freeman v Fairlie* (1817) 1 Moo Ind App 305, 343; 18 ER 117, 139; *Advocate-General of Bengal v Ranee Surnomoye Dossee* [1863] 2 Moo PC NS 22, 60; 15 ER 811, 824-5; and Sir Ivor Jennings, *Constitutional Laws of the Commonwealth,* (Clarendon Press, Oxford, 1952), p 45.
[27] *Blancard v Galdy* (1724) Comb 228; 90 ER 445.
[28] *Memorandum* (1722) 2 P Wms 75, 76; 24 ER 646. This was a record of the view of the Privy Council on an appeal to the King in Council from the plantations.
[29] *Fabrigas v Mostyn* (1773) 20 State Trials 82.

Justice de Grey concluded that the local law permitting banishment terminated upon the conquest of Minorca. He observed that:

> the governor knew that he could no more imprison [Fabrigas] for a twelvemonth, than that he could inflict the torture; yet the torture, as well as banishment, was the old law of Minorca, which fell of course when it came into our possession. Every English governor knew he could not inflict the torture; the constitution of this country put an end to that idea.[30]

The use of torture in conquered colonies under local law was raised directly in *Picton's* case. General Picton was the Governor of Trinidad and authorised the torture of a young woman who was a witness to a crime. It was argued that torture was permitted by the Spanish law that applied in Trinidad before its conquest (although this was the subject of dispute).[31] In reply, it was argued that torture was prohibited by the law of England and that a law permitting torture would be a *malum in se* and therefore instantly cease upon conquest 'as being contrary to the fundamental principles of our constitution.'[32]

Lord Ellenborough, however, appeared sceptical in his interventions in argument as to the automatic abrogation of such laws, noting that the persons who administered the laws would have great difficulty in ascertaining the applicable law.[33] He considered that the difficulty in drawing the relevant line was due to the introduction of concepts such as 'fundamental principles' and '*mala in se*' and that such difficulties would be avoided if the laws of a conquered country continued in force until altered by the conqueror, leaving no doubt as to the law.[34] The question was not resolved as no judgment was delivered in *Picton's* case.[35] General Picton, a war hero, was permitted to return to battle and later fell at Waterloo, 'gloriously leading his division to a charge with bayonets'.[36]

From these cases, commentators such as Jenkyns drew the principle that in conquered and ceded colonies where the prior foreign law continued to apply, 'any laws contrary to the fundamental principles of English law, e.g. torture, banishment or slavery, are *ipso facto* abrogated.'[37] The modern day description of this limitation, as set out in *Halsbury's Laws of England,* is that 'any law which is unconscionable or based on religious and ethical principles repugnant to European civilisation will not be given effect

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[30] *Fabrigas* (n 29), 181. See also the discussion of this case in: *Bancoult* (n 1) [88].
[31] Picton had apparently brought this form of torture, the piquet, to Trinidad and had previously used it as a punishment for soldiers: (1804-12) 30 State Trials 226, 808.
[32] *Picton* (n 31) 741.
[33] *Picton* (n 31) 944-5.
[34] *Picton* (n 31) 945. Note that in his objection to use of notions such as 'fundamental principles', Lord Ellenborough appeared to be prepared to accept the fifth but reject the sixth proposition of *Campbell v Hall*, discussed below.
[35] *Picton* (n 31) 955. See also: George Lewis, *An Essay on the Government of Dependencies*, (John Murray, London, 1841), pp 372-3.
[36] Despatch by the Duke of Wellington announcing victory at Waterloo, as quoted in *Picton* (n 31) 957.
[37] Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, Oxford, 1902), p 6. See also: William Burge, *Commentaries on colonial and foreign laws* (Saunders & Benning, London, 1836) p xxxii; Forsyth (n 3) 13; and Tarring (n 3) 14.

or permitted by the courts (though customs of the community such as polygamy or even suicide may be given some recognition, in order to prevent injustice and oppression)…'[38]

The principle, however, rests on shaky legal ground. There is very little authority for it and as Lewis has pointed out what little exists 'rests exclusively on judicial dicta', the authority or applicability of which 'is subject to doubt'.[39] Lewis pointed to the criticism of the Christian/pagan distinction, which was regarded as obsolete by the nineteenth century, and Lord Ellenborough's concerns about the practicality of administering such a doctrine.[40] Clerk was also critical of the principle, pointing out that it had been undermined by the toleration of 'immoral or unchristian' customs such as suttee in the East Indian possessions.[41] Clerk contended that the abrogation of such laws 'must be the effect of the declared will of the conqueror, and cannot take place as of course and unavoidably on the instant of the conquest.'[42]

Lewis expressed concern that 'if the judges of a dependency could nullify any law by declaring it to be inconsistent with what they might deem to be a fundamental principle of the British constitution, all its laws would manifestly be at their mercy; inasmuch as the phrase "fundamental principles of the British constitution" has not obtained any determinate meaning.'[43] The concern that this could lead to judicial supremacy and political instability was later given substance in South Australia in the 1860s with respect to the analogous issue of colonial repugnancy to fundamental common law principles.[44]

3. Fundamental common law principles as a limitation on the prerogative power of the Crown to legislate for colonies

In the *Bancoult* case, the issue was not whether the pre-existing foreign law of BIOT permitted banishment or torture, but rather whether the prerogative power of the Crown to legislate with respect to BIOT was limited so that it could not breach fundamental common law principles, such as rights against banishment or torture. The 2004 BIOT Ordinances did not banish the Chagossians from BIOT, as they had already long departed by the time the Ordinances were made. Rather, the Ordinances continued the effect of banishment by reinstating the prohibition upon the return of the Chagossians to BIOT. The Court was acutely conscious of the allegations that the largest island of BIOT, Diego Garcia, was being used to receive persons the subject of 'extraordinary rendition' and for

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[38] *Halsbury's Laws of England,* 4th ed, Vol 6, 2003 Reissue, 'The Commonwealth', para 878 [footnotes omitted].
[39] Lewis (n 35) 374.
[40] Lewis (n 35) 374.
[41] Charles Clark, *A Summary of Colonial Law*, (Sweet & Maxwell, London, 1834), p 5. See also on the acceptance and eventual outlawing of suttee: Forsyth (n 3) 14. Other customs such as polygamy were legally recognised: *Cheang Thye Phin v Tan Ay Loy* [1920] AC 369 (PC); and *Khoo Hooi Leong v Khoo Chong Yeok* [1930] AC 346 (PC).
[42] Clark (n 41) 5. Note, however, that Clark still appears to accept a limitation based on 'the fundamental constitution of the British empire' and the 'inalienable rights of her citizens', p 6.
[43] Lewis (n 35) 374.
[44] See the discussion of repugnancy and Justice Boothby of South Australia, below.

their torture in ships off its coast.[45] Lord Hoffmann noted that the 'idea that such conduct on British territory, touching the honour of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.'[46] Hence even though the question of torture was not at issue, it was a consideration that weighed on the reasoning of the courts in the *Bancoult* litigation.

