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Wanted Dead & Alive: Modern Law, Universality, and the Colonial Exception

Tayyab Mahmud

WANTED DEAD & ALIVE:

MODERN LAW, UNIVERSALITY, AND THE COLONIAL EXCEPTION

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> The exception is more interesting than the rule. . . . In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.
>
> —Carl Schmitt

> In the colonial principle of rationality, the native is thus a thing that is, but only insofar as it is nothing.
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> —Achille Mbembe

> Today . . . the need for colonization is as great as it ever was in the nineteenth century. . . . What is needed then is a new kind of imperialism, one acceptable to a world of human rights and cosmopolitan values.
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> —Robert Cooper

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INTRODUCTION

Any serious discussion of questions of territorial sovereignty and borders in modern international law unavoidably brings colonialism and its aftermath into sharp relief. Is colonialism incidental to modern law in both its domestic and international iterations? Or does it furnish the essential grounds to frame modernity's landscape? Is there a no-man's land beyond the reach of universality, the promise of constitutionalism, and human rights? Does racial difference preclude the entry of the Other into the zone of liberty, equality, and self-determination? Can modern law outgrow its founding violence? These questions have haunted modern constitutionalism ever since its inaugural moments. Both the operations of modern power and related strategies of resistance are animated by divergent answers to these stubborn questions. In various guises, these questions furnish the sub-text of the law, the privileged site of modernity. Every once in a while they percolate to the surface and force the law to speak explicitly, to show its hand. And when the law speaks to these questions, the speech is halting and fractured. In these fractured texts one can trace the fissures of race and colonialism that remain embedded in the edifice of modernity. *Bancoult v Secretary of State*, a case decided by the High Court of Britain, is one such text.[1] This is a case about the forcible removal in the 1970s of people of African descent from Diego Garcia, a British colony in the Indian Ocean, to make way for the largest US overseas military base.

My reading of *Bancoult* puts into question any linier evolutionary reading of modern international law, constitutionalism, and human rights. It also appears to refute any binary exclusion/inclusion frame of constitutionalism and human rights to locate marginalized and subordinated groups. Rather, *Bancoult* emerges as yet another instance of modern law's long-standing practice to deploy—constitutionalism and human rights notwithstanding—a three-step maneuver when confronted with the racialized and colonized Other—engulfment, invocation of exception, and subordination. In *Bancoult*, the court's decisions regarding jurisdiction, standard of review, and substantive constitutional and human rights in question appear to track this three-step stratagem perfectly. Instead of any unfolding of the often posited inclusion/exclusion binary, the racial and colonized other is found incorporated in, indeed engulfed by, the constitutional order at large,

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[1] R (Bancoult) v Sec'y of State for Foreign and Commonwealth Affairs, [2001] Q.B. 1067.

followed by invocation of the racial/colonial exception, which, in turn, justifies withholding of full protections of the law.

I. COLONIALISM AND MODERN LAW

Modern law was forged on the anvil of the colonial encounter between the West and the Rest. Colonialism sutured together "territorialist and capitalist logics of power" on a world-wide scale.[2] The worldview forged and sustained by this encounter, and its accompanying material and discursive structures, etched the foundational contours of the very identities of the West and the Rest. These enduring contours furnish the channels through which legal orders in and between these entangled zones continue to flow.

The entanglement of colonialism and empire with modern law, in both its national and international iterations, is quite transparent.[3] While colonialism was "central and enduring in the making of modern law," law remains "a key mode of imperial power."[4] The savage and her space, lacking Western understandings of geometry, history, and law, had to be ordered to contain the danger of otherness. The colonized Other, deemed an error of arrested evolution, was prescribed the corrective culture of a higher rational order. Claiming the authority of reason and redemption, colonialism undertook its "'soul making' mission,"[5] combining with the "epistemic violence" of imperialism.[6] The colonizers had no doubt that "[t]he Natives must either be kept down by a sense of our power, or they must willingly submit from a conviction that we are more wise, more just, more humane, and more anxious to improve their condition than any other ruler they possibly could have."[7] Colonial law substantiates that "violence is not exterior to the order of *droit*. It threatens it from within" and necessitates that we "recognize

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[2] GIOVANNI ARRIGHI, THE LONG TWENTIETH CENTURY: MONEY, POWER, AND THE ORIGINS OF OUR TIMES 54 (1994).

[3] *See* PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992); PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW (2001).

[4] PETER FITZPATRICK, LAW AS RESISTANCE: MODERNISM, IMPERIALISM, LEGALISM 23 (2008).

[5] Benita Perry, *Problems in Current Theories of Colonial Discourse, in* THE POST-COLONIAL STUDIES READER 39 (Bill Ashcroft et al. eds., 1995) (quoting Gayatri Chakravorty Spivak).

[6] *Id.* at 38. *See also* RACE AND THE ENLIGHTENMENT: A READER (Emmanuel Chukwudi Eze ed., 1997).

[7] Gauri Viswanathan, *Currying Favor: The Politics of British Educational Policy in India 1813-54, in* DANGEROUS LIAISONS: GENDER, NATION AND POSTCOLONIAL PERSPECTIVES 113 (Anne McClintock, Amir Mufti & Ella Shohat eds., 1997).

meaning in a violence that is not an accident arriving from outside law."[8] Modern law focused on the quality of the relationship between a people and territory to articulate doctrines of "*terra nullius*" and "discovery" and to fashion new property rights regimes.[9] These, in turn, assigned eligibility to autonomous political society and membership in global society. Frames of *jus gentium*, or principles of law common to all peoples, yielded to positivist ontology of law and sovereignty. Doctrines of sovereignty and recognition, foundational building blocks of international law, rest on such assignments.[10] The distinction between "civilized" and "uncivilized"—constituted in no small measure by modern geography—furnished the grounds for "civilizational geopolitics," the dominant spatial imaginary of the West.[11] "[P]ositivism's triumphant suppression of the non-European world"[12] rested on the premise that "of uncivilized natives international law t[ook] no account."[13]

Consequently, in the modern global legal order, "[t]o characterize any conduct whatever towards a barbarous people as a violation of the laws of nations, only shows that he who so speaks has never considered the subject."[14] This new and positivist international law

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[8] JACQUES DERRIDA, *Force of Law: The "Mystical Foundation of Authority," in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 34 (Drucilla Cornell, Michel Rosenfeld & David Carlson eds., 1992).

[9] *See* JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 198 (2d ed. 2004); Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* 1986 WIS. L. REV. 219 (1986); PAUL O. KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES 51-52 (2003); BOYCE RICHARDSON, PEOPLE OF *TERRA NULLIUS*: BETRAYAL AND REBIRTH IN ABORIGINAL CANADA (1993).

[10] *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999); Antony Anghie, *Francisco de Votoria and the Colonial Origins of International Law, in* LAWS OF THE POSTCOLONIAL 89 (E. Darian-Smith & Peter Fitzpatrick eds.,1999); MARTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE & FALL OF INTERNATIONAL LAW 98–178 (2001).

[11] *See* JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS 88–89 (1998); GERRIT W. GONG, THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY (1984).

[12] Anghie, *supra* note 10, at 7.

[13] John Westlake, *John Westlake on the Title to Sovereignty, in* IMPERIALISM 45, 47 (Philip D. Curtin ed., 1971).

[14] *See* JOHN STUART MILL, *Dissertations and Discussions: Political, Philosophical and Historical, Volume III* 168 (1867). Antony Anghie captures the relationship between international law's turn to positivism and a particular characterization of colonized people well:

> The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these people, presenting them as suitable objects of conquest, and legitimizing the most extreme

at the service of "the body of states . . . consisting of persons interested in maintaining the rules of good breeding"[15] produced a confluence of people and territory in the category "backward" and legitimated colonial acquisition of "backward territory."[16] Over time, the master narrative of "civilization" created discourses of "development," "modernization," and "globalization"—constructs that took on the work of classifying populations, territories, and desirable social change.[17] In succession, attendant global legal regimes were put in place. Today these legal regimes engulf the four corners of the globe in ubiquitous regulatory designs that enforce elaborate normative orders over almost all realms of collective life.

Inscription of the law over colonized bodies and spaces subscribed to an enduring grammar of modernity's engagement with alterity. This grammar is not one of exclusion.[18] Rather, this engagement

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violence against them, all in the furtherance of the civilizing mission–the discharge of the white man's burden.

Anghie, *supra* note 10, at 7.

[15] JOHN WESTLAKE, COLLECTED PAPERS ON PUBLIC INTERNATIONAL LAW 6 (L. Oppenheim ed., 1914).

