United Kingdom: The royal prerogative

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Executive powers—royal prerogative—House of Lords upholds government decision not to repatriate the Chagos Islanders—R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs or Bancoult (No. 2)

The attention of the legal world has turned, of late, to the question of executive powers. An important site of such power in the British Constitution—although far more important in the past than today—is the royal prerogative. The royal prerogative refers to those powers left over from when the monarch was directly involved in government, powers that now include making treaties, declaring war, deploying the armed forces, regulating the civil service, and granting pardons. Prerogative powers are exercised, today, by government ministers or else by the monarch personally acting, in almost all conceivable instances, under direction from ministers.1 The defining characteristic of the prerogative is that its exercise does not require the approval of Parliament. Beyond this bare account, there is little agreement either on the definition of the concept itself2—those two giants of English public law scholarship, Blackstone and A. V. Dicey, gave contrasting accounts3—or even as to the precise scope of the powers still extant.4

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1 There are also so-called ‘personal prerogatives’ that are exercised by the monarch herself. These include powers to appoint the prime minister, to dissolve Parliament, and to give royal assent to legislation. All these powers are strongly hedged by constitutional conventions. After initially announcing plans for a sweeping reform of the prerogative (The Governance of Britain Green Paper, July 2007), the government has decided to undertake only a small amount of tidying up work in the Constitutional Reform and Governance Bill (currently before the House of Commons). See Ministry of Justice, Review of the Executive Royal Prerogative: Final Report (15 October 2009).


3 ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 424 (10th ed. 1959) (1885) (“The residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”) WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. I, Ch. 7 (1765) (“It follows that it must be in its nature singular and eccentricial: that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects.”).

One might confidently call the royal prerogative a constitutional anachronism—which at one level it surely is—were it not for the fact that it works in much the same way as much of the rest of the U.K.’s ramshackle Constitution. In fact, in its historicity, in its monarchical form, in the disjunction between its past and present use, and in the thinness of the (formal) legal norms that apply to it, the prerogative might even be said to represent the very essence of the British Constitution. For that reason, it is practically impossible in this corner of British public law to avoid, in a phrase that has become a favorite among judges in cases involving the prerogative, “the clanking of mediaeval chains of the ghosts of the past.”

However, even historically the prerogative is controversial, and in a way that, say, the principle of Parliamentary sovereignty is not. The king’s prerogative was at the center of the constitutional crises of the seventeenth century, a revolutionary period in British politics that ended with the king’s being invited by Parliament to maintain his position but to give up much of his power. The fundamentals of the present-day Constitution derive from that settlement; Locke’s notion of the prerogative as a legitimate but exceptional power, subject ultimately to control by Parliament, drove its monarchical and republican opponents from the field. Nonetheless, the idea of the prerogative as the black sheep of the constitutional fold—that is, both an uncomfortable fit with primary constitutional values (the supremacy of Parliament and the rule of law) and an inherently untrustworthy source of power—has been hardwired into British constitutional thinking since at least that period. This sense of distrust has deepened over the centuries as the idea of the British polity as a parliamentary democracy has solidified. And for good reason: the prerogative is far removed from the modern archetype of legitimate lawmaking, which in the British polity is the act of Parliament, with all its attendant procedural and formal rigors.

The U.K.’s highest court, the House of Lords, has recently been asked to decide a case on the limits of prerogative power: R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs or Bancoult (No. 2). The case concerned decisions taken in the aftermath of the expulsion of a population of islanders from the Chagos Archipelago in the Indian Ocean in the late 1960s and early 1970s in order to make way for a U.S. military base. The whole series of decisions was achieved through the exercise of prerogative power, for centuries an important tool of colonial governance. This meant not only that the courts were required to return, once more, to the constitutional past in order to shape the current constitutional landscape. They also had to encounter the grubby reality of (post)imperial power politics—and its modern equivalent, the politics

7 On Locke on the prerogative, see the discussion in Thomas Poole, Constitutional Exceptionalism and the Common Law, 7 INT’L J. CONST. L. (I•CON) 247 (2009).
8 See, classically, DICEY, supra note 2.
10 See, e.g., Campbell v. Hall, (1774) 1 Cowp. 204.
of security. It is an important case, and one of interest beyond its otherwise parochial setting. But, curiously, while the case involved what would count for many as a basic human right—the right not to be displaced from one’s homeland—it was also, in practical terms, about nothing, since all parties accepted that there was no prospect of being relocated to the islands in question. Before turning to look at the case itself, we need to look, first, at the way in which the courts have handled the prerogative in the past.

