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Special Issue: The Constitutional Legacies of Empire

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Introduction: 'The Constitutional Legacies of Empire'

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Introduction

In his review of Thomas Poole's *Reason of State*,[1] published in 2015, Mark Walters noted that the book was, in the first place, a contribution to the literature on constitutional theory, with the 'main actors' in the story being political theorists, to whom judges and lawyers played 'at best' a supporting role.[2] Walters noted that:

> … [t]here was a time, not very long ago, when leading scholars and jurists in Britain wrote about the law of empire as if it mattered to the British constitution … Although scholarly work on the imperial dimensions of constitutional law has continued in former colonies, especially in places where the legacy of colonialism still informs legal responses to claims by indigenous peoples to lands or rights of self-determination … this kind of scholarship has all but disappeared in Britain itself.[3]

By the time I first read this, I had come to a similar conclusion. My entry into this world of the imperial dimension of constitutional law, a world that had been mostly ignored by the key texts of my education in constitutional law, had come via the doctrine of Crown Act of State, on which I published in these same pages in 2015.[4] The doctrine, discussed in this special edition by Jane Rooney, was for most of its history – as I put it at the time – 'little more than an extrapolation from a small number of disparate and unusual cases, some of them barely reasoned and most of which belong to a very different constitutional era'.[5]

The truth, though, is that the cases in question – while they may well have been disparate and unusual – had something very obvious in common: they arose, almost all of them, out of the murky depths of the history of the British Empire. Take, for example, *Walker v Baird*,[6] an appeal from the decision of the Supreme Court of Newfoundland regarding the seizure of a lobster factory by the captain of *HMS Emerald*,

1 Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge University Press 2015).

2 (2017) 80 Modern Law Review 164.

3 Ibid 165.

4 'The vanishing law of Crown act of state' (2015) 66 Northern Ireland Legal Quarterly 367.

5 Ibid 165.

6 *Walker v Baird* [1892] AC 491.

in accordance with an agreement between the British and French governments. Or the more well-known case of *Buron v Denman*,[7] arising from events when chattel slavery had been abolished in the British Empire, and the British navy had found itself enforcing bilateral prohibitions on slavery outside that empire. Then there were the disputes arising out of dealings of the British government (or its proxy, the East India Company) with Indian princely states, many of which – wrested from their historical context – are barely comprehensible to the modern reader.[8] The 'different constitutional era' to which I made reference lasted much longer than that phrasing might suggest and, crucially, came to an end much more recently than a student of the contemporary UK constitution might realise. Chasing this case law back through time led to a range of material on law of and in the Empire. Alongside this, I came to realise that there was happening in the disciplines of international law and legal history a turn to empire that had at that point mostly failed to penetrate the discipline of constitutional law, though has begun to do so in some style in recent years.[9]

Some of this, no doubt, reflects my own failings, but not – or so I would at least like to think – all of it. Domestic constitutional scholarship had, it seems, mostly forgotten that the constitution of the UK once overlapped with and was, in some ways simultaneously, the constitution of the British Empire. The names of the leading scholars of the Imperial Constitution – Arthur Berriedale Keith,[10] most importantly, and others such as Kenneth Wheare,[11] – do not often feature in contemporary constitutional scholarship, though the discipline is generally not averse to the reification of the writings of certain of its historical exponents. Only the involvement of Ivor Jennings, who wrote on the constitutional law of the Empire and was the first Vice-Chancellor of the University of Ceylon, is usually remembered.[12] Even there, however, there is a clear divide between those contributions of Jennings which are cited by those working domestically and those cited by scholars working on or in the former empire.[13]

Constitutional scholarship in the former Dominions has no choice but to address the question of dominion status – how it came about, and how it came to an end[14] – as well as the links that did or still do exist, via the Crown or the Judicial Committee of the Privy Council, with the metropole. Part of the privilege of imperial might, on the other hand,

7 *Buron v Denman* (1848) 2 Ex 167. On the case, see Charles Mitchell and Leslie Turano, 'Buron v Denman (1848)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart Publishing 2010).

8 E.g. *Secretary of State for India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22.

9 See, especially, the work of Dylan Lino: 'Albert Venn Dicey and the constitutional theory of empire' (2016) Oxford Journal of Legal Studies 751 and 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739.

10 1879–1944: Regius Professor of Sanskrit and Lecturer in Constitutional History in the University of Edinburgh. Keith's works include *The Constitutional History of the First British Empire* (Clarendon Press 1930), *The Constitutional Law of the British Dominions* (Macmillan & Co 1933), *The Governments of the British Empire* (Macmillan & Co 1935), *The King and the Imperial Crown* (Longmans & Co 1936). On Keith's life and work, see Ridgeway F Shinn, *Arthur Berriedale Keith, 1879–1944: The Chief Ornament of Scottish Learning (*Aberdeen University Press 1990).

11 1907–1979: Gladstone Professor of Government at All Souls College, Oxford, and later Rector of Exeter College, Oxford. Weare's publications in this area include *The Statute of Westminster, 1931* (Clarendon Press 1933), *The Statute of Westminster and Dominion Status* (five editions, Clarendon Press 1938–1953).

12 1903-1965: Jennings wrote *Constitutional Laws of the British Empire* (Clarendon Press 1938) (in later editions, *Constitutional Laws of the Commonwealth*).

13 The relationship between the different phases of Jennings' career is considered in Mara Malagodi, 'Ivor Jennings's constitutional legacy beyond the occidental–oriental divide' (2015) 42 Journal of Law and Society 102. See also the discussion of Jennings' work in the article by Martin Clark in the present volume.

14 On which see the symposium in (2019) 17 International Journal of Constitutional Law.

lies in the ability to ignore, or even to forget, one's (former) imperial possessions. Not only, however, has the decline of the empire resulted in the forgetting of the links between the UK's constitutional order and Britain's imperial deeds and misdeeds. Alongside it there have been forgotten also those elements of the UK's constitutional order which were forged in an empire and so bear to this day its mark or which, in fact, are not merely the legacies of empire but proof – perhaps – of its ongoing imperial status. The various Overseas Territories which exist are mostly not addressed within contemporary public law scholarship, making an appearance only where they become immediately salient to the domestic doctrine, as did – for example – the prerogative power to govern overseas possessions in the context of the *Bancoult* litigation.[15] Nor does the Commonwealth feature heavily in the contemporary constitutional imagination, notwithstanding frequent attempts by certain political actors to increase its prominence and significance.[16]

Few constitutional lawyers would disagree with the contention that to understand the present requires a knowledge of the past. What has been lost, however, or so it seemed to me, was the awareness of the extent to which that past was one of empire. If that was true – and again, the fault is likely to have been much more on my part than that of the discipline in which I work – then one possible explanation is the rather partial historiography which prevails within constitutional law. Oftentimes, contemporary historical accounts jump directly from the great constitutional disputes of the seventeenth century to those of the early twentieth century, as though little of great constitutional import took place in the eighteenth or nineteenth centuries – the disputes over the freedom of the press in the 1760s, perhaps, and the expansion of the franchise which progressed in fits and starts after 1832.[17] The period thus skipped over, therefore, is the period at which British imperial power was at its height, in which the nexus between domestic doctrine and imperial endeavour must have been most palpable. But, of course, the causation is complex. It is not, or not only, that we underestimate the significance of empire because we pay less attention to the eighteenth century than the seventeenth, but that we pay that less attention because we have come – been able to come – to think of Britain's constitutional order as a largely discrete and self-regarding object of study.

The idea, then, was to seek to begin more fully and more systematically to incorporate the British Empire into the study of the UK's constitution. A workshop, generously funded by the Society of Legal Scholars and the University of Glasgow, took place in Glasgow in May of 2019. It is from that workshop that the papers in this special edition emerged. They were not the entirety of the contribution, however. Additional papers were given by Tanzil Chowdhury ('The royal prerogative, colonial-era and post-colonial military deployments: continuity or rupture?'), by Ian Patel and Bronwen Manby ('A

15 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* (No 2) [2008] UKHL 61.

16 A project which seems, judging by the work of Philip Murphy, doomed to failure: Philip Murphy, *The Empire's New Clothes: The Myth of the Commonwealth* (Oxford University Press 2018).

17 See Martin Loughlin, 'Towards a republican revival?' (2006) 26 Oxford Journal of Legal Studies 425, reviewing Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005), and criticising (at 431) Tomkins' focus upon events of the seventeenth century to the exclusion of those of subsequent centuries: 'Less exciting though they may be, the 18th and 19th centuries were just as significant to the formation of the British constitution. It was during this period that the practices of parliamentary government, constitutional monarchy and the cabinet system were settled, when the role of political parties within the framework of government was established, and when parliamentary sovereignty was clearly formulated as a legal doctrine. And it was during this period that Britain itself was transformed from an insular society with a largely agricultural economy into an industrial and commercial nation underpinned by a fiscal–military state of considerable imperial might.'

transnational genealogy of patriality: citizenship, immigration, and race') and by Colm O'Cinneide ('Northern Ireland – a constitutional fragment of empire'). Alongside the keynote talk by Devyani Prabhat, a second keynote talk – not published here – was given by Ed Cavanagh ('The imperial crown: the constitutional history of an idea, 1660–1938'). My thanks to all of these contributors, as well as to Vidya Kumar, who contributed so much to the discussions at the workshop. Particular thanks go to Mark Flear who, as editor of the *Northern Ireland Legal Quarterly*, has been exceptionally supportive of this project from the very beginning, and endlessly patient too.

This collection, I hope, demonstrates the value of the imperial perspective on the British constitution and those it has influenced. It demonstrates, perhaps above all, the range of questions to which the British Empire might be relevant. Some of those are historical in nature, others contemporary. Some relate to the UK itself, others to the various jurisdictions whose constitutional orders, like so much else, bear the marks of empire. I hope further, therefore, that at least some of those who read these papers are encouraged to join me in the project of attempting to understand the British constitution in this imperial light.

The papers

The doctrines of Crown and foreign act of state have both in recent years been the subject of major Supreme Court judgments. Each is considered in a paper here. First, Jane Rooney reviews the contemporary use to which the doctrine of Crown act of state has been put, and in particular its application to detention in Afghanistan. She suggests that the doctrine is the vehicle through which the colonial mindset – and the associated 'ambivalence towards the extraterritorial' – which is one legacy of empire, manifests itself. Looking at Foreign act of state, Courtney Grafton reviews the history of the 'judicial restraint' limb of foreign act of state, calling into question the historical pedigree of that limb. Crucial here is the imperial context of many of the historical cases said to ground the doctrine, which cannot for that reason be read over into the relationship between sovereign states as a matter of international law. That is, case law developed to address the exigencies of the relationship between centre and periphery in the imperial context has been applied, misleadingly, in a context which is – at least at a formal level – without the hierarchy that is embedded in the very notion of empire.

There is a synergy here with the paper by Martin Clark, in which he considers the relationship between domestic and international law via a consideration of a mostly forgotten body of work by Ivor Jennings. Jennings, a leading thinker of the domestic constitution, would go on to be a leading practitioner, as it were, of imperial constitutionalism in its dying phase. He assisted, for example, in the drafting of the Constitution of Ceylon when it achieved dominion status. Clark shows how Jennings' contributions focused first on the interaction of an existing body of imperial constitutional law with an expanding corpus of international law. As international law developed, Jennings argued for an understanding of the 'rule of law' equivalent to that which prevailed in the domestic order. Both of these strands of thought, Clark shows, were evident in the post-war work undertaken by Jennings.

Devyani Prabhat in her paper considers the conceptual commonalities of subjecthood and citizenship, arguing that the move from the latter to the former in the process of decolonisation masks substantial continuities between the two legal categories. In making this case, she draws on the issues of – first – the so-called 'hostile environment', in which individuals present in Britain are forced to prove their legal status in order to carry out everyday activities, and – second – the question of the deprivation of citizenship, used

ever-more frequently as a tool of national security in the last decade. Donal Coffey's contribution addresses the influence of empire on the study of constitutional law in the UK in the interwar period. Surveying the key constitutional texts of the period, Coffey is able to show the growing if uneven influence of imperial law, in particular in the domains of liberty – the writ of *habeas corpus* – and of citizenship. He offers a detailed reading of how imperial precedents came to be accommodated into the treatment of the doctrine of parliamentary sovereignty. His argument here is that to talk of an orthodox account of that doctrine is misleading, for Dicey – the alleged purveyor of that orthodoxy – came to accommodate in his writings the primary challenge to it: the so-called 'manner and form' argument.

In their paper, T T Arvind and Daithí Mac Síthigh address the question of constitutionalism in the 'periphery'. Focusing on India and Ireland, they assess how those who were subjects of – and subject to – the British Empire experienced it, and how that experience fed into the terms in which arguments for self-rule were made in those jurisdictions. They demonstrate the use in both countries of a civic republican rhetoric which has been more usually associated with transatlantic political theory, but which diverged in important ways, reflecting the status of the periphery in relation to the centre. They show too how that borrowing rebounded back on the centre, so that developments in the periphery worked over time to influence constitutional thought in the UK. Though not focused on constitutional doctrine, they therefore offer a compelling account of the complexities of borrowing and influence, which suggests the need to consider the question of legacy not in terms of one-off events but rather as a process of interplay unfolding over time, notwithstanding the imbalances in power which are inherent in empire. Lindsay Stirton and Martin Lodge look elsewhere in the periphery, to Jamaica, in order to demonstrate the continuity between the pathologies of imperial governance and the difficulties which Jamaica has experienced as an independent state. The continuity they identify is not a simplistic structural or institutional one. Rather, it is the continuity of a more subtle set of unresolved ambiguities as to the relationship between political and administrative elites, between whom there existed an atmosphere of 'mutual suspicion' which set the stage for post-independence conflicts in Jamaica.

In my own contribution, I consider the residue of the British Empire, the 14 Overseas Territories and how they are governed from the centre via first of all the Westminster Parliament – though they are not part of the UK – and, more often, by the Privy Council, in which legislation applying to the territories is often made and the Judicial Committee of which resolves disputes as to the law which applies there. My aim, however, is not merely to assert the ongoing imperial nature of the state, but to show how that imperial nature is hidden from view by that same Privy Council. Influenced by Daniel Immerwahr's work on American empire,[18] I argue that the Privy Council creates a formal divide where there is substantive continuity. The effect is to hide the residue of empire from the domestic constitution and, in turn, permit a reliance on legal and constitutional practices which would not be permitted within that domestic constitution. Following on from this, Roger Masterman in his contribution casts a sceptical eye over the oft-made claim that the work of the UK's Supreme Court is enriched by the work done by the same individuals in the guise of the Judicial Committee of the Privy Council in relation to various overseas jurisdictions. Though this latter work has had an obviously constitutional dimension for much longer than has the work of the UK courts, Masterman shows that the reliance on it by the Supreme Court has been sporadic and *ad hoc*. Only in a few specific areas has there been any sustained reliance on Privy Council jurisprudence, and

18 Daniel Immerwahr, *How to Hide an Empire: A History of the Greater United States* (Bodley Head 2019).

even that has diminished over time as a body of domestic case law has grown. Masterman explores the possible explanations for, and significance of, the Supreme Court's hesitation, even unwillingness, to strengthen the link between the two institutions.

Two analysis pieces address particular issues around the ongoing doctrinal legacies of empire. First, Gail Lythgoe examines the opinion of the International Court of Justice as to the legal consequences of the separation of the Chagos Islands – now, in official terms, the British Indian Ocean Territory – from Mauritius. The domestic legal implications of that separation have, as discussed in my own contribution, been the subject of a vast quantity of litigation. The discussion here shows the strengths and weaknesses of international law: able to condemn in clear terms that which the domestic legal system ultimately, if hesitantly, endorsed, but unable to enforce the prohibition of colonialism with any vigour. The paradox of empire is that those states powerful enough to retain colonies are likely to be those best able to resist attempts to use the law to bring to an end, once and for all, their imperial phase. Tim Sayer returns us to the domestic legal order, considering the litigation which has been brought relating to end of empire struggles in various jurisdictions, and the way in which the common law can (and cannot) be used to seek vindication for wrongful acts done during these conflicts. This he takes to be an example of the 'Diceyan dialectic', whereby a single constitutional outlook – so influential in our constitution – oscillates between parliamentary sovereignty and common law rights protection, and so can be used to justify both strong and weak review, as the situation demands.

Finally, and by way of conclusion, I review Nadine El-Enany's recent book, *(B)ordering Britain: Law, Race and Empire*,[19] which addresses citizenship, immigration and asylum law in their imperial context, and which considers more directly than do any of the papers in the special edition the racial (and racist) dimensions of the modern Britain constitution. That country – the argument goes – first enriched itself on a massive scale via rampant exploitation of its colonial possessions. As that empire diminished, it then sought, through a series of transparently discriminatory reforms of citizenship and immigration law, to exclude from the country (and so in turn the enjoyment of that stolen wealth) those who resided in or hailed from those colonies. Where the various papers included herein treat the imperial dimension of Britain's past as one perspective amongst many – illuminating, to be sure, but not the only lens through which the topic might be studied – the argument of El-Enany's book challenges constitutional scholarship in the UK at a more fundamental level. It suggests, in effect, that the central organising logic of those aspects of modern law which are the book's subject is the logic of empire. As the review of the book explores, this case is compellingly made. It works, in turn, to prompt the question of whether a constitutional scholarship that is grounded in the rules, methods and concepts of the domestic constitutional order – that excludes from consideration, that is, the imperial context of the contemporary UK – can ever hope to understand the manner in which that constitutional order has developed. Are there, to put the point another way, 'constitutional legacies' of empire, as the title of this project suggests, or is it rather the case that the constitutional order itself is in the first place a legacy of empire?

Avenues for future research?

A single special edition of a journal could not begin to cover the full range of questions within UK constitutional law – present or past – which would benefit from consideration, or further consideration, via the lens of empire. Here, I suggest some avenues for future

19 Nadine El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester University Press 2020).

research along these lines. One is theoretical: there would seem to be significant scope for incorporating the many insights of recent work on the political theory of empire into the mainstream of British constitutional theory. Another is devolution. Colin Kidd, for example, has shown that attitudes towards 'Home Rule' in Scotland – what became in time devolution – were associated in perhaps surprising ways with views on the British Empire, so that for some the empowerment of Scotland was desirable in large part because it would allow Scotland to play a more assertive role in the empire to which its citizens contributed so much.[20] Though there are of course limits to what might be said about the relationship between Scotland and Wales on one hand and the (British) Empire on the other – only the former was an independent state in the age of modern empires, and only for a short period – other lines of enquiry seem more promising.

A paper given at the workshop from which these papers originate by Colm O'Cinneide addressed the possibility that Northern Ireland is itself in some sense a constitutional legacy – a 'fragment' – of the British Empire. That possibility is an important one in a context in which the reunification of Ireland appears significantly more likely than at any time for the last century but is potentially illuminating even outside of that context. Northern Ireland has a modern constitutional history that is much better developed than those of Scotland and Wales, and yet is (even) more weakly integrated into the mainstream study of constitutional law than are either of those. One can largely manage to discuss Scotland and Wales, that is, without researching back before 1998 and without having to engage with those difficult issues which are particular to Northern Irish society. Considering Northern Ireland through the lens of the legacies of empire – or, conversely, rejecting the possibility of doing so – offers an opportunity to incorporate it more fully into a constitutional law that is truly of the UK, and not simply that of England with occasional nods to the nations and regions.

Another topic which might speak to the question of empire is, perhaps, conspicuous by its absence in this collection. It has become common to analyse the UK's decision to leave the EU, taken in 2016 and completed in 2020, in terms of empire and imperialism. It represents, it has been suggested, a nostalgia for empire on the part of the British public,[21] perhaps a desire to restore Britain's place in the world under the banner of Global Britain,[22] or even to restore (consensually, this time, one would hope) a smaller (and – it must be noted – whiter) alternative to the lost British Empire under the label of CANZUK.[23] The absence of a paper herein on the imperial roots (or, indeed, imperial

20 See Colin Kidd, *Union and Unionisms: Political Thought in Scotland, 1500–2000* (Cambridge University Press 2010) 275-281.

21 See, for example, Danny Dorling and Sally Tomlinson, *Rule Britannia: Brexit and the End of Empire* (Biteback Publishing 2019) and, in broader perspective, Robert Gildea, *Empires of the Mind: The Colonial Past and the Politics of the Present* (Cambridge University Press 2019).

22 Oliver Turner, 'Global Britain and the narrative of empire' (2019) 90 Political Quarterly 727, arguing that 'Global Britain' is 'an autobiographical narrative about what Britain is and what it envisions the world and its actors to be', but that this narrative is unhelpful in a number of ways, not least because events in recent years have 'a broad and highly problematic mismatch between [Britain's] sense of self and the assessments of the international partners it requires to succeed'.

23 See Duncan Bell and Srdjan Vucetic, 'Brexit, CANZUK, and the legacy of empire' (2019) 21 British Journal of Politics and International Relations 367, arguing, at 379, that although the concept 'has (re)emerged in the wake of Brexit, its conceptual roots, and many of its animating concerns and ideas, can be traced to the imperial debates of the late 19th and early 20th century' and 'serves as a window into the assumptions, interests, and dreams, of some of those seeking to maintain Britain's – or the "English-speaking peoples" – position as a major global power'. The anglosphere is considered in its wider historical perspective also in Michael Kenny and Nick Pearce, *Shadows of Empire: The Anglosphere in British Politics* (Polity Press 2018).

consequences) of Brexit is not to be taken as indicating that there is nothing to be said on the topic. Quite the opposite.

One distinctive feature of the Brexit discourse is the marginal status of arguments based upon the costs and benefits of the UK's membership of the EU (and, in turn, of its decision to leave that union). Even allowing for the incommensurability of many of the values at stake in such a calculation, it seems clear to this author that there could only have been one outcome of such a process of reasoning, and it was not that which in fact was endorsed by the British electorate in 2016.[24] What it would mean to think in such terms, though, is less important than the fact that it does not – did not – tend to happen within the mainstream political discourse: either for or against membership of the EU. One motive for that, one might suggest, is that a cost–benefit analysis involves seeing the UK as one country amongst many, which – like any other – might (even must) choose to give up one thing in order to gain some other thing within a community of nations. Many do not, perhaps cannot, see the UK in that way, and while it would not be right to unthinkingly attribute that unwillingness to Britain's imperial past, that past would certainly be a part of any plausible explanation.

It is also true that much of the political discourse since the 2016 referendum has betrayed the influence of the imperial past and suggested – whether or not deliberately – a desire to reconstruct that influence, its modes and its forms. Think, for example, of the (re)convening of the Board of Trade under the Presidency of Liam Fox as Secretary of State for International Trade. The Board, the government claimed at the time, would 'help boost exports, attract inward investors and ensure the benefits of free trade are spread equally across the country'.[25] The endeavour collapsed quickly into farce. The Board being a committee of the Privy Council, membership of it was limited to Privy Counsellors, and so the various business figures – sourced in suitable proportions from the UK's various regions and nations – could not sit on it, but merely advise it. Fox was, therefore, not only the President of the Board but its sole member.[26] The episode turns out to have been trivial but might not have been had Fox been less predictably hapless. And the relevance to empire is clear to any historically minded observer. Though the body which was (re)convened in 2017, the Board of Trade, used the name by which that body had indeed been known at the time of its lapse, the history of that body is much older and tied up in imperial governance. The Board was not always, that is, the Board of Trade,

24 Here we must note, in keeping with the theme of empire and its legacies in the contemporary UK, that the referendum franchise – being based upon that used for general elections – permitted nationals of Commonwealth states resident in the UK (or Gibraltar) to vote but not EU nationals (unless Irish) similarly resident: European Union Referendum Act 2015, s 2.

25 Department for International Trade, 'International Trade Secretary Dr Liam Fox convenes a new Board of Trade to ensure the benefits of free trade are spread throughout the UK' (12 October 2017).

26 Jessica Elgot, 'Liam Fox ridiculed for being only member of new UK Board of Trade' *The Guardian* (London, 12 October 2017).

but rather the Board of Trade and Plantations, neatly encapsulating the relationship between English mercantilism and the country's imperial endeavours.[27]

But this was, in the end, mere rhetoric, and there has been little sign yet that the legacy of the British Empire in this domain is more substantial than a sort of inchoate exceptionalism. Certainly, if 'Global Britain' is a post- or even neo-imperial construct – and it may well be – then the apparent failure of that slogan to amount to anything of substance (thus far, at least) might indicate that imperial rhetoric is just that. Brexit, then, is not an inherently neo-imperial project. It is, though, one which could only have taken the form which it did in the context of a state, like the UK, which has not yet come to terms with its post-imperial character. The speed with which arguments for it – and for what it permits the UK to do – lapse into an imperial register demonstrates that the connection is not a trivial one. In parallel with that conclusion, the argument which emerges out of this special issue is not that the constitutional order of the UK is a creation of empire, but rather that the legacies of empire are distributed widely within it, and that, if we seek to understand both the development and the current reality of that order, the lens of empire is one that we cannot afford to overlook.

27 The Board was constituted by William III in 1695 under the title of 'the Lords Commissioners for promoting the Trade of our Kingdom, and for inspecting and improving our Plantations in America and elsewhere', replacing the permanent administrative body known as the Lords of Trade and Plantations set up in 1675. The Board was reconstituted around a century later by William Pitt and reformed by an Order in Council of 1786. The Harbours and Passing Tolls, &c Act 1861, s 65, provides that the 'Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations may be described in all Acts of Parliament, deeds, contracts, and other instruments, by the official title of "the Board of Trade" without expressing their names'. The history of the Board is found written only in a series of scattered studies, many of very restricted focus: see, on the early operation of the Board, Mary Patterson Clarke, 'The Board of Trade at Work' (1911) 17 American Historical Review 17, 42: 'the Board of Trade stood between the King in Council on the one hand, and the outlying portions of the empire on the other. As a result of this position it could, and did many times, give advice and submit policies, but at all times it furnished information … By close connection with colonists and merchants the Board kept its finger, so to speak, on the colonial and commercial pulse, and helped to diagnose disorders for treatment by a higher power.'

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Crown act of state and detention in Afghanistan

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Abstract

The Serdar Mohammed litigation signalled a decisive change in judicial attitude towards scrutiny of extraterritorial executive action in armed conflict. The most significant indicator of a change in judicial attitude was the reinstatement of the act of state doctrine in the private law claim in tort. Act of state bars tort claims against the Crown when the Crown acts outside of its territory. The UK Supreme Court characterised act of state as a non-justiciability doctrine. The article argues that the UK Supreme Court exercised extreme deference in its adjudication of the act of state in the private law claim. This deference was then mirrored in the reasoning employed in the public law claim under the Human Rights Act 1998, departing from international and domestic standards on detention in armed conflict.

Keywords: act of state; detention; extraterritorial application of human rights; Afghanistan; *Serdar Mohammed*; *Rahmatullah*.

Introduction

Over the last two decades UK courts have embraced the extraterritorial application of the Human Rights Act 1998 (HRA) in armed conflict. This means that the courts increasingly held the executive to account when acting outside of UK territory. Further, courts increasingly found themselves adjudicating upon and enforcing international law norms. This is significant as the UK is a dualist state, and the normal state of affairs is that in order for international law to be enforceable in UK domestic law it must be incorporated through domestic legislation.[1] Although the HRA is domestic legislation that incorporates only the European Convention on Human Rights (ECHR), in its extraterritorial application in armed conflict it is an instrument through which other international law obligations are enforced. In extraterritorial armed conflict cases, UK courts acknowledged other international law norms designed to regulate armed conflict in the interpretation of the HRA, including the laws of armed conflict (LOAC) and UN Security Council Resolutions

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1 Customary international law is enforceable in UK domestic law without incorporation, except in cases of crimes. EU law was directly enforceable through direct effect and the European Communities Act 1972.

(UNSCRs).[2] Another consequence of the extraterritorial application of the HRA in armed conflict was that extraterritorial prerogative powers were increasingly challenged as it was acknowledged that parliamentary legislation superseded unilateral executive decision-making.[3]

On 17 January 2017, two judgments handed down by the UK Supreme Court – a private and a public law claim – concerning the alleged illegal detention by the UK of a suspected terrorist in Afghanistan, the *Serdar Mohammed* litigation, signalled a decisive change in judicial attitude towards scrutiny of extraterritorial executive action in armed conflict.[4] This case was significant for the extraterritorial enforcement of the ECHR because it was the first time that the ECHR would apply to military intervention in Afghanistan.[5] It would provide a blueprint for other Council of Europe states and the European Court of Human Rights (ECtHR) in deciding upon the application of the ECHR to 'internationalised' non-international armed conflict (NIAC)[6] and would represent a significant expansion of extraterritorial adjudication.

It was perhaps as a result of the perceived political and international significance of this decision that the courts decided to take a remarkably more restrained approach to the public law and private law claims. The most significant indicator of a change of judicial attitude in the *Serdar Mohammed* litigation was the reinstatement of the act of state doctrine in the private law claim in tort: an elusive prerogative power, the parameters of which remain vague, and which had only been successfully invoked in the Privy Council during the twentieth century until the present litigation when it was successfully used as a defence to a claim in tort.[7] Broadly, act of state bars tort claims against the Crown when the Crown acts outside of its territory. It presented itself, *obiter dicta*, in *Al Jedda v Ministry of Defence (No 2)* in 2010 but was fully utilised and reinstated in the present litigation.[8] The act of state doctrine, although confined to the private law claim, underpins a radically more deferential approach by the courts to extraterritorial claims arising from armed conflict. Further, while act of state was reinvigorated with life in both the High Court and

2 See e.g. *Al Skeini v Ministry of Defence* [2007] UKHL 26, para 129 per Lord Brown of Eaton-Under-Haywood; *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58.

3 Customary international is generally considered justiciable in UK domestic law without further legislation, as long as it is not inconsistent with an Act of Parliament or common law. See further: Patrick Capps, 'The court as gatekeeper: customary international law in English courts' (2007) 70(3) Modern Law Review 458; *R v Margaret Jones* [2006] UKHL 13, [2007] 1 AC 136 is authority for the proposition that UK criminal law cannot be changed by customary international law.

4 *Mohammed v Ministry of Defence* [2017] UKSC 1 (*Mohammed I*); *Mohammed v Ministry of Defence* [2017] UKSC 2 (*Mohammed II*). The *Serdar Mohammed* litigation is listed under these citations on the Supreme Court website. Both cases involved joint appeals involving detention practices in Iraq: *Rahmatullah (No 2)* and *Mohammed v Ministry of Defence* [2017] UKSC 1; *Abd Ali Hameed Al-Waheed and Mohammed v Ministry of Defence* [2017] UKSC 1.

5 But note: *The Queen (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), 2010 WL 2516377. This case was brought by Maya Evans, not under the HRA but for judicial review in the public interest. It concerned the transfer by British armed forces of Afghan terror suspects to the Afghan National Directorate of Security (NDS) where they were subjected to degrading and inhuman treatment. The High Court banned detainee transfers to this particular NDS facility.

6 For one of the most comprehensive accounts of the internationalisation of a NIAC and the ensuing legal challenges, see Kubo Macak, *Internationalized Armed Conflicts in International Law* (Oxford University Press 2018).

7 One of the most comprehensive contemporary accounts of act of state is provided by Amanda Perreau-Saussine, 'British acts of state in English courts' (2008) 78(1) British Yearbook of International Law 176. *Yunus Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) soon followed the *Mohammed* High Court decision and was considered jointly with *Mohammed* in the Supreme Court private law claim (*Mohammed I*).

8 *Al Jedda v Ministry of Defence* [2010] EWCA Civ 758.

Court of Appeal *Serdar Mohammed* litigation and successfully invoked in the High Court, the Supreme Court's conceptualisation and characterisation of act of state signalled a deference to the executive that was uncharacteristic of the trend towards acceptance of scrutiny of extraterritorial executive action in armed conflict under the HRA. While all three courts accept that act of state can be a defence in tort or a principle of non-justiciability, the High Court and Court of Appeal concluded that arbitrary and unlawful detention was a justiciable issue, while a majority in the Supreme Court decided it was not. The High Court and Court of Appeal decisions treated act of state as a defence in tort, whereas the majority of justices on the Supreme Court treated it as a non-justiciable issue.

The article argues that the majority of the Supreme Court characterised act of state as a principle of non-justiciability. It then posits four criticisms against the characterisation of act of state as a non-justiciability rule. First, act of state as a non-justiciability doctrine is an anachronistic principle that originated in colonialist practices of despotic rule and has no place in contemporary governance. Second, act of state as a principle of non-justiciability falls far below the standard of 'high-policy' decisions accepted as non-justiciable in contemporary discourse. The day-to-day administration of detention policies falls outside the normal ambit of high policy. Third, the judges only review public law non-justiciability cases, despite the fact that this is a private law claim in tort and there is a distinct body of case law on non-justiciability in this area of law which points to detention being justiciable. Fourth, there is a disparity of treatment of the prerogative by the courts. The courts are much more willing to review prerogatives concerning domestic affairs – even if they are *prima facie* matters falling within high-policy subject matter – than they are willing to review prerogatives which affect extraterritorial individuals – even if the latter concerns a traditionally justiciable subject matter. The article then argues that the extreme deference exercised in the act of state private law decision was reflected in the judge's adjudication of the human rights issue in the public law judgment, representing a change in judicial attitude toward a more deferential approach to the executive and less willingness to engage in extraterritorial scrutiny. An analysis of the competing international and domestic law norms is conducted to argue that the judges departed from accepted and agreed upon standards of international and domestic law with the instrumental purpose of ensuring some consistency between the private and public law adjudication.

The principle developed in the public law decision has implications for the enforcement of international law in UK domestic law. The HRA has become a gateway through which international obligations beyond the ECHR are enforceable. The High Court and Court of Appeal *Serdar Mohammed* judgments are illustrative of the employment of international law in the interpretation of human rights in armed conflict. The act of state doctrine in the private law judgment, as part of its deference towards the executive, inculcates the prioritisation of domestic constitutional law principles over more outward-looking, international perspectives. Act of state thus sets the tone of a domestic-oriented approach to extraterritorial cases, which is carried through to the public law judgment by deprioritising an analysis of international law regulating the situation.

1 The Supreme Court decision on Crown act of state

Serdar Mohammed was detained for 110 days without charge and without access to a court to determine legality of detention from April to July 2010 in Afghanistan by UK forces. The applicant alleged that his detention did not conform with law and policy under the International Security Assistance Force (ISAF) Standard Operating Procedure (SOP) 362 which permitted detention for up to 96 hours before the detainee had to be

transferred to Afghan authorities with limited exceptions to this rule (including if a delay arose because of an inability to transfer the prisoner). Further it was alleged that this was not in conformity with Afghan domestic law which permitted detention for up to 72 hours; Article 5 ECHR which prohibits internment in NIACs absent a derogation; and customary international law on detention in NIACs.

Initially, the Ministry of Defence argued that act of state was a bar to a private and public law claim.[9] Justice Leggatt in the High Court found that the doctrine of Crown act of state does not operate in the field of public law but only operates in the field of tort law.[10] This was accepted by the Court of Appeal and the Supreme Court.[11] Both the High Court and Court of Appeal characterised act of state as a defence in tort and not a rule of non-justiciability because it was justiciable under the HRA. However, the High Court ruled that the act of state could be a defence in the present litigation, whereas the Court of Appeal was not convinced that it was in the public interest to allow the act of state to operate as a bar on the claim in the present litigation.

When the case arrived at the Supreme Court, act of state as a rule of non-justiciability or a defence to a claim in tort was only considered in relation to the breach of Afghan tort law. The Supreme Court unanimously agreed that act of state could be successfully invoked. The judges were split on whether act of state should be characterised as a defence in tort or a principle of non-justiciability, but regardless of characterisation ultimately agreed with the definition put forward by Lady Hale. Acts of state are 'sovereign acts … the sorts of things that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law)'.[12] The latter phrase means that in order to invoke act of state as a bar to an extraterritorial tort claim, the military intervention and British presence in Afghanistan must be legal but the act which is under judicial scrutiny (e.g. detention of an individual) can be otherwise illegal under international law for the defence of act of state to be invoked. Act of state cannot operate as a bar to an action regarding allegations of torture, maltreatment of prisoners or detainees,[13] but can apply in cases of expropriation and destruction of property,[14] killings and detention.[15] Act of state could be used as a defence against both nationals and non-nationals extraterritorially.[16]

Although the Crown act of state applies solely in the private law claim and not in the public law claim, there is a divergence of opinion across the Supreme Court as to whether there is any legal authority for the proposition that act of state operates as a defence in tort. Lord Mance characterises act of state as a rule of non-justiciability, finding no

9 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (*Mohammed HC*), para 409.

10 Ibid para 379.

11 *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843 (*Mohammed CA*); *Mohammed II* (n 4) para 14 per Lady Hale.

12 *Mohammed I* (n 4) para 37 per Lady Hale. Lords Wilson and Hughes agree. Lord Sumption (para 81) and Mance (para 72) agree with Lady Hale, but they omit the phrase about the lawfulness of the military intervention being a condition and an act can be designated as an act of state before or after the event has taken place.

13 Ibid para 36 per Lady Hale.

14 Ibid para 36 per Lady Hale; para 96 per Lord Sumption.

15 Ibid para 32 per Lady Hale; para 88 per Lord Sumption.

16 Ibid paras 29, 37 per Lady Hale.

authority for act of state as a defence in tort. He purports to agree with Lord Sumption's definition, but Lord Sumption adopts Lady Hale's definition, which is framed as a defence in tort.[17] Lady Hale, with whom Lords Wilson and Hughes agreed, accepts there are two conceptions of act of state, non-justiciability and a defence to a tort claim. For her, act of state as a non-justiciability rule does not extend to the subject matter of the current case: detention practices in the course of UK military operations. Instead, act of state as a defence in tort is successfully invoked. Lord Mance, with whom Lord Hughes agrees, finds that Crown act of state is only a non-justiciability rule (and not a defence to a tort claim) and that the present private law action is non-justiciable.[18] Lord Sumption finds that act of state is a non-justiciability rule and tort defence but that the rules 'merge into one' principle of non-justiciability.[19] Lord Clarke agrees with Lord Sumption.[20] Lord Neuberger, with whom Lord Hughes agrees, declines to describe Crown act of state as a principle of non-justiciability and implies that there is limited authority for the proposition that it is a defence in tort. He encourages 'caution' in its contemporary use but recognises its existence and agrees with the definition put forward by Lady Hale.[21] All judges are in favour of the contemporary relevance and application of act of state in the context described by Lady Hale.

However, the divergence of opinion on what principles and precedent this is founded upon calls into question the legitimacy of the ruling. The most convincing arguments made on both sides are those made against characterising act of state as a defence in tort or a rule of non-justiciability. Lord Hughes ignores the disparity and agrees with every judge. Leaving him aside, two judges read act of state as operating as a defence in tort (Hale and Wilson); three judges ultimately characterise it as a principle of non-justiciability (Mance, Sumption and Clarke); and Lord Neuberger concedes his discomfort in characterising it as either. Moving forward, the act of state doctrine will be a successful defence to an extraterritorial private law claim in the circumstances outlined by Lady Hale and, based on a 3:2 majority, treated as a principle of non-justiciability. While the act of state as a defence in tort was the predominant focus of the litigation running up to the Supreme Court decision and has been examined in depth elsewhere,[22] this article considers the negative implications of framing act of state as a principle of non-justiciability in the *Serdar Mohammed* case.

The majority of Supreme Court judges accept a non-justiciability reading of Crown act of state. Lord Mance, with whom Lord Hughes agrees, clarifies that it is a principle of abstention: the domestic court's stance should not be out of line with that of its own state in its international relations[23] and that actions involving foreign states and their citizens may be more appropriately pursued at a state-to-state level rather than through domestic courts.[24] The Court of Appeal understands the purpose of act of state as ensuring that the executive and judiciary 'speak with the same voice' in matters

17 Ibid para 36 per Lady Hale; paras 88–93 per Lord Sumption; paras 56–58 per Lord Mance.

18 Ibid para 101 per Lord Mance.

19 Ibid para 81 per Lord Sumption

20 Ibid paras 107–109 per Lord Clarke.

21 Ibid para 102 per Lord Neuberger.

22 Paul Scott, 'The vanishing law of Crown act of state' (2015) 66(4) Northern Ireland Legal Quarterly 367; Perreau-Saussine (n 7) 218–245.

23 *Mohammed I* (n 4) paras 51, 54 per Lord Mance.

24 Ibid para 57 per Lord Mance.

concerning the conduct of foreign relations.[25] However, the Court of Appeal notes that the 'speak with one voice' principle should only apply in private law claims when it is the same for public law claims. But there is no such bar in public law claims on this issue.[26] Lord Sumption argues that the Crown act of state has nothing to do with subject matter, but with the distinction between domestic rights and international rights. The latter are non-justiciable in domestic courts.[27] Lord Mance disagrees with Lord Sumption stating that domestic courts are able to adjudicate upon and give effect to international law, the prime example being that customary international law is justiciable in domestic law.[28] They both agree that a non-justiciable act of state is one that must: involve an exercise of sovereign power, inherently governmental in nature; and be done outside the UK; with the prior authority or subsequent ratification of the Crown; and in the conduct of the Crown's relations with other states or their subjects.[29] It must be a necessary consequence of a decision made by the Crown through its ministers.[30] The act of state can extend to relatively low-level decisions.[31] For Lord Mance, Serdar Mohammed's case was non-justiciable because the UK's actions 'were steps taken pursuant to or in implementation of a deliberately formed policy against persons … reasonably suspected to be insurgents or terrorists in the context and furtherance of foreign military operations during a time of armed conflict'.[32] For Lord Sumption, the acts of state 'were authorised by the UK's detention policy or required by the UK's agreements with the US' and as such were 'inherently governmental' and 'authorised by the Crown'.[33]

Four criticisms can be levelled against characterising act of state as a principle of non-justiciability. First, act of state as a non-justiciability doctrine is an anachronistic principle that originated in colonialist practices of despotic rule and has no place in contemporary governance. Second, act of state as a principle of non-justiciability falls far below the standard of high-policy decisions accepted as non-justiciable in contemporary discourse. The day-to-day administration of detention policies falls outside the normal ambit of high policy. Third, the judges only review public law non-justiciability cases, despite the fact that this is a private law claim in tort, and there is a distinct body of case law on non-justiciability in this area of law which points to detention being justiciable. Fourth, there is a disparity of treatment of the prerogative by the courts. The courts are much more willing to review prerogatives concerning domestic affairs – even if they are *prima facie* matters falling within high-policy subject matter – than they are willing to review prerogatives which effect extraterritorial individuals – even if the latter concerns a traditionally justiciable subject matter.

25 *Mohammed CA* (n 11) 353.

26 Ibid paras 354–355.

27 Ibid paras 79–80 per Lord Sumption.

28 Ibid para 58 per Lord Mance citing *Keyu v Secretary of State for Foreign Affairs* [2015] 3 WLR 1665, paras 117–122, 144–151.

29 Ibid para 72 per Lord Mance following Lord Sumption at para 81 who takes his lead from Lady Hale para 37.

30 Ibid para 92 per Lord Sumption.

31 Ibid para 91 per Lord Sumption.

32 Ibid para 75 per Lord Mance.

33 Ibid para 95 per Lord Sumption.

2 Act of state as a doctrine of non-justiciability

2.1 Act of state as anachronistic

First, the judges misrepresent the authorities on act of state. Act of state as a non-justiciability doctrine is an anachronistic principle that originated in colonialist practices of despotic rule and has no place in contemporary governance.[34] The definition of act of state arrived at by the judges is not grounded in any judicial authority and does not provide a true representation of its operation.

Act of state was originally invoked as a device to bar claims against a commercial company, the East India Company, with whom the British state had a *sui generis* relationship, to operate as an aggressive colonial power in India.[35] At its height, the East India Company had a private army of 200,000 men supported and funded by the British Parliament with the prime purpose of satisfying its shareholders by acquiring property: 'it was not the British government that began seizing great chunks of India in the mid-eighteenth century, but a dangerously unregulated private company headquartered in one small office … in London, and managed in India by a violent, utterly ruthless and intermittently mentally unstable corporate predator'.[36] The act of state is then invoked to condone similar practices conducted by governors appointed to colonies.

Lord Mance and Lord Sumption identify *Secretary of State in Council of India v Kamachee Boye Sahaba*[37] as the main authority for a non-justiciable act of state doctrine.[38] *Kamachee* concerned a case where the East India Company seized the Raj of Tanjore and the public and private property of the deceased Rajah of Tanjore in the absence of an heir. His widow brought a claim against seizure of the private property. However, the actions of the East India Company were not considered to be within the jurisdiction of a court. It was decided that '[a]n act done by an agent of the Government, *though in excess of his authority*, being ratified and adopted by the Government, held to be equivalent to previous authority'.[39] Lord Kingsdown delivering the judgment of the Privy Council found that: 'the property now claimed by the respondent has been seized by the British government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of state over which the [Court] has no jurisdiction'.[40] Much criticism was levelled against invoking act of state doctrine developed in *Kamachee*. Amanda Perreau-Saussine finds that: 'In *Kamachee*, the Crown was held to have successfully delegated to the East India Company a non-justiciable "sovereign" power to act despotically.'[41] Bethell AG in *Kamachee* stated that the conduct of the East India Company was 'a most violent and unjustifiable measure'.[42]

Crown action overseas is treated as non-justiciable because the imperial expansions involved were acts of 'arbitrary power' which were not performed 'under colour of legal title'.[43] Precisely because the Privy Council was unable to find 'any ground of legal right'

34 Perreau-Saussine (n 7) 194.

35 Ibid.

36 William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury 2019) xxv.

37 *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moore PCC 22 (15ER 9).

38 *Mohammed I* (n 4) para 61 per Lord Mance; para 85 per Lord Sumption.

39 *Kamachee* (n 37) 476 (emphasis added).

40 Ibid 540.

41 Perreau-Saussine (n 7) 194.

42 *Kamachee* (n 37) 78-79.

43 F A Mann, *Foreign Affairs in English Courts* (Clarendon Press 1986) 184.

for a seizure, the company's actions had to be understood as non-justiciable acts of state.[44] Justice Leggatt in the High Court concluded that the doctrine in *Kamachee* was 'perverse' as 'the executive can be held to account if it purports to act legally, but not if it openly flouts the law'.[45] Lord Mance fails to acknowledge explicitly that illegality is a criteria for invocation of act of state but in discussing the present litigation and other extraterritorial decisions concedes that the non-justiciability doctrine will operate where there are clear rules pronouncing on the legality of an act: 'What the Supreme Court's recent decisions emphasises is that the doctrine is not confined to situations in which it can be said that there are no judicial or manageable standards.'[46]

The cases cited by Lord Sumption in support of the proposition that *Kamachee* is established authority for a rule of non-justiciability in low-level extraterritorial detention decisions are either Privy Council cases particular to the colonialist context and concern annexation of property,[47] or weak authority involving unsuccessful invocations of act of state in the twentieth century.[48] Lord Sumption's list fails to mention the invocation of *Kamachee* to detain without legal authority in the colonial context. The application of *Kamachee* to detention cases in the process of annexation of territory in the nineteenth century reveals an open contempt for foreign victims of fundamental rights violations that would not be acceptable in contemporary decision-making.

In the Privy Council case, *Cook v Sprigg*, the appellants sought to enforce rights they claimed had been granted to them in concessions made by Sigcau prior to British annexation. The Privy Council, invoking *Kamachee*, found that 'taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of state' and therefore could not be questioned in a court of law.[49] *Cook v Sprigg* resurfaced in the Court of Appeal, *The King v the Earl of Crew ex parte Sekgome*.[50] The governor was entitled to detain Sekgome either because he was empowered to act and legislate under the Foreign Jurisdiction Act 1890 (FJA) or because it was an act of state. The FJA declared the Crown's actions in foreign dominions to be 'as valid and effectual as though the same had been done according to the local law then in force within such Country or Place'. The ruling left the High Commissioner legally unaccountable.[51] Vaughan Williams LJ provided that the decision was 'made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous'.[52] If the argument about the statutory powers of the commissioner was ungrounded, Sekgome's detention 'would be justified as an act of state'.[53] Lord Kennedy found that detention was an act of state, justifying the

44 Perreau-Saussine (n 7) 194.

45 *Mohammed HC* (n 9) para 86 per Justice Leggatt.

46 Lord Mance, 'International law in the UK Supreme Court' (King's College London, 13 February 2017) <www.supremecourt.uk/docs/speech-170213.pdf>.

47 *Sirdar Baghwan Singh v Secretary of State for India* [1874] LR 2 Ind App 38, 47; *Cook v Sprigg* [1899] AC 572; *Vajesingji Joravarsingji v Secretary of State for India* [1924] LR 51 Ind App 357; *Secretary of State for India v Sardar Rustam Khan* [1941] AC 536.

48 *Nissan v Attorney General* [1970] AC 179, 218 (Lord Morris of Borth-y-Gest), 225 (Lord Pearce), 231–232 (Lord Wilberforce), 238 (Lord Pearson); *Johnstone v Pedlar* [1921] 2 AC 262, 275 (Viscount Cave), 278–279 (Lord Atkinson), 290–291 (Lord Sumner);

49 *Cook* (n 47) 578.

50 *The King v the Earl of Crewe ex parte Sekgome* [1910] 2 KB 576 (CA).

51 Perreau-Saussine (n 7) 199.

52 *Sekgome* (n 50) 610.

53 Ibid.

detention of Sekgome.[54] Ordinarily, legislation cannot be directed against a particular person, but here the court had not 'the case of a civilised and orderly state, such as modern England or the Rome of Cicero's time, but the administration of a barbarous or, at least, semi-barbarous community'.[55]

Perreau-Saussine labels the *Kamachee*, *Cook* and *Sekgome* cases as the 'autocratic' act of state cases because they are based upon a principle that endorses despotic rule.[56] Invoking act of state in 2017 to justify breaching Afghan law and policy agreements on detention in favour of retrospective decisions authorised by the executive that are not compliant with policy agreements and legal authority is retrogressive in terms of the principles of comity and fundamental rights protections abroad.

2.2 Non-justiciability in public law

Second, the act of state doctrine is a principle of non-justiciability that falls far below the standard of high-policy decisions accepted as non-justiciable in contemporary discourse. The day-to-day administration of detention policies falls outside the normal ambit of high policy. While act of state as a principle of non-justiciability is confined to the private law action, public law jurisprudence is invoked to justify and confine this reading of the prerogative power and to distinguish it from merely a defence in tort – a conception of act of state for which judges resorting to the non-justiciability conception could not find precedent to support. This lower threshold of non-justiciability could potentially affect public law cases, especially in the absence of the HRA.

While the particular area of policy-making itself may call for a degree of judicial deference to the superior knowledge or expertise of elected branches, this is not and should not be regarded as being the same as making a topic non-justiciable in its entirety. Non-justiciability has been described as the 'nuclear option'[57] when courts consider it beyond their competence to exercise judicial scrutiny of executive action. This is because invocation of non-justiciability does not only affect the outcome of the case before the courts, but could exclude future cases based on similar facts from judicial analysis, regardless of the merits of the claim and the potential development in Strasbourg.[58] It is only in exceptional circumstances that a doctrine of non-justiciability is invoked, and the use of the doctrine has been limited in the interest of constitutional legitimacy, including the separation of powers principle, parliamentary democracy and the rule of law. *GCHQ* provides an authoritative list of matters that may be characterised as high policy and beyond judicial scrutiny. In *GCHQ* the courts decided that whether or not a case was justiciable did not depend upon the source of the law: prerogative powers were justiciable. But certain issues may be non-justiciable depending upon their subject matter.[59] Lord Roskill clarified the subject matter that would not be justiciable: 'those 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 as well as others'.[60] This is a non-exhaustive list.

54 Ibid 609, 624–625

55 Ibid 627–628.

56 Perreau-Saussine (n 7) 202.

57 Jeff King, 'Institutional approaches to judicial restraint' (2008) 28 Oxford Journal of Legal Studies 409, 421.

58 Roger Masterman, *The Separation of Powers in the Contemporary Constitution* (Cambridge University Press 2011) 92.

59 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1985] AC 374 (GCHQ).

60 Ibid para 418 per Lord Roskill.

However, the HRA made questions pertaining to Convention rights justiciable even in matters of high policy:[61] 'it is now common ground that if a Convention right requires the court to examine and adjudicate upon matters which were previously regarded as non-justiciable, then adjudicate we must'.[62] High-policy decisions that may be non-justiciable include questions of international significance upon which no consensus in international law or policy has been reached. These are high-level decisions of an abstract and far-reaching nature upon which there is no state consensus or which the UK domestic courts feel are outside of their control to pronounce upon unilaterally. One of the prime examples is in *R (Campaign for Nuclear Disarmament) v Prime Minister of the UK*.[63] The claimants sought a declaration that it would be contrary to international law for the UK to use force against Iraq without a UNSCR authorising such action under the UN Charter. The divisional court found the case non-justiciable because it would be contrary to the 'public interest' for it to adjudicate upon such matters.[64] The legality of the use of force against Iraq depended upon whether or not it constituted an exception to the customary international law prohibition on the use of force, and in particular whether UNSCR 1441 authorised an exception to the rule. The applicants argued that 'the *ius cogens* prohibition on the use of force was part of the common law in the absence of any contrary legislation; that it was asking the court to determine not a factual or policy issue but a "clinical point of law"; and that to leave it within the exclusive province of the executive would be contrary to the rule of law'.[65]

The court invoked the doctrine of the separation of powers to characterise the legality of the government's decision to go to war as non-justiciable. Foreign policy and deployment of armed forces remained 'forbidden areas',[66] and international law must often be left 'as shades of grey and open for diplomatic negotiation' as clear articulation of the international law position would undermine government negotiations.[67] Perreau-Saussine notes that this reasoning conflicts with the International Court of Justice decision of *Threat or Use of Nuclear Weapons*: 'Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed on them by international law.'[68] Simon Brown LJ stated that 'the common law encompasses customary international law'.[69] However, he also held that UNSCR 1441 had the status of an 'unincorporated treaty' and therefore constituted 'international law in no way bearing on the application of domestic law' and that there was 'simply no foothold in domestic law for any ruling to be given on international law'.[70] Perreau-Saussine criticises this aspect of the judgment arguing that if

61 Masterman (n 58) 92; *Mohammed HC* (n 9) para 412; *Mohammed CA* (n 11) paras 346–348.

62 *Mohammed HC* (n 9) 415 citing *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20, per Lady Hale para 60.

63 *R (Campaign for Nuclear Disarmament) v Prime Minister of the UK* [2002] EWHC 2777 (Admin).

64 Ibid Lord Simon Brown para 47(ii); Lord Richards paras 55–58.

65 Amanda Perreau-Saussine, 'The shades of grey in the rule of international law' (2003) 62(3) Cambridge Law Journal 538, 538.

66 Kay J citing *(Abbassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 para 106 per Lord Phillips MR.

67 *R (Campaign for Nuclear Disarmament)* (n 63) para 60 per Judge Richard.

68 Perreau-Saussine (n 65) 539 citing [1996] ICJ Reports 226, para 13.

69 *R (Campaign for Nuclear Disarmament)* (n 63) para 40 per Lord Simon Brown.

70 Ibid paras 36, 47 per Lord Simon Brown.

customary international law is part of the common law, the executive must obey it as a matter of law rather than as a matter of choice.[71]

Justice Leggatt found that act of state as a non-justiciability rule had no application in the present case because it was within the capacity of the courts to adjudicate on detention. Lady Hale agreed:

> … including detention as a non-justiciable subject matter would mean expanding the meaning of non-justiciability to situations that have not been covered by that rule previously. It would not only encompass high policy decisions but also aspects of the conduct of military operations, even though their subject matter was entirely suitable for determination by the court.[72]

The adoption of a non-justiciability conception of act of state is therefore concerning. It signals a lack of willingness to adjudicate extraterritorially on matters that are usually central to the judicial role as is indicated in the content of Article 5 itself, which prohibits deprivation of liberty except when a court has decided that the individual should be detained following conviction by a court[73] or in cases where the individual is detained in order to bring them before a competent court to decide the lawfulness of detention.[74] Furthermore, a procedural safeguard enshrined in Article 5(4) is that the lawfulness of detention is contingent upon the ability to be able to have the lawfulness of the detention brought speedily before the court.[75] Invoking act of state as a bar to jurisdiction in cases concerning deprivation of liberty runs contrary to established human rights treaty norms.

2.3 Non-justiciability in tort law

Third, detention is not a non-justiciable issue in English tort law. Lords Mance and Sumption do not assess whether a doctrine of non-justiciability can bar an action in tort despite the fact that the act is justiciable under public law. They do not consider the tort position at all, only relying on public law cases to assess justiciability whilst denying that their non-justiciability doctrine extends to the public law claim. The purpose of tort law claims is not only compensation, but also deterrence and accountability. Immunity from a tort claim obstructs all of the functions of tort. This is not withstanding the fact that a parallel plea under the HRA may exist. False imprisonment is a trespass tort, aiming to protect fundamental rights and challenging the legality of detention is actionable *per se*.[76] While recent cases may have limited the extent to which damages can be awarded in tort when the applicants cannot show any tangible harm from detention, this does not take away from the fact that tort recognises alleged unlawful detention as actionable *per se*.[77]

A disparity can arise between the tort law and HRA position on justiciability – they do not have to hold the same legal position, although in the interests of legal certainty and the rule of law it is beneficial for both bodies of law to align. A disparity often arises in relation to positive obligations arising under Article 2 HRA in the context of public authorities and the police failing to take active steps to protect life, especially where the police are expected to protect a person's life against a third party.[78] However, even the

71 Ibid 540.

72 *Mohammed I* (n 4) para 33 Lady Hale.

73 Article 5(1)(a).

74 Article 5(c) and (d).

75 Article 5(4).

76 Jane Wright, *Tort Law and Human Rights* (Hart 2017) 171.

77 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12.

78 *Van Colle v Chief Constable of Hertfordshire Police* [2008] UKHL 50.

disparity relating to positive obligations and the right to life is closing. *Smith v Ministry of Defence* concerned a duty of care owed by the state to service personnel for failing to provide adequate equipment and training on the battlefield, leading to the death of soldiers while serving in Iraq.[79] The Supreme Court held, dismissing any precedent to the contrary, that common law tort aligned with the position under Article 2 ECHR that a positive obligation existed to protect the life of the soldiers. The interaction between tort and the HRA, between a duty of care owed/claims in negligence versus positive obligations in terms of what public authorities are expected to do to prevent harm to individuals is still contentious, mutable and gives rise to divergence. But as a result of the HRA, the ability to use non-justiciability to block the claim has been seriously undermined.[80] Detention is different. It concerns a trespass tort, false or unlawful imprisonment, and operates to protect fundamental rights. It is always actionable *per se*. Under the applicable Afghan law, the imprisonment was unlawful and justiciable.

In a High Court decision that followed the *Serdar Mohammed* litigation, in *Alseran v Ministry of Defence*, Leggatt in effect rejects that a matter can be non-justiciable under the tort law claim whilst being justiciable under the HRA.[81] Leggatt invokes the principle that Parliament can displace and override a prerogative power with legislation and that act of state, so far as it concerns detention practices, has been overridden by the HRA. Leggatt found there was a basis of liability for the unlawful imprisonments and batteries of claimants under Iraqi law. He considered whether the Crown act of state doctrine applied if the conduct and/or policy in question was unlawful as a matter of English domestic law. Leggatt held that the doctrine does not apply where a particular government policy of a kind which is judicially reviewable is unlawful in English domestic law and therefore outside the scope of the government's legal powers.[82] *Ultra vires* policies and acts have no legal effect and can give rise to the Crown's liability in tort.[83] Being contrary to LOAC and the HRA 1998, such policies were unlawful under English domestic law and therefore ultra vires.[84] It is in practice a rejection of the position adopted by the Supreme Court. The government policy or decision must comply with English domestic law, including the HRA. The dichotomy between private and public law is eroded by Leggatt.

Uglješa Grušić explains the judgment as Leggatt connecting private and public law.[85] But it is important to note that Leggatt goes further: he erodes the dichotomy between the private and public law claim so far as the question of justiciability is concerned. Grušić's explanation is the following:

> It is through this process that a question of tort law and private international law (Is there a tortious claim against the crown which concerns governmental acts committed abroad?) becomes a question of domestic public law (is the government's policy in question judicially reviewable and unlawful as a matter of English domestic law and ultra vires?), which in turn becomes a question of

79 *Smith v Ministry of Defence* [2013] UKSC 41

80 Wright (n 76) 4; *Jain v Trent Strategic Health Authority* [2008] QB 246 [62]: Lady Justice Arden: 'following the 1998 Act courts have now to consider questions of social policy with which they were not previously concerned … it is possible to conclude that the courts will hold that fewer matters are now non-justiciable [in negligence] on the grounds that they involve policy issues'.

81 *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB).

82 Ibid para 76.

83 Ibid para 71.

84 Ibid paras 327–328.

85 Uglješa Grušić, 'Civil claims against the Crown in the wake of the Iraq War: Crown act of state, limitation under foreign law and litigation funding in Alseran v ministry of defence' (2018) 37(4) Civil Justice Quarterly 428–442.

> public international law (Has the government's policy violated [LOAC] and human rights standards?).[86]

Mance and Sumption did not consider the doctrine of non-justiciability in tort law and only relied upon public law cases. Their assessment was of whether the matter was justiciable under public law and therefore speaks to the claim under the HRA. Reiterating Leggatt and the Court of Appeal, a finding of non-justiciability would preclude both actions, and this would be illegitimate because it is well established that this type of detention case is justiciable under the HRA. In *Alseran*, Justice Leggatt rejects the Chinese wall created by the Supreme Court between the private and public law claim, act of state as non-justiciability running parallel with the HRA claim.

2.4 Non-justiciability: disparity between domestic and international cases

Fourth, to label extraterritorial detention as a non-justiciable subject matter is to reinforce the binary between domestic and extraterritorial state action in the common law. As previously stated, the orthodox position is that non-justiciability is considered as a 'nuclear option', and high-policy matters that preclude judicial adjudication have a high threshold, e.g. questions of international significance upon which no consensus in international law or policy has been reached. However, the courts increasingly contradict this orthodoxy along jurisdictional lines. The courts have demonstrated an increased willingness to adjudicate upon matters traditionally understood as matters of high policy in the domestic sphere, while declining to adjudicate upon non-HRA, lower-level matters upon which clear legal and/or policy guidelines exist in the extraterritorial domain.

This results in a disparity of treatment and perceived worth between those situated within the UK's territory as compared with those situated outside of the territory where the rights violation occurs. A binary does exist between the national and the foreigner but is not limited to that: it is a binary between those who stay and those who leave. The introduction of act of state, which creates a presumption that people affected outside UK territory will not have any legal recourse against the UK in British courts, reinforces further this dichotomy.

Miller v Secretary of State for Exiting the EU[87] (*Miller I*) and *Miller v Prime Minister*[88] (*Miller II*) are two noteworthy cases where the Supreme Court found that the prerogatives, despite falling *prime facie* within the high-policy matters of making and leaving treaties and prorogation of Parliament respectively, were nevertheless justiciable. The applicant was furthermore successful in challenging the executive action in both cases. In contrast, non-HRA extraterritorial cases,[89] such as *Bancoult (No 2)*,[90] *Noor Khan*[91] and *Sandiford*,[92] demonstrate the UK courts' unwillingness to review an

86 Ibid 432.

87 *Miller v Secretary of State for Exiting the EU* [2017] UKSC 5.

88 *Miller v Prime Minister* [2019] UKSC 41.

89 In *R (on the application of Noor Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24 no claim was brought under the HRA but instead under the Serious Crimes Act 2017. In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 (*Bancoult (No 2)*); and in *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 the HRA did not apply as a result of jurisdictional issues.

90 *Bancoult (No 2)* (n 89). The appeal which did not relate to the scope of the prerogative power also failed: *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35. There is also litigation on fishing rights being pursued in UK courts: *R (on the application of Bancoult (No 3)) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2018] UKSC 3.

91 *Khan* (n 89).

92 *Sandiford* (n 89)

extraterritorial matter/prerogative, instead labelling it as 'non-justiciable' and, if not non-justiciable, then subject to a severely limited form of review, leaving the applicant with no judicial or alternative remedy. The courts are invoking the language of 'rights' in the domestic context to justify review of archetypal prerogative powers, while placing little weight on the rights of those harmed extraterritorially.

In *Bancoult (No 2)*,[93] the House of Lords held that the prerogative power to expel the indigenous population of the Chagos Islands was non-justiciable. The Chagos islands were a dependency of Mauritius when it was ceded to the UK by France in 1814 and until 1965 were administered as part of that colony. In 1966 the UK government agreed to allow the USA to use the largest of the Chagos Islands, Diego Garcia, as a military base. The UK therefore made the British Indian Ocean Territories (BIOT) Order 1965 SI No 1920 which, under the Colonial Boundaries Act 1895, detached the Chagos islands from the colony of Mauritius and constituted them a separate colony known as BIOT.[94] The order created the office of Commissioner of BIOT and conferred upon him power to 'make laws for the peace, order and good government of the Territory'. Under these powers the commissioner for BIOT made the Immigration Ordinance 1971. Section 4 of the Ordinance made it unlawful for a person to be in the BIOT without a permit and empowered the Commissioner to make an order directing that person's removal. Between 1968 and 1973 the UK government procured the removal and resettlement of the Chagossians. The UK paid some compensation for the harm suffered by the displaced Chagossians.[95] Litigation begun in 1998 for the declaration that Immigration Ordinance 1971 was void was successful, and the Commissioner revoked the ordinance.[96] However, following an examination of the feasibility of resettling Chagossians to the islands, including discontent from the USA, the immigration controls were reintroduced by section 9 of the Constitution Order and an Order in Council (Immigration Order) in 2004. Chagossians needed immigration consent even to visit the islands. The current litigation challenged the 2004 order.

The judgment begins by acknowledging that, as BIOT was ceded to the Crown, the executive has a prerogative power to legislate for the territory,[97] and it was for the court to determine the limits of that power. Lord Hoffmann found that a prerogative Order in Council was primary legislation and not subordinate[98] but was not the same as an Act of Parliament because it was not democratically accountable and was judicially reviewable on the grounds of legality, irrationality and procedural impropriety.[99] However, he found the proposition that the Crown did not have power to remove an islander's right of abode in BIOT 'too extreme'.[100] For him, there was 'no basis for saying that the right of abode was in its nature so fundamental' that the Crown could not touch it.[101] Hoffmann rejected the argument that the powers of the Crown were limited to legislation for the 'peace, order and good government' of the territory, and therefore for the benefit of the

93 *Bancoult (No 2)* (n 89).

94 The inhabitants of BIOT were UK citizens and did not lose their UK citizenship when Mauritius became independent in 1968.

95 *Bancoult (No 2)* (n 89) paras 11 and 13.

96 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

97 *Bancoult (No 2)* (n 89) para 31 per Lord Hoffmann citing *Halsbury's Laws of England* (4th edn, LexisNexis Butterworths 2003 reissue) vol 6, para 823.

98 Ibid para 34.

99 Ibid para 35.

100 Ibid para 42.

101 Ibid para 45.

inhabitants.[102] Where there is a conflict of interests, the Crown is entitled to legislate in the interests of the UK.[103] In terms of judicial review, it is not irrational to deny the right of abode on the grounds that it is uneconomic[104] and was not in the interest of UK security.[105]

Lords Rodger and Carswell decided against the applicants on the grounds that the Colonial Laws Validity Act of 1865 ousted the jurisdiction of English courts to review the scope and exercise of powers of colonial government and that the order in question was an example of such a power. However, Lord Rodgers considered whether the order in council was reviewable and, although agreeing with Hoffmann that prerogative orders may be reviewable *per se*, thought that this order in council was not justiciable insofar as considering the question of whether it was made for the 'peace, order and good government of the Territory'. Parliament would have to intervene if it felt that the power had been exercised incorrectly.[106] He agreed with Lord Hoffmann that the order was not irrational on economic and security grounds.[107] Arguments based on the legitimate expectation created by the 1998 litigation were rejected.[108] The case testifies to the frigidity with which each branch of governance confronts its colonial past. This frigidity is a hallmark of the colonial mindset, which is operationalised through the prerogative power.

Noor Kahn concerned the targeted killing by a drone operated by the US Central Intelligence Agency (CIA) of 40 people attending a peaceful council of trial elders including the applicant's father.[109] The strike was facilitated by Government Communications Headquarters (GCHQ) intelligence. The claimant argued that the lack of a formulated legal policy and practice in handing over intelligence to the CIA involved requiring GCHQ officers to encourage and/or assist the commission of murder.[110] The courts found that the case was non-justiciable because, in the course of adjudicating upon the actions of the UK, it would be necessary to make a statement on the legality of action of the USA. Lord Justice Laws found that:

> ... a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood … by the US as a condemnation of the US … What matters is that the findings would be understood by the US authorities as critical of them.[111]

However, the implicit condemnation of another state's actions does not take away from the fact that it is the lawfulness of the UK's inaction, according to UK law, that is under scrutiny. The latter reasoning has in the past resulted in a successful action against the UK for failing to make the USA return a prisoner of war from a US base in Afghanistan to a British base in Iraq to prevent inhumane and degrading treatment.[112] The Joint Committee on Human Rights has since expressed grave concerns about the transparency

102 Ibid paras 46–47.

103 Ibid para 49.

104 Ibid para 54.

105 Ibid para 57.

106 Ibid para 109 per Lord Rodgers.

107 Ibid paras 112–114.

108 Ibid paras 59–61 per Lord Hoffmann.

109 *Khan* (n 89).

110 Contrary to ss 44 and 46 of the 2007 Act.

111 *Khan* (n 89) para 37.

112 *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48, para 70 Lord Kerr,

of procedures in UK targeted killings.[113] The scale of unaccountable UK targeted killings has been raised as a matter of concern by the All Party Parliamentary Group on Drones. To find this subject matter non-justiciable on the grounds that it would mean inadvertently criticising the conduct of another state illustrates a disregard for the individuals affected.

In *Sandiford* the courts found the decision of the Secretary of State to withhold legal aid for a final appeal by a British citizen convicted of drug smuggling and sentenced to death in Indonesia reviewable because it did not raise real issues of foreign policy.[114] But they could only review the Secretary of State's decision in accordance with their published guide. The *Support for British Nationals Abroad: A Guide 2007* provided that the UK government could not give legal advice or start legal proceedings on behalf of nationals facing capital punishment abroad. It could provide a list of local interpreters and lawyers but could not offer any financial assistance. The applicant sought to challenge the blanket nature of the policy. The courts did not find this policy irrational.[115] There was a financial justification for not providing funding because there were a number of death penalty cases arising. Despite refusing to criticise the blanket ban on funding, Lords Carnwath and Mance stated that 'logic and consistency call for an urgent review of the policy as it applies to Sandford'.[116] The mitigating factors in her case included her age (she was 57) and that she had mental problems, no previous record, had cooperated with the police to bring to justice members of the drug syndicate, the sentence was disproportionate, and the fees for the lawyer were relatively cheap.[117] Further, 'under the pre-2007 policy, the Foreign Office did not experience real difficulty in controlling and limiting the financial exposure which it incurred in a few exceptional cases'.[118] This case was 'extreme' in terms of the injustice that would accrue as a result of the lack of funding. But this appraisal did not affect the outcome which was to not award financial help to *Sandiford*.

Cases that do not fall within the jurisdiction of the HRA and concern executive exercise of the prerogative abroad illustrate the deference of the courts towards the executive. Even when fundamental rights are at stake, such as the right to life – the right not to be assassinated, the right not to be subjected to the death penalty – and the right to be able to return to your home.[119] The re-emergence of act of state in the twenty-first century in cases falling under the HRA, with an unforeseen potential as an enabler of unchecked executive action, signals a lack of empathy for the extraterritorial individual that is reminiscent of the colonial mindset.

3 Deference in the public law claim: act of state and the decline of international law adjudication

Reinstatement of act of state marks a departure from the increasingly expansive approach adopted by the UK courts to extraterritorial human rights adjudication. While act of state is confined to the private law claim and not a ban on an extraterritorial action under the HRA, the public law case accompanying the private law case, both handed down on the

113 Joint Committee on Human Rights, 'Government's policy on use of drones for targeted killing' (May 2016) <https://publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/57402.htm>.

114 *Sandiford* (n 89) para 65.

115 Ibid para 66.

116 Ibid para 74.

117 Ibid para 75.

118 Ibid.

119 See e.g. *Loizidou v Turkey (preliminary objections)* (1996) 23 EHRR 513, (1997) 23 EHRR 513, (1998) 26 EHRR CD 5, HRCD 732

same day and both pertaining to the case of *Serdar Mohammed*, demonstrates a change in judicial attitude towards the extraterritorial application of human rights in armed conflict. The courts are less willing to question the extraterritorial actions of the executive even when no clear legal authority exists for their action or arguably when the law expressly prohibits the action. The judgment also reveals a lack of willingness by the court to enforce or clarify international law obligations through the HRA.