[16] M. F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW, BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (1926); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

[17] Seeing societies through the binary lens of modern/traditional, this model prescribed diffusion of modern technologies, laws, and ways of life as the panacea for underdevelopment. The resulting economic policies, crafted under the watchful eyes of experts from the global North, focused on growth of leading sectors of the economy, the trickle-down effect of which was supposed to, in time, take care of lagging sectors and poverty. The capacity for effective control rather than representative nature of the state was deemed the yardstick of an appropriate political order. *See* W. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (1960); CHARLES KINDLEBERGER, ECONOMIC DEVELOPMENT (3d. ed. 1977). For critiques of this model, see SAMIR AMIN, UNEQUAL DEVELOPMENT (1976); SUSAN BODENHEIMER, THE IDEOLOGY OF DEVELOPMENTALISM: THE AMERICAN PARADIGM FOR LATIN AMERICAN STUDIES 15 (1971); ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 10 (1995). This model of development was an extension of colonial designs of social development. *See* VINAY GIDWANI, CAPITAL INTERRUPTED: AGRARIAN DEVELOPMENT AND THE POLITICS OF WORK 14 (2008). It was in this context that the "law and development" project emerged as part of the ensemble of prescribed legal designs far removed from the culture, practices, and material needs of the vast populations of the global South. *See* JAMES GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980); Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, 7:2 GLOBAL JURIST 1 (2007), *available at* http://www.bepress.com/gj/vol7/iss2/art1; Issa G. Shivji, *Law's Empire and Empire's Lawlessness: Beyond Anglo-American Law*, 1 J. L. SOC. JUST. & GLOBAL DEV. (2003), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/shivji2.rtf.

[18] For a critique of the "exclusion" thesis in modern construction of race, see DENISE FERREIRA DA SILVA, TOWARDS A GLOBAL IDEA OF RACE (2007).

with alterity forms a three-pronged matrix: engulfment/exception/subordination. The Other does not exist prior to the engagement; it is not "discovered," left out or left alone—excluded from operations of power. The Other was and is produced by and through engagement. It is engulfed in operations of modernity, located in zones of exception, and positioned in states of subordination. This subordination in and as exception concurrently produces the Other and the identity of the modern self.

The regimes of engulfment of the Other aim to render the subjected body "more obedient as it becomes more useful."[19] Here the role of law becomes critical. Recognition of the centrality of law to the colonizing process stands widely acknowledged.[20] Law in the colony aimed to "reduce . . . to civility" those who had "no skill of submission."[21] Violence was deemed a vital instrument of colonial progress,[22] with law furnishing "the cutting edge of colonialism."[23] Violence in general, and the violence of law in particular, was seen as playing "the leading part in the creation of civilization."[24] Colonial rule deemed "[o]ur law . . . a compulsory gospel which admits of no dissent and no disobedience."[25] This overt concert of law and violence has been aptly characterized as "*lawfare*, the effort to conquer and control indigenous peoples by the coercive use of legal means."[26] The geo-legal space of colonialism brings into sharp relief "the blood that has dried on the codes of law."[27]

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[19] MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 137–38 (Alan Sheridan trans., 2d ed. 1979).

[20] *See* Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 LAW & SOC. INQUIRY 269-90 (2003); NATHAN J. BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF (1997); CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE, (Mindie Lazarus-Black & Susan Hirsch eds., 1994); RONEN SHAMIR, THE COLONIES OF LAW: COLONIALISM, ZIONISM, AND LAW IN EARLY MANDATE PALESTINE (2000).

[21] J. AXTELL, THE INVASION WITHIN: THE CONTEST OF CULTURES IN COLONIAL NORTH AMERICA 131, 271 (1985).

[22] ASHIS NANDY, THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM 69 (1983).

[23] MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA 4 (1998).

[24] ERIC STOKES, THE ENGLISH UTILITARIANS AND INDIA 294 (1959).

[25] R. C. J. COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE 87 (1988). *See also* RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (1998).

[26] John L. Comaroff, *Colonialism, Culture, and the Law: A Foreword*, 26 LAW & SOC. INQUIRY 305, 306 (2001).

[27] JAMES MILLER, THE PASSION OF MICHEL FOUCAULT 289 (1993) (quoting Michel Foucault).

In the colony, law congealed epistemic, structural, and physical violence. The colonized Other, deemed an error of arrested evolution, was prescribed corrective norms of a higher rational order. This "soul-making" colonial project entailed entrenchment of a layered legal order.[28] First, the colony was inserted into the global legal system of hierarchically differentiated sovereignties. Second, metropolitan law was transplanted in the colony, supplemented by exceptions that ensured that coercion displaced hegemony as its animating force,[29] thereby ordering a "rule of difference" that mandated performance of nonidentity between the colonizer and the colonized.[30] Third, through selective recognition, malleable norms of the colonized were truncated and reconstituted as fixed "customary law."[31]

Attempts to modernize the colony while keeping its imagined traditional lineaments in place produced a geo-legal space that, rather than being a homogenous whole, was fractured—multiple normative orders laid claim over the same space. This fracture complemented "uneven development,"[32] and the "'asymmetries' that inevitably arise out of spatial exchange relation"[33] orchestrated by global capital accumulation. While the phenomenon of unevenness, and synchronicity of the non-synchronous, is intrinsic to capitalism, this assumed an exaggerated form in colonial contexts where diverse modes of production were harnessed in the service of global accumulation.[34] The resulting concurrent homogenizations and differentiations continue to animate the post-colonial imperial order.[35] A close reading of *Bancoult* substantiates these propositions.

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[28] PERRY, *supra* note 5, at 39.

[29] *See* RANJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA (1997).

[30] PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES 16–24 (1993).

[31] *See* FRANCIS G. SNYDER, CAPITALISM AND LEGAL CHANGE: AN AFRICAN TRANSFORMATION (1981); SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, *1880–1980,* (1986).

[32] NEIL SMITH, UNEVEN DEVELOPMENT: NATURE, CAPITAL AND THE PRODUCTION OF SPACE 90 (1984).

[33] DAVID HARVEY, THE NEW IMPERIALISM 31 (2003).

[34] For the phenomenon of unevenness in political and economic registers, see generally SAMIR AMIN, ACCUMULATION ON A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT (Brian Pearce trans., 2d ed. 1974); HARVEY, *supra* note 33, at 87–136.

[35] HARVEY, *supra* note 33, at 137–182.

II. DIEGO GARCIA: MAKING A FOOTPRINT OF FREEDOM

Bancoult concerns Diego Garcia, a coral atoll in the Chagos Archipelago situated in the southern Indian Ocean. It is a major American military base from where in recent years B-52 flew ostensibly to bring freedom, democracy, and the rule of law to Afghanistan and Iraq. More importantly, the case concerns the Ilois,[36] the native people of the atoll, who were forcibly removed from the island in the 1970s to facilitate the establishment of what the United States described as "an all but indispensable platform" for the fulfillment of its defense and security responsibilities in the region.[37] "Discovered" by the Portuguese in the early 16th century, it passed to the French in 1715.[38] The French set up a leper colony and copra production from coconut palms. The Ilois are the descendants of slaves that were brought in from East Africa to work in copra production.[39] The Archipelago and Mauritius were ceded by France to Britain in 1814 by virtue of the Treaty of Paris, following the Napoleonic Wars. From that date until 1965 the archipelago was governed as part of the British colony of Mauritius. Characterized as "a beauty spot of unrivalled tranquility and beauty,"[40] the islands were governed by a British administrator based in the Seychelles who made annual visits to the islands.[41]

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[36] Ilois is Creole for "islanders," and has been in use since the 19th century to describe inhabitants of the Chagos Islands. STEPHEN ALLEN, THE CHAGOS ISLANDERS AND INTERNATIONAL LAW 2 n.5 (2014).

[37] *R (Bancoult)* [2001] Q.B. at 1075 (describing a letter from the U.S. Dep't of State, dated June 21, 2000).

[38] The history of Diego Garcia demonstrates the accuracy of Mbembe's observation that "from the fifteenth century, there is no longer a 'distinctive historicity' of [colonized] societies, one not embedded in times and rhythms heavily conditioned by European domination." ACHILLE MBEMBE, ON THE POSTCOLONY, 9 (2001).

[39] By the beginning of the 20th century, there was a population of about 426 families, of which 60% were of African and Malagasy origin and 40% were Tamils from South India. JOHN MADELEY, DIEGO GARCIA 4 (rev ed. 1985) (internal citations omitted). The Ilois brought to the islands were like the black slaves on colonial sugar plantations about whom Montesquieu said, "It is impossible for us to suppose these creatures to be men, because, allowing them to be men, a suspicion would follow that we ourselves are not Christians." MONTESQUIEU, THE SPIRIT OF LAWS 316 (T. Nugent trans., J.V. Pritchard ed., 1952).

[40] MADELEY, *supra* note 39, at 4.

[41] *Id.* at 12 n. 21. For a history and diplomacy surrounding the Chagos islands, see GUPTA RANJAN, THE INDIAN OCEAN: A POLITICAL GEOGRAPHY (1979); D DIETER BRAUN, INDIAN OCEAN: REGION OF CONFLICT OR 'PEACE ZONE' (Carol Geldart & Kathleen Llanwarne trans., 1984); ALVIN J. COTTRELL, SEA POWER AND STRATEGY IN THE INDIAN OCEAN (1981); K.S. JAWATKAR, DIEGO GARCIA IN INTERNATIONAL DIPLOMACY (1983).