1. Legal Control of the Prerogative

Early seventeenth-century cases established that while the courts could determine the existence and extent of a prerogative power they could not question or review the manner in which a prerogative power had been exercised. The courts also established the principle that if statutory powers exist that cover the same ground as a prerogative power, the government is, in general, not free to choose between them but must act under the statute. The reasons for the courts’ reticence on questions pertaining to the prerogative relate to the prerogative’s connection with the idea of “the Crown,” a nebulous but structurally central concept within U.K. public law that tends to act, in the words of the constitutional historian F. W. Maitland, as “a convenient cover for ignorance,” which “saves us from asking difficult questions.” Courts have, in the past, tended to act with special reserve when it came to reviewing legal acts done in the name of the Crown—even when those acts were clearly done by (or on behalf of) the executive.

This limited approach to reviewing the prerogative persisted until the mid-1980s when, in the seminal GCHQ case, the House of Lords held that an instruction made under an order in council (the main form of prerogative legislation) could be subject, in principle, to judicial review. The case concerned the unilateral decision by Margaret Thatcher—who as prime minister was also the minister for the civil service—to deny trade union membership at Government Communications Headquarters (GCHQ), a military and signals intelligence center. The “law relating to judicial review has now reached a stage,” one of the judges in that case said, that “if the subject matter in respect of which prerogative power is exercised is justiciable” then the exercise of power will be subject to ordinary public law principles.

11 Prohibitions del Roy (1607) 12 Co. Rep. 63; Case of Proclamations (1611) 12 Co. Rep. 74, 76 (“The King hath no prerogative, but that which the law of the land allows him.”).
12 Attorney-General v. De Keyser’s Royal Hotel Ltd., (1920) A.C. 508. See also the dictum of Lord Diplock in BBC v. Johns, (1965) Ch. 32, 79, that it was “350 years and a civil war too late for the Queen’s courts to broaden the prerogative.” See also R v. Sec’y of State for the Home Department, ex p Fire Brigades Union, (1995) 2 A.C. 513 (the government could not rely on the prerogative for introducing a compensation scheme for crime victims where a statutory scheme was already established). Cf. R v. Sec’y of State for the Home Department, ex p Northumbria Police Authority, (1989) Q.B. 26 (where the Court of Appeal “discovered” a prerogative of protection of the realm and the subjects within it).
16 Id. at 387 (L. Scarman).
Though important for its “modernising” effects, the GCHQ case was also complicated in two significant respects. First, the Law Lords did not rule, specifically, on the question of whether the prerogative itself—as distinct from secondary powers derived from exercises of the prerogative—was subject to judicial review under normal principles. Second, in deciding that the claimants’ legitimate expectation to be consulted, prior to a decision of this sort being taken, was overridden by the requirements of national security, the court set a pattern that has been followed in most (if not all) subsequent cases on the prerogative. Indeed, the court in GCHQ went out of its way to identify areas of prerogative lawmaking activity that were, in all likelihood, not justiciable. Lord Roskill produced a list of “excluded categories”—areas of activity immune to judicial review—that included prerogative powers “relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers.” The prerogative might now, in principle, be classified as a normal substatutory source of law for the purposes of judicial review; however, in practice, the courts tend still to approach the prerogative with a caution bordering on outright deference.

2. Islands in the Storm

The Chagos Archipelago comprises a group of seven atolls and some sixty islands in the center of the Indian Ocean, halfway between Tanzania and Java. The first inhabitants of the islands were lepers brought from the Île de France (Mauritius) in the second half of the eighteenth century. They were soon followed by workers from Africa and southern India brought in to man coconut plantations established by the French. The islands (with Mauritius) were ceded to Britain after Napoleon’s defeat in 1814. In 1965, the archipelago was first separated from Mauritius and then constituted as a separate overseas territory known as the British Indian Ocean Territory (BIOT). This was done in order to facilitate the establishment of a major U.S. military base on the archipelago’s chief island, Diego Garcia. This transformation was effected by the British Indian Ocean Territory Order 1965 (that is, by royal prerogative). The entire population (known as the Chagossians or Ilois) were removed to Mauritius. This was achieved by the Immigration Ordinance 1971, made by the BIOT commissioner, under powers created by the BIOT Order, which authorized him (in the standard colonial formula) to “make laws for the peace, order and good government of the territory.” A treaty was then concluded between the U.S. and the U.K., by means of which the island of Diego Garcia was leased to the American military.