Prior to the Supreme Court's *Serdar Mohammed* judgments, UK courts adopted an increasingly expansive approach to the extraterritorial application of human rights. In 2013, in *Smith v Ministry of Defence*, the Supreme Court confirmed that the HRA extended to securing the protection of the right to life, under Article 2 ECHR, to members of the armed forces when they were serving outside its territory in a case where British soldiers alleged they were killed in Iraq as a result of inadequate equipment.[120] This resulted in a successful claim in negligence against the state. The Supreme Court accepted the test of extraterritoriality adopted by the ECtHR in *Al Skeini v UK* of 'state agent authority and control' which enabled the jurisdiction of the ECHR to be triggered when one state agent breached the rights of another individual.[121] However, the Supreme Court went further than the ECtHR in extraterritorial accountability insofar as it was the first case in which armed forces of a member state claimed extraterritorial rights under the ECHR, and the court imposed on the state positive obligations to protect the right to life extraterritorially. This was not a matter of merely questioning the legality of a particular use of force or requiring an investigation to be carried out into the death.[122]

Al-Saadoon & Others v Secretary of State for Defence[123] concerned a number of claims relating to British military involvement in Iraq between 2003 and 2009, including ill-treatment, unlawful detention and unlawful killing of Iraqi civilians. The High Court found that the HRA could extend to situations where control was exercised through the use of physical force alone.[124] The Court of Appeal applied a more limited approach but with the same outcome: that ECHR accountability extended to unlawful killing. However, in order for jurisdiction to be established, the applicant had to demonstrate 'a greater degree of power and control than that represented by the use of lethal force . . . alone':[125] for example, being a detainee or because some of the public powers were exercised by the member state in Iraq, e.g. maintaining peace and security. The fact that the HRA was applicable in a case where someone was killed by UK armed forces in an overseas military intervention represented an expansive approach to extraterritoriality.

Serdar Mohammed was the first time that the ECHR would apply to military intervention in Afghanistan. It would provide a blueprint for other Council of Europe states and the ECtHR in deciding upon the application of the ECHR to internationalised NIAC and would represent a significant expansion of extraterritorial adjudication. An 'internationalised' NIAC is widely used to denote multinational military interventions taking place in one state's territory between multiple state and non-state actors. It is distinguished from a NIAC because of the involvement of international states, and it is

120 *Smith* (n 79).

121 This was a departure from the House of Lords decision: *R (on the application of Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 where the courts decided that the ECHR would apply extraterritorially only when the member state exercised 'effective control' over the territory and was in a position to ensure the full range of ECHR protection following *Bankovic v Belgium* (2007) 44 EHRR SE5.

122 See e.g. *Al Skeini v UK* (2011) 53 EHRR 18; *Jaloud v Netherlands* [2014] ECHR 1403.

123 *Al-Saadoon and others v Secretary of State for Defence* [2016] EWCA Civ 811.

124 *Al-Saadoon and others v Secretary of State for Defence* [2015] EWHC 715 (Admin), para 95.

125 *Al Saadoon CA* (n 123) para 69.

differentiated from an international armed conflict (IAC) because of the involvement of non-state actors and the centralisation of conflict in one territory. While traditionally only human rights regulated detention in NIACs, and LOAC regulated detention in an IAC, whether or not the more permissive LOAC regime should regulate detention in an internationalised NIAC remained (and remains) a controversial question. The ECHR only permits detention on seven exhaustive grounds.[126] Internment was not permitted in the absence of a derogation.[127] But, in light of the exigencies of NIACs, many argue that it should be allowed as long as there is a legal basis for it and the proper procedural safeguards are in place.[128] Among those who take this position, it is a contentious question as to whether LOAC can be a legal basis for detention in NIACs.[129] The main question which the UK courts had to consider in the public law claim under the HRA was whether they should apply human rights standards to the exclusion of LOAC in detention in Afghanistan and prohibit detention that did not fall within any of the exceptions listed in Article 5. In different ways, all of the courts were reluctant to find that human rights could not accommodate – at least partially – the detention of Serdar Mohammed, and the Court of Appeal and Supreme Court were reluctant to rely on human rights standards, instead focusing on LOAC and UNSCRs respectively. But the Supreme Court's approach was significant in the extent of the deference it demonstrated to the executive.

Also in question were more abstract questions, such as the extent to which domestic courts could contribute to the development of international law in this unclear area of law and the point at which domestic court decisions could become a source of international law. If the courts were to resolve not to interpret the HRA through the lens of LOAC in a NIAC, and instead prohibit internment, they would be applying the *status quo* rather than contributing to the development of international law. But commentators believed that, at least to a certain extent, and with all procedural safeguards in place, internment should be permitted in the more complex forms of NIACs. The main question was whether human rights standards (prohibition on internment) should apply to the exclusion of LOAC (circumstances in which internment is permitted) in detention cases in Afghanistan.

The High Court and Court of Appeal in *Serdar Mohammed* found a violation of Article 5 ECHR in the case of an Afghan detained by the UK for longer than 96 hours. The High Court and Court of Appeal reached this decision primarily by engaging in an adjudication of the human rights and potential LOAC rights for determining the outcome. The Supreme Court arrived at the decision that indefinite internment could potentially be permitted under a UNSCR that stated that member states were authorised to do whatever was 'necessary for imperative reasons of security'.

126 'Guide on Article 5 of the Convention – right to liberty and security' (European Court of Human Rights, updated 31 December 2019) 11, paras 25–26. But note comments on international armed conflict at 11 para 27: 'As regards detention taking place during an international armed conflict, the safeguards under Article 5 must be interpreted and applied taking into account the context and the provisions of international humanitarian law' citing *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014).

127 Ibid. See e.g. Gentian Zyberi and Anna Andersson, T*he 'Legal Pluriverse' Surrounding Multinational Military Operations* (Oxford University Press 2020) 148.

128 See e.g. Lawrence Hill-Hawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016).

129 See, generally, the discussion on *EJIL:Talk!* which provides a variety of positions on this matter. A good starting point is here: Lawrence Hill-Cawthorne and Dapo Akande, 'Locating the legal basis for detention in non-international armed conflicts: a rejoinder to Aurel' <www.ejiltalk.org/locating-the-legal-basis-for-detention-in-non-international-armed-conflicts-a-rejoinder-to-aurel-sari/>.

The Supreme Court decision creates a worrying precedent. First, the majority found that the relevant UNSCRs could potentially authorise detention in Afghanistan indefinitely using the wording that the member states were authorised to do what was 'necessary for imperative reasons of security'. Although UNSCRs are a source of international law,[130] the Supreme Court has in effect rejected substantive international law in favour of wide-reaching and ill-defined powers accorded to states by the Security Council. Contrary to the High Court and Court of Appeal, the Supreme Court concluded *obiter dicta* that there was a right to detain under LOAC treaty and customary law in NIACs but, ultimately, did not rely on the essential question of the relationship between two significant bodies of international law, LOAC and human rights. Instead they pointed to UNSCRs to condone the decisions of the executive. The Supreme Court then decided that Article 5 ECHR could accommodate exceptional grounds of detention when authorised by UNSCRs.

3.1 The case: human rights, LOAC and UNSCRs

Serdar Mohammed was detained for 110 days from April to July 2010. The states taking part in the ISAF had agreed upon detention for up to 96 hours in SOP 362 before the detainee had to be transferred to Afghan authorities with limited exceptions to this rule (including if a delay arose because of an inability to transfer the prisoner). Afghan domestic law permitted detention for up to 72 hours. Justice Leggatt in the High Court had split the period of detention into three different timeframes. The first timeframe consisted of the first 96 hours of detention (ISAF policy deadline before detainee had to be transferred to Afghan authorities). Justice Leggatt argued that he was bound by the *Al Jedda* House of Lords decision wherein it was stated that, where a UNSCR and human rights conflict, the UNSCR trumps the human right and that the UNSCR constituted a binding obligation.[131] Leggatt then accepted that the UNSCR gave authorisation to detain but not outside the ISAF policy (96 hours) or the Afghan criminal justice system (72 hours).[132]

However, he found the requirements of the ISAF policy were compliant with the exception to prohibition against deprivation of liberty under Article 5(1)(c) ECHR – detention 'for the purpose of bringing him before an Afghan prosecutor or judge' and that it cannot have been a coincidence that the four-day limit used by ISAF was compliant with ECtHR jurisprudence on this matter.[133] In conclusion, 'the applicable UNSCR authorised detention by UK armed forces participating in ISAF only for such time as was necessary to deliver the detained person to Afghan authorities, and ISAF's policy was within the scope of this authorisation'.[134] Justice Leggatt found that the 'applicable UNSCRs conferred on UK armed forces participating in ISAF authority to detain people where this was considered necessary to fulfil ISAF's mandate'.[135]

The second timeframe was from 11 April to 4 May 2010, during which time Serdar Mohammed was held for intelligence purposes, and the third period was when Serdar Mohammed was waiting to be transferred to Afghan authorities from 4 May to 25 July 2010. Justice Leggatt applied human rights standards to conclude that detention for

130 See e.g. Stefan Talmon, 'The Security Council as world legislature' (2005) 99(1) American Journal of International Law 175.

131 *Mohammed HC* (n 9) para 211.

132 Ibid 219.

133 Ibid paras 323–324, citing *Brogan v UK* (1988) Series A, no 145-B, 11 EHRR 117, para 47.

134 Ibid para 331.

135 Ibid paras 227, 418.

intelligence purposes was illegal. For the remainder of detention he was held in custody 'on the decision of Ministers and officials without being brought before a judge, and without being given any opportunity to challenge the lawfulness of his detention' and did not fall within any of the exceptional grounds under Article 5.[136] In terms of the application of LOAC, he found that, even though it was possible for LOAC to be used in the interpretation of human rights if a state derogated from the pure application of human rights, he was not convinced that LOAC could 'provide a legal basis for detention in situations of non-international armed conflict'.[137]

The government appealed the decisions on the second and third period. Since the High Court decision, the ECtHR had handed down *Hassan v UK*, which was significant insofar as it confirmed that states did not have to derogate from the ECHR in order to interpret human rights, and in particular Article 5, through the lens of LOAC, thereby allowing detention without charge in specified circumstances.[138] This constituted an exception to what had previously been construed as an exhaustive list of grounds of detention. The judgment strictly concerned IACs and not NIACs. The Court of Appeal accepted that human rights standards could be interpreted through the lens of LOAC without a derogation. But it reasoned that *Hassan* could be extended to the present case only if it could be confirmed that LOAC provided a legal basis for detention in NIACs, thereby accepting the *prima facie* position that the detention was illegal on the face of the HRA. The Court of Appeal could not find a legal basis for the detention beyond 96 hours in the UNSCRs, Afghan law, or LOAC, despite the very detailed consideration of both treaty and customary law when considering the latter. Therefore, under the HRA, the detention was illegal. The Court of Appeal could also not point to any English legislation that allowed for a detention policy that departed from the other legal frameworks and intimated that this may have been enough to make the detention non-arbitrary. The Court of Appeal, unlike Justice Leggatt, found that act of state was not applicable in the present case and that the claimants were eligible for a remedy in tort.

The Supreme Court decision takes a different turn. The majority in *Serdar Mohammed* found that there was a breach of Article 5 insofar as he was detained for intelligence purposes from 11 April to 4 May 2010. However, of that majority, many agreed that if it could be argued that the detainee was held for a simultaneous purpose, for 'imperative reasons of security', then the detention could be labelled as legal.[139] The Supreme Court held that there was no breach while he was waiting to be transferred to Afghan authorities from 4 May to 25 July 2010[140] because during this time he was being held for 'imperative reasons of security' as well as for logistical reasons.

The UK had to pay compensation so far as the duration of the detention (including any detention pursuant to his conviction by a court in Afghanistan) was prolonged by his detention for intelligence purposes.[141] Doubts were expressed as to whether any overall detriment had been suffered because he would have been transferred and detained to the Afghan authorities after the initial 96 hours, and this would impact reward of damages.[142] It is worth mentioning the decision on the conditions of detention. There was a breach

136 Ibid paras 335–337.

137 Ibid paras 288–294.

138 *Hassan* (n 126).

139 *Mohammed II* (n 4) paras 86–89 per Lord Sumption; para 198 per Lord Mance.

140 Ibid para 76 per Lord Sumption (with whom Hale agrees); para 144 per Lord Wilson.

141 Ibid para 110 per Lord Sumption.

142 Ibid para 193 per Lord Mance.

of the procedural obligation under Article 5(4) as there was 'insufficient institutional guarantees of impartiality' because the reviewing authority was not independent of those responsible for authorising the detention under review,[143] and there was no participation of the detainee in the review process.[144] Lord Mance in the Supreme Court did not agree there was a breach of Article 5(4) because he believed that the detainee's participation would not have made a difference to his detention.

3.2 UNSCR AUTHORISATION: 'NECESSARY FOR IMPERATIVE REASONS OF SECURITY'

The Supreme Court found that the relevant UNSCRs authorised detention beyond the 96-hour period using the wording that the member states were authorised to do what was 'necessary for imperative reasons of security'.[145] Lord Sumption stated that the UNSCRs[146] 'could constitute an authority binding in international law to do that which would otherwise be illegal in international law'[147] even if authorisation to breach international obligations was only implicit rather than explicit.[148] The authorisation given to troop-contributing states in Afghanistan by UNSCR to use 'all necessary measures' included detention of members of the opposing armed forces when this was required for imperative reasons of security, even if the detention was contrary to human rights or the laws of armed conflict.[149] This was because of the *jus cogens* nature of UNSCRs.[150] Lord Sumption stated that it would be impractical if a regional human rights system required certain member states of a multinational force to adopt a detention policy that was distinct from the ISAF policy,[151] without acknowledging that it was the UK's departure from the multinational agreement embodied in the ISAF policy that was so contentious.

Lord Sumption relied upon the House of Lords *Al Jedda* decision as authority for the position that UNSCRs could trump human rights.[152] Al Jedda was detained for three years with no charge or trial. The US Secretary of State Mr Powell had adjoined a letter to UNSCR 1546 (2003) expressly authorising internment in Iraq in the interests of what was necessary for the maintenance and security of the region. What was at issue was whether this was a mere power rather than an obligation imposed by the UN Security Council to intern and then whether the UNSCR trumped the human rights position prohibiting internment. The House of Lords found that the UNSCR had peremptory force under Article 103 UN Charter which was thereby an obligation that trumped the ECHR.[153] The ECtHR did not agree with the House of Lords' decision. It found that 'in the event of any ambiguity in the terms of a [UNSCR], the court must … choose the interpretation which is most in harmony with the requirements of the Convention': 'clear

143 Ibid para 105 per Lord Sumption.

144 Ibid para 106 per Lord Sumption. This is following the High Court and Court of Appeal decision; Lord Mance in the Supreme Court did not agree there was a breach of Article 5(4) because he believed that his participation would not have made a difference to his detention.

145 Lord Reed dissenting, with whom Lord Kerr agreed, stated that the continued detention beyond 96 hours for intelligence purposes was illegal. However, he noted that there would be no legal basis under UNSCRs or LOAC for detention beyond 96 hours if he had been detained for imperative reasons of security (para 235).

146 UNSCR 1386 (2011), 1510 (2003), 1890 (2009).

147 *Mohammed II* (n 4) para 25.

148 Ibid para 27.

149 Ibid para 28.

150 Ibid para 24 citing *Behrami v France; Saramati v France, Germany and Norway* (2007) 45 EHRR, paras 148–149.

151 *Mohammed II* (n 4) para 41.

152 Ibid para 20 Lord Sumption.

153 *Al Jedda (No 2)* (n 8).

and explicit language' is required if the UNSCR intends states to take particular measures which would conflict with their obligations under the ECHR.[154] In the application of this principle to the facts of the case, the ECHR did not think that Mr Powell's letter provided clear enough authority for the proposition that states should intern. Instead, they found that it was merely one of the 'broad range of tasks' that could be undertaken, and that the 'terminology appears to leave the choice of the means to achieve this end to the Member States within [the multinational force]'.[155]

Justice Leggatt in the High Court had recognised that he was bound by the House of Lords *Al Jedda* decision rather than the ECtHR's approach, unless and until the Supreme Court departed from that decision. But he felt that the interpretation given by the House of Lords to UNSCR 1546 did not oblige him to read UNSCR 1890 relating to Afghanistan in the same way, as the former UNSCR had a letter attached explicitly condoning internment whereas the latter did not.[156] He found that the UNSCR did provide authority for the detention up to 96 hours upon which ISAF had an agreed policy, but not beyond. Taking into account the principles developed in the ECtHR's *Al Jedda* decision, he concluded that there was nothing in the language of UNSCR 1890 that demonstrated an intention to require or authorise detention contrary to human rights. For him, human rights condoned the detention for up to 96 hours for the purpose of bringing him before a competent judge. But not beyond. The Court of Appeal concludes that the UK is acting outside UNSCR 1890, that the detention beyond 96 hours cannot be attributed to the UN, and that therefore the detention beyond 96 hours is attributable to the UK and within the jurisdiction of the courts to examine.

The reliance on an ambiguously worded UNSCR as the legal basis of detention in the first 96-hour period is unfortunate throughout the *Serdar Mohammed* litigation. Finding that the first 96 hours were compliant with Article 5(1)(c) and referring to the ISAF policy as an indication of an intent of good will would not have been enough to secure the legality of the detention in the first 96 hours because it is unlikely that the ISAF policy would have provided the requisite legal basis for the detention in the absence of its grounding in the peremptory force of the UNSCR. But Afghan law, allowing 72 hours detention, might have enabled a first period of detention to be legal. Justice Leggatt obviously did not want to conclude that the entire detention was illegal and wanted to provide an indication of circumstances of where terrorist suspects could be detained legally in Afghanistan. As Justice Leggatt remarked himself, the House of Lords' *Al Jedda* decision need never have been significant because he could have simply found that there was no conflict between the UNSCR and human rights. The truth of the matter was that internment without a derogation and without a legal basis under the ECHR was illegal. The UK authorities should have put in place legislation that they would intern for a certain justified period as was done in the Northern Irish context,[157] according the policy some democratic legitimacy, although with a democratic deficit arising in relation to the lack of agreement and participation in the law-making process of other participating member states and the Afghan authorities.

Reliance on the UNSCR as a legal basis for some of the detention in the first period opened the door to a much broader interpretation of the UNSCR in the Court of Appeal and Supreme Court litigation. If we consider Perreau-Saussine's analogy between act of

154 *Al Jedda v UK* (2011) 35 EHRR 23, para 102.

155 Ibid.

156 *Mohammed HC* (n 9) paras 213–217.

157 *Mohammed II* (n 4) per Lord Reed para 255.

state and UNSCRs as an authority for member states to have discretion in their actions against foreigners, we can understand the problems with placing so much power in ambiguously worded UNSCRs:

> On this account, the Security Council can authorise the exercise of autocratic acts of state, constrained only by its self-understanding of the laws of war. In effect this treats the [UNSC] as a foreign sovereign whose acts of state fall outside the jurisdiction of British courts.[158] ...
>
> The qualification is worthy of Kafka: here a right to be free from internment is trumped by an obligation to intern.[159]

3.3 The end of a right to liberty?

In the end, the majority conclude that UNSCRs trump human rights norms but also that Article 5 can accommodate the rights-violating UNSCR. In other words, Article 5 has been emptied of its protective force. The executive can point to an ambiguously worded UNSCR as authorisation for indefinite detention in a NIAC.

The Supreme Court found that *Hassan v UK* was authority for the proposition that Article 5 ECHR can be interpreted so as to accommodate an international law power of detention which is not among the permissible occasions for detention listed in Article 5(1).[160] The Court of Appeal had stated that, by parity of reasoning with *Hassan*, 'if detention under the Geneva Conventions in an IAC can be a ground for detention that is compatible with Article 5 ECHR, it is difficult to see why detention under the UN Charter and UNSCRs cannot also be a ground that is compatible with Article 5',[161] thus providing a misguided forerunner for the Supreme Court decision. But in the latter judgment they did not conclude that the UNSCR had authorised detention. The ECtHR would not authorise Article 5 to accommodate indefinite detention. *Hassan* is not authority for this position. The ECtHR on jurisprudence both before and after *Hassan* indicates that the ECtHR follows the position adopted in its *Al Jedda* decision: that UNSCRs will be interpreted to be in conformity with human rights unless 'clear and explicit' language provides otherwise.[162] The act of state doctrine resonates through this aspect of the decision – emptying Article 5 ECHR of its content in relation to the treatment by member states of foreigners (but going arguably further than the original conception of act of state and extending to nationals) situated in a territory. It is hoped that the ECtHR has an opportunity to confirm that *Hassan* is not authority for the proposition that Article 5 can accommodate otherwise rights-violating UNSCRs.

Concluding remarks

One may argue that the introduction of the act of state doctrine merely as a defence to a private claim but not a block to the public claim is a reasonable outcome of limited significance because it will not have practical ramifications on the ability of the complainant to successfully claim a remedy under the HRA, albeit that the applicant may not be awarded as much in damages under the HRA as in tort law.[163] However, the

158 Perreau-Saussine (n 7) 215.

159 Ibid 216.

160 *Mohammed II* (n 4) para 60.

161 *Mohammed CA* (n 11) 162–163.

162 *Nada v Switzerland* (2012) 56 EHRR 18; *Al Dulimi v Switzerland* [2012] ECHR 1638. This is reiterated by Lord Reed in his dissenting judgment.

163 See e.g. *Alseran* (n 81) per Leggatt J, para 836.

judgments are collectively significant on a number of levels and have a number of negative ramifications on rights protection.

First, if the private law claim denotes a practice as non-justiciable whereas the public law claim treats it as justiciable, a disparity in outcome and reasoning between private and public law claims can provide confusion about what is or should be permissible behaviour by the state which is contrary to the rule of law.[164] The rule of law requires the provision of clear and consistent rules, providing stability, foreseeability and a frame one can point to in holding governing powers accountable.[165] The confusion is exacerbated by conceptualising act of state as a principle of non-justiciability in detention cases, rather than a defence in tort, but nevertheless confining its adoption to the private law action.

Second, act of state leaves no protection to extraterritorial applicants in the common law, which is concerning because of the precariousness of the HRA and particularly the extraterritorial application of the HRA in the UK. While at present the claimant is still entitled to protection under the HRA,[166] the extraterritorial application of the HRA is contested. The government at the time of writing has expressed its intention to ensure vexatious claims against the armed forces for their actions abroad are prevented.[167] In these circumstances, the common law will be resorted to in determining what civil claims can be brought. Act of state, whether conceptualised as a defence in tort or a principle of non-justiciability, will leave the claimant with no action for extraterritorial alleged killings or detention under this Supreme Court ruling. Act of state will come to the fore as a decisive principle for defining the jurisdiction of the courts to review extraterritorial executive conduct in the absence of the extraterritorial application of the HRA.

International judicial attention has been placed on the armed conflicts in both Iraq and Afghanistan by the International Criminal Court (ICC). The ICC Pre-Trial Chamber II unanimously rejected the request of the prosecutor to proceed with an investigation into alleged war crimes and crimes against humanity committed in the context of the armed conflict in Afghanistan concerning allegations brought against the USA.[168] However, on 5 March 2020, the Appeals Chamber of the ICC decided unanimously to authorise the investigation.[169]

In the *Report on Preliminary Examination Activities*, the Office of the Prosecutor calls to light allegations against the UK that from 20 March 2003 through 28 July 2009 UK service personnel committed war crimes against persons in their custody in the context of armed conflicts in Iraq including wilful killing/murder.[170] The *Report* assesses whether there is evidence to suggest the UK is unwilling and unable to investigate alleged crimes in conformity with the principle of complementarity. The office considered investigative journalism that brought to light alleged attempts to shield the conduct of British troops

164 Wright (n 76) 14.

165 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 210.

166 See e.g. Campbell McLachlan, 'The foreign relations power in the Supreme Court' (2018) 134 (July) Law Quarterly Review 380 who argues that the balance between the lack of remedy in the tort claim and the ability to claim under the HRA is a good position.

167 *Get Brexit Done: Unleash Britain's Potential* (Conservative and Unionist Manifesto 2019) 52 <https://vote.conservatives.com/our-plan>.

168 *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan* ICC-02/17-33, 12 April 2019, Pre-Trial Chamber II.

169 *Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan* ICC-02/17 OA4, 5 March 2020, Appeals Chamber.

170 Article 8(2)(a)(i)) or 8(2)(c)(i)); as well as torture and inhuman/cruel treatment, and outrages upon personal dignity (Article 8(2)(b)(xxi) or 8(2)(c)(ii)).

in Iraq and Afghanistan from criminal accountability.[171] It further noted the intent by the UK government to create a statutory presumption against prosecution of personnel for alleged offences committed outside the UK more than 10 years previously, and which have been the subject of a previous investigation,[172] which would include investigations in Afghanistan, Iraq and Northern Ireland. The invocation of the act of state doctrine, and parallel expansive reading of UNSCRs, is in effect the court's retreat from judicial scrutiny of these conflicts, except in cases of alleged inhumane treatment or torture. This could be construed as an additional indicator that UK institutions are unwilling and unable to detect, scrutinise and hold relevant personnel responsible for systemic rights violations in overseas conflicts, especially in vulnerable states hosting proxy wars between multinational actors. Act of state is a white flag in the battlefield of judicial warfare: the courts will not operate under the assumption that executive action against those harmed extraterritorially is justiciable. The HRA decision reinforces this element of surrender by the courts to executive decisions.

Empire is alive and well: act of state is one vehicle through which it is manifested. But it is the colonial mindset, characterised by an ambivalence towards the extraterritorial, which is the legacy of empire.

171 The Office of the Prosecutor, *Report on Preliminary Examination Activities 2019* (International Criminal Court, 5 December 2019) para 170 <www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf>.

172 Ibid para 173.

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Foreign act of state and empire

Courtney Grafton

Abstract

The judicial restraint limb of the foreign act of state doctrine is presented as a time-worn doctrine dating back to the seventeenth century. Its legitimacy is indelibly wedded to its historical roots. This article demonstrates that this view is misguided. It shows that the cases which are said to form the foundation of the judicial restraint limb primarily concern the Crown in the context of the British Empire and are of dubious legal reasoning, resulting in a concept trammelled by the irrelevant and the obfuscating. It has also unnecessarily complicated important questions relating to the relationship between English law and public international law. This article suggests that the judicial restraint limb of the foreign act of state doctrine ought to be understood on the basis of the principle of the sovereign equality of states and conceptualised accordingly.

Keywords: foreign act of state; non-justiciability; British Empire.

Introduction

> Rules and practices created as servants of the exigencies of Britain's expanding empire need to be re-evaluated in order to see whether the principles that underlie those rules remain relevant today.
>
> Campbell McLachlan, *Foreign Relations Law* (n 2) at xxi.

In general terms, the foreign act of state doctrine comprises two limbs. The first limb is of a hard-edged nature according to which an English court will recognise and not question the effect of legislation and executive acts of a foreign state which take place or effect within the foreign state's territory (hereinafter referred to as 'municipal law act of state').[1] In broad terms, this limb supports a result dictated by the ordinary operation of the rules of private international law.[2] The second limb provides that it is 'inappropriate' for the

1 *Belhaj v Straw* and *Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3, [2017] AC 964 [121]–[122], [146].

2 Campbell McLachlan, *Foreign Relations Law* (Cambridge University Press 2014) 524. The rules of private international law are not wholly analogous because private international law does not require an uncritical application of foreign law. It allows the forum court to decline to apply a foreign law on the basis that it is contrary to public policy.

courts of the UK to resolve certain issues because they involve 'a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it'.[3] This article is largely concerned with the latter limb, sometimes referred to as a principle of non-justiciability.[4] However, this article characterises the limb as one of judicial restraint because its application is a matter of discretion,[5] as recognised by the UK Supreme Court in *Belhaj*,[6] 'in that it applies to issues which judges decide that they should abstain from resolving'.[7] The application of the limb results in a substantive bar to adjudication.[8]

Part 1 of this article offers a deliberative explanation of the historical context of the cases which are said to form the foundation[9] of the judicial restraint limb in an effort to 'liberate us from the tyranny of the old, from the sway or hold of the past'.[10] The method adopted is one of factual and legal disaggregation. There has been the occasional advocate for disaggregation in the context of the foreign act of state doctrine. Commenting in 1943, F A Mann lamented the notion that 'foreign acts of state are entitled to some kind of sacrosanctity'.[11] He argued that 'its very generality and vagueness involves obvious dangers. What is required is … specialization.'[12] However, legal disaggregation in the absence of factual disaggregation is of limited use. Indeed, legal disaggregation must be informed by factual disaggregation: as Milsom observed, 'neither in the single case nor in the mass and over the centuries are the law and facts so separate that either can be seen as the fixed background to an examination of the other'.[13] In the context of the judicial restraint limb, it is clear that this exercise is necessary.

3 *Belhaj* (n 1) [123] (Lord Neuberger).

4 It is generally accepted that an issue is justiciable if it is 'proper to be examined in a court of justice'. See Bryan A Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014). See also G Marshall, 'Justiciability' in A G Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 265, 267–268. Lord Sumption described 'non-justiciability' as a 'treacherous word' in *Rahmatullah v Ministry of Defence and another* [2017] UKSC 1, [2017] AC 649 [18].

5 F A Mann observed that 'a finding of non-justiciability involves a very special responsibility and is certainly not a matter of discretion'. See F A Mann, *Foreign Affairs in English Courts* (Clarendon Press 1986) 69.

6 Lord Mance, Lord Neuberger (with whom Lord Wilson agreed) and Lord Sumption (with whom Lord Hughes agreed) each gave detailed judgments in *Belhaj*. Lady Hale and Lord Clarke agreed with the reasoning of Lord Neuberger, thereby establishing his judgment as the *ratio* to the extent of any disagreement.

7 *Belhaj* (n 1) [151] (Lord Neuberger). To this end, Lord Neuberger directs that judges should 'be wary of accepting an invitation to determine an issue which is, on analysis, not appropriate for judicial assessment'. See ibid [144]. See also ibid [40] (Lord Mance).

8 Ibid [144] (Lord Neuberger). See also James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 70.

9 In *Belhaj,* Lord Neuberger and Lord Sumption substantiated the judicial restraint limb on the basis of six cases, all discussed in this article. See *Belhaj* (n 1) [128]–[129], [234]. (Lord Sumption also relied on *Dobree v Napier* ((1836) 2 Bing NC 781)). Lord Mance did not trace the judicial self-restraint limb in the same manner but instead relied heavily on *Buttes Gas & Oil Co v Hammer (No 3)* [1982] AC 888 (HL) and *Shergill v Khaira* [2015] AC 359.

10 J W F Allison, 'History to understand, and history to reform, English public law' (2013) 72 Cambridge Law Journal 526, 531. The invocation of history to understand and reform the law is an increasingly prominent approach in English public law. See, for instance, the approaches of Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010); M Loughlin, *Foundations of Public Law* (Oxford University Press 2010); and P Craig, 'Proportionality and judicial review: a UK historical perspective' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspective*s (Hart 2017).

11 F A Mann, 'The sacrosanctity of the foreign act of state' (1943) 59 Law Quarterly Review 42, 43.

12 Ibid. See also McLachlan (n 2) 524–525.

13 S F C Milsom, 'Law and fact in legal development' (1967) 17 University of Toronto Law Journal 1, 1.

First, the limb is increasingly defined by its exceptions, including a public policy exception,[14] a commercial exception[15] and an incidental unlawfulness exception.[16] Commenting on the scope of the foreign act of state doctrine in *Yukos v Rosneft*, the Court of Appeal observed, '[t]he important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed'.[17] The problem is that, when the courts increasingly carve out exceptions, it weakens the foundation upon which the doctrine relies.

Second, the judicial restraint limb has become increasingly abstract, rendering the limb incapable of reflecting significant normative differences between factual situations. When a court is tasked with deciding a case, it characterises the facts at various levels of generality.[18] The level of abstraction of facts informs the norm articulated. On occasion, subsequent judges rely on norms articulated in prior cases to craft a more general norm.[19] However, a norm will be recognisable as too abstract whenever its enunciation requires us to mischaracterise or ignore the facts of the prior cases which were central to its establishment.[20] In applying the judicial restraint limb today, the courts mischaracterise or ignore the facts of cases integral to the development of the judicial restraint limb. This article will seek to demonstrate that factual and legal disaggregation is necessary in order to delineate the contours of this 'protean' conceptualisation of restraint.[21]

The exercise of disaggregation in Part 1 will demonstrate that the cases which are said to form the foundation of the judicial restraint limb concern the actions of the Crown in the context of the British Empire – i.e. a Crown act of state. A Crown act of state is an act which is inherently governmental in nature, committed outside the UK with the prior authority or subsequent ratification of the Crown in the conduct of the Crown's relations

14 The judicial restraint limb does not apply to acts which are in breach of fundamental principles of public policy (*Oppenheimer v Cattermole* [1976] AC 249 (HL) 277–278) or serious violations of international law (*Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883 [29] (Lord Nicholls)).

15 The judicial restraint limb only applies to sovereign or *jure imperii* acts and not to commercial or other private acts (*Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855, [2014] QB 458 [92]–[94]).

16 The judicial restraint limb 'does not apply … simply by reason of the fact that the subject matter may incidentally disclose that a state has acted unlawfully. It applies only where the … unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it'. See *Belhaj* (n 1) [240] (Lord Sumption). This exception is most clearly articulated in the case of *WS Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990) 493 US 400.

17 *Yukos* (n 15) [115].

18 Julius Stone, 'The *ratio* of the *ratio decidendi*' (1959) 22 Modern Law Review 597, 603.

19 For example, this was the approach adopted by Lord Neuberger in *Belhaj* (n 1) [128]–[130].

20 Relatedly, Eugen Ehrlich has observed that norms can 'become so general and so abstract, by the uninterrupted process of extension and of enrichment of their context in the course of the millennia that … [the norms] function in situations for which they were not created, and to which therefore they were not adapted'. See *Fundamental Principles of the Sociology of Law* (first published 1936, Routledge, Taylor & Francis Group 2017) Part VI.

21 Lord Mance admitted that, in re-reading the judgment in *Belhaj*, he is 'conscious that [the case] might too be described as protean'. See Lord Mance, 'Justiciability' (40th Annual F A Mann Lecture at Middle Temple Hall, London, 27 November 2017) 10 <https://www.supremecourt.uk/docs/speech-171127.pdf>.

with other states or their subjects.[22] The Crown act of state doctrine is intertwined with the exercise of the prerogative powers of the Crown ('making treaties, making peace and war, conquering or annexing territories').[23] Prior to 1985, the courts could not review how the prerogative had been exercised,[24] only the extent of the power and whether a proper occasion for its exercise had arisen.[25] The exercise of the prerogative was 'by definition a non-justiciable matter',[26] and the appropriate forum for control of the prerogative power of the Crown was Parliament.[27] It was in light of this strict separation between domestic and foreign affairs of the Executive that the concept of Crown act of state emerged. It was accepted that acts done 'in foreign parts' were 'beyond the pale (in Kipling's words, "without the law"), and there the Crown has a free hand'.[28] However, the Crown prerogative is of no relevance in foreign act of state cases as the dispute concerns the actions of two foreign states. As Lady Hale remarked in *Rahmatullah* (the first case in which the courts applied the Crown act of state doctrine since the nineteenth century),[29] 'act of state' is used in a 'completely different context' in foreign act of state cases.[30]

Part 2 relies on *Buttes Gas* to formulate a conceptualisation of the judicial restraint limb premised on the sovereign equality of states: judicial restraint should only be exercised where the central issue(s) in the case require the courts to determine the validity of the acts of foreign states arising on the plane of public international law. In other words, the judicial restraint limb should be understood on the basis that there exists 'a sphere of action or transactions between states where redress ought to be sought at the

22 *Rahmatullah* (n 4) [81]. Crown act of state has also been conceptualised as a distinct defence in tort, although in *Rahmatullah* Lady Hale (with whom Lord Wilson and Lord Hughes agreed) was of the view that the foundations upon which such a defence rests are 'very shaky', and Lord Mance (with whom Lord Hughes also agreed) was of the view that it was unnecessarily confusing to suggest that a tort defence exists. See ibid [22], [47].

23 Ibid [15] (Lady Hale). See also [3], [19] (Lady Hale); [56]–[57] (Lord Mance); [96], [101] (Lord Sumption). Lady Hale also observed that the old Crown act of state cases were 'decided against the backdrop of the principle that the "King can do no wrong"'. See, for instance, Chitty's observation in 1820 that 'there can be no doubt that … since the reign of Edward I the Crown has been free from any action at the suit of its subjects' in *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and rights of the Subject* (J Butterworth & Son 1820) 339.

24 Chitty (n 23) 257.

25 Peter Cane, *Administrative Law* (5th edn, Oxford University Press 2011) 272. This general position changed after *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374, where the House of Lords decided that exclusion of the prerogative from judicial review was dependent on the subject matter and nature of the prerogative (rather than the source). However, Lord Roskill observed that prerogative powers 'relating to the making of treaties, the defence of the realm … as well as others' were still exceptions precisely because 'their nature and subject matter are such as not to be amenable to the judicial process'.

26 Amanda Perreau-Saussine, 'British acts of state in English courts' (2007) 78 British Yearbook of International Law 176, 185; Crawford (n 8) 68. Peter Cane argues that the Crown act of state cases which concern justiciability are 'indistinguishable' from the unreviewable exercise of prerogative powers. See 'Prerogative acts, acts of state and justiciability' (1980) 29 International and Comparative Law Quarterly 680, 680.

27 Blackstone highlighted this check on the prerogative: 'lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment … [a]nd the same check of parliamentary impeachment, for improper or inglorious conduct … is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative'. See Blackstone, *Commentaries on the Laws of England* (9th edn, Strahan, Cadell & Prince 1783) 259.

28 William Wade, *Administrative Law* (1st edn, Clarendon Press 1961) 230.

29 *Rahmatullah* (n 4) [18].

30 Ibid. See also [89] (Lord Sumption). Cf. [51] (Lord Mance).

international level rather than through domestic courts'.[31] Such restraint should be exercised not because the English courts are unable to apply international law, but because it would not be appropriate to do so on the basis of the principle of sovereign equality of states.

1 Jurisprudence of empire

It is commonly thought that the origin of the judicial restraint limb is the decision of Lord Chancellor Nottingham in *Blad v Bamfield*,[32] particularly in light of his expansive turns of phrase.[33] However, the inclusion of this case in any discussion of the judicial restraint limb is misguided. The confusion derives from a fundamental misunderstanding of the facts of the case and the relationship between the Chancery and the common law courts in the 1670s.

In the seventeenth century, Danish merchants were granted patents by the King of Denmark to trade in Iceland.[34] The dispute in *Blad v Bamfield* arose as a result of Bamfield and others, British subjects, fishing off the coast of Iceland in 1668, allegedly in breach of a patent to Blad, a Danish subject, for the sole right to trade in that area of Iceland. In response to the alleged breach of the patent, Blad seized Bamfield and others' goods under the authority of the Danish Crown, and the goods were subsequently forfeited by the Danish courts.[35]

Bamfield and others brought several actions against Blad for trespass and trover for the seizure of their goods in the common law courts. Blad subsequently visited England where he was arrested. Blad petitioned the Court of Chancery (i.e. a court of equity) to stay all actions against him on the basis that the seizure was 'a case of state'.[36] Bamfield and others argued that they had a 'right of fishing' in the area and the 'articles of peace' between Charles II and Christian V justified their fishing off the coast of Iceland.[37]

In *Belhaj*, the Supreme Court was of the view that the judicial restraint limb was applied in *Blad v Bamfield*.[38] This is not accurate. Lord Chancellor Nottingham did not exercise judicial restraint: he adjudicated on the acts of a foreign state – i.e. on the seizure by Blad under the authority of the Danish Crown and in respect of the articles of peace. Lord Chancellor Nottingham held that 'never was any cause more properly before the Court than the case in question; first, as it relates to a trespass done upon the high sea ...;

31 Dapo Akande, 'Non-justiciability: reappraisal of Buttes Gas in the light of recent decisions' (British Institute of International and Comparative Law conference on Non-justiciability, Act of State and International Law, London, 15 January 2007) 4.

32 *Blad v Bamfield* (1674) 3 Swan 604, 36 ER 992.

33 See, for instance, *Buttes Gas* (n 9) 932 (Lord Wilberforce); Crawford (n 8) 58; McLachlan (n 2) 540; Matthew Nicholson, 'The political unconscious of the English foreign act of state and non-justiciability doctrine(s)' (2015) 64 International and Comparative Law Quarterly 743, 756–757.

34 Gisli Gunnarsson, 'Monopoly trade and economic stagnation: studies in the foreign trade of Iceland 1602–1787' (1983) 38 Ekonomisk Historiska Foreningen 1, 27.

35 *Blad v Bamfield* (n 32) 605, 992, referring to *Blad's Case* (1673) 3 Swan 603, 36 ER 991.

36 *Blad's Case* (n 35) 603, 991.

37 Ibid 606, 992. The 'articles of peace' were the Articles of Alliance and Commerce between the Most Serene and Potent Prince, Charles the Second, By the Grace of God, King of Great Britain … and the Most Serene and Potent Prince Christian the Fifth, by the Grace of God, King of Denmark (concluded 11 July 1670) ('Articles of Alliance and Commerce').

38 *Belhaj* (n 1) [61] (Lord Mance); [128] (Lord Neuberger); [234] (Lord Sumption).

secondly, as it had relation to articles of peace'.[39] He was of the view that the 'pretence of articles of peace' failed the defendants. Article V of the articles of peace stated:

> ... [i]t shall be lawful for the Subjects of both Kings with their Commodities and Merchandise both by Sea and Land, in time of Peace without licence or safe Conduct General or special to come to the Kingdoms, Provinces, Mart-towns, Ports and Rivers of each other, and in any place therein to remain and trade, Paying Usual Customs and Duties; *Reserving nevertheless to either Prince his Superiority, and Regal jurisdiction in his kingdoms, Provinces, Principalities and Territories respectively.*[40]

In light of Article V, Lord Chancellor Nottingham concluded that 'certainly no case was ever better proved' due to the 'letters patent from the King of Denmark for the sole trade of Iceland; a seizure by virtue of that patent; a sentence upon that seizure; a confirmation of that sentence by the Chancellor of Denmark; an execution of that sentence after confirmation; and a payment of two thirds to the King of Denmark after that execution'.[41] It was only 'after all this' (i.e. his interpretation and application of the articles of peace) that Lord Chancellor Nottingham observed it would be 'monstrous and absurd' to send the case 'to a trial at law'.[42] As such, he granted a 'perpetual injunction' to stay Bamfield and others' 'suit at law' on the basis that he had determined in a court of equity the same legal issues which were at issue in the common law courts.[43] An injunction such as this was not unusual at the time.[44] In fact, the seventeenth century was a particularly acrimonious period between the common law courts and the Chancery, when common law judges were 'disturbed' by the 'capricious granting of injunctions'.[45] F A Mann also acknowledges that *Blad v Bamfield* is exemplary of nothing more than the use formerly made by the Lord Chancellor of his powers of injunction.[46]

If *Blad v Bamfield* is severed from any discussion of the judicial restraint limb, we must then turn to *Nabob of the Carnatic*[47] – the next case (chronologically speaking) on which the judicial restraint limb is said to rest.[48] This case arose in the wake of tumultuous relations between the East India Company and the Nabob of the Carnatic[49] (i.e. an Indian prince, also referred to as a 'glittering puppet' through which the East India Company 'could exercise sovereignty in India').[50] The East India Company and others had assisted the Nabob in various territorial wars in the eighteenth century, during which time the Nabob accrued a substantial debt to the East India Company and private

39 *Blad v Bamfield* (n 32) 605–606, 992.

40 Articles of Alliance and Commerce (n 37) Article V (emphasis added).

41 *Blad v Bamfield* (n 32) 606–607, 993.

42 Ibid 606, 992.

43 Ibid 607, 993.

44 At the time, a party had to seek equitable and legal remedies in separate courts, and it was common to seek a specific remedy from the Lord Chancellor, irrespective of whether proceedings were pending at common law: J H Baker, *Introduction to English Legal History* (4th edn, Butterworths LexisNexis 2002) 109–111.

45 D W Raack, 'A history of injunctions in England before 1700' (1986) 61 Indiana Law Journal 539, 572.

46 Mann (n 11) 'The sacrosanctity of the foreign act of state' 45.

47 *Nabob of the Carnatic v East India Company* (1793) 2 Ves Jr 56, 30 ER 521. See also another report of the same case: *Nabob of Arcot v The East India Company* (1793) 4 Bro CC 180, 29 ER 841. Arcot was the capital of the Carnatic region. For a detailed historical account of the background to this case, see Perreau-Saussine (n 26) 187–191.

48 *Belhaj* (n 1) [128] (Lord Neuberger); [234] (Lord Sumption).

49 Muhammad Ali Khan Wallajah was the Nabob of the Carnatic from 1749–1795.

50 Thomas Babington Macaulay, *Critical and Historical Essays,* vol III (5th edn, Longman, Brown, Green & Longmans 1848) 123.

creditors (including 14 members of Parliament)[51] at rates of interest as high as 25 per cent.[52] In 1781, to pay the debt to the East India Company, the Nabob reluctantly entered into an agreement with Lord Macartney to assign revenue from certain districts of the Carnatic to the East India Company. Thereafter, private creditors sought repayment of their debts from the East India Company out of the revenue it collected on the Nabob's behalf. The Board of Control of the East India Company controversially agreed to repay these creditors on behalf of the Nabob, prompting Edmund Burke to give his celebrated oration in the House of Commons. He remarked that the Nabob's 'debt to the company … forms the foul, putrid mucus in which are engendered the whole brood of creeping ascarides, all the endless involutions, the eternal knot, added to a knot of those inexpungable tape-worms which devour the nutriment and eat up the bowels of India'.[53] And, of the Nabob and others liked him, Burke observed that:

> … these miserable Indian princes are continued in their seats, for no other purpose than to render them in the first instance objects of every species of extortion, and in the second, to force them to become, for the sake of a momentary shadow of reduced authority, a sort of subordinate tyrants, the ruin and calamity, not the fathers and cherishers of their people.[54]

In 1785, the East India Company restored the Nabob to possession of his territories and receipt of the revenue, but private creditors claimed that many of their debts (albeit, 'both doubtful in origin and exaggerated in amount')[55] remained outstanding. Therefore, the Nabob prayed an account to establish that the revenues that had been received by the East India Company on behalf of him should have been more than sufficient to repay the creditors their debts.[56]

The dispute first came before Lord Chancellor Thurlow in the Court of Chancery. The Attorney General argued that the prerogative of making war and peace had been delegated to the East India Company, so the agreements with the Nabob were 'treaties' which could not 'be a subject for the municipal jurisdiction of any Court in the country of either of the contracting parties'.[57] In other words, the East India Company argued that the Court of Chancery could not challenge its decision not to repay any debts it might owe to the Nabob and/or private creditors. Lord Chancellor Thurlow did not indulge this argument, and considered it 'quite a new plea':[58]

> … this plea says, expressly, that *the party has no remedy in any court of municipal jurisdiction whatever* … The plea, therefore, as I take it, is a plea in bar, not a plea to the jurisdiction of a particular court, but of all courts: and a plea to the jurisdiction of all courts, I take to be absurd, and repugnant in terms.[59]

That is, the Lord Chancellor found it an absurd and repugnant contention to argue that either the parties to the agreement or the subject matter of the agreement could bar a plea

51 C H Philips, *The East India Company 1784–1834* (Manchester University Press 1940) 36, 41.

52 Perreau-Saussine (n 26) 187.

53 James Burke (ed), *The Speeches of the Right Hon Edmund Burke*, 'Speech on the Nabob of Arcot's Debts' (speech delivered on 28 February 1785, James Duffy, Sons & Co 1854) 336–337.

54 Ibid 342.

55 Philips (n 51) 37.

56 Or rather, his creditors prayed an account, as the Nabob knew no more of his case 'than of what is passing at Vienna'. See *Nabob of Arcot v The East India Company* (1791) 3 Bro CC 292, 309; 29 ER 544, 553.

57 *Nabob of the Carnatic v East India Company* (1791) 1 Ves Jr 371, 372; 30 ER 391, 392.

58 Ibid 388, 400.

59 *Nabob of Arcot* (1791) (n 56) 301, 549 (emphasis in the original).

in all municipal courts.[60] He also observed that the Attorney General could provide 'no instance … of an issue at all parallel to this' and 'of such general propositions tendered'.[61] Lord Chancellor Thurlow therefore held that the 'the plea was bad in every view'.[62]

This particular case was summarised in two nominate reports: Vesey's Chancery Reports and Brown's Chancery Reports.[63] History has overlooked the latter, despite the fact that it contains much greater detail.[64] This is unfortunate because, in the latter report, we are told that Lord Chancellor Thurlow also queried whether the agreements in question could accurately be described as 'between sovereigns'.[65] He commented that the Nabob was a prince of the Carnatic, one of 'many palatine jurisdictions, which are, as to all subordinate relations … like kingdoms'.[66] In other words, he acknowledged that the matter was of 'inter-imperial origins'.[67]

In 1792, the East India Company put in an answer to address its relationship vis-à-vis the Crown. The Attorney General referred 'to the several charters, letters patent, and acts of parliament, by which they were from time to time invested with the powers … to enter into federal conventions with princes or people that are not Christians … on their own behalf as that of the British nation, as they should see fit …'.[68] The East India Company did not, however, disrupt Lord Chancellor Thurlow's finding on the status of the Nabob (nor could it, as the 'official British view' at the time was that the Carnatic 'possessed no international status').[69]

The final judgment was unfortunately delivered in rushed circumstances.[70] As a consequence, the decision lacked any substantive reasoning. However, the central finding is clear: the court dismissed the bill on the basis that the East India Company was acting on behalf of the Crown,[71] making 'the whole … a political transaction'.[72] In other words, the Court of Chancery exercised restraint on the basis that the East India Company's exercise of the Crown prerogative was inherently political, and as such, not a matter for

60 His concern for a lack of redress is shared by Lord Mance in *Belhaj* (n 1) [107].

61 *Nabob of the Carnatic* (1791) 393, 402.

62 Ibid.

63 In the eighteenth century, reporting was left to the unregulated market. There were often multiple reports of a single case, 'none of which were complete verbatim records of what transpired', but rather summaries of the proceedings 'with varying degrees of accuracy and completeness'. See Peter M Tiersma, 'The textualization of precedent' (2007) 82 Notre Dame Law Review 1187, 1201. See also, Lord Carnwath, 'Judicial precedent – taming the common law' (2012) 12 Oxford University Commonwealth Law Journal 261, 262.

64 For instance, this report was not considered in *Belhaj v Straw* (n 1).

65 *Nabob of Arcot* (1791) (n 56) 304, 550.

66 Ibid 304–305, 550–551.

67 F A Mann, 'The enforcement of treaties by English courts' (1958) 44 Transactions of the Grotius Society 29, 58.

68 *Nabob of Arcot* (1793) (n 47) 180, 841.

69 Lord McNair, *International Law Opinions*, vol 1 (Cambridge University Press 1956) 64.

70 As the court was proceeding to deliver its judgment in 1792, counsel for the East India Company indicated that dispatches were received from Lord Cornwallis, Governor General of Bengal, intimating that a new agreement had been entered into between the Nabob and the East India Company, which rendered the suit unnecessary. The case was adjourned to the next term. On 28 January 1793, when the Lord Commissioners resigned the Great Seal, and immediately before the court rose, counsel for the Nabob declared that 'there was no ground for what had been stated by the [East India Company] concerning a treaty' and prayed judgment. As a consequence, Lord Commissioner Eyre did not give 'the reasons of our judgment fully'. See *Nabob of the Carnatic* (1793) (n 47) 59–60, 522–523.

71 Ibid 60, 523.

72 *Nabob of Arcot* (1793) (n 47) 198, 849.

an English court.[73] In the early 1800s, this was precisely how the case was understood.[74] Today, however, this case is consistently mischaracterised and misunderstood. McLachlan, for instance, argues that *Nabob of Arcot* provides an example of a dispute that the courts would not determine because the central issue involved the determination of the rights and obligations of states arising on the plane of public international law.[75] Such a reading is difficult to sustain. It requires one to recognise the Carnatic as a state, which it was not, and fails to acknowledge that the court was asked to challenge the exercise of the Crown prerogative, not the acts of a foreign state.[76]

In the period after the decision of *Nabob of the Carnatic*, the East India Company drastically expanded its mandate and its territorial reach in India. Whereas in the late eighteenth century the East India Company had focused on revenue collection, by the mid-nineteenth century the East India Company had realised the economic value of India as a market for British goods and for the production of raw materials and agriculture.[77] In 1839 the English courts officially accepted that the East India Company was 'invested with powers and privileges of a twofold nature': those of a merchant and those of the Crown.[78]

In Tanjore, the East India Company had entered into a series of treaties with the Rajah, Shivaji Bhonsle. In the third of such treaties, signed on 25 October 1799, the Rajah 'transferr[ed] sovereignty of his country to the Company'.[79] The ideological justification for doing so at the time was summarised by the historian Edward Thornton, writing in 1842. He observed that this arrangement:

> … was undoubtedly beneficial to the interests of Great Britain; but it is no exaggeration to say that it was far more beneficial to the people of Tanjore. It delivered them from the effects of native oppression and European cupidity. It gave them what they had never before possessed – the security derived from the administration of justice.[80]

In 1855, the Rajah of Tanjore died without a male heir. Upon his death, the East India Company declared the dignity of the Rajah to be extinct and invoked the doctrine of lapse (i.e. the East India Company annexed the property of the Rajah). In response, the eldest widow of the Rajah, who was entitled to his private estate (i.e. 'real estate, cash, jewels, horses, etc')[81] under Hindu law, brought an action in the Supreme Court of

73 Perreau-Saussine suggests that this is one (of three) iterations of the Crown act of state doctrine (and the frankest) (n 26) 191, 252.

74 See the fifth edition of John Comyns and Anthony Hammond, *A Digest of the Laws of England*, vol 8 (Strahan 1822) 58.

75 McLachlan (n 2) 282

76 McNair (n 69) 64.

77 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2004) 150–151.

78 *Gibson v The East India Company* (1839) 5 Bing NC 262, 274; 132 ER 1105, 1110.

79 Treaty with the Rajah of Tanjore, for transferring the sovereignty of his country to the Company in Select Committee on the Affairs of the East India Company: VI (Political or Foreign), *Minutes of Evidence* (House of Commons 1832). See also, H H Dodwell (ed), *The Cambridge History of the British Empire: British India 1497–1858*, vol iv (Cambridge University Press 1929) 361.

80 *The History of the British Empire in India*, vol 3 (WH Allen & Co 1842) 104.

81 *Secretary of State for India v Kamachee Boye Sahaba* (1859) 7 Moo Ind App 476, 523; 19 ER 388, 405.

Madras,[82] no doubt hoping to be a recipient of Mr Thornton's lauded British 'administration of justice'.[83]

The Supreme Court of Madras considered the case a few months after the Sepoy uprising broke out.[84] At the hearing, the East India Company insisted that its treaties with the Rajah and the subsequent seizure were acts which concerned the 'political relations between the East India Company, acting in trust for Her Majesty'.[85] This plea was unsuccessful. The Chief Justice, Sir Christopher Rawlinson, declared that the seizure of the private property of the Rajah 'cannot be considered an act of state'.[86]

The case was appealed to the Privy Council. In the interim period, two important events occurred. First, the administration of British India was placed under the direct authority of the Crown (rather than that of the East India Company).[87] Second, the Sepoy uprising ended. In the course of 18 months, as many as 6000 Europeans had died and hundreds of thousands of Indians (many of them, civilians).[88] The widespread (and exaggerated) reporting of the siege at Cawnpore, where many British women and children were killed (e.g. 'a place … covered with blood like a butcher's slaughter-house'),[89] left many British soldiers outraged. The British troops, in turn, indulged in excessive acts of cruelty, torture and sexual violence. For instance, one British officer at the time described the siege on Delhi as follows:

> … [a]ll the city's people found within the walls of the city of Delhi when our troops entered were bayoneted on the spot, and the number was considerable. … These were not mutineers but residents of the city, who trusted to our well-known mild rule for pardon. I am glad to say they were disappointed.[90]

In light of the coverage by the press, there was 'a national mood of despair and retribution' which resulted in 'almost universal approval in Britain of the often ferocious measures taken to put down the uprising'.[91] It is against this political backdrop that the Privy Council considered *Secretary of State for India v Kamachee Boye Sahaba*[92] – the next case on which the judicial restraint limb is said to rest.[93]

In his judgment, Lord Kingsdown set out a very broad 'general principle'[94] which has caused a great deal of confusion in the centuries since:

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82 The Supreme Court of Madras had jurisdiction over matters involving British subjects and East India Company employees. It did not specifically exclude the local population. See Government of India Act 1800 (39, 41 Geo 3 c79).

83 See (n 80).

84 The uprising commenced on 10 May 1857 and the case was heard in the Supreme Court of Madras on 29–30 September and 1 October 1857.

85 *Kamachee* (n 81) 490, 393.

86 Ibid 504, 398.

87 John Clark Marshman, *History of India* (first published in 1876, Cambridge University Press 2010) 519–520.

88 The latter figure is more difficult to determine. See Douglas Peers, 'The Sepoy Mutiny (1857–1859)' in *The Encyclopedia of War*, vol 1 (Blackwell Publishing 2012).

89 *Illustrated London News* (1857) in Rosie Llewellyn-Jones, *The Great Uprising in India, 1857–58* (Boydell Press 2007) 160.

90 Letter from anonymous British officer (September 1857) in ibid.

91 Dennis Judd, *The Lion and the Tiger: The Rise and Fall of the British Raj, 1600–1947* (Oxford University Press 2005) 87.

92 *Kamachee* (n 81).

93 *Belhaj* (n 1) [128] (Lord Neuberger); [234] (Lord Sumption).

94 *Kamachee* (n 81) 529, 407.

> … [t]he transactions of independent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.[95]

The reference to 'other laws' has been understood as a reference to international law.[96] This is an incorrect interpretation. Lord Kingsdown was referring first to transactions governed by *no* law. This is evident in his judgment. Lord Kingsdown accepted that the East India Company was acting on behalf of the Crown in seizing the property of the late Rajah and then queried the 'character' of the seizure:

> … [w]as it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore …? If it were the latter, the defence set up [i.e. act of State], of course, has no foundations.[97]

In other words, Lord Kingsdown would have adjudicated on the seizure by the East India Company if the act was carried out in accordance with rules of law (i.e. 'under colour of legal title of the property'). It was only if the East India Company sought to act *outside* the law (i.e. 'a seizure by arbitrary power') that he would exercise restraint.

On applying the facts, Lord Kingsdown concluded that 'the seizure was an exercise of Sovereign power effected at the *arbitrary* discretion of the Company, by the aid of military force'[98] carried out 'according to their *own notions* of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts'.[99] Thus, he concluded, 'an act so done, with its consequences, is an act of state over which the Supreme Court of Madras has no jurisdiction':

> … [o]f the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.[100]

In other words, the Privy Council found that it should exercise restraint not simply because the Crown had seized property, but because it had done so in a lawless manner: the seizure was 'beyond the pale (in Kipling's words "without the law")'.[101] In any event, the case did not involve a challenge to the lawfulness of the act of a foreign state: the case concerned a seizure of personal property by the Crown in its own colony,[102] and there existed 'no machinery in existence for the decision of legal disputes between members of the British Commonwealth of Nations'.[103]

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95 Ibid 529, 407.

96 See, for example, *Belhaj* (n 1) [128] (Lord Neuberger).

97 *Kamachee* (n 81) 531, 408.

98 Ibid 537, 410 (emphasis added).

99 Ibid 539, 411 (emphasis added).

100 Ibid 540, 411.

101 William Wade, *Administrative Law* (4th edn, Clarendon Press 1977) 648.

102 Treaty with the Rajah of Tanjore (n 79).

103 F A Mann, 'The enforcement of treaties by English courts' (n 67) 58.

It would, of course, be absurd to apply the reasoning in *Kamachee* to cases in which the judicial restraint limb is said to arise. Consider, for instance, its application to the facts in *Belhaj*: an English court could consider the actions of the USA in detaining a suspect outside its borders if it purported to act in accordance with applicable law, but the court could not consider these same actions if the USA expressed, either directly or indirectly, an intention to act outside the law. Decisions like *Kamachee* give teeth to the notion that 'in the heyday of imperial expansion … judges often seemed to be as executive-minded as the Executive'.[104]

Kamachee also exemplifies why judges should be wary of self-proclaimed general principles. Even though Lord Kingsdown characterised his statement as a 'general principle', it could hardly be considered as such. He cited only two cases to support his statement: *Nabob of Arcot* and *The East India Company v Syed Alley*.[105] The foibles of the former have been discussed in detail above.[106] In the latter case, the Privy Council did interpret and enforce a transaction (i.e., a treaty) between so-called 'independent states' (albeit, not two foreign states) in *favour* of the Crown. The Privy Council held that the treaty in question 'did vest the rights of Sovereignty in the East India Company' such that the treaty and subsequent actions carried out in furtherance of the treaty prevailed over the local law of the Carnatic.[107] In light of its shortcomings, Lord Kingsdown's judgment might have been forgotten had he not couched his statement as a 'general principle'.[108] Instead, his principle was relied upon with vigour in subsequent colonial annexation cases, including in *Cook v Sprigg*[109] – the final colonial case on which the judicial restraint limb is said to rest.[110]

The facts of *Cook v Sprigg* concerned the Crown's annexation of property in the Cape Colony, which had become a British possession in 1814. In 1894, the Prime Minister of the Cape Colony, Cecil Rhodes, annexed the territory that bordered the Cape Colony, Eastern Pondoland, from the Chief of Pondoland, Sigcau.[111] Cook and another, both citizens of the Cape Colony, claimed that Sigcau had granted them 'certain railway, mineral, township, land, forest, trading and other rights' in Eastern Pondoland prior to its annexation.[112] They brought an action to enforce these rights against Sir Gordon Sprigg, who had succeeded Cecil Rhodes as Prime Minister in 1898.

The Supreme Court of the Cape of Good Hope, applying the 'native customs' of Pondoland, held that Sigcau had not created 'legal obligations which could be enforced in a court of law against the Government of Cape Colony'.[113] It therefore found in favour of Sprigg. The claimants appealed. In the Privy Council, Lord Halsbury LC eschewed the discussion of 'native customs', concluding that 'there is a more complete answer': '[t]he

104 S A de Smith, *Constitutional and Administrative Law* (3rd edn, Penguin 1981) 132.

105 (1827) 7 Moo Ind App 555, 19 ER 417.

106 Lord Kingsdown appears to have borrowed a phrase from the pleadings of the East India Company in *Nabob of Arcot* in crafting his 'general principle': 'matters arising from transactions between independent states, are not the proper subjects of municipal jurisdiction'. See (n 47) 188, 844.

107 *Syed Alley* (n 105) 577–578, 430.

108 *Kamachee* (n 81) 529, 407.

109 *Cook v Sir James Gordon Sprigg* [1899] AC 572 (PC).

110 *Belhaj* (n 1) [128] (Lord Neuberger); [234] (Lord Sumption).

111 The British had previously 'informed' Sigcau (and the chief of Western Pondoland) that 'by reason of their inability or unwillingness to maintain peace in their borders, their rule was at an end', but it was the Pondoland Annexation Act that 'consummated' this annexation. See L C A Knowles and C M Knowles, *The Economic Development of the British Overseas Empire*, vol 3 (George Routledge & Sons 1936) 59.

112 *Cook v Sprigg* (n 109).

113 Ibid 573.

taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State'.[114] He paraphrased the *dicta* of Lord Kingsdown to support his conclusion: '[i]t is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer'.[115] He held that such an obligation could not be enforced and dismissed the appeal.[116]

This decision was subject to sustained academic criticism at the time. The authors of the January 1900 edition of Law Quarterly Review observed that the judgment was 'not only uninstructive but perplexing' and neither 'sound nor convenient': it can be read 'only as meant to lay down that on the annexation of territory, even by peaceable cession, there is a total abeyance of justice until the will of the new annexing Power is expressly made known'.[117] William Harrison Moore similarly found it 'startling'.[118]

At its highest level, *Cook v Sprigg* is authority for the proposition that, despite 'the well-understood rules of international law [that] a change of sovereignty by cession ought not to affect private property',[119] the English courts will not adjudicate in respect of an annexation by the Crown and the subsequent denial of private property rights within the Crown's annexed territory.[120] In other words, the case did not involve foreign states, but the Crown in its colony,[121] and the Privy Council opted to apply no law, rather than the relevant rules of international law.[122]

The historical antecedents discussed above are more than just a Tennysonian 'wilderness of single instances':[123] they form the very foundation of the judicial restraint limb.[124] However, from this exercise of disaggregation, it is apparent that these cases should be severed from further discussions of the judicial restraint limb. *Blad v Bamfield* is authority for the proposition that the English courts can interpret the actions of sovereign states. In *Nabob of the Carnatic*, the Court of Chancery was asked to challenge the exercise of the Crown prerogative – not the acts of a foreign state. And neither *Kamachee* nor *Cook v Sprigg* concerned a foreign state at all: the Privy Council was asked to scrutinise Crown actions in a British colony. At best, each of these cases (with the exception of *Blad v Bamfield*) was decided on the basis of the Crown prerogative; at worst, the loose rhetoric of 'act of state' obscured an imperial impetus where the law in its operation was 'paper thin'.[125]

114 Ibid 578.

115 Ibid.

116 Ibid.

117 Frederick Pollock (ed), 'Notes' (1900) 16 Law Quarterly Review 1, 1–2.

118 William Harrison Moore, *Act of State in English Law* (John Murray 1903) 79–80.

119 *Cook v Sprigg* (n 109) 578.

120 Robert Jennings and Arthur Watts, *Oppenheim's International Law,* vol 1 (9th edn, Longman 1996) 368.

121 The incongruence of the *dicta* of Lord Halsbury LC with the facts in *Cook v Sprigg* is recognised by J G Collier in 'Transactions between states – non-justiciability – international law and the House of Lords in a judicial no-man's land' (1982) 41 Cambridge Law Journal 18, 20.

122 *Cook v Sprigg* (n 109) 578.

123 Eirik Bjorge, 'Can unincorporated treaty obligations be part of English law?' (2017) Public Law 571, 572, quoting Lord Tennyson, 'Aylmer's Field' (1793).

124 As set out above, in *Belhaj*, Lord Neuberger and Lord Sumption substantiated the judicial restraint limb on the basis of six cases, all discussed in this article. See (n 1) [128]–[129], [234], although Lord Sumption also relied on *Dobree v Napier*.

125 Thomas Poole, *Reason of State* (Cambridge University Press 2015) 190.

2 The end of empire

It was only as the British Empire shuddered to a halt that the House of Lords exercised judicial restraint in respect of the acts of foreign states. *Buttes Gas* is the subject of extensive learned discussion,[126] much of which this article will not reprise, save to make the observation that the reasoning of Lord Wilberforce has been vehemently criticised. Collier noted, 'with the greatest respect, this sort of judgment is not much contribution to the science of jurisprudence, nor to the law of nations, nor to English law',[127] and F A Mann described the decision as a 'freakish one without value as a precedent'.[128]

The facts of *Buttes Gas* concerned the last vestiges of the British Empire. The underlying dispute arose in the wake of the British decision to withdraw from the Trucial States[129] in 1968[130] (a decision which prompted the US Secretary of State to exclaim, '[f]or God's sake, act like Britain!').[131] The UK had assumed responsibility for the defence of the Trucial States in 1835 to ensure the safety of its ships along the Gulf coast.[132] In 1892 (wary of the encroachment of the French), the British government signed treaties with the various chiefs of the Trucial States. The treaties bound the Trucial States into exclusive political relations with the UK, and the chiefs ceded control of external affairs to the British government.[133] This strategic arrangement allowed the British to establish a '*cordon sanitaire*' to protect British India, and, even when the British government opted to withdraw from India in 1947, it decided to stay in the Gulf in order to protect its oil supply.[134] This arrangement placed the Trucial States 'informally within the British Empire'.[135]

126 See, for instance, Collier (n 121); I A E Insley and Frank Wooldridge, 'The Buttes case: the final chapter in the litigation' (1983) 32 International and Comparative Law Quarterly 62, 81; Martin Bühler, 'The emperor's new clothes: defabricating the myth of "act of state" in Anglo-Canadian law' in Craig Scott (ed), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart 2001) 343–372, 356; and Cameron Sim, 'Non-justiciability in Australian private international law: a lack of judicial restraint' (2002) 10 Melbourne Journal of International Law 102, 110–111.

127 He added that 'on the brighter side, with any luck, the courts will not be troubled again by quarrelsome American oil companies and Arab sheikhs'. See Collier (n 121) 21. See also a stinging criticism of *Buttes Gas* by Rosalyn Higgins in 'International law and the avoidance, containment and resolution of disputes' (1991) 230 Recueil des Cours 273–274.

128 F A Mann, *Foreign Affairs in English Courts* (n 5) 70. F A Mann's uncensored feelings about the case were revealed in a handwritten note in his own copy of *Foreign Affairs in English Courts*: '[i]t was the House of Lords which lacked "judicial restraint"!'. See Lawrence Collins, 'Foreign relations and the judiciary' (2002) 51 International and Comparative Law Quarterly 485, 510.

129 Seven former Trucial States comprise the United Arab Emirates: Dubai, Abu Dhabi, Sharjah, Ajman, Umm al Qaiwain, Fujairah and Ras Al Khaimah.

130 Despite Harold Wilson's desire to remain in the Gulf States, the 1968 financial crisis in the UK caused a 'sudden volte-face' in the Labour government. The UK officially withdrew in November 1971. See Peter Mansfield, *A History of the Middle East* (Penguin 1992) 282.

131 Foreign Office Telegram, Washington to London, 11 January 1968, PREM 13/1999 in W Taylor Fain, *American Ascendance and British Retreat in the Persian Gulf Region* (Palgrave Macmillan 2008) 141. The USA feared that the Soviets would seize the opportunity to establish a presence in the region, threatening the access of the West to Gulf oil.

132 James Onley, 'Britain and the Gulf shaikhdoms, 1820–1971: the politics of protection' (Occasional Paper No 4 ISSN 2072-5957, Center for International and Regional Studies, Georgetown University School of Foreign Service in Qatar, 2009).

133 Agreements with the Trucial Chiefs and also with the Chiefs of Bahrain in British Library India Office Records and Private Papers, IOR/R/15/1/191.

134 James Onley, 'Britain's informal empire in the Gulf, 1820–1971' (2005) 22 Journal of Social Affairs 29, 42. Or as Judge Morgan observed, '[i]n the early 1960's … the Persian Gulf was becoming hot property'. See *Occidental of Umm al Qaywayn Inc v A Certain Cargo* (1978) 517 F2d 1196, 1199.

135 Onley (n 134) 32.

Following the British decision to withdraw, Sharjah and Umm al Qaiwain (UAQ), neighbouring Trucial States, invited bids for oil concessions to their offshore seabeds. Buttes Gas Oil and Co ('Buttes Gas') obtained a concession from Sharjah; Occidental Petroleum Corporation ('Occidental') obtained a concession from UAQ. In 1970, the British political agent in Dubai became aware that both companies intended to drill in approximately the same area off the island of Abu Musa (i.e. the purported boundaries of the territorial waters of UAQ and Sharjah overlapped).[136] In November 1971, days before the British withdrew from the Gulf, the UK brokered an understanding whereby Buttes Gas was deemed the concessionaire, and Iran, Sharjah and UAQ agreed to share the revenues from the exploitation.[137] As the only party not reaping profits, Occidental commenced multiple proceedings against Buttes Gas in the US courts.[138]

In the UK, Buttes Gas brought an action against Occidental and its chairman, Mr Hammer, for slander because Mr Hammer had stated in a press conference in London that Buttes Gas had colluded with the ruler of Sharjah to backdate a decree extending the territorial waters of Sharjah. Occidental submitted a defence and counterclaims. The case rattled through the courts, arriving at the House of Lords in 1980. Buttes Gas argued that the court should not exercise jurisdiction in respect of 'certain specified acts being acts of state of the Governments of Sharjah, UAQ, Iran and the United Kingdom'.[139] To this, Lord Wilberforce observed, quite rightly, that 'difficulty has lain in the indiscriminating use of "act of state" to cover situations which are quite distinct, and different in law'.[140] He acknowledged that one 'version' concerned actions of the Crown abroad (i.e. Crown act of state), whilst 'a second version' concerned the applicability of a foreign state's legislation within its own territory (i.e. the first limb of the foreign act of state doctrine, municipal law act of state).[141] But he held that the facts of the case did not fall within the remit of either version because the case was not about the validity of Sharjah's decree under the law of Sharjah, but about its efficacy under international law. He therefore queried if, apart from these situations, there existed in English law 'a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states' – one of 'judicial restraint or abstention'.[142] He sought to substantiate such a principle on the basis of 'a rather eclectic survey of a collection of judicial decisions and apophthegms'.[143] In addition to the cases discussed above,[144] he considered three other

136 Sharjah, UAQ and Iran each claimed that the island of Abu Musa was within its territorial waters. Occidental then attempted to move into the disputed area. The UK government intercepted the barge 'thus averting what seemed likely to be a major international incident'. See Insley and Wooldridge (n 126) 63–65.