In the early 1960s, the United States expressed to the British an interest in establishing a permanent military base on Diego Garcia, one free of local populations and of political control of post-colonial states.[42] Initially, the United States was interested in the island of Aldabra, but a military base there was deemed to endanger giant tortoises.[43] In 1966, a secret Anglo-American agreement signed "'under the cover of darkness' without congressional approval or parliamentary oversight" allowed the United States to build a military base on Diego Garcia.[44]

In 1964, through a secret "gentleman's agreement," in exchange for 3 million pounds, the Chagos Islands were "excised" from Mauritius to be retained by the British "for the construction of defense facilities by the British and US governments."[45] "The primary objective in acquiring these islands," wrote a British Official, "is to ensure that Britain has full title to and control over these islands . . . so that Britain and the United States should be able to clear the Territory of its current population."[46] In 1965, the archipelago was re-constituted as a separate colony, designated the "British Indian Ocean Territory (BIOT)." This was done by virtue of the British Indian Ocean Territory Order (SI 1965/1920), an Order in Council made under the powers of royal prerogative, and "in exercise of the powers in that behalf by the Colonial Boundaries Act 1895, or

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[42] "It would be unacceptable to both the British and the American defense authorities if facilities of the kind proposed were in any way to be subject to the political control of ministers of a newly emergent independent state." Simon Winchester, *Diego Garcia*, 73 GRANTA 207, 214 (2001) (quoting a note by British Colonial Office minister, dated Oct. 20, 1964).

[43] MADELEY, *supra* note 39, at 4 (quoting Robin Cook MP from "Britain's Other Islands," Granada TV, "World in Action," June 21, 1982.).

[44] DAVID VINE, ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA 7 (2009); Availability of Certain Indian Ocean Islands for Defense Purposes, U.S.-U.K., Dec. 30, 1966, 18 U.S.T. 28. *See also* Naval Communications Facility on Diego Garcia, U.S.-U.K., Oct. 24, 1972, 23 U.S.T. 3088. This agreement authorized only the construction of a communications facility on the island. *Id.* This was superseded by another treaty in 1976, which allowed substantial expansion of the facility. Naval Support Facility on Diego Garcia, U.S.-U.K., Feb. 25, 1976, 27 U.S.T. 316–17.

[45] BORDERS AND TERRITORIAL DISPUTES 278 (John B. Allock et al. eds., 3rd ed. 1992). During November of 1965, the British government negotiated a settlement with Mauritius about the Chagos Archipelago. U.K. COLONIAL OFFICE, ANNUAL REPORT ON MAURITIUS (1965). This settlement was reached at a constitutional conference convened to prepare the colony for independence. ADELE SMITH SIMMONS, MODERN MAURITIUS: THE POLITICS OF DECOLONIZATION 173 (1982). Representatives of Mauritius agreed to transfer the Archipelago to the United Kingdom in return for three million pounds; the transaction was concluded orally and there is no record of the sale negotiations and no exchange of documents. *Id.*

[46] Winchester, *supra* note 42, at 214 (quoting a British official).

otherwise in Her Majesty vested."[47] By virtue of agreement between Britain and the United States, finalized in December 1966, BIOT would remain under British sovereignty, but would be available for the security needs of both states, and the United States secured a fifty-year lease to the Diego Garcia.[48] In 1968, Mauritius was decolonized. In 1971, the commissioner of BIOT issued a measure designated the Immigration Ordinance, purportedly made under powers conferred by section 11 of the BIOT Order; the section provides that "[t]he Commissioner may make laws for the peace, order and good government of the Territory."[49] The Order made it unlawful for anyone to remain in the Territory without a permit; and authorized the commissioner to remove indefinitely people remaining in the Territory unlawfully; and persons awaiting removal could be kept in custody. Between 1971 and 1973 all native inhabitants of the islands were removed and "dumped dockside of Port Louis in Mauritius."[50] For good measure, nearly a thousand dogs, strays and ones the natives were forced to abandon at the their removal, were burned to

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[47] R (Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs, [2001] Q.B. 1067 at 1076 (Eng.) (quoting the BIOT Order, 1965, S.I. 1965/1920).

[48] 18 U.S.T. 28, *supra* note 44, at 31. To keep transaction from the parliament and the public, Britain successfully persuaded the Americans to disguise the $14 million lease fee as a discount on research and development charges for Polaris nuclear missiles being sold to the Royal Navy. Winchester, *supra* note 42, at 222.

[49] *Bancoult*, [2001] Q.B. at 1077.

[50] Winchester, *supra* note 42, at 217–18. In Mauritius, an island with high unemployment and no scheme in place for resettlement and integration, the Ilois remain marginalized and destitute. Following a public campaign about their plight by the Mauritian Militant Movement, in 1973 Britain agreed to pay 650,000 pounds to the Mauritian government for relief and resettlement, which was described by Britain as "full and final" discharge of its obligations. MADELEY, *supra* note 39, at 5. In the late 1970s, Mauritian government asked for increased compensation. Britain offered 1.25 million pounds, but insisted that compensation would be paid only to those Ilois who would sign a no return clause. *Id.* at 15 The clause reads: "I am an Ilois who left that part of British Indian Ocean Territory known as . . . never to return. We accept the money already paid to the Mauritian Government . . . and abandon all our claims and rights (if any) of whatsoever nature to return to the British Indian Ocean Territory." *Id.* (quoting Deed of Acceptance & Power of Attorney). Some Ilois signed, but most refused. In 1982, Britain gave 4 million pounds to be administered by a trust. All claims to this trust lay dormant until the Bancoult case in 1999. Rachael Bradley, *Diego Garcia–Britain in the Dock*, 7 BOUNDARY AND SEC. BULL. 82, 87 (1999). In the early 1980s, a new government of Mauritius announced that it intended to present its claim over the archipelago to the International Court of Justice. Joseph Lelyveld, *Election in Mauritius Sharpens Diego Garcia Issue*, N.Y. TIMES, June 20, 1982, at 16. The Mauritian claim is summarized in G.A. Res. 38/711, U.N. Doc. A/38/711 (Dec. 8, 1983). The British claim is summarized in G.A. Res. 38/598, U.N. Doc. A/38/598 (Nov. 22, 1983). Due to political changes within Mauritius, the case was never pursued. For a legalistic examination of Mauritius' claim, see generally Timothy P. Lynch, *Diego Garcia: Competing Claims to a Strategic Island*, 16 CASE W. RES. J. INT'L L. 101 (1984).

death in a coconut calorifier.[51] Construction of the military base on Diego Garcia began in 1971; the facility became fully operational in 1973, and was expanded in the 1980s. Today it serves as a major naval and air force base and as a staging area for ground troops. Diego Garcia was used to launch long-range cruise missiles and B-52 bombers during the 1991 Gulf War, the 1998 bombing of Iraq, the American operation against Afghanistan in 2001, and the 2003 invasion of Iraq.[52] Since 2001, Diego Garcia has also been claimed to be a holding center for people captured in the "war against terrorism."[53] On the water tower by the entrance to the military base are painted the words: "DIEGO GARCIA: THE FOOTPRINT OF FREEDOM."

The American demand that the islands be "fully sanitized" and "swept,"[54] of native inhabitants, on the one hand, and mandates of Article 73 of the UN Charter[55] and General Assembly Resolution No 1514 of December 14, 1960,[56] on the other, presented the British government with "an awkward problem."[57] Britain knew well that "the territory is a non-self-governing territory and there is a civilian population even though it is small."[58] To cope with this dilemma, Britain adopted a two-pronged strategy. One prong comprised of "a policy of 'quiet disregard'—in other words, let's forget about this one until the United

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[51] Winchester, *supra* note 42, at 209–10.

[52] Osei Boateng, *Diego Garcia: Africa's Forgotten Island*, NEW AFRICAN, Sept. 2002, at 26; John Pilger, *A Little-Known and Suppressed British Atrocity in a Faraway Island Tells us Much about the Function of "Globalisation"*, NEW STATESMAN, Sept. 27, 1996, at 34; John Pilger, *A War in the American Tradition*, NEW STATESMAN, Oct. 15, 2001, at 12.

[53] VINE, *supra* note 44, at 9; David Vine & Laura Jeffery, *"Give Us Back Diego Garcia": Unity and Division among Activists in the Indian Ocean*, *in* THE BASES OF EMPIRE: THE GLOBAL STRUGGLE AGAINST U.S. MILITARY POSTS, 181 (Catherine Lutz ed., 2009); Philip Shenon, *Mideast Turmoil: Intelligence; Officials Say Qaeda Suspect Has Given Useful Information*, N.Y. TIMES, Apr. 26, 2002, *available at* http://www.nytimes.com/2002/04/26/world/mideast-turmoil-intelligence-officials-say-qaeda-suspect-has-given-useful.html.

[54] Winchester, *supra* note 42, at 214.

[55] The article requires members "to transmit regularly to the Secretary General . . . statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible." U.N. Charter art. 73, para. e.

[56] The Resolution reads: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., U.N. Doc. A/L.323 and Add. 1-6, at 67 (Dec. 14, 1960).

[57] *See* R (Bancoult) v. Sec'y of State for Foreign and Commonwealth Affairs, [2001] Q.B. 1067 at 1081 (quoting a British governmental note, (Nov. 12, 1965)).