The prerogative power of the Crown in Council to legislate for colonies is derived from, and forms part of, the common law. The common law rule was that where a colony was settled, the settlers brought with them the common law and the power of the Crown to legislate for the colony was confined to providing it with a representative legislature.[47] Where a colony was conquered or ceded, however, the Crown's power to legislate for the colony was plenary in nature until such time as a constitution was granted to the colony. There was no obligation on the Sovereign to legislate in a manner that was consistent with the laws of England,[48] except for Acts of Parliament that applied with respect to the relevant colony.

To what extent, if at all, was the Sovereign's power to legislate for these colonies limited so that it could not be inconsistent with 'fundamental common law principles'? The primary authority for such a limitation is *Campbell v Hall.*[49] That case concerned whether the King could legislate by his prerogative power to impose a tax upon the conquered colony of Grenada, or whether his promise of a constitution and local assembly abrogated any such power. Lord Mansfield set out a number of propositions that he regarded as 'too clear to be denied'.[50] In brief, the first three propositions were that countries conquered by the British form part of the Crown's dominions and are therefore subject to the legislative power of Parliament. The conquered inhabitants become subjects and the articles of capitulation upon which the conquest is surrendered are to be respected. Lord Mansfield's fourth proposition stressed that the law of every colony applies to all persons equally within the colony, whether they be English or locals. If an English person settles in a colony, he or she is subject to the same laws as others in the colony and has no special rights or privileges. The fifth proposition was that the laws of the conquered country continue until they are altered by the conqueror. This is qualified by the crucial sixth proposition, which states:

> If the king has power (and, when I say the king, I mean in this case to be understood "without concurrence of parliament") to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme legislature in parliament, he can make none which are contrary to

[45] See Jamie Doward, 'British island "used by US for rendition"', *The Observer*, 2 March 2008, reporting allegations made by the United Nations special rapporteur on torture, Manfred Novak.
[46] *Bancoult* (n 1) [35] (Lord Hoffmann). See also [88] (Lord Rodger); *Bancoult* (n 6) [38] (Sedley LJ); and *Bancoult* (n 2) [125] regarding other references to torture.
[47] *Kielley v Carson* (1842) 4 Moo PCCC 63, 84-5; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut* (n 17); *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273. See now the British Settlements Act 1887 which provides a legislative source of power for the Crown to legislate with respect to certain settled colonies.
[48] Clark (n 41) 6.
[49] *Campbell* (n 25).
[50] *Campbell* (n 25) 322.

> fundamental principles; none excepting from the laws of trade or authority of parliament, or privileges exclusive of his other subjects.[51]

The source of this proposition is not clear. The arguments made before the court in *Campbell v Hall* are recorded in extensive detail in *State Trials.* At no stage is there mention of an argument that the prerogative power of the King is limited by 'fundamental principles'. The argument instead focused on whether the prerogative power to legislate existed with respect to Grenada or ceased to exist once courts were established, a constitution promised and English colonists invited to settle on Grenada. It was contended that, as with settled colonies, the constitutional rights of British subjects must be respected, including the right not to be made subject to taxation except by legislation.[52] It was also argued that it 'would be repugnant to every principle of reason' for English conquerors to lose their rights and share the fate of the conquered to be taxed without representation or legislation.[53] These were the very arguments which were being made at that time in the American colonies, with the Boston Tea Party having very recently taken place.[54]

In addition, counsel in *Campbell v Hall* raised a further principle of importance, noting that 'there is no one principle of English law more decidedly clear than that the crown cannot, by its sole prerogative, enact a law.'[55] Despite these arguments, Lord Mansfield accepted that the King could legislate with respect to a conquered colony and that he could impose a tax by the exercise of prerogative power, rather than legislation (although not after he had promised the establishment of an Assembly to enact such laws).[56] Hence, Lord Mansfield's notion of 'fundamental principles' that control the prerogative did not extend to a prohibition on the use of the prerogative to impose taxes on conquered colonies without legislation or representation. It must have had a narrower meaning.

The three main problems with Lord Mansfield's sixth proposition are first, that it is not clear what he actually meant. It is not elucidated by argument or authority. It could conceivably have been confined in its scope to the proposition that laws made by the Crown must be consistent with legislation and the supremacy of Parliament[57] or must not exempt persons from the application of the law.[58] Such an interpretation is consistent with Lord Mansfield's reference to the subordination of the King in Council to the King

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[51] *Campbell* (n 25) 323. See the different wording in *Campbell* (n 17), 209, where it says '… he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament or give him privileges exclusive of his other subjects; and so in many other instances which might be put.'

[52] *Campbell* (n 25) 264 and 277.

[53] *Campbell* (n 25) 290.

[54] The dispute as to whether the British Parliament could impose internal taxes on the American colonies is discussed in: Clark (n 41) 11-14.

[55] *Campbell* (n 25) 282.

[56] *Campbell* (n 25) 323-8.

[57] Lewis (n 35) 158; and Sydney Bell, *Colonial Administration of Great Britain* (Longman Brown, London, 1859), p 161.

[58] *Bancoult* (n 1) [90] (Lord Rodger); and [125] (Lord Carswell). See also: Thomas Anstey, 'On the Competence of Colonial Legislatures to Enact Laws in Derogation of Common Liability or Common Right' (1868) 3 *Papers Read Before the Juridical Society* 401, 407.

in Parliament and the examples he gives. It could, however, have a broader meaning, drawing from Lord Coke's approach in *Dr Bonham's* case. Secondly, the term 'fundamental principles' is too 'vague'[59] and uncertain in its scope, leading to the risk of judicial supremacy and instability in the application of the law. As was argued in *Liyanage v The Queen,* it would be 'extremely dangerous if the courts were given such a wide power to strike down legislation where "fundamental principles" were incapable of definition'.[60] Thirdly, Lord Mansfield's sixth proposition, while widely acknowledged in *obiter dicta*, has no firmer base itself than *obiter dicta.* It does not appear to have ever been applied by a court to strike down the validity of an Order in Council.