137 Memorandum of Understanding as attached to the Letter from the Ruler of Sharjah to the UK Foreign Secretary (18 November 1971). Sharjah and Iran both retained their claim to sovereignty over Abu Musa.

138 See, for instance, *Occidental* (n 134) 1203.

139 *Buttes Gas* (n 9) 920.

140 Ibid 930.

141 Ibid 930–931.

142 Ibid 931.

143 Collier (n 121) 19.

144 Lord Wilberforce did not consider the case of *Nabob of the Carnatic* (1793) (n 47).

English cases, *Luther v Sagor*,[145] *Princess Paley Olga v Weisz*[146] and *Duke of Brunswick v King of Hanover*,[147] each of which concerned the municipal law act of state limb.[148]

However, the facts of the cases he surveyed could not support his 'general principle' – it was only the facts in *Buttes Ga*s itself which required the court to adjudicate on 'transactions of foreign sovereign states' (i.e. the actions of Sharjah, Iran and UAQ).[149] Lord Wilberforce was, in fact, making law by creating a new basis on which an English judge should exercise restraint. Unfortunately, his unwillingness to admit as much entrenched mischaracterisations of the cases on which he relied and the basis on which he made his decision. For instance, Nicholson argues that *Buttes Gas* is 'unconsciously, a crown act of state case' where 'political propriety defines legal doctrine and political considerations trump the value of independent judicial reasoning'.[150] Others argue, in light of Lord Wilberforce's distracting invocation of pithy phrases from US cases – i.e. 'no judicial or manageable standards by which to judge these issues'[151] or 'judicial no-man's land'[152] – that the House of Lords in *Buttes Gas* simply had no legal standards on which to rely.[153] Neither view is tenable. The case did not directly concern the actions of the Crown, and it is a bridge too far to suggest as much; and there were clear judicial standards on which to decide the central issue in the case – international law.

The question that Lord Wilberforce had to consider was whether the issues raised in *Buttes Gas* were appropriate to be decided by a domestic court, rather than an international court. This is evident in his reasoning. If the House of Lords had adjudicated, Lord Wilberforce observed that it would have been necessary to determine the lawfulness of such transactions not 'under any municipal law … but under international law'.[154] This required 'an inquiry into important inter-state issues and/or issues of international law'.[155] In particular, in order to adjudicate on the defence in the slander claim and on the counterclaims, the House of Lords had to determine, *inter alia*, which state had sovereignty over Abu Musa and the extent of the territorial waters of Sharjah, Iran and UAQ. However, Lord Wilberforce did limit the ambit of his 'general principle': he held that 'it would be too broad a proposition to say that mere emergence in an action here of a dispute as to the boundaries of states is sufficient' to preclude judgment by an English

145 [1921] 3 KB 532 (CA).

146 [1929] 1 KB 718 (CA).

147 (1848) 2 HL Cas 1, 9 ER 993.

148 In respect of *Luther v Sagor* and *Princess Paley*, see *Belhaj* (n 1) [35] (Lord Mance); [126]–[127] (Lord Neuberger); [229]–[230] (Lord Sumption); Collier (n 121) 20; Shaheed Fatima, *Using International Law in Domestic Courts* (Hart 2005) 389. In respect of *Duke of Brunswick*, see *Belhaj* (n 1) [125] (Lord Neuberger); William S Holdsworth, 'The history of acts of state in English law' (1941) 41 Columbia Law Review 1313, 1318; Collier (n 121) 20. Because a foreign sovereign was directly impleaded in *Duke of Brunswick* (i.e. the King of Hanover), the case can also be considered in light of his sovereign immunity. See Collier (n 121) 20; F A Mann, 'The foreign act of state' (1990) 106 Law Quarterly Review 352, 352; and Nicholson (n 33) 750.

149 *Buttes Gas* (n 9) 938.

150 Nicholson (n 33) 763.

151 *Buttes Gas* (n 9) 938. See *Baker v Carr* (1962) 369 US 186, 217.

152 *Buttes Gas* (n 9) 938. See *Occidental* (n 134) [30].

153 Daniel Amoroso, 'Judicial abdication in foreign affairs and the effectiveness of international law' (2015) 14 Chinese Journal of International Law 99, 119; Matthew Alderton, 'The act of state doctrine: questions of validity and abstention from *Underhill* to *Habib*' (2011) 12 Melbourne Journal of International Law 1, 13.

154 *Buttes Gas* (n 9) 938.

155 Ibid 937–938.

court – only if such an issue was 'at the heart of the case' should an English court exercise restraint, as was the case in *Buttes Gas*.[156]

Taken together, these statements suggest that Lord Wilberforce exercised judicial restraint because the central issues in *Buttes Gas* required the English courts to determine the validity of the acts of foreign states arising on the plane of public international law – e.g. territorial disputes and allegations of breaches of international law. These issues, which were integral to the defence in the slander claim and to the counterclaims, were issues which should be settled on the international plane by those states involved. Lord Wilberforce would have been entering into a field in which he was 'simply not competent to adjudicate', as an English court is, after all, 'not an international court'.[157] As such, he stayed the counterclaims and, because Buttes Gas had offered to submit to a stay of the slander claim if the counterclaims were stayed, Lord Wilberforce directed that Buttes Gas should be held to its offer.[158]

Buttes Gas is the basis on which we should understand the judicial restraint limb, and it is important not to lose sight of the caveats to Lord Wilberforce's 'general principle'. It is equally important to understand the rationale that underpins a decision not to adjudicate in circumstances such as those encountered in *Buttes Gas*. The English courts often do, for instance, criticise the acts of foreign sovereign states, implicitly and explicitly, in circumstances in which no such issues of restraint are said to arise. Courts considering immigration and deportation claims have to assess whether a person was tortured in a country or if a person would be at risk of torture or an unfair trial upon return;[159] criminal courts assess whether to stay proceedings because acts of a foreign state in securing extradition were unlawful;[160] and civil courts assess whether or not foreign courts are corrupt, including due to the influence of politicians.[161] Higgins suggests that there is no reason why an English court should not pronounce upon an international law obligation that is relevant for purposes of litigation between private persons.[162] However, there is a fundamental difference in the examples above, where there is no dispute between states, and those cases, such as *Buttes Gas*, which require the English courts to be the arbiter of an international dispute between two or more foreign states. In the latter category of case, the principle of sovereign equality of states is of paramount importance.

The principle of sovereign equality of states is one of the basic principles of international law.[163] It can be traced back to the fourteenth-century Italian jurist, Bartolus, who wrote, '[*n*]*on enim una civitas potest facere legem super alteram, quia par in parem non habet imperium*'.[164] The principle of sovereign equality of states is the basis for the

156 Ibid 927.

157 *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61 (HL) 103.

158 *Buttes Gas* (n 9) 938.

159 See, for instance, the castigating remarks by the Special Immigration Appeals Commission about the former Libyan government in *AS & DD v Secretary of State for the Home Department* [2007] UKSIAC 42/50.

160 *R v Horseferry Magistrate's Court, ex parte Bennett* [1994] 1 AC 42 (HL); *R v Mullen (Nicholas Roberts)* [2000] QB 520 (CA).

161 *Yukos* (n 15).

162 Higgins (n 127) 273–274.

163 Charter of the United Nations, Article 2(1).

164 'For it is not for one city to make the law upon another, for an equal has no power over an equal' (author's translation).

immunity of states from the jurisdiction of other states.[165] A corollary of the sovereign equality of states is the duty on each state not to intervene in the internal affairs of another state.[166] The judicial restraint limb should be understood through the prism of these customary international law principles.[167] That is, where an English court is asked to *determine* the validity of the acts of foreign states arising on the plane of public international law, the UK would be intruding on the sovereign equality of the states in question if it adjudicated. If, by contrast, the international community recognises a clear breach of international law and the English courts simply rely on this breach, an intrusion on the sovereign equality of states cannot be said to arise.[168]

The failure of the English courts to recognise the principle of the sovereign equality of states as the basis of the judicial restraint limb (or to recognise any basis at all) explains much of the confusion that has pervaded the jurisprudence of the English courts since the decision in *Buttes Gas*. Twenty-five years later, in the most recent UK Supreme Court decision on the foreign act of state doctrine, the court displayed not only 'substantial disagreement over the interpretation and characterisation of past jurisprudence' but was also 'divided on both the conceptualisation of the foreign act of state doctrine and its application to the facts'.[169]

This conceptual confusion is problematic for the lower courts. It has resulted in the misinterpretation of Lord Wilberforce's 'general principle' under the guises of the judicial restraint limb in the same manner as Lord Kingsdown's 'general principle': the generality of Lord Wilberforce's expressions in *Buttes Gas* are being (mis-)interpreted as 'expositions of the whole law' rather than 'governed and qualified by the particular facts'.[170]

Perhaps the most worrying example of such a misinterpretation occurred in *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs*.[171] The facts of the case are striking. Noor Khan's father had been presiding over a peaceful council of tribal elders in Pakistan on 17 March 2011 when a missile was fired from a drone, allegedly operated by the USA Central Intelligence Agency.[172] His father was one of over 40 persons killed. Khan sought judicial review of the decision of the Secretary of State for the Home Department to provide USA authorities with intelligence for use in drone strikes in Pakistan. The remedy sought was admittedly unusual.[173]

In the Court of Appeal, Lord Dyson MR was of the view that 'the courts would not even consider, let alone resolve, the legality of the United States' drone strikes'.[174] He

165 Dapo Akande and Sangeeta Shah, 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) 21 European Journal of International Law 815, 824.

166 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits, Judgment) [1986] ICJ Rep 14, paragraph 202.

167 See Lord Sumption's comments to this effect in *Belhaj* (n 1) [200].

168 *Kuwait Airways* (n 14) [113] (Lord Nicholls). It should therefore be emphasised that a clear breach of international law recognised as such by the international community should not be viewed as an exception to the judicial restraint limb but should be understood to delineate the scope of the limb.

169 Andrew Sanger, 'UK government cannot hide from complicity in human rights abuses' (2017) 76 Cambridge Law Journal 223, 224–226, commenting on *Belhaj* (n 1).

170 *Quinn v Leathem* [1901] AC 495 (HL) 506 (Lord Halsbury).

171 *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 24, [2014] 1 WLR 872.

172 Ibid [1].

173 Ibid [6]. Mr Khan sought, *inter alia*, a declaration that a British national who kills a person in a drone strike in Pakistan is not entitled to rely on the defence of combatant immunity.

174 Ibid quoting *R (on the application of Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin), [2013] ACD 23 [14]–[15] (Moses LJ).

came to this conclusion largely in reliance on the reasoning of Moses LJ in the High Court, much of which was fundamentally flawed. Moses LJ had held that *Buttes Gas* is authority for the proposition that 'to examine and sit in judgment on the conduct of another state would imperil relations between states',[175] but Lord Wilberforce supported no such view. He also woefully misread the judgment of the House of Lords in *Kuwait Airways* by attributing a quote from Lord Nicholls' summary of the arguments of Counsel – that the principle in *Buttes Gas* includes 'a prohibition against adjudication on the legality, validity or acceptability of such acts, either under domestic law or international law' – to Lord Nicholl's himself,[176] who had expressly stated that Counsel's argument had pressed the principle in *Buttes Gas* 'too far'.[177] Lord Dyson MR then compounded the problem by extrapolating from the flawed reasoning of Moses LJ to conclude that the court will 'usually not sit in judgment on the acts of a sovereign state as a matter of discretion', 'save in exceptional circumstances'.[178] It was exactly these types of statements that Lord Wilberforce warned against in *Buttes Gas* when he said that 'such general phrases as "sitting in judgment on," "inquiring into" or "entertaining questions" must be read in their context [and] are not to be used without circumspection: the nature of the judgment, or inquiry or entertainment must be carefully analysed'.[179] Lord Dyson MR also ignored the facts in *Buttes Gas* completely. The House of Lords exercised restraint in *Buttes Gas* precisely because of the exceptional factual matrix. Perhaps most concerning is that Lord Dyson MR (quoting Moses LJ) felt it necessary to add that he saw no 'incentive' to adjudicate because it 'would give the impression that this court was presuming to judge the activities of the United States'.[180] Lord Dyson MR stated that 'a finding by our court that the notional UK operator of a drone bomb which caused a death was guilty of murder would inevitably be understood (and rightly understood) by the US as a condemnation of the US' – it would be 'critical of them'.[181] He therefore concluded that the claim was 'fundamentally flawed' because it involved 'serious criticisms of the acts of a foreign state', and it is 'only in certain established circumstances that our courts will exceptionally sit in judgment of such acts'.[182]

The result in *Khan* may not have differed had *Buttes Gas* been properly interpreted, but the reasoning most certainly would have. The purpose for which the claim was brought was to establish that the reported policy and practice of the UK government in transferring locational intelligence to the USA government is unlawful because it gives rise to various offences under domestic law.[183] In order to determine this issue, it would have been necessary to determine the validity of the acts of the USA arising on the plane of public international law – e.g. whether the USA had a right under international law to use force in self-defence in Pakistan at the relevant time. If the UK courts had determined these issues, it is certainly arguable that they would have been intruding upon the sovereignty of the USA. That being said, an argument could perhaps be made that the drone strikes carried out in Pakistan at the relevant time by the USA were recognised by

175 *Khan* (n 171) [22] quoting *Khan* (n 174) [15].
176 Ibid.
177 *Kuwait Airways* (n 14) [25].
178 *Khan* (n 171) [28]–[29].
179 *Buttes Gas* (n 9) 933.
180 *Khan* (n 171) [34] quoting *Khan* (n 174) [55].
181 Ibid [37].
182 Ibid [53].
183 Ibid [7].

the international community as a clear violation of international law.[184] Such a conclusion would have allowed the UK to avoid intruding on the sovereignty of the USA, much as the House of Lords did in respect of Iraq's breach of international law in *Kuwait Airways*.[185]

The highly questionable analysis in *Khan* demonstrates why it is necessary for the Supreme Court to explain the proper basis of the judicial restraint limb. The Supreme Court has been presented with the opportunity to reconsider the judicial restraint limb in the recent appeal of *The Law Debenture Trust Corporation plc v Ukraine*.[186] By way of brief background, the Law Debenture Trust Corporation plc ('Law Debenture') is the trustee of notes, which were constituted by a trust deed to which the named parties were Law Debenture and Ukraine, with a nominal value of US$3 billion. The trust deed is expressed to be governed by English law, and Ukraine waived state immunity in the trust deed. The sole subscriber of the notes was the Russian Federation ('Russia'), acting by its Ministry of Finance (i.e. Russia is the beneficial owner of the notes). The principal amount of the notes fell due for payment, together with the last instalment of interest, on 21 December 2015. Ukraine refused to make the payment. In February 2016, Law Debenture issued enforcement proceedings in the English courts at the direction of Russia. Ukraine has not challenged the jurisdiction of the English courts to determine the claim against it, but it served a defence and resisted the application for summary judgment on a number of grounds, including duress. In short, Ukraine alleges that the issue of the notes was procured by unlawful and illegitimate threats, and pressure exerted, by Russia, such as to vitiate the consent of Ukraine and to constitute duress as a matter of English law. Law Debenture contends that Ukraine is unable to show that it was subject to illegitimate pressure because to do so would require examination of the conduct of Russia on the international plane, which is something an English court cannot embark upon.

To adjudicate in respect of the defence of duress, the court would need to consider whether Russia threatened to use force in violation of *jus cogens* norms of international law and/or whether Russia violated various treaty obligations in force between Russia and Ukraine. Like *Buttes Gas*, the central issue here involves the determination of the validity of the acts of foreign states arising on the plane of public international law. However, unlike in *Buttes Gas* and similar to *Kuwait Airways*, the international community regards many of the actions of Russia in question as clear violations of Russia's obligations under international law (at least insofar as the presence of Russian troops in Crimea is contrary to the national sovereignty, political independence and territorial integrity of Ukraine).[187] In light of such agreement, it cannot be said that the UK would be intruding on the sovereignty of either state if its courts adjudicated in respect of the dispute. It is also noteworthy that Russia has not agreed to submit the dispute to the International Court

184 Some support for this argument could be derived from the UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (2014) UN Doc A/HRC/25/59. See also Jemima Stratford QC and Tim Johnston, 'The Snowden "revelations": is GCHQ breaking the law?' (2014) 2 European Human Rights Law Review 129, 138.

185 In *Kuwait Airways* (n 14) [113] (Lord Nicholls), the House of Lords was satisfied that the relevant conduct by Kuwait 'was a flagrant breach of international law' on the basis of UN Security Council Resolutions. It might be said that UN Security Council resolutions are more reflective of the views of the international community than the sources which would have been available to the claimant in *Khan*.

186 [2018] EWCA Civ 2026.

187 See, for example, UN General Assembly Resolution 68/262 (27 March 2014); and UN General Assembly Resolution 73/194 (23 January 2019). A UN Security Council draft resolution to affirm Ukraine's sovereignty and national borders was vetoed by Russia in 2014.

of Justice, despite Ukraine's willingness to do so, and it was Russia itself (through Law Debenture) which submitted the dispute to the English courts. It is hoped that the Supreme Court will seize the opportunity in *Law Debenture Trust* to identify the proper basis and scope of the judicial restraint limb.

Conclusion

This article has shown that the present conceptualisation of the judicial restraint is misguided. In Part 1, it was demonstrated that the cases which are said to form the foundation of the judicial restraint limb primarily concern the Crown in the context of the British Empire and are of dubious legal reasoning, resulting in a concept trammelled by the irrelevant and the obfuscating. In Part 2, it identified the origin, and proper basis, of the judicial restraint limb. The judicial restraint limb of the foreign act of state doctrine ought to be understood on the basis of the principle of the sovereign equality of states: the English courts will exercise restraint where the central issue(s) in a case require the English courts to determine the validity of the acts of foreign states arising on the plane of public international law.

The conceptualisation of the judicial restraint limb advocated for in this article will ensure that the limb is liberated from any suggestion that it was a servant of the exigencies of the British Empire. It will also ensure that vague notions of 'act of state' are not reprised (and unjustifiably expanded) in cases like *Khan* which concern the British Empire's closest cousin: the British facilitation of US actions abroad.[188]

188 Conor Gearty, 'Not in the public interest?' (14th Annual Sir David Williams Lecture, 21 February 2014).

NILQ 71(2): 157–174

'Something like the principles of British liberalism': Ivor Jennings and the international and domestic, 1920–1960

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Abstract

While the relationship between domestic and international law provoked constant debate among European jurists in the interwar years, British thinking is remembered as orthodoxly dualist and practice-focused. Complicating this narrative, this article revisits W Ivor Jennings' work, arguing that the domestic and international were central to his understandings of interwar legal change in the imperial and international communities. Part 1 examines Jennings' seemingly forgotten 1920s works, which analysed constitutional and international interactions within the rapidly changing imperial system. Part 2 explores Jennings' turn to international and domestic forms of the rule of law in the lead-up to war, emphasising their British liberal heritage. Part 3 shows how these conceptions, and their imperial connections, echoed in Jennings' post-war projects: a European federation modelled on the empire; and lectures to decolonising states. This reveals both new angles to Jennings' work and the importance of the domestic and international for constitutional legacies of empire.

Keywords: international law; domestic law; public law; imperial constitution; interwar period; W Ivor Jennings.

Introduction: the 'insularity of Englishmen'

The relationship between domestic and international law provoked constant discussions for European jurists working in the interwar period. In the 1920s, the Italian jurist Dionisio Anzilotti's new articulation of Heinrich Triepel's dualist theory – that international and domestic laws formed separate systems – was endorsed and developed further by many jurists throughout Western Europe.[1] Against this view, the Austrians Hans Kelsen, Josef Kunz and Alfred Verdross revived and rearticulated the theory of monism, arguing that international law and domestic legal systems were not distinct, but instead elements of a

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1 See Giorgio Gaja, 'Positivism and dualism in Dionisio Anzilotti' (1992) 3 European Journal of International Law 123.

unified, universal legal system.[2] These debates have been read in various ways: as bolstering the normativity of law and emphasising its ability to restrain state power;[3] as an interwar legal project to reject the power of sovereign states by affirming the primacy of international law over them;[4] and as the centrepiece of a wider legal revolution that transformed national constitutions into global laws, turned state sovereignty into democratic sovereignty, and made rights a concern of and for all human beings as part of a global legal society.[5]

At the same time, British jurists seemed, at first glance, to be firmly and in a sense obviously dualist, with no real option for endorsing monism within their constitutional orthodoxy. A purportedly international system of laws or norms could hold no sway over the endlessly sovereign British Parliament, and the executive's foreign actions of signing treaties could never alter the law of the land. What Europeans saw as a debate about the nature of law, state and international community, the British saw as, at most, a question of what English courts would decide to do with the possible 'rules' of international 'law'. John Fischer Williams, a prominent UK legal adviser at the League of Nations (the League) since the 1920s, wrote in 1939 that 'however much it may be thought to be important for the formation of a true theory of international law', the 'problem' of the relation of domestic and international law 'is not very likely to cause embarrassment to the practitioner or to a court or even an arbitrator', all of whom will know and agree on the law to be applied.[6] When Kunz addressed the Grotius Society in London on the theories of monism and dualism in 1924, the discussion began with the chair giving thanks for a 'wonderful discourse' and expressing two regrets: the small audience, and the 'insularity of Englishmen' when it came to continental theories – the latter probably explaining the former.[7] British jurists seemed steadfastly and characteristically unengaged with the philosophical issues of state and law taking place as the League rose and fell.

Delving deeper than this first glance, this article argues that, far from being insular theoretical irrelevancies or confined to debates on monism and dualism, the domestic and international were central to juristic attempts to make sense of the enormous legal transformations at the League, throughout the Empire, and within the inauguration of 'modern' British constitutional government in the 1920s.[8] They were used to formulate and announce general principles of government and ordering, internally and globally.

2 See e.g. Jochen von Bernstorff, 'An "objective" architecture of international law: Kelsen, Kunz and Verdross' in *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010). For a recent re-articulation of Kelsen's theory arguing for its applicability today, see Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018). On Verdross, see especially Natasha Wheatley, 'Making nations into legal persons between imperial and international law: scenes from a central European history of group rights' (2018) 28 Duke Journal of Comparative and International Law 481.

3 Alexander Orakhelashvili, 'Scelle, Schmitt, Kelsen, Lauterpacht and the continuing relevance of their inter-war debate on normativity' (2014) 83 Nordic Journal of International Law 1.

4 Peter Langford and Ian Bryan, 'Hans Kelsen's theory of legal monism – a critical engagement with the emerging legal order of the 1920s' (2012) 14 Journal of the History of International Law 51.

5 Hauke Brunkhorst, 'Critique of dualism: Hans Kelsen and the twentieth century revolution in international law' (2011) 18 Constellations 496.

6 See e.g. John Fischer Williams, 'Relations of international and municipal law' in *Aspects of Modern International Law* (Oxford University Press 1939) 81–2.

7 Josef Kunz, 'On the theoretical basis of the law of nations' (1924) 10 Transactions of the Grotius Society 115, 141.

8 See further Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017); Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015); Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009);

Many British jurists examined the intertwining of domestic law, public law and international law as it related to problems of empire: Thomas Baty, Arthur Berridale Keith and Hersch Lauterpacht each published sustained examinations of these conjoint problems in the interwar years.[9] This article focuses, however, on the influential and yet understudied constitutional theorist W Ivor Jennings. Writing and teaching at Leeds and then the London School of Economics from the 1920s, Jennings was a major figure critical of Diceyan constitutional theory and its orthodoxy, as part of a wider response to positivism in mainstream legal thought, advocating for functionalist and sociological accounts of legal doctrines that paid due regard to the ideological, material and normative elements of law and legal systems.[10] Jennings is usually remembered as a foundational and prolific constitutional law theorist who radically reshaped views of parliamentary, cabinet and local government and later served as an architect of decolonisation-era constitutions.[11] But his earliest works were fixed on questions of international and imperial constitutional law, and his later appraisals of the constitutional laws of the British Commonwealth and post-war plans for Europe dealt extensively with the interactions of domestic and international laws.

Exploring this development, this article argues that questions of domestic and international law were central to Jennings' efforts to understand the legal aspects of the imperial and international communities in the interwar and decolonisation years. This argument unfolds in three parts.

Part 1 examines Jennings' seemingly forgotten earliest works from the mid-1920s: a series of French articles that dealt with the difficult mix of constitutional and international law in the rapidly changing British Empire through arguments that imperial constitutional law was the proper, global limit to the international personality of Britain's dominions and protectorates. In these pieces, Jennings examined international personality, gradual self-government grants, the retention of executive control over non-white possessions, and arguments about international limits to prerogative powers. These works grounded Jennings' treatment of the doctrinal issues of the relationship of domestic and international law in the constitution.

Part 2 shows how these early interests in empire moved towards a parallel emphasis on the 'rule of law', as a systematic link between domestic and international, with the British constitution providing a model for international and internal rules of law. In the

9 Thomas Baty, 'Sovereign colonies' (1921) 34 Harvard Law Review 837; Thomas Baty, 'Protectorates and mandates' (1921) 2 British Yearbook of International Law 109; Thomas Baty, 'The structure of the Empire' (1930) 12 Journal of Comparative Legislation and International Law 157; Thomas Baty, *International Law in Twilight* (Maruzen 1954) 2ff (calling the interwar debates on the relation of municipal and international law, 'all the most futile word-spinning': at 3); Arthur Berriedale Keith, 'The international status of the dominions' (1923) 5 Journal of Comparative Legislation and International Law 161; Arthur Berriedale Keith, *Letters on Imperial Relations, Indian Reforms, Constitutional and International Law, 1916–1935* (Oxford University Press 1935); Arthur Berriedale Keith, *Letters and Essays on Current Imperial and International Problems, 1935–6* (Oxford University Press 1936); Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co 1927) (applying theoretical reflections on municipal–international analogies and connections to the status of the mandates, and concluding, contra Jennings, that international law bound the Crown in mandatory administration, and that the League remained sovereign over them: 191–202); Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933); Hersch Lauterpacht, 'Is international law a part of the law of England?' (1939) 25 Transactions of the Grotius Society 51.

10 On the LSE and especially the influence of Harold Laski's functionalism, see Martin Loughlin, *Public Law and Political Theory* (Clarendon 1992) 169–176.

11 See further A W Bradley, 'Sir William Ivor Jennings: a centennial paper' (2004) 67 Modern Law Review 716; Adam Tomkins, '"Talking in fictions": Jennings on Parliament' (2004) 67 Modern Law Review 772.

lead-up to and early years of the Second World War, Jennings turned to international and domestic limits on government power in changing conceptions of the rule of law, which were central to his arguments that re-establishing international law required not just attaining public order in occupied territories, but 'public order based on something like the principles of British liberalism'.

Part 3 examines the legacies of these theoretical commitments, examining how this concept of public order and British liberalism played out in two of Jennings' post-war intellectual projects: a European federation, whose constitution was based on the 'lessons' of the interwar imperial constitution, and a set of lectures to decolonising states urging them to hew to British parliamentarism against socialist international designs.

Jennings' work on the international and domestic involved a variety of efforts to theorise and justify new visions of law, government and ordering amid the rapidly changing and, later, dissolving, empire. This new emphasis also reminds us that the confluence and interactions between the fields of public and international law, as well as their joint imperial imbrications, are not new or recent, but rather built deeply into at least the early twentieth-century foundations of today's theory and practice; one important constitutional legacy of empire.

1 Jennings' empire: dominion and mandate, 1920–1938

The immediate outcome of the First World War was the collapse of the Russian, German, Austro-Hungarian and Ottoman Empires and their subsequent partitions into nation-states or new supervised colonial dependencies under the new 'mandate' system of the League. As the first international institution to harbour aspirations of global membership and influence, the League focused the attention of Western international lawyers and diplomats. It also formed the institutional point of 'inclusion' for new nations and was the place to debate pressing questions around the protection of minorities, the administration of former empires, the international economic system and the development of international law.[12] But the 1920s also inaugurated the rapid legal transformation of the British Empire through gradual cessions of self-government to the dominions and the establishment of the Irish Free State on an equal footing with them, combined with repression and continued Crown 'guidance' in parts of India and Africa, and in the new acquisitions of mandates taken from the empires of the defeated Central Powers in the Middle East, Africa and the Pacific. The vague questions about international personality and constitutional links between the polities of the British Empire that burned throughout the war were intensified by the establishment of the League. Which dominions could represent themselves at the League? Did they appear as part of the Empire or independently? Could they conduct independent foreign policy? These questions were gradually, partially resolved by successive imperial conferences in the 1920s and 1930s. This section explores how Jennings' examinations of changing ideas about the interaction of domestic and international were foundational in these wider transformations in empire, parliament, dominions and mandates.

The questions debated at the 1920s imperial conferences motivated Jennings' first academic works; a series of seemingly now-forgotten articles on international legal aspects of the British Empire and Commonwealth, based on London lectures, and translated for the major French international law journal *Revue Generale de Droit International et Legislation Comparée* (RDILC). These pieces explored the international personality of the dominions, arguing that their status was, ultimately, a matter of imperial

12 See Pedersen (n 8).

constitutional law and not international law, but basing that argument on a subtle account of the interaction of principles from both of these fields. Jennings sought to explain the varieties of international personality throughout the Empire as stemming from its complex, various constitutional orderings and degrees of self-government possessed by the entities which formed it and the retention of executive control over non-white possessions. Jennings sought to convince readers that the Empire's juridical relations overrode international law and, in some cases, created new categories of polity previously unknown to international law. In a sense, his argument reflected both an internationalising and localising of the British constitution: making it relevant and resistant to new international law concepts, and binding and shaping the constitutional and international development of the Empire's constituent members. In the early 1930s, Jennings saw this imperial rule returning to influence government and the constitution at home.

The idea of international law constraining or shaping the powers of the Crown was the subject of Jennings' first published work, which built on his essay as the Whewell Scholar in International Law at Cambridge. Examining the right of angary, which related to the interaction of statutory, prerogative and international law rights to seize foreign property, Jennings examined two major decisions in which English courts held that international law doctrines on angary formed part of the law of England and, thus, corresponded to the prerogative right to requisition neutral goods for the defence of the realm.[13] Jennings endorsed Westlake's view that English courts enforce rights in international or domestic law where they fall within jurisdiction, subject to the sovereign's incapacity to, in Westlake's words, 'divest or modify private rights by treaty' and that courts cannot question acts of state.[14] Jennings noted, however, that:

> [t]he word "rights" is here used in rather a peculiar sense. Rights are given by International Law only to States, whereas Municipal Courts usually invoke International Law in suits by an individual. What is meant, therefore, is that Municipal Courts must recognise a right where a rule of International Law gives an individual a benefit; as, for example, where an ambassador claims a diplomatic immunity.[15]

Jennings read this in a language of private law, as a coordination of benefits and compensation. A state's international law right to seize the property of neutrals within its territory rests in the Crown and executive government, and a right of compensation rests with the owner.[16] Jennings thought that this should translate into English constitutional law as international law shaping the prerogative: there 'ought therefore to be a prerogative right of the Crown to seize the property in accordance with the rules of International Law … there is nothing in the common law inconsistent with such a right, nor is there any statute to prevent such rights from taking effect'.[17] The Crown's prerogative rights, then, are constrained or moulded by the rules of international law, though might be limited further by statute.

13 W Ivor Jennings, 'The right of angary' (1927) 3 Cambridge Law Journal 49. See *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271; *West Rand Central Gold Mining Co Ltd v King* [1905] 2 KB 391.

14 John Westlake, *The Collected Papers of John Westlake on Public International Law*, Lassa Oppenheim (ed) (Cambridge University Press 1914) 518, quoted in Jennings, 'The right of angary' (n 13) 57.

15 Jennings, 'The right of angary' (n 13) 57.

16 Ibid.

17 Ibid.

Jennings' next works delved much more deeply into the relationship of Crown, empire and international law. The first piece examined the international status of the dominions after the 1926 Imperial Conference, responding to articles by the influential Belgian jurist Henri Rolin and the more obscure Canadian political scientist C D Allin. Jennings rejected Rolin's argument that the dominions had no international personality and went further than Allin's contention that they had some degree of international personality, but not to the extent of full sovereign states. Jennings contended instead that following the 1926 Conference the dominions held, under international law, the same international status as the UK, and that this status was 'limited by the superior law of the community of states conventionally called, erroneously, the British Empire'.[18]

Jennings' argument built on a disagreement with Rolin's view of the meaning of 'state'. Whereas Rolin saw states as juridically distinct, supreme organs that gain their powers by expressing the will of a people, rather than from delegation by another higher body, for Jennings this did not reflect the reality of state formation and would make, for example, non-revolutionary emergences of states impossible: 'the *source* of the institution is immaterial. What is important is knowing whether the power is exercised by the institution for itself, yet on behalf of a third party.'[19] Rolin, Jennings argued, had fallen into an error common to jurists unfamiliar with British juridical thought by confounding a theory of law with the facts of reality and the conventions of the British constitution. Put another way, Jennings placed the operation of the British imperial constitution over the concepts of international law.

Jennings' own view of the dominions' status moved between British imperial–constitutional law and international law. While the constitutional law of the British Empire was developed by judicial interpretations of law from an earlier era in which the King exercised governmental powers and the people were merely consulted, the contemporary reality was that Cabinet and the Prime Minister – not legal categories and 'unknown to English law' – possess and exercise those powers. Likewise, the full sovereign status of the dominions rested on their ability and permission to exercise those powers, most crucially for international personality, the ability to conduct foreign relations, which was granted to them by imperial constitutional law. British constitutional law theoretically made the dominions 'complete dependents' under the English government, but they are practically never subjected to that control.[20]

Jennings emphasised that the international law analysis must not look to this 'theory of the Constitution' but instead to the 'real authority of the Dominion governments'.[21] If they lack the 'necessary authority to accomplish international acts', they cannot be recognised as having a personality distinct from Britain, but if they do have 'the capacity to maintain international relations' then the only element missing from their full international personality is recognition of that fact by other states.[22] Jennings thought that that recognition had been accorded to the dominions by most of the important states in Europe and America.[23] Moreover, this was the position of the Empire, evidenced by the report adopted by the 1926 Conference, which 'first established the general principle of independence' among the dominions, and 'then acknowledged that theories of law and

18 W Ivor Jennings, 'Le Statut des Dominions et La Conference Imperiale de 1926' (1927) 8 RDILC 397, 398 (translations of Jennings' French articles are my own).

19 Ibid 399 (emphasis original).

20 Ibid 400.

21 Ibid.

22 Ibid.

23 Ibid.

forms of government (but not practice) do not conform to this principle' and 'finally suggest[ed] means of attenuating this divergence'.[24] Jennings' emphasis, then, was on the practical operation of domestic and imperial law, over the theory-fixation of other international law jurists.

The remainder of Jennings' argument explored those practical operations in detail, though with some examination of the conceptual changes announced by the Conference. While, in keeping with British tradition, the Conference refused to countenance a written constitution for the Empire, it did seek to define the relationship of the UK and the dominions by a general proposition:

> There are autonomous communities within the Empire, equal in their status, no one subordinate to another from the particular point of view of their internal affairs, although united by a common allegiance to the Crown, and freely associating as members of the British community of nations.[25]

Jennings saw no contradiction between independence and membership of the Empire, insisting that the it was 'in fact' a society of free nations, linked by common places and shared history, and 'a loyalism towards a shared sovereign and a tradition of liberty and democratic government, transmitted from generation to generation'.[26]

While dominion parliaments remained theoretically subject to the laws of the British Parliament, in practice that was of little importance: contemporary British legislation did not apply generally to the dominions, and they made their own laws.[27] This independence followed into their international lives and was the basis of their juridical equality with Britain itself. After examining the international relations of the various dominions – their negotiation of treaties with foreign states outside the Empire, their modes of representation, their domestic ratifications, and their position in relation to wider conventions (as Jennings put it, those 'international acts between governments that generally do not necessitate legislative intervention, but have a purely political objective')[28] – Jennings concluded that the dominions and the UK held the same status in international law. But the particulars of that international status were still limited and shaped by the presence of imperial constitutional ties: 'the rights of different parts of the Empire are limited by the personality of the Empire, because from the point of view of questions of interest to a part of the empire, there is a unity'.[29] This unity meant treaties relevant to more than one part of the Empire bound the entirety, and that questions about the relations between parts of the Empire – 'conventions, disputes, etc' – 'are not regulated by international law, but by the constitutional laws and customs of the Empire'.[30]

In his 1928 piece 'International personality in the British Empire', Jennings broadened his analysis to argue that the British arrangements had now reshaped international law, conceptualising dominion–imperial relations as a new upheaval and challenge to old outdated notions of international personality. Historically, all international legal persons were 'homogeneous States', and the nature of international personality was not a complicated question, with new states admitted not only by satisfying 'certain philosophical principles' but also because they appeared to be similar to current

24 Ibid 403.
25 Ibid 404 (quoting and translating the Report).
26 Ibid.
27 Ibid 414.
28 Ibid 429.
29 Ibid 433.
30 Ibid.

members.[31] When international organisation and the state form became more complex, fundamental ideas about the nature of states became relevant to international personality.

As applied to the British Empire, Jennings argued that it was 'an organisation of a character so complex that it is impossible to examine the personality of its different parts' without first establishing the principles of international personality.[32] Jennings now saw the British Empire as a formerly unitary state 'in transition', owing to the partial, somewhat unclear, international capacities of the dominions.[33] But the international implications of this transition was not a question of international law but one of imperial constitutional law:

> We are now in a state of transition. But the principle is clear. No part of the Empire can be recognised as having an international capacity greater than that which it possesses constitutionally. To admit a British community to a power that it does not have constitutionally is to intervene in the internal government of the British Empire, and this is contrary to international law.[34]

Here, Jennings raised the international law principle of non-intervention in internal affairs to place imperial constitutional law over the other ordinary principles of international law and give it an international and absolute effect. Jennings saw each dominion's constitutional capacities as the 'extreme limit' on any possible recognition by other states. This mixed and went beyond international and constitutional ideas of personality: 'The situation that has been examined here does not fit into the normal classifications of international law', he noted and concluded by stating '[t]he distribution of personality that is thus laid down does not fit within the classification seen so far in international law'.[35]

By the mid-1930s, following the passage of the Statute of Westminster, the kinds of restrictions that Jennings had theorised as following from imperial conventions, the practical operations of the dominions, and the statements in the Imperial Reports, were solidified into clearer doctrines of imperial constitutional law.[36] Jennings theorised the legal structure of the British Empire as slowly disintegrating, moving from the 1914 foundation of a Parliament and Crown that could, in principle, legislate and govern in any part of the Empire, through a severe weakening in the 1920s that had, by the early 1930s, given way to a stark contrast between the constitution within the British Isles and that which barely bound what was now the Commonwealth. While the British constitution was 'a complex of institutions, laws, conventions and practices' that made it 'one of the most detailed and closely co-ordinated in the world', the 'Constitution of the British Commonwealth' had 'undergone a process of disintegration on the legal side which has not been met by any corresponding process of integration on the side of convention or practice. It does indeed exist, but its limbs are so weak that it seems that a breath would cause them to break.'[37] This weakness followed from the Statute of Westminster's

31 W Ivor Jennings, 'La Personnalité Internationale dans l'Empire Britannique' (1928) 9 RDILC 438, 438.

32 Ibid 438–439.

33 Ibid 440.

34 Ibid.

35 Ibid 493.

36 The Statute of Westminster 1931 marked the Imperial Parliament's recognition that self-governing dominions were now, effectively, fully sovereign states. For the classic contemporaneous treatment, see K C Wheare, *The Statute of Westminster, 1931* (Clarendon Press 1933), and for a recent revisiting that examines its effect on the Irish Free State, see Thomas Mohr, 'The Statute of Westminster, 1931: an Irish perspective' (2013) 31 Law and History Review 749.

37 W Ivor Jennings, 'The constitution of the British Commonwealth' (1938) 9 Political Quarterly 465, 465.

removal of the presumption that any UK Act of Parliament would extend or be deemed to extend to a dominion as part of its law, unless expressly stated in the Act and requested and consented to by the dominion.[38] Practically, Jennings thought, the connections and collaborations between Commonwealth nations were now questions of international cooperation akin to ordinary foreign affairs: 'neither an Imperial Federation nor a *Zollverein* [customs union] is practical politics. The question is now to secure collaboration among six or seven autonomous nations.'[39]

Beyond the Commonwealth, however, Jennings argued that British Crown powers over protectorates and mandates remained shaped and limited by imperial constitutional law alone, even though the claim to govern those mandates originated in international law doctrines and the League's mandatory grants. This approach shows the endurance of aspects of Jennings' late 1920s views on imperial control, even as the Empire had turned to Commonwealth. In the 1938 *Constitutional Laws of the Commonwealth*, which relied more heavily on the judicial decisions compiled by his co-author C M Young[40] than on William Anson and A B Keith's treatises used in the earlier articles, Jennings contended that the earlier doctrine of incorporation from *West Rand* and *Commercial and Estates Co of Egypt* was now expressed too widely, an error partly stemming from changes in the Empire since those cases were decided. While there is a presumption that international law and English law are not incompatible, the jurisdiction of English courts to decide any dispute about which law applies flows from the jurisdiction of the Crown: 'The jurisdiction of the Crown, in which is included the jurisdiction of the Queen's Courts, has thus to be decided by English law. A jurisdiction may be lawful according to English law and yet unlawful according to international law'.[41] These recent decisions had confirmed that jurisdiction was ultimately up to the Crown, subject to any statutory limits on that power, and this extended to international status and the government of protectorates.[42]

This had effects for the status of mandate territories. Contra W E Hall and Henry Jenkyns, who in the late nineteenth and early twentieth century saw protectorate government as a question of international law, Jennings insisted it was one of constitutional law. Whereas they had begun with international law doctrines on when a state might exercise its powers within the territory of another state, for the 'English lawyer' the starting question is 'to determine what powers the Crown possesses by English law outside British territory': this was solely about constitutional law, and the Crown 'is not bound even by the treaty by which the jurisdiction is first acquired in the international sense'.[43] Governance of mandates was the same as the position over protectorates. The Crown's acceptance of the League's mandate was a grant of jurisdiction and, while British obligations to the League were 'international obligations' and the Crown's Orders in Council provided that the terms of the mandate should not be broken, this only reflected the Crown being 'anxious' that Britain's international obligations be kept.[44] As a matter of constitutional law the mandate did not bind the Crown.

38 Ibid.

39 Ibid 474.

40 See W Ivor Jennings, *Constitutional Laws of the Commonwealth* (3rd edn, Clarendon Press 1957) 'Preface' v.

41 W Ivor Jennings and C M Young, *Constitutional Laws of the Commonwealth* (Clarendon Press 1938) 16.

42 Ibid 16–17. See also W Ivor Jennings, 'Dominion legislation and treaties' (1937) 15 Canadian Bar Review 455.

43 Jennings and Young (n 41) 17, referring to W E Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon Press 1894); Henry Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Clarendon Press 1902).

44 Jennings and Young (n 41) 17.

This supremacy of imperial constitutional law over international obligations followed, for Jennings, from the absolute nature of the Crown's powers. Jennings was quick to clarify that this did not allow the Crown or governor to act as an 'uncontrolled despot': administration by the Colonial Office still took place through law, according to the local constitution and legal system and subject to appeals to the Privy Council.[45] The Crown was 'a legal abstraction', and government was essentially 'that provided by the local constitution' – though certainly still 'subject to the control of the Government of the United Kingdom'.[46] Imperial government was theoretically local, practically still subject to the control of Britain, and, either way, entirely freed of the international law that was the original basis of that claim to govern. In the parts of the world where it continued, British imperial government was legitimated by international law, but only constrained by British constitutional law.

2 Jennings' orthodoxies: internal and international rules of law, 1935–1941

This part examines how Jennings' early interests shifted towards a parallel examination of various forms of the 'rule of law'. For Jennings, it involved analysing the impact of imperial government on constitutional arrangements in the British Isles and his acknowledgment that Parliament was practically constrained by international law. These early points led him to use the British imperial constitution of the mid-1930s as a model for liberal international order, arguing during the Second World War that re-establishing international law and the domestic laws of occupied nations meant more than a simple vision of law and order, and instead a rule of law 'based on something like the principles of British liberalism'.

Jennings' late 1920s works on the difficulties of imperial–international law formed an early foundation for his later, wider rebuke to the gaps and inadequacies of Dicey's late nineteenth-century vision of the British constitution. This was partly about a change in the municipal. By the 1920s, these problems had become so glaring as to make Dicey's work, in Jennings' view, of little contemporary use, despite Dicey's thorough enduring influence.[47] As Jennings wrote in the preface to the 1959 edition of *Law and the Constitution*, if there were any heretics in 1930s English constitutional thought, 'they were to be found among those who regarded themselves as "orthodox"'.[48] That orthodoxy took Dicey as essentially correct but in need of qualification and updating. To Jennings, teaching and writing in the late 1920s, local government, cabinet conventions and the relations between the UK and the Commonwealth simply 'could not satisfactorily be fitted' within the Diceyan orthodoxy.[49]

Jennings' other 1930s interest was in placing local government law within the ambit of public law teaching, scholarship and practice that reflected the new importance of the 'municipal'. What is significant about this shift in both policy and theory is that for Jennings it reflected a turning inward of both Parliament and the executive, away from their imperial functions and toward a domestic sphere now characterised by the provision of social services and the implementation of economic reform that reflected the new idea of 'administration' previously and famously rejected by Dicey as inapposite to the British

45 Ibid 18.

46 Ibid.

47 See the both laudatory and critical W Ivor Jennings, 'In praise of Dicey, 1885–1935' (1935) 13 Public Administration 123.

48 Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) vi.

49 Ibid v.

system. His own autobiographical writings insist that it was the importance of local government to the practice of his students at Leeds – rather than the influence of Harold Laski and left-wing politics – that set him on the path against Dicey and towards writing *The Law and the Constitution*.[50] Jennings saw the municipality as the place where urban life is regulated. Local government law was, as he put it in 1939, 'the means by which urban life becomes possible'.[51] The rapid expansion of the legal powers of authorities responsible for delivering socially progressive policy and services was the 'municipal revolution', seeded in the 1835 establishment of the first municipal corporations.[52] Jennings saw this as a shift from an old nineteenth-century imperial executive to a wider use of discretion in policy implementation at home. The nineteenth-century executive was tasked with domestic policing, government of the colonies, control of the armed forces and levying small taxes: '"Executive" was, indeed, the correct word. For the internal functions of the State were largely ministerial', and discretion was mostly afforded to judges, while executive officers had limited discretionary power, except for foreign relations and the military. The rise of public services – health, education, employment exchanges, housing, public transport – had expanded the administrative 'machinery' since the 1870s.[53] Jennings incorporated them into an account of the constitution not by their functions, which he saw as an unclear mix of policing, regulation and the 'general external functions of the old "executive"' – that is, its colonial role – but instead by their new institutional locations: the central government, independent statutory authorities and local governments.[54]

Parliament was also changing. By the late 1930s, Jennings agreed that Parliament was constrained 'in practice' by the rules of international law, but that the incorporation of international law into British law – as 'part of the law of England' – meant only that British law is 'presumed not to be contrary to international law'.[55] Jennings expressed this as a series of assumptions about the territorial extent of laws, jurisdiction over the seas and the powers of the crown – as including those held by a government under international law, and not including powers which would be contrary to international law.[56] This amounted to the doctrine that English courts will give English law the meaning 'most consistent' with international law.[57] In a lengthy note, Jennings disagreed with Lauterpacht's 1935 view that customary international law was part of the common law. While Jennings agreed that courts would not presume a contradiction between custom and the common law, 'if it means that whatever is accepted customary international law is *per se* part of the common law, so that a modern rule of international law overrides principles already established by decisions of the courts, it cannot, in my opinion, be accepted', and, moreover, the cases quoted by Lauterpacht did not support his apparent view.[58] Instead, Jennings emphasised that the common law provided a superior source of protection for foreigners. In the

50 Bradley (n 11) 721–722.

51 W Ivor Jennings, *Principles of Local Government Law* (2nd edn, University of London Press 1939) 'Preface'.

52 W Ivor Jennings, 'The municipal revolution' in Harold J Laski, W Ivor Jennings and William Robson (eds), *A Century of Municipal Progress 1835–1935* (Allen 1936) 55.

53 Ivor Jennings, *The Law and the Constitution* (2nd edn, University of London Press 1938) 171–173.

54 Ibid 173ff.

55 Ibid 154.

56 Ibid.

57 Ibid.

58 Ibid 155–157 n 1, citing Hersch Lauterpacht, *Oppenheim's International Law* (5th edn, Longmans 1935) vol 1, 36.

absence of legislation and even if international law allowed it, the Crown could not abrogate common law rights of foreigners like assembly or due process.[59]

Jennings conceptualised the constitutional position of international law, however, as a constitutional convention rather than firm law, and one that allowed Parliament to legislate itself into actions or internal laws that might constitute breaches of international obligations, though practically and normatively constraining it from doing so:

> [A]ny breach of international law by the United Kingdom will give to the country injured a claim against this country which may be enforced by any means available by international law for the time being (such as consideration of the matter by the Council or Assembly of the League of Nations or by the Permanent Court of International Justice, or even, subject to the Kellogg Pact, war). This means that the United Kingdom, through legislation enacted by Parliament, may be liable to give redress to a foreign Power. This does not impose any legal obligation upon Parliament. But it means in fact that Parliament will not deliberately, and ought not to, pass any legislation which will result in a breach of international law. Consequently international law limits the power of Parliament through the operation of constitutional convention.[60]

A second set of international–imperial conventions grew out of the constitutional relations with the dominions and the mandate territories. Regarding the mandates, however, Jennings maintained his earlier view that, as a matter of constitutional law, their government was 'within the entire discretion of the Crown' and, while the UK was bound by the terms of the mandates concluded and approved by the League Council, '[t]he fact that the obligations arise out of international law makes no difference' to this absolute constitutional discretion.[61]

Jennings' account of international law and imperial and mandate relations rested on a view of the rule of law that, innovatively for his time, held both internal and international forms. Beginning the chapter on English constitutional law with the rule of law, Jennings started not with England's constitutional history or the major principles, but instead with ideas of law and order in the context of instability at the international level. Jennings stated that the idea that it is 'necessary to establish "the rule of law" in international relations' is a recurring suggestion in contemporary discussions; that international law exists but is not obeyed, that diplomacy is based on force rather than law, and that establishing the 'rule of law' would lead to order, peace and the settlement of international disputes according to law.[62] For Jennings, this appeal 'expressly or impliedly draws a parallel between international society and the internal society of a modern State'.[63] International society today, however, resembled feudalism, where 'lawless and law-abiding barons alike felt that their security rested primarily upon the number of their retainers and the impregnability of their castles'.[64] The difference is that the 'natural solution' to this problem, stemming from Roman imperial traditions, was to recognise 'the authority of an overlord, a king or an emperor'.[65] Jennings goes on to contend that the

59 Jennings, *Law and the Constitution (*n 53) 155–157 n 1.

60 Ibid 157. See also Jennings, *Law of the Constitution* (n 48) 175–176, identical save for updated references to the League and the Permanent Court of International Justice, reading 'Security Council of the United Nations or by the Court of International Justice, or even war'.

61 Jennings, *Law and the Constitution* (n 53) 95 n 9.

62 Ibid 41.

63 Ibid.

64 Ibid 41–42.

65 Ibid.

rule of law was largely established internally, despite civil unrest, in the simple sense of 'the existence of public order', which depended on the existence of a superior power to use force to stop lawlessness: 'One lawless man, like one lawless State, can destroy the peace of a substantial part of his world. Force is necessary only for the lawless and can be used only if the lawless are the exceptions.'[66] While this basic sense of 'law and order' has been established in most states and is a 'universally recognised principle', in Britain, Jennings insisted, this experience had been one of liberalism or liberal-democracy that is not necessarily shared by other nations.

In Jennings' final analysis, the rule of law in the simple sense of law and order is present in 'all civilised States' and encompasses a range of governmental forms, including non-democratic and aggressively expansionist states.[67] If it means something more than that, it must rest on a more comprehensive theory of government which usually 'includes notions which are essentially imprecise' – control of the executive, limited legislative powers, and so on – but which are besides the central requirement that it be based on the 'active and willing consent and cooperation of the people'; an anti-formalist, substantive account of democracy.[68]

During the Second World War, Jennings revisited this vision of the rule of law and re-drew it as holding an essentially British – rather than generically democratic – substance that emphasised parliamentary control of the executive. He drew close parallels between domestic and international versions of the rule of law, contending that its conceptual content was fundamentally British, contained in British constitutional and parliamentary history 'and the works of publicists who consciously or unconsciously provide ammunition for political artillery'.[69] Moving beyond the contemporary view that Dicey's popularisation expressed its essence, Jennings instead traced the rule of law's history through Aristotle, Occam and the Revolutionary Settlement of 1688 to the contemporary discretionary government most clearly seen in the expansion of social services, which required 'a new technique of government and a new alignment of governmental powers'.[70] Arbitrariness, and not discretion as such, was where Jennings found the breakdown of the rule of law, and Dicey's failure was in missing the 'most fundamental element' in British controls of discretion, namely the control of government by Parliament, and the control of Parliament by the people.[71] Seeing the rule of law as generally controls 'exercised by one governmental authority upon another'[72] – neither necessarily by a court, nor necessarily total[73] – Jennings ultimately concluded that executive wartime powers, while 'as vast as those of any dictator', remained subject to parliamentary oversight and control, which he insisted would prevent any abuses.[74]

Earlier in the piece, and more striking, was Jennings' treatment of the international aspects of the rule of law. Noting again that the phrase 'rule of law' has 'mainly' been used in the context of international affairs to mark its absence between states, the lack of recourse through the League, and the outbreak of the war to 're-establish the rule of law', Jennings saw it as holding here 'much the same meaning as "law and order"', implying that

66 Ibid 42–43.

67 Ibid 59–61.

68 Ibid.

69 W Ivor Jennings, 'The rule of law in total war' (1941) 50 Yale Law Journal 365, 365.

70 Ibid 371–372.

71 Ibid.

72 Ibid 372.

73 Ibid 374.

74 Ibid 386.

diplomacy should be regulated by international law not force.[75] But Jennings insisted on a more capacious meaning that linked international and internal concepts of the rule of law:

> Yet, the rule of law has always meant more than order. International law should be re-established, not because it is law, but because it is good law. The Germans have re-established law and order throughout western Europe, but no British politician outside the internment camps has yet praised Hitler for establishing the rule of law. On the contrary, it is asserted that the law is the rule of the despot and the order the tyranny of the tyrant. In truth, it is the immediate aim of British strategy to create disorder in the occupied territories in order that the oppressed peoples may re-establish the rule of law. The rule of law means, therefore, not merely public order, but public order based on something like the principles of British liberalism.[76]

This formulation, reminiscent of his 1938 account but applied to the realities of the war itself, saw Jennings unsurprisingly denying tyranny the character of the rule of law; as merely public order that lacks the substance of 'something like' British liberalism. In doing so he mixed international and domestic conceptions without much clarity about the content or basis of the international version. It seems to need not just law and order, but also to be based – at the very least – on whatever principles the 'comity of nations' has given to it, though ideally move closer to British liberal conceptions. Adherence to this British content seems, then, to be Jennings' real prerequisite to 're-establishing' the 'good law' of international law.

3 Jennings at the end of empire: new commonwealths, 1940–1960

This part turns to how Jennings used the conceptualisations of the domestic and international from Parts 1 and 2 in two projects for the commonwealths of the post-war world. Jennings' wartime plans for a European federation modelled its laws on the British Empire's international–imperial experience in the 1920s. His post-war theorising around the constitutions for decolonising states aimed to fit them into a renewed Commonwealth. Instead of ruminating on their new international legal personality or freedom in domestic law-making, Jennings urged them to stay with British parliamentary traditions and resist the scourge of international socialism.

In 1941, Jennings sketched a plan for a federation of Western Europe, including a draft of its constitution. This 'federal union' would improve on the failures of the League, but against those who thought international government only meant replacing sovereign states with a world order – an ideal of 'insuperable' difficulties – Jennings insisted that a Western European federation of democratic governments was the only true solution to many of the world's problems.[77] Its practicability depended on persuading nations to send representatives to an international conference to draft a constitution, which meant persuading public opinion in these nations that this was both urgent and essential, which, in turn, depended on aiming at a constitution that would work to solve these problems without calling for 'too great a sacrifice' in the sovereignty of federating states.[78] For practical reasons, some flexibility in national forms of internal government would be allowed within the Federation, but in broad terms its constituent parts had to be democratic. Jennings insisted that centralising control over defence and foreign affairs for a single Western European bloc, which would attend the League of Nations in unity, was

75 Ibid 365–366.

76 Ibid.

77 Ivor Jennings, *A Federation for Western Europe* (Cambridge University Press 1940) 1.

78 Ibid 2.

fundamental to peace.[79] Some form of coordinated control over colonial possessions and economic relations within and beyond the Federation was central to avoid repeating the financial and military disasters of the interwar period.[80] These formed the pillars of Jennings' view. But he also insisted that it was not a utopian project. The 'empty sentiments' and 'vague Utopianism' that reflected a poor understanding of the practical and theoretical problems involved in such a union were a serious danger.[81] To clarify these practicalities, and outline how powers over foreign affairs, defence and some controls on economic relations and colonies might operate, Jennings turned back to the only other international organisation he thought effective and guiding: the British Empire's interwar experience of global order.

Analogies with the Empire and illustrations from its successes and failures form much of the arguments that followed. Pleading for the practicality of the scheme and exhorting the anglophone world to advocate for it, Jennings argued that just as the 'systems' from the 'Mediterranean to the Arctic' are 'copies' of the British system adapted to national characters and 'conditions of national life', his plan was 'based essentially on the British tradition' as it was 'adapted by British people' to the conditions of North American and Australia and, thus, the 'initiative' for the scheme must come from those peoples.[82] But the Commonwealth would also endure and be accommodated into the Federation. He insisted that nothing in the plan would formally detract from the King's powers or interfere with imperial–dominion relations – 'The Statute of Westminster of 1931 would not be amended even by the omission of a comma' – but practically it would significantly change Commonwealth intergovernmental relations: the UK could not defend the dominions except through the Federation's processes, and citizenship and immigration status would change, though this would not follow if the dominions were to join the Federation themselves.[83]

Following this imperial guide, Jennings' vision for the interaction of domestic and international in his European Federation strongly resembled the imperial–dominion arrangements in their 1920s forms, albeit here solidified in a written international constitution, rather than the policy preferences of the Empire and its areas of disengagement with dominion governments. Major foreign policy decisions would be for a Council of Ministers and President, to the exclusion of any 'direct political relations' between individual federated states and outsiders.[84] But plenty of international questions would be reserved to the internal systems of these states. There are 'many subjects of international discussion' that would remain 'entirely within the jurisdiction of the federated States': public health, extradition, mutual enforcement of foreign judgments, bankruptcy, patents, trademark, copyright and communications.[85] Balancing this internal jurisdiction with the problems usually solved in single-nation federations by delegating all international powers to the Federation prompted Jennings to draft a 'limited treaty-making power', granted to the constituent states, but subject to the Federation's control.[86] The Federation would also hold a legislative power to implement major treaties it signed,

79 Ibid 6ff.
80 Ibid 6–15.
81 Ibid 3.
82 Ibid 156–157.
83 Ibid 34–40.
84 Ibid 105.
85 Ibid.
86 Ibid 107ff.

and Jennings contemplated a convention for the unification of laws between the constituent states.[87]

In general layout, Jennings' Federation plan presaged many of the major elements of the post-war European integration projects and the eventual EU. Yet, Jennings' hope for a commonwealth with empire enduring alongside these European projects did not come to pass. Indeed, it is in the coda of Jennings' final works that his views on the international and domestic shift at the end of empire. They focused primarily on the kinds of domestic orders that the former colonies should aspire to adapt to their local conditions, mostly along the lines of the British constitution, though offering little guidance on their newly acquired rights and duties under international law. Jennings was extensively and personally involved in decolonisation as a constitutional architect.[88] His last works turned to vast statements of legislative authority and executive power – now asserted by newly decolonised states – but seeing new roots for them in the history of British colonial law-making.

In the 1961 second edition of *Parliament*, Jennings began now with Coke's early seventeenth-century vision of Parliament's authority as 'transcendent and absolute', not exactly rejecting it, but pointing to its clear functional limits while giving it theoretically global reach: 'The legislative authority of Parliament extends to all persons, to all places and to all events; but the only legal systems which it can amend are those which recognise its authority.'[89] Parliament is not subject to any 'physical' limitation, only those limits recognised by law. Law here meant simply the authority that peoples would practically accept and consent to; 'convenient general propositions' not entirely removed from social and political realities, but 'not necessarily bear[ing] any very close' relation to them.[90] Jennings noted that, regardless of the claims of statutes still on the books that purported to bind 'subjects of the Crown in America', this evidently could not include former colonial possessions over which the UK once exercised jurisdiction.[91]

As part of this view, Jennings once more contested Dicey's arguments that the rule of law prohibited wide discretionary authority and was not well served by delegated legislation. Jennings contended that this ignored the vast history of extra-parliamentary law-making outside the British Isles,[92] which was, amidst decolonisation, in the process of being dismantled and transferred to new states. Jennings listed the range of Crown rights to legislate in conquered or ceded territories where no local legislature had been set up or the right to legislate reserved, the Crown's wide powers to 'act as [it] pleases outside British territory and against foreigners [which] follows from principles of the common law', orders binding even British subjects in protectorates, trust territories, and Crown rights to legislate for certain settled colonies.[93] Those powers, formerly exercised for empire, which excluded international law's application in favour of imperial constitutional law, were now to be held by these new sovereigns. Jennings' vision, then, was still for a world order that based its idea of the international on both 'something like the principles

87 Ibid 109–110.

88 See e.g. Mara Malagodi, 'Ivor Jennings's constitutional legacy beyond the occidental–oriental divide' (2015) 42 Journal of Law and Society 102; Ivor Jennings and Harshan Kumarasingham, *The Road to Temple Trees: Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Centre for Policy Alternatives 2015) (Jennings' autobiographical reflections on Sri Lanka).

89 Ivor Jennings, *Parliament* (2nd edn, Cambridge University Press 1961) 1.

90 Ibid 2.

91 Ibid 1.

92 Ibid 474.

93 Ibid.

of British liberalism' as well as something like the principles – to him, practised and proven – of the British Empire.

As both of these foundational orthodoxies began to slip away in the 1960s, Jennings' focus turned to delivering lectures that buttressed and explained his work drafting new constitutions for decolonising states.[94] Amidst wide discussions of diversities in local populations, educational programmes, responsible government, the difficulties of constitution-making removed from local conditions, and the constitutional documents themselves, Jennings almost entirely eschewed any discussion of international law for these new states. Instead, Jennings reflections on late 1940s Asian decolonisation concluded with an examination of Commonwealth (rather than international) relations, and the suggestion that the historical and economic ties of the Commonwealth ought to guide newly independent India, Pakistan and Sri Lanka, alongside the likely benefits of a general alignment with British views of the 'power politics' of the early 1950s Cold War.[95]

By the 1960s and the era of African decolonisation, Jennings' (rather condescending) concluding suggestions would briefly note that new African states 'have a part to play in the international scene'.[96] But Jennings also thought that African leaders should treat their new international powers as carefully as their fledgling domestic governmental forms, given that control over external affairs had until independence been 'matters for the Government of the United Kingdom'.[97] The Commonwealth, Jennings suggested, might be a source of friendly advice, information and diplomatic connections.[98] The danger, however, was of African alignment with communist bloc states, determined to undermine democratic systems, and importing their ideologies alongside international aid and advice.[99] More abstractly, Jennings argued that the very existence of independent states necessarily led to international 'competition', and that each state tends to press its internal political organisation and culture as the mark of the ideal.[100] But despite all these international challenges, Jennings concluded that the greater ones remained internal. Constitutions could provide some solutions for self-government, but their success remained for the men – and, Jennings added, women – in public service.[101]

Conclusion: dissolutions

This article has shown how the transformations and fall of the Empire motivated Jennings' radical rethinking of the domestic and international in a range of projects around empire, administration and international community. What began as a focus on the interaction of imperial–constitutional law with the new international legal system, turned to the uses of the 'rule of law' to guide the development of international laws and, finally, post-war projects of European federation, decolonised independence and human rights. At that point, the dissolution of the British Empire in the 1950s and 1960s, its replacement with the Commonwealth, and the shift in Western hegemonic power from Britain to America had turned the Empire's global connections of power and law into

94 See e.g. the connected works of W Ivor Jennings, *The Commonwealth in Asia* (Clarendon 1951); W Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press 1956); W Ivor Jennings, *Democracy in Africa* (Cambridge University Press 1963).

95 Jennings, *Asia* (n 94) chapter 8 ('Commonwealth Relations').

96 Jennings, *Africa* (n 94) 84.

97 Ibid.

98 Ibid.

99 Ibid 85–87.

100 Ibid 87.

101 Ibid 88–89.

ones of imposed culture and inescapable history; the real power and law having gone elsewhere to the conflicts of the Cold War.[102] British visions of the international and domestic did not cease so much as turn to a different field: general jurisprudence. While Jennings drafted new constitutions for the decolonising world and lectured Asian and African jurists and state leaders, H L A Hart's analytic legal positivist 'revival' of John Austin's perspective influentially contended once more that international law lacked the status of law, for lack of sovereign or command, and could not be analogised to domestic law, where these elements were central.[103] Hart's vision seemed aimed at the failures of the League, the internationalism of the decolonising world, and the apparent 'deadlock' of current international institutions that, in the midst of the Cold War, could neither lawfully command nor protect in service of any ideology, but instead operated only through force, if at all.[104] The complexities of the debates over the relationship of international and domestic law now came to be dominated more by the intricacies of linguistic usage. This dissolved into an analytic project that tried to abstract itself from the world events and the rise of public and international law and power, intimately connected to the Empire, that had made Jennings' attempts to understand and link or distinguish them so urgent and important. Those events and the new roles for the international and domestic in justifying intervention and internal legal rearrangements according to capitalism or socialism would come to burn through the Cold War unabated, amid the flexing of new imperial powers.

102 On law and the end of (British) Empire, see Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (Oxford University Press 2013) ch 3, 'The Suez Crisis'; Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019). On new global political ideologies in the war and its aftermath, see Or Rosenboim, *The Emergence of Globalism: Visions of World Order in Britain and the United States, 1939–50* (Princeton University Press 2017).

103 H L A Hart, *The Concept of Law* (3rd edn, Oxford University Press 1961) ch x.

104 On Hart, primitive law and decolonisation, see Coel Kirkby, 'Law evolves: the uses of primitive law in Anglo-American concepts of modern law, 1861–1961' (2018) 58 American Journal of Legal History 535. On Cold War, see further Luis Eslava et al (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017); Matt Craven et al (eds), *International Law and the Cold War* (Cambridge University Press 2019).

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Unequal citizenship and subjecthood: a rose by any other name …?

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Abstract

British Citizenship is facing significant contemporary challenges in terms of failure to include ethnic minority citizens in an equal manner within the legal rights and protection of citizenship. Some examples of such failure are the hostile environment laws which have resulted in discrimination and deportation of citizens, new hurdles in becoming a citizen, and cancellation laws for conduct which have affected citizens with migrant connections more than those born British and holding only British nationality. This paper investigates why such legal inequalities persist by tracing modern-day manifestations to the progress of law in this area from the days of subjecthood and empire. It finds that, despite changes in the nature of state and governance since days of empire, contemporary British citizenship has inbuilt legal inequalities which persist from the time of subjecthood. Present inequalities are not just remnants of empire; they are constructed on the legal archaeology of empire.

Keywords: subjecthood; citizenship; empire; immigration; nationality.

Introduction

> Hitherto, we have not had any law discriminating against any British subject. I hope we never shall, but I do not know. If you are minded to discriminate, you can discriminate, whether you call them 'subjects' or whether you call them 'citizens'.[2] *William Allen Jowitt, 1st Earl Jowitt, The Lord Chancellor, 1948*

Modern British citizenship is a formal, legal relationship.[3] Although the link between rights and citizenship is often considered fundamental, there is very little case law in terms of the content of British citizenship.[4] Statutory laws on citizenship have developed

1 A version of this paper was delivered as the keynote address at a workshop on Subjecthood and Empire at Glasgow University organised by Dr Paul Scott. The discussions at the workshop, and anonymous peer review comments from the journal's peer reviewers, were most helpful for refining the paper.

2 HL Deb 11 May 1948, vol 155, cols 754–99, 3.21pm. §Order of the Day for the Second Reading Read.

3 Rieko Karatani, *Defining British Citizenship: Empire, Commonwealth and Modern Britain* (Psychology Press 2003).

4 Some cases do offer a few reflections on the content of citizenship, most recently in the Court of Appeal in *Pham* [2018] EWCA Civ 2064, discussed later in this paper. Two decades earlier, in 1998 in the *Al-Fayed* case, Lord Woolf wrote: 'Citizenship was an important status; refusal could have damaging implications, important benefits were not conferred.' See *R (Al-Fayed) v SSHD* [1998] 1 WLR 763, 773E.

in close conjunction with legislation on immigration control. In its turn, the present-day framework of immigration control in the UK developed largely as a response to decolonisation and the breakup of the British Empire in the twentieth century. This chapter traces the present-day challenges to equal citizenship faced by ethnic minority citizens in the UK and links these to past developments in subjecthood and decolonisation. It argues that even within the formal, legal framework there are inbuilt inequalities which have rendered citizenship rights illusory for many citizens who have minority ethnicity and who are racialised through their migrant origins or connections. These legal inequalities are rooted in the legal contours of the concept of subjecthood in Britain and in the British Empire. Some contemporary examples which are manifestations of these deep-seated legal inequalities are hostile environment policies, new stringent requirements for acquisition of citizenship, and the effect of cancellation of citizenship on ethnic minority citizens. The paper demonstrates that the racialised effects are not just remnants of empire but legal constructions built on the legal archaeology of empire. Understanding the legal links explains why some inequalities are durable and persist over time irrespective of changes in political forms of governance.

1 Challenges of modern British citizenship

1.1. Hostile environment policies

The 'hostile environment' is a shorthand reference to the anti-immigration policies and sentiments of the government from the 2010s. Used as a political buzzword in an interview with *The Telegraph* in May 2012 by Theresa May, the hostile environment has come to encompass a series of legislative and policy measures to make lives of irregular immigrants difficult, thereby motivating them to leave the UK.[5] Yet, many British citizens have been adversely affected by the 'hostile environment' policies of the past decade. The hostile environment includes measures to limit access to basic life resources such as work, housing and healthcare. Citizens who have access to the resources become responsible for checking the immigration status of others who seek employment, a place to live or treatment. Primary legislation, the Immigration Acts 2014 and 2016, made it mandatory for employers to check the immigration status of employees, whereas secondary legislation, for example regulations governing National Health Service charges, created barriers to healthcare for migrants. Bureaucratic changes (such as embedding of immigration officials at police stations and in local authorities) and data-sharing agreements between government departments (such as memorandums of understanding between the Home Office and Department of Health) have led to greater numbers of deportations.

Theresa May elaborated in the interview that the objectives of the hostile environment were to discourage people from coming to the UK (so stopping them at source through negative branding), to prevent those who do come from overstaying (by putting the actual barriers in place for them which make them detectable) and to stop irregular migrants from being able to access the essentials for living life (hence the focus on basic resources). Then Immigration Minister Mark Harper introduced the Bill for the Immigration Act 2014 in a similar manner: 'stop migrants using public services to which they are not entitled, reduce the pull factors which encourage people to come to the UK and make it easier to remove people who should not be here'.

5 'Theresa May Interview' *The Telegraph* (London 25 May 2012) <www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>.