[58] *Id.*

Nations challenges us on it."[59] The other prong would "avoid any reference to 'permanent inhabitants'"[60] and directed that "[i]t is . . . of particular importance that the decision taken by the Colonial Office should be that there are no permanent inhabitants in the BIOT."[61] Only through these strategies, "Britain or the United States should be able to clear it (BIOT) of its current population. The Americans in particular attached great importance to this freedom of maneuver, divorced from the normal considerations applying to a populated dependent territory."[62] The enunciated official position therefore had to be that "[t]he islands . . . had, *for all practical purposes*, no permanent population."[63] Furthermore, Britain, "could not accept *the principles governing our otherwise universal behaviour* in our dependent territories, e.g., we could not accept that the interests of the inhabitants were paramount and that we should develop self-government there."[64] The Foreign Office legal advisor gave his imprimatur to the strategy: "In this respect *we are able*

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[59] *Id.* This followed the adoption of a resolution of the United Nations General Assembly condemning the transfer of the Archipelago from Mauritius, and declared the occurrence as a violation of the territorial integrity of Mauritius. G.A. Res. 2066 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6160, at 57 (Dec. 16, 1965). The resolution was adopted on the advice of the Special Committee appointed to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples. G.A. Res. 1654 (XVI), U.N. GAOR, 21st Sess., Supp. No. 17, U.N. Doc. A/L 336 and Add. 1-3, at 65 (Nov. 27, 1961). General Assembly's disapproval was repeated in 1966 and 1967. G.A. Res. 2232 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6628, at 75 (Dec. 20, 1966). G.A. Res. 2357, U.N. GAOR, 22nd Sess., Supp. No. 16, U.N. Doc A/7013, at 56 (Dec. 19, 1967). The Special Committee's final report on Mauritius reiterated disapproval of the transaction. Rep. of the Special Comm. on the Situation with regard to the Implementation of the Dec. on the Granting of Independence to Colonial Countries and Peoples, U.N. Doc. A/7200/Rev.1, Ch. XI; GAOR, 23rd Sess. (Nov. 18, 1968). The Special Committee continued to consider the question of the BIOT with regards to the Seychelles Islands until 1972; each year from 1968 to 1972, the General Assembly, on advice of the Special Committee, adopted a resolution deploring the severance of the territory and the construction of military bases in the Indian Ocean. The United Kingdom abstained from voting on any of these resolutions. G.A. Res. 2984 (XXVII), U.N. GAOR, 27th Sess., Supp. No. 30, U.N. Doc. A/8955, at 85 (Dec. 14, 1972); G.A. Res. 2869 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8616, at 104 (Dec. 20, 1971); G.A. Res. 2709 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8248, at 100 (Dec. 14, 1970); G.A. Res. 2592, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7896, at 74 (Dec. 16, 1969); G.A. Res. 2430, U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7419, at 64 (Dec. 18, 1968). In 1976 Seychelles gained independence and the islands of Aldabra, Desroches and Farquhar, that had been made part of BIOT, were ceded to Seychelles. Boateng, *supra* note 52, at 28.

[60] *Bancoult*, [2001] Q.B. at 1082 (quoting a confidential missive from the Secretary of State for the Colonies to the Commissioner of BIOT, dated Feb. 25, 1966).

[61] *Id.* at 1082–83 (quoting a minute about the position of the Colonial Office (June 1966)).

[62] *Id.* at 1083 (quoting a British government document (Aug. 12, 1966)).

[63] *Id.* (emphasis added).

[64] *Id.* at 1084 (emphasis added).

to make up the rules as we go along and treat the inhabitants of BIOT as not 'belonging' to it in any sense."[65] The Court in *Bancoult* found "the flavor of these documents a little odd. It is as if some of the officials felt that if they willed it hard enough, they might bring about the desired result, and there would *be* no such permanent population."[66] The Court found some of the material documents contained in governmental files "embarrassing and worse."[67]

The Foreign Office legal advisor was clear that the purpose of the BIOT Immigration Ordinance was "to maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population. . . . [T]he British Government will have to continue to argue that the local people are only a floating population."[68] That the alchemy of turning native population into non-inhabitants might involve stretching the truth was of little concern. Rather, there was irritation to "a certain old fashioned reluctance to tell a whopping fib, or even a little fib, depending on the number of permanent inhabitants."[69] The marching orders were:

> [w]e must surely be very tough about this. The object of the exercise was to get some rocks which will remain ours; there will be no indigenous population except seagulls who have not yet got a committee (the Status of Women Committee does not cover the rights of birds).[70]

The reference to the Status of Women Committee may have been prompted by the fact that the Ilois constituted a "pronounced matriarchal

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[65] *Id.* at 1085 (quoting a minute by the Foreign Office legal adviser (Oct. 23, 1968)) (emphasis added).

[66] *Id.* at 1081. The posture of British authorities reminds one that:

> To colonize is also to deploy a subjectivity freed of any limit, a subjectivity seeing itself as absolute but which, to experience that absolute, must constantly reveal to itself by creating, destroying, and desiring the thing and the animal that it has previously summoned into existence. From the standpoint of the conqueror, the colony is a world of limitless subjectivity. In this, the act of colonizing resembles a miracle.

MBEMBE, *supra* note 38, at 189.

[67] *Bancoult*, [2001] Q.B. at 1106.

[68] *Id.* at 1086 (quoting the advice of the Foreign Office legal advisor, (Jan. 16, 1970).

[69] *Id.* at 1083 (quoting a manuscript note by a British official).

[70] *Id.* (quoting a minute from the Permanent Under Secretary of the Colonial Office (Aug. 24, 1966)). Another official added the comment: "Unfortunately along with the birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done I agree we must be very tough and a submission is being done accordingly." *Id.*

society," where women outnumbered men in the total population, and women were dominant in the struggle against the mass removal and exile.[71]

The legal alchemists turned to private law constructs of property rights and contracts to turn natives into non-inhabitants. As a matter of private law, title to the Chagos Islands had vested in the plantation company, Chagos Agalega Ltd., and the British government purchased the company's rights in 1967. The islands were then managed by the same company under lease from the government. Later the company was reconstituted and renamed Moulinie & Co Ltd. and continued to manage the islands under contract with the Crown. Both before and after the acquisition of the company by the Crown, all inhabitants of the islands, including the native Ilois, were contract workers on the copra plantations, or family members of such workers. None of the natives enjoyed property rights in any of the land. The British authorities sought to rely on the native inhabitants' lack of such property rights, and their status as contract workers wholly dependent on the plantations, as being inconsistent with their possession of any public law rights to remain in the territory as citizens of it. Besides the lack of any right to remain, the status of the natives with regards to private law regimes of property and contract was supposed to absolve the British government of any responsibility towards the United Nations.[72] The acquisition of the copra company's rights was motivated by a desire to cement this status. Before the acquisition, the Secretary of State for the Colonies informed the Commissioner of BIOT:

> [w]e are . . . taking steps to acquire ownership of the land on the islands and consider that it would be desirable . . . for the inhabitants to be given some form of temporary residence permit. We could then more effectively take the line in discussion that these people are Mauritians and Seychellois; that they are temporary residents in BIOT for the purpose of making a living on the basis of contract or day to day employment with companies engaged in exploiting the islands; and that when the new use of the islands makes it impossible for these operations to continue on the old scale the people concerned will be resettled in Mauritius or Seychelles.[73]

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[71] MADELEY, *supra* note 39, at 4; *Id.* at 3–4 (noting that the gender balance of the population was rooted in the Chagos Islands having had been a leper colony).

[72] *Bancoult*, [2001] Q.B. at 1081 (quoting a Foreign Office memorandum (July 28, 1965)).

[73] *Id.* at 1082 (quoting a confidential missive (Feb. 25, 1966)).

The issue was turned from historic presence to one about "belonging," and policy rationale became that "although they have been in Chagos for a long time, they have lived there only on sufferance of the owners of the islands, and could at any time have been sent back to Mauritius if no longer wanted in connection with the estate. They have never in the past had any right to reside permanently in Chagos."[74] In arguments before the Court, the British government sought to capitalize on the fact that "[t]he Ilois accepted that they could be moved by their employers from one island to another and even from the islands as a whole if, for example, they were guilty of misconduct."[75]

Internal correspondence of the British government indicates an awareness of problems with grounding public law rights upon private law status. Some officials remained skeptical "about the validity of the argument that the Ilois have lived in Chagos 'only on sufferance of the owners,' since the point at issue is 'belonging' in the national sense rather than rights of residence on private property."[76] Others pointed out that "all the inhabitants of BIOT (totaling under 1500) are citizens of the UK and Colonies and they are all entitled to a UK passport with the colonial endorsement. . . . If they applied for a UK passport, presently the colonial endorsement could only reveal that they belong to BIOT since there was no other British colony to which they could belong."[77] Decision-makers, however, continued to ground the expulsion policy on the premise that, "[t]he people with whom we are concerned are working in the Chagos under contract and own no property or fixed assets there."[78] Lack of such rights were grounds "to continue to argue that the local people are only a floating population . . . strict immigration legislation giving such laborers and their families very restricted rights of residence would bolster our argument that the territory has no indigenous or settled population."[79] And given "the earnest desire of the British Government to ensure that its [Ordinance] making should be attended by as little publicity as possible. . . . The ordinance would be published in

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[74] *Id.* at 1084 (quoting the Commissioner for BIOT to the Secretary of State in minutes accompanying draft Ordinance (Mar. 2, 1967)).

[75] *Id.* at 1079 (quoting an argument by the British government's counsel).

[76] *Id.* at 1084 (quoting a missive to the Secretary of State for Commonwealth Affairs (Sept. 29, 1967)).

[77] *Id.* at 1084–85 (quoting an intra-governmental note, (Sept. 4, 1968)).

[78] *Id.* at 1085 (quoting minute from Foreign Secretary to the Prime Minister (Apr. 29, 1969)).