4. Fundamental common law principles as a limitation on the powers of colonial legislatures

While the power of the King to legislate by prerogative for the colonies was limited by reference to the type of colony and whether it had already been given representative government, the power of the Westminster Parliament to legislate for the colonies remained supreme regardless of the type of colony and its level of development.[61] The doctrine of repugnancy applied, either expressly[62] or impliedly,[63] to laws enacted by colonial legislatures. Such laws were void to the extent that they were repugnant to the 'law of England'.[64]

The extent of this doctrine was uncertain. It was clear that 'received law'[65] could be amended or abrogated by a colonial legislature[66] and was not regarded as the 'law of England' for the purposes of the repugnancy doctrine.[67] If it had been, there would have been little point in creating a colonial legislature at all, as it would have had virtually no room to legislate.[68] The repugnancy doctrine applied instead where a law enacted by a

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[59] *Picton* (n 31) 944-5 (Lord Ellenborough); Lewis (n 35) 374; Opinion by Sir William Atherton and Sir Roundell Palmer, Law Officers to Colonial Office, 12 April 1862 in: D P O'Connell and A Riordan, *Opinions on Imperial Constitutional Law,* (Law Book Co, Sydney, 1971), p 64; *Phillips* (n 47) 20; A B Keith, *The Sovereignty of the British Dominions* (Macmillan & Co Ltd, London, 1929), pp 45-6; *Liyanage v The Queen* [1967] AC 259 (PC) 284. Cf *Bancoult* (n 6) [28].

[60] *Liyanage* (n 59) 270 (argued by Victor Tennekoon QC, Solicitor-General of Ceylon).

[61] Clark (n 41) 10; Anstey (n 58) 403. See also: *Campbell* (n 25) 323.

[62] See, for example, 13 & 14 Vict, c 59, s 7 and 15 & 16 Vict, c 72, s 53.

[63] Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law,* (Stevens & Sons, London, 1966) p 400.

[64] For the history of repugnancy see: McPherson (n 21) 160-1; and E Campbell, 'Colonial Legislation and the Laws of England' (1965) 2 *University of Tasmania Law Review* 148, 149-50.

[65] 'Received law' was that part of the law of England, including common law and statute, that was brought with the colonists to a settled colony or applied at a later date to a colony, that was suitable to its circumstances.

[66] *Harris v Davies* (1885) 10 App Case 279, 281. (Sir Barnes Peacock)

[67] *Phillips* (n 47) 20-2; 'Points of Colonial Law – On the Doctrine of Repugnancy in Relation to Colonial Statutes', *The Law Magazine* (1854) NS Vol 20, 1, 6; J E Cote, 'The Reception of English Law' (1977) 15 *Alberta Law Review* 29, 34. *Cf* D B Swinfen, *Imperial Control of Colonial Legislation 1813-1865* (Clarendon Press, Oxford, 1970) pp 59-62.

[68] Points of Colonial Law (n 67) 2. See also: McPherson (n 21) 162.

colonial legislature was repugnant to a British statute that applied expressly or by necessary intendment to the colony.[69]

Whether a colonial law could also be held invalid because it was repugnant to the common law of England was a question which 'plagued several generations of colonial courts and lawyers'[70] prior to the enactment of the CLVA. Some doubted whether the doctrine of repugnancy ever extended beyond repugnancy to British Acts of Parliament applying to a colony,[71] while others considered that it applied to laws that were repugnant to the common law[72] and still others remained doubtful, referring to the doctrine of repugnancy to the common law as a 'vague limitation which was supposed to exist'.[73]

In part, the theory rested on the authorities and reasoning of the other three categories discussed above. It was assumed that if foreign law in a conquered colony could not stand contrary to fundamental common law principles and the Crown could not legislate for a colony in a manner inconsistent with these principles, then neither could a colonial legislature enact laws contrary to them.[74] Matters were further complicated by the difference between the policy position taken by the Colonial Office in disallowing colonial laws and the legal power of a colonial legislature to enact the law. The Colonial Office was prepared to use the disallowance mechanism to terminate the application of colonial laws that were contrary to fundamental common law principles.[75] Such laws remained valid until they were disallowed. The legal power to enact such a law was a different matter altogether. Sir James Stephen, Under-Secretary of State for the Colonies, observed:

> To have required, on pain of nullity, an adherence to the fundamental Principles of English Legislation, would I think have involved more than one absurdity. It may be very reasonably doubted whether those principles have any real & definite Existence: and even if, by a great effort of abstraction & subtlety, our written or unwritten law, could be made to yield a body of fundamental maxims pervading the whole mass, it would have been strange if Parliament had required the rigid observance of those Maxims in a Society of which all material Circumstances, & the whole elementary Character, differ essentially from what has ever been known in the parent State…[76]

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[69] Lewis (n 35) 207; and Clark (n 41) 15. See also regarding British possessions in America: 3 & 4 Wm IV, c 59, s 56; and regarding Canada: 31 Geo 3, c 31, s 46; and 3 & 4 Vict c 35, s 3.
[70] *Ffrost v Stevenson* (1937) 58 CLR 528 (High Court of Australia), 602 (Evatt J).
[71] Points of Colonial Law (n 67). See also: Jeremiah Dummer, *A Defense of the New-England Charters* (J Almon, London, 1765) pp 66-70.
[72] Anstey (n 58) 405.
[73] Sir James F Stephen, *A History of the Criminal Law of England* (Macmillan, London, 1883) Vol 2, p 58; and Tarring (n 3) 129.
[74] See T Elias, *British Colonial Law,* (Stevens & Sons Ltd, London, 1962) p 51, on how *Campbell v Hall* led to the doctrine of repugnancy. See also the argument in *Phillips v Eyre* that a colonial law contrary to natural justice was invalid just as a foreign law against natural justice was invalid: *Phillips* (n 47) 23.
[75] For examples, see: Campbell (n 64) 151.
[76] Report by James Stephen, 16 June 1834, reprinted in: Paul Knaplund, *James Stephen and The British Colonial System 1813-1847,* (University of Wisconsin Press, Madison, 1953), p 232. See also: Swinfen, (n 67) 56-7; and *Bancoult* (n 1) [93] (Lord Rodger).