These measures have a spillover effect on all kinds of people, including citizens. The most visible images of the hostile environment have been concerned with the detriment to British Caribbean persons for their inability to prove their British citizenship. Termed the *Windrush* scandal, many people who had lived all their lives in the UK suddenly found themselves homeless, unemployed, without healthcare and even deported as new document-checking rules and practices became prevalent.[6]

The racialised effects of measures, such as making landlords check the immigration status of tenants, have been disproportionately borne by ethnic minority citizens and migrants. The Home Office asked landlords in the West Midlands in 2015 to roll out the scheme of checking documents of prospective tenants. Home Office and Joint Council for the Welfare of Immigrants (JCWI) research indicated that minority ethnicity tenants were more likely to be asked for their immigration papers and that some landlords displayed potentially discriminatory behaviour or attitudes. The JCWI brought a case about the new housing checks in the High Court. It won the case, as the High Court agreed that housing immigration checks cause racial discrimination and declared them unlawful. As a result, the government was forced to halt its plans to roll the new scheme out to Wales, Scotland and Northern Ireland. The government appealed, so in 2020 the case came to the Court of Appeal. The Court of Appeal agreed with the JCWI that the scheme causes racial discrimination but stopped short of declaring the scheme unlawful, instead leaving it to MPs and government to decide whether the racial discrimination is 'greater than envisaged'.[7]

1.2 Restrictions on becoming a citizen

While the contingency on political context of citizenship status has become apparent in the hostile environment policies, the uncertainty in the lives of other long-term residents has also increased as access to citizenship was tightened through the requirement of longer periods of residence.[8] New language and citizenship tests were introduced in 2002 and later toughened to introduce greater difficulty.[9] Another hurdle has been the cost of making an application which has increased sharply from £575 in 2008 to £1330 in 2018.[10] All of these measures have served to create a significant population of settled residents without citizenship who are permanently subject to immigration control.[11] The lack of a declaratory system for settled status for EU nationals in the context of the Brexit legal transition has added to these numbers in limbo, as EU nationals undergo administrative processes to secure their residence rights. Adding to the continued control of migrant entrants and further extending it to those who are citizens is the cancellation of British citizenship for conduct.

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6 Fiona Bawdon, 'Remember when "Windrush" was still just the name of a ship?' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar 2019); Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Guardian Faber 2019).

7 See JCWI, 'Right to rent' <https://www.jcwi.org.uk/right-to-rent>.

8 Continuous residence of five years has always been required in order to naturalise for those not married to a British citizen, but a shorter three-year route available to those who were married to British citizens was effectively scrapped in 2012.

9 For an informative background note on cancellation powers, see Melanie Gower, *Deprivation of British Citizenship and Withdrawal of Passport Facilities* (House of Commons Library 2015).

10 £1330 is the current naturalisation application fee in 2020.

11 Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 108–109.

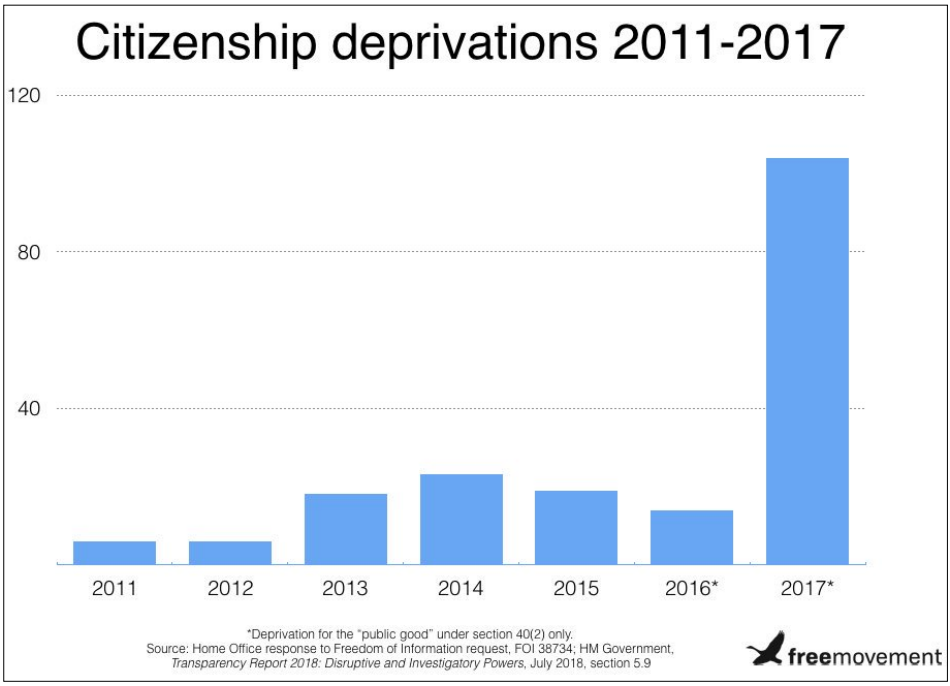

Figure 1

1.3 Cancellation of citizenship

Cancellation of citizenship is justified as a national security measure but has become increasingly popular as a means of determining who is undesirable and has to be kept out of the country. Figure 1 depicts how cancellation powers in the UK are on the rise for conduct reasons.

The British Nationality Act 1981, which sets out who can have their citizenship revoked, is clear that some citizens cannot lose their citizenship: people who are British at birth and do not have any other nationality cannot have their British citizenship cancelled.[12] It permits cancellation as long as a person has a surviving nationality in order to safeguard against statelessness.[13] However, since an amendment in 2014, it is now possible to leave a naturalised, single (only British) nationality holder stateless by

12 The general standard for cancellation is whether it is conducive to the public good. The Immigration Act 2014 defines the standard of conduct for cases in which cancellation can occur. The first is whether it is conducive to the public good to cancel the citizenship. This typically is considered in instances of terrorism and war crimes, which are both deemed as unacceptable behaviour. It is a broad standard for defining what is conducive to the public good and can potentially expand beyond the scope of national security. In s 40(4A) of the British Nationality Act 1981 the Home Secretary can deprive a naturalised person of their British citizenship status on the grounds that they had conducted themselves in a manner 'seriously prejudicial' to the vital interests of the UK.

13 Statelessness is the foremost concern in cancellation of citizenship. Article 15 of the Universal Declaration of Human Rights declares that 'everyone has the right to a nationality'. The 1954 UN Convention on Stateless Persons aims to regulate and improve the legal status of stateless persons: Article 1 defines a stateless person as 'a person who is not considered as a national by any State under the operation of its law'. The Convention on the Reduction of Statelessness aims to avoid incidents of statelessness (ratified with reservation).

depriving them of their British citizenship. This change put into the formal legal framework the lesser tolerance of 'disloyal' behaviour by naturalised citizens. Table 1 illustrates this new scenario and how different people are affected differentially by the new powers:

British citizen born in the UK?	Any other nationality?	Can British nationality be cancelled for conduct?	Can be rendered stateless?
YES	NO	NO	NO
YES	YES	YES	NO RISK OF STATELESSNESS
NO	YES	YES	NO RISK OF STATELESSNESS
NO	NO	NO	YES

Table 1

The international framework on statelessness and the right to nationality, of which the UK is a signatory, declares that governments cannot create statelessness. However, there is a caveat to this; in the interests of national security, naturalised people can be stripped of their citizenship and left stateless. There is very little information about what any person who is deprived and left effectively stateless may expect. The only indication of practice and policy in this area can be found in a letter sent from Lord Taylor of Holbeach, Home Office Minister, who after the Lords Report stage debate on the Immigration Bill in 2014 writes:

> 1. anyone who had been deprived of their British citizenship in such circumstances would be unlikely to satisfy the eligibility criteria for leave to remain under the Immigration Rules for stateless people … 2. But scope to grant people a period of 'restricted leave', which could be subject to conditions such as restrictions on employment and residency.

Hence, it is unclear how far statelessness acts as a safeguard anymore and, also, whether the kind of statelessness created by deprivation is now qualitatively different from the kind which is protected under international law.

Just as the importance of marriage is underlined in divorce proceedings, ironically, it is in the context of citizenship cancellation in the *Pham* case of 2018 that Arden LJ pronounced that: 'The right to nationality is an important and weighty right. It is properly described as the right to have other rights, such as the right to reside in the country of residence and to consular protection and so on.' Yet, many are able to lose this weighty right without even being present in the country and without any criminal charge or judicial determination of the order to deprive them.

A recent controversy in cancellation of citizenship which demonstrates the continued precarity of British citizens of minority ethnicity is that of Shamima Begum. Ms Begum, now 20, was born in the UK to British parents of Bangladeshi origin. At the age of 15 she was recruited online and went to Syria where she married an Islamic State fighter. After some years she wanted to return to the UK, but her British citizenship was cancelled by the government for national security reasons. She was not charged with any offence, but she has been unable to re-enter the UK. While her citizenship was being cancelled, her infant son,

a British citizen at birth, died in Syria.[14] Ms Begum is now in Syria in refugee camps while her family in the UK challenges the cancellation of her citizenship.[15] At the time of writing, Ms Begum has lost her appeal heard by Closed Materials Proceedings in the Special Immigration Appeals Commission (SIAC) which has found that, at the time she was deprived of her British citizenship, Ms Begum was also a Bangladeshi citizen, and so was not left stateless by that deprivation.[16] According to Bangladeshi law, until she is 21 Ms Begum has an automatic claim through her parents to citizenship. This approach has now opened the door for Home Office submissions that it is possible for people to have involuntary and automatic national connections with other countries through ethnicity or parental links which may count as other nationality at time of deprivation.[17]

Intense media interest has followed Ms Begum's situation, but her case is not just a human interest story. It is an example of the use of legal powers in relation to citizenship and potential statelessness and what the implications are for the usage of such powers. Her situation raises pertinent questions about British citizenship and statelessness, especially as these apply to ethnic minority people who are born in the UK and/or who hold British passports. Are all citizens equal or are some more susceptible to having the bonds of citizenship snapped because of their conduct than others? From the Home Office deprivation order, and the subsequent SIAC judgment, it appears people who are migrants who naturalise or who have migrant parents are more vulnerable in cancellation cases, as they are likely to have connections with other countries. In Ms Begum's situation, Bangladesh has already declared her as an alien and said it would prosecute her and execute her under death penalty provisions if she is found guilty of terrorism. Despite acknowledging her inability to effectively conduct her appeal from outside the country, the SIAC has found she has Bangladeshi nationality and is therefore not stateless.[18]

In *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, Arden LJ said at paragraph 51 of the judgment:

> In the present case, the appellant has over a significant period of time fundamentally and seriously broken the obligations which apply to him as a citizen and put at risk the lives of others whom the Crown is bound to protect. I do not consider that it would be sensibly argued that this is not a situation in

14 See blogpost on the cancellation decision: Devyani Prabhat, 'Shamima Begum: legality of revoking British citizenship of Islamic State teenager hangs on her heritage' (*The Conversation*, 20 February 2019) <https://theconversation.com/shamima-begum-legality-of-revoking-british-citizenship-of-islamic-state-teenager-hangs-on-her-heritage-112163?utm_source=twitter&utm_medium=footertwitterbutton>.

15 The issue of surviving nationality has come up in the past in the *Al Jedda* case [2013] UKSC 62, where the issue was whether Mr Al Jedda had a surviving Iraqi nationality. Mr Al Jedda claimed that he did not have a surviving Iraqi nationality in addition to his British nationality, and the court agreed that indeed Mr Jedda did not have any other existing nationality at the time he lost his British nationality. The UK's statelessness obligations in international law at that time meant Mr Jedda could not be stripped of his British citizenship.

16 Appeal No SC: 163/2019; judgment dated 7 February 2019.

17 The Court of Appeal decided on 16 July 2020 that Shamima Begum should be allowed back so that she can effectively challenge the removal of her British citizenship. See blogpost about the Court of Appeal decision: Devyani Prabhat, 'Shamima Begum: what the legal ruling about her return to the UK actually means' (*The Conversation*, 17 July 2020) <https://theconversation.com/shamima-begum-what-the-legal-ruling-about-her-return-to-the-uk-actually-means-142860?utm_source=twitter&utm_medium=bylinetwitterbutton>.

18 Similar issues have come to the courts in the past: see Devyani Prabhat, *Unleashing the Force of Law: Legal Mobilization, National Security, and Basic Freedoms* (Palgrave Macmillan 2016; and Lucia Zedner, 'Citizenship deprivation, security and human rights' (2016) 18(2) European Journal of Migration and Law 222–242. In the *Pham* case of 2015 the Supreme Court examined the statelessness issue. *Pham (Appellant) v Secretary of State for the Home Department (Respondent)* [2015] UKSC 19 and the *Al Jedda* case (n 15). See, generally, Gower (n 9) for a background note on deprivation powers.

> which the state is justified in seeking to be relieved of any further obligation to protect the appellant.

Irrespective of the assessment of Mr Pham's individual conduct, this judgment illustrates the resurgence of a loyalty and allegiance model in British citizenship as it makes protection conditional on conduct.

The framework of 'exceptionalism' in national security has further eroded citizenship rights and extended state powers of immigration control.[19] It facilitates the shoring-up of the nation-state's borders as jurisdiction is removed from the bodies of former citizens who are effectively expelled from the borders. There are new elements of extraterritoriality in counterterrorism as proposals include setting up war tribunals to try European fighters in Syria (rather than in Western democracies).[20] Apart from keeping people outside the country, cancellation powers make expressive statements about who does not belong. These signal that there are certain – usually non-white – populations who need to be managed outside the borders. Such clear differentiation between citizens, both in law and in practice, resonates with the concept of second-class citizenship.[21] Bosniak writes that racial subordination has distorted formerly egalitarian polities resulting in the creation of 'second-class citizens' who enjoy the status of citizenship but who nevertheless are denied the enjoyment of citizenship rights or 'equal citizenship'.[22] The denial of substantive rights has created lesser forms of citizenship status itself; a conditional citizenship which can be deactivated without much administrative or judicial engagement.[23]

2 Why are legal inequalities inbuilt into British citizenship?

As seen from the three prominent examples above, there are legal inequalities built into every aspect of modern British citizenship law: its acquisition, its holding, and its loss. Such legal inequalities can be traced back to British citizenship's close connections with subjecthood.

2.1 What is subjecthood?

Subjecthood was a relationship of allegiance and protection.[24] There is a critical link between subjecthood and the emergence of the nation-state; allegiance and loyalty was first to king and then, with time, to king and state.[25] Muller writes how it also provided a

19 Devyani Prabhat, 'The blurred lines of British citizenship and immigration control: the ordinary and the exceptional' in Prabhat (ed) (n 6).

20 Rojava Information Centre, *Bringing Isis to Justice towards an International Tribunal in North East Syria* (RIC 2019) <https://rojavainformationcenter.com/storage/2019/07/Bringing-ISIS-to-justice-Rojava-Information-Center-Report-2019-Website.pdf>.

21 Linda Bosniak, 'Constitutional citizenship through the prism of alienage' (2002) 63 Ohio State Law Journal 1304; Linda Bosniak, 'Citizenship denationalized' (2000) 7 Indiana Journal of Global Law Studies 447.

22 Linda Bosniak, 'Citizenship denationalized" (n 21) 465.

23 See also on alien-citizenship: Mae M Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University Press 2004) and Mae M Ngai, 'Birthright citizenship and the alien citizen' (2007) 75 Fordham Law Review 2521. The alien citizen is an American citizen by birth on American territory but whose citizenship is suspect, if not denied, on account of the racialised identity of immigrant ancestry.

24 A Dummett and A Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld & Nicolson 1990) 142.

25 Benjamin Carvalho, 'The making of the political subject: subjects and territory in the formation of the state' 45(1) Theory and Society 57–88.

common bond between people of distant lands in times of empire.[26] The ruler was distant but was experienced from afar in diverse lands through connections fostered by ceremonies and rituals to celebrate royal life events. Although subjecthood was a different kind of political and legal relationship between the ruler and the ruled it also had dimensions which continued seamlessly into citizenship and immigration legislation.

Subjecthood is often traced genealogically as a pre-cursor to citizenship starting from the *Calvin* case.[27] The *Calvin* case arose out of the succession of James VI of Scotland to the English throne and the unification of the Crowns of Scotland and England. The question was whether Calvin, a Scot, could hold land in England. This was possible if Scots were subjects of England as well as of Scotland, rather than just of Scotland. The legal question thus became about who is an alien and who is a subject.

The court decided that for a person to be a subject he has to be born in the 'King's dominion' and have parents who were 'under the actual obedience of the King'. The case has connected subjecthood to territorial control and allegiance to the ruler. However, another consequence of the case is that protection of rights, such as property rights for Calvin, can be derived from the status of subjecthood.[28] In the context of empire and colonial rule, rights have been attached to subject status as well. Whereas colonial rulers have used subjecthood pragmatically to enforce relationships of allegiance, colonial people have mobilised subjecthood as a category to agitate for rights as well. Both processes could take place simultaneously.[29] People approached courts set up by the British rulers to be declared as 'subjects', so that they could seek the protection of the common law.[30] In India, the Calcutta High Court, for example, has given several decisions on who is a subject.[31] The person bringing the case has wanted to be declared as a subject in order to come within the court's jurisdiction.[32] Given the close proximity of subjecthood with rights (even if inconsistent over time and space), it is not wholly accurate to contrast subjecthood with citizenship on the basis of rights or rightlessness.

3 Dominions and colonies

Subjecthood's complex dimensions arise from its portability across the vast breadth of the British Empire comprising of present-day old and new Commonwealth nations, as

26 Hannah Muller, *Subjects and Sovereign, Bonds of Belonging in the Eighteenth-century British Empire* (Oxford University Press 2017).

27 (1608) 77 ER 377.

28 Keechang Kim, 'Calvin's case (1608) and the law of alien status' (1996) 17(2) Journal of Legal History 155–171, 156.

29 In the context of resistance and the use of legal systems, see Brooke N Newman, 'Contesting "black" liberty and subjecthood in the anglophone Caribbean 1730s–1780s' (2011) 32(2) Slavery and Abolition 169–183 and Sally Engle Merry, 'Law and colonialism' (1991) 25 Law and Society Review 889 who write about resisting using colonial ideology, procedures and systems.

30 Bijita Majumdar, 'Citizen or subject? Blurring boundaries, claiming space: Indians in colonial South Africa' (2013) 26(4) Journal of Historical Sociology 479–502.

31 It may be relevant to note the exceptional position of India within the British Empire, as it was not considered a colony because the East India Company's rule came to an end in 1858, and the British Crown took direct control and appointed a government there. Yet, India was often treated as a dominion, and especially after the First World War Indian representatives at the 1923 Imperial Conference were formally treated as equals of the representatives of the dominions.

32 Several cases exist on jurisdiction and subjecthood. One example is *Killican v Juggernauth Dutt* (1777) 1 Ind D 946 where jurisdiction of the court extended over all born in Calcutta or residing in Calcutta. The court was less likely to extend jurisdiction over people in the areas surrounding Calcutta.

well as other lands not in the present-day Commonwealth.[33] The old Commonwealth (Canada, Australia, New Zealand) were also called 'dominions'. These are white settler colonies where local governance was usually autonomous. Locally elected representative governments were in charge in these places. In colonial territories, there were large non-European populations, and the white residents were a small minority. These colonies became self-governing later than the dominions and became known as the new Commonwealth.

During days of empire there were significant differences in how people perceived the legal status of being a British subject in dominions or colonies and within England.[34] Within Britain, the term British subject stood for Britain's own national identity as well as imperial supremacy. This rang true even at the time of the dissolution of empire. For example, Lord Chancellor Lord Jowitt introduced the British Nationality Bill in the House of Lords on 11 May 1948 with the words:

> … of all the remarkable contributions which our race has made to the art of government, the conception of our Empire and Commonwealth is the greatest … I believe that we have managed to combine a sense of unity and a sense of individual freedom, now the link the bond which binds us together is of course primarily the fact that we are all proud to be subjects of his Majesty the King.[35]

In dominions, which primarily consisted of settler white populations, subjecthood was perceived as a direct relationship with king and country, although this perception changed with time as dominions strove for independence. In the colonies, where white rulers were minorities, being a subject was seen as being subjugated to a foreign power. Colonial subjects were considered social, cultural and political inferiors. For instance, Indian British subjects were mockingly referenced as Gentoos (Hindus) and conquering Moors (Muslims) with Gentoos waiting to be rescued from their subjugated state.[36] Subjecthood encountered different issues in settler societies and in colonies. In settler societies, the presence of indigenous people was a factor that did not exist in colonies. While indigenous people were part of subjecthood, they were often denied citizenship of the emerging nations; a situation rectified only after many struggles for equality. Like an able contortionist, subjecthood could change shape and become both what is desired and what is feared across the Empire.

While subjecthood was carried around the world by British rulers through documents, laws and courts, it was never tested in a uniform or universal manner. Thus, experiences of being a subject varied widely. Hardly any mass travel had taken place for most of human history until the past century, so few British subjects chose to make use of their hypothetical rights by travelling to England. The few who did were at the extremes of social strata: either very poor or very wealthy. Poorer British subjects, such as sailors and servants from India who travelled to England, were usually left impoverished by the India

33 For example, see Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996), which ably demonstrates the complex dimensions of subjecthood in late colonial Africa and the effects of these on contemporary Africa, and Radhika Mongia, *Indian Migration and Empire: A Colonial Genealogy of the Modern State* (Duke University Press 2018), in the context of India and Indian migration throughout the Empire and which demonstrates how subjecthood interacts with migration to build a state.

34 Priyamvada Gopal, *Insurgent Empire: Anticolonial Resistance and British Dissent* (Verso 2019).

35 HL Debs 11 May 1948, vol 155, col 755.

36 Sudipta Sen, 'Imperial subjects on trial: on the legal identity of Britons in late eighteenth-century India' (2006) 45(3) Journal of British Studies 532–555.

Office in England, which was charged with their welfare.[37] Others who were elite travellers from colonies could come and reside peaceably and even qualify from the most elite institutions. For example, alongside many male Indian barristers who studied in the UK, was the first female Indian lawyer Cornelia Sorabji. Sorabji was the first woman to study law at Somerville College, Oxford University. She was also the first woman to practise law in India.[38]

4 Barriers to free movement of subjects

Indeed, migration has stretched the fabric of subjecthood because global movement of people as humans with agency and freewill was not anticipated or planned for in the past. Human beings outside Europe were transported as property rather than as humans. They were traded as slaves or moved as indentured labour to provide for colonial needs.[39] When human beings exercised their freewill to travel they made attempts to use free movement between colonies and dominions using the promise of equality in subjecthood as a basis of free movement. The reality of free movement was quite different from the legal promise. People from colonies (with white minority rulers) who wanted to travel to and/or settle in dominions (with white settler populations) often found that there were racial qualifications added to their entry and settlement criteria.[40] Discrimination was directed towards non-white migrants, both subjects and non-subjects, through various means, from charging additional fees (e.g. for Chinese workers to enter) or fixing number of passengers of one ethnicity as a ratio of total passengers in a ship, through to setting conditions such as not allowing people to land unless they travel directly to the country, which made long-distance journies (such as between India and Canada) impossible.[41] Chesterman writes:

> … a person's status as a British subject in Australia entitled them to very few legal rights. Entitlements that one might see as naturally flowing from British subject status – such as the right to vote and receive social security – did not follow automatically upon a person being recognised as a British subject in Australia.[42]

In order for subjecthood to attach to specific rights, it has had to be mobilised by movements or individuals who tested the limits of its egalitarian scope. Otherwise it meant there were no real gains. Contextually placing subjecthood in the various backdrops, it is possible to see how the promise of rights has been illusory for many people in the colonies. The indeterminacy of its form has led to its widespread use as a pragmatic policy linked to selective categorical operation in demographic control.

37 Raminder K Saini, '"England failed to do her duty towards them": the India Office and pauper Indians in the metropole, 1857–1914' (2018) 46(2) Journal of Imperial and Commonwealth History 226–256.

38 See Open University Research Project, *Making Britain* <www.open.ac.uk/researchprojects/makingbritain/content/cornelia-sorabji>for details on Cornelia Sorabji.

39 Brenna Bhandar, *Colonial Lives of Property* (Duke University Press 2018): Bhandar writes about racial regimes of property ownership that have evolved in settler societies in the context of colonialism.

40 In *Musgrove v Chung Teong Toy* 1891 AC 272, the Privy Council ruled that aliens had no enforceable right to enter the country. Canada enacted an Act in 1909 which stated regulations could prohibit 'immigrants belonging to any race deemed unsuited to the climate or requirements of Canada'.

41 Ann Dummet, 'Nationality and immigration status' in Ann Dummet (ed), *Towards a Just Immigration Policy* (Cobden Trust 1986).

42 John Chesterman, 'Natural-born subjects? Race and British subjecthood in Australia' (2005) 51(1) Australian Journal of Politics and History 30–39, 33.

These disjunctions in understanding subjecthood indicate that it was a relationship that was made-to-measure rather than a one-size-fits-all.[43] It remained indeterminate in character with a wide range of inbuilt discretion regarding its substantive content. It could demand allegiance, become rights-linked or facilitate subjugation of people. Muller writes: 'Subjecthood … was constantly shifting both in response to, and to accommodate, the vagaries of imperial rule.'[44] It did not, however, denote cultural belonging to Britain. In that sense, it is very different from citizenship, where demonstrating cultural knowledge and language skills is part of the naturalisation process even if it reduces actual emotional wellbeing and sense of belonging for modern-day migrant-citizens.[45] Citizenship ceremonies also include an oath of allegiance which is reminiscent of the loyalty aspects of subjecthood.[46]

Continued British involvement in a post-war period in former colonies and dominions, whether through the Commonwealth or special relationships, has kept links alive between the former constituents of the Empire. Whereas divisions of countries into controversial borders have left nationality as a legacy of misery for millions today,[47] as already mentioned, Britain as a policy continued subjecthood via its own nationality legislation. These links between subjecthood and citizenship continue in present times but, arguably, the most important links to subjecthood today are the living progeny of former colonised people who are ethnic minority citizens in the modern UK. For the rest of this paper the focus shifts to how such people come within immigration control. Subjecthood lives on through them while being replaced in terminology by citizenship. This is clear when twentieth-century nationality and immigration laws are examined.

5 Twentieth-century nationality and immigration

Prior to 1948 every British national was treated as a British subject.[48] The loyalty element of subjecthood acted as a rallying call for participation in the two world wars across the Empire. In the dying days of empire, subjecthood was challenged and discarded nationally in the former colonial spaces. The rise of nationalism in the newly born, free countries in decolonising nations created an urge to monitor immigration locally and nationally as an expression of state sovereignty. This led to more barriers being set up against the entry and naturalisation of British subjects. In different countries, racial and ethnic qualifications to citizenship were eventually removed because of national social and political movements to include minority and indigenous persons in the fold of national citizenry. Countries like Australia and Canada perceived this reconfiguration as a

43 See Timothy H Breen, 'Subjecthood and citizenship: the context of James Otis's radical critique of John Locke' (1998) 71(3) New England Quarterly 378–403 for a conceptual analysis of the difference between subjecthood and citizenship; and Robbie Shilliam, 'Civilization and the poetics of slavery' (2012) 108(1) Critical Theory and Historical Sociology 97–116 for a discussion on how subjects can invent their own subjecthood.

44 Muller (n 26) 13.

45 Devyani Prabhat, *Britishness, Belonging and Citizenship: Experiencing Nationality Law* (Policy Press: 2018).

46 Bridget Byrne, *Making Citizens: Public Rituals and Personal Journals to Citizenship* (Palgrave Macmillan 2014).

47 A current example is the controversy about the Indian Citizenship Amendment Act 2019 which offers a fast-track citizenship to people belonging to persecuted minority religious groups in Muslim majority countries neighbouring India but not to any Muslims. This Act has caused concerns about India's secular constitutional structure. Meanwhile, several Muslim lifelong residents in some parts of India have not been included in registers of citizen names, leaving them stateless and vulnerable. These issues can be traced back to the arbitrary religion-linked borders drawn at the time of the partition of India signalling the end of Empire but also the end of a subcontinent-wide country of religious pot-pourri.

48 Sarah Ansari, 'Subjects or citizens? India, Pakistan and the 1948 British Nationality Act' (2013) 41(2) Journal of Imperial and Commonwealth History 285–312.

liberation from British subjecthood. Discretion remained on racial qualifiers for admission, as well as settlement, and rights did not automatically transfigure from legal guarantees.

Arguably, national citizenship in both Australia and Canada is of a thin kind.[49] This could be a reason for the lingering ethnocentrism of subjecthood with its continued structural inequalities. However, even in the USA where American citizenship, born out of American decolonisation and anti-slavery constitutionalism, is of a much thicker kind, durable inequality of the legal structural kind between citizens continued.[50] Equal rights and racial non-discrimination, at least on paper, were achieved only after prolonged civil rights struggles and after social movements agitated for continued justice.

At the point of breakdown of empire, as more and more countries achieved independence, if those countries chose to join the Commonwealth their citizens remained British subjects. The British Nationality Act 1948 changed the focus of having allegiance to the king to, instead, just being a citizen of a country in the Commonwealth.[51] Regarding the 1948 Act, Everson writes[52] 'the natural universalism of subjecthood had been territorially qualified', and the 1948 Act had 'created a new geographical and territorial entity known as the UK and Colonies'. The British colonies would henceforth share a citizenship with the UK to be called citizenship of the UK and colonies. Under the British Nationality Act 1948, the concept of a British subject covered, in addition to citizens of the independent Commonwealth countries, 'Citizens of the United Kingdom and Colonies' (CUKCs) and 'British subjects without citizenship'. 'British subjects without citizenship' were persons who could potentially become citizens of an emerging independent Commonwealth country on the coming into force of that country's citizenship law. If they did not acquire such citizenship, they would, by default, then acquire citizenship of the UK and colonies.[53]

The story of how citizenship came to be defined in the UK was not about the UK's willingness to express a definitive view on the matter. Indeed, British politicians had viewed the dilemma of dominions regulating entry from colonies as follows:

> We quite sympathise with the determination of the white inhabitants of these colonies which are in comparatively close proximity to millions and hundreds of millions of Asiatics that there shall not be an influx of people alien in civilisation, alien in religion, alien in customs, whose influx, moreover, would most seriously interfere with the legitimate rights of the existing labour population. An immigration of that kind must, I quite understand, in the interests of the Colonies, be prevented at all hazards, and we shall not offer any opposition to the proposals intended with that object.[54]

49 David Pearson, 'Theorizing citizenship in British settler societies' (2002) 25(6) Ethnic and Racial Studies 989–1012.

50 Denver Brunsman, 'Subjects vs citizens: impressment and identity in the Anglo-American Atlantic' (2010) 30(4) Journal of the Early Republic 557–586, 559; Andreas Fahrmeir, Citizenship: *The Rise and Fall of a Modern Concept* (Yale University Press 2007); Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union, 1774–1804* (University of Virginia Press 2009).

51 Randall Hansen, *Citizenship and Immigration in Post-war Britain* (Oxford University Press 2000).

52 Michelle Everson, '"Subjects", or "citizens of Erewhon"? Law and non-law in the development of a "British citizenship"' (2003) 7(1) Citizenship Studies 57–83, 77.

53 Dummet (n 41) 143.

54 Joseph Chamberlain in a conference in 1896, cited in Robert A Huttenback, 'The British Empire as a "white man's country" – racial attitudes and immigration legislation in the colonies of white settlement' (1973) 13(1) Journal of British Studies 108–137, 117.

Eventually, it was an assertion of national sovereignty of a newly independent dominion which forced the UK legislation to adopt a statutory definition of citizenship. The direct impetus was the Canadian domestic legislation. Canada passed its own citizenship Act in 1946 and issued Canadian passports to include its own French Canadian citizens.[55] Canada's initiative in controlling its own immigration and naturalisation meant that each dominion could now determine criteria for entry and residence of its own and regulate subjects from other parts of the Empire. This challenged the common status of British subjecthood.

Canada termed British subjects as Commonwealth citizens, so the British government introduced its own Bill to include all Commonwealth citizens as British subjects. This was achieved through a legal sleight of hand: a shift in terminology from subject to citizen in the British Nationality Act 1948. To create equal status of subjects, the 1948 Act permitted former subjects of the Commonwealth and colonies to freely enter and settle in the UK. The Act made it possible to naturalise as well as hold plural citizenships elsewhere without any limitation. It also recognised for the first time in statute law that people can become British by incorporation of territory (s 11) without requirements of proving any allegiance as a basis for citizenship. However, having to take an oath of allegiance to the monarch was part of the process of naturalisation (s 10(1)), so some people still had to demonstrate some sort of allegiance akin to subjecthood. Thus, the 1948 Act did not abolish subjecthood and replace it with a uniform set of rights attached to British citizenship. Instead of this, the various former colonies and dominions made different rules applicable for their own national citizenship.

Newly independent countries could opt whether to join or not join the Commonwealth. Burma, for example, chose not to join the Commonwealth, so Burmese nationals did not retain British subjecthood. In contrast, Commonwealth citizens retained a right to enter, live, and work in the UK just as all subjects had done in the past. The driving force behind a continued nationality relationship with people of decolonised nations was the desire of Britain to exert soft power over the former empire nations and to retain a position as 'first amongst equals' in the Commonwealth.

Apart from empire nostalgia, why did the 1948 Act not attempt to control immigration from the Commonwealth? First, there was hardly any mass migration in the early 1940s, so migration had not yet become a major concern. Thus, the Act merely embodied the status quo. The second reason was Britain's partnership with its colonies in the two world wars. In 1914, George V, the King of England, had declared war on Germany on behalf of the whole empire. Every subject was called upon to contribute to war efforts and appeals were made to their sense of allegiance to the Crown.

The First World War proved extremely expensive for Britain, and the Second World War left Britain in enormous debt. Troops from the colonies and dominions fought for Britain, and resources were mobilised from all over the Empire. Given the role of the colonies in the world wars and the continued role of the Commonwealth in 1948, there was a lack of political will for bringing in new checks on immigration from the newly born Commonwealth nations. Ironically, it was the involvement of British colonial subjects in the Second World War that led to increased migration to the UK.

55 Laurie Fransman, *Fransman's British Nationality Law* (Bloomsbury Professional 2011).

6 The change in subject status

People did not just arrive in the UK on their own initiative. British companies actively recruited from the Commonwealth, especially in sectors such as textiles and farm labour where labour was scarce within the UK. Family members of labourers arrived later, closer to the end of 1950s or in the early 1960s, when there were strong indications that immigration policies were likely to tighten to stem further migration.[56] The apprehensions about the closing immigration door were proved right when the Commonwealth Immigrants' Act 1962 ended the right of automatic entry for Commonwealth citizens. They were still 'British subjects' under the British Nationality Act 1948, but that status was detached from any substantive rights. Even if they were ordinarily resident, or had been, they were subject to a new system enabling deportation of those who had committed criminal offences. All of these changes permitted enormous administrative discretion in determining who could enter and who could stay in the UK. Crucially, the 1962 Act removed the right of entry of citizens of the UK and Colonies whose passports had been issued by colonial authorities.

It is clear that, through legal limits placed on the rights of Commonwealth citizens, the UK was withdrawing from the Commonwealth free movement area from 1962 onwards, thereby affecting its citizens who resided outside the UK and whose parentage lay outside the UK. CUKCs formally possessed the same legal status, but few had real residence rights. Citizens who resided in the UK, or whose parentage lay within the UK, did usually have a continued right of residence in the UK; they were mostly white. People who lacked residence rights were disproportionately non-white CUKCs. Just as free movement of subjects during days of Empire was also racially determined by their regions of origin, British citizenship was now of less value to non-white British from overseas. Alongside new legislation, steps were taken to discourage new arrivals, such as through advertising campaigns. Racism and hostility directed towards these newer members of British society became heightened.[57]

It was in this politically charged context that in the 1960s and 1970s a large number of displaced East Asian African British passport holders migrated to the UK. Dictatorial regimes of East Africa, and the rise of African nationalism there, had led to the persecution of minorities such as Asian-origin Ugandans and Kenyans.[58] Of these people, those who were British passport holders migrated to the UK to seek personal safety but found that they could not readily enter and settle in the UK. The British government refused them entry or detained and deported many of them, stating that their passports were not intended to be used as travel documents.

The refusal of entry of several East African Asian British passport holders was challenged in the European Commission of Human Rights. The European Commission found that the UK had participated in the inhumane and degrading treatment of the East African Asians in the form of racism and discrimination.[59] In response, the UK government started a voucher system for each head of household (defined as a male member of household) who wanted to resettle in the country.

56 Joe Turner, 'The family migration visa in the history of marriage restrictions: postcolonial relations and the UK border' (2015) 17 British Journal of Politics and International Relations 623–643.

57 Trevor Phillips et al, *Windrush: The Irresistible Rise of Multi-Racial Britain* (Harper Collins 1998).

58 Randall Hansen, 'The Kenyan Asians, British politics, and the Commonwealth Immigrants Act, 1968' (1999) 42(3) Historical Journal 809–834.

59 *East African Asians v UK* (3 EHRR 76) 15 December 1973.

In 1968, in just three days, the British government passed an immigration Act, the Commonwealth Immigrants' Act 1968, in order to prevent the re-entry of people from countries such as Uganda and Kenya. The 1968 Act further restricted the right of entry of Commonwealth citizens. A citizen could only live and work in the UK if they, or at least one of their parents or grandparents, had been born, adopted, registered or naturalised in the UK. This rule excluded almost all of the East African Asians who were at that time seeking entry to the UK.

7 Patriality and new categories

The zenith of the process of exclusion of Commonwealth citizens was seen in the enactment of the Immigration Act 1971. It ended the preferential system of labour vouchers and student entry for Commonwealth citizens and introduced the concept of 'patriality' and 'right of abode' for CUKCs. The Immigration Act 1971 created two categories: patrials, who have a special connection with the country; and 'non-patrials'. Patriality depended on close connections (for instance, grandparent or parent born in the UK). A 'patrial' was generally (i) a CUKC who held that citizenship through birth, adoption, naturalisation or registration in the UK, or (ii) a CUKC who acquired citizenship outside the UK but who had lived in the UK for a continuous five-year period. These patrials held the right of abode in the UK; non-patrials did not. There was no longer any advantage in immigration law in being a Commonwealth citizen without patriality.

These new categories carried over the dominion-versus-colony divide, as they also gave preference to those who were ethnically similar to the white British population. People from former dominions with their white settler populations were more likely to have parents or grandparents born within the UK because of having ethnic links to the white majority British population. They could readily establish patriality. Naturally, non-patrials resided mainly in the former colonies, which were ethnically different, and so were usually not able to prove such a link. As a result, they were automatically eliminated from future migration.[60]

Under this differential treatment, aggravated racial divisions were created in the UK and culminated in the hostile environment towards migrants and their progeny. Eventually, it led to a renewed emphasis on a loyalty and allegiance model of citizenship for migrants and migrant-citizens which is exemplified in the development of cancellation laws.

8 Hostile environment and proving citizenship

As has been set out above, from 1983 there were no more special connections in law with Commonwealth citizens. They had to naturalise like anyone else. *Jus soli* (birth on territory citizenship), which had not depended on bloodlines, was abolished by the British Nationality Act 1981.[61] The British Nationality Act 1981, which also abolished the status of citizenship of the UK and colonies, and the earlier Immigration Act 1971, together brought preferential Commonwealth migration to a complete halt. The big question at this point was: how would Commonwealth citizens already present in the UK be differentiated from those who would apply to enter in the future?

60 Nadine El-Enany, 'Before Grenfell' in Dan Bulley et al (eds), *After Grenfell* (Pluto Press 2019) 54–55.

61 Karatani (n 3).

The UK government did not engage in any immediate egregious ethnic makeover by removing all rights of all Commonwealth citizen residents and preventing all future entries. It also did not compel any residents to apply for new permits or visas. It simply adopted a declaratory system in legislation which implied that all existing lawful residents could simply continue to exist as lawful residents without taking any additional action. At the time, this step caused minimal disruption, but, because they were not required to take any further steps, many residents did not obtain any proof of their secure legal status. This made it impossible to readily ascertain who had legal residence as a citizen and who was a newer arrival not covered by the law, thereby creating the injustice suffered by the '*Windrush* generation'.

Just as the formal restrictions of citizenship law in the USA in the nineteenth century set the stage for the gendered and racialised *de facto* barriers to full membership in the twentieth century (as Haney-Lopez, Volpp and Aleinikoff have demonstrated),[62] so subjecthood of racialised others has also cast a long shadow over citizenship rights in present-day Britain for racialised others. Although it seems unlikely that the British Nationality Act 1948 played a major role in attracting the *Windrush* generation from the colonies and Commonwealth into the UK as it merely maintained the status quo, the manner in which the status quo shifted over the years meant that the progeny of the *Windrush* entrants were never fully considered as British, despite living their whole lives in the UK.[63] Their plight highlights how the promise of equal citizenship has been as much illusory for Britain's ethnic minority citizens as the hollow promise of equal subjecthood had been earlier for ethnically non-white subjects.

The consequence of the legacy of empire and the mutual, self-resembling faces of subjecthood and citizenship is the undermining of British multiculturalism today. Pearson writes that British multiculturalism is a product of the end of empire and the 'unwelcome arrival of waves of New Commonwealth migrants' which led to a political consensus about the necessity of strict immigration control.[64] Everson[65] situates the tensions of contemporary Britain in three critical factors: 'the non-incorporation of the Briton within the state, the failure to identify a distinct national notion of belonging and the unstable nature of industrial citizenship'. The factors contribute to the flexibility and indeterminacy of citizenship which, while formally equal, remains differentiated in its practice and its impacts in a categorical manner.

The current allegiance approach to citizenship is strikingly similar to subjecthood, which was based on loyalty to the king and state in earlier times. It harks back, through centrality of allegiance tested by national security exceptionalism, to similar promises of subjecthood which were also derived from its variability. Continuing in its current trajectory, citizenship is likely to become a similar legal technique of control over minority/migrant-citizen bodies. As Said wrote: 'Imperialism did not end, did not suddenly become "past", once decolonisation had set in motion the dismantling of the classical empires.'[66]

The promise of automatic rights which a legal guarantee of citizenship seems to propose, and which subjecthood also tended to proffer, was always an illusion.

62 Ian Haney Lopez, *White by Law: The Legal Construction of Race* (Critical America) (NYU Press 2006); Leti Volpp, 'Feminism versus multiculturalism' (2001) 101(5) Columbia Law Review 1181–1218; Alexander T Aleinikoff, 'Citizens, aliens, membership and the constitution' (1990) Constitutional Commentary 1067.

63 Phillips et al (n 57).

64 Pearson (n 49).

65 Everson (n 52) 82.

66 Edward W Said, *Culture and imperialism* (Knopf 1993) 282.

Understanding subjecthood, and its close links with citizenship, reveals citizenship for what it is; a potential relationship of the promise of rights which is contingent on ongoing struggles for rights rather than a taken-for-granted set of rights.

Conclusion

Given the contemporary context of conditional citizenship, and the history of legislative changes to free movement of erstwhile Commonwealth citizens from the 1960s onwards, as well as the juxtaposition of 'hostile environment' legislation with Brexit proposals, a clear picture emerges of what successive nationality and immigration laws have sought to achieve or achieved through their effects. Instead of a clear territorial decolonisation at the end of empire, these laws have created demographic changes within the UK through a process of successive and cumulative exclusion. It is a process which is reminiscent of 'reverse decolonisation' where people who could freely arrive are rendered susceptible to deportation and expulsion. Contextually placing subjecthood and citizenship in various backdrops, it is possible to identify similarities such as the promise of rights, the indeterminacy of form, a pragmatic policy-linked categorical operation, and a strong role in demographic control.

Thinking about citizenship through subjecthood could help one reflect on issues of extra territoriality, and how, and why, the UK chooses to exercise jurisdiction over some populations, but not others. The implications of categorical exclusion go beyond illusory promises and pragmatic politics. If citizenship of a democratic country for its ethnic minority people is mapped so closely to subjecthood of an empire for colonised people, is it even possible for democracy to thrive? Can the centre of an erstwhile empire ever fully adopt multiculturalism in a meaningful manner? These questions are timeless but are also time sensitive, as the effect of Brexit on long-term resident migrants and their citizenship rapidly becomes another chapter of precarious legal situations in British history. To return to the words in the epigraph of this paper of the Lord Chancellor William Allen Jowitt, 1st Earl Jowitt, merely substituting the word citizen for the word subject does not mean that discrimination ends. Discrimination can continue irrespective of terminology and is the thread that ties citizenship to subjecthood. It is the negative version of Shakespeare's words in *Romeo and Juliet*:

> *What's in a name? That which we call a rose*
> *By any other name would smell as sweet.*[67]

67 Act II, scene II of *Romeo and Juliet*.

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Constitutional law and empire in interwar Britain: universities, liberty, nationality and parliamentary supremacy

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Abstract

This article examines the influence of imperial law, law outside the UK but within the British Empire, on the development of British constitutional law in the interwar period. It first looks at public law within the universities. Four foundational textbooks in British public law are then analysed to assess the extent to which the academic exposition of constitutional law was influenced by imperial law. The influence of imperial law on the areas of liberty/habeas corpus *and citizenship is then considered. The article concludes by re-examining the doctrine of parliamentary supremacy and argues that Dicey accepted a variant of the 'manner and form' objection in the final edition of his textbook completed before his death.*

Key words: imperial history; constitutional law; constitutional history; legal history; British history.

Introduction

> The English jurist is not a sociologist; he is a lawyer, but he has been taught that he cannot be a lawyer unless he is also a historian. For all law (except of course the largest part of it which, being in legislation, tends to be ignored) is simply the scum left by the receding tide of history. *W Ivor Jennings*[1]

The egress of the British constitution was the constitution of the British Empire. Based on the doctrine of the indivisible Crown, and fortified by legislation and common law, it came to govern many corners of the globe. The fundamentals of the British constitution including parliamentary supremacy remained a cornerstone of the constitution, although increasingly tempered in its usage by constitutional conventions in the self-governing parts of the Empire, called dominions after 1907. The field of British constitutional law in the early part of the twentieth century was therefore faced with a conundrum: whether to embrace imperial constitutional law and, if so, how exactly one might do it. The question became particularly complicated by the explosion in the number of constitutions, both dominion and colonial, in the Empire, for example the constitution of Australia which entered into force in 1901, that of the Union of South Africa in 1910, and the Irish Free

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1 Ivor Jennings, 'A plea for utilitarianism' (1938) 2 Modern Law Review 22, 27–28.

State in 1922. Within the Empire, the final appeal to the Judicial Committee of the Privy Council (JCPC), controversial in many quarters, provided a means of ensuring continuity in the development of the common law in these jurisdictions, but also meant that the law lords were conversant with the contours of constitutional development in other countries. In the time period under consideration, the interwar period, the dominions were gradually asserting more independence, culminating in the political declaration of equality of status between the UK and the dominions in the Balfour Declaration of 1926 and legally in the Statute of Westminster 1931.

There has recently been renewed interest in the manner in which changes in constitutional theory were shaped by developments in other parts of the Empire. Peter Oliver's magisterial comparative work on Commonwealth constitutional theory has elaborated on the ways in which constitutional debates around the core concepts of British constitutional theory, in particular in relation to concepts of parliamentary supremacy, were shaped by developments in Commonwealth constitutional theory.[2] Dylan Lino has drawn attention to the manner in which Empire shaped the work of Albert Venn Dicey.[3] Harshan Kumarasingham and others have noted the way in which W Ivor Jennings' experience of empire shaped his constitutional thought.[4] Bonny Ibhawoh has written about the influence of Nigerian cases on British law.[5] The International Journal of Constitutional Law has also recently published a symposium on 'New Dominion Constitutionalism'.[6]

This paper aims to add to these constitutional histories by analysing the extent to which imperial law influenced domestic British constitutional law in the interwar period. Throughout this article, the term 'imperial law' will be used to refer to law that originates in a part of the Empire other than the UK. This is preferred to 'colonial law' as the jurisdictions were not always colonies. Imperial law may be a constitutional law or institution, a statute, a theory, or a case which originates outside the UK. It does not refer to laws made within the UK which extend to the Empire; these are noted explicitly in the text.

The article first gives some background as to the general history relating to tertiary education and constitutional law in the interwar period. This was informed by books on

2 Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford University Press 2005) in particular 54–110.

3 Dylan Lino, 'Albert Venn Dicey and the constitutional theory of empire' (2016) 36 Oxford Journal of Legal Studies 751; and 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739.

4 H Kumarasingham (ed), *The Road to Temple Trees: Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Centre for Policy Alternatives 2015); H Kumarasingham (ed), *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (Routledge 2016).

5 Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford University Press 2013) 139–146. See also T O Elias, 'Nigeria's contribution to colonial law' (1951) 33 Journal of Comparative Legislation and International Law 49, 52–53.

6 See Mara Malagodi, Luke McDonagh and Thomas Poole, 'New dominion constitutionalism at the twilight of the British Empire: an introduction' (2019) 17 International Journal of Constitutional Law 1166; Peter C Oliver, '"Dominion status": history, framework and context' (2019) 17 International Journal of Constitutional Law 1173; Luke McDonagh, 'Losing Ireland, losing the empire: dominion status and the Irish constitutions of 1922 and 1937' (2019) 17 International Journal of Constitutional Law 1192; Rohit De, 'Between midnight and republic: theory and practice of India's dominion status' (2019) 17 International Journal of Constitutional Law 1213; Mara Malagodi, 'Dominion status and the origins of authoritarian constitutionalism in Pakistan' (2019) 17 International Journal of Constitutional Law 1235; Rehan Abeyratne, 'Uncertain sovereignty: Ceylon as a dominion 1948–1972' (2019) 17 International Journal of Constitutional Law 1258; and Mara Malagodi, Luke McDonagh and Thomas Poole, 'The dominion model of transitional constitutionalism' (2019) 17 International Journal of Constitutional Law 1283.

constitutional law from the period as well as articles written on constitutional law in the time period in the Law Quarterly Review, the Cambridge Law Journal, and Juridical Review. It then examines generally the treatment of imperial law in the four core constitutional textbooks from the 1920s and 1930s to assess the influence of imperial law on the academic treatment of constitutional law. The surveyed books are: D L Keir and F H Lawsons's casebook C*ases in Constitutional Law*; Arthur Berriedale Keith's A*n Introduction to British Constitutional Law*; E C S Wade and G Godfrey Phillips' *Constitutional Law*; and W Ivor Jennings' *The Law and the Constitution*.[7] It then builds on this general analysis by illustrating the manner in which imperial law played a particularly important part in two specific areas: citizenship and liberty. It closes by an analysis of Dicey's theory of parliamentary supremacy in the interwar period. It argues that Dicey accepted the manner and form objection to parliamentary supremacy, that this acceptance was overlooked in the *Trethowan* case which it may have influenced, and that the composition of the ninth edition of his textbook by E C S Wade meant that there has been a failure to appreciate the position that Dicey took on this matter towards the end of his life.

1 Constitutional law in the universities

The period under consideration for this paper naturally predated the explosion in academic research published in the field of constitutional law in recent years. The exposition of constitutional law remained, however, a key goal of law faculties in the UK at the time. Of these, the largest by student number in England were the Universities of Cambridge, Oxford and London. In the academic year 1933–1934 they attracted respectively 519, 500 and 307 students, while no other English law school had more than 100 students.[8]

The syllabus of universities reflected the increasing importance of the Empire to students of the law, which might be thought to render British constitutional law permeable to imperial influences. Perhaps the best example here is from the University of London, where students could study a course on the constitutional law of the British Empire in their third year.[9] More significantly, there was a personnel overlap; Professor John Hartman Morgan lectured both the third-year course and the first-year constitutional course in 1930/1931.[10] In this time period, it makes sense to treat the University of London as a single faculty for the purposes of this paper, as the lecturers, professors and venues were shared between courses.[11] In the interwar period, the University of London attracted professors who had been active in other parts of the Empire – Edward Jenks had been a professor at the University of Melbourne: indeed, he was the first professor of law at that university and lectured the introductory course in

7 D L Keir and F H Lawson, *Cases in Constitutional Law* (Oxford University Press 1928); Arthur Berriedale Keith, *An Introduction to British Constitutional Law* (Oxford University Press 1931); E C S Wade and G Godfrey Phillips, *Constitutional Law* (Longmans, Green & Co 1931); W Ivor Jennings, *The Law and the Constitution* (University of London Press 1933).

8 Statistics taken from Edward Jenks, 'English legal education' (1935) 51 Law Quarterly Review 162, 179.

9 University of London, *University College: Calendar Session MCMXXX–MCMXXXI* (Taylor & Francis 1930) 234.

10 Ibid 240, 243. For some examples of Morgan's works, see J H Morgan (ed), *The New Irish Constitution* (Hodder and Stoughton 1912); 'Dominion status' (1929) 9 Dalhousie Review 131; 'Introduction: remedies against the Crown' in G E Robinson, *Public Authorities and Legal Liability* (University of London Press 1925) xvii.

11 See Jenks (n 8) 171–172 and W L Twining, 'Laws' in F M Thompson (ed), *The University of London and the World of Learning 1836–1986* (Hambledon Press 1990) 96–99.

London until 1930,[12] while Herbert A Smith had been a professor of constitutional law at McGill University before he lectured on the third-year course.[13] Jenks was replaced in 1930 by W Ivor Jennings who had been based in Leeds and whose later time as Vice Chancellor of the University of Ceylon and as a constitutional expert in South Asia has seen renewed interest in recent academic literature.[14] Sir Maurice Amos joined after Jennings as Quain Professor of Jurisprudence; he had already published *The English Constitution* by the time of appointment.[15] Although he joined the faculty late in the period under consideration, it is also worth noting the Australian scholar R T E Latham, whose work during his brief life was very impressive.[16]

Universities at the time provided courses necessary for the education of imperial civil servants who would be sent overseas.[17] This was bolstered by the attendance of students who would go on to become influential constitutional thinkers in their own countries in the lead into and attainment of independence; looking only at South Asia, Bernard Peiris of Ceylon, Chan Htoon of Burma, and V K Krishna Menon of India all studied law in London in the interwar period, while Liaquat Ali Khan of Pakistan studied law in the University of Oxford. The presence of formidable intellects from around the globe must have sharpened the constitutional debates that occurred in the metropole. Certainly, the constitutional developments within the Empire were live issues within the UK. In Trinity Term 1922 in the University of Oxford, for example, one question on the constitutional law and legal history exam was 'What is meant by dominion status?'[18]

The interwar period did not have a comparable amount of academic writing as one finds today, but it was nonetheless lively. It saw the establishment of the Cambridge Law Journal and the Modern Law Review. The establishment of the latter in 1937 was too late to influence the field in the time period under consideration, but the number of short notes and substantive articles on constitutional law that were generated in only three years was substantial.[19] There were also a number of textbooks and monographs on constitutional law. The most significant, which will be surveyed in the next section were Keir[20] and Lawon's[21] *Cases in Constitutional Law*, E C S Wade[22] and Phillips'[23] *Constitutional Law*, which first appeared in 1931, Keith's[24] *An Introduction to British Constitutional Law*, published in the

12 For examples of Jenks' works, see Edward Jenks, *The Government of the British Empire (as at the end of the year 1917)* (John Murray 1918); 'The Imperial Conference and the constitution' (1927) 3(1) Cambridge Law Journal 13.

13 For examples of Smith's works, see Herbert A Smith, 'Judicial control of legislation in the British Empire' (1924–1925) 34 Yale Law Journal 277; 'The residue of power in Canada' (1926) 4 Canadian Bar Review 432.

14 Kumarasingham (ed), T*he Road to Temple Trees* (n 4)'; Kumarasingham (ed), *Constitution-making in Asia* (n 4).

15 Maurice Amos, *The English Constitution* (Longmans 1930).

16 See Oliver (n 2) 85–91.

17 See J C H Macnair, 'The Indian civil service and the courts' (1928) 40 Juridical Review 266, 268. Jenks (n 8) 172.

18 F H Lawson, *The Oxford Law School 1850–1965* (Oxford University Press 1968) 234. The interest was also alluded to in the Oxford casebook; see Keir and Lawson (n 7) vii.

19 See e.g. W I Jennings, 'The Ministers of the Crown Act, 1937' (1937) 1 Modern Law Review 145, 'Official Secrets Acts' (1938) 2 Modern Law Review 73; E C S Wade, 'Declaration of Abdication Act, 1936' (1937) 1 Modern Law Review 64, 'Regency Act, 1937' (1937) 1 Modern Law Review 66, 'The Law of Public Meeting' (1938) 2 Modern Law Review 177.

20 At the time Fellow and Dean of University College.

21 Later professor of comparative law.

22 Then a fellow of St John's College, subsequently Downing Professor.

23 Based at Gray's Inns at the time.

24 Professor of Sanskrit at the University of Edinburgh.

same year, and Jennings' *The Law and the Constitution*, published in 1933. To this might be added minor works such as *The English Constitution* by Sir Maurice Amos, published in 1930, shortly before he became the Quain Professor of Jurisprudence.[25]

The pages of British journals such as the Law Quarterly Review often included articles on the constitutional law and development of other parts of the Empire. This was particularly true of Australia, with pieces from the Australian Solicitor-General Robert Garran,[26] the former Premier of New South Wales W A Holman[27] and, most famously, the Australian High Court judge Owen Dixon.[28] In contrast, Juridical Review had a series of articles on Canadian constitutional law and history by the Dean of the University of Toronto law school W P M Kennedy,[29] as well as articles on South Africa and Ireland by Keith.[30] The Journal of Comparative Legislation and International Law contained the most overtly imperial bent, with articles from numerous jurisdictions, including from the indomitable Keith. The authors of articles in journals were often based overseas, such as D M Gordon who wrote articles on administrative law in the Law Quarterly Review.[31]

It is, of course, a subjective measurement to rank the strength of different law faculties, but it may help the reader to have some indication of the relative abilities of the law faculties in terms of constitutional law. The strongest faculty in the country at the time for constitutional law was the University of London, which numbered amongst its members Jennings, Jenks, Morgan, Amos, and Smith.[32] The second strongest was Edinburgh, based solely on the prodigious output of Keith.[33] Thereafter, it was Cambridge, primarily based on E C S Wade but also Arnold McNair,[34] while Oxford suffered from the death of Dicey and failed to find anyone of sufficient stature to replace him in the *immediate* aftermath.[35] It is worth noting in this regard that the ninth edition of Dicey was edited by E C S Wade in Cambridge, which provides some indication of the lack of a suitable candidate to take it over in Oxford. While this brief overview gives some idea of the background to the academic discourse surrounding British constitutional law in the interwar period, it is necessary to consider in more detail how the subject was approached in academic textbooks in order to give a more rounded impression of how it influenced constitutional law as a whole.

25 Amos (n 15).

26 Robert Garran, 'Development of the Australian Constitution' (1940) 40 Law Quarterly Review 202.

27 W A Holman, 'Constitutional relations in Australia: commonwealth and states' (1930) 46 Law Quarterly Review 502.

28 Owen Dixon, 'The law and the constitution' (1935) 51 Law Quarterly Review 590.

29 W P M Kennedy, 'Aspects of the administrative law in Canada' (1934) 46 Juridical Review 203, 'The workings of the British North America Acts, 1867–1931' (1936) 48 Juridical Review 57, 'The centenary of Lord Durham's mission to British North America, 1838–1938' (1938) 50 Juridical Review 136.

30 A Berriedale Keith, 'The status of the union of South Africa' (1934) 46 Juridical Review 155; 'The constitution of Eire' (1937) 49 Juridical Review 256.

31 See e.g. D M Gordon, 'Administrative tribunals and the courts' (1933) 49 Law Quarterly Review 94. On Gordon, see Kent Roach, 'The administrative law scholarship of D M Gordon' (1989) 34 McGill Law Journal 1.

32 See e.g. H A Smith, 'Nature of our constitutional law' (1920) 36 Law Quarterly Review 140.

33 On Keith, see Ridgeway F Shinn, *Arthur Berriedale Keith, 1879–1944: The Chief Ornament of Scottish Learning* (Aberdeen University Press 1990); Oliver (n 2) 65–70.

34 Courtney Kenny had retired as Downing Professor of the Laws of England but was still publishing on constitutional law in this period; see e.g. 'The dominions and their mother country' (1925) 2 Cambridge Law Journal 157.

35 A L Goodhart produced some short articles e.g. 'Thomas v Sawkins: a constitutional innovation' (1936) 6 Cambridge Law Journal 22.

2 Approaches to imperial law

The approaches to imperial law varied from monograph to monograph, but there are certain common features that are worth pointing out before going on to consider the individual volumes. The first element that was common to most monographs was a separate section which dealt with the law of the Empire, including the Commonwealth. A typical example was the seventeenth edition of Stephen's *Commentaries on the Laws of England*, printed in 1922, volume I of which was on the topic of 'Public Law' and was compiled by Philip Landon, a fellow of Trinity College Oxford. In it, the first chapter deals with 'The meaning and scope of public law', and this is immediately followed by 'The British Empire'.[36] Each of the textbooks under consideration here adopted a similar means of exposition with the exception of Jennings.[37] Wade and Phillips' title of the section, 'The British Commonwealth', betrays a certain unfamiliarity of the authors with the subject area, as the British Commonwealth itself was confined to the dominions and the UK, whereas the territorial sweep of the section indicates it dealt with the entire Empire.[38] As this subject was in essence internally cabined off from the other expositions of constitutional law, it will not be considered further here. Similarly, the expositions of martial law were based on foreign precedent except for an Irish case; Keir and Lawson felt obliged to note that an appeal to the House of Lords on an Irish issue was equally binding on English courts on a similar issue.[39] Again, here, the topic was essentially separated from the development of British law.[40] What will be considered below is where imperial law influenced the exposition or analysis of British law.

The geographical focus of the analysis was predominantly on Great Britain. The rather more complicated question about the position of Northern Ireland within the UK's constitutional firmament after the Government of Ireland Act 1920 was often simply ignored. Wade and Phillips, for example, were praised for including a section on local government in their textbook, but the more substantial question of Northern Ireland was dealt with in half a paragraph at the start of the section on 'the British Commonwealth' where it was included with the Channel Islands and the Isle of Man.[41] Keith dealt with it in two pages.[42] The constitutional arrangements of Northern Ireland were, however, the subject of two volumes by Arthur S Quekett, Parliamentary Draftsman to the Government of Northern Ireland, although the volumes largely reproduced the relevant statutory provisions relating to various topics.[43] That this was the approach in UK constitutional law textbooks such as Wade and Phillips a full decade after the establishment of the Parliament of Northern Ireland gives some indication as to the lack of interest in developments outside Great Britain itself. This lack of interest was mitigated in the case of Scotland by the fact that specialist Scots law journals existed; articles published in Juridical Review often dealt with the particular constitutional

36 Philip A Landon, *Volume I: Public Law* in Edward Jenks (ed), *Stephen's Commentaries on the Laws of England* (17th edn, Butterworth & Co 1922) 111–128.

37 Keith (n 7) 163–225; Wade and Phillips (n 7) 343–377; Keir and Lawson (n 7) 405–466.

38 Wade and Phillips (n 7) 343–377.

39 Keir and Lawson (n 7) 369–370.

40 See also Wade and Phillips (n 7) 335–339.

41 Ibid 343.

42 Keith (n 7) 159–160.

43 Arthur S Quekett, *The Constitution of Northern Ireland: Part I The Origin and Development of the Constitution* (HM Stationery Office 1928) and *The Constitution of Northern Ireland: Part II The Government of Ireland Act, 1920 and Subsequent Enactments* (HM Stationery Office 1933).

anomalies that existed in Scotland at the time, for example the prerogative in Scotland,[44] or whether there was any means to impeach a Lord of Session.[45] Given the paucity of coverage of an integral part of the UK, it might be thought likely that academic treatment of constitutional law paid little attention to examples from imperial law. In fact, imperial law was present in each of the monographs surveyed, although with varying degrees of integration into the main analytical sections.

Keir and Lawson's book was a casebook, which left less space for analytical sections on constitutional law. Notwithstanding this fact, there were a number of precedents from imperial jurisdictions relied upon; amongst other topics, the JCPC was canvassed for the relationship between the Crown and the court,[46] and in relation to parliamentary privilege.[47] More interestingly, it included the Cape of Good Hope Supreme Court decision in *Reg v Smith* relating to the responsibility of soldiers when obeying orders that were not manifestly illegal in their section on military law.[48] Keir and Lawson also dealt with the imperial dimension in some depth in relation to the question of nationality, which we will consider below.

As might be expected, Keith's interest in the Commonwealth and Empire meant that imperial examples were studded throughout his exposition of the British constitution. This touched on straightforward exposition of constitutional practice, such as that relating to the grant of honours[49] or the Crown's powers in the colonies;[50] in providing examples of constitutional innovations that had been tried (and often failed) within the Empire, such as the use of extern ministers in the Irish Free State[51] or the referendum;[52] and in a description of imperial arrangements, such as in relation to the JCPC and the possibility of a Commonwealth Tribunal.[53] It entered into the consideration of the Church of England,[54] the privileges of Parliament,[55] and the construction of statutes.[56]

In his examination of the Crown, Keith drew attention to the fact that the Imperial Conference in 1930 had established that the line of succession was only to be varied with the concerted action of the members of the Commonwealth, although this led him to conclude that no parliament except Westminster could vary the succession to the throne which was shown to be false, at least temporally, by the actions of the Irish and South African Parliaments in the abdication crisis of 1936. Moreover, he drew attention to the

44 Hugh R Buchanan, 'Some aspects of the royal prerogative' (1923) 35 Juridical Review 49.

45 J R Philip, 'The judicial immunity of the Lords of Session' (1927) 39 Juridical Review 1.

46 The authority relied upon was *In re Lord Bishop of Natal* (1864–1865) 3 Moo PCC (NS) 115; see Keir and Lawson (n 7) 272, 278–282.

47 Keir and Lawson (n 7) 71.

48 Keir and Lawson (n 7) 340, 348–351.

49 Keith (n 7) 64.

50 Ibid 83.

51 Ibid 55.

52 Ibid 107–109.

53 Ibid 132–133. On the Commonwealth Tribunal, see Donal K Coffey, 'The failure of the 1930 Tribunal of the British Commonwealth of Nations: a conflict between international and constitutional law' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press 2019) 240.

54 Keith (n 7) 155–156, 158.

55 Ibid 116.

56 Ibid 126.

fact that this might mean secession from the Commonwealth was not legally possible, although the South Africans disagreed on this point.[57]

Wade and Phillips' book utilised imperial law less frequently than Keith, but it was still integrated into a number of different topics, from conventional limitations on parliamentary sovereignty,[58] to the reference jurisdiction of the JCPC,[59] constitutional guarantees of rights[60] and Crown forces.[61] It was the most substantial new textbook on constitutional law, but the references to imperial law were comparatively sparse. The copies of executive documents to be found in the appendices, particularly appendix C, do contain examples of copies of important colonial documents, for example that establishing the constitutional structure of Fiji.[62]

Jennings' *The Law and the Constitution* contains relatively few references to imperial law with two major exceptions. In the majority of the textbook, the dominions are referenced for relatively straightforward assertions of fact, such as the proclivity towards written constitutions[63] or the position of the courts.[64] Jennings does, however, integrate a discussion of developments in imperial law into those parts for which he is most well known: constitutional conventions and parliamentary supremacy. It should be noted that Jennings had the benefit of the passage of the Statute of Westminster in 1931, compared to the other authors surveyed, but it must also be admitted that he drew on the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping in 1929, which would have been available to Keith and Wade and Phillips. Conventions are associated with Jennings' critique of Dicey, and the discussion of the role that conventions had come to play in the relations between the members of the Commonwealth, in particular with reference to the Irish Free State, take up a large portion of the discussion on the topic:[65] similarly, with the discussion on parliamentary supremacy, which contains numerous asides on the constitutional structure of the dominions and, of course, the introduction of the *Trethowan* case to a British audience.[66]

Each of the textbooks considered integrated imperial law into the exposition of British constitutional law. The slightest degree of integration was to be found in Wade and Phillips' book and Keir and Lawson's casebook. Jennings integrated imperial law into the most memorable elements of his book, but overall to a lesser degree than Keith, who utilised his vast knowledge of imperial law as a guide to many facets of British constitutional law. Having given a basic overview of the textbooks under consideration, it is useful to demonstrate how imperial law influenced the development of British constitutional law in more depth in specific areas: citizenship and liberty/*habeas corpus*. In order to do this, we will expand our analysis beyond the four textbooks contained in this section but refer to them where appropriate.

57 Ibid 34. On secession, see Donal K Coffey, '"The right to shoot himself": secession in the British Commonwealth of Nations' (2018) 39 Journal of Legal History 117. On the abdication crisis, see Donal K Coffey, 'British, Commonwealth, and Irish responses to the abdication of King Edward VIII' (2009) 44 Irish Jurist 95.

58 Wade and Phillips (n 7) 56–57.

59 Ibid 156.

60 Ibid 286.

61 Ibid 322, 325.

62 Ibid 420–446.

63 Jennings (n 7) 29.

64 Ibid 37, 211.

65 Ibid 81–88, 93–99, 105–106.

66 Ibid 114–115, 120–121, 123–126, 131–135, 140–141, 153, 155.

3 Citizenship

In the interwar period, the great Australian historian of the Commonwealth William Keith Hancock left his chair in the University of Adelaide to become a professor at the University of Birmingham. In 1937, the first volume of his survey of Commonwealth affairs was published, the subtitle of which, 'Problems of Nationality', gave an indication of how important the question of nationality and citizenship had become in the interwar Empire.[67] The legislative underpinnings of British citizenship after the First World War were primarily set by the British Nationality and Status of Aliens Acts 1914 and 1918 which stated a British subject included 'any person born within His Majesty's dominions and allegiance'.[68] This was supplemented by an explicit recognition that Part II of the 1914 Act, which set out rules governing the naturalisation of aliens, did not apply to the dominions unless adopted by the legislature of the relevant dominion.[69] The significance of this legislation may be seen from the extracts directly presented in Keir and Lawson.[70]

This meant that the provisions relating to British subjecthood were entangled with the dominions. The growth of nationalist movements in South Africa and the Irish Free State, with an emphasis on nationalities distinct from British subjecthood, further complicated the area. In the Irish Free State, the government relied upon Article 2 of the Constitution to issue passports which did not mention that the holders were British subjects; these passports were confiscated by British consular officials in London when they were presented for special endorsement, and new passports were issued in their place.[71]

It is hardly surprising, therefore, to find developments in this area that integrate the imperial dimension. A prominent example of this is Dicey's *A Digest of the Law of England with Reference to the Conflict of Laws*, which between its second edition in 1908 and its third in 1922 added a co-author in Keith. The shift in tone in relation to subjecthood is notable. From the second edition:

> But every person born within the British dominions does, with very rare exceptions, enjoy at birth the protection of the Crown. Hence, subject to such exceptions, every child born within the British dominions is born 'within the ligeance,' as the expression goes, of the Crown, and is at and from the moment of his birth a British subject; he is, in other words, a natural-born British subject.[72]

In contrast, the third edition is expressed as follows:

> This rule expresses the fundamental principle governing the law of British nationality, that every person born within any part of the British dominions (n) is as and from his birth a natural-born British subject.

67 W K Hancock, *Survey of British Commonwealth Affairs: Volume I Problems of Nationality* (Oxford University Press 1937).

68 British Nationality and Status of Aliens Act 1914, s 1.

69 Ibid s 9.

70 Keir and Lawson (n 7) 284–286. See also Wade and Phillips (n 7) 180–184.

71 On this question, see Joseph O'Grady, 'The Irish Free state passport and the questions of citizenship' (1929) 26 Irish Historical Studies 396; Mary Daly, 'Irish nationality and citizenship since 1922' (2001) 32 Irish Historical Studies 381; Donal K Coffey, *Constitutionalism in Ireland, 1932–1938: National, Commonwealth, and International Perspectives* (Palgrave Macmillan 2018) 59–65.

72 A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (2nd edn, Steven & Sons 1908) 166–167.

> N. This includes the territory of another kingdom united by a personal union with the British Crown.[73]

The third edition might be thought to express the conventional view of British subjecthood, based as it was on *Calvin's* case, but it is notable that the change occurred and specifically referred to a 'personal union'. It can readily be appreciated how this might be controversial as, while the book was being compiled, there was a war raging in Ireland in which a large body of the population sought full independence from the UK. If what was to result from this war was a personal union between a constitutional monarch in Ireland and the UK, the formulation above would have preserved British subjecthood for anyone born in Ireland. The vexed question of citizenship was to play out in that jurisdiction for the next 26 years, and the provisions of section 33(2) of the Irish Nationality and Citizenship Act 1935 which sought to repeal the common law relating to British nationality was treated as not being applicable outside Ireland by the UK. It was only fully laid to rest with the passage of the Ireland Act 1949.

A standard imperial case which was present in the books of the time was the JCPC case of *De Jager v AG of Natal* in relation to the concept of allegiance when a territory was invaded.[74] The JCPC further considered the link between the dominions and nationality, in particular what was meant by 'common status' of British nationality throughout the Empire; at the time of writing of the monograph, the Statute of Westminster was not yet in force and the Colonial Laws Validity Act 1865 meant that the provisions of the British Nationality and Status of Aliens Acts could not then be repealed as they were enshrined in a Westminster statute (the alternative Irish theory about the applicability of the 1865 Act in the Free State was apparently unknown to the authors).[75] Keir and Lawson included in their casebook the text of the oaths taken by British MPs and Irish Teachtaí Dála (members of the Irish Lower House).[76] The question of the Irish oath had been controversial as it was seen by some as a form of imperial control and was to prove a particular sticking point in Anglo-Irish relations in the 1930s after Éamon de Valera assumed the presidency of the Executive Council. The link between the allegiance and the status of the subject presented a particularly obvious legal nexus between British constitutional and imperial law because of the statutory underpinnings. In the next section, we will see that imperial case law could influence the development of English jurisprudence.