A number of cases dealing with matters relating to the expulsion of the Chagossians have made their way through the British courts prior to the recent decision in *Bancoult (No. 2)*. In 2000, the High Court found in *Bancoult (No. 1)* that the relevant part of the 1971 Immigration Ordinance was unlawful on the ground that a power to legislate for the “peace, order and good government” of the territory, while broad, did not include a power to exile a people from their homelands. As Lord Justice Laws put it, the people of the islands “are to be governed: not removed.” (The Court of Appeal later held that this unlawful conduct did not give rise to liability in damages, affirming a settlement package agreed by the U.K. and Chagossian representatives in 1982.) The government responded to the first judgment by issuing a statement to the press that it would not challenge the decision and, henceforth, would permit inhabitants to return to the outer islands of the archipelago, but not to Diego Garcia. (This was accomplished by passing a new Immigration Ordinance in 2000). A feasibility study, which had already been set up to investigate the possibility of resettlement, reported in 2002 and concluded that, while resettlement might be feasible in the short term with considerable financial input from the U.K. government, global warming made the archipelago uninhabitable in the longer term.

The government decided in light of this report that it would not support resettlement. The U.S. government had also made known its concern that repopulating the Chagos Islands might compromise what it regarded as the unique security of Diego Garcia. The BIOT Order was revoked and a new Constitution Order passed in June 2004. Another order in council (the Immigration Order) was passed at the same time. These provisions reinstated full immigration control—but this time, in order to “legislate around” the decision in *Bancoult (No. 1)*, through the use of primary rather than secondary prerogative legislation. The claimants in *Bancoult (No. 2)* challenged the legality of the new arrangements, specifically section 9 of the Constitution Order that provided (a) that no person had the right to abode in BIOT and (b) that no person was entitled to enter BIOT without authorization. The challenge was successful both in the High Court and the Court of Appeal, the latter holding that the Orders amounted to an abuse of power because, for reasons unconnected with their interests, the Orders negated the islanders’ right to return to their homeland. The government appealed to the House of Lords.

### 3. *Bancoult (No. 2)* in the House of Lords

The House of Lords had to determine two questions. The first concerned the general question of the reviewability of prerogative legislation. Recall that the GCHQ case had

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22. R (Bancoult), (2001) QB 1067, [57].


decided that executive measures made pursuant to prerogative powers were subject to ordinary principles of review. It had left open the question of whether this was also true of the prerogative itself. The judges agreed that while prerogative orders in council are a type of primary legislation, it does not follow that they share all the characteristics of acts of Parliament (which are not susceptible to ordinary principles of judicial review). The unique authority enjoyed by an act of Parliament derives, they said, from its representative character. An exercise of the prerogative lacks this quality—although legislative in character, it is still an exercise of power by the executive acting alone. That being so, the court saw “no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.”

The second question concerned the legality of this particular exercise of prerogative lawmaking power. This question divided the Court (three to two), a majority finding that the 2004 orders were not unlawful. The majority held that the phrase “peace, order and good government” must be understood as relating to the governance of the entire Crown realm and not just to those residing (or once residing) in BIOT. The words have always been treated “as apt to confer plenary law-making authority.” They also decided that the exercise of these powers was essentially a concern for government and Parliament and not properly a matter for the courts. This position was expressed in various ways. Lord Hoffmann said that the matter fell within a “macro-political field” and was thus “particularly within the competence of the executive.” Lord Rodger said that the matter at hand was a “political, not judicial” question. Lord Carswell spoke of a “rule of abstinence”—however “distasteful” the Court might consider the provisions at issue in the case, it should avoid interfering since the challenge related to “what is essentially a political judgment.” Lords Carswell and Rodger also thought that the Colonial Laws Validity Act 1865 precluded judicial review, on the ground 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. The majority also denied that the Chagossians had a legitimate expectation arising from the press statement after Bancoult (No. 1) that entitled them to resettlement.


28 Id. at [50].

29 Id. at [58].

30 Id. at [109].

31 Id. at [130].

In dissent, Lords Bingham and Mance argued that the English courts have an inherent jurisdiction to delineate the scope of the prerogative power of colonial governance. They held that there was no prerogative power to make an order whose effect was to exile a population—“the reciprocal duties of allegiance and protection . . . cannot ordinarily be discharged by removing and excluding the citizen from his homeland.” The right of abode is a fundamental “and, in the informal sense in which that term is necessarily used in a United Kingdom context, constitutional” right, recognized as such since Magna Carta. No permissible distinction could be drawn between British citizens and those whose homes are in former colonial territories. Further, the term “peace, order and good government” specifies a power “intended to enable the proper governance of the territory, at least among other things for the benefit of the people inhabiting it. A constitution which exiles a territory’s inhabitants is a contradiction in terms.” The government’s submission, Lord Mance thundered,

treats BIOT and the prerogative power to make constitutional or other laws relating to BIOT as if they related to nothing more than the bare land, and as if the people inhabiting BIOT were an insignificant inconvenience (a phrase which reflects the flavour of some of the government’s internal memoranda in the 1960s), liable to be dispossessed at will for any reason that might seem good to the executive in the interests of the United Kingdom.