Sir Frederic Rogers, who was Stephen's successor, stressed in an opinion in 1858 that colonial legislatures were 'legally competent' to pass any law as long as it was not repugnant with an Imperial statute intended by Parliament to be binding on the colony. It was then up to the Crown to intervene by disallowance if it sought to prevent colonial laws from conflicting with the fundamental principles of English law.[77]

As a matter of law, repugnancy to fundamental common law principles was sometimes raised in argument or *obiter dicta,*[78] but did not tend to be used by the courts for finding legislation invalid. This may well be because colonial laws repugnant to fundamental common law principles were dealt with by disallowance or the threat of disallowance or were simply not enacted by colonial legislatures.[79] Prior to the mid-nineteenth century, there had been only one significant judicial proceeding in which a court struck down a colonial law on the ground that it was repugnant to fundamental principles of common law.[80] In 1727 in *Winthrop v Lechmere* the Privy Council held that a law of Connecticut was invalid on the ground that it was repugnant to the common law rule of succession by primogeniture.[81] However, other laws of a similar nature were later held to be valid,[82] and by 1862 British Crown Law Officers referred to laws changing the rule of succession by primogeniture as examples of laws that were *not* invalid for repugnancy.[83]

It was not until Justice Boothby of South Australia started to express the view in argument and judgments that colonial laws were invalid if repugnant to the common law,[84] that the issue came to the fore. In 1861, a Select Committee of the South Australian House of Assembly accepted that colonial legislation could not be repugnant to some fundamental principles, such as Crown sovereignty, but objected to Boothby J's broader view of common law repugnancy, pointing out the 'doubtful nature of the principle' and 'the uncertainty and insecurity which its adoption must necessarily introduce into the administration of justice.' It also pointed to the absence of any judicial application of such a principle.[85] It was concerned that repugnancy would come to be defined to be 'any alteration of the law of England which was either impolitic or unfair;

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[77] Sir Frederic Rogers, Opinion on a South Australian Act, 5 May 1858, in: Swinfen, (n 67) 62.
[78] See, for example, *Leonard Watson's Case* (1839) 9 A & E 731, 782-3; *Bank of Australasia v Nias* (1851) 16 QB 717, 734; and *R v Whelan* 5 WW & a'B (L) 7 (Supreme Court of Victoria), 18 (Stawell CJ), referring to the 'grand principles of the common law'.
[79] Campbell (n 64) 149 and 171-2; Anstey (n 58) 409-11; and Swinfen, (n 67) 39-40.
[80] McPherson (n 21) 164.
[81] *Winthrop v Lechmere* (1727) 3 *Acts of the Privy Council of England* (Colonial Series, HMSO 1908-12) 112, Joseph H Smith, *Appeals to the Privy Council from the American Plantations,* (Columbia University Press, New York, 1950) pp 537-560. See also: Opinion of Attorney-General Yorke and Solicitor-General Talbot, 1 August 1730, in: George Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence,* (2nd ed, C Goodrich, Burlington, 1858) pp 341-2.
[82] *Phillips v Savage* (1738) 3 *Acts of the Privy Council of England* 322.
[83] Opinion by Sir William Atherton and Sir Roundell Palmer, 12 April 1862 in: O'Connell (n 59) 60-5.
[84] These unreported cases are recorded in: Irish University Press Series, *British Parliamentary Papers,* 1862-3, Colonies, Australia, Vol 24, pp 301-314; and Swinfen, (n 67) 171-8.
[85] South Australia, Report of the Select Committee of the House of Assembly Appointed to Inquire into the Recent Judgments of Judge Boothby, 3 September 1861, in: *British Parliamentary Papers* (n 84) 319, 320-1.

the impolicy and unfairness being determined according to the opinions of the individual judge who may be called upon to decide the question.' It concluded that if this occurred, few colonial laws would be immune as 'almost all, in some degree, depart from the English law'.[86]

The Secretary of State for the Colonies referred the matter to the Crown Law Officers. They concluded that the doctrine of repugnancy *did* extend to inconsistencies with fundamental common law principles. They conceded, however, that they could not identify any rule to distinguish between fundamental principles and non-fundamental principles of English law.[87] Nonetheless, their brief referred to examples of laws that would conflict with fundamental principles of the law of England. They included laws that denied the sovereignty of Her Majesty, allowed slavery or polygamy, prohibited Christianity, or authorised the infliction of punishment without trial or the 'uncontrolled destruction of aborigines'.

The Secretary of State advised the South Australian Governor that judges must declare that a colonial law was void if it was '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…'[88]

This non-judicial clarification of the legal position did not resolve the continuing disputes in South Australia about the validity of South Australian laws. The Chief Justice of South Australia, Hansen CJ, complained that the doctrine of repugnancy still had not received any judicial interpretation and that the resulting uncertainty as to its application 'weakens confidence in our laws and tends to encourage litigation.' He proposed the enactment of Imperial legislation replicating the Canadian model that confined repugnancy to conflicts with Imperial Acts made applicable to the colony. Hansen CJ noted that such a restriction 'is clear and intelligible and no doubt can arise with regard to its interpretation and coupled with the power of disallowance vested in Her Majesty during a period of two years, would seem to give all the security against perverse or mistaken legislation which can be required.'[89]

This view was accepted by the Colonial Secretary[90] and the British Crown Law Officers[91] and resulted in the enactment of the CLVA in 1865. Section 3 of that Act was intended to limit (or clarify) the scope of the doctrine of repugnancy with respect to colonial laws so that it did not extend to inconsistency with fundamental principles of English law, but rather was confined in its application to repugnancy to British Acts that applied expressly or by necessary intendment to the colony.

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[86] South Australia (n 85) 321.
[87] Opinion by Sir William Atherton and Sir Roundell Palmer, 12 April 1862, in: O'Connell (n 59) 60-5.
[88] Despatch by the Duke of Newcastle to Sir D Daly, 24 April 1862, *British Parliamentary Papers* (n 84) 361. This statement appears to hark back to *Dr Bonham's* case discussed in category 1 above. See also: Walters (n 8) 126.
[89] Letter by Hanson CJ to Sir D Daly, 25 January 1864, which was forwarded to the Colonial Office: Despatch 2396, 26 January 1864: Public Records Office ('PRO') CO 13/114.
[90] 'I agree entirely' was handwritten in the margin of Hansen CJ's letter: PRO CO 13/114.
[91] Opinion by Sir Roundell Palmer and R P Collier, 28 September 1864, in: O'Connell (n 59) 68-73.

The current status of categories 1-4

What remains of these four ways in which fundamental common law principles have been considered to apply as a limitation on the validity of laws? As discussed above, the first category of limitation on the legislative power of Parliament has largely been reduced to a principle of statutory interpretation, although courts have been reluctant to hammer the nails into Dr Bonham's coffin, leaving open the possibility of the resurrection of the corpse *in extremis*.

The current status of the second category, under which certain laws of a conquered nation were abrogated automatically because they were contrary to fundamental common law principles, remains uncertain. There are no recent examples to point to in support of this rule, which itself rests on thin judicial authority and has been the subject of criticism.