4 Liberty/*habeas corpus*

Writing in 1935, E C S Wade claimed:

> Opinions differ widely as to the conception of liberty, but so far as the lawyer is concerned, the rule of law, in the sense of a state of regular law in contrast to arbitrary régime, still prevails within the Empire, whatever may be the conditions elsewhere, and with the future we are not immediately concerned.[77]

73 A V Dicey and Arthur Berriedale Keith, *A Digest of the Law of England with Reference to the Conflict of Laws* (3rd edn, Steven & Sons 1922) 170.

74 Wade and Phillips (n 7) 182; Keith (n 7) 142–145; Amos (n 15) 176–179; Keir and Lawson (n 7) 288, 291–293.

75 Wade and Phillips (n 7) 182–184. On the Irish theory, see Thomas Mohr, 'The Colonial Laws Validity Act and the Irish Free State' (2008) 43 Irish Jurist 21. Keith took a similar approach to Wade and Phillips, though with less emphasis on the 1865 Act; see Keith (n 7) 142–145.

76 Keir and Lawson (n 7) 288.

77 E C S Wade, 'Constitutional law' (1935) 51 Law Quarterly Review 235, 236–237.

A similar sentiment can be traced in Latham's *Australia and the British Commonwealth* written in 1929, which commences with the chapter 'The principle of freedom'.[78] Keith introduced a note of caution in terms of such a sweeping claim in regard to the Empire, noting the censorship and 'the most repressive law against political opponents known in modern British law' in the Irish Free State.[79] It is not entirely clear what he attributed this to, as he mentioned the 'continental fashion' of constitutional codification of rights in the Free State, but equally notes that it was amendable by ordinary legislation under Article 50, which would have made it closer to the Westminster model of parliamentary sovereignty. The law to which he referred was the Public Safety Act 1927, which provided in section 3 that every provision of the Act which was in contravention of the Irish Constitution was to be an amendment of that Constitution, but only for as long as the Act was in force.[80] This was followed by an even more draconian amendment of the Constitution in 1931, too late for inclusion in Keith's book, but drawing into question the issue of 'liberty' within the Empire.

The case of *Eleko v Officer Administering Nigeria (No 1)*[81] concerned whether or not an applicant for *habeas corpus* had the right to apply successively to different judges on a petition, or whether, if it was heard once, that meant no further applications could be made. Hailsham LC argued that the right was a successive one:

> If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each judge of that Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria.[82]

This had potentially far-reaching implications because the law in Nigeria at the time was based on the English Common Law – if the reasoning of the Privy Council was correct, it could also apply within England itself. It seems to have initially been treated as accurately stating the law as it applied in England; in 1930 the Court of Appeal in *In Re Carroll* did not question the 'exhaustive examination' that was carried out by the Privy Council.[83] It was accepted as stating the law in relation to the Habeas Corpus Act 1679 in Keith's textbook on *British Constitutional Law*[84] and also by Wade and Phillips, who referred to it as a 'curious case'.[85] Notwithstanding this development, when it came to be considered directly by the Queen's Bench Division in *Re Hastings (No 2)*[85a] the court took the view that the opinion was incorrect and that, if a divisional court had previously heard the petition, then no subsequent application could be made.

78 See also the comments of the former Chief Justice of Ceylon, A Wood Renton, 'A century of colonial juridical policy' (1931) 43 Juridical Review 287, 291.

79 Keith (n 7) 145–146. The use of the term 'British' here is interesting, as it seems to include 'Irish' within 'British', which may be a reference back to the idea of British subjecthood. See also ibid 31.

80 Donal K Coffey, 'The judiciary of the Irish Free State' (2011) 33 Dublin University Law Journal 61, 65–67.

81 (1927) UKPC 127, [1928] AC 459. For the background to the cases see Ibhawoh (n 5).

82 *Eleko* (n 81) 468.

83 (1931) 1 KB 104.

84 Keith (n 7) 147.

85 Wade and Phillips (n 7) 293.

85a [1959] 1 QB 358.

In the second case concerning Eshugbayi Eleko, *Eleko v Officer Administering Nigeria (No 2)*,[86] Lord Atkin held:

> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive.[87]

This second case has had a more successful run than the first, immediately being cited in the Law Quarterly Review[88] and later cited with approval in a number of British cases including inter alia, *Zamir v Secretary of State for the Home Department*.[89] Notwithstanding the impact of the decisions, it is interesting to consider the treatment of these cases by E C S Wade in the 1935 Law Quarterly Review:

> The great writ of *Habeas Corpus* played its part even in the emergency period of 1914–20, though it has now reverted to its modern function of providing at home a means for settling disputes with the proprietors of orphanages (*Re Carroll*), and abroad of affording loopholes of escape for deposed African chiefs (*Eshugbayi Eleko v Government of Nigeria; Eshugbayi Eleko v Government of Nigeria (No 2)*). The very rarity of its employment shows the efficacy with which it preserves personal liberty.[90]

The description of the *Eleko* cases here might be treated as being a joke by Wade were it not for the tendency of his writing to disclose a hostility to foreigners. It is worth noting, for example, in a textbook on constitutional law, Wade and Phillips included the following passage:

> The policy of admitting or excluding aliens is not, of course, solely governed by the desire to check elements of possible disorder. For example, the admission of large numbers of aliens from countries where low wages prevail may have the effect of lowering wages to starvation point in unorganised trades in this country. Moreover, the habits of such people may have a demoralising effect in the crowded areas where they settle.[91]

This passage is not concerned with any provision of statutory law or case law and may be taken to accurately reflect the views of the authors on a question unrelated to the ostensible subject matter of the textbook – constitutional law. Although *Eleko* was a British subject and not an alien, the hostility disclosed in this passage provides a context, an ugly context, in which one must consider Wade's assessment of the *Eleko* cases.

5 Parliamentary supremacy

The most famous development from the time period under consideration concerns the 'manner and form' objection to parliamentary supremacy. Dicey contended that parliamentary supremacy meant that there was no legal limit on what the Crown in Parliament (that is, a Bill duly passed by both Houses to which royal assent had been given) could enact, save that no Parliament could bind a successor. The objection that arose in relation to this theory was whether or not the procedure by which laws were

86 [1931] AC 662.

87 Ibid 670.

88 D M Gordon, '"Administrative" tribunals and the courts' (1933) 49 Law Quarterly Review 94.

89 [1980] AC 930.

90 Wade (n 77) 238. Case references omitted.

91 Wade and Phillips (n 7) 178–179.

enacted could be changed, imposing a procedural limitation on the Crown in Parliament. The question arose in a case in New South Wales, the *Trethowan* case.[92] In *Trethowan* the government of Jack Lang attempted to abolish the Upper Chamber without submitting the Bill to achieve this to a referendum, a procedural requirement which had been inserted by the previous Conservative government. They inserted section 7A which provided, under subsection (2) that a Bill to abolish the Legislative Council 'shall not be presented to the Governor for his Majesty's Assent' until it had been approved in a plebiscite.[93] The court case occurred before royal assent had been given, but after passage by both houses, and turned on whether or not the amendment changed the 'manner and form' in which legislation had to be passed; a phrase derived from section 5 of the Colonial Laws Validity Act 1865. The High Court of Australia and the JCPC famously held that this restriction was valid, and that the Bill could not be presented to the governor for royal assent. In 1933, Jennings introduced the case as evidence for the proposition that the Crown in Parliament could change the rules governing its own composition.[94] This was the basis of the 'manner and form' objection to the Diceyan model of parliamentary supremacy.[95]

This conventional history overlooks the fact that Dicey had adopted the procedural objection, albeit not called 'manner and form', before he passed away. The issue was considered in relation to the Parliament Act 1911 in the eighth edition of his classical textbook published in 1915. The eighth edition preserved the body of the text from the seventh, published in 1908, to which he added a lengthy introduction of almost 100 pages, including an extended section on the Parliament Act. The Act provided a procedure by which Acts of Parliament could be passed by the House of Commons and Crown acting in concert, without the need for approval by the House of Lords.

The question that confronted Dicey, therefore, was how this new procedure fitted into the British constitutional scheme. Dicey argued: '[t]he simple truth is that Parliament Act has given to the House of Commons … the power of passing any Bill whatever, provided always that the conditions of the Parliament Act, section 2, are complied with.'[96] The decisive analytical paragraph is on page xxiv as follows:

> In these circumstances it is arguable that the Parliament Act has transformed the sovereignty of Parliament into the sovereignty of the King and the House of Commons. But the better opinion on the whole is that sovereignty still resides in the King and the two Houses of Parliament. The grounds for this opinion are, firstly, that the King and the two Houses acting together can most certainly enact or repeal any law whatever without in any way contravening the Parliament Act; and, secondly, that the House of Lords, while it cannot prevent the House of Commons from, in effect, passing under the Parliament Act any change of the constitution, provided always that the requirements of the Parliament Act are complied with, nevertheless can, as long as that Act remains in force, prohibit the

92 *Trethowan v Peden* [1931] 31 New South Wales Law Reports 183 for the New South Wales Supreme Court (Peden was a professor in the University of Sydney Law School); *Attorney-General (NSW) v Trethowan* [1931] HCA 3 for the High Court of Australia; [1932] UKPC 1 for the JCPC decision.

93 Sub-s 6 provided that any Bill to amend the procedure also had to follow the procedure.

94 Jennings (n 7) 123–124.

95 It is not possible here to list the numerous publications that relate to the debate on parliamentary supremacy. One classical contribution that still merits reading is R F V Heuston, *Essays in Constitutional Law* (2nd edn, Steven & Sons 1964) 6–29. For modern contributions, see Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) and Michael Gordon, P*arliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Hart 2015).

96 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan & Co 1915) xxiii.

> passing of any Act the effectiveness of which depends upon its being passed without delay.[97]

What Dicey does not do in this passage is adumbrate any substantive limitation on the powers of the Commons and Crown under the Parliament Act, which he concedes can pass 'any change of the constitution'. The only limitation is actually the procedural requirement identified in the Parliament Act itself; which, slightly ironically, is simply a manner and form requirement to the manner and form objection. Dicey does not state that the power that the Commons and Crown enjoy was a type of delegated legislation (considered in more detail below), and his argument in favour of the conventional 'Crown in Parliament' model does not detract in any way from the claims that the 'Crown in the Commons' could make. He merely restates that the Crown in Parliament still possesses parliamentary supremacy, which, of course, proponents of the manner and form objection also concede.

The view that is commonly attributed to Dicey had been abandoned in its strictest form by Dicey himself before he passed away. The fact that this point has been obscured may be attributed to four principal reasons. First, the High Court of Australia, in particular Owen Dixon who publicised the decision academically thereafter,[98] did not refer to Dicey's changed views. Second, in the first generation of academic treatment of the question, particularly by Jennings, this point was not canvassed. Third, the ninth edition of Dicey, which was edited by E C S Wade, did not contain the foreword where Dicey adopted this view. Fourth, H W R Wade's 're-statement' of what he claimed to be the orthodox view in 1955 distorted Dicey's actual views, primarily because it was based on the ninth edition.[99]

In Australia, the eighth edition of Dicey was in common usage. It was the core textbook of the law schools at the University of Melbourne and the University of Sydney. The fact that this edition was in common use in Australia at the time means it is a reasonable inference that the contents of it would be known to Australian jurists at the time. Granted, there are no references to Dicey in *Trethowan* at the High Court level, but one finds it sprinkled quite liberally in the decision of the Supreme Court of New South Wales the previous year, particularly in the decision of Street CJ and the submissions of H V Evatt.[100] This does not prove that Dicey's views were the genesis of the decision in *Trethowan*, simply that they may have been known, and an alternative Australian pathway can be found in the case of *Taylor v Attorney-General (Qld)*,[101] which foreshadowed many of the points later made in *Trethowan*. Nonetheless, it is possible that the analysis may have been influenced by Dicey's eighth edition. Despite this, the key academic texts which introduced the reasoning of the case immediately thereafter, Jennings in his textbook and Dixon in the Law Quarterly Review, did not refer to the Parliament Act argument, which languished in obscurity.

The ninth edition of Dicey's textbook, written after his death, was first published in 1939 under the editorship of E C S Wade. It is significant because it omitted the passage quoted above in relation to the Parliament Act. Wade made the decision to omit certain

97 Ibid xxiv.

98 Dixon (n 28).

99 See H W R Wade, 'The basis of legal sovereignty' (1955) Cambridge Law Journal 172, 184. On Wade's arguments see Richard S Kay, 'Constitutional change and Wade's ultimate political fact' (2016) University of Queensland Law Journal 31. Wade's insistence that what was being propounded were 'orthodox' principles may also be seen in Wade and Phillips (n 7) 25.

100 *Trethowan v Peden* [1931] 31 New South Wales Law Reports 183, 198, 200.

101 [1917] HCA 45.

portions of the introduction on the basis that they dealt with contemporary matters that were not yet settled law, including female suffrage and proportional representation, and to summarise other elements.[102] Dicey's examination of the Parliament Act was omitted, and only the conclusion was left: 'His conclusion was that sovereignty still resided in the King and the two Houses of Parliament, but that the Act had greatly increased the share of sovereignty possessed by the House of Commons.'[103] The body of the text contained in the text of the ninth edition, however, was that from 1908, namely the edition before the passage of the Parliament Act.

The significance of the difference between the eighth and ninth editions of Dicey's textbook can be more fully appreciated when considering what is regarded as the classical re-statement of Dicey's views by H W R Wade in the 1955 Cambridge Law Journal. That article referred repeatedly to Dicey, but only to the ninth edition.[104] H W R Wade appears to have relied upon E C S Wade's summary of Dicey which was not, however, a full reflection of Dicey's views towards the end of his life. Moreover, H W R Wade's argument in relation to the question of manner and form simply sought to evade the crux of the issue. Considering the potential application of *Trethowan* to the UK, for example, Wade presents the following matrix: 'Next suppose that Parliament, wishing to retrace its steps, passes a repealing Act by its ordinary procedure, with no referendum, and the royal assent is duly given. Is the repeal effective?'[105] This overlooks a key, and controversial, element of the *Trethowan* litigation – the case took place before royal assent had been given. The repealing statute that Wade's example rests on would not yet be in force, it would still be a Bill pending the royal assent, so the argument constructed on that basis cannot proceed.[106] This sleight of hand can also be seen in editions of E C S Wade and Phillips' book written after *Trethowan* was handed down – *Trethowan* raises the question of what the courts should do before the Bill has been presented for royal assent, and the answer proceeds on the basis of 'an Act of Parliament which had been duly promulgated'.[107] It would, of course, be possible to argue that such a case would not be justiciable as a proceeding in Parliament, but that would be open to the counter-argument that the provisions regulating non-justiciability of proceedings in Parliament could be waived by virtue of parliamentary supremacy. In any event, the argument was not canvassed, and the key element of *Trethowan* was simply ignored, which allowed H W R Wade to simply set out what force of law an Act of Parliament had.

A final point raised by H W R Wade that featured in the *Jackson v Attorney General*[108] litigation was that the legislation passed under the Parliament Act 1911 was, in fact, delegated legislation. This delegated legislation argument was not considered directly by Dicey, so it is arguably consistent with his view of the Parliament Act as laid out above. Dicey's references to the procedural requirements of section 2 of the 1911 Act may also seem to point in this direction given that part of Wade's argument is that the section 2

102 A V Dicey and E C S Wade, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co 1950) x–xi.

103 Ibid lxv.

104 See, *inter alia*, Wade (n 99) footnotes 2, 19, 31.

105 Ibid 175.

106 The remainder of Wade's analysis restates this on the basis that an Act has been passed, rather than the case arising when it is still at Bill stage, see e.g. :'that Act like any other could be repealed by an ordinary *Act of Crown*, Lords and Commons without a referendum' (ibid 190, emphasis added).

107 E C S Wade and G Godfrey Phillips, *Constitutional Law* (3rd edn, Longmans Green & Co 1948) 39.

108 [2005] UKHL 56.

requirements demonstrate that legislation passed under the 1911 Act is delegated legislation.[109]

There are, however, four pieces of evidence that indicate that the better reading of Dicey is that he did not agree with the delegated legislation argument, particularly when attention is paid not merely to the foreword but also to the body of the text. First, it should be noted that H W R Wade's argument rests on the claim that, while the procedure under the Parliament Act was sufficient for the legislation passed thereunder to be called an Act of Parliament, it was only 'in a sense which does not affect any question of sovereignty'.[110] Dicey, as we have seen, addressed this question rather differently. Having considered the legislative ambit of the Parliament Act, Dicey moved then to the question of whether it had transformed 'the sovereignty of Parliament into the *sovereignty* of the King and the House of Commons'.[111] Dicey's question therefore goes to the question of sovereignty and, as we have noted, simply reasserts the sovereignty of the Crown in Parliament. Second, Dicey argued that there is a potential bar to the operation of the Parliament Act – the royal veto – but was also clear that he believed this could be deployed against Bills passed by both Houses.[112] He did not argue that a judicial remedy exists. Third, Dicey could have placed more reliance on the time-based limitation of the Parliament Act, namely that the provisions of section 2 did not apply to Acts to extend Parliament beyond five years, to argue that there was a substantive limitation on what was possible under the 1911 Act. The fact that he chose not to do so is instructive, particularly as the question of whether Parliament can prolong itself even in the face of a previously passed statute was a key element in his argument about the nature of parliamentary supremacy.[113] In the body of the text, Dicey argued that the 'standing proof' of parliamentary supremacy was that the Crown in Parliament, in violation of a prior Act, extended its duration from three to seven years. If the provisions of section 2 relating to duration were a limitation on powers conferred under the Parliament Act, as Dicey argued would have been the case if the septennial Act had been passed under the US Constitution, then it would have been a decisive argument against the sovereignty of the King and Commons. The fact that Dicey did not run this point is evidence that he did not think it held, and the natural basis on which he would hold this view was that, notwithstanding the wording of the 1911 Act, if push came to shove the five-year rule would be set aside in the same manner as the triennial Act. Fourth, and relatedly, Dicey argued that laws passed by the US Congress, like rules of the Great Eastern Railway Company, 'are at bottom simply "bye-laws"',[114] which could be set aside for being *ultra vires*. This, of course, is a variant of the delegated legislation argument, but, again, it is not deployed against the Parliament Act in the foreword. While none of these pieces of evidence is conclusive, the logical inference of them when considered as a whole is that the reason Dicey did not address the delegated legislation argument is that he didn't consider it to apply to the Parliament Act.

109 Wade (n 99) 193–194.

110 Ibid 194.

111 Emphasis added.

112 Dicey (n 96) xxiii n 1.

113 Ibid 42–46.

114 Ibid 146.

Conclusion

This article set out to provide some additional insights into the interaction between British constitutional law and imperial law in the interwar period. The expansion of the academic discipline in this period against a backdrop of increased interaction with colonial elites inevitably made its way into core textbooks on British constitutional law. This was understandably not uniform amongst authors, but it was notable that all of the textbooks considered for this article referred to imperial law to some extent. It was foreseeable that the statutory provisions relating to nationality would entangle British constitutional law in the consideration of imperial law. More surprising perhaps is the manner in which the English law relating to *habeas corpus* was directly influenced, to a greater and lesser degree, by developments in Nigeria, while the snide manner in which these precedents were treated by certain members of the academy is lamentable.

The interwar period also saw developments in core concepts, including parliamentary supremacy. This paper has endeavoured to show, however, that the basic idea of the manner and form objection was to be found within Dicey's own work, although it was not acknowledged at the time and has been subsequently misinterpreted. Ultimately, the question of whether Dicey did or did not adhere to the manner and form objection does not alter the debate as it stands today; the arguments stand or fall on their logic and coherence, rather than on whether they cohere more closely or loosely with Dicey's theory. It does, however, undermine claims that there is an 'orthodox' view to defend. Whether or not Dicey's views influenced the Australian jurisprudence on the question, it is inarguable that it was the *Trethowan* case and the academic commentary that popularised the objection. What this article has endeavoured to show, however, is that the influence of imperial law on British constitutional law at this time was, however, more widespread than in relation to a single conceptual issue; it spanned multiple topics of constitutional law. The egress of the British constitution was the constitution of the British Empire; which in turn became an ingress into British constitutional theory.

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Constitutionalism in the periphery: revisiting the roots of self-rule movements in Ireland and India

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Abstract

This article re-examines the constitutionalism that underlay moderate self-rule movements in Ireland and India. We argue that early self-rule movements in India and Ireland were rooted in the same civic republican tradition that also influenced Anglo-American political thought but developed it in ways that have no counterparts in English political thought. These developments left a lasting legacy on constitutional thought in India and Ireland and present a contrast with nineteenth-century British political and constitutional thought. Through an examination of Mill and Dicey's views on empire, we show that constitutional thought in the UK saw a shift away from older republican traditions of politics towards an interests-based constitutionalism, which saw government as being justified by its efficiency in promoting particular interests. We conclude by considering some of the broader implications of our work for the manner in which the British Empire is treated in constitutional scholarship in the present day.

Keywords: constitutional nationalism; Ireland; India; patriotism; British Empire; legal history.

Introduction: rethinking colonial constitutionalism

The purpose of this article is to re-examine the constitutionalism that underlay moderate self-rule movements in Ireland and India. In the received view, these movements represent a failed 'constitutional nationalism'[1] which sought to reshape and reform empire and secure a higher degree of self-rule by working within rather than outside the structures of empire. Constitutional nationalism[2] had deep cultural roots[3] and played a dominant role in shaping early colonial challenges to imperial rule.[4] Ultimately, however, it failed to secure

1 See e.g. C Reid, 'Stephen Gwynn and the failure of constitutional nationalism in Ireland, 1919-1921' (2010) 53 Historical Journal 723.

2 We use the term 'constitutional nationalism' in this introduction in the sense that it has in scholarship on anticolonial movements in the British Empire and, in particular, in Ireland. In the USA, the term is used in a very different way, to describe a nationalism based on 'the conviction that the Constitution defines and embodies the nation's fundamental values'. See e.g. J A Goldstein, 'The American Liberty League and the rise of constitutional nationalism' (2014) Temple Law Review 287.

3 See e.g. C Reid, *The Lost Ireland of Stephen Gwynn: Irish Constitutional Nationalism and Cultural Politics, 1864–1950* (Manchester University Press 2011).

4 See e.g. R English, *Irish Freedom: The History of Nationalism in Ireland* (Macmillan 2006).

an acceptable measure of self-rule,[5] and was supplanted by movements and ideologies seeking a more radical break through extra-constitutional means.

This view is right as far as it goes, but it leaves many questions unanswered about the constitutional thinking that drove self-rule movements. Why did they command so much support and endure for as long as they did, and why did they collapse as rapidly as they did? What role did the link to empire – including not just the metropole, but also the rest of the periphery – play in the constitutional understandings that underpinned these movements? Did they leave any broader legacies in the constitutions of the states that emerged from empire? How does their constitutional legacy in those states fit with the legacy of more radical nationalisms? And – crucially – why did their claims have so little purchase in Britain itself? What was the nature of the disjunction between the constitutional nationalism of the periphery and the imperial constitutionalism of the metropole, and why was it so utterly unbridgeable as to make rapprochement seemingly impossible?

These questions are of interest to historians of empire generally,[6] but they are even more relevant to constitutional history. Over the past three decades, the historiography of empire has been strongly influenced by the realisation that a proper understanding of the colonial experience requires bringing 'metropole and colony, colonizer and colonized' into 'one analytical field'[7] which encompasses not just the patterns of acquiescence, resistance and contestation that imperial rule met with in the colonies, but also the manner in which imperial visions, understandings and justifications were themselves reshaped by the patterns of challenge and contestation they encountered from those they sought to rule.[8] In place of the national–imperial narratives that mark traditional accounts of empire, this approach points to the importance of patterns of connection, interdependence, engagement and agency, between metropole and periphery and between different portions of the periphery, as well as the political vocabularies and frameworks that enabled sharp distinctions between metropole and periphery to be drawn despite those patterns of engagement and interdependence.[9]

This approach has exercised considerable influence over a range of disciplines, but it has had relatively little impact on constitutional theory. Thus, for example, whilst there has been a resurgence of interest in the everyday constitutionalism that underpinned Britain's experience of its empire – the role of pomp, ceremony and pageantry,[10] the actions and approaches of administrators,[11] and the motives and purposes of the high officials as well as the rank and file members of British expatriate communities who built the imperial project[12] – the everyday constitutionalism of those *subject* to Britain's empire has received considerably less attention.

5 The old 'settler' dominions of Australia, New Zealand and Canada are a possible exception to this failure. See e.g. E M Adams, 'Constitutional nationalism: politics, law, and culture on the road to patriation' in L Harder and S Patten (eds), *Patriation and its Consequences: Constitution Making in Canada* (University of British Columbia Press 2015).

6 See e.g. P Bew, *Ideology and the Irish Question: Ulster Unionism and Irish Nationalism 1912–1916* (Clarendon Press 1984) xv–xix.

7 A L Stoler and F Cooper, 'Between metropole and colony: rethinking a research agenda' in F Cooper and A L Stoler, *Tensions of Empire: Colonial Cultures in a Bourgeois World* (University of California Press 1997) 15.

8 Ibid 6.

9 Ibid 3–4.

10 D Cannadine, *Ornamentalism: How the British Saw their Empire* (Allen Lane 2001).

11 D Gilmour, *The Ruling Caste: Imperial Lives in the Victorian Raj* (Farrar, Straus & Giroux 2005).

12 J Darwin, *Unfinished Empire: The Global Expansion of Britain* (Allen Lane 2012); D Gilmour, *The British in India: Three Centuries of Ambition and Experience* (Allen Lane 2018).

The absence of the colonies in most histories of British constitutional thought[13] reflects the fact that world of the metropole and the world of the periphery have long been treated as two different analytical fields, springing from two different constitutional imaginations. The UK's actions in the colonies, in this account, are treated as part of a different story from that of its own constitution, and the constitutional stories of the colonies are typically told in terms of their post-independence national constitution-making.[14] Recent work has begun to challenge this absence. The work on 'New Dominion Constitutionalism', for example, uses a focus on the first half of the twentieth century to highlight the scope for new approaches to British constitutional history in which a close study of reception and adaption at the periphery informs an empire-wide assessment of constitutionalism and supports an understanding of the evolution of the UK's constitutional order.[15]

This article offers a deeper challenge to the assumption that the worlds of the metropole and periphery occupied two distinct analytical fields. As we show, there was in fact a considerable field of 'interdependence and engagement' between the constitutional worlds of the metropole and the periphery, which exercised a lasting influence on the manner in which both conceived of the empire as a field of constitutional action. Three aspects of this conception are at the heart of the analysis we present here. The first is that the early self-rule movements in India and Ireland were rooted in the same tradition of civic republicanism that also exercised a formative influence over transatlantic political thought in the seventeenth and eighteenth centuries. The language they used was overtly republican, and the preoccupations of their early proponents very closely reflect the preoccupations of the civic republican tradition. Secondly, despite these parallels, Irish and Indian actors were not simply adopting British thought. The constitutionalism they developed was a constitutionalism of the periphery, which differed in several ways from English republicanism, in particular in relation to the position of the 'ancient constitution' and the dimensions of civic virtue it emphasised. Thirdly and finally, this early constitutionalism left a lasting legacy not only on constitutional thought in the colonies but also on constitutional thought in the UK itself.

Part 1 of this paper begins by setting out the background to the emergence of early self-rule movements in Ireland and India, and reconstructs the constitutional ideas underlying their actions and the positions its leading proponents took, through an analysis of their speeches and writings. It is, of course, impossible in a single article to present a comprehensive account of the many varieties of political thought that then prevailed in India and Ireland. We focus on the activity of Henry Grattan in Ireland in the last three decades of the eighteenth century, and of Ram Mohan Roy in India in the first three decades of the nineteenth century. Our choice of Grattan and Roy is because of the importance attached to their positions in their own time, as well as the symbolic place that they and the achievements with which they were credited occupied in the subsequent development of constitutional nationalism. As we show through a detailed examination

13 The recent work of Dylan Lino on the importance of empire to Dicey's constitutional thought is a rare exception. D Lino, 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739; D Lino, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 Oxford Journal of Legal Studies 751.

14 See e.g. M Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020).

15 See especially M Malagodi, L McDonagh and T Poole, 'New Dominion Constitutionalism at the twilight of the British Empire: an introduction' (2019) 17 International Journal of Constitutional Law 1166, and the other papers published as part of the symposium on New Dominion Constitutionalism in that issue.

of their speeches and writings,[16] their constitutional ideas were influenced by the civic republican tradition, but also developed that tradition in ways that have no counterparts in English political thought and which shaped the subsequent development of the self-rule tradition.

In Part 2, we consider the impact the periphery's claims had on constitutional thinking in Britain itself at the time, by contrasting the constitutionalism of those claims with the constitutionalism that underpinned the rejection of those claims by British political and constitutional thinkers. We use an examination of the views of Mill and Dicey on the governance of empire, and their relationship with the general thrust of imperial policy towards Ireland and India, to argue that constitutional thought in the UK saw a shift away from older republican traditions of politics towards an interests-based constitutionalism, which saw government as being legitimised and justified by its efficiency in promoting interests rather than by liberty or consent. This shift led to the intertwining of kindness and coercion in colonial governance and played a significant role in making accommodation with the self-rule movements impossible. We conclude by considering some of the broader implications of our work for the manner in which the Empire is treated within constitutional law in the present day.

1 The context of patriotism: colonial grievance and the demand for participatory rule

India and Ireland occupied distinctive positions within the British Empire in the eighteenth and early nineteenth centuries. Both were at least partial participants in the imperial project. Irish administrators[17] and Indian merchants[18] took advantage of the opportunities for advancement offered by the Empire, and both India and Ireland provided soldiers for the armed forces of the Empire.[19] These circumstances gave the imperial connection a qualitatively different resonance in India and Ireland than it had in other colonies. In addition, India and Ireland were also different from other colonies in constitutional terms. Ireland was technically never a colony even if in practical terms it was frequently treated as precisely that.[20] Before 1801, it was legally a separate kingdom, and after 1801 it was a part of the UK. India, similarly, began under the governance of the East India Company and, after 1858, was governed through the India Office rather than the Colonial Office. As a result, techniques of colonial rule developed for Ireland

16 In focusing in detail on the words of a small number of key thinkers, this article broadly follows the methodology of what has sometimes been called the 'Cambridge school' which focuses on the words used by key individuals and their meaning in their historical context. Although the method was in its origin largely applied to the transatlantic world (a category which would include Ireland), its relevance to the history of South Asia has been shown by the work of C A Bayly (discussed below).

17 K Kenny, 'The Irish in the empire' in K Kenny (ed), *Ireland and the British Empire* (Oxford University Press 2004).

18 S Bose, *A Hundred Horizons: The Indian Ocean in the Age of Global Empire* (Harvard University Press 2009). Nor was this confined to the British Empire. For the transoceanic activity of Indian merchants in the Portuguese world, see P Machado, *Ocean of Trade: South Asian Merchants, Africa and the Indian Ocean, c 1750–1850* (Cambridge University Press 2014).

19 K Jeffery, 'The Irish military tradition and the British Empire' in K Jeffery (ed), 'An Irish empire'? Aspects of Ireland and the British Empire' (Manchester University Press 1996) 94–118; C I McGrath, *Ireland and Empire, 1692–1770* (Pickering & Chatto 2012) 143–166.

20 The question of whether Ireland's position in relation to Britain was akin to that of a colony is a heavily contested one. For the case that it was not, see R F Foster, 'History and the Irish question' (1983) 33 Transactions of the Royal Historical Society 169. For an argument that it was, see C Kinealy, 'At home with the empire: the example of Ireland' in C Hall and S O Rose (eds), *At Home with the Empire: Metropolitan Culture and the Imperial World* (Cambridge University Press 2006) 77–88.

were frequently also deployed in India,[21] and there were structural similarities in the types of issues and grievances surrounding colonial rule in both countries.[22] The mobility of information and individuals across the Empire also meant that movements for self-rule in both countries developed in conscious awareness of each other: Irish and Indian nationalists were familiar with, and regularly commented on, each other's conditions and concerns,[23] and there was considerable personal interaction between them, particularly in the late nineteenth[24] and early twentieth centuries.[25]

A third point of distinctiveness was that both Ireland and India had a strong local deliberative tradition, centred on native political institutions and political frameworks that had a long pedigree. In eighteenth-century Ireland, the Irish Parliament occupied a central place in political life. Apart from its national importance, there were also many close connections and points of contact between it and the local political and discursive worlds of individual counties and boroughs.[26] Much of the struggle around colonial grievances in eighteenth-century Ireland, in consequence, not only took place around the political world of Parliament, but were focused on the position of the Irish Parliament in relation to other imperial institutions. The position in India was not fundamentally dissimilar. Although India had never had any institutions comparable to the Irish Parliament, it nevertheless had a strong tradition of civic engagement with and participation in political affairs, ranging in formality from the *a<u>kh</u>lāq* tradition of political writing[27] to institutions and offices that provided vehicles for broader participation in the functioning of the state. As in Ireland, much of the early struggle around colonial grievances took the form of attempts to translate the opportunities that had formerly been presented by these institutions into the systems of colonial government.

Cumulatively, these factors meant that Ireland and India were fertile ground for a constitutionalism which provided a conceptual basis for the claims that were being made in relation to their deliberative institutions, but also retained room to express the political and cultural value of maintaining a link to empire. In the remainder of this Part, we begin by discussing how and why these factors made India and Ireland fertile ground for a new constitutionalism rooted in civic republicanism (section 1.1). We then discuss how this tradition developed in both Ireland and India, against the backdrop of new forms of British colonial control, which were increasingly coming into conflict with rapidly evolving local ways of thinking about domestic institutions (sections 1.2 and 1.3), and conclude by examining its legacies (section 1.4).

21 T Ballantyne, 'The sinews of empire: Ireland, India and the construction of British colonial knowledge' in T McDonough (ed), *Was Ireland a Colony? Economics, Politics and Culture in Nineteenth-Century Ireland* (Irish Academic Press 2005) 145–164.

22 C A Bayly, 'Ireland, India and the empire: 1780–1914' (2000) 10 Transactions of the Royal Historical Society 377, 378.

23 T G Fraser, 'Ireland and India' in K Jeffery, *An Irish Empire* (n 19) 77–92.

24 S B Cook, *Imperial Affinities: Nineteenth Century Analogies and Exchanges between India and Ireland* (Sage 1993).

25 K O'Malley, *India, Ireland and Empire: Indo-Irish Radical Connections, 1919–64* (Manchester University Press 2008).

26 D A Fleming, *Politics and Provincial People: Sligo and Limerick, 1691–1761* (Manchester University Press 2010); T P Power, *Land, Politics, and Society in Eighteenth-century Tipperary* (Oxford University Press 1993).

27 See section 1.1 below.

1.1 Republicanism, patriotism and empire: the challenge of constitutionalism in the periphery

The eighteenth and early nineteenth centuries were a period of rapid change in political language and usage, and the meanings of terms and labels could and did evolve quite significantly over the course of a few decades. By the end of the eighteenth century, the label of 'republican' had come to be closely associated with the excesses of the French Revolution, and was disclaimed by many Irish political figures who might have embraced it half a century earlier. Nevertheless, the political thought they represented shows clear marks of the civic republican tradition, as received and interpreted through the lens of seventeenth and eighteenth-century patriot thought.[28]

The organising concepts of republican thought took the form of linked dichotomies. Three of these played a central role in republican thought in the English-speaking world, including in the constitutional thought that developed in Ireland and India. The first was a dichotomy between liberty and slavery. Liberty, as they understood it, falls neither into what we would today regard as 'positive' liberty, nor is it 'negative' liberty. Instead, liberty meant being free of the dominion of another, and lay in freedom from subjugation to the will of another. By definition, a person who was not in a state of liberty was a slave.[29] The second was a dichotomy between being governed by representative institutions and being governed by despotism, or the arbitrary will of an individual. Republicanism did not, unlike in the present day, require the absence of a king. A constitutional monarch was compatible with a republican polity.[30] What mattered, rather, was that powers should be held in well-designed institutions which created the possibility of a self-governing civic life protected from arbitrary power.[31] The third is a dichotomy between civic virtue and corruption. Civic virtue subsists when those occupying public office discharge their functions in a spirit of supporting the public good. Corruption exists when the advancement of the interests of a faction takes priority over the public good.

The third of these points was of particular importance to the patriot tradition. Eighteenth-century Irish campaigners for legislative sovereignty used 'patriot' rather than 'republican' as a broad political description,[32] and Indian campaigners for self-rule would use the label well into the twentieth century. Both were at least partially influenced by the example of the Patriots in the American Revolution.[33] Patriotism, as they saw it, entailed service to one's country not in a spirit of self-interest, but out of a desire to promote public prosperity and the public good. Patriots placed a particularly strong emphasis on the importance of a commitment to the common liberty of the people, an attachment to

28 On republicanism generally, see the work of J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 1975); J G A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Centur*y (Cambridge University Press 1957).

29 Q Skinner, 'A third concept of liberty' (2002) 117 Proceedings of the British Academy 237.

30 Q Skinner, *Liberty before Liberalism* (Cambridge University Press 1998) 1–57.

31 J G A Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History* (Cambridge University Press 1985) 40.

32 S Small, *Political Thought in Ireland 1776–1798: Republicanism, Patriotism, and Radicalism* (Clarendon Press 2002) 26–33.

33 On the nature and limits of American influence over the Irish Patriots, see ibid 48–61. On India, see C A Bayly, 'Rammohan Roy and the advent of constitutional liberalism in India, 1800–30' (2007) 4 Modern Intellectual History 25.

the political institutions and constitutional arrangements that sustain that liberty, and a spirit of selfless work to improve those institutions and the general state of the country.[34]

These points underpinned the constitutionalism that emerged in both India and Ireland in the wake of the pressures placed on them by British colonial policy. Its fundamental assumptions reflected a vision of empire, governance and legitimacy derived from the civic republican tradition – in particular, the civic republican idea of liberty as non-domination; the role it assigned civic virtue; and the manner in which it conceived of the role of representative institutions. The periphery, however, faced a challenge in importing this tradition for two reasons. Firstly, much of the republican tradition was focused on the potential tyranny of a king, not least because the two key republican moments in England and Scotland – the Civil War and the Glorious Revolution – were prompted by the action of a king.[35] Ireland and India were, however, faced with a situation where the source of their grievances lay not in the actions of a king, but in the actions of a foreign legislature which itself made republican claims. This meant that standard republican thought needed to be reworked to accommodate the idea that a *legislature* could be despotic.

This was not a trivial issue, and it was exacerbated by a second challenge. A central pillar of republican thought in England was the idea of an ancient constitution which had guaranteed liberty to freeborn Englishmen, but which had been corrupted by the passage of time and needed to be restored to its original purity.[36] The Glorious Revolution and other constitutional developments of the seventeenth and eighteenth centuries were seen through that lens of constitutional restoration. In *Entick v Carrington*, Lord Camden provided a classic statement of this position:

> The Revolution only restored this Constitution to it's first Principles. It did nothing more. It did not enlarge the Liberty of the Subject, but only gave it a better Security than it had before. It repair'd the Fabrick & might support or aid it by way of Buttress to it, but it did not rebuild it.[37]

But it was very hard to maintain arguments around an ancient constitution in the context of Ireland and India. Early thinkers in both countries did try to discover an ancient constitution. William Molyneux argued at the close of the sixteenth century that there was a separate Irish Magna Carta which created a similar constitution for Ireland as in England, giving its Parliament and its citizens the same liberties and privileges as were enjoyed in England and making the Irish Parliament equal, rather than subordinate, to the English Parliament.[38] Ram Mohan Roy in Bengal similarly sought to discover a quasi-republican constitution in the history of ancient India. Drawing on ancient legends of a conflict between sages and kings which ended in a massacre and a settlement, he suggested that ancient India had had a balanced constitution based on something akin to a separation of powers.[39]

Yet these efforts were unsatisfactory, for two reasons. Firstly, in comparison with the theory of the ancient constitution in England, the Irish and Indian attempts to locate one

34 See especially M Viroli, *For Love of Country: An Essay on Patriotism and Nationalism* (Clarendon Press 1995).

35 M Dzelzainis, 'Anti-monarchism in English Republicanism' in M van Gelderen and Q Skinner (eds), *Republicanism: A Shared European Heritage* (Cambridge University Press 2002) vol 1, 27–41.

36 Pocock, *Ancient Constitution* (n 28).

37 *Entick v Carrington* (1765) MS Rep, BL Add MS 36206, ff 43v–44r.

38 W Molyneux, *The Case of Ireland's Being Bound by Acts of Parliament in England, Stated* (Dublin 1698).

39 Ram Mohan Roy, 'Modern encroachments on the ancient rights of females' in *The English Works of Raja Rammohun Roy* (Calcutta, Sadharan Brahmo Samaj 1995) vol 1, 1.

had a thinner evidence base. Ancient constitutionalists in England could point not just to Magna Carta, but to a succession of events as evidence of the ancient constitution. As Holt has shown, the 'Six Statutes' of Edward III were as foundational to the constitutional world of seventeenth-century England as Magna Carta itself,[40] and discussions of the provisions of Magna Carta relied not just on the text of the provisions themselves but on subsequent cases and developments that were seen as reflecting the same underlying constitutional principle as the provision.[41] Ireland and India had few, if any, such intervening constitutional moments. The situation for India was, if anything, even more challenging. Magna Carta, at least, was less than five centuries old when Molyneux wrote. Ram Mohan Roy, in contrast, had to go back millennia rather than centuries, and it is therefore unsurprising that the idea does not feature in his later work.

This problem was not unique to Ireland and India. Other European countries, such as the Netherlands, also could not draw on recent constitutional moments, and their use of the ancient constitution took a less particularistic form[42] in which national history – in the case of the Netherlands, the legends of the Batavians in the Roman period – played a very different role.[43] The second, and more troubling, issue was, however, more pronounced in India and Ireland. Both India and Ireland were stratified societies, with strong religious divides that could and did lead to periodic outbreaks of sectarian tension and violence: in Ireland, between Catholics and Protestants[44] and, to an extent, also between Anglicans and 'Dissenters' (as Presbyterians were usually called),[45] and in India, between Hindus and Muslims (and, to an extent, also between Sunni and Shi'a Muslims).[46] In both, ideas grounded in the ancient constitution frequently contributed to exacerbating, rather than ameliorating, the divide.

In Ireland, the rhetoric of the ancient constitution was closely bound up with ideas of Protestant privilege. Arguments based on the ancient constitution tended to cite not just Ireland's long parliamentary tradition, but also the rights of loyal subjects of English descent to a political system on the lines of that prevailing in England.[47] This was carried over from the world of English political ideas, where the idea of the ancient constitution was closely bound up with the idea that the English were a special or elect nation with a distinctive constitutional bias towards liberty,[48] and that this character was tied to Protestantism.[49]

The difficulty with this was that the majority of the people of Ireland were neither English nor Protestant. Some ancient constitutionalists tried to mitigate this through convenient fictions. Molyneux, for example, suggested that there had been so much intermarriage between the English and the Irish in the past that it would be impossible to

40 J C Holt, *Magna Carta* (2nd edn, Cambridge University Press 1992) 10–13.

41 See, generally, F Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300–1629* (University of Minnesota Press 1948).

42 W R E Velema, *Republicans: Essays on Eighteenth-century Dutch Political Thought* (Brill 2007) 69–75.

43 I Schröder, 'The Batavian myth during the sixteenth and seventeenth centuries' in J S Bromley and E H Kossmann (eds), *Britain and the Netherlands Volume V: Some Political Mythologies* (Martinus Nijhoff 1977).

44 Power (n 26) 221–281.

45 J Kelly, 'Inter-denominational relations and religious toleration in late eighteenth-century Ireland: The "Paper War" of 1786–88' (1988) 3 Eighteenth Century Ireland 39.

46 C A Bayly, 'The pre-history of "communalism"? religious conflict in India, 1700–1860' (1985) 19 Modern Asian Studies 177.

47 J Kelly, '"Era of liberty": the politics of civil and political rights in eighteenth-century Ireland' in J P Greene (ed), *Exclusionary Empire: English Liberty Overseas, 1600–1900* (Cambridge University Press 2009) 81.

48 H Cunningham, 'The language of patriotism, 1750–1914' (1981) 12 History Workshop Journal 8, 10.

49 Pocock, *Machiavellian Moment* (n 28) 361–400.

prove that any given person was not English: anybody in Ireland could, therefore, claim the freedoms of Englishmen on the basis that they were of English descent.[50] But in general, the effect of ancient constitutionalism was to entrench sectarian divides. The constitution that was being claimed was fundamentally an English constitution which drew on English ideas of political liberty and, in consequence, necessarily fell victim to doubts about whether it could extend to Catholics.[51] Otherwise reformist Protestants feared that extending liberty to Catholics would compromise the Protestant character of the constitution.[52] The emphasis on the English origins of the ancient constitution also led its supporters to favour a union with the English Parliament. Molyneux, despite his defence of the Irish Parliament, favoured such an outcome,[53] and his call was periodically revived during the eighteenth century.[54] This was the precise opposite result to that which the Patriots sought, but it was a danger inherent in the ancient constitution.

The position in India was not dissimilar. Indian political thought had long associated kings with ritual acts of religious patronage or religious support. These acts and rituals could, however, have sectarian overtones as readily as they could have more syncretic overtones, and they frequently contributed to destabilising relationships between different religions, including denominations within Islam.[55] Nor was this confined to overt acts. Political thought in India, much as in Ireland, was deeply divided on the question of who constituted the political community. The *a<u>kh</u>lāq* literature in the Mughal world, for example, drew an analogy between the state and a human body. The task of the state, in this tradition, was to 'harmonise the conflicting interests of diverse social and religious groups' and provide the pre-conditions for the maintenance of a civil society and support the struggle of individuals to achieve self-perfection.[56] There are strong and obvious affinities between this image of society and the image that underpinned Hobbes' *Leviathan*, and Bayly has argued that it represents a kind of Indian civic republicanism.[57] The resemblance is not coincidental. The *a<u>kh</u>lāq* tradition was influenced by the Byzantine reading of classical Greek ideas and incorporated Greek understandings of *nomos* (borrowed as '*nāmūs*').[58] It also had strong resonances with Hindu and Buddhist traditions of the virtuous *cakravartin* ruler and the responsibility of the state to support the pursuit of self-perfection. Yet, although the *a<u>kh</u>lāq* literature's ideas of justice, co-operation, social harmony and mutual sympathy did move political thought towards tolerance, it could also have the opposite effect. More strident thinkers such as Shah Waliullah repurposed its imagery to argue that the metaphor of the body implied that only Muslims could be part of the political community.[59]

The mixed legacy of the past troubled Indian Patriots well into the twentieth century, confronting them with incompatible traditions and memories of past rulers. While some historical figures such as the early Mughal emperor Akbar and the Mauryan emperor

50 Molyneux (n 38) 20.

51 Small (n 32) 15.

52 Kelly (n 47) 101.

53 Molyneux (n 38) 20.

54 J Kelly, 'The origins of the Act of Union: an examination of unionist opinion in Britain and Ireland, 1659–1800' (1987) 25 Irish Historical Studies 236.

55 Bayly (n 46) 184–189.

56 M Alam, *The Languages of Political Islam in India* (University of Chicago Press 2004).

57 C A Bayly, *The Origins of Nationality in South Asia: Patriotism and Ethical Government in the Making of Modern India* (Oxford University Press 1998).

58 Alam (n 56).

59 S A A Rizvi, *Shah Wali-allah and his Times: A Study of Eighteenth Century Islam, Politics and Society in India* (Ma'rifat Publishing 1980) 309–316.

Asoka lent themselves to a non-sectarian national narrative,[60] other figures central to one religious tradition's view of the past, such as the Maratha king Shivaji and the Mughal ruler Aurangzeb, were considerably more problematic for Indian leaders seeking to craft narratives that appealed to both religious traditions in India.[61]

The result was that patriot constitutionalism in India and Ireland had to deal with questions that had no counterparts in the British republican tradition and had to do so without having the template of an imagined past – an ancient constitution – on which it could draw. The result was a form of constitutional thought based on *aspirational* constitutionalism rather than ancient constitutionalism. Taking up the key patriot themes of service, improvement and institutions that sustain liberty and improvement, its focus was on creating routes for civic participation in governance that would support liberty and a programme of improvement. Section 1.3 discuss the key elements of this constitutionalism in greater depth, but it is first necessary to consider in a bit more detail the issues that led to its emergence.

1.2 Colonial grievances and colonial rule

The immediate context for the rise of patriot constitutionalism in Ireland was the role of the Irish Parliament. The Irish Parliament was an old institution, which had existed since the thirteenth century.[62] Until the late seventeenth century, however, it did not meet regularly. It was summoned when finance was needed or when local grievances needed redress,[63] but the country could be and was governed for extended periods of time without its involvement.[64] The political changes brought about by the Civil War, the Restoration and the Williamite Wars made it an institution that was less representative of the general population but also more active. Catholics were excluded from being elected to Parliament in 1692 and deprived of the franchise altogether in 1728.[65] Presbyterians (or Dissenters) were barred from sitting in Parliament in 1704 although they retained the franchise. This meant that, for much of the eighteenth century, Parliament consisted almost exclusively of individuals who were members of the Church of Ireland and who belonged to the class that would by the end of the century come to be called the Anglo-Irish 'Ascendency'.[66] The dominance of the Ascendency was deeply entrenched in Parliament's processes and even in its visual environment.[67] Notwithstanding this, however, Parliament's power grew. The constant deficits run by the Irish exchequer after the Hanoverian succession led to it being summoned more frequently, and from around

60 B Josh, 'Asoka: historical discourse and the post-colonial Indian state' in P Olivelle, J Leoshko and H P Ray (eds), *Reimagining Asoka: Memory and History* (Oxford University Press 2012).

61 F Hasan, 'Nationalist representations of the Mughal state: The views of Tilak and Gandhi' (2019) 6 Studies in People's History 52.

62 H G Richardson and G O Sayles, *The Irish Parliament in the Middle Ages* (University of Pennsylvania Press 1952).

63 On the activity of the Irish Parliament during this period, see C A Dennehy, *The Irish Parliament, 1613–89: The Evolution of a Colonial Institution* (Manchester University Press 2019).

64 H Kearney, 'The Irish Parliament in the early seventeenth century' in B Farrell (ed), *The Irish Parliamentary Tradition* (Dublin, Gill & Macmillan 1973).

65 J G Simms, 'Irish Catholics and the parliamentary franchise, 1692–1728' (1960) 12 Irish Historical Studies 28.

66 See, generally, U Gillen, 'Ascendency Ireland 1660–1800' in R Bourke and I McBride (eds), *The Princeton History of Modern Ireland* (Princeton University Press 2016).

67 T Hunt, *Ten Cities that Made an Empire* (Allen Lane 2014) 112–113.

1720 it began meeting in regular biennial sessions in a 'quiet constitutional revolution' which give it a central role in scrutinising government expenditure.[68]

Its legislative power was, however, subject to two serious restrictions. Firstly, the English (and later British) Parliament regularly legislated for Ireland without the Irish Parliament's consent. The Oaths Act of 1692,[69] which prevented Catholics from sitting in the House of Commons, was passed by the English Parliament, and in 1714 the British Parliament unilaterally extended the Schism Act,[70] which curtailed dissenting academies, to Ireland. In 1719, it worsened matters with the Declaratory Act,[71] declaring that it had power to legislate for Ireland and that the British House of Lords had appellate jurisdiction over Irish litigation.

Secondly, the Irish Parliament's legislative powers had since 1494 been curtailed by Poyning's law which gave English institutions power to rewrite Irish Bills. Poyning's law provided that Bills could only originate in the Irish Privy Council and not in either House. The Irish Privy Council would send the Bills to the English Privy Council, which could alter or reject them. The Irish Parliament could accept or reject the Bill as amended in England but had no amending power itself. The power to vary or reject Bills was exercised frequently in the eighteenth century and was a serious concern for Patriots.[72] Equally, while the Irish Parliament could exercise some control over the content of legislation by framing heads of Bills which it sent to the Irish Privy Council to convert into a draft Bill and transmit to England,[73] the procedure was cumbersome and slowed down the legislative process, adversely affecting the Irish Parliament's ability to promote commerce and industry.[74] The problem was heightened by a series of laws passed by the English Parliament which restricted Irish economic activity. The Woollen Act of 1699[75] banned the export of Irish wool overseas, and the Cattle Act of 1667[76] closed the English market to Irish beef, pork and bacon, while the Navigation Acts of 1663[77] and 1671[78] prevented Ireland from trading directly with the colonies. The Irish Parliament was largely powerless to intervene, and it was against this background that patriot constitutional ideas began acquiring growing currency in Irish elite opinion.

The grievances that led to demands in India for greater involvement in government can be summarised more briefly. Unlike Ireland, India did not have a parliamentary tradition, but it did have a tradition of local institutions and offices through which elites could participate in government and a traditional vocabulary of ethical government on which elites could draw. The emergence of British rule disrupted these. Former Mughal elites who witnessed the transition to company rule lamented the new rulers' failure to

68 D Hayton, 'Patriots and legislators: Irishmen and their parliaments, c 1689–c 1740' in J Hoppitt (ed), *Parliaments, Nations and Identities in Britain and Ireland, 1660–1850* (Manchester University Press 2003) 104–106.

69 3 W&M c 2.

70 13 Ann c 7.

71 6 Geo I c 5.

72 J Kelly, 'Monitoring the constitution: the operation of Poyning's law in the 1760s' (2001) 20 Parliamentary History 87.

73 Hayton (n 68) 112.

74 Ibid 113–114.

75 10 & 11 W&M c 10.

76 18 Car 2 c 23.

77 15 Car 2 c 7.

78 22 & 23 Car 3 c 26.

adhere to traditional standards and practices.[79] Equally, local assemblies such as the *pañcāyat*, whose discursive and adjudicative role had expanded with the Maratha state, were important pre-colonial vehicles for public participation,[80] but their colonial equivalents, such as the senior judiciary and juries, were closed to Indians. Cornwallis as Governor-General had issued a blanket prohibition on appointing natives to positions of trust and responsibility, believing their character to be deficient.[81] The regular imposition of press censorship meant that other vehicles for public discussion of government were also restricted. Early Indian demands were, accordingly, oriented around recreating opportunities for participation in colonial government.

1.3 Colonial constitutionalism: key themes

The key demands of the Patriot party in the Irish Parliament were achieving free trade, repealing the Declaratory Act, amending the legislative procedure set out in Poyning's law, securing an independent judiciary, and enacting some measure of Catholic relief. Between the late 1770s and 1782, most of these were achieved, culminating in the achievement of full legislative independence in 1782. Catholic representation, in contrast, proved much harder to obtain. Although the vote was conceded in 1793, Grattan's attempt to enable them to sit in Commons failed in 1795, with Fitzwilliam, the viceroy, who was sympathetic to the cause of Catholic emancipation, being recalled to England and replaced by a more hard-line figure. The failure of Catholic representation also marked the final failure of the patriot project. Following the 1798 rebellion, Ireland was incorporated into the UK and the Irish Parliament dissolved. In India, the debates centred around press freedom and reform of the revenue, judicial and legal systems, both to provide opportunity for civic participation in colonial rule, and to create colonial institutions that were responsive to local needs. The renewal of the East India Company's charter in 1832 provided a focus point for these demands as did, in a less obvious way, the passage of the Great Reform Act. Roy played a leading role in this movement, drafting petitions and providing detailed evidence to Parliament. As with the Irish patriot project, however, his attempts also ended in failure, with Parliament making few, if any, concessions to his demands.

The following discussion is organised around the Irish context, primarily because of the greater quantity of documentation available in English. However, it also examines the debates in India, which closely paralleled it. It focuses on two specific themes: firstly, the demand for commercial freedom, its connection with legislative sovereignty, and the vision for imperial links it implied; and, secondly, the nature of the polity, the people it included, and the basis of political obligation. As we show, in each of these areas, Irish and Indian actors drew heavily on patriot conceptions of improvement, liberty, civic pride and sympathy, and the importance of participation to institutional legitimacy.

1.3.1 Reimagining the link: public improvement, civic pride and national liberty

The civic republican tradition in Britain in the eighteenth century was much occupied with a debate that is often termed the 'wealth versus virtue' debate. Was the growth of commerce a corrupting influence on the body politic, or was it a benign influence which

79 R Travers, 'Contested despotism: problems of liberty in British India' in Greene (n 47) 209–210.

80 R O'Hanlon, 'In the presence of witnesses: petitioning and judicial "publics" in western India, circa 1600–1820' (2019) 53 Modern Asian Studies 52.

81 C Sinha, 'Significance of Cornwallis's judicial reforms in Bengal presidency' (1969) 11 Journal of the Indian Law Institute 185, 188.

promoted arts, science, and progress?[82] The issue divided political thinkers in Britain, but in Ireland and India, the debate took on a very different character. Far from being viewed with suspicion as a source of corruption, it was seen as a source of civic pride.

Colonial thinkers were not alone in this shift. It was most fully theorised by Dutch republicans, who argued that the suspicion of wealth in classical republican thought reflected its relationship with societies characterised by 'agriculture, slavery, and militarism'. In modern polities which were based on commerce, it was love for the country and its form of governance that were of greater importance.[83] In addition, the colonial context permitted the corrupting force to be ascribed to British wealth, exercised on British institutions, which made those institutions agents of tyranny vis-à-vis the colonies. Because the interests of British manufacturers were so influential in the British Parliament, Britain imposed restrictive policies on the colonies, stunting their economy for Manchester's sake. The success of local manufacture and commerce, in contrast, was a matter of civic pride and, to patriots, civic pride was crucial to the maintenance of a free constitution.[84] In the wake of the Act of Union, it was the pride in Ireland's commercial progress that Grattan would highlight as one of the Irish Parliament's main achievements. The result was that the British Parliament's restrictions on the wool trade were as much a cause of complaint in Ireland as restrictions on industrialisation in India would be a century later, and in arguing for legislative autonomy Grattan would repeatedly tie the case to restrictions imposed by the British Parliament:

> … where is the freedom of trade? where is the security of property? where is the liberty of the people? I here, in this Declaratory Act, see my country proclaimed a slave! I see every man in this House enrolled a slave! I see the judges of the realm, the oracles of the law, borne down by an unauthorized foreign power, by the authority of the British Parliament against the law![85]

Grattan's language here is explicitly republican in its invocation of slavery and domination, but it embodies a distinctive version of republicanism in which it is not just the individual but also the country that is rendered a slave, and where the dominating power is not another *individual* but another *country*. The nature of the domination Grattan described, however, is also important to understand the aspirational constitutionalism it reflected and the nature of the link which it saw a colony free from domination as maintaining with the imperial power.

As a previous section has discussed, patriot political thought emphasised the importance of selfless devotion to the country and one's fellow citizens. In the eighteenth century, this took the specific form of working for improvement – that is to say, for economic development and national economic progress. Working for improvement was a central part of patriotism and parliamentary public spirit in eighteenth-century Ireland.[86] As Rees has shown, the Irish patriots of the early part of the eighteenth century focused their attention on practical and pragmatic policies of economic development, rather than on constitutional issues.[87] Their achievements were considerable and included the Newry

82 The classic account is I Hont and M Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge University Press 1983).

83 Velema (n 42) 102–105.

84 Viroli (n 34) 27–30.

85 H Grattan, 'Speech in Parliament of 19 April 1780' in *The Speeches of the Right Honourable Henry Grattan in the Irish and in the Imperial Parliament* (Longman 1822) vol 1, 43.

86 T C Barnard, *The Kingdom of Ireland 1641–1760* (Palgrave Macmillan 2004) 67–68.

87 G Rees, 'Sir Richard Cox, 1702–66: patriotism and improvement in mid-eighteenth-century Ireland' (2014) 29 Eighteenth Century Ireland 47.

canal, the first inland canal anywhere in Britain or Ireland,[88] as well as a range of other measures to promote and regulate commerce.[89] The growing prominence of constitutional issues did not disrupt this project. Rather, it reflected a sense that the limitations of the Irish Parliament's powers were a serious hurdle to the furtherance of this project.[90]

The impetus for improvement was built on the role sentiments of fellowship played in patriot political thought. The affection between fellow-citizens that formed the basis of a republic depended on a feeling of affection which in turn built on the sentiment Adam Smith would describe as sympathy.[91] This understanding of the sentiment that binds members of a polity was, in patriot thought, translated into a very distinctive understanding of empire, and of the nature of the links that constituted empire, which saw the links lying in the sympathy generated by shared constitutional values, rather than in hierarchies of command and control or the bonds of allegiance between inferior and superior. The nature of this link was summarised by Grattan in 1782, at the culmination of his campaign for Irish legislative sovereignty:

> This nation is connected with England not by *allegiance* only, but *liberty* … Ireland has British privileges, and is by them connected with Britain; both countries are united in liberty … *Liberty, we say, with England; but at all events liberty.*[92]

This contrasted sharply with the tighter, hierarchical relationship created by the Act of Union:

> … similarity of constitutions is no longer the bond of connection, all are to be swallowed up, according to this doctrine, in one imperial Parliament, whose powers increase as the boundaries of the empire contract, and the spirit of her liberties declines.[93]

Put differently, in patriot thought, the bonds of a shared constitution could and did create a natural and productive link based on sympathy and a shared commitment to civic improvement. A distant shared legislature, however, would be 'free from the influence of vicinity, of sympathy'.[94] The form of relationship created by the Union ran contrary to patriot principles because it was neither 'an identification of interests' nor 'an identification of feeling and of sympathy'. It was, rather, an 'act of absorption' by which 'the feelings of [Ireland] is not identified but alienated'. All that it produced was 'Irish alienation'.[95]

In the light of the subsequent history of Britain, Ireland, India and the rest of the Empire, this dimension of patriot thought appears prophetic, and we will return to the question of why greater account was not taken of it in Part 2 of this article. Before that, however, it is worth noting the parallels with the position taken by Roy.

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88 W A McCutcheon, 'The Newry Navigation: the earliest inland canal in the British Isles' (1963) 129 Geographical Journal 466.

89 E Magennis, 'The Irish Parliament and the regulatory impulse, 1692–1800: the case of the coal trade' (2014) 33 Parliamentary History 54.

90 Hayton (n 68) 119 notes that the number of measures passed by the Irish Parliament relative to the British Parliament declined from one-fifth to 8.5% between 1751 and 1770, contributing to the frustration that fed the demand for legislative independence.

91 On the connection between Adam Smith's theory of sympathy and empire, see J Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press 2005) chapter 1.

92 H Grattan, *Speeches of the Right Hon Henry Grattan* (Eastburn Kirk & Co 1813) lxxxiv–lxxxv.

93 H Grattan, 'Speech in Parliament of 15 January 1800' in *Speeches* (n 85) vol III, 356.

94 Ibid vol III, 366.

95 Ibid, 'Speech in Parliament of 5 February 1800' (n 85) vol III, 393.

India in Roy's era presented a radically different social and political context from Ireland. Unlike Ireland, there were no national institutions or a national polity. Much of the country was still part of one of hundreds of Indian kingdoms. The seventeenth and eighteenth centuries had also been a time of war. The slow collapse of the Mughal state had led to the governors of many formerly Mughal provinces setting themselves up as independent kings, and it had also opened large areas of the country to invasion: large and formerly prosperous cities such as Delhi were pillaged and sacked on more than one occasion.[96] The Maratha expansion into the North came to an end in the 1760s, and was followed by a slow retreat and eventual collapse.[97] Although the British bridgeheads in India – Bengal, Bombay and Madras – were located in relatively calm provinces, they were nevertheless embedded in a region disrupted by military conflict. The British claim to have instituted better governance and established safety was not wholly accurate – British intervention frequently escalated conflict and tended to create what Bayly has accurately termed a 'European military despotism'.[98] Nevertheless, Indian quiescence in the face of that claim should be seen against this background of turbulence.[99]

Roy, like Grattan, did not seek to end the link to Britain. His starting point, again like Grattan's, was in the idea that, for the link with Britain to endure, the people would need to acquire a form of attachment to Britain. The British policy of excluding Indians from positions of responsibility, however, had operated in a way that degraded Indians and caused them to be alienated from the government, rather than encouraging them to feel a bond of attachment to Britain:

> … men of aspiring character and members of such ancient families as are very much reduced by the present system, consider it derogatory to accept of the trifling public situations which natives are allowed to hold under the British Government, and are decidedly disaffected to it.[100]

Roy believed that this reflected a view that Indians were less capable of improvement and possessed a weaker character than Europeans – a view he rejected. Writing, as he put it, in 'very moderate language',[101] he pointed out that Indians 'have the same capability of improvement as any other civilized people'.[102] The difficulty, however, was their reduction to a 'selfish and servile' state which led them to abuse whatever arbitrary power they had.[103] Roy's political activity was directed towards improvement away from this state of things, and a key dimension of that was reducing the degrading alienation and expectation of servility that Indians experienced in everyday life under British rule, of which Roy had personal experience.[104] Indians, Roy pointed out, rarely encountered

96 On the decline of Mughal India in the eighteenth century, see J F Richards, *The Mughal Empire* (Cambridge University Press 1993) 253–281.

97 S Gordon, *The Marathas 1600–1818* (Cambridge University Press 1993) 154–174.

98 C A Bayly, *Indian Society and the Making of the British Empire* (Cambridge University Press 1988) 79.

99 P J Marshall, *Bengal: The British Bridgehead* (Cambridge University Press 1988) 93–136.

100 Ram Mohan Roy, 'Additional queries respecting the condition of India' in *Exposition of the Practical Operation of the Judicial and Revenue Systems of India* (Smit, Elder & Co 1832) 110.

101 Ibid 111.

102 Ibid 108. The statement that Indians were 'civilized' people is likely to have been a response to James Mill who, in his influential *History of British India*, had dismissed Indians as a 'rude' people incapable of advanced government. J Mill, *The History of British India* (Baldwin, Cradock & Joy 1817) 91ff.

103 Ram Mohan Roy, 'Address to Lord William Bentick' in J C Ghoshe (ed), *The English Works of Raja Rammohun Roy* (Calcutta, Srikanta Roy 1901) col II, 329–330.

104 See e.g. the incident described in Ram Mohan Roy, 'Letter to Lord Minto' in *Selected Works of Raja Rammohun Roy* (New Delhi, Government of India Publications Division 1977) 304–306.

Europeans from a position of equality, forcing them into a submissive position.[105] The problem would be reduced if Indians saw

> … that their merits were appreciated, that they might hope to gain an independence by honest means, and that just and honourable conduct afforded the best prospect of their being ultimately rewarded by situations of trust and respectability.[106]

Although Roy engaged closely with Parliament's enquiry into the renewal of the East India Company's charter, he did not have much faith in its ability or willingness to provide relief. Like Grattan, he appears to have held a view that there was little scope for sympathy between Indians and a remote Parliament. In a biographical sketch written after his death, a close associate reported that he felt that in colonial matters

> … the Minister was absolute, and the majority of the House of Commons subservient; there being no body of persons there who had any adequate motive to thwart the Government in regard to distant dependencies of the British crown.[107]

A more practical option was to work with local institutions of British rule in the East India Company to achieve practical measures of progress. Roy saw in commerce a promising template. The security of tenure and commercial opportunities British rule had brought had provided considerable opportunities for improvement.[108] Nevertheless, there were significant blind spots. The government showed considerable indulgence to landlords, but not to the actual cultivators who lived in 'very miserable' conditions, subject to rents which left 'little or nothing for seed or subsistence to the labourer or his family'.[109] The government's failure to address the needs of ordinary Indians troubled Roy, who felt that the potential fragility of Indian loyalty to empire was not properly appreciated by Britain. In a letter to a progressive English friend, Roy expressed himself with somewhat more candour than he did in his published work. Britain, he said, had the choice of having India

> … either useful and profitable as a willing province, and ally of the British Empire, or troublesome and annoying as a determined enemy.[110]

Its lack of attention to the actual needs of Indians, or to the underpinnings of bonds of loyalty, were pushing it in the latter direction.

1.3.2 Constituting a people: governments, popular participation and civic virtue

A second theme in colonial constitutionalism arose out of the need to define who and what constituted the polity. The position of Catholics in Ireland was a particular point of contention and became more contentious after the Constitution of 1782 gave the Irish Parliament the power to remove their disabilities. Successive attempts at Catholic relief were watered down, but disabilities on their ability to lease, own and inherit property were lifted in 1782, and they received the vote on the same terms as Protestants in 1793. Granting them the right to sit in Parliament, however, proved more difficult. The Irish Commons had historically included Catholics as well as Protestants until the Civil War. James I created new boroughs to attempt to entrench a Protestant majority, but was

105 Ibid, 'Remarks on settlement in India by Europeans' 117.

106 Roy, 'Additional queries' (n 100) 105.

107 Anon, 'Ram Mohan Roy' (1933) 12 Asiatic Journal 195, 212.

108 Roy, 'Additional queries' (n 100) 110.

109 Roy, 'Questions and answers on the revenue system of India' in *Exposition* (n 100) 69.

110 Roy, 'Extract from a letter to J Crawford' in *Seleceted Works* (n 104) 297.

forced under pressure to reduce it to a nominal number.[111] Catholics were excluded under Cromwell, but returned to Parliament after the Restoration. The Williamite settlement, however, again excluded them. Although the Articles of Surrender were ambiguous, the Oaths Act of 1692 altered the oath of supremacy to require a rejection of transubstantiation, which had the effect of excluding Catholics from Commons and a range of professions.[112] In 1728, Catholics were deprived of the vote.

Protestant Dissenters (who were mostly Presbyterians) were also not wholly trusted by the Ascendency and were subject to some legal disabilities,[113] but these were considerably less severe than those that applied to Catholics. The main disability that applied to them was the inability to hold civil or military office. This was the result of the introduction of what was called the 'Sacramental Test' in 1704, which barred them from holding civil or military office. They were never, however, subject to the broader range of disabilities that affected Catholics, nor were they ever deprived of the vote. Underlying this was the fact that the 'Protestant constitution' could accommodate Dissenters more easily than it could accommodate Catholics. One of the characteristics of dissenter political discourse was the ease with which it could combine a strong sense of Protestant supremacy with strident criticism of the Ascendency,[114] and the Sacramental Test itself was not a creation of the Irish Parliament. It had been inserted by the English Privy Council into the 1704 statute (which the Irish Parliament had drafted to only apply to Catholics) in exercise of its powers under Poyning's Law.[115] Once introduced, it was staunchly defended by the Church of Ireland,[116] but was ultimately abolished in 1780. Extending full constitutional liberty to Catholics, in contrast, was much more controversial because it sat uneasily with the place Protestantism occupied in the Anglo-Irish constitutional imagination, as a previous section has discussed.

Grattan, however, strongly supported Catholic representation, and his speeches show the importance of patriot constitutionalism to his thought. Grattan argued that, without full Catholic equality, Ireland would not be a polity:

> The question is now … whether we shall be a *Protestant settlement* or an *Irish nation* ... The question is not, whether we shall shew mercy to the Roman Catholics, but whether we shall mould the inhabitants of Ireland into a *people*: for so long as we exclude Catholics from natural liberty and the common rights of men, we are not a *people*.[117]

Underlying this was a characteristically patriot emphasis on the importance of affection for and attachment to institutions, rather than simply obedience to them. In patriot thought, obedience by itself did not and could not form a sustainable basis for a polity. It was, instead, necessary for individuals to love the institutions of their country, and the patriot's task was to ensure that institutions were worthy of the public's affection.[118] Grattan's arguments for Catholic emancipation closely reflect this view:

111 J Ohlmeyer, 'Power, politics and Parliament in Seventeenth-Century Ireland' in M Jansson (ed), *Realities of Representation: State Building in Early Modern Europe and European America* (Palgrave Macmillan 2007) 119.

112 E Kinsella, 'In pursuit of a positive construction: Irish Catholics and the Williamite articles of surrender, 1690–1701' (2009) 24 Eighteenth Century Ireland 11, 20.