[79] *Id.* at 1086 (quoting Advice by the Foreign Office legal adviser (Jan. 16, 1970)).

the BIOT Gazette, which has only very limited circulation both here and overseas . . . . Publicity will therefore be minimal."[80]

The Court rehearsed these facts partly in response to the plaintiff's position that the Ordinance and the actions taken under it were things done for an improper motive or purpose, i.e., not only to facilitate the establishment of the military base, but also to keep the whole affair a secret. The Court recounted the facts to fulfill its obligation "to demonstrate that it has at least a reasonable understanding of the issues which exercised the decision makers of the time, and how they responded to them," And hastened to add that "although, of course, nothing is more elementary than that we are not policy makers ourselves and must decide the case by reference only to the applicable law."[81] The Court held that the plaintiff was not entitled to succeed on this ground so far as it is put forward as a freestanding head of challenge. According to the Court, it all depended on the scope of the enabling legislation, the BIOT Order; if the scope was indeed as wide as the government contended, then "what was done would have been justified in law; in particular, the dictates of the desired military base would have fallen within (the scope of the Order). The desire for secrecy would have been ancillary, not separately objectionable."[82] The deference of the Court to governmental policy included its position that "[t]here is no doubt but that the defense facility which the base provides is of the highest importance."[83]

III. JURISDICTION: ENGULFMENT NOT EXCLUSION

As a first step towards deciding the case, the Court considered the question of jurisdiction. It held that the Divisional Bench of the Queen's Bench in London did have jurisdiction. The Government had argued for lack of jurisdiction on two grounds. One, that any petition against the Ordinance should be laid before the BIOT Courts, from where the ultimate court of appeal is the Judicial Committee of the Privy Council. From the Queen's Bench the ultimate court of appeal is the House of Lords. Thus there exists the possibility of conflicting judicial

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[80] *Id.*

[81] *Id.* at 1079.

[82] *Id.* at 1105.

[83] *Id.* at 1075. For the Court this was established by a June 21, 2000 letter by the US State Department that described the base as "'an all but indispensable platform' for the fulfillment of defense and security responsibilities [in the region]." *Id.*

opinions at the highest level. On this ground, the government argued that the Court as a matter of discretion, rather than jurisdiction, should not adjudicate. Two, the government argued the doctrine of divisibility of the Crown, i.e., that the Crown should be treated as a separate sovereign entity vis-à-vis each territory over which it has sovereignty.[84]

As for the first argument, the Court indicated that "the possibility is altogether more apparent than real," apparently mindful of the fact that there was no court structure in place in BIOT, despite provision for one in the BIOT Order.[85] Furthermore, the petitioner was not permitted to enter the BIOT, the very grounds of the case, and hence not able to avail of any relief that may had been available from the courts of BIOT. As for the divisibility of the Crown argument, the Court found it to be "an abject surrender of substance to form."[86] The Court recounted that the Ordinance was done on orders of the ministers in London; that the "government had entered into obligations and understandings with the Americans, not with the government of BIOT. The government of BIOT was itself a creature of those understandings."[87] Furthermore, the BIOT courts could rightly take the position that they had no control over officials sitting in London. The Court rested its holding of jurisdiction on Lord Mansfield's dictum in *R v Cowle*,[88] that prerogative writs "may issue to every dominion of the Crown of England. There is no doubt as to the power of this court; where the place in under the subjection of the Crown of England; the only question is, as to propriety."[89] Lord Denning's holding that "[i]f the Crown exceeds its jurisdiction over the

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[84] *Id.* at 1086 (citing *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta* (1982) QB 892; *Tito v. Waddell* (No 2) (1977) Ch 106. 255A-B; *R v. Secretary of State for the Home Department, Ex p Bhurosah* (1968) 1 QB 266 ('In Mauritius the Queen is the Queen of Mauritius.' Per Lord Denning MR at p. 284E).

[85] *Id.* at 1077 (citing Sections 16 and 17 of the BIOT Order). A Supreme Court for BIOT was established by the Courts Ordinance 1983 (BIOT Ordinance No 3 of 1983), which provided for this court: "unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law and with all the powers, privileges and authority which is vested in or capable of being exercised by the High Court of Justice in England." *Id.* Transcript of Judgment at 3-4, R v. Sec'y of State for the Home Dep't, *Ex parte* Bancoult, [1999] Q.B. (CO/3775/98).

[86] *Bancoult*, [2001] Q.B. at 1092.

[87] *Id.* The court could have pointed out the fact that the government and legislature of BIOT is a team of four civil servants in the Foreign and commonwealth Office in London who work part-time for the BIOT administration, and whose costs are borne not by BIOT but the British government. 361 PARL. DEB., H.C. (6th ser.) (2001) 404WA (U.K.).

[88] R v. Cowle, [1759] Eng. Rep. 834 at 855.

[89] *Bancoult*, [2001] Q.B. at 1087 (quoting R v. Cowle, (1759), Eng. Rep. 834 at 855).

colony, its conduct can be challenged in these courts," was also cited in support. [90]

IV. STANDARD OF REVIEW: INVOCATION OF THE COLONIAL EXCEPTION

The petitioner had asked the Court to apply the so-called *Witham* principle, enunciated by Lord Justice Laws as the standard of review of executive actions that implicate fundamental constitutional rights.[91] In *Witham,* the Court had struck down the relevant part of a measure that restricted access to courts by those reliant upon legal aid. The Court held that a fundamental or constitutional right could be abridged by the executive only where that was specifically authorized by express words in the enabling Act of Parliament.[92] The government, on the other hand, contended that the appropriate standard of review in *Bancoult* was furnished by the Colonial Laws Validity Act 1865 and the Privy Council's pronouncement in *Liyanage v. The Queen.*[93] The Colonial Laws Validity Act provides that no colonial law shall be deemed to be void and inoperable on grounds of repugnancy to the law of England, unless it is repugnant to some act of parliament made applicable to such

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[90] *Id.* (quoting Sabally and N'Jie v Attorney General, (1965) Q.B. 273 at 290 (Eng.)). The Court noted that while the 1861 case *In re Mansergh,* (1861) 121 Eng. Rep. 764, had put in doubt the breadth of Lord Mansfield's dictum, two 20th century cases gave further support to it. *Bancoult,* [2001] Q.B. at 1089 (also citing Ex parte Mwenya, (1960) 1 Q.B. 241 and R v. Earl of Crewe, *Ex parte* Sekgome, (1910) 2 K.B. 576). In *Mansergh,* Lord Evershed had cited Blackstone ("'for the King is at all times entitled to have an account why the liberty of any of his subjects is restrained wherever that restraint be inflicted' (Blackstone, 1768, vol 3, p 131)") and Sir Edward Coke ("'But the other kind of writs that are mandatory and not remedial, are not tied to any place, but do follow subjection and ligeance in what country or nation soever the subject is . . .'") *Id.* at 1089–90 (quoting *In re Mansergh,* Eng. Rep. at 292–93).

[91] R v. Lord Chancellor, *Ex parte* Witham, [1985] Q.B. 575 at 575–76 (Eng.).

[92] *Id.* at 581. A latter case, provided the rationale for such a position:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. . . .The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

R v. Sec'y of State for the Home Dep't, *Ex parte Simms,* (2000) 2 A.C. 1125 (Eng.). *Id.* at 131.

[93] Liyanage v. The Queen, [1967] 1 A.C. 259 at 260 (Eng.).

colony by express words or necessary intendment.[94] In *Liyanage* appellants had been convicted of grave criminal offences under the laws of the Parliament of Ceylon, specifically adopted to retrospectively deprive the appellants of their right to trial by jury. The appellants had argued that the Parliament of Ceylon could not adopt any legislation "which is contrary to fundamental principles of justice."[95] The Privy Council held that it "cannot accept the view that the legislation (Colonial Laws Validity Act) while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice."[96]

The choice before the Court was a rather clear one. Before enunciating its position, it framed the situation as being exceptional. Now it backtracked from the inclusive posture it had adopted while asserting jurisdiction over the case. It felt compelled to remind itself that it was "a municipal court of England and Wales . . . in this case treading in the field of colonial law."[97] While such intrusion was "justified" it also warranted a "trade-off."[98] It appeared to the Court of "particular importance" that it "should respect the decisions of the Privy council upon relevant issues of colonial law."[99] After all, "[w]here there is a body of jurisprudence, possessing high authority, which addresses the legal relations between the United Kingdom and its colonies, we should, sitting in this court, treat it as settled and binding."[100] This was from a judge who had no problem going against a highly authoritative body of jurisprudence while enunciating the *Witham* standard. The justification

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[94] *Bancoult*, [2001] Q.B. at 1092–93.

[95] *Liyanage*, 1 A.C. at 283.

[96] *Id.* at 284. The Act was adopted in the face of what the Privy Council said were" considerable difficulties [that] had been caused by the over-insistence of a Colonial judge in South Australia that colonial legislative Acts must not be repugnant to English Law." *Id.* The Privy Council cited with approval the commentary that:

> The essential feature of this measure is that it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial Act. . . . The boon thus secured was enormous; it was now necessary only for the colonial legislature to ascertain that there was no Imperial Act applicable and his field of action and choice of means became unfettered.

Id. at 284 (quoting ARTHUR BERRIEDALE KEITH, THE SOVEREIGNTY OF THE BRITISH DOMINIONS 45 (1929). *Id.* (discussing KENNETH WHEARE, THE STATUE OF WESTMINSTER AND DOMINION STATUS 75–77 (4th ed. 1949)).