The fourth category was clearly eliminated by the CLVA. Section 2 of the CLVA provides that a colonial law that is repugnant to the provisions of any Act of Parliament extending to the colony, or any order or regulation made under such an Act, shall 'to the extent of such repugnancy, *but not otherwise*, be and remain absolutely void and inoperative.'[92] Section 3 then states:

> No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid.

This provision applies both prospectively and retrospectively (i.e prohibiting laws from being 'deemed to have been' void). It is therefore abundantly clear that a law enacted by a colonial legislature is not void or inoperative on the ground of repugnancy to the law of England because it conflicts with fundamental common law principles.[93]

However, s 3 is not confined in its application to laws made by colonial legislatures. The definition of 'colonial law' in s 1 extends to laws made for any colony, either by the colonial legislature or by Her Majesty in Council. This brings into question the continuing application of the third category. If in 1865 the Crown's legislative power was limited to making Orders in Council that were not repugnant to fundamental common law principles, did s 3 of the CLVA eliminate that limitation?

The application of the *Colonial Laws Validity Act* to Imperial Orders in Council

At first glance, it seems inappropriate that the CLVA, which reasserts British parliamentary sovereignty over the laws of colonial legislatures, should also apply to an Order in Council made by Her Majesty on the advice of her responsible British Ministers.

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[92] 28 & 29 Vict, c 63. [Emphasis added]

[93] *Phillips* (n 47) 20-21; *R v Earl of Crewe; ex parte Sekgome* [1910] 2 KB 576, 613; and *Liyanage* (n 59) 284-5

Why was the reference to Orders in Council included?[94] Lord Justice Sedley, having considered the opinions of the Crown Law Officers and commentators such as Dicey, took the view that little significance was accorded to the inclusion of the reference to Imperial Orders in Council, and that it was a 'a fair inference' that this reference was included by the parliamentary draftsman 'for completeness'.[95] Professor Finnis, on the other hand, has argued that the inclusion of the reference to Orders in Council would have been 'an act of high policy' by responsible Ministers and that its purpose was to 'abolish the whole repugnancy doctrine in *Campbell v Hall.*'[96]

Orders in Council were included in the definition of 'colonial laws' in the first British draft of the CLVA that was sent to the colonies for comment.[97] They were not included in the draft Bill requested by South Australia.[98] Both draft Bills were referred to the Crown Law Officers for scrutiny and while the British draft was preferred it was amended by adopting one of the proposed South Australian clauses (which became s 6 of the CLVA) and some other drafting suggestions of the South Australian Chief Justice.[99] Throughout this process the definition of 'colonial laws' remained unchanged from the original British draft. It is unlikely that it was not closely considered.

Finnis has suggested that one of the motivations for the inclusion of Orders in Council was the anticipation that Jamaica would soon have to revert to Crown rule by Orders in Council after a rebellion.[100] Another motivation might have been that the greatest problems in South Australia had arisen from Boothby J's attacks upon the validity of provisions of the South Australian Constitution Act 1855 on the ground that they were inconsistent with fundamental common law principles.[101] While the South Australian Constitution Act had been enacted by the colonial legislature, the Queensland Constitution had recently been enacted by Imperial Order in Council in 1859 and had not at that time been replaced by colonial legislation. In shoring up the validity of the South Australian Constitution, it was also efficient on the part of the Colonial Office to ensure that the Constitutions of the other Australian colonies were equally supported, especially as both Orders in Council and the laws of colonial legislatures were vulnerable to arguments that they were void if repugnant to the fundamental common law of England.

There is, however, a conceptual difficulty in the application of ss 2 and 3 of the CLVA to Orders in Council. It arises from the fact that ss 2 and 3 deal not only with repugnancy to any British Act of Parliament extending to the colony, but also repugnancy to 'any order or regulation made under authority of such Act of Parliament'. This leads to a peculiar anomaly in the hierarchy of laws. Orders in Council may find their source in either the

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[94] Note that there was no such reference in the Canadian provision which was the initial model for the CLVA. See: Canadian Union Act 1840, 3 & 4 Vict, c 35, s 3.
[95] *Bancoult* (n 6) [26].
[96] John Finnis, 'Common Law Constraints: Whose Common Good Counts', University of Oxford Faculty of Law Legal Studies Research Paper Series, http://papers.ssrn.com/Abstract=1100628, [6].
[97] Despatch from Colonial Secretary to Governor of South Australia, 26 October 1864: PRO: CO 13/115.
[98] Despatch from Governor of South Australia to Colonial Secretary, 25 October 1864: PRO: CO 13/115.
[99] See internal Colonial Office memoranda January-February 1865: PRO: CO 13/115.
[100] Finnis (n 96), fn 15.
[101] South Australia (n 85) 349-50.

royal prerogative or legislation. For example, at the time the CLVA was enacted, the British Settlements Act 1843 (Imp)[102] (later replaced by the British Settlements Act 1887[103]) empowered Her Majesty to legislate for settled colonies by way of Order in Council. Such Orders in Council amount to a form of delegated legislation and are orders made under the authority of an Act of Parliament extending to the colony. Section 2 of the CLVA therefore provided in effect that an Order in Council, made under the British Settlements Act 1843, was subordinate to, and could not be repugnant to, itself because it was also an order made under an Act of Parliament applying to the colony. While an Order in Council was never going to be repugnant to itself, resulting in no practical problem, it was still an incongruous result, which suggests that the inclusion of Orders in Council in the definition of 'colonial laws' in the CLVA might not have been as well thought through as it ought to have been.

Despite this drafting flaw, it appears clear that ss 2 and 3 of the CLVA were intended to terminate the 'vague doctrine', to the extent that it ever existed, that the Crown may not legislate by Order in Council with respect to colonies in a manner that is contrary to fundamental common law principles. This issue was addressed by the Privy Council in *Liyanage v The Queen.*[104] It was there argued that the Crown's power to legislate by Order in Council with respect to Ceylon was limited to the enactment of provisions that were not contrary to fundamental principles and that this limitation on legislative power was inherited by the Parliament of Ceylon. The Privy Council rejected this argument, holding that the CLVA had removed any such fetter of repugnancy to English law. It also rejected any suggestion that there remained in existence 'a fetter of repugnancy to some vague unspecified law of natural justice'.[105] Their Lordships concluded that the 'terms of the Colonial Laws Validity Act and especially the words "but not otherwise" in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy.'[106]

The Courts in *Bancoult* struggled with the question of the effect of the CLVA on the 2004 BIOT Orders. There were two important issues in question. The first was whether the CLVA had removed any doctrine that the Crown could not legislate for a colony contrary to fundamental common law principles, such as the principle that a person could not be banished from his or her homeland. If so, the second issue was whether the CLVA also had the effect of immunising Orders in Council made for colonies from judicial review on the ground that in substance judicial review concerns the repugnancy of an executive or prerogative act to fundamental common law principles (such as those relating to irrationality, abuse of power and legitimate expectation).