113 Gillen (n 66) 57.

114 Small (n 32) 15.

115 J G Simms, 'The making of a penal law (2 Anne, c 6), 1703–4' (1960) 12 Irish Historical Studies 105.

116 D Hayton, *Ruling Ireland 1685–1742: Politics, Politicians and Parties* (Boydell Press 2004) 186.

117 Grattan, 'Speech in Parliament of 20 February 1782' in *Speeches* (n 85) vol I, 102–103.

118 Viroli (n 34) 1, 9–12.

> The relation in which the Protestant stands, makes him a party to the laws; the relation in which the Catholic stands, makes him the object of the law; not party. He is not a party to the law, and the law is a party against him; therefore the laws may be objects of his obedience not his affection.[119]

The failure to provide for Catholics also played a role in Grattan's opposition to the Act of Union:

> This fabric he calls a Union … it is no Union; it is not an identification of people, for it excludes the Catholics … it is an extinction of the constitution, and an exclusion of the people.[120]

The repeated reference to the people, however, has a significance in Grattan's speeches that goes beyond Catholic emancipation. Grattan's view was that it was the people, as distinct from the government, who were the true object of Parliament's duties. In criticising Parliament's opposition to a tax on English absentee landlords, for example, Grattan argued that Parliament was ignoring its duties to the people in pursuit of satisfying the government:

> We had been advised to reject this tax in order to pursue the principle of conciliation; conciliation with whom? The absentees, or the people. It is very remarkable, that, speaking of conciliation and mildness, we should proceed as if we had no people whatsoever; and provided we pleased the court, or that body whom the court espoused, we accomplished every purpose of harmony.[121]

It would be anachronistic to link this to popular sovereignty in the modern sense, but it reflected a point that was fundamental to patriot thought in the English-speaking world. States were fundamentally polities: groups of citizens, linked by common bonds of sympathy and solidarity, and a love of the institutions that created them.[122] Governments were necessary, but always subject to the danger of corruption and the pursuit of personal or factional interests at the expense of those of the polity. A strong culture of civic participation, and institutions to support that culture, was therefore seen by patriots as being an essential aspect of free constitutions.[123]

This was of particular importance in Ireland. The achievement of legislative independence in 1782 was widely believed to have been possible only because of the Irish Volunteers. The Volunteers had originally been formed in 1778 when, with the Army engaged in the North American campaign, Ireland was believed to be vulnerable to French and Spanish invasion in support of the American cause. The membership of the Volunteers was drawn from the propertied and commercial classes, and they explicitly depicted themselves as having been formed 'to guard the constitution'.[124] Although their members' political views varied, they broadly supported both free trade and Irish legislative autonomy, and the concessions obtained from Britain were ascribed to the strength of the Volunteers.[125]

Grattan praised the Volunteers and the role of public associations in inspiring the Commons to act for an object that was in the public interest.[126] This was not, however a

119 Grattan, 'Speech in Parliament of 22 February 1793' in *Speeches* (n 85) vol III, 56.

120 Grattan, 'Speech in Parliament of 14 February 1800' in ibid vol III, 404.

121 Grattan, 'Speech in Parliament of 28 February 1797' in ibid vol III, 295.

122 Viroli (n 34) 10.

123 R Browning, *Political and Constitutional Ideas of the Court Whigs* (Louisiana State University Press 1982) 21–26.

124 N Garnham, *The Militia in Eighteenth-century Ireland: In Defence of the Protestant Interest* (Boydell Press 2012) 113.

125 Ibid 119–122.

126 Grattan, 'Speech in Parliament of 10 November 1779' in *Speeches* (n 85) vol I, 27–29.

reflection of their martial virtue, but of the civic virtue that they displayed by participating in the formulation of policy to the public benefit, a position that was behind Grattan's reluctance to fully support the Volunteers in their later activities. In 1793, he tentatively supported disarming the Volunteers hand-in-hand with genuine constitutional reform. In contrast, when the government introduced a Convention Act, which would entirely ban conventions of the type that had secured legislative independence in 1782, and of the type which Catholic associations and the United Irishmen were then using to press for reform, Grattan said it was:

> … directly adverse to the genius of the constitution, and goes to destroy its resuscitative power, by incapacitating the people from acting in important cases by delegation; the only way, when, in such emergencies, they can act with constitutional energy.[127]

Grattan made this point even more forcefully in 1797, when the government embarked on a policy of coercion in Ulster in response to the activity of the United Irishmen. A Parliament which threw in its lot with ministers in such a situation, Grattan argued, was betraying the people:

> We were called upon to attaint a *people*; to attaint a *people* for high treason, on the charge preferred by a *minister* … An Irish Parliament was called on to take the word of a minister, and on that word to attaint their country of treason.[128]

Whilst the government claimed its opponents were committing treason, it was the government that was guilty of a greater treason:

> The treason of the minister against the liberties of the people was infinitely worse than the rebellion of the people against the minister.[129]

The patriot claim to colonial self-government, in other words, reflected the idea that the state consisted of its people, that its institutions owed their duties to that people, that the people exhibited civic virtue through selfless participation in public affairs, and that a free constitution would prize such participation. A constitution that lacks such institutions not only lacks vehicles for a virtuous citizenry to display their virtue, but also lacks vehicles for aspirational constitutionalism.

These ideas also animated Roy's political campaigns. Roy had an expansive understanding of the polity – one which encompassed not only Indians, but also Europeans resident in India. Calcutta had a population of Indo-Portuguese, and Roy closely followed the progress of the Iberian revolutions. In 1822, Roy organised a celebration for the second anniversary of the proclamation of constitutional government in Portugal, and the interest was reciprocated: the reissue of the 1812 Cadiz constitution was dedicated to Roy by the Spanish reformers who issued it.[130] The events, as Roy saw them, were part of a struggle 'between liberty and tyranny throughout the world'.[131] Roy was also a strong supporter of the Great Reform Act and celebrated its passage, announcing that he would have renounced his connection with England had it not passed.[132]

127 Grattan, 'Speech in Parliament of 17 July 1793' in ibid vol III, 97.

128 Grattan, 'Speech in Parliament of 20 March 1797' in ibid vol III, 300.

129 Grattan, 'Speech in Parliament of 15 January 1800' in ibid vol III, 362.

130 C A Bayly, 'Rammohan Roy and the advent of constitutional liberalism in India, 1800–30' (2007) 4 Modern Intellectual History 25, 26–28.

131 Roy, 'Letter to Mrs Woodford' in *English Works* (n 103) vol II, 354.

132 Roy, 'Letter to William Rathbone' in ibid vol II, 355.

Nevertheless, Roy was frustrated by the 'opposition and obstinacy of despots and bigots'[133] which, he felt, led to Indians having few opportunities to develop an attachment to the institutions of British India, or participate in its government. Britain, he said, had a tendency to make rules for India 'without consulting or seeming to understand the feelings of its Indian subjects', even after half a century of rule over India.[134] Roy's solution to this was institutional. Local institutions and forms of rule had remained stable despite the slow collapse of Mughal and Maratha rule,[135] and they had permitted participation through local assemblies such as the *pañcāyat* and through the ability to hold office in royal government. Much of Roy's campaigning was directed to trying to create similar opportunities for Indians under British rule. The reforms he proposed were modest: he proposed a judiciary consisting of mixed benches of Indians and Europeans,[136] the revival of *pañcāyats* as a legal institution (and not as a merely informal body as they had become under British rule) that discharged the role of the jury,[137] the creation of a local court of appeal to replace the appeal to the Privy Council,[138] and the creation of codes of law for India based on local custom, and in particular 'those principles which are common to, and acknowledged by all the different sects and tribes inhabiting the country'.[139] He also called for an end to the practical discrimination that restricted their access to government jobs (for example, testing candidates on Latin and Greek, or on Christian doctrine), and for Indians to be fully admitted to all professions.

As Bayly has pointed out, in making these points Roy was deeply influenced by the constitutional importance of popular representation in government[140] – a view which, as we have seen, was shared by Grattan. This also applied to the exercise of arbitrary power against other forms of popular participation. Roy took a leading part in the protest against the Press Regulations which had led to suppression of the *Calcutta Journal* and the expulsion of its editor, James Silk Buckingham. In a memorial to the Supreme Court challenging the regulations, Roy argued that the Regulations challenged a fundamental principle of liberty:

> After this sudden deprivation of one of the most precious of their rights … a right which they are not, and cannot be charged with having ever abused, the inhabitants of Calcutta would be no longer justified in boasting … that they are secured in in the enjoyment of the same civil and religious privileges that every Briton is entitled to in England.[141]

It was only through full civic participation that Britain could create a genuine polity in India to which Indians would feel they belong. As Roy put it in evidence submitted to Parliament:

> I have no hesitation in stating … that the only course of policy which can ensure [the Native community's] attachment to any form of government, would be that

133 Roy, 'Letter to Mrs. Woodford' in ibid 354–355.

134 Roy, 'Letter to J Crawford' (n 110) 297–298.

135 Bayly, *Indian Society* (n 98) 7–44.

136 Roy, 'Questions and answers on the Judicial System of India' in *Exposition* (n 100) 14–20.

137 Ibid 21–24.

138 Ibid 36–37.

139 Ibid 43–45, 49–51.

140 C A Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* (Cambridge University Press 2012) 61–71.

141 'Press Regulations: Memorial to the Supreme Court' in *Selected Works* (n 105) 96.

> of making them eligible to gradual promotion, according their respective abilities and merits, to situations of trust and respectability in the state.[142]

1.4 The legacies of empire

In their own day, Grattan's and Roy's projects were failures, and the question of whether their actual achievements deserve the position and credit they were subsequently given,[143] and whether their ideas could have formed a workable basis for a reimagined Empire, remain controversial.[144] These debates are, however, orthogonal to the purposes of this article. Our purpose is not to vindicate Grattan's or Roy's ideas, but to locate them within the history of constitutional thought and trace the impact they had on subsequent constitutional thinking in Ireland and India. This is important, not just for its historical interest, but also for what it tells us about the role played in the present day by the constitutional legacies of empire. Much of the recent work on the constitutional legacy which empire left for the colonies has focused on the *institutional* legacies of empire – the institutional structures of government, the locus of governmental power within those structures, and the relationship of those institutions to each other.[145] Our focus, in contrast, is on the *conceptual* dimension of the legacies of empire – specifically, its impact on the political and intellectual vocabulary and frameworks which nationalists of all stripes used to think not just about institutional structures and relations, but about the tasks of government vis-à-vis the citizenry, and the mutual relationship of state, government, citizen and polity.

A first legacy was in relation to the relationship between national liberation movements and the broader Empire. Grattan's and Roy's views were, as we have seen, grounded in a particular view of the imperial link. For subsequent generations of Irish and Indian activists this became a project of *imperial* emancipation, which sought to create a periphery-centred vision of empire and imperial governance grounded in a sense of the commonality of aspirations across the periphery. Indian nationalists, starting with Roy himself, commented frequently on the Irish cause: the phrase 'glorified parish council', which acquired considerable currency during the debates over Scottish devolution in the 1990s, was originally coined by an Indian nationalist, Aurobindo Ghosh, in response to the 1907 Irish Council Bill.[146] Irish nationalists, too, saw themselves as actors on an imperial stage: Parnell repeatedly took up the Boer cause in Parliament, and imperial policies towards South Africa, India and Egypt were the subject of strident criticism by politicians and the popular press.[147] There were also strong interpersonal contacts: the Indian Home Rule League was founded by Annie Besant, an Irish nationalist resident in India, and Indian nationalist MPs at Westminster like Shapurji Saklatvala were among very few voices to oppose the partition of Ireland under the Anglo-Irish treaty.[148]

142 Roy, 'Additional queries' (n 100) 111.

143 J Lee, 'Grattan's Parliament' in Farrell (n 64).

144 For the Irish debate on Grattan, see especially G O'Brien, 'The Grattan mystique' (1986) 1 Eighteenth Century Ireland 177 and the response: W J McCormack, 'Vision and revision in the study of eighteenth-century Irish parliamentary rhetoric' (1987) 2 Eighteenth Century Ireland 7.

145 M Malagodi, L McDonagh and T Poole, 'The dominion model of transnational constitutionalism' (2019) 17 International Journal of Constitutional Law 1283.

146 A Ghosh, 'The Thunderer's challenge' *Bande Mataram* (Calcutta, 24 May 1907), reprinted in *Bande Mataram: Early Political Writings* (Pondicherry, Sri Aurobindo Ashram 1973) 368.

147 P A Townend, *The Road to Home Rule: Anti-imperialism and the Irish National Movement* (University of Wisconsin Press 2016).

148 O'Malley (n 25) 26–28.

A second legacy was the continuity of language and conceptual frameworks in Ireland and India, even among radical nationalists who rejected the moderation of Grattan and Roy. Ghosh, for example, in an early piece criticising moderates, argued in language that mirrored Grattan and Roy that they raised institutions 'to the rank of a fetish'. The effect of doing so was 'simply to become the slaves of our own machinery'.[149] The parallels to Roy's criticism of 'servility' are obvious. Equally, the image of the nation enslaved became a core part of nationalist vocabulary. Tamil nationalist poetry, for example, repurposed the mediaeval tradition of depicting Tamil as a woman to depict India as a woman in chains.[150]

A similar connection can be seen between Grattan and the thinking of pre-partition Sinn Féin. Although Sinn Féin rejected Home Rule as insufficient, it did not at its founding demand a complete break with Empire. Instead, it sought to create a relationship similar to the Austro-Hungarian dual monarchy. This was obviously similar to the 1782 settlement, and Sinn Féin's policy of abstentionism from the UK Parliament was based on an argument from Grattan about the illegitimacy of the abolition of that settlement by the Act of Union. Grattan had argued, citing Locke and Puffendorf, that the Irish Parliament did not have the power to create a legislative union with Britain:

> Parliament is not the proprietor, but the trustee; and the people the proprietor, and not the property … it is appointed for a limited time to exercise the legislative power for the use and benefit of Ireland, and therefore precluded from transferring, and transferring for ever, that legislative power to the people of another country.[151]

Arthur Griffiths echoed this language in his founding manifesto for Sinn Féin. The Irish Parliament still existed, and MPs for Ireland had a constitutional duty to convene as that Parliament rather than as part of the British Parliament.[152] His reliance on Grattan did not, however, reflect any admiration of Grattan, about whom Griffiths was scathing. He saw Grattan as lacking the courage of his convictions[153] and blamed his acquiescence in the disarming of the Volunteers for the downfall of the Irish Parliament.[154] Yet, when seen against the background of the substantial constitutional ground they shared, the disjunction between them seems less about basic constitutionalism and more about the means that might be adopted to secure that constitutionalism – a difference that, in turn, closely parallels eighteenth-century debates about the relative importance of martial and commercial virtue in civic patriotism. The more hard-line nationalist positions taken up by Ghosh and Griffiths, from this perspective, represent not a rejection of the constitutional goals of Grattan and Roy, but rather a reincorporation into them of the tradition of martial virtue that Grattan and Roy rejected.

Focusing on the conceptual, rather than institutional, legacies of empire helps us better understand the impact of patriot thought on the constitutions of Ireland and India, both of which are expressly republican. Consider the Directive Principles, which both the

149 A Ghosh, 'New lamps for old – I', *Indu Prakash* (Calcutta, 7 August 1893), reprinted in *Bande Mataram* (n 146) 6.

150 See e.g. Cu Pārati, 'cutantira tākam', reprinted in Vi Karu Irāmanatan (ed), *Makākavi Pāratiyār kavitaikal* (Chennai, intu patippakam 1992) 51. There is an obvious parallel with the Irish *aisling* poetical tradition, which we, however, do not pursue here.

151 Grattan, 'Speech in Parliament of 5 February 1800' in Speeches (n 85) vol III, 386.

152 A Griffiths, *The Resurrection of Hungary: A Parallel for Ireland* (James Duffy 1904) 89, 92–93.

153 A Griffiths, *The Resurrection of Hungary: A Parallel for Ireland* (3rd edn, Whelan & Son 1918) 87.

154 Ibid 117.

Irish and Indian constitutions share. The following article occurs in both constitutions with nearly identical wording.

> The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.
>
> – Constitution of Ireland, Article 45(1)

> The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
>
> – Constitution of India, Article 38(1)

Coffey has shown that this provision was influenced by the Weimar constitution[155] – an influence that is easily intelligible in view of the ideas shared between the Indian and Irish patriot traditions and the European republican tradition. Against the backdrop of the patriot tradition and the colonial grievance that gave it its power, this provision can be read as a declaration of the significance and importance of aspirational constitutionalism. The patriot tradition emphasised the need to incorporate a constitutionalism of protest which accommodates and channels into the institutions of the body politic the voices and claims of dissenting groups that might otherwise find themselves alienated from the polity. As Khaitan has persuasively argued, the accommodation of dissenting groups and voices is a key purpose of the Directive Principles.[156] Indeed, in the Indian context they arguably build – precisely as Roy did – on ideas common to *a<u>kh</u>lāq*, the vedantic (and Buddhist) conception of the role of the state in self-perfection and the characteristically patriot idea of the state as a vehicle for improvement. A similar point could be made about the more radical ideas about 'extern ministers' and popular initiatives in the 1922 constitution of the Irish Free State,[157] the original vision of a single unified civil service in revolutionary Ireland, which would have let a county clerk rise to the level of the secretary of one of the great Departments of state,[158] and the debates in the early years of independent India of what the executive structures of the Westminster-style constitution would actually mean in the new dispensation.[159] At their core, these provisions sought to create a more organic polity which would give the public a stake in the institutions of government that was simultaneously greater, more direct, and more developed than the institutions of the British constitution had ever permitted. This helps give more context to a key finding that has emerged from recent historical work on the path to independence, which has shown how many independent countries did not simply adopt but actively sought to repurpose the institutions of imperial rule to their own ends.[160] The constitutionalism of the periphery, in other words, developed and embedded

155 D K Coffey, 'The influence of the Weimar constitution on the common law world' (2019) 27 Rechtsgeschichte – Legal History 222.

156 T Khaitan, 'Directive principles and the expressive accommodation of ideological dissenters' (2018) 16 International Journal of Constitutional Law 389.

157 On the background to these provisions, see B Kissane, 'The constitutional revolution that never was: democratic radicalism and the Sinn Féin movement' (2009) 104 Radical History Review 77.

158 M Maguire, *The Civil Service and the Revolution in Ireland 1912–38: 'Shaking the Blood-stained Hand of Mr Collins'* (Manchester University Press 2008) 96.

159 H Kumarasingham, 'The Indian version of first among equals: executive power during the first decade of independence' (2010) 44 Modern Asian Studies 709.

160 See e.g. Kumarasingham's discussion of the very different significance which dominion status had to the three South Asian dominions: H Kumarasingham, 'The "tropical dominions": the appeal of dominion status in the decolonisation of India, Pakistan and Ceylon' (2013) 23 Transactions of the Royal Historical Society 223.

into the republican constitutions of India and Ireland a dimension of the civic republican tradition which was wholly distinctive to the periphery, and which both underpinned and gave a wholly different significance to the seeming institutional continuity between their pre- and post-independence governmental structures.[161]

2 Liberty, coercion and kindness: the constitutional roots of colonial policy

This article began with the objective of putting the world of metropole and periphery in a single analytical frame. The one piece of that picture that remains to be discussed is the British position. Why did the claims of the colonies have so little traction in Britain, and what were the constitutional ideas that underpinned the position Britain eventually adopted? As this section discusses, the answer to these questions is both interesting and potentially troubling, not least because it sits uneasily with the republican tradition to which theorists of the British constitution continue to lay claim.[162]

By the late nineteenth century, a consensus had emerged in Britain about the appropriate way to respond to demands for Irish Home Rule, juxtaposing conciliation (or 'kindness') and coercion.[163] This policy was most formally articulated in relation to Ireland – in particular, in Arthur Balfour's policy of 'killing Home Rule through kindness' – but it also underpinned the approach to India.[164] In the course of an essay on the Irish question, Dicey explained the constitutional logic behind this approach. The functioning of the English constitution meant that, in practice, it was the sentiments of English voters, rather than the Irish Parliamentary Party, that was the primary restraint on government action in Ireland:

> Humanity and a sense of justice would, one may hope, make it impossible for the English democracy to tolerate courses of action which would be repudiated by the very advisers who now recommend them, the moment when the actual results of such courses became visible to all observers.[165]

If, however, Ireland failed to respond to conciliation, then there would be a 'growth of a general conviction that justice had been tried with Irishmen in vain, and that there was nothing left for England but to show her power', against which no amount of parliamentary strength for Home-Rulers would avail.[166] Dicey also argued that English public opinion had shifted in favour of imperialism because of the view that an empire was necessary to 'maintain the power and the authority and the greatness of England' – in effect, a shift towards seeing imperial governance in the light of the contribution the Empire made to serving Britain's political needs.[167] The campaigns against Home Rule in England were, therefore, underpinned by an emphasis on the negative consequences for England.

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161 Cf. the point made by Malagodi et al (n 145) at 1284 that 'New Dominion Constitutionalism represents a crucial but understudied instrument of decolonization by constitutional means.'

162 For example, A Tomkins, *Our Republican Constitution* (Hart 2005).

163 For a detailed discussion of the policy, see L P Curtis, *Coercion and Conciliation in Ireland, 1880–1892* (Princeton University Press 1963) and A Gailey, *Ireland and the Death of Kindness: The Experience of Constructive Unionism, 1890–1905* (Cork University Press 1987).

164 Thus, for example, the passage of the Government of India Act 1919 – which conceded a measure of responsible executive government to India – was accompanied by the Rowlatt Acts, which incorporated what were at the time the most extensive measures of coercion that had yet been implemented in empire, and were directly implicated in the Amritsar Massacre.

165 A V Dicey, 'Notes on the relation between Home Rule and English politics' (1883) 37 The Nation 72, 73.

166 A V Dicey, 'What is the state of English opinion about Ireland?' (1882) 36 The Nation 95, 97.

167 See A V Dicey, 'The causes of imperialism in England' (1901) 55 The Nation 203.

These points, however, do not entirely answer the puzzle which this section set out to address, not least because Grattan expressly considered them. To Grattan, the idea that coercion was a price worth paying for mildness was unsupportable:

> … their logic appears to be little more, than that in consideration of a mild government, you should suspend civil liberty, and in consideration of the blessings of our constitution, you ought to deprive three-fourths of the inhabitants of its franchises; in other words, that in gratitude for the blessings of the constitution, you are going to surrender it to the crown. The sophism … mistakes the constitutional checks on government, for the natural mildness of its character, and infers that we should give up those checks to fortify the government; it proposes to put down the constitution to strengthen the government.[168]

In response to the contention that coercion was necessary to save Ireland from the United Irishmen's Jacobinism, Grattan responded angrily that it was the government's coercion that was Jacobin, not the actions of the United Irishmen:

> Away with the system of coercion; the Jacobinal system. What is the Jacobinal system? It is a contempt for human rights, and a violent encroachment on the laws. What has been our system of coercion, but a violent contempt of the rights and franchises of our fellow-subjects, and a violent outrage on the laws; it has been law-making in the spirit of law-breaking.[169]

Far from avoiding tyranny, the effect of enabling coercion would be to *create* tyranny, because it would create:

> … a minister perfectly uncontrollable and irresponsible … Such a minister would be a monster, the spring of every action, and with the executive power of both … Such a minister is a tyrant.[170]

Equally, Grattan (and Roy) went to lengths to try and demonstrate that Ireland and India would show more, not less, solidarity with Britain were they to be granted a greater measure of participation in their own rule.

Why, then, did British constitutional thinkers place so much emphasis on English public opinion, and so little on Irish or Indian? The answer, we suggest, lies in the manner in which political and constitutional thought in Britain had begun to view the question of authority in an imperial world, moving away from a principles-based constitutionalism legitimised by liberty and consent towards an interests-based constitutionalism legitimised by efficient and effective governance. Mill drew a sharp distinction between countries whose inhabitants had a national character marked by 'savage life', with little law, commerce, manufacture and agriculture, and more civilised nations such as Britain.[171] Savage countries were ill-served by letting them rule themselves.[172] India was explicitly placed in this category by Mill,[173] and, despite the general impression that he was sympathetic to Ireland, he appears to have believed that Ireland, too, belonged there. To Mill, the best way to rule a people unfit for self-rule was through what he termed

168 Grattan, 'Speech in Parliament of 17 October 1797' in *Speeches* (n 85) vol III, 265.

169 Grattan, 'Speech in Parliament of 20 March 1797' in ibid vol III, 304.

170 Grattan, 'Speech in Parliament of 3 May 1797' in ibid vol III, 331.

171 For a fuller analysis of Mill's views on colonialism, see Pitts, *Turn to Empire* (n 91) chapter 4.

172 Ibid 135.

173 Ibid 139.

'progressive colonial despotism', and, in his critique of Britain's history in Ireland, he faults it for failing to have imposed a progressive colonial despotism there.[174]

What did Mill mean by national character? It is clear that he did not see it as being racial: national character was mutable and evolved over time.[175] What he appears to have meant, in the terminology of modern social science, was that the capacity for self-rule requires informal institutions that facilitate and provide an environment for self-rule and have a propensity to produce agreement around principles of the sort that had come to be accepted as sound in England. These institutions could be acquired by acculturation. The Scots and Welsh, Mill held, had benefited through the Anglicisation that accompanied their union with England, and the same could happen with the Irish.[176] Absent such acculturation, however, colonised people are unfit to rule themselves because they lack the moral and political sentiments which such institutions engender. The best that can be done for them is progressive despotism.

Mill's views are not easy to account for. It is striking that his views on Ireland and India do not engage with the arguments of Grattan and Roy, even though both were well-known in England. After Union, Grattan sat for many years as an MP in the UK Parliament, and his views and thought were well-known in Liberal circles. Roy, too, was a minor celebrity in England, and was described by Bentham as his 'intensely admired and dearly beloved collaborator in the service of mankind'.[177] That Mill pays so little heed to their views on the Irish and Indian capacity for self-government is not easy to explain.

Nevertheless, Salisbury's notorious comment that one could no more justify giving free representative institutions to the Irish than to the Hottentots[178] arguably reflects a position close to Mill's views on national character, as does the juxtaposition of coercion and conciliation in Dicey's thought and British policy. Coercion, to the extent it saves the masses from misrule by the unfit, is in this view itself an act of kindness.

From the perspective of patriot political thought, it is self-evident that this was bound to fail to appeal to the people of India or Ireland. Benevolent tyranny is still tyranny; and if what should be a matter of right is no more than a matter of grace, then the subject is still a slave. Dicey's position may well have been that the rejection of kindness would leave no option but coercion, but the response from the colonies could equally be that if every demonstration of civic virtue was rejected, then there was no option but direct action. Against this background, it easy to see why the problem was so intractable and would, ultimately, lead both India[179] and Ireland[180] to reject constitutional nationalism altogether in favour of a more complete severance of the imperial link.

Conclusion

In his Isiah Berlin lecture, Quentin Skinner pointed to the parallels between anticolonial movements and the republican concept of liberty as non-domination.[181] Despite that

174 Ibid 146.

175 Ibid 136.

176 J S Mill, *Considerations on Representative Government* (Parker, Son & Bourn 1861) 293, 295–296.

177 B Majumdar, *History of Political Thought from Rammohun to Dayanand* (University of Calcutta Press 1934) 18.

178 Curtis (n 163) 103.

179 R De, 'Between midnight and republic: theory and practice of India's dominion status' (2019) 17 International Journal of Constitutional Law 1213.

180 L McDonagh, 'Losing Ireland, losing the empire: dominion status and the Irish Constitutions of 1922 and 1937' (2019) 17 International Journal of Constitutional Law 1192.

181 Skinner, 'A third concept of liberty' (n 29) 256.

provocative point, the relationship between moderate self-rule movements and republican and patriot political thought has largely remained unexplored, and little has been done to bring the two into a single analytical frame. The history not just of the constitution, but of political thought in the UK more generally, is almost invariably told without reference to the Empire. It is telling, for example, that Dicey's views on empire were not discussed in legal scholarship until very recently, and that Greenleaf's magisterial history of the British political tradition lacks the final volume on the influence of empire which it was projected to include.

Against that background, this article has sought to recover an important but neglected dimension of how people thought in the past about the constitution of empire: the attitudes, understandings and value commitments that underpinned their actions, and the legacy it has left in our present day thought, principles and institutional arrangements. The era when we could tell the story of the UK's constitution as an unbroken progression centred on England, from the Glorious Revolution, via *Entick v Carrington*, to Dicey and the present day, is long past. The Empire intervened in that story, and as we have sought to show, it is time it also intervened in the way in which we seek to study and understand the UK's constitutional development. Equally, the experience of empire left its legacies on constitutions and constitutional thought around the common law world. Putting the focus back on the legacies of empire is useful because it helps us understand what was gained and what was lost in the process.

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Constitutional legacies of empire in politics and administration: Jamaica's incomplete settlement[1]

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Abstract

Constitutionalism is characterised by tensions and ambiguities. The Westminster constitutional framework is no different and, in the UK, these tensions are traditionally mitigated through informal institutions, underpinned by what Leslie Lipson called a 'mutually beneficial bargain'. While the existing literature has pointed to a 'transplant effect' in which only the formal but not the informal institutions are transplanted, little is understood about the legacy effects of such transplants, how they are mediated by the presence, absence or modification of such a bargain, and the impact on the conduct and effectiveness of government. Using the case of Jamaica, this paper explores these issues by examining the constitutional tension between principles of responsible and representative government as they operate on the relationship between politics and civil service in the colonial and immediate post-colonial period. We argue that the constitutional legacy is one of a 'mutually suspicious bargain' between politicians and civil servants, which emerged under the era of colonial rule, but persisted into the post-colonial era, becoming, in the 1970s, a central flashpoint of constitutional conflict. As a result of this colonial legacy, there has been an unresolved tension in the operation of the Jamaican constitution regarding the appropriate balance between constitutional principles of responsibility.

Keywords: responsible government; representative government; constitutionalism; 'public service bargain'; colonial legacy.

Introduction

It is widely acknowledged that formal constitutional rules matter to the manner in which societies are governed. They are critical for deciding winners and losers in society and embody 'the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content'.[2] It is also widely recognised that informal institutions – defined here as implicit understandings

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2 S A de Smith, 'Constitutionalism in the commonwealth today' (1962) 4(2) Malaya Law Review, 205, 205.

between constitutional actors[3] — matter for offering interpretive guidance as to the meaning and application of constitutional rules. Finally, it is similarly acknowledged that the colonial origins of constitutions matter. The 'transfer' of constitutional arrangements from 'metropolis' to colonies has, however, rarely been straightforward, and the colonial inheritance has had a significant effect on subsequent post-colonial political, economic and social development in newly independent nations.

So far, so bland. What is less well understood is the manner in which transplanted constitutional ideas are affected by informal institutions – and how these matter for constitutional development. As yet, there has been limited interest in such 'transplant effects': for example, Berkowitz, Pistor and Richards use this term to describe the detrimental impact on the law's functioning, either where transplanted law is not adapted to local needs, or where it is unfamiliar to those who use the law as a result of colonial imposition or otherwise.[4] And in a study of the harmonisation of arbitral law, T T Arvind links the existence of the 'transplant effect' to 'the relationship between formal written sources of the law and unwritten conventions, norms and practices inherent in the legal system'.[5] Harmonisation frequently goes awry, he argues, because it tends to focus only on the formal institutions of the law and is therefore 'vulnerable to situations where informal institutions on which the formal institutions rely are missing in the receiving jurisdiction'.[6]

This article focuses on the informal understandings that enable different parties to mediate between ambiguous and conflicting constitutional values that are expressed in formal institutions. Taking the Westminster model of constitutionalism and its transplant to Jamaica as a case study, the article focuses on one particular tension, namely that which exists between 'responsibility' and 'representation'. Within the formal institutions of the Westminster system, we argue, these values are expressed in the relationship between a politically accountable 'political directorate' and a permanent, neutral and impartial civil service. The viability of this institutional relationship, and its capacity to negotiate the tension that exists between responsibility and representation, however, depended, we argue, on the existence of what Leslie Lipson (in the context of New Zealand) called a 'mutually beneficial bargain'.[7]

The informal understandings that underpinned relations between politicians and civil servants in Jamaica were far from constituting a mutually beneficial bargain. In fact, since colonial times, a 'mutually suspicious bargain' has persisted. The key features of this distrustful bargain can be found in colonial administration well before independence and proved decisive in shaping Jamaica's post-colonial political development. This absence an informal mutually beneficial understanding regarding the tension between two fundamental constitutional principles of the Westminster system represents the true British colonial legacy.

3 This definition, emphasising informal understandings that moderate tensions between constitutional principles, differs from other ways in which informal institutions have been explored in the context of constitutionalism, such as the presence of informal power structures affecting the ways in which formal constitutional rules operate (such as decision-making in a system of clientelism) or the role of informal conventions in the absence of codified constitutional rules.

4 Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The transplant effect' (2003) 51 American Journal of Comparative Law 163.

5 T T Arvind 'The "transplant effect" in harmonisation' (2010) 59 International and Comparative Law Quarterly 65, 78

6 Ibid 79.

7 Leslie Lipson, *The Politics of Equality* (University of Chicago Press 1948) 479.

By arguing that the true colonial legacy of the Westminster inheritance is a presence of mutual suspicion regarding other parties' understanding of constitutional principles, this article also resolves a continuing paradox in the literature on Jamaica itself. Decolonisation in Jamaica was a process of (broadly) consensual political transition in a two-party system; yet, we find the disintegration of this consensus in the 1970s, exposing the frailty of informal understandings shared between political and administrative elites, which proved unable to mediate between demands for representativeness and demands for responsibility. This argument also resolves the apparent contradiction between a literature that points to the transition of constitutional principles (and its functioning) in the immediate post-colonial period and a subsequent literature that has sought to highlight the dysfunctional characteristics of the Westminster transplant in view of a national style of politics that is sometimes characterised in terms of patron–client relations.[8]

The following section outlines in greater detail the tensions over doctrines of responsible and representative government, and how this translated into formal institutions as well as informal understandings between politicians and civil servants. Sections 2 to 5 cover, in chronological order, the dynamics in the conflict over constitutional understandings in the case of Jamaica. They document the development of formal and informal executive government institutions in the pre-independence period, and how key elements in the 'mutually suspicious bargain' were left unaddressed in the immediate post-independence decade. The failure to address them in this period proved crucial when, in the 1970s, the political consensus that had characterised the 1960s broke down and a more ideological style of politics took hold. The conclusions draw out wider lessons for the understanding of Westminster's 'export models' in terms of both formal institutions and the informal understandings which they presuppose.[9]

1 Constitutionalism and responsible and representative government

The Westminster system's unresolved tension over the constitutional doctrines of responsible and representative government has shaped both metropolitan, as well as colonial discussions about constitutionalism. In the legal literature, at the core of responsible government is the duty of ministers to account to a democratically elected body. Roberts-Wray, for example, defines responsible government as 'a system of government by or on the advice of ministers who are responsible to a legislature consisting wholly, or mainly, of elected members; and this responsibility implies an obligation to resign if they no longer have the confidence of the legislature'.[10] Underlying this particular conception of responsibility lies a view that ministers should have, as Birch puts it, 'sufficient independence to pursue consistent policies without permitting them to forget their obligation to keep in step with public opinion'.[11] Yet, as Birch further argues, this is only one among several meanings of responsibility within British constitutional thought, coming second in terms of priority to the primary understanding of responsibility as consistency, prudence and leadership.[12] A third conception of

8 Carl Stone, *Democracy and Clientelism in Jamaica* (Transaction Books 1983).

9 S A de Smith, 'Westminster's export models: the legal framework of responsible government' (1961) 1 Journal of Commonwealth Political Studies 2

10 Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens 1966) 64.

11 Anthony Birch, *Representative and Responsible Government (*Allen & Unwin 1964) 170.

12 Ibid 245.

responsibility as responsiveness to public opinion and demands has, he argues, still lower priority.[13]

In contrast to doctrines of responsible government, the idea of representative government seems to have no defined meaning in British colonial law, except as an 'inapt and confusing'[14] synonym for a representative legislature. In a broader sense, however, the idea of representative government is part of the British tradition of constitutionalism, one which, according to Birch, incorporates elements of distinct political traditions, including a doctrinal commitment to the independent representative role of MPs (understood primarily in terms of their ability to resist the influence of sectional interests), the link between MPs and local constituencies and, perhaps most importantly, a concentration of political power within an elected chamber which fairly represented all the interests of the country.[15]

Within so-called Westminster constitutional systems, the convention of civil service 'neutrality' or 'impartiality' is traditionally seen as playing a crucial role in mediating between values of responsibility and representativeness. 'The task of the politician', as Jennings understood it, included, 'maintain[ing] a close relationship between public opinion and the process of administration'.[16] 'The actual business of government', on the other hand, 'is the function of professional administrators and technical experts'.[17] Thus ministers provide the link to the electorate both directly and through Parliament, while a permanent civil service enhances responsibility, especially in Birch's primary sense of consistency, prudence and leadership. While the civil service never occupied a 'tutelary' position, in the sense used by Hood and Lodge,[18] the indivisibility of political and bureaucratic roles in the Westminster system of government could be seen as a kind of 'Hegelian synthesis' of responsibility and representation. For the philosopher Georg Hegel, the middle class of civil servants embodied not so much the popular will as the 'educated intelligence and legal consciousness of the mass of the people'.[19] Hegel pointed to the danger that, left unchecked, the civil service threatened to assume the 'isolated position of an aristocracy' and to use 'its education and skills as an arbitrary means of domination'.[20] Hegel pointed to the crucial role of institutional structures in mitigating against such dangers: the role that the monarchy and organised civil society played in Hegel's Prussia could in Westminster systems arguably be said to be discharged by oversight from ministers and Parliament and by public opinion channelled through the electoral system, as well as the constituency representation function of MPs.

Such a synthesis of responsibility and representation rests, however, on fragile foundations. Anthony Lester noted how, in the British constitutional context, the absolute power expressed in the doctrine of parliamentary sovereignty was checked by conventions which, in turn, relied on 'a sense of fair play' shared between ministers and

13 Ibid.

14 Roberts-Wray (n 10) 69.

15 Birch (n 11) 230ff.

16 Sir Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press 1958) 125.

17 Ibid.

18 Christopher Hood and Martin Lodge, *The Politics of Public Service Bargains: Reward, Competency, Loyalty – and Blame* (Oxford University Press 2006) 37–40.

19 Georg Hegel, *Hegel: Elements of the Philosophy of Right*, Allen Wood (ed), N B Nisbet (trans) (Cambridge University Press 1991) 297.

20 Ibid.

their civil servants.[21] A more critical interpretation of the elite consensus that prevailed in the Westminster–Whitehall system in London is that these relationships were constitutive of a system of 'club government', characterised by members' trust in all parties' observation of the spirit of the club rules.[22] Yet such a commitment to shared rules was arguably essential to prevent the relationship between ministers and civil servants from becoming one of antagonism. Donald Kingsley recognised, in his *Representative Bureaucracy*, that one crucial assumption was a correspondence of views between politicians and civil servants. 'The convention of impartiality', he wrote, 'can only be maintained when the members of the directing grades of the Service are thoroughly committed to the larger purposes the State is attempting to serve; when in other words, their views are identical with those of the dominant class as a whole'.[23] Writing on the eve of the 1945 Labour landslide in Britain, Kingsley sounded a warning that unless the basis of civil service recruitment was broadened, the bureaucracy would resist the policies for which the future government could claim an electoral mandate.

Ultimately, that Kingsley's warnings proved largely unfounded in view of the post-1945 Labour programme might point to the presence of a shared 'sense of fair play' between politicians and civil servants and, thus, a shared understanding as to how to mediate between responsibility and representation. The underlying institutional configuration was similar to that of New Zealand, in which Leslie Lipson noted how, following the Civil Service Act 1912, conditions for a successful accommodation between politicians and civil servants had emerged:

> With the political parties the modern [New Zealand] civil service has struck a mutually beneficial bargain. By guaranteeing to public servants a life's career and a pension, parties have foresworn the use of patronage and have guaranteed to the state's employees their tenure of their jobs. In return the parties expect, and the public servants owe, equal loyalty to any government which the party have placed in office.[24]

Such an accommodation has been essential in New Zealand, as it has in the UK, to resolving the tensions between responsible and representative government.[25] The privileged role of a permanent civil service in the management of public affairs provided prudence and leadership and, especially, consistency in an electoral system in which parties alternate in power. Serial loyalty to ministers and traditional civil service anonymity underpinned doctrines of ministerial accountability, while also ensuring responsiveness to public opinion through the electoral system.

Lipson's 'mutually beneficial bargain' also accommodated a degree of representativeness, not only through shifting allegiance to the political programmes of popularly elected governments of different stripes, but as a result of the self-denial by

21 Anthony Lester, 'Fundamental rights in the United Kingdom: the law and the British constitution' (1976) 125 (December) University of Pennsylvania Law Review 337, 339. Lester noted how this 'sense of fair play' was particularly well-suited for a homogeneous Victorian elite.

22 David Marquand, *The Unprincipled Society* (Jonathan Cape 1988) 178. See also Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press 2003); David Marquand, 'Club government – the crisis of the Labour Party in the national perspective' (1981) 16 Government and Opposition 19.

23 Donald Kingsley, *Representative Bureaucracy: An Interpretation of the British Civil Service* (The Antioch Press 1944) 278.

24 Lipson (n 7) 479. It should be noted that the 1912 Act followed (criticism of) an era of extensive patronage in public sector appointments.

25 We do not suggest that there have not been continued tensions over the 'bargain' and that this 'accommodation' has repeatedly experienced moments of potential breakdown.

politicians of patronage powers over the establishment of a professional, permanent civil service. As with subsequent analyses of 'public service bargains',[26] Lipson's characterisation highlights the distinctly informal and often implicit nature of such understandings which, in contrast with the formal constitutional principles, are not amenable to strategies and techniques of legal transplant. 'The peculiar and delicate conditions which … had permitted the creation of that sort of depoliticised public service with which Australian and British administrators and politicians have been familiar in their metropolitan politics', writes Schaffer, 'were never present in colonial and dependent systems'.[27]

The immediate pre- and post-independence period in Jamaica provides an ideal and – for scholars of law and public administration – thoroughly fascinating context in which to explore the role of informal institutions emerging in 'peculiar and delicate conditions'. Jamaica is one of the 'purest' cases of the classic Westminster model to exist outside the UK itself. However, the peculiar conditions of the colonialism in the West Indies in general and Jamaica in particular prevented the emergence of a 'mutually beneficial bargain' of the sort described by Lipson. Rather, what we observe might better be described as a 'mutually suspicious bargain'. Moreover, the post-independence political elite believed that the public service was not 'representative' in Kingsley's sense of faithfully reflecting the new dominant interests in society and was suspicious of administrators' loyalty and competence. At the same time, bureaucrats distrusted politicians' claims to enjoy popular support for their policies and their calls for greater representativeness in government, seeing in them instead challenges to settled understandings of 'appropriate' ways of governing and to their own social privilege.

This had serious consequences for the stability of the post-independence constitutional settlement. As well as not being representative, the public service was seen as lacking the necessary autonomy that responsibility, in the senses noted by Birch, would seem to presuppose. As Jones and Subramaniam have argued, an important aspect of the peculiar conditions that characterise societies dominated by plantation and extractive industries was the privileged yet precarious position of a 'derivative middle class' of lawyers, teachers and clerks which mediated between the general public and the colonial administration. In contrast with the metropolitan middle classes, they argue, the middle class of colonial Jamaica was 'lopsided because there was no corresponding economic middle class of distributors, retailers, service-men and rentiers to balance this professional salaried class'.[28] Wholly dependent for their position on the beneficence of the colonial administration, this derivative middle class resentfully adopted an attitude that was necessarily conformist to the colonial regime. In other words, the institutional and social configuration which, for Lipson, mediated between the competing demands of responsibility and representation in New Zealand was, prior to independence, almost entirely lacking in Jamaica, as well as in the West Indian territories more generally.

If there is a colonial legacy in terms of constitutionalism in Jamaica and the Commonwealth Caribbean, then it therefore lies in this unresolved tension between fundamental constitutional principles and the absence of supporting informal institutions to mediate between them. These tensions and absences led to the persistence in the post-colonial period of a 'mutually suspicious bargain' which in turn undermined support

26 Hood and Lodge (n 18); Bernard Schaffer, 'Public employment, political rights and political development' in *The Administrative Factor* (Frank Cass 1973).

27 Schaffer (n 26) 258.

28 E Jones and V Subramaniam, 'Jamaica – embracing privatization and seeking integration' (1993) 59 International Review of Administrative Sciences 651, 654.

among politicians for the broader constitutional settlement of independence. To develop this argument, we next consider the ambiguity of constitutional principles that were inherited from the times of colonial government.

2 Crown colony rule and its legacies

Any inquiry into the nature of constitutionalism in the context of post-colonial government needs to start with the colonial period. This is not just because this was the period in which the independence-era constitution was written; it was also the period where the dominant informal understandings about responsibility and representation were established and consequential aspects of the relationship between politics and administration took shape. In the following section, we highlight the strong formal emphasis on responsibility that characterised the Crown colony arrangement that defined the government of Jamaica in colonial times. However, we also note how non-mutually beneficial these arrangements were, creating the conditions for the unresolved nature of the tension between constitutional principles.

The Crown colony arrangement emerged in the aftermath of the Morant Bay Rebellion of 1865, later described by *The Times* as 'one of the most acute public controversies of the nineteenth century'.[29] The constitutional significance of the Rebellion and the bloody response of the British authorities was that it led directly to the surrender by Jamaica of its seventeenth-century constitution (known as the 'old representative system')[30] and its replacement by Crown colony administration. In fact, constitutional relations between the Governor and the Assembly had long been dysfunctional,[31] and Governor Eyre had previously, but with limited success, sought the support of the Colonial Office for a new constitution. The Assembly now willingly, albeit in a moment of panic, gave up its existing powers.

From a legal point of view, such as that expressed by Roberts-Wray, the expression Crown colony can be seen as lacking in precision. The term, he said, was 'sometimes freely used with a degree of confidence which is hardly justified, for it is difficult to say precisely what it means'.[32] From the internal point of view of the colonial administration, the term acquired a much more detailed understanding. Charles Bruce quoted, in glowing

29 'Death of ex-Governor Eyre', *The Times* (London, 3 December 1901) 8, quoted in Rande Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford University Press 2008) 1. In this work, Kostal has undertaken a detailed legal historical analysis of the episode and its ramifications in metropolitan society – including the private prosecution of two officers, Nelson and Brand, who had executed Gordon, as well as that of Eyre himself.

30 We discuss the old representative system (in contrast both with French and Dutch colonial systems, as well as with later Crown colony rule) in Lindsay Stirton and Martin Lodge, 'Constitutionalism and colonial legacies in the Caribbean' in Richard Albert, Derek O'Brien and Se-shauna Wheatle (eds), *The Oxford Handbook of the Constitutions of the Caribbean* (Oxford University Press 2020) 25–46.

31 Of particular relevance to present purposes is the disconnect in the old representative system between the Governor, appointed by the Crown, and the locally elected representative Assembly. The latter, as Wrong puts it, was to have 'special powers over taxation, but it was to be kept well under control by the Governor and Council, and was to have no right to meddle in executive matters … [W]hatever control the Assembly secured over the executive was exercised indirectly and below the surface. The power of refusing supplies was the one weapon which the Assembly employed against the Governor and Council.' See Hume Wrong, *Government of the West Indies (*Clarendon Press 1923) 41.

32 Roberts-Wray (n 10) 44.

terms,[33] a despatch of the Duke of Buckingham, Secretary of State for the Colonies between 1867–1868. The Secretary of State argued that the constitutions adopted in the West Indies from 1865, while differing in specifics, 'have one feature in common – that the power of the Crown in the Legislature, if pressed to its extreme limit, would avail to overcome every resistance that could be made to it'.[34]

This was accomplished through a set of constitutional arrangements that placed responsibility for all matters on the Governor. Appointed by the Sovereign on the recommendation of the Secretary of State for the Colonies, he was, as Colonial Office Regulations put it, 'single and supreme authority, responsible to, and representative of His Majesty'. The Governor was, as Bruce puts it:

> … not in the position of a constitutional sovereign; he is actual ruler. He, and he alone, is responsible for the conduct of the local affairs of the colony. He is responsible to the Home Government, while his advisers are responsible to him, and not, as in a self-governing colony to the local legislature.[35]

Similarly, Barnett describes the role of the Governor in the following terms:

> By virtue of his control of the Legislative Council, ultimate legislative as well as executive power vested in him, he alone could initiate financial measures and all legislation was subject to his assent. He had the right to appoint judicial and public officers, subject to the overriding powers of the Secretary of State, at will. He was responsible only to the Colonial Office and was the sole channel of communication with the British Government.[36]

Crucial to these observations was the subordinate position of advisory bodies, as well as the colonial bureaucracy headed by the Colonial Secretary. Until 1884, there was no elective element to the Legislative Council. Instead, its members consisted of *ex officio* members (including the Colonial Secretary who presented the government's business in the Council, as well as the main colonial heads of department) and nominated members appointed by the Governor.[37] After that year, an element of representation was introduced, in the form of nine elected members, increased to 14 in 1895. The increase in elected members was balanced by an increase in official and nominated members to five and 10 respectively, ensuring the government side had a bare majority.[38]

An executive Privy Council (more commonly, 'Executive Council') consisted of the Governor, as President, the Colonial Secretary, Financial Secretary and the Attorney General, as well as two nominated officials appointed by the Crown on the recommendation of the Governor. It was possible for an unofficial (i.e. nominated or elected) member of the Legislative Council to serve on the Executive Council. This was, according to Hamilton, 'a high privilege for the unofficial member, as it enabled him to

33 'Seldom, if ever, has a system been more clearly explained, and in all essential principles it may be said to constitute the fundamental law of Crown colony government to the present day.' Charles Bruce, *The Broad Stone of Empire: Problems of Crown Colony Administration, With Records of Personal Experience*, volume 1 (first published 1910, Cambridge 2010) 233.

34 Quoted in ibid 235–236.

35 Ibid 219–220.

36 Lloyd Barnett, *The Constitutional Law of Jamaica* (Oxford University Press for the London School of Economics and Political Science 1977) 9.

37 The circumstances around the introduction of elected members are discussed in Ronald Sires, 'The Jamaica Constitution of 1884' (1954) 3 Social and Economic Studies 64.

38 A vote of any nine elected members could defeat any money Bill ('the power of the nine'), while all 14 could defeat any Bill ('the power of the fourteen'). See Barnett (n 36) 11.

participate in the business of policy making'.[39] He further notes, however, that a frequent criticism among members representing labour interests was that 'the appointment of unofficial members to the Executive Council was limited to representatives of the employer class'.[40]

These constitutional arrangements also served – to some extent – to limit criticism and insulate the Governor from accountability. Although formally accountable to the Crown via the Colonial Office and the Secretary of State, distance and unfamiliarity with local conditions meant that Colonial Office doctrine emphasised the discretion of the 'man on the spot'; the idea that colonies were under the control of the Colonial Office was regarded in Downing Street as 'the one rank heresy we all shudder at'.[41] In the Legislative Council, the Governor not only enjoyed support of official and nominated members who were expected to support the Governor in their votes and their debate contributions, but by a 'quasi-spoils system' that seemed to give greater priority to the constituency needs of those elected members who voted with the government.[42] In the final instance, the Governor could force through any measure that he declared to be 'of paramount importance to the public interest'.[43]

Such insulation was never complete, however. Despite disavowals of rule from London, particular instances of defiance or mismanagement of governmental affairs could provoke outrage in Whitehall and Westminster, and in British society more generally, as happened following the Morant Bay Rebellion, noted earlier.[44] This had to be balanced against criticism from local interests, who voiced their opposition in the local press. As Hamilton puts it:

> Invariably he needed the agility of a tight-rope walker. Any action inimical to the identifiable metropolitan interests could raise a storm of protest about his head. On the other hand, it was equally vital that he not provoke local interests to the point where peace and tranquillity were disturbed.[45]

The selective insulation of the Governor and his administration from local interests was noted by the West India Royal Commission (The Moyne Commission), which described the Governor as:

> … not an autocrat, inasmuch as … he and his administration are open to influence; the complaint most frequently heard is, rather, that Governments are dominated by vested interests and that only the representatives of such interests are successful in exercising their influence.[46]

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39 B L St John Hamilton, *Problems of Administration in an Emergent Nation: The Case of Jamaica* (Frederick A Praeger 1964) 35.

40 Ibid 35. Hamilton notes the considerable difficulties of appointing members who were opponents of the government in the legislature. Experience in Trinidad suggested that the difficulties fell on both sides. Woodling points out, in the context of Trinidad and Tobago, that the Executive Council 'became so associated in the public mind with supposed blind acceptance of the official Downing Street [i.e. Colonial Office] view that it became a pitfall for any member to enter in'. See H O B Woodling, 'The constitutional history of Trinidad and Tobago' (1960) 6 Caribbean Quarterly 143, 154; see also Craig Hewan, *The Legislative Council of Trinidad and Tobago* (Faber & Faber 1951)149.

41 Ronald Hyam, 'Bureaucracy and trusteeship in the colonial empire' in J Brown and W M R Louis (eds), *The Oxford History of the British Empire, vol IV – The Twentieth Century* (Oxford University Press 1999) 257.

42 Hamilton (n 39) 20.

43 See Barnett (n 36) 11.

44 General Picton's defiance of anti-slavery legislation in Trinidad (1797–1802) provides another example.

45 Hamilton (n 39) 15.

46 West India Royal Commission Report (Cmd 6607, Her Majesty's Stationery Office 1945), Cap V, paragraph 7, hereafter, the 'Moyne Report'.

Similarly, Hamilton contrasted the informality, and indeed deference, with which members of the bureaucracy dealt with members of their own social class with their superordinate position in relation to members of the general public who were expected to stand outside the barricades and wait their turn.[47]

In its constitutional structure, Crown colony rule seemed, in theory at least, to suggest the ultimate emphasis on responsible government, in the foremost sense of consistency, prudence and leadership, while consciously rejecting understandings relating to accountability towards a legislative body or responsiveness to local public opinion. This was justified by an ideology of 'wardship' or 'trusteeship' which emphasised, on the one hand, that the duty of the colonial administration was to balance the different class and ethnic interests and, on the other, that this must be accompanied by sufficient powers to carry out that trust. For West Indian nationalists, such as C L R James, the ideology of trusteeship was a threadbare justification which barely concealed the racism underpinning it.[48]

Even from a European and metropolitan perspective, however, the practice arguably fell far short of this ideal. For example, Harold Laski, writing on the eve of the 1938 disturbances, complained that the word 'trusteeship', was:

> … too flattering to the results obtained. It is hardly compatible with the historic incidence of the facts. It is a word whose sound is too noble for the squalid results too often attained; for, in many cases, whether the test taken be standard of life, public health, education, or growth of fitness for self-government, the colonies remain, in large degree, the slums of empire.[49]

Laski blamed this state of affairs partly on a narrow approach to recruitment, which included failing to develop the talents of 'educated coloured people',[50] as well as a preference for 'sound men' rather than 'innovators'. Compounding this situation was the Treasury's determination to run an empire 'on the cheap'.[51] A series of official reports from the 1920s through to the 1940s shows the consequences of this intention, highlighting the persistence of low salaries, poor recruitment practices and inadequate physical working environments for civil servants.[52] Senior civil servants were overloaded by excessive workloads, including for some attendance in the Legislative Council for as many as a hundred days per year, while junior officers exhibited little initiative, passing matters for decision up to their superiors, while busying themselves with 'administrivia'.[53] The result, as seen locally, was that 'the bureaucracy exhibited incapacity for technical programmes as distinct from routine operations'.[54]

47 Hamilton (n 39) 18

48 'Men have to justify themselves, and [the colonial Englishman] falls heavily back on the "ability of the Anglo-Saxon to govern", "the trusteeship of the mother country until such time" (always in the distant future) "as these countries can stand by themselves," etc., etc.': See C L R James, 'The case for West Indian self government' in C L R James, *The Life of Captain Cipriani: An Account of British Government in the West Indies* (Duke University Press 2014) 174.

49 Harold J Laski, 'The colonial civil service' (1938) 9 Political Quarterly 541, 541.

50 Ibid 547.

51 Ibid.

52 These are discussed in detail in Martin Lodge, Lindsay Stirton and Kim Moloney, 'Whitehall in the Caribbean? The legacy of colonial administration for post-colonial democratic development' (2015) 53 Commonwealth and Comparative Politics 8.

53 Edwin Jones, 'The executive agency: a manifesto against administrivia' (2001) 3 Caribbean Journal of Public Sector Management 30.

54 Hamilton (n 39) 31.

The reality of responsible government was, to its critics, therefore less about consistency, prudence and leadership, but rather largely about maintaining law and order and ensuring economic production. It barely included extensive understandings of development and welfare understandings that only emerged in the 1930s and 1940s in response to the growth of trade union movements, riots and evidence of widespread underdevelopment. These concerns, as well as the inability of existing constitutional arrangements to respond to them, were exposed by the disturbances of 1938 and laid bare in the Moyne Report, whose findings and conclusions were largely kept from the public eye in order not to fuel potential opposition to colonial rule during the Second World War.

To recap, several things are worth emphasising. First, Crown colony rule operated without the necessity of any 'mutually beneficial' understandings between (local) politicians and civil servants. The colonial administration, in particular the expatriate officers who occupied senior positions, enjoyed an exalted position in relation to elected members of the Legislative Council. Moreover, the colonial system successfully monopolised local officers' loyalties due to the peculiar nature of the class structure of colonial society. In this context, demands for 'responsibility' were in reality demands only for responsiveness to particular colonial interests, such as local big business. Frustrated though they may have been, the loyalties of local administrators were completely bound up with the metropolitan interests and institutions. Secondly, many of the features that were later to be associated with the political sociology of post-Colonial Jamaica – including the fragility of the position of the government, despite its apparent power, relations between the bureaucracy and sections of the public that were patron–clientelistic, the absence of technical skills to carry out programmes of social and economic reform, and the concentration of decision-making authority at the apex of governmental structures – were already to be found in barely concealed form in the unresolved tensions within Crown colony government.

3 The path to independence 1944–1962

In less than 20 years, between 1944 and 1962, Jamaica transitioned from Crown colony rule with a minority of elected representatives in its Legislative Council to a fully independent Commonwealth state with a Westminster-style constitution. It is not fanciful or fallacious to see each of the intermediate steps as staging posts towards independence. Indeed, Colonial Office policy during this time embraced the doctrine of 'preparation', the training of local populations 'for the self-government and independence which British policy intends that they should achieve in as short a time as is reasonably possible'.[55] Nevertheless, and in view of the various intermediate constitutional steps granting greater political authority, the precise course of Jamaica's path of constitutional development towards independence should not be assumed to have been planned from the outset.

The 1938 crisis marked a sea-change in public opinion in Jamaica – and indeed in the wider Caribbean. Popular unrest had long been a feature of West Indian societies, but the disturbances of 1938 were, as the West India Royal Commission put it, 'a phenomenon of a different character, representing a mere blind protest against a worsening of

55 S J Robertson, 'Some problems on the path to self-government' (1961) 39 Public Administration 313, 313.

conditions, but a positive demand for the creation of new conditions that will render possible a better and less restricted life'.[56] Against this observation, two aspects of the Moyne Commission's recommendations stand out.

First, was the Report's embrace of the need for a far-reaching programme of social welfare. This followed earlier acceptance by the then Secretary of State for the Colonies (Sidney Webb, Lord Passfield) who noted that the poor social conditions in the colonies represented a 'reproach to our colonial administration'.[57] These were radical and far-reaching recommendations, notwithstanding their burial deep within the structure of the Moyne report[58] and despite criticism that they were founded on out-of-date assumptions about West Indian society.[59] In particular, the Colonial Development and Welfare Act 1940, passed in response to the Moyne Commission recommendations, accepted the principle of the UK Treasury's responsibility for the welfare and development of its colonial subjects. This followed the unification of the colonial civil service in 1930 which also intended to encourage the recruitment of civil servants capable of planning and development.

A second noteworthy feature of the Moyne Report was that it placed constitutional and administrative reform at the heart of its recommended response to the 'West Indian question'. Social regeneration was 'not possible under the present form of government'. And it recognised, though it stopped short of endorsing, the strength of West Indian sentiment that a more expansive role for the colonial government in social and economic policy and that, far from being antagonistic ideals, responsible government depended on a greater degree of representation than the mid-nineteenth-century conception of trusteeship allowed:

> Rightly or wrongly, a substantial body of public opinion in the West Indies is convinced that far-reaching measures of social reconstruction depend, both for their initiation and their effective administration, upon greater participation of the people in the business of government.[60]

The Moyne Commission, for its part, was willing to contemplate greater representation through variation in the composition of Legislative and Executive Councils.[61] However, it cautioned against 'any fundamental change in the parts they play in the public affairs of those colonies', insisting instead that: 'The initiative in formulating policy should remain with the Governor in Executive Council.'[62]

Moyne's thinking was reflected in the Jamaican Constitution of 1944.[63] The precise content of the political rights granted under the 1944 Constitution were, as Stephens and

56 Moyne Report (n 46) Cap I, 8, paragraph 17. Reporting in 1939, the Moyne Commission presented such a damning picture of British colonial rule in the West Indies that it was suppressed until 1945 for fear of the propaganda value to Germany of its contents. A summary of recommendations was published in 1939.

57 Cabinet Office papers, TNA CAB21/809.

58 As Simey puts it, proposals for welfare reform were 'tucked away as an appendage to another recommendation dealing with administrative machinery, and this is buried in a sub-section labelled "Other needs and Services", attached in its turn as an afterthought to the section of the Recommendations dealing with administrative reforms in the social services': see T S Simey, *Welfare and Planning in the West Indies* (Clarendon 1946) 233. It should nevertheless be noted that the Report's executive summary that was published in 1939 condemned 'with a sense of shame' the 'situation that now exists'.

59 Ibid.

60 Moyne Report (n 46) Cap XXII, paragraph 2.

61 Ibid Cap XXII, paragraph 6, noted the importance of 'educating unofficial in the business of government', in part to address the 'inordinate' length of speeches in the Jamaican Legislative Council, for example.

62 Ibid Cap XXII, paragraph 4.

63 Jamaica (Constitution) Order in Council 1944, SI 1944/1215.

Stephens note, the outcome of a 'long process of negotiation between the Colonial Office, the Elected Members Association, and the PNP' (the People's National Party).[64] A reformed Legislative Council became the upper house in a bicameral legislative structure; a newly created House of Representatives, whose membership was elected on the basis of universal adult suffrage, performed the functions of a lower chamber. Responsibility for making policy remained with Governors in Council, chaired as before by the Governor. Now, however, the House of Representatives could elect five of its members to serve on the Executive Council.[65]

In formal terms, the civil service remained responsible, through the Colonial Secretary and the Governor to the Colonial Office and, ultimately, the Crown. But, as Byles put it, it was the voices of Chairs of the five newly created Standing Committees of the House of Representatives 'which are now heard in the House in debates on the work of Departments – not the voices of the civil servants as was the case in the previous setup'.[66] More generally, this period also witnessed reorganisation of the Colonial Service, especially in terms of advanced training opportunities.[67] A new constitution in 1953[68] took a step towards responsible government in the legal sense, by creating what Barnett called an 'incipient cabinet system'.[69] This was effected through a change in the composition of the Executive Council, which was now to have a eight elected members: a 'Chief Minister' selected by the Governor and approved by the House of Representatives; and seven ministers with portfolio responsibilities selected by the Chief Minister. Ministries were created and took on the functions formerly performed by the Colonial Secretariat, but the old Executive Departments continued at first, leading to tensions, especially in 'technical' departments such as agriculture.[70]

From a political (but not an administrative) point of view, these anomalies were addressed by the 1959 Constitution, which established responsible government in the legal sense.[71] A Cabinet was established 'as the principal instrument of policy', and its members were 'collectively responsible' to the legislature.[72] While from a political point of view, the 1959 Constitution seemed to establish internal self-government, no provision was made for a change in control of the civil service, with the result, as Hamilton puts it, that 'the control of the civil service under national government remained basically what it was under Crown Colony government'.[73]

At the eve of independence, therefore, Jamaica had assumed the formal political institutions of responsible government. But, despite the findings of the Moyne Commission that the appalling social and economic conditions that caused the 1938 disturbances were in part due to the 'low standards of administration' practised in the

64 Evelyn Huber Stephens and John Stephens, *Democratic Socialism in Jamaica: The Political Movement and Social Administration in Dependent Capitalism* (Princeton University Press 1986) 17. We were not able to independently confirm this point, but note that it is consistent with the archival record for Trinidad and Tobago, in which the British government undertook detailed consultation with the Peoples National Movement.

65 Elected members of the Executive Council were given the courtesy title of 'Minister', but had no portfolio responsibility. Sometimes they have been called 'ministers in embryo'.

66 G Louis Byles, 'The Jamaican experiment' (1948) 56 Parliamentary Affairs 56, 64–65.

67 Colonial Office, *Organisation of the Colonial Service* (Colonial No 197, HMSO 1946).

68 Jamaica (Constitution) Order in Council 1953, SI 1953/747.

69 Barnett (n 36) 18.

70 Hamilton (n 39) 88–89.

71 Jamaica (Constitution) Order 1959, SI 1959/862.

72 Ibid section 47.

73 Hamilton (n 39) 92.

colony, improvements during the post-war period were erratic, piecemeal and incremental. While tensions were bound to arise in a new constitutional dispensation which for the first time expected civil servants to be responsive to the demands of politicians – and ultimately the public – the evidence seems to suggest that relations between elected representatives and civil servants were on the whole more cooperative than they had been before 1944.[74] There were doubtless numerous reasons for this, but among them was that the civil service had been unable to recover from the loss of prestige it suffered as a result of the 1938 disturbances and was thus reliant on the legitimacy of elected national politicians. Equally, Alexander Bustamante, the leader of the Jamaica Labour Party (JLP), which had won the 1944 elections, was reliant on support from the departments in the face of a virile opposition.

Competence remained a challenge. Despite the acceptance by the legislature of the Mills Report in 1950, the service remained rooted in routine, and was criticised for being unable to adapt to the expectations of Jamaicans of a service that would deliver material and social improvements in line with a growing economy.[75] While it was a source of national pride that Jamaicans had begun to occupy senior positions, the rapid loss of expatriate officers represented a loss of expertise in a system that had not proved effective in developing local talent.[76] Pressure of work also increased, especially after the PNP took office following the 1955 elections and began to implement more administratively ambitious central planning measures. Against these expectations it was all too easy for politicians to interpret a lack of responsiveness as 'sabotage'.

Slowly but surely, however, the old hierarchy, which placed civil servants in an elevated position vis-à-vis elected representatives, began to invert itself. For example, in 1949 Eric Mills, the Public Service Commissioner, observed that frankly expressing their views to politicians 'may put at risk the career of any public servant'.[77] With the advent of the ministerial system, argues Hamilton:

> The status [civil servants] enjoyed would largely be determined by the politicians whose behavior would indicate to the people whether the civil service was accepted as the bureaucratic arm of the executive or was seen in the relationship of master and servant in the Jamaican context of low status for employees.[78]

This, he argues, led to a situation in which the traditional status roles 'were reversed so that it was then the civil servants who tended to become sycophants'.[79]

Institutional measures were put in place to limit political control of the bureaucracy. The Public Service Commission Law 1951 placed matters of recruitment and promotion

74 Ibid 60; Barnett (n 36) 16–17.

75 Indeed, colonial development and welfare programmes had initially been administered outside of regular departmental lines, under the direction of the Comptroller of Welfare and Development working in collaboration with the Colonial Office, with the local civil service acting only in an advisory capacity.

76 A partial exception can be inferred from Gladstone Mills' observation that with the advent of colonial development and welfare funds a career in the Treasury began to rival that of the Secretariat for prestige and influence. Since appointment in the Secretariat had been largely reserved to those in the top levels of colonial Jamaica's ethnic-complexion hierarchy, this brought new opportunities for talented black Jamaicans to gain experience. He notes a number of notable individuals who served in the Treasury prior to 1944, adding that: 'All would rise rapidly thereafter, and especially after the introduction of the 1944 Constitution and of the Ministerial system in 1953.' Gladstone E Mills *Grist for the Mills, Reflections on a Life* (Ian Randle 1994) 60.

77 Eric Mills, *Report of the Commission on the Public Service in Jamaica* (Kingston, The Government Printer 1949) paragraph 5.7; On the Mills Report see further Lodge et al (n 52) 21–23.

78 Hamilton (n 39) 143.

79 Ibid 146.

in the hands of a statutory board, the Public Service Commission. While this was intended as a measure to limit political patronage, the motivation may have been less about ensuring responsible government than about absolving the metropolitan government from complaints that it had abandoned the fate of expatriate officers to the hands of local political elites.[80] In other words, they were a cheap way for the British government to 'shuffle out' of its implicit commitment to colonial civil servants.

In sum, the period of Crown colony rule had emphasised (even if it did not always live up to) a concept of 'trusteeship' that saw local control over administration as an impediment to consistency, prudence and leadership. In fact, the absence of representative institutions had been irreconcilably associated in the public mind with serious failures of administration. Against this background, the post-war period, with its emphasis on 'preparation', was notable in terms of its attempt to reconcile ideals of responsibility with a greater emphasis on representation. The period is important in terms of the emergence of political demands for as well as institutional configurations through which public servants were supposed to be responsive, through the legislature, to wider movements in public opinion in the territories. As seen from the Moyne Report's ambivalence on this point, this change of approach was not borne out of any great conviction that responsibility and representation could be reconciled, given the state of political development of the West Indies, but out of a sense that the legitimacy of Crown colony rule had been shaken in a way that was irreversible within the existing constitutional framework.

All in all, the civil service during this period was remarkable in its ability to act according to the ideal of neutrality, often in the face of accusations of 'partisanship' and 'sabotage'. On the contrary, the administration often adopted an attitude of quiescence. Combined with the inability to overcome a colonial legacy of a service more comfortable with routine than innovation and the design of institutions that sought to reduce discretionary *political* decision-making by new political elites through creating new formal institutions, the picture that emerges is of a failure to design administrative institutions that could reconcile responsibility and representation. This was to prove highly problematic in terms of supporting the development of informal underpinnings of formal constitutionalisation in the post-independence period.

4 The post-independence period

After the abortive experiment with West Indies Federation,[81] which ended when in 1961 Jamaica voted in a referendum against participation in Federation, preparations began for the country to move towards independence on its own.[82] Jamaica's independence constitution was framed by a small bipartisan committee, with little input from organised civil society or grass roots groups.[83] While there were differences within the committee, for the most part these did not extend to questioning the fundamentals of the political settlement that had been fashioned since 1944. One cleavage was the extent to which the

80 Lodge et al (n 52) 20–21.

81 British Caribbean Federation Act 1956; West Indies (Federation) Order in Council 1957, SI 1957/1364.

82 Jamaica Independence Act 1962.

83 Trevor Monroe, *The Politics of Constitutional Decolonisation, Jamaica 1944–62* (Institute of Social and Economic Research, University of the West Indies 1972) 147ff.

new constitution fettered the post-independence leadership, through the entrenchment of a bill of rights within the constitution, as well as the entrenchment of the Public Service Commissions.[84]

Outside of the then political elites, a more radical critique was emerging. In a posthumous contribution, the late Norman Girvan wrote of being part of a group of young scholars – some of whom would later serve as political advisers in Michael Manley's 1972–1980 PNP government – who rejected the fundamentals of the Westminster model as a basis for nation-building in the Caribbean.[85] To Girvan and other critical observers, Jamaica's constitution of 1962 was an 'Independence Pact' the purpose of which was to preserve the *status quo* after the end of British rule. One focus for criticism was the inclusion in the bill of rights of the right to private property, which was argued to entrench patterns of foreign ownership of key areas of the Jamaican economy. In fact, the clause that was accepted by the committee was a compromise which allowed expropriation in the public interest but required adequate compensation to be paid.[86]

These contrasting perspectives reflect an emerging conflict between the idea that responsible government – particularly in its primary interpretation of consistency, prudence and leadership – depended on proper limits as to the policies that could be justified by reference to the popular will and those who saw such limits as placing unjustifiable limits on the path that an independent, democratic Jamaica could chart for itself. The latter view also included those who were sceptical about the practice of 'responsible government' in the first place and who suggested that career advancement within the civil service required responsiveness to key (big business) interests.[87] In Jamaica, the 1960s proved a benign environment inasmuch as the policies pursued by the JLP government, first under Alexander Bustamante and then (from 1967) by Hugh Shearer, did not significantly challenge the *status quo*. The economic policies of the 1960s continued the pattern of the 1950s in which, according to Stephens and Stephens: 'The state's role was limited to providing infrastructure and protection and incentives to local and foreign capital, which were to be the engines of economic growth.'[88] These policies were heavily influenced by the scholarship of the West Indian economist W Arthur Lewis and formed the basis of a policy consensus between politicians and civil servants, which, as noted above, for Kingsley were a precondition for civil service neutrality. Stephens and Stephens make similar claims about Jamaica's foreign policy, which they characterise as rhetorically pro-Western, but which was in reality isolationist, claiming that 'it hardly entered the international arena at all'.[89] Subsequent scholarship has suggested that Jamaica emerged, through the leadership of Prime Minister Hugh Shearer and Ambassador to the United Nations, Egerton Richardson, as a major broker in

84 Interestingly, some among the Jamaican political leadership fell on different sides of these issues. Edward Seaga, for example, opposed an entrenched bill of rights, but was in favour of clarifying the powers of the Service Commissions to protect public servants against some future leader who might be 'willing to ransom an ounce of responsibility for a pound of political power'. Quoted in Patrick E Bryan, *Edward Seaga and the Challenges of Modern Jamaica* (University of the West Indies Press 2009) 89.