[97] *Bancoult*, [2001] Q.B. at 1099.

[98] *Id.*

[99] *Id.*

[100] *Id.*

for this capitulation was sought in "the specter of conflicting judicial opinion," one that had been discounted while asserting jurisdiction over the case.[101] The Court acknowledged the consequence of its holding that the "constitutional principle" described in *Witham* could not "withstand the authority of *Liyanage*" namely that "as regards fundamental or constitutional rights, there is a difference of approach between the developed law of England and the law applicable to the colonies."[102] This consequence, however, issued from a foundational difference in legal subjecthood: "[b]elongers here take the benefit of the constraints which the common law imposes upon the construction of legislation which interferes with such rights; belongers there do not."[103] Acknowledging this was a "misfit," the Court hastened to add that "in practice, in the post-imperial world as it is, this is a misfit which nearly always will be nothing but theoretical." This because some colonial territories, like Gibraltar, "possess written constitutions which enshrine fundamental rights based on or akin to the model of the European Convention on Human Rights." But, "BIOT does not, and there is therefore dissonance, one which may strike real lives, between the richness of the rights which our municipal law today affords and the wintry asperity of authority such as *Liyanage*." This, notwithstanding the recital of the history of BIOT by the Court earlier in the opinion, would imply that some self-determining inhabitants of BIOT had chosen not to entrench their fundamental rights. Much less self-determining, the whole BIOT project, designed in London, aimed at having no inhabitants. While refuting the government's position that the BIOT Commissioner may legislate absolutely as he chooses, Lord Justice Laws stated that this would mean "[t]he Commissioner would be above the law, save I suppose to the extent that his masters in London might correct him."[104] So the inhabitants of BIOT have to suffer the consequences of not having entrenched their fundamental rights in a situation where the only constituent and legislative power is the Commissioner and his masters in London. Confronted with the miss-fitting dissonance, the Court's task was seen as being "accordingly acute." The chasm could be bridged, however, by invoking the foundational fracture in the very notion of the rule of law, a fracture that rests upon the difference between us and them,

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1100.

between here and there. The Court itself would "affront the rule of law if we translated the liberal perceptions of today, even if they have become the warp and weave of our domestic public law, into law binding on established colonial powers in the face of authority that we should do no such thing."[105] Thus, the *Witham* principle was found inapplicable.

V. *VIRES* OF THE ORDINANCE: WANTED DEAD AND ALIVE

Turning to the substantive grounds of the challenge to the Ordinance, the Court first dealt with the petitioner's claim that the Ordinance was *ultra vires* as it violated the rights and liberties enshrined in Chapter 29 of Magna Carta (1297).[106] This section of Magna Carta provides that:

> [n]o freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[107]

Counsel for Bancoult argued that the Ordinance amounted to the exiling of the Ilois; thus, being repugnant to Magna Carta, the Ordinance was void and unlawful. For this argument—one that Lord Justice Laws described as possessing "beguiling simplicity"[108]—to succeed, it would have to be shown that Magna Carta extended to the colony of BIOT. The answer to the question, the Court opined, lay in Magna Carta overcoming the exception enshrined in the Colonial Laws Validity Act 1865, that no colonial law shall be deemed to be void on grounds of repugnancy to the law of England, unless it is repugnant to an Act of Parliament made applicable to such colony by express words or necessary implication.[109] The government contested petitioner's position on two grounds. Initially, it argued that Magna Carta did not constitute a statute at all, or at least did not do so for the purposes of the 1865 Act. Lord Justice Laws was "dismayed" to hear the government argue that Magna Carta "belonged to some unspecified category of subordinate law."[110] Following an

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[105] *Id.*

[106] Magna Carta, 1297, 25 Edw. 1, c. 29.

[107] Magna Carta, (1297), 10 HALS. STAT. (4th ed.) 16.

[108] *Bancoult*, [2001] Q.B. at 1093.

[109] *See* Liyanage v. The Queen, [1967] 1 A.C. 259 at 284.

[110] *Bancoult*, [2001] Q.B. at 1093.

examination of the Charter's history and its repeated confirmation by Parliament, the government resiled from this position. The government further argued that Magna Carta did not extend to BIOT, because BIOT was a ceded not a settled colony. The appellant argued that BIOT should be regarded as a settled colony because "by the time [it] was created as a separate colony [in 1965] it had a settled population."[111] Furthermore, the appellant argued that the Crown's legislative powers in respect of the colony should not now depend on whether the colony is regarded as ceded or settled.

The distinction between ceded and settled colonies is an entrenched principle of colonial law, which some trace back to the early Stuart period.[112] Cession refers to colonies which were ceded to the Crown by treaty or other agreement. Settlement refers to colonies which were acquired by virtue of their having been settled by British subjects in a place where there was "no civilized government and legal system."[113] Traditionally the law-making powers of the Crown are different for the two categories. The difference is often traced back to the *Calvin Case* of 1608,[114] which stated that "if a King come to a Christian kingdom by conquest . . . he may at his pleasure alter and change the laws of that kingdom . . . [b]ut if a King hath a kingdom by title or decent . . . he cannot change those laws himself without the consent of Parliament."[115] This dictum was cited by Lord Mansfield in a leading case of colonial law, *Campbell v. Hall*.[116] In *Campbell*, Lord Mansfield ruled that the Crown will cease to possess full legislative power over even a conquered or ceded colony once it has granted to such a colony a representative legislative body without reserving to itself the power to legislate.[117] In the absence of such a representative legislature, the Crown retains sovereign legislative authority unencumbered by any English law. Hence, it is only in the case of a settled colony that an English Act (such as Magna Carta)

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[111] *Bancoult*, [2001] Q.B. at 1071.

[112] *See* Adam Tomkins, *Magna Carta, Crown and Colonies*, 2001 PUB. L. 571, 577; SIR KENNETH ROBERTS-WRAY, COMMONWEALTH AND COLONIAL LAW 636 (1966).

[113] ROBERTS-WRAY, *supra* note 110, at 99.

[114] 77 Eng. Rep. 377 (K.B. 1608). 7 Co. Rep. 1a. Lord Coke held that upon conquest by a Christian king, "the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature False" *Id.* at 17 b.

[115] *Id.* at 17 b.

[116] Campbell v. Hall, (1774) 98 Eng. Rep. 1045 (K.B.); 1 Cowp. 204.

[117] This ruling was entrenched by the Privy Council in *Abeyesekera v. Jayatilake* (1932) A.C. 260 at 264 (Eng.).

accompanies the Englishmen who settle the new colony, becomes law of the land, and limits the legislative power of the Crown.

Turning to the interface of Magna Carta and the 1865 Act, clearly Magna Carta is not applied to any colony by express words. The question remained whether it could still be so by necessary intendment. Petitioner urged reliance on *Calder v. Attorney General of British Columbia*,[118] in which the Supreme Court of Canada stated that Magna Carta "has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly discovered or acquired lands or territories."[119] In making this statement, the Canadian court disregarded any distinction between ceded and settled colonies. The statement was later approved by Lord Denning MR in *R. v. Secretary of State for Foreign and Commonwealth Office, Ex p. Indian Association of Alberta*.[120] Lord Justice Laws found the arguments as regards to Magna Carta "in the end, barren."[121] He ruled that even if Magna Carta "'followed the flag' to BIOT, its potency would not suffice to condemn what has been done here, *if it was done in accordance with the law*, not merely the letter of the law, but in accordance with our substantive constitutional law."[122] He opined that Magna Carta "is in truth the first general declaration . . . in the long run of our constitutional jurisprudence, of the principle of the rule of law."[123]

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[118] Calder v. A-G of B.C., [1973] 34 D.L.R. 45, 203 (Can.).

[119] *Id.*

[120] R v. Sec'y of State for Foreign and Commonwealth Affairs, *Ex parte* Indian Association of Alberta, [1982] Q.B. 892 at 912. The government sought instead reliance on the decision of the Judicial Committee of the Privy Council in in *Staples v. The Queen* (unreported) (Jan. 27, 1899). *Bancoult*, [2001] Q.B. at 1093. This is an unreported case, but the Judicial Committee issued a memorandum of their decision. *Id.* The case concerned Matabeleland, a protectorate not a colony, the question was whether denial of trial by jury was unlawful due to conflict with Magna Carta. *Id.* at 1093–94. The Privy Council held that Magna Carta did not extend to a protectorate, to which section 12 of the *Foreign Jurisdiction Act* 1890 applied. *Id.* at 1094. Section 12 of that Act is substantially the same as Section 2 and 3 of the 1865 Act. *Id.* The memorandum stated that the repugnancy contemplated by the Foreign Jurisdiction Act must mean repugnancy to a statute or order applied in some special way to British subjects in the foreign country in question. *Id.* "It would be a most unreasonable limit on the Crown's power of introducing laws fitting to the circumstances of its subjects in a foreign country if it were made impossible to modify any Act of Parliament which prior to the Order in Council might be invoked as applicable to a British subject." *Id.* (quoting a memorandum to the Privy Council). Petitioner argued that Staples addresses issues of a protectorate, not a colony like BIOT. Because citizens of a colony are Queen's subjects, they enjoy the legal heritage of Magna Carta.

[121] *Bancoult*, [2001] Q.B. at 1094.