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[102] 6 & 7 Vict, c 13. Note that this Act was initially limited in its application to West Africa and the South Atlantic, but was extended in 1860 to apply to all Possessions not acquired by cession or conquest: 23 & 24 Vict c 121.
[103] 50 & 51 Vict, c 54. This Act remains in force, as amended in 1945.
[104] *Liyanage* (n 59).
[105] *Liyanage* (n 59) 284.
[106] *Liyanage* (n 59) 284-5.

The effect of the CLVA on repugnancy to fundamental common law principles

In the course of the *Bancoult* litigation, only Sedley LJ in the Court of Appeal appeared to regard the operation of fundamental common law principles as an ongoing constraint on the prerogative power of the Crown to legislate by Order in Council for colonies. He considered that the sixth proposition in *Campbell v Hall* could yet be used to strike down an Order in Council permitting the use of torture on the ground that it was 'contrary to fundamental principles'.[107]

On appeal to the House of Lords, two members of the majority, Lord Rodger and Lord Carswell, took the opposite view, concluding that to the extent that this limitation ever existed, it did not survive the enactment of ss 2 and 3 of the CLVA.[108] Lord Rodger noted in response to Sedley LJ's concerns about the misuse of such powers by, for example, permitting torture, that colonial laws were subject to disallowance or could be overruled by legislation and were ultimately subject to the democratic control of the electorate.[109] He upheld the authority of *Liyanage*,[110] as had the Divisional Court in the earlier 2001 *Bancoult* case concerning the validity of the original 1971 Immigration Ordinance.[111]

The third member of the majority, Lord Hoffmann, took the view that the CLVA was only concerned with the application of laws to a colony as determined by colonial courts, not English courts, and was therefore not relevant in this instance.[112] However, he accepted that where it did apply, the CLVA put to rest Lord Mansfield's contention that the Crown's power to legislate was subject to fundamental principles.[113] Lord Hoffmann also accepted that the power of the Crown to legislate for conquered or ceded colonies was plenary in nature and could therefore abrogate the common law right of abode.[114] He concluded that 'there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it.'[115] It is not clear whether his Lordship simply considered that the right of abode was not sufficiently 'fundamental' to fall within Lord Mansfield's sixth proposition or whether he rejected altogether the notion that as a matter of English law, fundamental common law principles act as a limit on the Crown's plenary legislative powers with respect to conquered and ceded colonies.

The two members of the minority, Lord Bingham and Lord Mance, avoided the issue by focussing on the scope of the prerogative power to legislate for conquered and ceded

[107] *Bancoult* (n 6) [38]. See also [64] where Sedley LJ observed that Lord Mansfield may have been 'right before his time' in holding that the Monarch cannot exercise prerogative power to 'make any new change contrary to fundamental principles'.
[108] *Bancoult* (n 1) [96] (Lord Rodger); and [126] (Lord Carswell).
[109] *Bancoult* (n 1) [98].
[110] *Bancoult* (n 1) [99]-[102].
[111] *Bancoult* (n 4) [43].
[112] *Bancoult* (n 1) [40]-[41].
[113] *Bancoult* (n 1) [36].
[114] *Bancoult* (n 1) [44].
[115] *Bancoult* (n 1) [45].

colonies. Instead of applying a limitation on that power by reference to fundamental common law principles, they appeared to reject the plenary nature of the prerogative power to legislate. Instead they assessed the scope of that power by reference to historical usage, as is done with the exercise of prerogative executive power. In the absence of any example of the prior exercise of a prerogative power to expel a population from its home, they concluded that the prerogative power did not extend that far.[116] Although their Lordships did not apply fundamental common law principles as an express limitation on the legislative power of the Crown, they effectively brought about the same result by treating the Crown's *legislative* power in the same manner as its residual *executive* prerogative powers, which do not have the capacity to override the common law.

The outcome of the *Bancoult* case in the House of Lords on this point is therefore mixed. The majority accepted that the Crown retains a plenary power to legislate for colonies in particular circumstances, which includes the power to abrogate common law rights. The majority also agreed that where the CLVA applied, a court could not hold an Order in Council that legislated for a colony to be void or inoperative on the ground of repugnancy to the law of England. One member of the majority took the view that the CLVA did not apply when English courts were considering the validity of Orders in Council, but did not directly decide whether in the absence of the application of that Act there could be rights so fundamental that they limit the Crown's legislative power.

The CLVA and judicial review of Orders in Council made for the colonies

The second, more difficult, issue was whether the legal force given to judicial review can be characterised as deriving from the repugnancy of prerogative or executive acts to fundamental common law principles. If so, does the CLVA, by terminating the application of common law repugnancy to Orders in Council made for a colony, have the effect of immunising this very small field of Crown legislation for colonies from judicial review?

All the judges in the courts that heard the *Bancoult* matter agreed that the 2004 BIOT Orders were subject to judicial review.[117] Various reasons were given as to why the CLVA did not immunise these orders from judicial review. The three main arguments were:

1. The CLVA applies to the priority of conflicting valid laws and is not relevant where there is prior invalidity;
2. The CLVA only applies to the validity of colonial laws as determined by colonial courts; and
3. The CLVA was only directed at repugnancy and does not affect other grounds upon which a law might be invalid, such as judicial review.

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[116] *Bancoult* (n 1) [69]–[70] (Lord Bingham); and [149]–[150] (Lord Mance).
[117] *Bancoult* (n 1) [35] (Lord Hoffmann); [71] (Lord Bingham); [105] (Lord Rodger); [122] (Lord Carswell); and [141] Lord Mance, *Bancoult* (n 6) [35] (Sedley LJ); [107] (Waller LJ); [112] (Clarke MR); *Bancoult* (n 2) [164]; *Bancoult* (n 4) [29] (Laws LJ) and [68] (Gibbs J).