4. The Prerogative: *Arcana Imperii*

Lord Mance is right, of course. Few would deny the aptness of Lord Rodger’s characterization of the U.K.’s treatment of the Chagossians in the early 1970s as “disgraceful.” One might note, in this respect, the studied refusal by the Foreign Office—in the internal memos referred to by Lord Mance in the passage just quoted—to acknowledge the existence of an indigenous population on the Chagos Archipelago. There is a telling parallel here with the fiction of *terra nullius* by which the rights and interests of indigenous groups have been ignored and thus denied in the colonial past. Lord Hoffmann referred to a “legal façade,” designed, at least in part, to avoid possible legal obligations arising under the UN Charter to the people of a non–self-governing territory. This aspect of the case was part of a broader “us v. them” (or “We the People v. Them the Other”) dimension that was largely submerged in the discussion—although it was alluded to by the minority judges.

As well as sharing in their condemnation of the U.K. government’s “original sin” of exiling the Chagossians, the Law Lords recognized that the finding of a right to abode in

33 See Campbell v Hall, (1774) 1 Cowp. 204
34 R (Bancoult) (No. 2), (2008) UKHL 61, [70] (L. Bingham).
35 Section 29 of which provides that “No freeman shall be . . . exiled . . . but by lawful judgment of his Peers, or by the Law of the Land.”
37 R (Bancoult) (No. 2), (2008) UKHL 61, [157].
39 See also Stephen Allen, Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Chagos Islands, 7 HUM RTS. L. REV. 441 (2007).
this instance would not in practice be exercisable. There was disagreement, however, about what this situation entailed. In the course of a typically rumbustious judgment, Lord Hoffmann criticized the Chagossians for bringing the case. The action was, he said, an attempt to carry on a political campaign by another means—“a step in a campaign to achieve funded resettlement.” The “purely symbolic” nature of the litigation thus fuelled his conviction that the case was a matter of politics rather than law. The minority, by contrast, thought that the unexercisability of the right meant that there was all the more reason to uphold it, since a ruling in the islanders’ favor would have few direct consequences or financial implications. “It cannot be doubted that the right was of intangible value, and the smaller its practical value the less reason to take it away.”

The House of Lords’ decision has been met with consternation by most commentators. One can readily understand why. The Chagossians were very badly treated in being displaced from their homes; and the government’s U-turn after Bancoult (No. 1) can only have added insult to injury. But, for all that, the case was not legally straightforward. One complicating factor is that what was specifically at issue in the case was not the original act of displacement—the focus of Bancoult (No. 1)—but the policy shift of 2004. Now, one might regard the two decisions as simply two points on a continuum of high-handed acts spanning four decades. Alternatively, one might approach the two decisions separately—albeit on the understanding that the earlier act (the original sin) necessarily colors the later. This was how the majority of the House of Lords approached the case, and it is not immediately obvious that they were wrong to do so. Seen in these terms, the 2004 decision becomes somewhat harder—although not impossible—to fault, since a government must in principle be entitled to change its mind, even (perhaps especially) on decisions of this magnitude. (This point speaks most directly to the minority’s finding that the islanders had a legitimate expectation of repatriation, an outcome that would have shocked administrative lawyers across the common law world.)

The interpretation of “peace, order and good government,” a stock phrase from the era of imperial governance, is also more complicated than some critics of the decision allow. It is almost inconceivable to imagine that, in the colonial context in which the phrase was designed to operate, it would not have been understood (at least when push came to shove) to refer to the common good of the United Kingdom and all its dependencies as a whole. This original meaning of the term need not be dispositive of the case. However, it does reveal that a central difference between the majority and minority lay in their attitude toward history—or, rather, the various arcs of historical meaning at play in the case involving the common law, imperial lawmaking, and the prerogative. Indeed, the argument over history is, perhaps, the most intriguing feature of the case. The majority tend to take history at face value, as it were. Whether or not we like how our predecessors conducted their affairs, the duty of the judge is

40 R (Bancoult) (No. 2), (2008) UKHL 61, [82] (L. Bingham). See also id. at [138] (L. Mance).
42 See Finnis, supra note 31.
to apply the law as it stands, a duty that includes respecting the legal arrangements designed to structure systems that no longer make much (normative) sense. The minority judgments are infused with a different spirit, one marked by a clear distaste for the imperial framework (and associated normative presuppositions) under which the original decision to displace the Chagossians took place. Where we now see the historical practice in question as unedifying, these judges suggest, or where old principles no longer fit contemporary constitutional and moral standards, why should we follow them? Surely the judicial task is to rework things like neoimperial texts and outdated legal attitudes to the prerogative in order to cure obvious injustices and to vindicate a modern conception of the rule of law.  