[122] *Id.*

[123] *Id.* at 1095 (quoting 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 173 (2d ed. 1923)).

If he had any doubts otherwise about the reach of Magna Carta, for Lord Justice Laws "[s]o far as it is a proclamation of the rule of law, it may indeed be said to follow the flag—certainly as far as BIOT."[124] Still, it "does not provide the answer,"[125] because Magna Carta, in the Court's view, "does not . . . curtail the sovereignty of the proper lawmaker to make what laws seem fit to him."[126] Magna Carta is not an absolute ban on exile; it merely states that no freeman "shall be exiled . . . but . . . by the law of the land."[127] Lord Justice Laws rejected petitioner's claim that the law of the land, in the context of Magna Carta, only includes an Act of Parliament or an established rule of common law.[128] He took the position that an "Order in Council may in the context of the Crown's powers to make law for a colony amount to an act of primary legislation under the prerogative."[129] The question for Lord Justice Laws remained whether the Ordinance was within the scope of the form and substance of legal authority. As discussed infra, Lord Justice Laws did rule the Ordinance as void on account of being beyond the scope of its enabling legislation. It is curious then why Magna Carta's limitation of "the law of the land" would not render the Ordinance void. The implicit project appears to be retention of the colonial exception, lest Magna Carta is used to put colonial subjects on the same footing as English colonizers.

The question of whether BIOT was a ceded or a settled colony was determinative of the question whether the power to legislate for BIOT arose ultimately from the Queen's prerogative, or the British Settlements Act 1887.[130] While the Crown enjoys prerogative power to make laws for a ceded colony,[131] in relation to a settled colony legislative power is conferred on the Queen in Council by statute, the British Settlements Act 1887, and the prerogative gives no legislative authority in such a case.[132] The 1887 Act defines "British settlement":

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[124] *Id.* at 1095.

[125] *Id.*

[126] *Id.* at 1094.

[127] *Id.*

[128] Petitioner had cited the authority of *Entick v. Carrington* for the proposition that save in time of war, the executive has no power to abridge the freedoms of the Queen's subjects save by authority of a valid statute or an established common law prerogative. *Id.* at 1095 (citing Entick v. Carrington, (1765) 95 Eng. Rep. 275 (K.B.) 292; 2 Wils. 807).

[129] *Bancoult*, [2001] Q.B. at 1095.

[130] British Settlements Act, 1887, 50 & 51 Vict. c. 54.

[131] Abeyesekera v. Jayatilake (1932) A.C. 260 at 264.

[132] Sammut v. Strickland (1938) A.C. 678 at 701.

> [a]ny British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or any Act repealed by this Act, of any British possession.[133]

Section 2 of the 1887 Act provides, in part,

> [i]t shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions . . . as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement.

Lord Justice Laws ruled that the ceded or settled question "has surely to be determined as at the time when the territory concerned became subject to the Queen's dominion."[134] While accepting petitioner's submission that in 1965, when BIOT was established as a separate colony, it had a settled population of citizens of the United Kingdom and its colonies, he noted that it was "beyond question that BIOT was in 1814 part of a ceded colony."[135] Consequently, he held that "the 1887 Act has no application to this case."[136] The implication is that as a matter of royal prerogative, the Crown could make whatever laws it deemed fit for BIOT, including exiling the whole population, without regard to Magna Carta or any other constitutional provision or convention. Judge Gibbs, while admitting that the distinction between ceded and settled was "admittedly in modern context, [an] arcane distinction," concurred with Lord Justice Laws that BIOT was a ceded colony and thus Magna Carta offered no help to the applicant.[137] The language used by Judge Gibbs is worth noting. He said "[i]f Magna Carta had applied to *people such as the applicant*, I might have found assistance in the provisions of Chapter

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[133] British Settlements Act, *supra* note 128, § 6.

[134] *Bancoult*, [2001] Q.B. at 1102.

[135] *Id.*

[136] *Id.* A settled colony is one acquired by the Crown by virtue of it having been settled by British subjects in a place where there was no "civilized government and legal system." Tomkins, *supra* note 110, at 577. The Court did not explore whether there was any "civilized government or legal system," or even an indigenous population, in the Chagos Islands in 1814. *Id.* at 579 n.39. The government's position in the 1960s and 1970s was there was no permanent indigenous population on the islands even in 1971. *Id.* The four methods of acquisition of a colony, settlement, cession, annexation, and conquest are not necessarily mutually exclusive. *Id.* at 577. The islands did indeed fall under the sovereignty of the Crown by virtue of having been ceded by France in 1814, but given its later history and demographic changes, the Court could have declared it to be both a ceded and settled colony, thereby removing the dissonance in its ruling regarding the application of Magna Carta. *Id.* at 579 n.39.

[137] *Bancoult*, [2001] Q.B. at 1107.

29 in interpreting the legality of the Ordinance, at least in the resolution of any doubts on the point."[138] Universality of law, therefore, yields to differential status and eligibility to protections, with the divide between colonizers and the colonized furnishing the bright line.

There is a remarkable dissonance in the ruling. On the one hand, both judges ruled that Magna Carta was not applicable due to BIOT's status as a ceded colony. On the other, Lord Justice Laws stated that Magna Carta, in so far as it is a proclamation of the rule of law, did indeed follow the flag "certainly as far as BIOT."[139] The Court's reliance on the arcane distinction has the effect that a foundational fracture of the imperial heritage continues: constitutional and fundamental rights of Englishmen are not extended to the remaining colonies.[140]

The Court, of course, remained wary of "entry into a barbarous world where there is no rule of law."[141] This specter was raised by the government's submission that the BIOT Commissioner may legislate absolutely as he chooses. The Court took the position that powers of any colonial legislature were limited by the Act that created it.[142] "[N]othing

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[138] *Id.* at 1106. The leading authority on the efficacy of Magna Carta within Britain is the decision of the Court of Appeal in *R v. Secretary of State for the Home Department, Ex parte Phansopkar* [1976] Q.B. 606. *Phansopkar* concerned the rule of against delay contained in chapter 29. *Id.* at 626. The delay arose in the granting of a certificate of partiality under terms of the Immigration Act 1971. *Id.* at 606. Magna Carta was cited by all three judges in obiter dicta. *Id.* at 621, 624, 626. M/R. explained that the Immigration Act 1971 provided that wives of partials could enter the United Kingdom by right, rather than by leave, and as such enjoyed an entitlement, and not a mere privilege. *Id.* at 608. "Such being her right," he continued, "I do not think it can be taken away by arbitrarily refusing her a certificate or by delaying to issue it to her without good cause." *Id.* at 621. He then added that in such an event, the woman concerned could "invoke" Magna Carta. *Id.* Lawton L.J. agreed, stating that the Secretary of State "cannot refuse to consider the application, nor can he delay consideration unreasonably. *Id* at 624. Lawton L.J. agreed, stating that the Secretary of State "cannot refuse to consider the application, nor can he delay consideration unreasonably. These duties were imposed on the Crown and its servants by Magna Carta." *Id.* at 624. Scarman L.J. spoke in similar terms. *Id.* at 626.

[139] *Bancoult*, [2001] Q.B. at 1095.

[140] Britain's remaining colonies are: Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, St. Helena (with sub-dependencies Tristan da Cunha and Ascension Island), and the Turks and Caicos Islands. Britain also controls three colonies with no permanent indigenous population: The British Antarctic Territory, the BIOT, and South Georgia and the South Sandwich Islands. *See* FOREIGN AFFAIRS SELECT COMMITTEE, DEPENDENT TERRITORIES REVIEW: INTERIM REPORT, 1997-98, H.C. 347; SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, WHITE PAPER ON THE OVERSEAS TERRITORIES: PARTNERSHIP FOR PROGRESS AND PROSPERITY, 1999, Cm. 4264; *Id.* at 9–11.

[141] *Bancoult*, [2001] Q.B. at 1100.

[142] The Court relied on the authority of Privy Council's pronouncement that:

> The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which

could be more elementary" than that "a legislature created by a measure passed by a body which is legally prior to it must act within the confines of the power thereby conferred."[143] Furthermore, the government took the position that in light of the Colonial Laws Validity Act, the Commissioner's legislative powers could not be challenged on any ground, save that it conflicted with a British stature which extended to BIOT. The Court took the position that prior to the issue of such conflict is the principle that a legislative body in the colonies can only legislate on matters within its competence and limits of its jurisdiction.[144] Consequently, the case would turn on the question of whether the Order of removal and exile was within the scope of the Commissioner's legislative powers as enumerated by the BIOT Order.

The BIOT Order was made on November 8, 1965 by "Her Majesty, by virtue and in exercise of powers in that behalf by the Colonial Boundaries Act 1895, or otherwise in Her Majesty vested."[145] The Court noted that the 1895 Act merely regulates the alteration of a colonial boundary, and hence "affords no source of the vires of the BIOT Order for the presently relevant purposes."[146] The BIOT Order, the Court opined, "is an Order in Council made under the powers of the royal prerogative."[147] Given the Court's holding that BIOT was a ceded colony, the Order implied that there was no limit to the exercise of the royal prerogative, and that the Commissioner of BIOT created by the Order could have been given unbridled legislative powers if the Crown had so chosen.[148] The Court noted that the Order provided that "[t]he

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> circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

Bancoult, [2001] Q.B. at 1100 (citing R v. Burah (1878), 3 App. Cas. 889 at 904.).