1. The CLVA as a law of priority

The Court of Appeal rejected the application of the CLVA to the judicial review of the 2004 BIOT Orders on the ground that the CLVA provided a rule of priority which only applied to otherwise valid laws. If the law was invalid because it was *ultra vires,* then the CLVA never applied.[118] A good conceptual analogy to this argument is the application of s 109 of the Australian Constitution. It provides that where there is an inconsistency between a federal law and a State law, the federal law prevails. The State law is regarded as inoperative to the extent of the inconsistency, but was still validly made and may come into effect again if the inconsistency is removed by the repeal or amendment of the inconsistent Commonwealth law. The s 109 priority rule only comes into play when there are two valid laws that are inconsistent. It is inapplicable if one of the laws is invalid for another reason.[119]

The English Court of Appeal sought to apply the same logic to the CLVA arguing that if the colonial law were *ultra vires* or otherwise invalid on established judicial review grounds, then the CLVA did not apply as there was no repugnancy to address.[120]

The problem with this argument is that the doctrine of repugnancy has almost always been regarded as affecting the power to make the repugnant law, rather than being a mere rule of priority between valid laws.[121] This is apparent in numerous of the opinions of the British Crown Law Officers. For example, in 1864 the Crown Law Officers explained that repugnant provisions in a colonial law are 'wholly *ultra vires*' leaving the rest of the Act, as long as it is severable, *intra vires* and operable. They contrasted this with colonial laws that breached manner and form requirements or that breached legislative reservation requirements. These Acts were *intra vires* but invalid *in toto* because they did not meet the requirements for a valid exercise of legislative power.[122] Even more striking is the opinion of the Crown Law Officers in relation to Bills that had been passed by the Tasmanian and South Australian legislatures at a time when the substance of the Bills was repugnant to a British Act of Parliament applying to the colonies. The Bills had been reserved for the monarch's assent and a new British Act of Parliament was passed removing the repugnancy. The Crown Law Officers concluded that the monarch could still not assent to these reserved Bills because they had been passed by the colonial

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[118] *Bancoult* (n 6) [22] (Sedley LJ); [80] (Waller LJ); and [117] (Sir Anthony Clarke MR).
[119] *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 (High Court of Australia), 573; *Western Australia v Commonwealth* (1995) 183 CLR 373 (High Court of Australia) 464-5.
[120] *Bancoult* (n 6) [22] and [30] (Sedley LJ).
[121] *In re Reg v Marais; ex parte Marais* [1902] AC 51 (PC), 54; *Rediffusion (Hong Kong) Ltd v Attorney-General (Hong Kong)* [1970] AC 1136 (PC), 1160-1. See also: Anstey (n 58) 405; and Opinion of Attorney-General Yorke and Solicitor-General Talbot, 1 August 1730, in: Chalmers (n 81) 341-2. Cf *Cooperative Committee on Japanese Canadians v Attorney-General (Canada)* [1947] AC 87 (PC), 103 where it was stated in *obiter dicta* that the effect of the CLVA was to make repugnant laws inoperative rather than *ultra vires.*
[122] Opinion by Sir Roundell Palmer and R P Collier, 28 September 1864, in: O'Connell (n 59) p 71.

legislatures at a time when they had no power to do so, even though the repugnancy no longer existed.[123]

The doctrine of repugnancy, both before and after the CLVA, did not amount simply to a rule of priority between two validly enacted laws, but rather also amounted to a limitation on the power to make the repugnant law.[124] The conferral of legislative power upon colonial legislatures was limited by the requirement that they not make laws that were repugnant to the law of England. Section 2 of the CLVA also made clear that a repugnant law was 'absolutely void and inoperative' (rather than merely inoperative). Hence the Court of Appeal's argument does not appear to be correct, as Finnis has noted[125] and Lord Hoffmann appeared to accept.[126]

2. The application of the CLVA only within colonies

Lord Hoffmann, with whom Lord Mance agreed on this point, took the view that the CLVA 'was intended to deal with the validity of colonial laws' (be they local or Imperial Orders in Council) 'from the perspective of their forming part of the local system of laws administered by the local courts'.[127] He concluded that:

> It therefore seems to me that from the point of view of the jurisdiction of the courts of the United Kingdom to review the exercise of prerogative powers by Her Majesty in Council, the Constitution Order is not a colonial law, although it may well have been from the point of view of a BIOT court applying BIOT law.[128]

Certainly, the catalyst for the enactment of the CLVA was the action of South Australian courts in holding laws enacted by colonial legislatures invalid on the ground of repugnancy to the law of England. The focus was therefore on the actions of colonial courts in applying the doctrine of repugnancy. However, the point of including Orders in Council in the definition of 'colonial laws' in the CLVA was the fact that they too were vulnerable to being held invalid if they were contrary to fundamental common law principles, as a consequence of Lord Mansfield's sixth proposition in *Campbell v Hall.*[129] The abolition of this vague and much criticised doctrine with respect to the application of an Order in Council in a colony, but not in the United Kingdom, could have led to the absurd result that an English court would hold that an Order in Council made with respect to a colony was void because it was contrary to fundamental common law principles while a colonial court would be obliged to hold that it continued to apply in the colony even though it had not been validly made.[130] If it were simply a question of the application of a rule of priority, then such a distinction between the application of the rule

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[123] Opinion by J D Coleridge and G Jessel, 30 May 1873, in: O'Connell (n 59) 81-2.
[124] Todd (n 15) 302.
[125] Finnis (n 96) [12].
[126] *Bancoult* (n 1) [39]. Lord Hoffmann described the distinction as 'too fine to be serviceable'.
[127] *Bancoult* (n 1) [40] (Lord Hoffmann). See also: [142] (Lord Mance).
[128] *Bancoult* (n 1) [40].
[129] *Campbell* (n 17) 209.
[130] See also Lord Rodger's concerns on this point: *Bancoult* (n 1) [97].

in a colony and in the United Kingdom might have been workable, but as discussed above, repugnancy is a rule concerning *vires*, and if there was no power to make the Order in Council it cannot have a valid application in a colony.

In drawing a distinction between the 'law of England' and the domestic law of the colony, Lord Hoffmann suggested that while a colonial court had to dismiss from its consideration the 'law of England' (except for Acts of the Westminster Parliament applying to the colony), a colonial court 'might well apply local principles of judicial review identical with those existing in English law.'[131] A colony might well apply local principles of judicial review to determine the validity of local acts of the colonial executive, whether prerogative acts or the exercise of powers conferred by statute. However, such local laws could not determine the validity of a British Order in Council. This could only be determined by reference to the laws that governed the making of the Order in Council, being Acts of Parliament or the common law of England.