The politics of security, a recurring trope within contemporary public law, provides another complicating dimension to the case, which has a distinct post–September 11 accent to it. The government defended its new policy, in part, through the deployment of arguments relating to national security and counterterrorism considerations. In a statement to Parliament on the policy shift, the responsible minister said that “developments in the international security climate” that had occurred since Bancoult (No. 1) were central to the government’s reassessment of the situation. The judgments also reveal that the government’s change of mind on repatriation owed at least something to U.S. security concerns. Remote though it is, Diego Garcia is not peripheral within the post-9/11 security world. Persistent rumors circulate, for instance, about its use for “extraordinary rendition” flights. These rumors were mentioned by only one judge in the case—Lord Hoffmann referred to allegations that “Diego García or a ship in the waters around it have been used as a prison in which suspects have been tortured”—but these rumors would have been known to the Court as a whole. These allegations are denied by U.S. authorities. However, they are far from implausible; and, where secrecy reigns, we are naturally inclined to suspect the occurrence of unsavory things.

Bancoult (No. 2) sits at the confluence, then, of two histories of shady state secrets or half secrets, one relating to the shabby dealings of the recent postimperial past, the other to contemporary events involving the war on terrorism (or whatever we are now to call it). The presence here of the royal prerogative is curiously apt, associated as it is with constitutional exceptionalism, the mysteries of state, and the cloaking of executive power. The prerogative has ranked for centuries, in Blackstone’s words, “among the arcane imperii [state secrets]; and like the mysteries of the bona dea [the good goddess—the fertility goddess attended to by the Vestal Virgins] was not suffered to be pried into by any but such as were initiated in its service.”

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44 R (Bancoult) (No. 2), (2008) UKHL 61, [27].
45 Id. at [35].
46 See also Adam Tomkins, Magna Carta, Crown and Colonies, 2001 PUB. L. 571.
47 BLACKSTONE, supra note 2.
therefore, an almost blatant example of a case hinging on what has become law’s defining threshold or “limit concept.” 48 And, as in more mainstream terrorism cases in recent years, the House of Lords performed what is fast becoming a familiar two-step. Step one, the refusal to allow the operation of a legal black hole. Here, the assertion of ordinary legal principles over prerogative lawmaking. Step two, the accommodation of government security and diplomatic interests, leading to equivocation and uncertainty in the application of those ordinary principles. 49 This second step occurred in this case even though there was skepticism (among the majority as well as the minority) about the credibility of the security claims proffered by the government; even though there was at issue, arguably, a “deep” right with an unusually long history within the common law; and even though all agreed that this was a case on which little of practical significance rested—in the context we are discussing, in other words, this was a relatively easy case.

We might dismiss Bancoult (No. 2) as a mere curiosity. A case in which a court working within an atypical constitution addressed atypical questions relating to anachronistic exercises of legal authority in a remote location. Or we might see the case—as most British commentators seem to—as a simple mistake. The case was an easy one and the House of Lords got it wrong. Alternatively, we can see it as a quirky instance within a more general trend. On this reading, the Law Lords’ failure to impose real legal constraint on the exercise of executive power is particularly troubling. Once again, the courts seem unwilling or unable to get to grips with arguments relating to what would once have been called an act of state. 51 This emerging pattern provokes reflection into the promise of the rule of law. 52 Does it mean that in the absence of clear information—a feature of most security cases—the rule of law in the “modern,” value-laden sense is an unattainable ideal? We may cheer a judge like Lord Bingham in Bancoult prepared to take potshots at arguments from intelligence sources. We mourn the capitulation of the Court as a whole. But, perhaps, there is a silent recognition beneath all this surface Sturm und Drang that, whether or not we call it by that name, we are not prepared to abandon the substance of prerogative power—a “singular and eccentric” power shrouding the arcane mysteries of state that is only semipervious to norms of legality.

50 The situation is a little more complicated in this instance. The legal principles relating to the judicial control of the prerogative are in the process of being redefined. But the trajectory of that process is to bring such principles into line with ordinary principles governing the review of other non-statutory exercises of legal authority.
51 See, e.g., William Harrison Moore, Act of State in English Law (John Murray 1906).