[143] *Id.*

[144] Besides *Burah*, authority for this postulate was identified as the Court of Exchequer Chamber in Phillips v. Eyre (1870) LR 6 QB 1, 20:

> We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislature, though subject to be controlled by the imperial parliament.

Id. at 1101 (quoting Phillips v. Eyre, (1870) Q.B. 1 at 20).

[145] *Id.* at 1076; Tomkins *supra* note 110 at 571 n. 3 (citing 1965, S.I. 1965/ *revoked and replaced by* the British Indian Ocean Territory Order, 1976, S.I. 1976/893).

[146] *Id.* at 1076.

[147] *Id.*

[148] The Court said, "[h]owever broad the power in point of theory to legislate for a colony such as BIOT, here it has been done by a particular means." *Id.* at 1101.

Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order."[149] Furthermore, Section 11 of the BIOT Order, which the Court found to be of "critical importance to the central arguments in the case,"[150] provides that "[t]he Commissioner may make laws for peace, order, and good government of the Territory."[151] The scope of the Order would determine the *vires* of the Ordinance because the Ordinance, including Section 4 that mandated removal and exile of the inhabitants, had been made in exercise of powers conferred by the Order. In the evocative expression of Lord Justice Laws, "[i]f the chosen last is Section 11, the boot of Section 4 can be no bigger."[152]

The government took the position that the formula of "peace, order, and good government," used so often in measures conferring powers to make colonial law, was to be taken as having the widest possible intendment.[153] The Court generally agreed with this contention and as authorities for the proposition, cited *Ibralehbo v. The Queen*,[154] *Winfat Enterprise (HK) Co Ltd. V. Attorney General for Hong King*,[155] and *R. v. Earl of Crewe, Ex parte Sekgome*.[156] Consequently, the Court

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[149] *Id.* at 1076 (quoting BIOT Order, s. 5).

[150] *Id.* at 1076.

[151] *Id.* at 1077 (quoting BIOT Order, s. 11).

[152] *Id.* at 1101.

[153] The authority for proposition was *Riel v. The Queen*, (1885) 10 App. Cas. 675 The case concerned an Act of the Imperial Parliament authorizing the Canadian Parliament to make laws "for the administration, peace, order, and good government of any territory." The Privy Council held that:

> It appears to be suggested that any provisions differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as a matter of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to these objects, but which a court should think likely to fail to that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact. Their Lordships are of the opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.

Id. at 678.

[154] *Ibralehbo v. The Queen*, (1964) A.C. 900 at 924 held that the words peace, order and good government "connote, in British constitutional language, the widest law-making powers appropriate to a sovereign."

[155] *Winfat Enterprise Co. Ltd. V. A-G for H.K.*, (1985) A.C. 733 at 747 held that in makes no difference to the legislative power's breadth that the colonial legislature in question is not established on representative principles.

[156] R v. Earl of Crewe, *Ex parte Sekgome*, (1920) 2 K.B. 576 at 613.

found it to be "beyond the possibility of argument" that a colonial legislature empowered to make laws for the peace, order, and good government of its territory, "is the sole judge of what those considerations factually require. *It is not obliged to respect precepts of the common law, or English traditions of fair treatment.*"[157] Still, the Court found that colonial legislative authority "is not wholly unrestrained. *Peace, order and good government may be a very large tapestry, but every tapestry has a border.*"[158] The Court also acknowledged that "a very wide margin of discretion is to be accorded to the decision-maker."[159] The Court noted that "in stark contrast our modern domestic law tends in favor of a narrower margin, and a more intrusive judicial review, wherever fundamental or constitutional rights are involved."[160] This differential treatment simply "recalls the dissonance . . . between the rights which the common law confers here, and *the thinner rule of law which the jurisprudence has accorded the colonies.*"[161]

The Court noted that Section 4 of the Ordinance "effectively exiles the Ilois from the territory where they are belongers and forbids their return."[162] Whereas, peace, order, and good government of any territory "means nothing, surely, save by reference to the territory's population. They are to be governed not removed."[163] In the colonies, colonial subjects may rightfully be governed as colonial authorities please with law that "may be far different from what obtains in England."[164] But the colonial subjects are subjects of the Crown, "who

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[157] *Bancoult*, [2001] Q.B. at 1103.

[158] *Id.* The Court cited *Trustees Executor & Agency Co. Ltd. v. Federal Court of Taxation*, (1933) 49 C.L.R. 220, where the High Court of Australia started:

> The correct general principle is . . . whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned . . . The judgment of Lord Macmillan [in *Croft v. Dunphy*, (1933) AC 156] affirms the broad principle that the powers possessed are to be treated as analogous to those of 'a fully sovereign state', so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question . . .

Id. at 1103 (quoting Trs. Ex'r & Agency Co. Ltd., 49 C.L.R. 220 at 234–5).

[159] *Id.* at 1104 (citing *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, (1948) 1 K.B. 223 at 228).

[160] *Id.*

[161] *Id.* (emphasis added).

[162] *Id.*

[163] The wholesale removal of a people from the land where they belong could be for the peace, order and good government only in extraordinary instances like some natural or man-made catastrophe that renders the land toxic and uninhabitable. *Id.*

[164] These could include trials without juries and "severe, even brutal penalties." *Id.*

rightly look . . . to the rule of law which is given in the Queen's name, for the security of their homeland within the Queen's dominions."[165] The Ilois had been exiled for "high political reasons: good reasons, certainly, dictated by pressing considerations of military security."[166] Where tested by intrusive approach of judicial review of decision-maker's discretion in domestic law or the deferential approach of colonial law, "they are not reasons which may reasonably be said to touch the peace, order and good government of BIOT."[167] The fact that the Ilois owned no real estate on the islands, or any monetary compensation for the removal and exile "cannot affect the position in public or constitutional law."[168] Hence, the Court held, "the apparatus of Section 4 of the Ordinance has no color of lawful authority."[169] For good measure, Lord Justice Laws then quoted Tacitus ("*They make a desert and call it peace.*") and added, "He meant it as an irony, but here, it was an abject legal failure."[170] Lord Justice Laws proceeded to muse whether the removal and exile could have been achieved by royal prerogative or by an Act of Parliament. He had "considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory where they belong."[171] He found "unexplored ground here," but "would certainly hold this . . . could only be done by statute."[172] The bottom line then: the colonized cannot be exiled but they can be governed as the colonizer pleases; the colonized is wanted, both dead and alive.

VI. CONCLUSION

When asked to explore borders and border disputes in the context of modern international law, postcolonials, those who exist "after

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[165] *Id.* at 1104 (citing JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT (1820)).

[166] *Bancoult*, [2001] Q.B. at 1104.

[167] *Id.*

[168] *Id.* at 1105.

[169] *Id.*

[170] *Id.*

[171] *Id.* (citing 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 137 (1809); CHITTY, *supra* note 163, at 21; PLENDER, INTERNATIONAL MIGRATION LAW 133 (2d ed. 1988)). Plender observed that "A significant number of modern national constitutions characterize the right to enter one's own country as a fundamental or human right." PLENDER, INTERNATIONAL MIGRATION LAW 135 (2d ed. 1988).

[172] *Bancoult*, [2001] Q.B. at 1105.

being worked over by colonialism,"[173] cannot but remain mindful of formative and enduring entanglement of modern international law with the colonial encounter between the West and the Rest. This is particularly true given Empire's coming out of the closet as the inaugural gesture of the twenty-first century. We are told that today "the need for colonization is as great as it ever was in the nineteenth century. . . . What is needed then is a new kind of imperialism, one acceptable to a world of human rights and cosmopolitan values."[174] An unavoidable task then is to examine how modern borders are drawn and redrawn and the extent to which the grammar of colonialism may be implicated in the global reach of international law, constitutionalism, and human rights.

This article has explored whether the ubiquitous exclusion/inclusion binary is a helpful frame to measure the depth and reach of constitutionalism and human rights. A close reading of *Bancoult* shows that inscription of the law over subjugated bodies and spaces continues to subscribe to an enduring grammar of modernity's engagement with alterity. This grammar is not one of exclusion, but, rather forms a three-pronged matrix engagement: engulfment/exception/subordination. The Other is not "discovered," left out or left alone—excluded from operations of constitutional regimes, and then gradually incorporated as rights-bearing subject. The Other is always already engulfed in operations of modern law, placed in zones of exception, and positioned in states of subordination. Constitutional law and human rights presume the presence of human beings. Explorations of constitutionalism and human rights must contend with the enduring existence of "unpeople"—"beings who impede the pursuit of high policy and whose rights, often lives, therefore become irrelevant."[175]

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[173] Gyan Prakash, *Postcolonial Criticism and Indian Historiography*, SOC. TEXT, no. 31/32, 1992, at 8.

[174] Robert Cooper, *The New Liberal Imperialism*, THE GUARDIAN (Apr. 7, 2002), http://www.theguardian.com/world/2002/apr/07/1. Cooper, a high ranking British diplomat and subsequently a special advisor to the EU's Foreign Affairs Chief, was widely recognized as British Labor Prime Minister Tony Blair's "guru" in foreign affairs.

[175] MARK CURTIS, THE AMBIGUITIES OF POWER: BRITISH FOREIGN POLICY SINCE 1945 116 (1995).