If one were to follow Lord Hoffmann's argument to its logical conclusion then the enactment of the CLVA would have had the consequence that the validity of the 2004 BIOT Orders could potentially be struck down by the courts of BIOT for being inconsistent with common law principles of judicial review that became part of the law of BIOT in 1984,[132] but not for being inconsistent with the same common law principles that apply as part of the law of England (because of the application of s 3 of the CLVA), even though they could be potentially struck down by a British court for inconsistency with the same common law principles of judicial review forming the 'law of England'.

Lord Hoffmann suggested that 'Parliament in 1865 would simply not have contemplated the possibility of an Order in Council legislating for a colony as open to challenge in an English court on principles of judicial review'.[133] Yet to the extent that judicial review concerns whether an act of the executive is *ultra vires*, this was precisely the issue in *Campbell v Hall*, when Lord Mansfield held that Letters Patent legislating for a colony by imposing a tax upon it were *ultra vires* because the power to legislate for the colony had been terminated upon the making of a promise to grant a local representative assembly.[134] Indeed, it was Lord Mansfield's *dicta* in the same case, that the Sovereign could not legislate for a colony in a manner that was contrary to fundamental principles, that was clearly within the contemplation of Parliament in 1865 when the CLVA was enacted.

3. The distinction between repugnancy and judicial review

The final argument as to why the CLVA does not immunise Orders in Council legislating for a colony from judicial review is that the CLVA concerns the repugnancy of one law to another, and has no effect upon other grounds by which a law or act of the executive

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[131] *Bancoult* (n 1) [40].
[132] *British Indian Ocean Territory Courts Ordinance* 1983, applying the law of England as from time to time to BIOT.
[133] *Bancoult* (n 1) [40].
[134] *Campbell* (n 17) 213.

might be found to be *ultra vires.* This was essentially the view of Lord Rodger,[135] and the Divisional Court.[136]

It is clearly the case with respect to laws enacted by colonial legislatures that they may be held invalid on grounds other than repugnancy.[137] The colonial legislature may not have the power to make such a law (especially within a federal system, where heads of legislative power are divided amongst the constituent federal polities) or it may not have obeyed the required manner and form for making such a law. The CLVA does not purport to immunise laws enacted by colonial legislatures from such other grounds of invalidity. It only provides that a law of the colonial legislature shall not be void or inoperative on the ground of repugnancy to the *law of England* (other than Acts of Parliament applying to the colony expressly or by necessary intendment). Local laws concerning judicial review would not be excluded in their application to local executive acts because they were not the 'law of England'.

The difficulty arises with respect to the application of English common law judicial review doctrines to British Orders in Council that are 'made for any colony'. If a court finds that an Order in Council is invalid or void because its making was irrational or an abuse of power or in breach of a legitimate expectation, is this because the Order in Council is 'repugnant' to these common law doctrines, or is it simply a question of the scope of the power to make the Order in Council?

The power of the Crown to legislate for colonies by Order in Council may find its source in the prerogative (as was the case with respect to the 2004 BIOT Orders) or legislation (such as the British Settlements Act 1887). The prerogative power to legislate is derived from the common law and is governed by it. The scope of that power must be regarded as 'a pure question of English common law'.[138] As part of the common law, the royal prerogative is 'not to be exercised arbitrarily, but "per legem" and "sub modo legis".'[139] One could therefore argue that common law doctrines of judicial review simply form part of that common law from which the power to make the Order in Council is derived and that there is no issue of 'repugnancy' to another law. Similarly, where an Act of Parliament confers the power to legislate by Order in Council, one could argue as a matter of statutory interpretation that Parliament did not intend its power to be conferred in a manner contrary to the principles of judicial review. This is consistent with the principle of statutory interpretation which links back to *Dr Bonham's case* – that Parliament does not intend to confer a power to override fundamental common law principles unless it clearly states that it does so intend.[140] It is also consistent with the orthodox view of the constitutional foundations of judicial review – that it is based upon

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[135] *Bancoult* (n 1) [103].
[136] *Bancoult* (n 2) [169].
[137] *Bancoult* (n 4) [47] with respect to the making of an Ordinance by the Commissioner of BIOT.
[138] *Sammut* (n 17) 697. See also: *Ex parte Mwenya* [1960] 1 QB 241, 276.
[139] *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508, 567-9.
[140] *Simms* (n 14) 131; Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edition, CUP, 2007), p 657; D Pearce and S Argument, *Delegated Legislation in Australia* (Butterworths, Sydney, 1999) pp 214-8.

legislative intention rather than being a separate creation of the common law.[141] The issue is therefore the scope of the delegated power or the scope of the prerogative power, rather than the repugnancy of one law to another.

While this argument has some merit, the problem with it lies in the fact that repugnancy also concerns the very power to make the law. For example, Lord Mansfield took the view in *Campbell v Hall* that there was no power on the part of the Crown to legislate in a manner contrary to fundamental principles, and it was this very form of 'repugnancy' to which s 3 of the CLVA was directed. As Lord Hoffmann noted in *Bancoult*, 'a distinction between initial invalidity for lack of compliance with doctrines of English public law and invalidity for repugnancy to English law' may be 'too fine to be serviceable'.[142]

Conclusion

The idea that the courts may strike down laws (whether foreign laws or laws enacted by Parliament, the Crown or a colonial legislature) on the ground that they are repugnant to fundamental common law principles has its attractions as means of protecting the people but also has considerable disadvantages. The inability to define fundamental common law principles (and indeed the need to reconsider what is 'fundamental' at different times)[143] leads to uncertainty as to the validity of laws, speculative litigation and the potential for rule by judiciary rather than rule of law. The CLVA was enacted to eliminate this 'vague' and uncertain doctrine, both in relation to colonial legislatures and the Crown's remaining legislative powers with respect to colonies.

The *Bancoult* case is fascinating because the use of the obscure and 'anachronistic'[144] power of the Crown to legislate by Order in Council exposed to scrutiny long forgotten issues about the role of fundamental common law principles in limiting legislative power and modern controversies about the constitutional foundations of judicial review. It raised questions as to the legitimacy of judicial reinstatement of fundamental common law limits upon the legislative power of the executive and the extent to which common law judicial review is a partial revival of old doctrines concerning the supremacy of fundamental common law principles. The inconsistent, and at times inadequate, judicial views expressed about these issues are indicative not only of the complexity of the issues but the shifting constitutional role of the courts as a check on executive and legislative power.

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[141] See the intense debate about this theory: Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122; Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 CLJ 63; and Mark Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 CLJ 129.
[142] *Bancoult* (n 1) [39] (Lord Hoffmann).
[143] *Malika Holdings v Stretton* (2001) 204 CLR 290 (High Court of Australia), 298.
[144] *Bancoult* (n 1) [69].