85 Norman Girvan, 'Assessing Westminster in the Caribbean: then and now' (2015) 53 Commonwealth and Comparative Politics 95.

86 Constitution of Jamaica, chapter III, Article 15.

87 It was this view that led Dr Eric Williams, in the case of Trinidad and Tobago, to argue that key appointments should be made by the Chief Minister.

88 Stephens and Stephens (n 64) 22.

89 Ibid 32.

international human rights diplomacy at this time.[90] The broader point remains, however, that civil service responsiveness to the demands of political leadership remained fragile, dependent on a Kingsleyan correspondence of views rather than stabilised by informal institutional commitment to a Lipsonian mutually beneficial bargain.

In fact, signs of tension already existed for those who were perceptive enough to read the signs. Hamilton documents the severe shortage of skilled administrative expertise facing the government in independence, adding that:

> Aware of the high praise showered on the Jamaica civil service in the past they fail to comprehend ineptitude and so politicians of both parties have at sundry times suggested deliberate sabotage on the part of civil service personnel.[91]

For their part, civil servants were unable to respond to attempts by politicians to blame them for policy failures by restrictions on speaking publicly. Equally, though, Hamilton notes how civil servants, accustomed to taking direction from heads of departments, resented what they regarded as ministerial intrusion into their sphere of responsibility.[92]

The perceived limitations of these features of political–administrative interactions prompted the government to invite the UN Technical Assistance Department to undertake a review of the Jamaica civil service. The review praised Jamaica's 'strong, uncorrupt civil service' as 'a national asset of incalculable and fundamental value'. Nonetheless, the resulting report warned of an existential threat to the Jamaica civil service if the service was unable or unwilling to be responsive to the demands of the elected politicians who comprised the government of the day.

> If this concept cannot be substantially realised in practice, ministers will inevitably be faced with the temptation to press for the appointment to positions of responsibility in the civil service of people who *will* in fact carry out their policies and plans, because of membership in the same political party or because they appear to the Minister to be more responsive to their own thinking and more active in seeing that things happen. People will be sought who are prepared to be wholeheartedly 'involved' in implementing the policy of the government of the day. It is the essence of democracy that the will of the people, expressed through the government of the day, should be carried out effectively, economically and promptly, and if a permanent career civil service cannot do it then other kinds of executive instruments must be developed.[93]

These tensions emerged gradually, muted in their effects by the overall 'consensus' politics in Jamaica throughout the 1960s. Politicians, such as future prime minister Edward Seaga, experimented with statutory boards to overcome the perceived lack of responsiveness by the existing public service.[94] Others sought advice from particular civil servants in whom they had confidence, disregarding official channels of reporting and advice. However, severe strain emerged in the 1970s when the demand for representative politics (and a responsive public service) took a more radical turn.

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90 Stephen L B Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press 2016) chapter 3.

91 Hamilton (n 39) 193.

92 Ibid.

93 N C Angus, W P Barrett and E Holstein, *Public Administration in Jamaica* (UN Commissioner for Technical Assistance Department of Economic and Social Affairs 1965) 1. Similar concerns were expressed in Trinidad and Tobago at the time. See First Report of the Working Party on the Role and Status of the Civil Service in the Age of Independence (1964).

94 E.g. the Urban Development Corporation Act 1968.

5 Democratic socialism: PNP administration 1972–1980

In Jamaica, the election victory of the PNP in 1972 marked a turn towards a more radical politics, which by 1974 went under the name of 'democratic socialism'. This turn reflected, in part, also wider geopolitical changes, whether in terms of the turn towards more activist government in the early 1970s or in terms of Cold War tensions. In part, this turn was also based on particular Jamaican circumstances. The policy programme to which the government now committed itself was, in stark contrast to the earlier policies of the JLP, not only ideologically left-leaning but extremely demanding in terms of state and bureaucratic capacity. This included at the domestic level nationalisation of the commanding heights of the economy, a commitment to increasing economic self-reliance including agricultural and land reform, as well as ambitious social, educational and cultural policies.[95] In the field of foreign policy, Jamaica adopted an ambitious strategy of third world unity, including promoting the non-aligned movement, as well as continuing the ambitious international human rights agenda that began under the previous administration.[96]

For the then Prime Minister Michael Manley and the ruling PNP, the civil service was perceived as a conservative institution whose traditional emphasis on 'neutrality' was incompatible with their ambition (and what they saw as their democratic mandate) to transform society, especially in terms of property rights. Civil servants, it was contended, interpreted their role as 'protector of the society from the whims, the fancies and the extravagancies of the politicians'.[97] At the same time, in the face of the political ambition of expanding the state's role in managing the economy, and the introduction of new social and cultural programmes, the civil service faced difficulties in filling senior leadership positions from within its own ranks and severe criticism for perceived poor policy performance.

A number of measures were taken to overcome this perceived resistance. First, the transformation of the public service was to be achieved through the establishment of a new Ministry of Public Service, which would transform the civil service through the introduction of modern administrative techniques, and to select and train personnel to higher standards of competence. There was also said to be a greater reliance on external appointments and non-Jamaican consultants (see below). Members of the Public Service Commission, which had adopted a traditional approach to public sector appointments during the period between 1972 and 1976 were replaced, following the 1976 election,[98] by individuals more sympathetic to the 'politics of change' that Manley had sought to pursue. In particular, the move was seen as an attempt to ensure that political commitment to fulfilment of the policies and initiatives of the administration was weighed more heavily than seniority.[99] It is a sign of the administration's commitment to its particular vision of personnel administration that at this time chairmanship of the

95 A full inventory of the Manley administration's principal policies and initiatives between 1972 and 1879 is given in Stephens and Stephens (n 64) 70–71.

96 Ironically, given the Manley administration's overall approach in relation to issues such as apartheid and third world unity, Jensen (n 90) 258–259 notes that Jamaica 'seemed to have forgotten their own pivotal role' in human rights diplomacy in the previous decade.

97 Document submitted to the 1973 PNP Conference, 'Jamaicanise Jamaicans'; see also Michael Manley, *The Politics of Change: A Jamaican Testament* (Andre Deutsch 1974) 205–206.

98 The circumstances under which the existing Public Service Commissioners were asked and finally agreed to offer their resignations is described in the memoirs of then Chair of the Public Service Commission, Gladstone Mills. See Mills (n 76) 136–137.

99 Stephens and Stephens (n 64) 153.

Public Service Commission became a full-time position. These new appointments were to establish the conditions for a public service that was more responsive to the needs of a developing country. Subsequently, one of the new members of the Commission, Edwin Jones (from the University of the West Indies), justified the measures on a number of grounds.[100] He argued that for government programmes reflecting 'new development orientations', a supposedly neutral administrative 'cadre' was insufficient.

But, as well as seeking to make the civil service as it then existed more responsive, attempts were made, to a much greater degree than under the previous JLP government, to adopt much more responsive means for implementing the agendas of elected politicians. This included successive government reorganisations, involving not just the creation in 1973 of a Ministry of Public Service to oversee the adoption of contemporary administrative techniques, but also the Ministry of National Mobilisation and Human Resource Development in 1977 to coordinate and monitor the implementation of government policies and to act as a progress-chaser of other departments.[101] In addition, the Manley government pursued a number of strategies aimed at making public policies more responsive to what it saw as its popular mandate.[102]

Second, the PNP administration sought to identify those within the public service who were prepared to work with its agenda. As a 1973 party document put it: '[Government] must try to identify those civil servants who in spite of the screed of neutrality are nevertheless committed to the goals and actions of democratic socialism.' To this end, the party created an 'Accreditation Committee' chaired by PNP Minister Robert Pickersgill. The function of the committee was to ensure that appointees to statutory boards and other government committees had not only the competence but also the 'commitment' (as it was put by leading politicians at the time) to serve the government's agenda.

A fourth strategy was the appointment to the position of special advisors, a cadre of ideologically committed technical analysts, capable of providing an alternative to the civil service's conventional monopoly on advice to ministers. Such special advisors should be appointed by and solely to the minister: 'These cadres should not be integrated to the regular system. They must work outside of it.'[103] The appointment of these 'irregulars' (as they were known) often provoked the antipathy of senior civil servants, not just because of their different ideological perspectives – they were radicals, whereas the civil servants tended to be liberals – but also because they adopted different attitudes, mannerisms and even dress to traditional civil servants. For example, Stephens and Stephens quote one of the more conservative members of the then PNP Cabinet as describing the attitude and appearance of the West Indies economists (a group which included Norman Girvan and George Beckford) who worked on an alternative to the International Monetary Fund plan eventually agreed to by Manley:

> They would go up to the Bank of Jamaica wearing sandals and a tam, and demand, not ask, for some statistics or data and naturally people resented it. Their personal appearance, all wearing tams, they were known as the 'tam pack'.[104]

100 'UWI lecturer testifies at corruption probe' *Daily Gleaner* (Kingston, 15 May 1979) 13.

101 Government of Jamaica, 'The Ministry of National Mobilisation and Human Resource Development: Its Nature, Structure and Functions' (Ministry Paper 17 1977).

102 Quoting Arnold Bertram, Patrick Bryan (n 84) 124 notes how these calls for greater responsiveness not just involved calls for greater social justice, but also appeals to the national business sector by advertising the supposed benefits of greater economic nationalism in contrast to foreign ownership.

103 PNP document (1977).

104 Stephens and Stephens (n 64) 152.

Notwithstanding such culture clashes, in Stephens and Stephens' estimation, when judged by their achievements, the 'irregulars' proved effective in harnessing elements of the state bureaucracy.[105] More generally, by the mid-1970s, there was also a growing stress on the importance of 'competence' even among these ministerial advisors.

Finally, the PNP government ramped up the strategy, which had started with Edward Seaga as Minister for Development and Welfare in the 1960s, of creating statutory boards as vehicles for carrying out public policy. Board members were not permanent appointees but held their position for a fixed term. A convention developed whereby members of such boards were expected to tender their resignations after an election. The purpose of this convention was to further ensure responsiveness to the political goals of the administration. Again, however, by 1977, this strategy had been identified as problematic as these boards were diagnosed to have become unresponsive to political initiatives and to have assumed the position of 'bureaucracies in their own right'.

Overall, the experience of the Manley government in the 1970s reflects the concerns initially flagged by the UN Technical Department Report of 1965. Having embarked on a set of programmes aimed at transforming society, the government found the civil service itself to be one of the obstacles to achieving this goal. The criticisms of politicians of the time, however, went beyond familiar grumbling about civil service intransigence. Instead, the very idea of 'neutrality' was seen as incompatible with attempts at, what the PNP government called, the 'mass mobilisation' of society in pursuit of developmental goals. At the same time, it illustrated considerable tensions even within that strategy: matching 'competence' (i.e. technical expertise to deliver programmes, to analyse policy options and such like) and 'commitment' (i.e. loyalty towards a democratic socialist party seeking to challenge existing domestic and foreign policies) that inevitably led to conflicts, concern about leaks (for example, internal documents to the opposition leader) and accusations of outright sabotage (by supporting 'capitalist' organisations, such as the daily newspaper, the *Gleaner*, or US interests). Compounding these administrative shortcomings was the extremely ambitious nature of the PNP's programme throughout the period. As Stephens and Stephens put it, the government during this period:

> … started too many programs, at too fast a pace, for the available state machinery to be able to handle them efficiently. As a result, many of these programmes were poorly implemented and constituted a greater drain on the government's resources than they were supposed to do and than the government could afford.[106]

This over-commitment could arguably be said to be compounded by a failure to deal effectively with patronage in public employment, despite a clear policy intention to do so.

This point represents the most extreme attempt in the post-independence period to 'stretch' the constitutional understanding towards a particular ideological version of representativeness. Subsequently, as in the wider global context, the 1980s were characterised by a return towards calls for a more 'responsible' form of government and therefore also understanding of the appropriate role between politics and civil service. Even though a further elaboration is outside the remit of this paper, subsequent waves of public service reform continued to be characterised by the continued presence of mutual suspicion between political and administrative elites, especially during times of changing government.

105 Ibid 153.

106 Ibid 312.

Conclusions

This article's central focus has been the persistence of a mutually suspicious bargain between political and administrative elites, reinforced by the process of decolonisation, that centred on the tension between constitutional doctrines of responsibility and responsiveness. The persistence of this informal institution has been central to Jamaica's constitutional development and represents the central British colonial legacy. The lack of agreement as to how to reconcile notions of responsible and representative government, especially in relation to the relationship between political and administrative systems, has been a continual impediment to the development of strong political institutions.

This persistence of a mutually suspicious bargain can be seen in a number of ways. The continuing presence of mutual suspicion had repercussions for the party-political system itself. While the leader-centricity of the party system has been linked to initial political struggles between the fragmented political movement surrounding Bustamante (and the JLP) which forced the PNP to build a personality-based party (around Manley),[107] the continuing centrality of the 'leader' can be interpreted as a continuing expression of a suspicion regarding the competence of the bureaucracy to 'perform' and to do so 'loyally'. At the same time, the continued emphasis on personal leadership and resultant patron-clientelistic relations reinforced conditions of mutual suspensions, given, according to Carl Stone, the seemingly all powerful, yet uniquely vulnerable position of these leaders:

> The party boss or maximum leader is like a feudal monarch surrounded by a nobility who grow or diminish on scale of elite power depending on how he chooses to bestow favour. The maximum leader is able to keep the party together only if he constantly exerts personal authority over the party. The effective maximum leader can never be openly challenged, has the final word on most critical decisions (unless he chooses not to exercise that power), and is entrusted with the maximum power to determine policy and overall directions of the party. Maximum leaders who show signs of indecisiveness, weakness and lack of control invite challenges and lose credibility because the role of maximum leader is defined in the political culture as demanding strength, appearances of personal domination, and decisiveness.[108]

Indeed, this passage invites comparison with the position of the colonial-era Governor, who seemingly enjoyed a power that could avail to overcome all resistance that might be brought against him, yet had to maintain a fine balance between powerful opinion both locally and internationally.

Furthermore, the persistence of this mutually suspicious bargain is reflected in the incoming political elite that, on the one hand, inherited the ambiguous position of the Governor, a supposedly responsible office that nevertheless was beholden to select powerful interests. On the other hand, this political elite encountered an administrative elite that had not only exchanged loyalty towards colonial government for social status in previous times, but which was ill-equipped to deliver the kind of 'representative' programmes the new political elites and their electoral constituencies demanded of them. This, in turn, reinforced the reliance on informal and indirect governing networks that were classically clientistic.

107 Amanda Sives, *Elections, Violence and the Democratic Process in Jamaica 1944–2007* (Ian Randle 2010).
108 Stone (n 8) 97–98.

More generally, this article also contributes to wider discussions regarding the impact of colonial legacies and, thus, legal transplants. In contrast to those who highlight the dire consequences of 'totalising institutions' (such as a plantation economy) on subsequent political and economic development[109] or those that focus on formal constitutional arrangements, such as the Crown Colony arrangement in enabling essential administrative infrastructures[110], this article has highlighted the importance of distinct informal institutions, namely the role of understandings that support the accommodation of competing constitutional doctrines. Such informal understandings or institutions are central to all forms of social life, such as contractual transactions or marriage arrangements. However, as yet, these informal and usually 'unspoken' understandings have enjoyed limited attention in the context of constitutionalism or constitutional 'transplants' between metropolis and periphery. Such an emphasis raises two wider issues. One is that formal constitutional systems are open to considerable degrees of change according to how constitutional actors' understandings of the 'rules of the game' evolve. This is particularly the case with respect to tensions between constitutional principles that are reflected in the formal constitution. In Jamaica, the persistence of a 'mutually suspicious' rather than 'mutually beneficial' bargain fundamentally affected and reinforced these tensions and fuelled political dynamics right throughout the initial period of independence. More generally, such a focus also highlights how problematic it is to rely on simplistic understandings of colonial governance that supposedly established the basis for subsequent infrastructures of administrative power. Instead, the legacy of (Crown colony) colonial government was an unresolved ambiguity about how to govern and the lack of 'mutually beneficial understandings' shared among actors in the political system. The result was a persistent, ongoing antagonism which frustrated political, economic and social development.

109 D Acemoglu and J A Robinson, *Why Nations Fail* (Random House 2012). See also D Acemoglu, S Johnson and J A Robinson, 'The colonial origins of comparative development' (2001) 91 American Economic Review 1369.

110 M Lange, *Lineages of Despotism and Development* (Chicago University Press 2009). See also J Gerring, D Ziblatt, J Van Gorp and J Arevalo, 'An institutional theory of direct and indirect rule' (2011) 63 World Politics 377; J Mahoney, *Colonialism and Postcolonial Development* (Cambridge University Press 2010).

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The Privy Council and the constitutional legacies of empire

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Abstract

The British Empire is treated as a historical phenomenon, but it enjoys a residual existence in the form of the various Overseas Territories of the UK. This paper considers the constitutional position of those territories. It shows that they are mostly excluded from what is called here the 'domestic' constitution, having no representation in its institutions and, when acknowledged, if at all, conceived of as foreign entities. Instead, the Overseas Territories are governed mostly via a distinct (post-)imperial constitution, primarily via the mechanism of the Privy Council. That institution, which does little work within the domestic constitution, creates a formal divide between the domestic and the imperial. This formal divide both masks the substantive continuities between the domestic and the imperial constitutions and facilitates, as regards the Overseas Territories, forms of governance which would not be tolerated in the imperial centre.

Keywords: empire; Privy Council; Overseas Territories; orders in council.

Introduction

The end of the British Empire is usually dated to the handover of Hong Kong to China in July 1997, but the UK retains a number of Overseas Territories (OTs) which are best understood as the residue of that Empire: wholly distinct from the UK itself but for a number of reasons unlikely to join many of the former colonies of the British Empire in achieving independence, at least in the near future.[1] This article considers how this residue of Empire is managed constitutionally, arguing that the answer is to be found in the oft-neglected institution of the Privy Council. The Privy Council, which considered from the perspective of what is called here the 'domestic' constitution – that of the UK itself – is something of a black hole, is doubly central to the management of the residue of Empire. On one hand, the Privy Council is a key formal mechanism of governance (understood broadly) for the OTs, which keeps that governance separate from the institutional apparatus with which students of the domestic constitution are intimately familiar: Parliament, the executive, the domestic courts.

1 See George Drower, 'A rethink on Britain's dependent territories?' (1989) 78 The Round Table 12, 13, identifying a move away from the Foreign Office's policy of allowing independence to those who wanted it while not forcing it on undesiring parties. A few years later Drower predicted that the handover of Hong Kong would prompt the realisation that the remaining dependent territories (as they were then called) 'are going to provide Britain with colonial responsibilities until well into the next century – possibly forever': George Drower, *Britain's Dependent Territories: A Fistful of Islands* (Dartmouth Publishing 1992) x.

Simultaneously, however, the Privy Council acts as a constitutional firewall separating that domestic constitution from the constitution of the residual British Empire. That is, the Privy Council ensures a formal (but not substantive) separation of the domestic and imperial constitutions. For the most part, the judges who decide disputes from the OTs are those who sit in the Supreme Court, but they do so not in that capacity but rather as members of the Judicial Committee of the Privy Council (JCPC). Similarly, within the domestic constitution the territories are legislated for not usually by the Crown in Parliament but rather the Crown in Council: the same individuals who comprise the UK's executive make policy for the territories, but they make it not as ministers of the Crown but as members of the Privy Council. Rather than it being a matter of pure formality, or bare arcana, therefore, a key effect of the ongoing existence of the Privy Council is to create an artificial divide between the domestic and the imperial constitutions which both hinders the normal processes of democratic accountability and works to conceal the residue of the British Empire from the view of those who study the domestic constitution. The implication of this account is that reckoning with the Privy Council and its role in the British constitutional order is both necessary and difficult precisely because to do so involves reckoning with the legacy, and indeed the ongoing reality, of the British Empire.

1 The residual empire in the domestic constitution

Before turning to the specific role of the Privy Council, it is necessary to consider the nature of this residue of the British Empire and how the constitution of the UK – the domestic constitution – acknowledges and manages (or fails to acknowledge and manage) this artefact. The residue in question includes 14 OTs: Anguilla; Bermuda; the British Antarctic Territory; the British Indian Ocean Territory (BIOT); British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; St Helena; Ascension and Tristan da Cunha; Turks and Caicos Islands; and the Sovereign Base Areas (SBAs) of Akrotiri and Dhekelia on the island of Cyprus.[2] The position of the territories in the UK's constitutional order is not only inadequate, but works both to exclude them from constitutional consciousness and, when that fails, to mislead as to their constitutional status.

Of the various ministers within the Foreign and Commonwealth Office (FCO), the Minister for the Commonwealth, UN and South Asia has the greatest level of involvement with the territories, enjoying responsibility for all of the OTs except the Falklands, Gibraltar and the SBAs in Cyprus.[3] The Falklands and Gibraltar are the responsibility of the Minister of State for Europe and the Americas.[4] The SBAs, previously said to have been 'run as military bases, not colonial territories' and for that reason 'administered by the Ministry of Defence, and not the Foreign and

2 See Hakeem O Yusuf and Tanzil Chowdhury, 'The persistence of colonial constitutionalism in British Overseas Territories' (2019) Global Constitutionalism 157. The fullest account of the legal position of the OTs is found in Ian Hendry and Susan Dickson, *British Overseas Territory Law* (2nd edn, Hart Publishing 2018). The territories are to be distinguished from the three Crown dependencies, which were never colonies: the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man. On the constitutional position of the Crown dependencies, see Royal Commission on the Constitution 1969–1973, *Report*, vol I (Cmnd 5460, 1973) and, addressing developments since that report, House of Commons Justice Committee, Crown Dependencies (HC 56–I, 2009–2010).

3 FCO, *Minister of State (Minister for the Commonwealth, UN and South Asia)* <www.gov.uk/government/ministers/minister-of-state-at-the-foreign-commonwealth-office>.

4 FCO, *Minister of State (Minister for Europe and the Americas)* <www.gov.uk/government/ministers/minister-of-state--14>.

Commonwealth Office, which administers other Overseas Territories',[5] are now listed amongst the responsibilities of the same minister as are Gibraltar and the Falklands. This division between different ministers not only has the effect of implying a hierarchy between the territories – why are most lumped in with the Commonwealth, UN and South Asia even when located very far from there, but others given a more accurate geographical representation? – but also means that the interests of the OTs qua OTs are not represented holistically within government. Though they are culturally and geographically disparate, with significant and perhaps often overwhelming interests of their own, the OTs are nevertheless a single constitutional phenomenon, and the arrangements by which they are represented within the UK's government obscure that fact. From the point of view of the territories themselves, however, the problem is a more fundamental one: that it is the FCO – having inherited the responsibilities of the Colonial Office – which deals with them rather than, say, the Home Office:

> Many people question the very fact that the FCO is the primary interface between the UK and its Territories. This stems from the fact that Montserrat and the other Territories are legally British Territories and populated for the most part by British citizens. As such, Montserrat is neither foreign nor Commonwealth.[6]

The matter is of long-standing concern to the territories but has resurfaced recently in the context of a consideration of the OTs by the Foreign Affairs Committee, in the process of carrying out its first major inquiry into the position of the OTs for more than a decade.[7] It is no merely formal point, but it demonstrates very neatly the manner in which the domestic constitution takes every opportunity to place the OTs out of sight and so, politically, out of mind. On the basis of such sentiments, the Foreign Affairs Committee has recently recommended that the government 'commission an independent review into cross-government engagement with the OTs and the FCO's management of its responsibilities towards them'. The review, it suggested, 'should consider alternatives to the FCO and assess the costs, benefits and risks associated with moving primary responsibility for the OTs away from the FCO'.[8]

This, though telling, is by no means the only problem in relations between the centre and the periphery. The Westminster Parliament, though no longer thought of as an imperial parliament, continues to enjoy absolute legislative power over the territories, even those in which there exist domestic democratic institutions. Though it 'tends' only to legislate in areas such as national security and foreign affairs (described by the Foreign Affairs Committee, in a misleading allusion to the modern devolution settlements, as 'reserved' to the UK), there is no legal limit upon Parliament legislating upon those topics which are, by contrast, 'devolved'. It will though normally do so only when the OTs in question consent to it doing so.[9] As with the more constitutionally prominent question of the relationship between the Westminster Parliament and the devolved administrations within the UK, much tension is missed by a bare statement of this position. The key modern example is the Sanctions and Anti-Money Laundering Act 2018, which permits

5 FCO, *The Overseas Territories Security, Success and Sustainability* (Cm 8374 2012) 117.

6 Premier of Montserrat, quoted in House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship* (HC 1464, 2017–19) [9]. Not all the OTs are in agreement: [11].

7 For the previous report, see House of Commons Foreign Affairs Committee, *Overseas Territories* (HC 147-I, 2007–2008). See also FCO (n 5).

8 House of Commons Foreign Affairs Committee (n 6) [21].

9 Ibid [26].

the Foreign Secretary to impose upon the territories (by order in council) publicly accessible registers of beneficial ownership should the territories fail to establish such register themselves by the end of 2020.[10] This, it has been noted, is a measure which is understood differently by the UK and the territories, with the former arguing that what the latter see as a purely internal matter in fact implicates issues of both foreign policy and national security.[11]

Even when the system operates without controversy, however, there is of course a major difference between the devolved nations and regions and the OTs. The people of the former are represented in the Westminster Parliament which retains ultimate sovereignty over them, while the latter are not represented either directly or indirectly.[12] This too is, predictably, a source of frustration for the territories:

> The Overseas Territories have no direct representation in Parliament which has ultimate authority over its affairs and can pass any law that can impact the Overseas Territories disproportionately … A modern relationship requires each OT with a representative government to have direct representation in a body that, until independence is obtained, can make any law it pleases. There was great support for the Overseas Territories legislatures to have a veto power over laws passed by the British Parliament affecting them directly in the same way that English MPs have a veto power over laws passed affecting England.[13]

This reference to the 'English votes for English laws' system effectively sets the bar even higher than does implicit analogising with the position of the devolved institutions. MPs representing, say, Scottish constituencies enjoy (unlike those representing England) no ability to veto within the parliamentary process a hypothetical Bill relating to devolved matters in Scotland. But no matter where exactly the bar is set, the basic point is that there is no need to decide exactly how to balance the views of those representing the interests of the periphery against the views of those representing the interests of the centre within the legislative process, for as things stand the former are not formally represented at all.[14] There is no logical or practical bar to such inclusion, which occurs in other post-imperial states.[15] But nor is there any serious suggestion that this might be done, in the short term or at all. The result is that the political concerns which are taken up by the UK are not necessarily those which are most important to the people of its territories, while there are

10 Sanctions and Anti-Money Laundering Act 2018, section 51. The Foreign Affairs Committee recommended that the same path should be taken as regards same-sex marriage if necessary: House of Commons Foreign Affairs Committee: (n 6) [73].

11 House of Commons Foreign Affairs Committee (n 6) [27]–[33].

12 House of Commons Foreign Affairs Committee (n 7) [119]–[126].

13 Leader of the Opposition of the British Virgin Islands, cited in House of Commons Foreign Affairs Committee (n 6) [35]. See the discussion in Peter Clegg, 'The United Kingdom and its Overseas Territories: no longer a "benevolent patron"?' (2018) Small States and Territories 149, 158–160.

14 See the comments in response to a political scandal in the Turks and Caicos Islands: 'The longer-term recommendations contained in the Report seek to limit the scope for ministerial abuse by reducing the discretionary powers of ministers and buttressing the existing mechanisms for holding ministers to account, such as parliamentary oversight committees, while at the same time introducing new mechanisms of accountability in the form of a Freedom of Information Act and an Integrity Commission. There is, however, something ultimately paradoxical about seeking to strengthen parliamentary democracy within a governing framework where a number of the most important powers are reserved to an unelected and locally unaccountable governor who acts at the behest of the UK Government …' Derek O'Brien and Justin Leslie, 'Something rotten in the Turks and Caicos? Britain and its Caribbean Overseas Territories' [2010] Public Law 231, 239.

15 For example, 'Overseas France', which makes up more than 4% of the French population is represented by a total of 27 Members of the National Assembly and 21 senators.

occasional projects to impose rules on the territories without regard to their local popularity.[16] These sorts of decisions will always have an arbitrary appearance while the processes by which the OTs can feed into central decision-making are so weak. Though the UK presents itself as a post-imperial state, it retains a degree and form of control over the territories that suggests otherwise.

In its recent report on the OTs, the Foreign Affairs Committee made only the most anodyne of recommendations in response to this absence of political representation, saying that:

> … the time is right to give serious consideration to establishing a formal mechanism by which members of the Foreign Affairs, Justice, International Development, EFRA and other relevant Committees are able collectively to scrutinise the UK Government's administration of, spending on and policies towards the OTs.[17]

While such a move might – or might not – improve the quality of accountability for the administration of the OTs to Parliament, it would do nothing to address the fact that the residents of those territories, though mostly British citizens, are not represented either directly or indirectly in a Parliament which enjoys absolute legal sovereignty over them. This is of particular concern given that in many of the OTs those who do not possess some legal status particular to each territory – often described generically as 'belongership' – will not be entitled to vote in elections to the territories' representative institutions, even when they are British citizens or British OT citizens who are permanently resident in the OT in question.[18] Those who are not 'belongers' are doubly disenfranchised, represented neither in the institutions which exercise day-to-day control over them nor in those of the UK in which ultimate sovereignty resides. Such deviation from the precepts of democracy would not be tolerated within the domestic constitutional order.

The overall effect, therefore, is that the position of the OTs within the institutions of the domestic constitution is, though in the modern era mostly stable, undeniably inadequate. From the point of view of the territories, this is unfortunate: their interests are poorly represented within both the executive and legislative branches of the UK, notwithstanding that the power it enjoys over them. Though some in the territories would prefer to resolve the anomaly by acquiring greater autonomy rather than by acquiring greater input into the decision-making of the imperial centre, desire for full independence from the UK is mostly limited and such independence is unlikely to be forthcoming.[19] Some of the territories are unviable as independent states, while others are of such strategic importance that for the UK to voluntarily cede sovereignty is unthinkable.[20] And the territories are not the helpless victims of the UK: though there is in general no

16 For a recent consideration of the relationship between the UK and the OTs, see Clegg (n 13). An earlier period is considered in Peter Clegg and Peter Gold, 'The UK Overseas Territories: a decade of progress and prosperity?' (2011) Commonwealth and Comparative Politics 115.

17 House of Commons Foreign Affairs Committee (n 6) [38].

18 See the discussion in ibid [64]–[67] and, before then, House of Commons Foreign Affairs Committee (n 7) [269]–[275].

19 The Foreign Affairs Committee in 2008 noted that only in Bermuda – where independence was rejected in a 1995 referendum – did the government favour independence: House of Commons Foreign Affairs Committee (n 7) [32].

20 See FCO (n 5) 22 outlining some of the ways in which the OTs 'contribute to the security interests of the UK and our close allies'. The most obvious example is of course BIOT, discussed further below.

funding of the OTs, most benefit quite substantially in more or less tangible ways from the relationship. From the perspective of the UK the effect of the status quo – the incorporation of the OTs into the domestic constitution either as though they were foreign bodies (made the responsibility of the FCO and given no representation in the legislature) or not at all – is similarly mixed. The UK is capable of exercising authority over these territories without allowing them any direct input into its decision-making and, indeed, does so where the circumstances are thought to demand it. At the same time, however, the OTs are willing and able to make use of the practical latitude which they enjoy in order to act in ways which are potentially harmful to the interests of the UK: the tax haven status of several of the territories – viewed by them as a matter of purely internal significance – is the obvious example. In such a way, the status of the OTs reveals itself to be double-edged, disadvantaging not only the territories but also at times the metropole.

For present purposes, however, what matters are not the questions of which set of interests are to be privileged and where the balance of convenience lies in relation to the territories individually or collectively. What matters are the reasons for which these questions go mostly unasked; that is, the ways in which the UK is able to remain an Empire without being required to acknowledge that fact directly within its constitutional order. Central to this situation is the institution of the Privy Council, the constitutional firewall which operates to separate, more or less successfully in its different guises, and in appearance much more than in reality, the domestic constitution from its imperial counterpart.

2 The Privy Council

The Privy Council is a black hole at the centre of the British constitution. Any attempt to explain its functions tends towards vacuity. For example, the *Cabinet Manual* informs the reader that the Council 'advises the Sovereign on the exercise of the prerogative powers and certain functions assigned to the Sovereign and the Council by Act of Parliament'.[21] This practical nothingness contrasts with, and may in fact be thought to reflect, the richness of the Privy Council's history. That history is longer than that of most of the institutions which have usurped it within today's constitution, the Council being a continuation of the Royal Council – the *Curia Regis* – through which governmental power was exercised in the years following the Norman Conquest.[22] Dicey, noting that the role and functions of this Council had been characterised in a range of – to modern eyes – inconsistent ways, argued that such 'apparent inconsistency … vanishes on closer inspection, and throws great light on mediaeval history':

> For the 'Curia Regis' possessed every attribute which has been ascribed to it. It was the executive. It was also a Law Court. It certainly took part in acts of legislation. Still, at the time of its existence it was no anomaly, since to the men of the eleventh century, not the combination but the severance of judicial and executive powers would have appeared anomalous.[23]

Nowadays, and as discussed further below, the most prominent element of the Privy Council is one which has but a minor domestic significance: the decision-making by the

21 Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (October 2011) [1.10].

22 On that history, see James Fosdick Baldwin, *The King's Council in England during the Middle Ages* (Clarendon Press 1913) and Edward Raymond Turner, *The Privy Council of England in the Seventeenth and Eighteenth Centuries, 1603–1784* (2 volumes, Johns Hopkins University Press 1927–1929).

23 A V Dicey, *The Privy Council – the Arnold Prize Essay 1860* (MacMillan & Co 1887) 7.

JCPC, mostly in the context of appeals from a (small, and falling) number of mostly Commonwealth jurisdictions.[24] But the judges who sit on the Committee are only a tiny minority of the Privy Council, whose members number upwards of 600.[25] They include ministers of the Crown and senior members of other political parties at Westminster,[26] the leaders of the devolved governments,[27] judges of the courts of the various UK jurisdictions,[28] and a small number of Bishops of the Church of England.[29] It is this first category of members which gives the Privy Council much of its ongoing constitutional significance, for as a matter of constitutional technicality the Cabinet – that 'hyphen which joins … buckle which fastens, the legislative part of the state to the executive part of the state'[30] – is a committee of the Privy Council.[31] Though this overlap is of course unusual if not aberrational, each of these categories is – allowing for certain arcane features of the British constitutional order – recognisable as belonging to the three standard branches of the state: legislature, executive and judiciary. In this sense, it is tempting to simply treat the Council as a legacy of a pre-modern constitutional order, reflecting – as the *Curia Regis* did for Dicey – a period in which the different branches had yet to develop the separation characteristic of enlightenment constitutionalism, and notable – if at all – for demonstrating the singular whole out of which our contemporary, partial, institutions grew. And, certainly, this role is not to be discounted: the Privy Council's continuing existence does indeed act to remind modern observers of the fact that whatever rationalist ordering is perceptible within our constitution was not there to begin with and has as often been imposed on it from outside as emerged organically from within.

But several elements of the Council's membership demonstrate that the institution's present – like its past – goes further than that. One is that the Council is not merely an external source of advice to the Crown, in whose name power is exercised, but includes within its composition both members of the Royal family[32] and members of the Royal household, most notably the Queen's Private Secretary.[33] Another, more relevant for

24 Amongst the best guides to the contemporary work of the JCPC is the JCPC itself (see JCPC, 'Role of the JCPC': <www.jcpc.uk/about/role-of-the-jcpc.html>) and, though now slightly out of date, Andrew Le Sueur, *What is the Future for the Judicial Committee of the Privy Council?* (Constitution Unit 2001). On the history of the JCPC, see P A Howell, *The Judicial Committee of the Privy Council 1833–1876: Its Origins, Structure and Development* (Cambridge University Press 2008) and Thomas Mohr '"A British Empire court": a brief appraisal of the history of the Judicial Committee of the Privy Council' in Anthony McElligott et al (eds), *Power in History: From Medieval to the Post-modern World* (Irish Academic Press 2011).

25 See the full list on the Privy Council's website: 'Privy Council members' <https://privycouncil.independent.gov.uk/privy-council/privy-council-members/> It is usually noted that the Privy Council is summoned in its entirety on only two occasions. One is the demise of the Crown and the succession of a new monarch, for which an Accession Council takes place. The other is the announcement by a monarch of his or her engagement, which last took place on 23 November 1839 when Queen Victoria announced her engagement to Prince Albert of Saxe-Coburg and Gotha.

26 See ibid.

27 See ibid, which includes Nicola Sturgeon (First Minister of Scotland) and Mark Drakeford (First Minister of Wales).

28 Ibid, including a number of senators of the College of Justice, amongst them Lady Clark of Calton, Lord Clarke, Lady Cosgrove, Lady Dorrian etc.

29 Ibid. All those privy counsellors in this category appear to be bishops or archbishops of the Church of England who sit or have sat in the House of Lords.

30 Walter Bagehot, *The English Constitution* (Oxford University Press, reissue 2009) 13 (italics omitted).

31 As acknowledged by the *Cabinet Manual*: 'Cabinet is the executive committee of the Privy Council.' Cabinet Office (n 21) [1.14].

32 Amongst them the Duke of Edinburgh, the Prince of Wales, the Duchess of Cornwall and the Duke of Cambridge: Privy Council (n 25).

33 Currently Edward Young CVO. Ibid.

present purposes, is that the Privy Council's membership reflects more clearly than perhaps any other institution of the domestic constitutional order the UK's imperial past. Amongst the more than 600 members are a number of senior judges and current or former political actors from Commonwealth states. One survey suggests that perhaps 10 per cent of the members fall into this category.[34] An exhaustive list of those who do so is, however, impossible to provide as the Privy Council provides only a list of names in, remarkably, alphabetical order by first name (or, where a counsellor is one form of peer or another, by his or her title).[35] The effect is that, though the names are available, even the most minimal sense of who many of these people are, and why they have been appointed to the Council requires further, sometimes even extensive, research. Amongst those who represent the Commonwealth in one form or another are Ezekiel Alebua, former Prime Minster of the Solomon Islands; Doug Anthony, former Deputy Prime Minister of Australia; Owen Arthur, former Prime Minister of Barbados. Membership of the Privy Council appears to be limited to political figures from the Commonwealth realms, not (for obvious reason) encompassing the Commonwealth republics. Not all of the former, however, appear to be so represented.

It was noted above how fully the domestic constitution excludes the OTs, acknowledging them – if at all – only in their capacity as 'other' and not as part of a persistent empire. Further evidence of this orientation is to be found in the fact that there does not appear to be direct or systematic representation of the OTs in the Privy Council, though, for the same reason that it is difficult to know exactly who is a member of the Privy Council, it is difficult to be certain that none of the many hundreds of members was appointed in whole or in part due to his or her relationship with one or another of the OTs. This intensifies rather than diminishes the problem which we have identified, for – as we shall see below – of the domestic institutions it is the Privy Council which exercises the most frequent legislative authority over the OTs. To be clear: independent countries which have chosen to retain the monarch as head of state are (mostly) represented on the Council, but territories for whom it makes law are not. They thus have neither direct nor indirect representation within the bodies, Parliament and Privy Council, which still in large part govern them. The Privy Council, it suffices now to note, is an institution of the UK's constitution, but one which – unlike the domestic institutions which are an outgrowth of it, and which in the modern world mostly obscure it – bears, if subtly and without prominence, the marks of the UK as an imperial power. We see this in a number of ways, almost none of which are – not, it is submitted, coincidentally – prominent in the modern constitutional literature, within which the Privy Council features either little or at all.

Though the Privy Council is poorly served by that literature, we can extract from it a number of idealised ways of thinking about the body and its contemporary significance. One comes from the work of Dicey. Like the majority of the texts which follow it, Dicey's *Introduction to the Study of the Law of the Constitution* contains no extended discussion of the Privy Council, but Dicey had written, early in his career, an essay on the body, which won the Arnold Prize in 1860.[36] Though the essay is largely historical, Dicey commends the study of that history, which is 'nothing else than the account of the rise of all the greatest institutions which make up our national constitution':

34 David Rogers, *By Royal Appointment: Tales from the Privy Council – The Unknown Arm of Government* (Biteback Publishing 2015) 291.

35 Privy Council (n 25).

36 Dicey (n 23). In a preface, explaining that he has not updated the essay for its republication, Dicey terms it 'a youthful and immature attempt to sketch out the development of a great institution'.

> Our Parliaments and our Law Courts are but the outgrowth of the Council. In its history is seen how not only institutions but ideas assumed their modern form. As we study the gradual separation of judicial, political, and administrative functions, it is perceived that the notions of 'Law,' 'the State,' and 'the Government,' which now are so impressed on men's minds as almost to bear the delusive appearance of innate ideas, themselves grew up by slow degrees; and that the annals of a past age can never be understood till men have ceased to apply to them terms and conceptions which are themselves the product of later periods.[37]

This seems true – the Privy Council is the seed from which much, if not all, else grew – and so one question for constitutional lawyers is why it still exists within our constitution: a very obvious relic of constitutional history but not one which has yet been discarded altogether, nor even reduced to an entirely formal role.

Recent literature has paid significant critical attention to the imperial context of Dicey's writings.[38] Considered in that light, it is notable that, though the history of the Privy Council is told by him up to the reign of William IV, Dicey has little to say of its involvement in the governance of the British Empire, though such governance was in the past a major aspect of its work, much of it through that committee known more formally as the Lords of Trade and Plantations and more commonly as the Board of Trade.[39] Other leading considerations of the modern domestic constitution make little if any reference to the Council, though it has often been suggested as a possible solution to some new or newly apprehended constitutional dilemma. J D B Mitchell, for example, argued that the Privy Council ('and I emphasise that I do not mean the Judicial Committee of the Privy Council') should be given a new administrative jurisdiction, like that of the French *Conseil d'Etat*, in recognition of the weakness of parliamentary control of administration.[40] Tony Benn had earlier argued that it should replace the House of Lords.[41] More recent discussion considered whether the monarch, in granting royal assent to Bills passing both the House of Commons and the House of Lords, was acting on the

37 Ibid 146–147.

38 See Dylan Lino, 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739 and 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 Oxford Journal of Legal Studies 751.

39 See the overview in H E Egerton, 'The seventeenth and eighteen century Privy Council in its relations with the colonies' (1925) 7 Journal of Comparative Legislation and International Law 1. The Board of Trade, having been largely dormant in the second half of the twentieth century, was convened once more in 2017, though to no obvious effect.

40 'It is I believe necessary to start at that level for a variety of reasons. First, that it is essential that any new body should be a United Kingdom tribunal, and at that level any difficulties founded upon the Acts of Union would be overcome … Secondly, since the court will in some senses be a novelty, it is necessary to start it off sufficiently high up the tree to give it strength. To start lower would be to ensure that the enterprise were still-born. Thirdly it is likely that to start it there would be to increase the chances of acceptability by the civil service. Fourthly, by locating it there it would be easiest to secure the mixed composition of lawyers, administrators and others which is essential.' J D B Mitchell, 'The constitutional implications of judicial control of the administration in the United Kingdom' (1967) 25 Cambridge Law Journal 46, 55.

41 Anthony Wedgwood Benn, *The Privy Council as a Second Chamber* (Fabian Society 1957). Benn, at 18, noted that the 'characteristic of public service' was one of those elements which distinguished the Privy Council from the House of Lords. Because membership of the Privy Council was much more common amongst peers of first creation than amongst those holding inherited titles, turning the Council into the second chamber meant that 'all but a very few peers now sitting by their inheritance would have been swept away, and the exceptions would all be men who had earned their Privy Councillorship by public service'.

advice of the executive of the day or the Privy Council, or neither.[42] There is then, a sense that when we find ourselves discussing the Privy Council in its contemporary rather than historical role, something must already have gone wrong: we must, by definition, be in the realm of (perhaps slightly fevered) speculation, casting around for a *deus ex machina* by which one constitutional anomaly will resolve the problems caused by another.

All of which is to reaffirm that there is, in the ordinary course of events, a remarkable lack of attention paid to the Council. Post-Dicey, Sir Almeric FitzRoy, Clerk to the Privy Council, published a history of it in 1928.[43] A few years ago, David Rogers, a political advisor (including to William Whitelaw when he was Lord President of the Council), published a book about the Council.[44] That book – by virtue, it would seem, of its sheer novelty (a novelty on which the book trades openly) – was reviewed by Martin Loughlin in the pages of the *London Review of Books*.[45] Loughlin contests Roger's implicit endorsement of 'FitzRoy's claim that the Privy Council triumphantly vindicates Tocqueville's observation that "forms are the fortresses of liberty"':

> This kind of Whiggism overlooks the radical change in the Privy Council's function from instrument of monarchical government in a law-framed constitution to instrument of parliamentary government operating through conventional understandings. Tacitus is closer to the mark. The secret of establishing a new state, he says, is to maintain the forms of the old.[46]

That is, the Privy Council has contributed to the emergence of modern democracy by providing a stable form within which the underlying substances has been able to evolve. Though both FitzRoy's and Loughlin's claims are superficially plausible, the length of time between their articulation is indicative of the level of attention paid to the Council by constitutional scholars. The resulting gap in our understanding is perhaps best illustrated by the fact that the Interpretation Act 1978 defines 'The Privy Council' in a fashion so circular as to border on the absurd: it means, we are told, 'the Lords and others of Her Majesty's Most Honourable Privy Council'.[47]

It is perhaps tempting for the domestic constitutional lawyer to simply note this lacuna and move on; to explicitly confine the Privy Council to the realm of the dignified,[48] or to go further and to say that though it is interesting it holds no significance for us as modern constitutional lawyers – we should pay as much attention to it as we do to, say, the Lord Chamberlain, or the Lord Keeper of the Privy Seal. Once the question

42 See Robert Craig, 'Could the government advise the Queen to refuse royal assent to a backbench Bill?' (*UK Constitutional Law Association Blog*, 22 January 2019) and the comments in response, especially that of Sir Stephen Sedley.

43 Almeric FitzRoy, *The History of the Privy Council* (Murray 1928).

44 Rogers (n 34). It is perhaps telling that there is only one index reference for the OTs in the body of the book, and that the discussion to which it refers is in fact a discussion of the Crown dependencies.

45 Martin Loughlin, 'What's it for?' (22 October 2015) 37 London Review of Books 29.

46 Ibid.

47 Patrick O'Connor, *The Constitutional Role of the Privy Council and the Prerogative* (JUSTICE 2009) 4.

48 See Peter Billings and Ben Pontin, 'Prerogative powers and the Human Rights Act: elevating the status of orders in council' [2001] Public Law 21, 26 and 27, discussing the designation of prerogative orders in council as 'primary legislation' in the HRA: 'What cannot escape comment, however, is the profoundly arbitrary nature of the application of the Act to some prerogative powers, but not others. It is particularly difficult to justify the amenability to judicial challenge (on human rights grounds) of a declaration of war, or a withholding of a passport, depending on the involvement of the Privy Council – in most other respects a titular, dignified institution of the constitution' and 'what can be more arbitrary than to attribute novel legal significance to the Privy Council, an ancient institution which has hitherto evolved into a largely dignified aspect of the British constitution?'

is considered from the point of view of the UK as an imperial or post-imperial state, however, we see that this temptation must be resisted. Regardless of how it originated, and regardless of what it now means and does not mean for and within the domestic constitution, the Privy Council reflects very directly (perhaps, though nothing turns on it, more directly than does any other aspect of the contemporary constitution) the legacies of the British Empire. To confront the anomalies of the Privy Council is to confront the UK's unambiguous imperial past and, more importantly, its ambiguous imperial present. And so, conversely, the willingness to tolerate the constitutional anomaly of the Privy Council – the fact that rather than seeking to understand it and to mitigate some of its more obnoxious features, we (constitutional lawyers, but also the public more generally) are almost always content to ignore it – indicates the absence of any felt need to confront that legacy. In the following sections I make that case by considering the roles that the Privy Council plays in the governance of the residue of the British Empire, showing – in each case – that the formal institutional distinctions mask a substantive continuity; that the Privy Council, and the imperial constitution of which it forms part, is not a distinct order, but rather the shadow of the domestic constitution.

3 The judicial role of the Privy Council

The element of the Privy Council which is most familiar to contemporary observers is the Judicial Committee. Though the Committee was formally constituted only by the Judicial Committee Act 1833, the principle that statute reflects is much older:

> The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire … In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed, and is open to all the King's subjects in those Dominions.[49]

The judicial element of the Council was attested in a variety of other ways: the courts of both common law and chancery were originally elements of the Privy Council, exercising the King's prerogative to dispense justice, and remained that way until replaced by the High Court and the Court of Appeal following the enactment of the Supreme Court of Judicature Act 1873.[50] The 1833 Act, which in creating the Judicial Committee reaffirmed that 'from the decisions of various courts of judicature in the East Indies, and in the plantations, and colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council', does not create a judicial body as we would normally understand it. Rather it perpetuates the prior situation in which the judgment of the JCPC is not in fact a legal determination, but rather advice to the sovereign as to the judgment that should be made.[51] An Act of 1844 created the power 'to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments … of any court of

49 *Nadan v The King* [1926] AC 482, 491–492.

50 'The Judicial Committee of the Privy Council is basically a court of law, exercising, as I have tried to explain, by delegation the residual powers of the Curia Regis remaining attached to the Crown after the Courts of Common Law and Chancery had been hived off and the jurisdiction of the Papal Curia and various other statutory jurisdictions had been added.' HL Deb 21 April 1971, vol 317, cols 754–72 (Lord Chancellor).

51 Judicial Committee Act 1833, section 3. Minty noted in 1947 that 'for centuries their advice has always been accepted, and the reading of their decision at a Court at St James's Palace some weeks later is a mere picturesque formality': L M Minty, 'The Privy Council: new issues arise in the British Commonwealth' (1947) 33 American Bar Association Journal 1016, 1017.

justice within any British colony or possession abroad'.[52] In an evocative account of the JCPC, Viscount Haldane suggested that its real work was 'that of assisting in holding the Empire together'.[53]

That element of the Committee's jurisdiction which is most prominent is that by which it acts as a court of final appeal for a number of Commonwealth jurisdictions, both monarchies (Antigua and Barbuda, the Bahamas, Cook Islands and Niue (Associated States of New Zealand), Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Tuvalu) and republics (the Republic of Trinidad and Tobago, Mauritius and Kiribati – the jurisdiction in relation to the latter being very limited).[54] Geographically broad and diverse as these jurisdictions are, this represents a significantly lesser reach than was once possessed by the Privy Council: Pollock noted early in the twentieth century that 'no other Court in the world has a jurisdiction of such variety and complexity'.[55] It was 'at its height' in the period following the First World War, 'at a time when almost all the Overseas Territories acquired by Great Britain during the period of her expansion still remained intact as an integral part of the British Empire and when Great Britain had in addition accepted from the League of Nations a Mandate for a number of ex-enemy colonies and possessions'.[56] Though the largest of the Commonwealth states have abolished the Privy Council's jurisdiction thereover – something first made possible by the Statute of Westminster, which provided that henceforth no Act of a dominion parliament would be 'void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom'[57] – what remains is nevertheless a very obvious reminder of the UK's imperial past.[58]

From the perspective of the present study, however, another aspect of the JCPC's work is more directly relevant – that which relates to the UK's OTs,[59] including the SBAs

52 Judicial Committee Act 1844, section 1.

53 Viscount Haldane, 'The work for the Empire of the Judicial Committee of the Privy Council' (1922) 1 Cambridge Law Journal 143, 154. He continued: 'My own view is that it is a disappearing body, but that it will be a long time before it will disappear altogether … [A]t present we have constant indications that we are a useful body in vast regions where it is not always easy to get a common point of view. Our function is not to claim any fresh rights to interfere, but to act as statesmen should, being willing to help if called in, but not pressing assistance where assistance is not desired.'

54 See JCPC (n 24). There are also a number of – mostly rather arcane – domestic jurisdictions, including (for example) appeals from the Disciplinary Committee of the Royal College of Veterinary Surgeons and appeals from the Court of Admiralty of the Cinque Ports.

55 F Pollock, 'The jurisdiction of the Privy Council' (1906) 7 Journal of the Society of Comparative Legislation 330, 332.

56 H H Marshall, 'The Judicial Committee of the Privy Council: a waning jurisdiction' (1964) 13 International and Comparative Law Quarterly 697, 698.

57 Statute of Westminster 1931, section 2(2).

58 A second of the JCPC's jurisdictions is of constitutional interest, though no special relevance to empire past or present: section 4 of the Judicial Committee Act 1833 permits the monarch (acting, presumably, on advice from the executive) to refer to the Committee 'for hearing or consideration any such other matters whatsoever as His Majesty shall think fit', in which event the JCPC 'shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid'. Though relatively little use has been made of the provision, this sort of advisory jurisdiction is of course wholly (perhaps entirely) distinctive in the UK's legal orders. It provides, a Lord Chancellor once said, 'a convenient method of ascertaining the law when no other jurisdiction is available'. HL Deb 21 April 1971, vol 317, col 769 (Lord Chancellor).

59 Anguilla, Bermuda, British Antarctic Territory, BIOT, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, St Helena, Ascension and Tristan da Cunha, Turks and Caicos Islands.

in Cyprus.[60] Where the Committee's Commonwealth jurisdiction reflects the UK's imperial past, this jurisdiction is better understood as representing its imperial present. Though it attracts far less attention than does the jurisdiction over Commonwealth realms and republics, this element of the JCPC's jurisdiction is by no means marginal. To take first the OTs, the following are figures for the number of cases relating to these places decided between 2010 and 2019:[61]

Year	No of cases decided
2010	8
2011	4
2012	3
2013	13
2014	11
2015	9
2016	11
2017	7
2018	6
2019	8

The number of cases from each OT is as follows:

Overseas Territory	No of cases decided
Anguilla	5
Bermuda	23
British Antarctic Territory	0
British Indian Ocean Territory	0
British Virgin Islands	28
Cayman Islands	14
Falkland Islands	0
Gibraltar	6
Montserrat	2
Pitcairn Islands	1
St Helena, Ascension and Tristan da Cunha	0
Turks and Caicos Islands	9
Sovereign Base Areas of Akrotiri and Dhekelia	1

In 2013, the year with the highest number of decided cases from the OTs, such cases represented more than a third (34) of those decided by the JCPC. This is, it bears

60 Identified separately by the JCPC: JCPC (n 24).

61 Figures are my own.

repeating, not a marginal or secondary aspect of the JCPC's jurisdiction – indeed, given the very small populations of most of the OTs, it is probably a much higher per capita recourse to the Committee than is made by any of the Commonwealth states for which it continues to act as a final court of appeal.

But these figures are high not only as a proportion of the JCPC's work. They are high also as a proportion of the work of the UK Supreme Court, which in that same year (2013) decided 81 cases. To spell out the obvious: it makes a certain amount of sense to separate the work of the courts in relation to the 'undivided realm' from that of other states, and so it is not inherently illogical, considered in historical context, to have two bodies doing such similar work. It is, however, less obviously reasonable for the OTs to be dealt with by the latter (the JCPC) rather than by the former (the Supreme Court). Indeed, this might be thought to be the judicial equivalent of the lamented arrangements discussed above, whereby the OTs relate to the UK via the FCO rather than the Home Office. If such a change were made – that is, if appeals from the OTs went to the UK Supreme Court rather than the JCPC – we could crudely estimate that they would in at least some years account for more than 10 per cent of the Supreme Court's work. In such a situation, the ongoing imperial nature of the UK would be far more difficult to overlook than is currently the case. It would be present on the website of the highest court in the land (rather than a separate site) and the cases would be tweeted out by it (the JCPC does not have its own Twitter feed, and the UK Supreme Court's does not routinely tweet about the judgments of its alter ego).

The effect, then, is that the Privy Council acts as a constitutional firewall which separates the UK – the post-imperial state, with a domestic constitution which is post-imperial – from its reality as an ongoing imperial entity. For, of course, these are not in substance two different entities: the same individuals who act as justices of the Supreme Court on one floor of the old Middlesex Guildhall move to a different floor of that same building to act in their capacity as members of the JCPC when deciding cases which arrive from the OTs. The Privy Council is a formal barrier which disguises the substantive identity of the body at work and allows the UK to maintain two constitutions in operation simultaneously: one domestic and another imperial.

4 The legislative role of the Privy Council

The same dynamic which characterises the judicial role of the Privy Council is evident also in its legislative role in relation to the OTs: issues of form work to create an artificial divide, disguising the substantive reality whereby the government of the UK legislates, through the Council, for a residual empire. The starting point is that the territories in most cases have representative institutions of their own. Parliament, however – still an imperial Parliament – retains the unfettered right to legislate for the territories as and when it sees fit, notwithstanding the lack of democratic representation therein discussed above. In practice, it does not often do so. Instead, law is made for the territories by the Privy Council. The formal legislator is not the 'Queen in Parliament' but rather the 'Queen in Council'.

There are two primary forms of legislation for which the Queen in Council is formally responsible. Though both are 'orders in council', one is statutory in nature, the other prerogative.[62] Statutory orders in council are a form of 'statutory instrument' to which

62 A separate form of secondary legislation – which can be either statutory or prerogative – is the order of (rather than 'in') council, which is as a matter of law made by the privy counsellors themselves rather than the monarch. Most such orders relate to the regulation of professions in the medical field.

the provisions of the Statutory Instruments Act 1946 apply.[63] The key consequence of being so designated is that statutory instruments must be published. That secondary legislation is a statutory instrument does not in itself determine that it must be laid before Parliament nor the extent (if any) of parliamentary scrutiny that it undergoes, both of which are determined by the parent Act. Though they differ in their conception from other types of statutory instrument – being made by the Queen in Council, usually with the Lord President of the Council and three other of its members present[64] – statutory orders in council do not necessarily raise any great issues of constitutional principle: Parliament, after all, has empowered their making. Nevertheless, the use of such orders to legislate for the OTs – even to provide them with constitutions, which Parliament has in the past not done directly but rather empowered the Crown in Council to do – is deeply unsatisfactory. In most cases the relevant orders in council are not subject to the normal processes of parliamentary scrutiny, and so the requirement that they be printed is the sole obligation.[65] Even in the case of orders in council creating constitutions for the territories, the usual obligation is solely to lay them before Parliament, and that does not apply in all cases.[66] That Parliament is denied the oversight role it would ordinarily play in the making of secondary legislation might be considered less significant in light of modern understandings of how weak is that oversight, both in its negative and affirmative forms,[67] but the principle must be insisted upon. There should be scrutiny, guaranteed by law, and yet the forms of the Privy Council work, very often, to evade that requirement, obscuring a practice that would not be accepted in other circumstances.[68]

63 Statutory Instruments Act 1946, section 1 – the Act applies where 'power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown' either 'by this Act or any Act passed after the commencement of this Act'. Statutory orders in council made under authority which pre-dates the coming into force of the 1946 Act are not necessarily statutory instruments and so are not subject to the requirements of the 1946 Act, but only those of the parent Act (which may in practice be broadly equivalent).

64 Michael Everett, *The Privy Council* (House of Commons Library Briefing Paper CBP7460, 8 February 2016) 14: 'The Privy Council meets on average about once a month, and these meetings are held in the presence of the Queen. Only current Government Ministers (themselves Privy Counsellors) attend these meetings. The quorum for a meeting of the Privy Council is three Privy Counsellors, although four Ministers usually attend each meeting. One of these is the Lord President of the Council.'

65 See Hendry and Dickson (n 2) 60–63 discussing the various ways in which both the constitutions of the OTs and the statutes under which those constitutions are (mostly) made reserve the legislative power of the Queen in Council.

66 They do not apply to Anguilla or the SBAs: House of Commons Foreign Affairs Committee (n 7) [28]. At [27]–[30] the Committee notes the informal processes which exist in order to permit the Committee sight of constitution orders (but not others) before they are made.

67 See, for example, Adam Tucker, 'Parliamentary scrutiny of delegated legislation' in A Horne and G Drewry (eds), *Parliament and the Law* (Hart Publishing 2018).

68 The other issue raised by statutory orders in council relates to the question of when it is considered appropriate to empower the making of statutory instruments which take that form rather than, for example, some other type of secondary legislation. Certain secondary legislative powers invariably provide for the making of such orders – powers, for example, to extend the force of legislation to the Channel Islands or the Isle of Man – but it is unclear what (if any) specific principles account for the decision to employ it elsewhere. One suggestion is that '[i]t is more dignified and impressive for an independence constitution, or an instrument giving effect to an extradition treaty or creating new parliamentary constituencies or altering electoral boundaries, to be made by Her Majesty in Council'. Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books 1994) 161, quoted in Everett (n 64) 6. O'Connor glosses this point as meaning that the use of orders in council is 'purely cosmetic': Patrick O'Connor, *The Constitutional Role of the Privy Council and the Prerogative* (JUSTICE 2009). Reliance upon statutory orders in council therefore would seem to indicate, in general terms, the constitutional significance of what is being provided for.

The second form of order in council, more significant both for present purposes and from the point of view of constitutional principle, is the prerogative order in council.[69] Such orders do not fall within the definition of statutory instruments in the 1946 Act and so are not subject to the rules as to publication: as discussed further below, they are often not published in a form accessible to the public at large, or even in some cases at all. Nor, being non-statutory in nature, can a parent Act impose procedural obligations upon the legislating body – there is in relation to such orders no parent Act. Prerogative orders in council therefore can and do come into force without having been published by Her Majesty's Stationery Office and without Parliament having been given sight of them, quite apart from being given the opportunity to scrutinise and perhaps even reject them.

The scope of what might be done via prerogative order in council in the UK itself has been severely limited for several centuries. Most authorities trace the limitation to the decision in the *Case of Proclamations* and Coke's dictum that 'the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament'.[70] Proclamations could only go with the grain of the existing law, and not against it.[71] Such orders therefore were – and are – in that sense not always truly legislative. But Coke's dictum, it transpires, applies (at least in its fullest form) only to England and later the UK. As with the rule in *Entick v Carrington*,[72] the great principles of English common law are, it would seem, geographically constrained, and the outside – the OTs included – is constituted as a necessarily inferior 'other'. That is, amongst those few genuinely legislative acts which might still be done by prerogative order in council are – crucially – the making of law for the OTs. Prerogative legislation remains a key tool for the governance of the residual British Empire notwithstanding that it has dwindled almost to nothing within the domestic constitution.

The prerogative encompasses in the first a power to make constitutions for the OTs. This power has been augmented (rather than placed in abeyance) by statute,[73] with the majority of the OTs being subject to constitutions made on the basis of one or the other statute.[74] The points made above about the procedural deficiencies of many statutory orders in council – not required even to be laid before Parliament – apply also to orders in council creating constitutions for those territories where there is no statutory basis for

69 'Prerogative Orders in Council are anachronistic because in substance they are executive legislation made without parliamentary approval or scrutiny.' Richard Moules, 'Judicial review of prerogative orders in council: recognising the constitutional reality of executive legislation' (2008) 67 Cambridge Law Journal 12.

70 *Case of Proclamations* (1610) 12 Co Rep 74. See also *The Zamora* [1916] 2 AC 77. For discussion of these cases in relation to the prerogative, see Glendon A Schubert, Jr, 'Judicial review of royal proclamations and orders-in-council' (1951) 9 University of Toronto Law Journal 69. The implications of this element of *Case of Proclamations* were of course considered in recent times by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

71 'These proclamations have then a binding force, when … they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts, concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary.' Blackstone, *Commentaries*, I, 270.

72 See Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 270–273.

73 British Settlement Acts 1887 and 1945.

74 Hendry and Dickson (n 2) 14-5.

doing so; where they are, that is, prerogative orders in council.[75] The OTs in this category are Gibraltar and the BIOT. Their constitutions were made solely under the prerogative, with the prerogative to make 'ordinary' law explicitly reserved in the relevant orders. Moreover, a continuing power to legislate by order in council (deriving 'at least in part' from an Act of Parliament)[76] is reserved in relation to all of the territories other than Bermuda and the SBAs.[77] Without such reservation, as we shall see shortly, the creation of representative bodies in a territory would suffice to deprive the Queen in Council of the power to legislate under the prerogative.

To explain briefly the position of Parliament and prerogative as regards colonies: the common law distinguished between those which were settled, to which English law would apply without further action, and those which were ceded or conquered, in which existing laws would apply until changed.[78] Those changes might be made by either Parliament or Crown. In *Campbell v Hall*,[79] Lord Mansfield gave an influential account of the legal position of colonies acquired by conquest, starting from the proposition that a country 'conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain'.[80] He emphasised that, though the King was permitted to legislate for a conquered territory, his legislation was necessarily inferior and subject to limits which did not apply to Parliament:

> … if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles …[81]

In normal circumstances, therefore, a conquered colony was subject to these dual authorities: one absolute and one limited, however slightly and however imprecisely. In *Campbell*, however, Mansfield held that, though the King generally had authority to make laws for conquered territories, he had in respect of Grenada handed it over to a representative assembly and a governor. For that reason, a later attempt to impose taxation via the prerogative was void.[82] The exercise of the prerogative to empower the legislature to make laws for the colony operated as a ratchet, which could be done but not undone by the Crown. Once so empowered, the local legislature could have its power diminished only by the imperial Parliament.

75 Though as Hendry and Dickson ibid at 20 note, this is true also of some constitution orders made under statutory authority, while even those statutory orders which do require to be laid before Parliament need be so laid only after being made and are not subject to either the negative or affirmative procedures.

76 Ibid 59.

77 Ibid 60.

78 '[I]f an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force ... Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony … But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.' Blackstone, *Commentaries*, I, 107.

79 *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045.

80 98 ER 1045, 1047.

81 Ibid 1048.

82 Ibid 1050.

Once a colonial legislature existed, the question necessarily arose of the relationship between its laws and those of England. The basic rule was widely understood to be that colonial laws were void if 'repugnant' to the laws of England, though there was significant uncertainty as to the practical meaning of that rule, and – in particular – whether the law in question included only legislation of the imperial Parliament or encompassed also rules of the English common law.[83] Lord Mansfield's bare reference, in the passage from *Campbell v Hall* quoted above, to 'fundamental principles' had muddied the waters, and judges in some of the colonies were keen to exploit the ambiguity.[84] The difficulty was resolved – in part – by the Colonial Laws Validity Act 1865 (CLVA), whose long title states its intention as being 'to remove Doubts as to the Validity' of the laws in question. The Act, for present purposes, does a number of things. First, it confirms the inferiority of colonial law to the laws of the imperial legislature, whether primary or secondary.[85] From now on, colonial law was void if 'repugnant' to Acts of the imperial Parliament or their equivalent, but not otherwise.[86] Loose and uncertain talk of fundamental principles of the common law was no longer a threat to the validity of laws made by colonial legislatures.

The meaning of the 1865 Act has been explored in a number of cases, most importantly *Bancoult*, which pertains to (what is now) the BIOT. The territory, often known as the Chagos Islands, was famously (and disgracefully) depopulated in the 1960s in order to permit the construction of a US naval base.[87] In *Bancoult (No 1)* it was held that the Immigration Ordinance 1971 by which that depopulation was effected – made under the British Indian Ocean Territory Order 1965, a prerogative order in council – was unlawful. An order in effect exiling the population could not be said to be made 'for the peace order and good government' of the territory.[88] When the government responded with a new order in council – the British Indian Ocean Territory (Constitution) Order 2004 – it argued that prerogative orders in council, being acts of the Queen in Council,

83 See the discussion in Anne Twomey, 'Fundamental common law principles as limitations upon legislative power' (2009) 9 Oxford University Commonwealth Law Journal 47.

84 Many of the doubts were the result of the decision-making of a single judge, Benjamin Boothby, who repeatedly held constitutional laws to be void in accordance with Lord Mansfield's dictum in *Campbell v Hall*: see D B Swinfen, *Imperial Control of Colonial Legislation, 1813–65: A Study of British Policy towards Colonial Legislative Powers* (Oxford University Press 1970).

85 CLVA 1865, section 2: 'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.'

86 CLVA 1865, section 3: 'No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.'

87 See, amongst a voluminous literature, Stephen Allen, *The Chagos Islanders and International Law* (Hart Publishing 2014) and Stephen Allen and Chris Monaghan, *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018). The reason for the depopulation was the construction of a military base, on which see David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press 2011).

88 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* [2000] EWHC Admin 413. It was argued here that the Queen's Bench Division had no jurisdiction to make the order sought, there existing a separate court structure for BIOT in which it could be challenged. The Divisional Court rejected the claim that the Order in Council was an act of the government of BIOT rather than that of the UK, with Laws LJ saying (at [28]) that it represented 'an abject surrender of substance to form': 'Nothing is plainer … that the making of the Ordinance and its critical provision, section 4, were done on the orders or at the direction of Her Majesty's ministers here, Her ministers in right of the government of the United Kingdom.'

were immune from judicial review. At first instance, the Divisional Court rejected this, holding that the decision to make the 2004 Order 'was in reality that of the Secretary of State, not of Her Majesty' and so could be challenged by way of judicial review 'in the ordinary way'.[89] The CLVA, being concerned only with repugnancy, did not prevent the review of the order on rationality grounds,[90] and the claim that the order was indeed irrational was accepted by the High Court.[91]

The conclusions as to the implications of the 1865 Act were challenged on appeal, where it was argued that the effect of that Act was that an order in council applicable to the colonies could be challenged only on the basis of its repugnancy to an imperial statute and on no other grounds. Crucial here was that the 'colonial laws' whose status was clarified in 1865 were defined in the Act to include 'laws made for any colony … by Her Majesty in Council'.[92] Sedley LJ was sceptical as to the logic of this inclusion, suggesting that it was a 'fair inference' that orders in council 'were included by the parliamentary draftsman in the definition of colonial laws in s 1 for completeness, since they too were a source of colonial law, with the consequence that they acquired the same limited protection as local colonial statutes'.[93] Nevertheless, the notion of repugnancy was only a live one when the relevant 'colonial law' was first validly made, and so the 1865 Act did not preclude a challenge to the validity of the 2004 Order.[94] Nor did the subject matter of the order – specifically, the fact that it related to colonial governance – in itself preclude judicial review: 'one can readily accept that the colonial use of the prerogative power is for the most part beyond the reach of judicial review, but not that it is always or necessarily so'.[95] In holding that the 2004 Order was unlawful by reason of being an abuse of process, the Court of Appeal took the view that it had been done not in the interests of BIOT, but rather of the UK:

> The governance of each colonial territory is in constitutional principle a discrete function of the Crown. That territory's interests will not necessarily be the interests of the United Kingdom or of its allies. This is not to say that the two things are mutually exclusive: they will often, perhaps usually, be interdependent, so that the defence of a colony from attack, and even its use as a base to protect the United Kingdom, may serve both its and the United Kingdom's interests. But that is not the case here …[96]

On the first point the House of Lords agreed, holding that prerogative orders in council making provision for the OTs are in principle subject to judicial review: the 1865 Act did not immunise them against such review.[97] So, too, it is clear, might statutory orders in council be subject to such review.[98] Nevertheless, the law lords allowed the appeal of the FCO. First, it held, the Crown's legislative power was plenary, not limited by the traditional formulation of 'peace, order and good government'. To the extent that *Bancoult*

89 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin) [163]. See Richard Moules, 'Judicial review of prerogative orders in council' (2009) Cambridge Law Journal 14.

90 [2006] EWHC 1038 (Admin) [165]–[169].

91 Ibid [110]–[122].

92 See Twomey (n 83) 61–64.

93 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498 [26].

94 Ibid [30].

95 Ibid [46].

96 Ibid [67].

97 See Twomey (n 83) 66–70.

98 *R (Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin) and [2009] EWCA Civ 1549.

(No 1) had suggested otherwise, it was wrong.[99] Though it was accepted by all the law lords that some rights might be so fundamental as to limit the plenary power of the Crown, the majority held that the right of abode is not such a right. Second, the order could not be invalid for being contrary to the interests of the Chagossian people, for there was no obligation to act on their behalf. 'Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom' said Lord Hoffmann, 'and will act in the interests of her undivided realm, including both the UK and the colony.'[100] What this means in practice is that the interest of the part might be – as they indeed seem to have been – sacrificed in pursuit of those of another part of the whole:

> Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom.[101]

Though the effect of the *Bancoult* litigation is to confirm the possibility of legal challenge to prerogative orders in council as they apply to OTs, much more was lost than won. The decision of the House of Lords demonstrates a number of points. First, the emptiness of even the minimal limits implied by the language – common to the instruments governing all of the OTs – of 'peace, order and good governance'. Second, the poverty of fundamental rights discourse as it applies to those territories – entirely compatible, the majority held, with the depopulation of the islands. Third, and more generally, law might be made for those territories, over the head of their inhabitants, in pursuit of the interests of an 'undivided realm' whose centre of political gravity sits many thousands of miles away. The logic at work in this decision is, palpably, the logic of empire.[102] And the decision in *Bancoult (No 2)* – which one would strain to call even a Pyrrhic victory[103] – appears even less edifying once we remind ourselves of the underlying position whereby the rules governing such territories can in many cases be made without prior statutory authority and little or no democratic oversight. There is no democratic oversight in the imperial Parliament at Westminster, and none either in the representative organs of the OT in question (if such things even exist). To reaffirm: the power for the Queen in Council to make laws in exercise of the prerogative is reserved in relation to the majority of the OTs. Such orders in council are subject to no procedural obligations vis-à-vis Parliament, while statutory orders in council are in many cases subject only to the requirement that they be published after being made.

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99 [2008] UKHL 61 [50].

100 Ibid [47]. See on this point *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Quark Fishing Limited* [2005] UKHL 57

101 [2008] UKHL 61 [49].

102 The imperial dimensions of the litigation are brought out by Murray and Frost, arguing that the Chagos litigation 'must be understood in the context of broader jurisprudence on the management of Empire': Tom Frost and C R G Murray, 'The Chagos Islands cases: the empire strikes back' (2015) 66 Northern Ireland Legal Quarterly 263, 265. See also C R G Murray and Tom Frost, 'The Chagossians' struggle and the last bastions of imperial constitutionalism' in Allen and Monaghan (n 87).

103 Mark Elliott and Amanda Perreau-Saussine, 'Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power' [2009] Public Law 697.

The scale of the practice of prerogative legislation is presumably now small. Its extent, however, appears difficult and perhaps impossible to discern exactly, as there are very significant issues relating to the accessibility of prerogative orders in council, including to those most affected by them; issues which of course are a direct function of the procedural void in which they are made. These issues are of such gravity as to perhaps call into question their status as law. Though it is not unique in this regard, the BIOT case is the most egregious example given the appalling treatment of the native people by the UK and the quantity of associated litigation. One study of the case outlines the position as to the accessibility of the relevant legal rules:

> There is no official website with authoritative copies of the legislation. The official government website for legislation has a small number of BIOT statutes, but none made under the Royal Prerogative … The one place that BIOT legislation is published is in the British Indian Ocean Territory Gazette. Once again, the Gazette is not available online. According to the FOI response from the FCO, the current total global distribution list of the Gazette is 20. Of these, 16 go to an emanation of the government. The remaining 4 on the list are all British law libraries … One copy does go to Mauritius, but it is to the British High Commission there.[104]

Though the point is not always quite so vital as in the context of BIOT, a cursory search will demonstrate that the difficulty of obtaining legislation applies also in the context of the other OTs. The British Library's guide to the research of legislation, for example, says this about prerogative orders in council:

> Other instruments, though not SIs, may be included in the annual volumes of these as a kind of appendix. Still others may be issued as parliamentary papers, printed in the London Gazette or reprinted in the British and Foreign State Papers, all of which are indexed. Some may be issued separately but many are unpublished in any form and are available only as original documents at the National Archives, where enrolled copies should be among the chancery records. More recent Orders in Council may be available directly from the Privy Council Office.[105]

The problem is perhaps worse than this account may suggest, for prerogative orders in council often confer the power to make legislation on the governor in lieu of a legislature. Such ordinances are, of course, subject to even more attenuated political control than are the orders under whose authority they are made, with the intervention of the Queen in Council in relation to the latter acting to distinguish what is merely pseudo-democratic from what is entirely undemocratic.

Even if one accepts the need to have broad law-making powers in relation to the OTs, in short, much might be done to improve the status quo. There is, for example, no reason that the making of such legislation could not be placed in its entirety upon a statutory footing. And – the previous example shows – this could easily be done without taking responsibility from the Privy Council, if it was desired to retain the distinction between what is done by the (UK) executive and what is done by the Crown in Council. Nor would it be at all onerous to make prerogative legislation widely and easily available, by – for example – giving it the status of statutory instruments and so making it subject to the relevant rules as to publication. The status quo, whereby new prerogative orders in

104 Ronan Cormacain, 'Prerogative legislation as the paradigm of bad law-making: the Chagos Islands' (2013) 39 Commonwealth Law Bulletin 487, 503–505.

105 British Library, *Social Sciences Collections Guides: Official Publications: Legislation of the United Kingdom: Subordinate Legislation* (nd) 4.

council are published in a messy, unsearchable form on the website of the Privy Council and older ones have disappeared into a juridical black hole, is completely intolerable. More ambitiously, but still straightforwardly, the making of orders in council, both statutory and prerogative, for the OTs might be made subject to the approval of Parliament. Provision might be made for the involvement, in some form, of the relevant institutions of the territory in question. What the *Bancoult* litigation shows, however, is that such formal improvements, no matter how urgent, will only go so far to improve the status quo. The issue of plenary legislative power for the territories within the prerogative, underpinned by the logic of an undivided realm is more dangerous, for it neatly encapsulates both the vulnerability of the territories and the persistence of the deep logic of empire. The territories are separate when it suits the metropole – as when it comes to such matters as democratic accountability, or basic rule of law standards – but part of a single whole when it does not.

It is also significant that prerogative orders in council are, unlike their statutory equivalent, primary legislation for the purposes of the Human Rights Act 1998 (HRA).[106] On this basis, it was argued in *Bancoult* that, having equal status to Acts of the Westminster Parliament, they were immune from review by the courts. This was – quite rightly – rejected. Whatever their formal status, prerogative orders in council lack the democratic character of Acts of Parliament: though such an order 'may be legislative in character, it is still an exercise of power by the executive alone'.[107] But the designation of these instruments as primary legislation by the HRA has related consequences: the courts have no power to strike them down, but may only – where appropriate – make a declaration of their incompatibility with the European Convention on Human Rights.[108] Moreover, a prerogative order in council may provide a defence for a public authority which has been required by it – contrary to the general principle found in section 6 of the Act – to act incompatibly with the Convention rights.[109] This notwithstanding that there has been no parliamentary oversight of their content and no minister has been required to make a statement of their compatibility with the Convention, as is required of Bills laid before Parliament.[110] How, but also if, any incompatibility arising from a prerogative order in council is remedied is left to others to determine – not Parliament, but rather the executive, which will be permitted to act unilaterally in framing the remedy and in putting it before the monarch for approval.

Given that one significant element of the use of prerogative orders in council relates to the governance of the OTs, the effect of what appears at first sight to be a relatively technical point about their status under the HRA reveals itself to be the potential source of great injustice, allowing the government of the day to both have its constitutional cake (by not subjecting prerogative orders in council to any form of direct democratic

106 Along with orders in council which amend primary legislation in its ordinary sense or which are 'made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998': HRA 1998, section 21(1). See Peter Billings and Ben Pontin, 'Prerogative powers and the Human Rights Act: elevating the status of orders in council' [2001] Public Law 21: 'equating an Order in Council with primary legislation blurs an established boundary concerning the legal sources of the British constitution in a way that raises serious issues of constitutional principle.'

107 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 [35]. See also *The Zamora* [1916] 2 AC 77.

108 HRA, section 4.

109 Ibid section 6(2).

110 See O'Connor (n 47) 15: 'This is a problem of real substance: well beyond mere harmless and quaint ceremonial. It is surely a loophole in our constitutional safety net: a way in which hard law can be directly created, affecting fundamental rights, whilst by-passing Parliament and any prior accountability.'

oversight) and eat it (by nevertheless insulating them from fundamental rights challenges as though they were an expression of Parliament's clear will). It would be reasonable to identify, once more, a certain constitutional contempt for the OTs, again both given effect but also simultaneously hidden from domestic view by the institution of the Privy Council. To repeat the point made above in the relation to the judicial role of the Council: these legislative powers are not being exercised by the Privy Council in its entirety, with its absurdly large and eclectic membership. They are being exercised by the government of the day, the formal constitutional distinction serving most obviously to disguise the substantive continuity. The form of the Privy Council works to create an artificial separation between the domestic order and that which is the residue of empire, hiding the latter from public view and, in the legislative case, providing cover for practices that the domestic constitution would rightly reject.

Conclusion

It is not for nothing that the Privy Council attracts so little attention in the modern constitutional literature. It is much less important than it once was, having been transcended within the domestic constitution by a series of institutions which might be best understood as outgrowths of it. Its functions within that domestic constitution are residual, and mostly formal. Even those few which are of practical significance are carried out in a fashion which is often considerably less visible, less accessible, than are their analogues in Parliament. But the Privy Council is not only, and not in the first place, an institution of the domestic constitution. Rather, it is better understood, both in the judicial and legislative senses, as representing the beating heart of what remains of the imperial constitution. Here, its functions are no more visible, no more accessible – in fact in many cases they are much less so – but are significantly more important. In relation to some of the OTs, almost all that there is by way of law derives directly from the operation of the Crown in Council and only indirectly, if at all, from that of the Crown in Parliament.

Some of this is not just knowable, but in fact known – though the JCPC's work in relation to the Commonwealth attracts much more attention than does that in relation to the OTs – but other elements are mostly closed off, hidden from the view even of constitutional observers. The Privy Council acts as a constitutional firewall, keeping the residual empire largely separate from the domestic constitution of the UK, even where the allegedly distinct institutions are in substance identical. The result is that the imperial constitution is a shadow constitution, eclipsed by a domestic constitution whose values it would if visible work to undermine. It is for this reason that, notwithstanding its apparent constitutional insignificance, any attempt to remove the Privy Council from our constitutional order, or to turn its relative formality into absolute formality by depriving it of all substantive powers, is highly unlikely. To do so would require the UK to grapple not only with the considerable constitutional legacy of empire, but also with its ongoing reality.

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The constitutional influence of the Judicial Committee of the Privy Council on the UK apex court: institutional proximity and jurisprudential divergence?

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Abstract

It is often claimed that the constitutional role of the UK's apex court is enriched as a result of the experiences of the Judicial Committee of the Privy Council as interpreter of constitutions within its overseas jurisdiction. This paper considers the relationship between the House of Lords/UK Supreme Court and the Judicial Committee and its effect on the importation of external influences into the UK's legal system(s), further seeking to assess how far the jurisprudence *of the Judicial Committee has influenced constitutional decision-making in the UK apex court. While* ad hoc *citation of Privy Council authorities in House of Lords/Supreme Court decisions is relatively commonplace, a post-1998 enthusiasm for reliance on Judicial Committee authority – relating to (i) a 'generous and purposive' approach to constitutional interpretation and (ii) supporting the developing domestic test for proportionality – quickly faded. Both areas are illustrative of a diminishing reliance on Judicial Committee authority, but reveal divergent approaches to constitutional borrowing as the UK apex court has incrementally mapped the contours of an autochthonous constitutionalism while simultaneously recognising the trans-jurisdictional qualities of the proportionality test.*

Keywords: Judicial Committee of the Privy Council; Supreme Court; constitutional law; constitutional borrowing; constitutional interpretation; proportionality.

Introduction

Debates regarding the extent to which the UK's component jurisdictions are receptive to public law influences from elsewhere have in recent years coalesced around examination of the domestic impact of EU laws and decisions of the European Court of Human Rights. The 'incoming tide'[1] of continental European influences has tended to dominate both academic and judicial discussions of 'external' influences on 'internal' legal standards. The relationships between the domestic and the international governed – on the domestic plane – primarily by the Human Rights Act 1998 (HRA) and (until its repeal in 2020) European Communities Act 1972 created umbilical connections between domestic

* My thanks are due to Lizzy O'Loughlin and Se-shauna Wheatle for their comments and suggestions in relation to a previous draft. I am also grateful to Paul Scott and the participants at the 'Constitutional Legacies of Empire' workshop, for insightful discussions on the issues addressed in this piece.

1 *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418 (Denning MR).

and pan-European laws.[2] These linkages were amplified in practice by the EU doctrine of direct effect and the 'de facto supremacy over domestic law'[3] achieved by European Convention on Human Rights (ECHR) norms. In consequence, discussions relating to the receptivity of the UK legal order to constitutional ideas from elsewhere have, of late, been dominated by the domestic effect of pan-European standards.

The influence of non-EU/ECHR external norms in the UK has not, however, been entirely neglected as a topic of academic inquiry; the extent to which common law systems share constitutional characteristics[4] and the interplay between jurisprudential influences in human rights decision-making[5] both provide recurring themes to the literature concerning the extra-jurisdictional influences on the UK's legal order(s). However, amidst broader narratives surrounding the exchange and migration of constitutional ideas,[6] comparatively little attention has been given to the importation of influences from the almost exclusively overseas jurisdiction of the Judicial Committee of the Privy Council (JCPC). The neglect of detailed consideration of the relationship between the external and internal roles played by the law lords/justices of the UK Supreme Court in constitutional adjudication is slightly puzzling.[7] This is for the reason that the suitability of the UK's most senior judges to adjudicate on domestic constitutional[8] issues – in their parallel capacity as members of the Appellate Committee of the House of Lords and UK Supreme Court – has been supported by reference to the (prior and ongoing) experiences of the JCPC in the determination of constitutional issues arising from its overseas jurisdiction. While the precise nature of the nexus between the two courts is often imprecisely defined, the potential to harness the constitutional experiences of the JCPC for domestic deployment has been a recurring feature of suggestions for reform of the UK's apex court,[9] was influential on the allocation – initially to the JCPC itself – of jurisdiction to determine 'devolution issues' from 1999

2 For discussion of these connections see: J E K Murkens, 'The UK's reluctant relationship with the EU: integration, equivocation, or disintegration?' and R Masterman, 'Federal dynamics of the UK/Strasbourg relationship' in R Schütze and S Tierney, *The United Kingdom and the Federal Idea* (Hart Publishing 2018).

3 S Gardbaum, 'Human rights as international constitutional rights' (2008) 19 European Journal of International Law 749, 760.

4 For instance: J W Harris, 'The Privy Council and the common law' (1990) 106 Law Quarterly Review 574; M Elliott, J N E Varuhas and S Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018).

5 See, for instance: M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997); C McCrudden, 'A common law of human rights?: Transnational judicial conversations on constitutional rights' (2000) 20 Oxford Journal of Legal Studies 499; I Cram, 'Resort to foreign constitutional norms in domestic human rights jurisprudence with reference to terrorism cases' (2009) 68 Cambridge Law Journal 118; H Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart Publishing 2018).

6 For an introduction to a now vast literature on the migration and transplantation of constitutional ideas as general patterns, see: G Halmai, 'Constitutional transplants' in R Masterman and R Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019); V Perju, 'Constitutional transplants, borrowing and migrations' in M Rosenfeld and A Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

7 For a partial exception, see: C Harlow, 'Export, import. The ebb and flow of English public law' [2000] Public Law 240.

8 Primarily, for the purposes of this essay, in adjudication pursuant to the HRA 1998 and devolution statutes.

9 In the early 1970s, Louis Blom-Cooper and Gavin Drewry had suggested – as arguments in favour of a UK bill of rights (and perhaps even written constitution) began to gather momentum – that '[t]he experience of their Lordships in handling constitutional problems of the Commonwealth may yet provide them with a significant insight into such problems nearer to home': L Blom-Cooper and G Drewry, *Final Appeal: A Study of the House of Lords in its Judicial Capacity* (Clarendon Press 1972) 105.

until 2009,[10] and continues to be judicially noted in support of the burgeoning constitutional functions of the UK Supreme Court.[11] In the light of this, the interrelationship between decisions of the JCPC and the Appellate Committee of the House of Lords/Supreme Court in the sphere of constitutional adjudication is worthy of more detailed consideration.[12]

This piece considers the relationship between the House of Lords/UK Supreme Court and the Judicial Committee and its effect on the importation of external influences into the UK's legal system(s) before testing the claim that the UK apex court's ability to determine constitutional issues is somehow enriched by the experiences of the JCPC. The latter point is considered via an assessment of the extent to which the *jurisprudence* of the JCPC has exerted an influence on constitutional decision-making in the UK's apex court. First, it will be argued that while *ad hoc* citation of Judicial Committee decisions in judgments of the House of Lords/Supreme Court is a common occurrence, there is little evidence of a sustained pattern of reliance on JCPC authorities in the context of domestic constitutional adjudication. Second, evidence of a post-1998 enthusiasm for reliance on Judicial Committee authority in two fields – (i) relating to the adoption of a 'generous and purposive' approach to constitutional interpretation and (ii) supporting the developing domestic test for proportionality – will be examined. Both areas will be argued to be illustrative of a diminishing reliance on Judicial Committee authority, but revealing of divergent approaches to constitutional borrowing as the UK's apex court has incrementally mapped the contours of an autochthonous constitutionalism[13] while simultaneously recognising the trans-jurisdictional qualities of the proportionality test.

1 The Judicial Committee of the Privy Council and the UK apex court

The Judicial Committee was formally established by the Judicial Committee Act 1833 and in its pomp was estimated to serve as final appellate tribunal to a quarter of the world's population.[14] Through serving to uphold the 'supremacy of imperial statute'[15] to its primary latter-day role as interpreter of the written constitutions of various Caribbean states, its jurisdiction has been marked by a close engagement with constitutional issues.[16] As a result of this constitutional jurisdiction – coupled with its innovative (but little used) reference procedure[17] – the Judicial Committee has been described as an 'embryonic …

10 As noted by, for instance: Robert Reed QC, 'Devolution and the judiciary' in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing 1998) 25; A Le Sueur, 'What is the future for the Judicial Committee of the Privy Council?' (Constitution Unit 2001) 11–14; S Shetreet and S Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, Cambridge University Press 2013) 44–45; C McCorkindale, A McHarg and P Scott, 'The courts, devolution and constitutional review' (2018) 36 University of Queensland Law Review 289.

11 Baroness Hale, 'Devolution and the Supreme Court – 20 years on' (Speech to the Scottish Public Law Group, 14 June 2018).

12 For a general introduction see: K Keith, 'The interplay with the Judicial Committee of the Privy Council' in L Blom-Cooper, B Dickson and G Drewry, *The Judicial House of Lords, 1876–2009* (Oxford University Press 2009).

13 S Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] Public Law 394.

14 P O'Connor, *The Constitutional Role of the Privy Council and Prerogative* (Justice 2009) 16.

15 D B Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester University Press 1987) 15.

16 Blom-Cooper and Drewry (n 9) 104.

17 Judicial Committee Act 1833, section 4 (and, for instance, *In the matter of the Baronetcy of Pringle of Stichill* [2016] UKPC 16).

constitutional court'.[18] Its extensive multi-state jurisdiction also served as a template of sorts for the model of supranational adjudication that came to be seen as one of the late-twentieth-century hallmarks of constitutionalisation.[19]

However, since at least[20] the Statute of Westminster 1931, the jurisdiction of the JCPC has been steadily receding.[21] Appeals from Canada and India were ended in 1949, with Australia, Hong Kong and New Zealand following in 1986, 1997 and 2003, respectively. In addition to a residual specialist domestic jurisdiction,[22] the Judicial Committee continues to hear appeals from Crown dependencies[23] and Overseas Territories,[24] as well as from a number of Commonwealth – mostly Caribbean – states.[25] In spite of its diminished geographical jurisdiction, the Judicial Committee maintains a not insignificant case load, handing down decisions in some 40 appeals in 2018, and 53 appeals in 2019.[26]

The JCPC is at once internal and external to the UK's constitutional order; its benches are populated almost exclusively by justices of the UK Supreme Court, but the larger part of its diet of cases originate overseas. Though it sits – predominantly[27] – in London, 'the JCPC is not a court of any part of the United Kingdom'[28] and in common with the decisions of other foreign courts, decisions of the JCPC are regarded in the context of adjudication in the House of Lords/Supreme Court as being strongly persuasive, though not binding. In practice, the domestic influence of JCPC decisions has been an area of niche, or only occasional,[29] concern to researchers.[30] But the general relationship between decisions of the Supreme Court and the Judicial Committee has recently been restated in *Willers v Joyce*:

> First, given that the JCPC is not a UK court at all, decisions of the JCPC cannot be binding on any judge of England and Wales, and, in particular, cannot override any decision of a court of England and Wales (let alone a decision of

18 O'Connor (n 14) 17.

19 See N Bentwich, 'The Judicial Committee of the Privy Council as a model of an international court for human rights' (1948) 2 International Law Quarterly 392; T Robinson and A Bulkan, 'Constitutional comparisons by a supranational court in flux: the Privy Council and Caribbean Bills of Rights' (2017) 80 Modern Law Review 379.

20 Viscount Haldane described the Judicial Committee, in 1922, as a 'disappearing body': Viscount Haldane of Cloan, 'The work for the empire of the Judicial Committee of the Privy Council' (1922) 1 Cambridge Law Journal 143, 154.

21 On which see Swinfen (n 15).

22 In relation to, for instance, appeals from the disciplinary committee of the Royal College of Veterinary Surgeons (section 17(1) Veterinary Surgeons Act 1966); disputes arising under the House of Commons Disqualification Act 1975 (section 7); appeals from Prize Courts; appeals from the High Court of Chivalry.

23 Jersey, Guernsey and the Isle of Man.

24 Including, the British Virgin Islands, Cayman Islands, Gibraltar, and the Turks and Caicos Islands.

25 Including, the Bahamas, Grenada and Jamaica.

26 At the turn of the twenty-first century the JCPC heard approximately 70 cases per year: Le Sueur (n 10) 4.

27 The JCPC has occasionally convened overseas, including in the Bahamas and Mauritius. For an assessment of the JCPC's efforts to address its remoteness from much of its jurisdiction, see: P Mitchell, 'The Privy Council and the difficulty of distance' (2016) 36 Oxford Journal of Legal Studies 26.

28 *Willers v Joyce (2)* [2016] UKSC 44 [10]. See also: *Alexander E Hull and Co v McKenna* [1926] IR 402, 403–404.

29 For instance, in relation to the JCPC (*Attorney General for Jersey v Holley* [2005] UKPC 23; [2005] 2 AC 580) 'overruling' the Appellate Committee of the House of Lords (*R v Smith (Morgan James)* [2001] 1 AC 146) on an appeal relating to the law of provocation. The JCPC decision was subsequently adopted as authoritative in *R v James* [2006] EWCA Crim 14; [2006] 1 All ER 759. On which, see: J Elvin, 'The doctrine of precedent and the provocation defence: a comment on *R v James*' (2006) 69 Modern Law Review 819.

30 Tyrrell's excellent recent study (n 5) excludes JCPC decisions from its dataset (at 21).

> the Supreme Court or the Law Lords) which would otherwise represent a precedent which was binding on that judge. Secondly, given the identity of the Privy Counsellors who sit on the JCPC and the fact that they apply the common law, any decision of the JCPC, at least on a common law issue, should, subject always to the first point, normally be regarded by any Judge of England and Wales, and indeed any Justice of the Supreme Court, as being of great weight and persuasive value. Thirdly, the JCPC should regard itself as bound by any decision of the House of Lords or the Supreme Court – at least when applying the law of England and Wales. That last qualification is important: in some JCPC jurisdictions, the applicable common law is that of England and Wales, whereas in other JCPC jurisdictions, the common law is local common law, which will often be, but is by no means always necessarily, identical to that of England and Wales.[31]

The Judicial Committee is staffed – overwhelmingly so in practice[32] – by the judges of the UK's domestic apex court. Since 2009, the JCPC has also been physically accommodated within the same premises as the UK Supreme Court.[33] This proximity bears upon the relationship between the two courts in a number of ways. The adverse workload implications of apex court judges populating panels in the Judicial Committee are occasionally commented upon,[34] but the overlapping membership of the two courts otherwise diminishes the external element of the Judicial Committee's influence. As Bell has suggested, the common membership of the two courts has led to a perception that JCPC decisions are treated in the Supreme Court 'like obiter dicta in an English case, rather than the interpretation of a foreign law'.[35] Additionally, the importation of external influences originating in Judicial Committee decisions themselves taken by Law Lords/Justices of the Supreme Court represents a relatively surreptitious form of jurisprudential migration, less likely to attract controversy than the importation of authorities originating in an overseas court populated by a majority of overseas judges.[36]

2 The claimed benefit to constitutional adjudication in the UK apex court

The 1998 devolution legislation positioned the JCPC as the legal arbiter of devolution disputes. In part, this decision was the result of a perceived deficiency of the UK's then apex court; the Appellate Committee of the House of Lords – by virtue of its position as a component of the *UK* legislature – was felt to be an inapt mediator of disputes

31 *Willers v Joyce (2)* [2016] UKSC 44 [12]. The specific element of the judgment concerned the circumstances in which the JCPC might 'not only decide that [an] earlier decision of the House of Lords or Supreme Court, or of the Court of Appeal, was wrong, but also can expressly direct that domestic courts should treat the decision of the JCPC as representing the law of England and Wales' [19]. On the latter point see: P Mirfield, 'A novel theory of Privy Council precedent' (2017) 133 Law Quarterly Review 1.

32 *Willers v Joyce (2)* [2016] UKSC 44 [11]: '… either all or four of the five Privy Counsellors who normally sit on any appeal will almost always be Justices of the Supreme Court. This reflects the position as it has been for more than 100 years, following the Appellate Jurisdiction Act 1876, which created the Lords of Appeal in Ordinary (i.e. the Law Lords), who thereafter constituted the majority of the Privy Counsellors who sat in the JCPC, until the creation of the Supreme Court in October 2009.'

33 Prior to 2009, the JCPC sat in the Council Chamber at No 9 Downing Street.

34 B Dickson, 'The Lords of Appeal and their work, 1967–1996' in P Carmichael and B Dickson, *The House of Lords: Its Parliamentary and Judicial Roles* (Hart Publishing 1999) 150–153; Le Sueur (n 10) 11–14; M Peel and J Croft, 'Privy Council hampers Supreme Court' *Financial Times* (London, 20 September 2009).

35 J Bell, 'Comparative law in the Supreme Court, 2010–11' (2012) 1(2) Cambridge Journal of International and Comparative Law 20, 23 (commenting on the use in *R v Chaytor* of two JCPC decisions from Sri Lanka and New Zealand).

36 A point inelegantly made by Lord Hoffmann in 'The universality of human rights' (2009) 125 Law Quarterly Review 416.

concerning the legislative relationships between the devolved bodies and Westminster.[37] (This institutional obstacle to devolution cases being heard by the UK's apex court was removed, in 2009, by the replacement of the Appellate Committee of the House of Lords with the UK Supreme Court.[38]) However, characteristics of the Judicial Committee were argued to weigh in favour of it functioning as a proto-constitutional court in relation to devolution disputes. The allocation to the JCPC of this new adjudicatory power was at least partially justified by reference to the Judicial Committee's existing (and prior) jurisdiction in relation to constitutional matters. In 1998 the Labour government supported the allocation of the devolution jurisdiction to the JCPC in the following terms:

> The Judicial Committee acts now as the final constitutional court of appeal for various Commonwealth dependencies and colonies (sic) … As it already has that role, we thought it appropriate to use its experience of handling cases that raise constitutional issues.[39]

Others were in agreement; Lord Selkirk, for instance, noted during the House of Lords debates on the Scotland Bill that the Judicial Committee's 'wealth of constitutional experience'[40] rendered it an appropriate arbiter of competence disputes arising under the (then proposed) devolution legislation.

Judges have also endorsed the positive benefits that might derive from drawing domestically on the constitutional experiences of the Judicial Committee. Lord Reed (as he is now) wrote in 1998 that the decision to allocate the newly formed devolution jurisdiction to the JCPC was 'readily understandable' on the basis of its 'already developed experience of constitutional issues referred to it from the courts of several Commonwealth countries'.[41] In 2018, Lady Hale stated – in the context of a discussion of how the devolution jurisdiction has transformed the UK Supreme Court into something approximate to a 'genuinely constitutional court' – that '[a]s members of the Judicial Committee of the Privy Council, we were familiar with this role in the context of the Commonwealth Constitutions with which we have to deal'.[42]

However, as these judicial endorsements illustrate, the specific nature of the benefit to be derived from the linkage to the JCPC is unclear. Both Lord Reed and Lady Hale suggest the positive advantage of drawing on the body of constitutional authority developed over time by the Judicial Committee. Lady Hale – using the present tense – additionally highlights the direct experiential benefit resulting from justices of the Supreme Court sitting as members of the JCPC. Either way, the sense is given that the linkage between the two courts and their two jurisdictions – the external (or international) and the internal (or domestic) – somehow positively impacts upon decision-making in the UK top court.

There is a basically sound logic underpinning this suggested connection between the Law Lords'/Supreme Court Justices' external and internal roles. Indeed, the judges' contemporaneous membership of both courts may well provide insights into the context and intricacies of JCPC appeals that they could not claim in relation to domestic

37 Le Sueur (n 10) 11

38 Constitutional Reform Act 2005, section 40 and schedule 9.

39 HC Debs 3 February 1998, vol 305, col 927, Win Griffiths MP (Parliamentary Under Secretary in the Welsh Office).

40 HL Debs 28 October 1998, vol 593, cols 1964–1965 (Lord Selkirk of Douglas).

41 Reed (n 10) 25.

42 Hale (n 11).

deployment of other external authorities. But, as Ewing has argued,[43] claims that the external experiences and/or case-law of the Privy Council can straightforwardly be transposed into the domestic constitution simultaneously have something of an air of unreality to them. If the claimed benefit is to be found in the ability of the Law Lords/Justices of the Supreme Court to draw upon the accumulated constitutional jurisprudence built up by the JCPC, then it is unclear what – beyond the shared memberships of the two courts – would privilege the position of Judicial Committee case law vis-à-vis the jurisprudence of (say) other top courts in the common law world. If the value lies in the judges' participation in the adjudication of overseas constitutional cases in the JCPC, then the contemporary experiential benefits to be obtained should be understood as reflecting the JCPC's diminished and (comparatively) narrow contemporary jurisdiction. Indeed, commentators observed, at the point at which competence questions arising under the devolution legislation were allocated to the JCPC, that 'the Judicial Committee had not adjudicated on "division of powers" questions between different parts of a federation since Canada stopped sending appeals in 1949'[44] and that the broader constitutional jurisdiction of the court had declined so much as to be negligible.[45] And if the claimed advantage is to be found in the contemporaneous membership of the two courts then it is likely to give rise to linkages which will be imperceptible through the lens of decided cases. In the absence of access to the judges themselves, the extent to which the judges' experiences as members of the JCPC anecdotally inform their approach to decision-making in the UK's apex court will remain largely invisible.[46] Though, even in the context of research drawing on interviews with the Supreme Court justices, Tyrrell notes the 'unseen' role played by reference to foreign laws in domestic adjudication.[47] For these reasons, the remainder of this piece focuses on the *visible* aspect of the relationship between the two courts: the extent to which JCPC decisions exercise discernible influence on constitutional decision-making in the UK's apex court.

3 Incidental references to Judicial Committee decisions in the UK apex court

By contrast with those areas of the law in which statute has mandated consideration of external authorities, UK apex court judges are not obligated to consider JCPC decisions. Incidental citation of Judicial Committee decisions in House of Lords/Supreme Court judgments raising constitutional questions is nonetheless commonplace.

External influences are occasionally visible in UK apex court cases concerning constitutional norms, where JCPC decisions have provided contextual information or

43 Cf. K D Ewing, 'A bill of rights: lessons from the Privy Council' in W Finnie, C Himsworth and N Walker, *Edinburgh Essays in Public Law* (Edinburgh University Press 1991) 231: 'there is a superficial attraction in the simplistic assumption that with this experience the English courts must be well equipped to deal with a Bill of Rights which would flourish under the guidance of English judges'.

44 Le Sueur (n 10) 11.

45 R Hazell, 'Reinventing the constitution: can the state survive?' (CIPFA/Times Lecture, 4 November 1998).

46 The 'sociological' dimensions of the Law Lords' and Supreme Court Justices' decision-making processes are illuminated in Alan Paterson's works *The Law Lords* (Macmillan 1982) and *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013). The interplay between the roles of the Law Lords in the Appellate and Judicial Committees is touched upon in Paterson's earlier work, *The Law Lords*, but his coverage focused on the interplay between the judges themselves rather than between the courts they populate. While Paterson's later work – *Final Judgment* – also considers broader 'dialogues' between the Supreme Court and its counsel, other courts and government, this particular dialogue – the dialogue between the two courts served by the justices of the Supreme Court – is not considered.

47 Tyrrell (n 5) 196.

have otherwise infiltrated decisions concerning the domestic variants of those principles.[48] In *Jackson v Attorney-General*,[49] Lord Steyn spent some time considering the JCPC's case law on the legal limitations which might operate in respect of legislatures, citing *Attorney-General of New South Wales v Trethowan*,[50] *Bribery Commissioner v Ranasinghe*,[51] and a number of cases from South Africa in order to animate his discussion of Parliament as including both 'static and dynamic' elements.[52] Lord Steyn also punctuated his speech in *Anderson* with reference to those 'House of Lords and Privy Council'[53] decisions emphasising that the 'the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government'.[54] In *Bancoult (No 2)*[55] various Law Lords engaged with the JCPC authorities relating to the power to legislate for the 'peace, order and good government' of a territory.[56] And more recently, in the Supreme Court's unanimous *Miller/Cherry* decision, the Privy Council decision in *Bobb v Manning*[57] was cited in order to illustrate that the concept of governmental accountability to Parliament lay at the 'heart of Westminster democracy'.[58]

The House of Lords/Supreme Court has also utilised JCPC decisions in order to evidence more specific points of law. In *R (Wellington) v Secretary of State for the Home Department*[59] – a case concerning the proposed extradition of the claimant to the USA in order to stand trial for various offences, including murder in the first degree (which was punishable either by a death sentence, or life imprisonment) – the House of Lords relied upon the JCPC decision in *Reyes v The Queen*[60] in order to illustrate that a mandatory death sentence should be regarded as 'inhuman and degrading treatment' (and as such, a violation of Article 3 ECHR).[61] In *R (Miller) v Secretary of State for Exiting the European Union*,[62] a number of Judicial Committee decisions were cited in support of the court's majority judgment: these included *The Zamora*[63] (in support of the proposition that 'the exercise of [the Crown's administrative] powers must be compatible with legislation and

48 In relation to, for instance, the doctrine of separation of powers (*Hinds v The Queen* [1977] AC 195 (cited in e.g. *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, 526)); dualism (*Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PC 22 and *Higgs v Minister of National Security* [2000] 2 AC 228 (cited in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [33] and [167])); and the parameters of statutory interpretation by judges (*Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580 (cited in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557)).

49 *Jackson v Attorney-General* [2006] UKHL 56.

50 *Attorney-General of New South Wales v Trethowan* [1932] AC 526.

51 *Bribery Commissioner v Ranasinghe* [1965] AC 172.

52 *Jackson v Attorney-General* [2006] UKHL 56 [81].

53 The latter being: *Attorney General for Australia v The Queen* [1957] AC 288, 315; *Liyanage v The Queen* [1967] 1 AC 259, 291; *Hinds v The Queen* [1977] AC 195.

54 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837 [39].

55 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 51; [2009] 1 AC 453 [50], [99], [125].

56 Including: *Ibralebbe v The Queen* [1964] AC 900; *Liyanage v The Queen* [1967] 1 AC 259.

57 *Bobb v Manning* [2006] UKPC 22 [13].

58 *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41 [46].

59 *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335.

60 *Reyes v The Queen* [2002] 2 AC 235.

61 *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72; [2009] 1 AC 335 [63].

62 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

63 *The Zamora* [1916] 2 AC 77.

the common law'[64]); and *Madzimbamuto v Lardner Burke*[65] (in support of the notion that the courts will not directly enforce political/constitutional conventions).[66]

It is reasonably clear that House of Lords/Supreme Court citation of Judicial Committee decisions is both relatively common and relatively *ad hoc*. While routine and often rigorous engagement with ECHR and EU authorities is/was characteristic of adjudication under the HRA and European Communities Act 1972, the citation of JCPC authorities in constitutional cases is rather more intermittent. A number of significant post-1998 constitutional cases decided by the House of Lords/Supreme Court include no reference to overseas decisions of the JCPC:[67] A*XA v HM Advocate*;[68] *HS2*;[69] R *(Evans) v Attorney-General and R (UNISON) v Lord Chancellor*[70] can be counted within this category. In one sense this is unsurprising, for the reason that the primary focus of the decisions could be argued to be the interpretation and implications of domestic legislation. But each of the above cases also arguably deals with matters of broader constitutional principle; in particular *AXA* addresses the sort of 'federal' dispute which provided the initial justification for allocating devolutionary competence disputes to the JCPC, while in *Evans* the lead judgment is explicit in its efforts to realise the rule of law as a principle which reaches beyond the municipal.[71] As a result, the sense is given of an absence of methodical citation of Judicial Committee jurisprudence on constitutional issues, and of a relatively sporadic approach even in those fields where comparisons might be drawn (which itself in turn – and as the above examples from Lord Steyn may illustrate – might be judge-dependent).[72]

4 Patterns of diminishing influence?

Limited evidence is, however, available of recurrent references to certain JCPC cases – or lines of JCPC authority – demonstrating an initial post-1998 influence on domestic judicial reasoning, giving way to a diminishing effect over time. This pattern can be observed in two fields in particular: the UK apex court's approach to the interpretation of constitutional measures and its approach to the parameters of the test for proportionality.

4.1 'Generous and purposive' interpretation

4.1.1 Interpreting rights instruments

Following the full implementation of the Human Rights Act in October 2000 a number of House of Lords decisions drew parallels with the experiences of the JCPC in interpreting *constitutional* bills of rights, suggesting that the HRA 1998 ought to be

64 R *(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [45].

65 *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645

66 R *(Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [144].

67 Although pre-2009 JCPC decisions on devolution do feature (e.g. *Anderson v Scottish Ministers* [2001] UKPC D5; [2003] 2 AC 602 is cited in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868).

68 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868.

69 R *(Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324.

70 R *(UNISON) v Lord Chancellor* [2017] UKSC 51.

71 R *(Evans) v Attorney General* [2015] UKSC 21 [51].

72 Tyrrell (n 5) 195–198.

afforded a 'generous and purposive'[73] interpretation in order that individuals fully benefit from its protections.[74] In *R v Director of Public Prosecutions, ex parte Kebeline*, Lord Hope said:

> In *Attorney General of Hong Kong v Lee Kwong-kut*[75] … Lord Woolf referred to the general approach to the interpretations of constitutions and bills of rights indicated in previous decisions of the Board, which he said were equally applicable to the Hong Kong Bill of Rights Ordinance 1991. He mentioned Lord Wilberforce's observation in *Minister of Home Affairs v Fisher*[76] … that instruments of this nature call for a generous interpretation suitable to give to individuals the full measure of the fundamental rights and freedoms referred to, and Lord Diplock's comment in *Attorney General of The Gambia v Momodou Jobe*[77] … that a generous and purposive construction is to be given to that part of a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled. The same approach *will now have to be applied in this country* when issues are raised under the 1998 Act about the compatibility of domestic legislation and of acts of public authorities with the fundamental rights and freedoms which are enshrined in the Convention.[78]

The so-called 'radical' approach to interpretation[79] – initially evidenced in *R v A (No 2)* – drew on this expansive understanding of the Act, conceiving of the courts' powers under section 3(1) HRA as potentially remedial of all inconsistencies other than those explicitly 'stated in terms' by statute. This approach in turn viewed the declaration of incompatibility as a 'measure of last resort' to be avoided 'unless … plainly impossible to do so'.[80]

While the radical approach to interpretation under section 3(1) HRA was contextualised by the Privy Council experiences of the Law Lords,[81] and by reference to the 'weaker'[82] provisions of the New Zealand Bill of Rights Act 1990, it nonetheless sat uneasily with the constitutional 'balance'[83] that the adoption of the HRA's specific model had sought to preserve. Maximisation of the freedoms protected via the HRA through such judicially focused (and directed) means minimised the co-operative elements of the Act in a way which did not find wholesale support within the senior judiciary.[84] As Lord Rodger cautioned:

> … the Privy Council decisions may not provide a sure guide to the approach to be adopted under section 3(1). They are concerned with constitutions that are the supreme law, with which other laws must conform on pain of invalidity.[85]

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73 *Minister of Home Affairs v Fisher* [1980] AC 319, 329 (Lord Wilberforce). See also: *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 375; *Brown v Stott* [2003] 1 AC 681, 703.

74 Lord Steyn, 'The new legal landscape' [2000] European Human Rights Law Review 549, 550.

75 *Attorney General of Hong Kong v Lee Kwong-kut* [1993] AC 951, 966.

76 *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

77 *Attorney General of The Gambia v Momodou Jobe* [1984] AC 689, 700.

78 *R v Director of Public Prosecutions, ex parte Kebeline* [2000] 2 AC 326 (emphasis added).

79 A Kavanagh, 'Unlocking the Human Rights Act: the "radical" approach to s 3(1) revisited' [2005] European Human Rights Law Review 259.

80 *R v A (No 2)* [2002] 1 AC 45, [44] (Lord Steyn).

81 Ibid [38], [44] (Lord Steyn).

82 Ibid [44] (Lord Steyn).

83 Lord Irvine of Lairg QC, 'The impact of the Human Rights Act: Parliament, the courts and the executive' [2003] Public Law 308.

84 See, for instance: *R v A (No 2)* [2002] 1 AC 45 [108] (Lord Hope); *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837 [30] (Lord Bingham).

85 *R v A (No 2)* [2002] 1 AC 45 [120].

The expansive view to section 3(1) therefore relatively quickly ceded ground to a more contextual approach under which the dividing line between interpretation and law-making will be contingent on a range of issues, including – but not limited to – linguistic matters,[86] perceived constitutional competence,[87] the impact of the proposed interpretation on the impugned legislation,[88] the weight to be attached to the relevant/applicable Strasbourg jurisprudence[89] and so on.[90]

Human rights adjudication has also seen the apex court repeatedly refer to Lord Sankey's description of the British North American Act 1867 as a 'living tree capable of growth and expansion within its natural limits'.[91] In *Brown v Stott*, Lord Bingham, noted that, '[a]s an important constitutional instrument', the ECHR 'is to be seen as a "living tree capable of growth and expansion within its natural limits" … but those limits will often call for very careful consideration'.[92] While 'living tree' interpretation is primarily taken to address the capacity for understandings of constitutional instruments to develop over time, it is the 'natural limits' of evolutive interpretation that have been emphasised in subsequent decisions. Reference to the 'living tree' approach has – instead of supporting expansive interpretations of the Convention rights in decisions under the HRA – been used as a means of cautioning against an expansionist approach. As such, Lord Hope – in both *N v Home Secretary*[93] and *Ambrose v Harris*[94] – stressed that the 'natural limits' to the Convention rights were to be primarily found in the jurisprudence of the European Court of Human Rights. Reliance on JCPC authority was, again, tempered by the developing approach to the interpretation of the requirements of the HRA in order to reflect the HRA's explicit linkage to a specific body of extraterritorial jurisprudence.[95]

Both strands of Judicial Committee authority on constitutional interpretation provided an initial source of inspiration for the apex court's approach to HRA adjudication but were reasonably quickly jettisoned, or qualified, as a result of the emerging judicial consensus on the contours of legitimate section 3(1) interpretation,[96] and the solidification of the Convention jurisprudence as the dominant (external) judicial authority on the meaning and application of the HRA rights.[97] The former reflects both the sub-constitutional status of the HRA and the tension between the potentially judicio-centric 'generous and purposive' approach to constitutional rights instruments and the co-operative, and statutory, nature of the HRA; the latter – though 'internationalist' in its focus on giving effect to the requirements of the ECHR as expressed in the jurisprudence

86 *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

87 *Bellinger v Bellinger* [2003] 2 AC 467.

88 *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837.

89 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269.

90 For what remains the most sustained examination of these issues, see: A Kavanagh, *Constitutional Review under the UK's Human Rights Act* (Cambridge University Press 2009).

91 *Edwards v Attorney-General for Canada* [1930] AC 124, 136.

92 *Brown v Stott* [2003] 1 AC 681, 703.

93 *N v Secretary of State for the Home Department* [2005] UKHL 31; [2005] 2 AC 296 [22]–[25].

94 *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435 [19].

95 HRA, section 2(1).

96 *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557.

97 *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. On the broader role of foreign jurisprudence in HRA adjudication, see: R Masterman, 'Taking the Strasbourg jurisprudence into account: developing a "municipal law of human rights" under the Human Rights Act' (2005) 54 International and Comparative Law Quarterly 907, 921–923.

of the Strasbourg court[98] – reflected the HRA's purpose of giving domestic effect to the pre-existing catalogue of rights contained in the ECHR.

4.1.2 Devolution

A devolutionary counterpart to JCPC-supported expansive readings of the HRA can be found in the decision of the House of Lords in *Robinson v Secretary of State for Northern Ireland*.[99] In *Robinson*, Lord Bingham found that the Northern Ireland Act 1998 was 'in effect a constitution' and that it followed that its provisions 'should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody'.[100] Similarly, Lord Hoffmann found that the Act should not be interpreted 'rigidly' and that giving effect to the broader political agreement it rested upon 'required … flexibility'.[101] In so finding, a majority of the Law Lords was able to dismiss a challenge to the validity of elections to the positions of First Minister and deputy First Minister on the basis that they had fallen outside the statutory time limit apparently laid down by (the then) section 16 Northern Ireland Act 1998. Lord Bingham cited *no authority* in support of adopting the 'generous and purposive' interpretation of the Northern Ireland Act; this both illustrates the occasional difficulty – alluded to above and evident in broader patterns of constitutional borrowing[102] – of tracing the importation by the Law Lords of authorities articulated by their JCPC alter egos and also suggests a degree of ubiquity to the notion that constitutional instruments are entitled to an expansive, rather than, textualist interpretation. Yet, just as in the context of HRA adjudication, the 'generous and purposive' approach has failed to embed.

Subsequent decisions considering the interpretation of the Scotland Act 1998 and Government of Wales Act 1998 have indicated an intermediate approach, which seeks to reconcile the distinctive, democratic, characteristics of the devolved bodies with their heritage as creatures of legislation. As such, the Scottish Parliament is judicially regarded as being no ordinary statutory body, but a 'democratically elected legislature'[103] enjoying 'plenary powers'[104] subject to the limitations stated in the Scotland Act[105] and 'constitutional review' on the basis of the common law principle of legality.[106] Devolution jurisprudence post-*Robinson* illustrates two limitations to analogising the devolution legislation and written constitutions. First, as Lord Reed bluntly put it in the decision of the Inner House in *Imperial Tobacco*: 'The Scotland Act is not a constitution, but an Act of Parliament.'[107] Second, while the devolution Acts are regarded as

98 B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press 2013) chapter 3. Cf. *In Re McKerr* [2004] UKHL 12 [65] (Lord Hoffmann).

99 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

100 Ibid.

101 Ibid [32].

102 McCrudden (n 5) 111 highlights the 'distinction between explicit and non-explicit reference to judicial decisions in other jurisdictions'.

103 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [145].

104 Ibid [147].

105 Scotland Act 1998, section 29(2).

106 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868 [149]–[153].

107 *Imperial Tobacco* [2012] CSIH 9 [71] (emphasis added).

constitutional statutes at common law,[108] this status 'cannot be taken, in itself, as a guide to its interpretation. The statute must be interpreted like any other statute'.[109]

The balance to be struck between the character of the Scottish Parliament as a representative assembly and its status as the direct product of a Westminster statute was outlined by the unanimous Supreme Court in the reference on the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* in the following terms:

> The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.[110]

As such, the courts have sought to recognise – within the frameworks provided by the devolution legislation – the distinctive constitutional status of the devolutionary arrangements, without sanctioning general departures from the legislative intent-driven techniques of interpretation to be applied in their application. They have done so without adopting the 'generous and purposive' interpretative approach to constitutional instruments often visible in Judicial Committee decisions. In consequence, *Robinson* – as Lord Reed has argued – now appears 'best understood as a decision concerned with its own specific circumstances'.[111]

The devolutionary context also reveals instances of Privy Council jurisprudence being of indirect influence on UK apex court decision-making.[112] In *Martin v HM Advocate* – in the context of discussion over the boundary between 'devolved' and 'non-devolved' matters – Lord Hope used various 'federal' cases[113] to outline the influence of the 'pith and substance'[114] doctrine on the 'background to the scheme that is now to be found in the Scotland Act.[115] But Lord Hope went on to say that: '[w]hile the phrase "pith and substance" was used while [the provisions of the Scotland Act] were being debated, it does not appear in any of them. The idea had informed the statutory language, and the rules to which the courts must give effect are those laid down by the statute.'[116] Lord Walker was both in agreement and more forthright:

> The Scotland Act is on any view a monumental piece of constitutional legislation. Parliament established the Scottish Parliament and the Scottish

108 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151 [60]–[64].

109 *Imperial Tobacco v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153 [15]; *Agricultural Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43 [6].

110 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64 [12].

111 Lord Reed, 'Scotland's devolved settlement and the role of the courts' (Dover House Lecture, 27 February 2019). Cf. the dissenting judgment of Lord Kerr in *Re Northern Ireland Human Rights Commission* [2018] UKSC 27 [211]–[213].

112 Hale (n 11).

113 Including: *Prafulla Kumar Mukherjee v Bank of Commerce* (1947) LR 74 Indian Appeals 23; U*nion Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580.

114 Hale (n 11). The 'pith and substance' doctrine holds that so long as the primary object of challenged legislation (its 'pith and substance') is deemed to fall within competence, it will not be held *ultra vires* by virtue of incidental impacts on issues outwith the legislature's competence (*Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, 587).

115 *Martin v HM Advocate* [2010] UKSC 10 [11]–[14].

116 Ibid [15].

> Executive and undertook the challenging task of defining the legislative competence of the Scottish Parliament, while itself continuing as the sovereign legislature of the United Kingdom. That task is different from defining the division of legislative powers between one federal legislature and several provincial or state legislatures (as in Canada or Australia, whose constitutional difficulties the Judicial Committee of the Privy Council used to wrestle with, often to the dissatisfaction of those dominions). The doctrine of 'pith and substance' mentioned by Lord Hope in his judgment is probably more apt to apply to the construction of constitutions of that type.[117]

Both judges were keen to stress that reliance on JCPC case law on the allocation of powers in a federal system could only be of limited use to the interpretation of the statutory allocation of powers under the Scotland Act.[118]

4.1.3 Proportionality

A similar pattern can be observed in relation to the UK apex court's treatment of JCPC authorities concerning the test for proportionality. The post-HRA introduction of proportionality analysis in human rights adjudication in *R (Daly) v Secretary of State for the Home Department*[119] explicitly adopted the approach to proportionality mapped by the JCPC in *de Freitas*.[120] As Lord Steyn (again) noted in *Daly*:

> The contours of the principle of proportionality are familiar. In *de Freitas* … the Privy Council adopted a three-stage test. Lord Clyde observed … that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

Given that the European Court of Human Rights had already developed an extensive proportionality jurisprudence,[121] the adoption of a test from the JCPC is perhaps in and of itself an interesting development. The *de Freitas* test was also utilised in *R v A (No 2)*[122] and was adopted by the House of Lords in the *Belmarsh* decision,[123] but there was cited alongside a number of Canadian decisions including *R v Oakes*[124] and *Libman v Attorney-General of Quebec*.[125] By this point in time therefore the *de Freitas* definition no longer held the monopoly on the top court's conception of the doctrine. Since, the influence of *de Freitas* in the context of Supreme Court decisions on proportionality has been somewhat diluted by the wealth of comparative authorities which have attempted to define what is argued to have become a pre-eminent pan-jurisdictional tool of constitutionalism.[126] As

117 Ibid [44].

118 A point subsequently endorsed in *Christian Institute v Lord Advocate* [2016] UKSC 51 [27]–[32].

119 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

120 *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

121 For a brief summary of key cases, see R Clayton, 'Regaining a sense of proportion: the Human Rights Act and the proportionality principle' [2001] European Human Rights Law Review 504, 505–507.

122 *R v A (No 2)* [2002] 1 AC 45 [38].

123 *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 [30].

124 *R v Oakes* [1986] 1 SCR 103.

125 *Libman v Attorney-General of Quebec* (1997) 3 BHRC 269.

126 See, for instance: D Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004); K Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

a result – while the Supreme Court continues to cite the *Daly* variant of the proportionality test[127] – it has also relied on decisions from common and civil law jurisdictions[128] in support of the more precise test to now be applied. As Lord Reed outlined in *Bank Mellat*:

> The approach to proportionality adopted in our domestic law under the Human Rights Act has not generally mirrored that of the Strasbourg Court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982.[129]

In the same decision, Lord Sumption described *de Freitas* as containing 'the classic formulation of the test' for proportionality, but went on to say that 'although [*de Freitas*] was a milestone in the development of the law' the JCPC decision 'is now more important for the way in which it has been adapted and applied in the subsequent case law.'[130] Both Lords Sumption and Reed noted that the *de Freitas* test amounted to only a partial reflection of proportionality as it had subsequently been articulated by the House of Lords and Supreme Court, and that the addition of a fourth stage to the test – an overarching assessment of whether 'a fair balance has been struck between the rights of the individual and the interests of the community'[131] – was required in order to reflect proportionality in its contemporary iteration.

Conclusions

The foregoing has illustrated that the wholesale adoption of constitutional reasoning from decisions of the JCPC has not been in evidence in the development of the UK apex court's domestic constitutional jurisprudence. What has been seen is an occasional – and continuing – tendency to utilise specific decisions in respect of relatively discrete legal issues, *ad hoc* reference to cases illuminating common principles and a potentially diminishing series of trends in the utilisation of broad techniques of constitutional reasoning derived from Judicial Committee decisions.

The immediate post-HRA/devolution period saw a number of judicial pronouncements likening the new constitutional arrangements to those obtaining in a system with a documentary constitution. In the, now totemic, account of the principle of legality given in *ex parte Simms*, for instance, Lord Hoffmann said the following:

> … the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, [will] apply principles of constitutionality little different from those

127 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, [20]; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 [133].

128 In particular, Germany (G Lübbe-Wolff, 'The principle of proportionality in the case law of the German Federal Constitutional Court' (2014) 34 Human Rights Law Journal 12 is cited in both *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 [134] and *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [96]). On which see: Lord Reed, 'Comparative law in the Supreme Court of the United Kingdom' (Centre for Private Law, University of Edinburgh, 13 October 2017).

129 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 [72].

130 Ibid [20].

131 Ibid [20] (Lord Sumption); [74] (Lord Reed).

> which exist in countries where the power of the legislature is expressly limited by a constitutional document.[132]

Academic commentary also advanced the thesis that the constitutional changes of the late-1990s onwards had precipitated an abandonment of the *ancien régime*.[133] And even the more modest judicial suggestion that the constitution stood at an 'intermediate stage between parliamentary and constitutional supremacy'[134] might suggest the need for modes of constitutional interpretation that recognised the increasing constitutionalisation of the UK's governmental order.

But movements towards constitutionalisation should not necessarily be understood as a constitutional rebirth. The UK constitution remains a composite entity.[135] Its components do not cohere as a 'single coherent code of fundamental law which prevails over all other sources of law'.[136] Nor are those components reflective of the ambitions of the drafters of a documentary constitution to 'lay down an enduring scheme of government in accordance with certain moral and political values'.[137] The bare fact of constitutional interpretation in the post-1998 era is that is an exercise focused on the application of, and relationships between, components of the constitutional order, rather than an articulation of the order writ large. The recognition of 'constitutional statutes' is consistent with this, and speaks to the relationship between potentially conflicting statutes and other elements of the framework rather than mandating a wholesale approach to interpretation of legislation with a constitutional content and purpose.[138] Even though elements of the landscape – the HRA perhaps in particular – may wield something close to a pervasive influence, they too remain sub-constitutional in the sense that they are designed to ensure that the legislature retains the ability to legislate in contravention of the protections they seek to put in place.[139] The doctrine of parliamentary sovereignty looms large, both as a tool of constitutional design, and also as the meta-principle governing interpretation and application of the order's component parts. As Lord Rodger recognised in *R v A (No 2)* – against this backdrop – the importation of 'Privy Council authorities should be treated with some caution since they are the product of constitutional systems which differ from that of the United Kingdom in this important respect'.[140]

In this context, the importation of modes of judicial reasoning which might prompt a significant departure from the statute-focused interpretative techniques with which the common law is familiar would therefore be problematic from at least two perspectives. First, the importation of techniques of constitutional interpretation from Privy Council decisions would be susceptible to broader critiques of constitutional borrowing, namely

132 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, 131–132. See also: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] QB 151, [64]; *Jackson v Attorney-General* [2006] UKHL 56 [102].

133 For instance: A King, *Does the United Kingdom Still Have a Constitution?* (Sweet & Maxwell 2001); A King, *The British Constitution* (Oxford University Press 2007); V Bogdanor, *The New British Constitution* (Hart Publishing 2009).

134 *International Transport Roth GmbH v Secretary of State for Transport* [2003] QB 728 [71].

135 *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324 [207].

136 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [40].

137 *Matadeen v Pointu* [1998] UKPC 9; [1999] 1 AC 98, 108.

138 F Ahmed and A Perry, 'Constitutional statutes' (2016) Oxford Journal of Legal Studies 1, 5.

139 HRA, sections 3(2)(b) and 4(6). See also section 28(7) Scotland Act 1998.

140 *R v A (No 2)* [2002] 1 AC 45, [120]. See also: *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, [64].

that it is often unprincipled and methodologically imprecise, is susceptible to confirmation bias, and – in its importation of standards developed in other systems – is undermining of democratic self-government.[141] Second, such an approach would be undermining of parliamentary sovereignty in the sense that it would import methods of interpretation which – rather than giving effect to statutory purpose – seek to give effect to a broader understanding of the constitutional landscape and its purpose which is (potentially) disassociated from the specific legislation at issue. Concerns in relation to transferability of separation of powers' requirements from jurisdictions with documentary constitutions into the UK have on these grounds been longstanding.[142] As Lord Reed has recognised: 'decisions of courts in states with a written constitution can be as likely to mislead as to help when it comes to analysing the boundaries of common law rules developed on a case by case basis over the course of British history'.[143] It is for the latter reason in particular that the 'radical' approach to interpretation under the HRA and overtly 'federal' readings of the devolutionary scheme have failed to germinate in the jurisprudence of the UK's apex court. It is perhaps for a related reason that the inward migration of authorities relating to the meaning of proportionality may be more likely to be of ongoing significance. While doctrinal readings of the standard may differ as between jurisdictions, proportionality is nonetheless viewed as a common analytical tool with cross-jurisdictional influence.[144] Equally, it is sufficiently disassociated from application in any specific constitution or constitutions so as to negate concerns relating to the importation of ideas from an inappropriate source.

The failure of JCPC authorities to take consistent root in the UK constitution can also be seen to be of a piece with what Stephenson has described as the Supreme Court's 'renewed interest in autochthonous constitutionalism'.[145] Stephenson has argued that the UK Supreme Court – in the context of disputes concerning the degrees to which external (European) human rights norms will permeate and influence the domestic order – has sought to assert 'the primacy, relevance and sufficiency of the *UK* Constitution'.[146] Stephenson's thesis contends that the Supreme Court's emphasis on the autochthonous state of UK constitutional law is reflective of a caution relating to the extent to which external influences might disrupt the internal and a response to political pressures surrounding the domestic influence of the European Court of Human Rights and the Brexit-driven desire to disentangle the UK's legal order from EU norms.[147]

An alternative thesis might position the Supreme Court's approach in less negative terms and, instead, emphasise the growing confidence and maturity of the independent Supreme Court as a constitutional organ. As that court matures and is populated by a body of judges who have worked with the UK's own breed of constitutional jurisprudence for much of their professional lives, perhaps the guiding hand of the Judicial Committee jurisprudence is needed less than it may once have seemed. On this reading, the UK constitution remains open to jurisprudential influences from elsewhere,

141 V Perju, 'Constitutional transplants, borrowing and migrations' in M Rosenfeld and A Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) especially 1321–1325.

142 For instance: O Hood Phillips, 'A constitutional myth: separation of powers' (1977) 93 Law Quarterly Review 11.

143 Lord Reed (n 128).

144 See e.g. *McCloy v New South Wales* [2015] HCA 34 [72].

145 S Stephenson, 'The Supreme Court's renewed interest in autochthonous constitutionalism' [2015] Public Law 394.

146 Ibid 395 (emphasis added).

147 Ibid 401–402.

but the distinctive character of the UK's devolutionary arrangements (i.e. their non-federal nature), and of the HRA (especially as a result of its clear linkage with the decisions of the European Court of Human Rights) also mean that specific transplants from elsewhere may find it difficult to fully embed in the UKSC's jurisprudence. The diminishing relevance of JCPC authorities from this perspective also reflects the broader tendency for extra-jurisdictional authorities to be of transitional relevance.[148] In the immediate post-1998 period JCPC authorities were relied upon as a means of articulating and stabilising the requirements of the UK's new human rights and devolutionary regimes, but as a precursor to (or pathway towards) the development of a domestically engineered constitutional jurisprudence.

Lord Bingham has argued that the JCPC's constitutional and bills of rights jurisprudence has two faces, 'one traditional or conservative, the other broader and more internationalist in outlook'.[149] It is arguably the case that the constitutional jurisprudence of the UK Supreme Court is developing along similar lines, maintaining a necessary focus on the distinctive framework of the UK constitution, while remaining – as per the common law tradition – receptive to, though generally not driven by, extra-jurisdictional influences.

148 McCrudden (n 5) 523–524.

149 T Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press 2010) 58.

NOTES AND COMMENTARIES

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Asymmetrical international law and its role in constituting empires: the ICJ *Chagos* Advisory Opinion

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Abstract

The ongoing relationship between the UK and the Chagos Archipelago raises a number of important questions about international law's relationship with imperialism, more specifically, the ability of the international legal order to influence the fact and the manner of decolonisation. In this contribution, I explore some aspects of this problem. I begin by providing a brief overview of the proceedings of the International Court of Justice, summarising the basic legal consequences of the court's Advisory Opinion, before discussing its implications from the standpoint of what it reveals about international law's relationship with the residual British Empire. My argument is that, for all its apparent attempts to promote decolonisation and self-determination, the international legal order has been and continues to remain complicit in the maintenance of exactly the kind of asymmetrical legal relations that constitute empires. Thus, although the Chagos *Advisory Opinion may well have long-term significance for the development of the international legal doctrine and the teachings of international law, given the UK's current position, it will not have any immediate impact on the plight of the Chagossian people.*

Keywords: international law; international adjudication; imperialism; British Empire; postcolonial critique; legal subalternity; self-determination; International Court of Justice.

Introduction

On 22 May 2019, the UN General Assembly (UNGA), one of the six main organs of the UN, acting on a recently issued Opinion of the International Court of Justice (ICJ), passed a resolution calling for the UK to cease delaying the unlawfully discontinued decolonisation of Mauritius and to 'withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months … thereby enabling Mauritius to complete the decolonisation of its territory as rapidly as possible'.[1] The deadline set by the UNGA expired with no action taken by the UK government to comply with it. Indeed, the passing of the deadline was met with open defiance, even as it also triggered a wave of condemnation from other UN member states. As of June 2020, the UK continued not to recognise Mauritius's claim to sovereignty with regard to the Chagos Archipelago, despite the ICJ concluding that 'the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination' and

1 UN General Assembly Resolution 73/295 on the Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, UN Doc A/Res/73/295 (22 May 2019) paragraph 3.

that 'the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State'.[2] This turn of events has led many commentators and legal experts to determine that the UK is now acting the part of a 'rogue'[3] or 'pariah'[4] state.

In addition to prompting a series of broader reflections about the UK's dubiously unique place in the contemporary international architecture, the Chagos saga also raises a number of important, if not immediately answerable, questions about the deeper relationship between international law and imperialism.

At least since the early 1960s, colonialism as an international regime and a form of political practice has been unequivocally condemned as one of the most fundamental breaches of international law. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples pronounced colonialism as 'a denial of fundamental human rights' and 'an impediment to the promotion of world peace and cooperation'.[5] The 1970 Declaration on the Principles of International Law noted the duty of every state 'to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned'.[6] By 1989, the Draft Code of Crimes against Peace and Security of Mankind prepared by the International Law Commission listed 'colonial … or any other form of alien domination' as one of the principal crimes against peace on a par with aggression and international terrorism.[7] By 1995, the right of peoples to self-determination, the logical corollary of the prohibition of colonialism, was declared by the ICJ to be 'one of the essential principles of contemporary international law'.[8]

How legitimate is it then, against this background, that in 2020 not only should a state like the UK still find it possible to continue its 'colonial administration' over its overseas territories, despite the express wishes of the peoples concerned, but that this 'isolated, lawless, colonial'[9] state should continue to retain a privileged position in international relations and an authoritative voice on international law matters? As even its own diplomats have acknowledged, the UK's conduct raises serious questions about the propriety of its permanent membership of the UN Security Council (UNSC).[10] Yet, when all is said and done, the UK's position – both in relation to Chagos and to its

2 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (25 February 2019), ICJ (hereafter '*Chagos* Opinion/Advisory Opinion') paragraph 177.

3 Rachael Kennedy, 'UK a "rogue state" after missing deadline to handover Chagos Islands' (*Euronews*, 22 November 2019) <www.euronews.com/2019/11/22/uk-labelled-rogue-state-after-missing-un-deadline-to-hand-chagos-islands-back-to-mauritius>.

4 Andrew Harding, 'UK Chagos islands control "crime against humanity"' (*BBC News,* 27 December 2019) <www.bbc.com/news/world-50924704>.

5 UNGA Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960) paragraph 1.

6 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc A/RES/2625(XXV) Annex (24 October 1970)

7 Draft articles on the draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission 1989, vol II(2), UN Doc A/44/10, 70.

8 *Case Concerning East Timor (Portugal v Australia)*, Judgment of 30 June 1995, ICJ Reports, paragraph 29.

9 Philippe Sands, 'General Assembly orders UK to leave #Chagos within 6 months, 115 votes in favour, 6 against. An isolated, lawless, colonial United Kingdom, still refusing to allow expelled Chagossians to return to their homes, unwilling to respect the rule of law or the #ICJ' (*Twitter*, 23 May 2019) <https://twitter.com/philippesands/status/1131460195337551874>.

10 Jamie Doward, 'UK could forfeit Security Council seat over Chagos Islands dispute' *The Observer* (London, 5 January 2020) <www.theguardian.com/world/2020/jan/05/uk-forfeit-security-council-chagos-islands-dispute>.

membership of the UNSC – remains more than just sustainable: like its special place in the broader UN architecture, it seems, in a way, guaranteed by the very structure of the international legal system.

Or, at least, that is what seems to be the case for the time being. The international legal process has certainly not yet run its full course. Despite the ICJ Opinion and UNGA initiatives, the situation is far from resolved, nor is it an isolated problem. Quite the opposite. First, there is the potential for further legal proceedings related to Chagos. At the close of 2019, the Prime Minister of Mauritius confirmed plans to explore the possibility of bringing an action against UK officials at the International Criminal Court for crimes against humanity, especially with respect to the forcible expulsion of Chagossians between 1968 and 1973.[11] In relation to these claims, respected QC Philippe Sands said refusing a deported population the right of return is 'arguably' a crime against humanity.[12] Taking a broader view, it can be noted that it is not only the UK and Mauritius whose legal position continues to be affected by the UK's assertion of sovereign control over the Chagos Archipelago. Diego Garcia, the largest of the Chagos islands, also featured in the January 2020 hostility between Iran and the USA, an incident that involved the killing of Iranian General Qasem Soleimani. Under the 1966 UK–US agreement, the US maintains a military base on Diego Garcia. It was to this strategically placed military base that six US B-52 bombers were reportedly deployed during the confrontation, not least because the island, it seems, is out of range of Iranian missiles.[13]

The significance of the Chagos question, in short, is beyond doubt. It will remain on the international law agenda in the coming years. How much these discussions will be able to reach the real root of the problem, however, is a completely different matter.

The ICJ's decision, the UNGA follow-up resolution, and the UK's reaction to them raise a number of far-reaching and difficult questions, not only about the state of international law's relationship with imperialism today, but also, more broadly, the general ability of the international legal system to shape and influence the conduct and policies of states, and the fact and manner of decolonisation. In the remainder of this article, I explore some aspects of these problems. I begin by providing a brief overview of the ICJ's proceedings, summarising the basic legal consequences of the court's Advisory Opinion, before discussing its implications from the standpoint of what it reveals about international law's relationship with the residual British Empire. My argument is that, for all its apparent attempts to promote decolonisation and self-determination, the international legal order has been and continues to remain complicit in the maintenance of exactly the kind of asymmetrical legal relations that constitute empires. Thus, although the *Chagos* Opinion may well have long-term significance for the development of the international legal doctrine and the teaching of international law, given the UK's current position within the UN architecture and the sustainability of this position under the existing international legal order, it will not have any immediate impact on the plight of the Chagossian people.

11 Harding (n 4).

12 Ibid.

13 Wyatt Olson, 'Six B-52 bombers heading to Indian Ocean island amid Iran tensions, report says' (*Stars and Stripes*, 6 January 2020) <www.stripes.com/news/pacific/six-b-52-bombers-heading-to-indian-ocean-island-amid-iran-tensions-report-says-1.613744#.XhQ9ywAccac.twitter>.

1 Background to the ICJ Advisory Opinion

1.1 The facts

The history of Britain's involvement in Chagos began in 1814 when it took over the colonial administration of Mauritius after France ceded the colony to Britain under the Treaty of Paris. The Chagos Archipelago, which lies 500 kilometres south of the Maldives and is made up of 60 individual islands, was included at the time as a dependency of Mauritius and for the next 150 years was administered by Britain on those grounds. After the forming of the UN, Mauritius became what is known in the UN vocabulary as a non-self-governing territory, one of the consequences of which was that, as the administering power, the UK undertook under Article 73 of the UN Charter to 'develop self-government' and 'to promote constructive measures of development' of all its constituent territories and peoples.

In 1964, four years before the declaration of Mauritian independence, the UK began a process of intensive negotiations about the future of the Chagos Archipelago. In February 1964, the USA approached the UK with a proposal to establish an American military base on Diego Garcia. The realisation of this project would require, among other things, the removal of the population with the understanding that they would not subsequently be allowed to return. Having been receptive to the American proposal, in June 1964 the UK began negotiations with Mauritian representatives concerning the 'detachment' of the Chagos Archipelago from Mauritius. The detachment 'as a condition of independence'[14] was finally executed in the Lancaster House Agreement of September 1965. Almost immediately, the UNGA expressed its deep concerns about the matter, indicating that the detachment violated the territorial integrity of Mauritius.[15] Still, the process went ahead: in November 1965, the UK established a new colony, the British Indian Ocean Territory, which included the Chagos Archipelago.

For the next half-century, the matter, in terms of the UN process, remained an open agenda item, until, finally, in 2017 the UNGA, acting under Article 96 of the UN Charter, resolved to submit a formal request to the ICJ for an Advisory Opinion, a non-binding judicial statement designed to provide guidance on whatever legal question the UNGA may feel is required. The resolution posed the following questions:

> (a) 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius …';
>
> (b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago …'[16]

14 Diane Marie Amann, 'Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113 American Journal of International Law 784, 784.

15 UNGA Resolution 2066 (XX) Question of Mauritius, UN Doc A/RES/2066 (XX) (16 December 1965) paragraph 4.

16 UNGA Resolution 71/292 Request for an Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, UN Doc A/RES/71/292 (22 June 2017).

1.2 The law

The modern law of decolonisation, as commonly understood, finds its origins in a series of UNGA resolutions adopted in the 1960s. As legal instruments, it should be noted, UNGA resolutions are not, technically, legally binding. In the literature they are often described as a species of 'soft law',[17] and the common assumption remains that though they may ultimately provide evidence or contribute to the formation of customary international law, they cannot in themselves give rise to legally binding obligations.[18] In the *Chagos* Opinion, the ICJ confirmed this long-standing view, repeating its observation from an earlier judgment: 'General Assembly resolutions … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.'[19]

Substantively, the starting point of the modern law of decolonisation is found in UNGA Resolution 1514 (XV) of 14 December 1960. As the ICJ observes in *Chagos*, the adoption of Resolution 1514 became a 'defining moment'[20] in the evolution of contemporary international law not only because it had an important 'normative character, in so far as it affirm[ed] that "[a]ll peoples have the right to self-determination"',[21] but also because it had a 'declaratory character with regard to the right to self-determination as a customary norm'.[22] In particular, operative paragraph 5 of the resolution calls on colonial powers to 'transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire'.[23] Also of significance to the present case is paragraph 6 of the resolution which provided that '[a]ny 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'.[24]

Although not considered evidence of custom, UNGA Resolution 2066 (XX) is another instrument deserving of mention at this point since it specifically addressed the 'Question of Mauritius'. Under paragraph 3 of this resolution, the UK was invited to 'take no action which would dismember the Territory of Mauritius and violate its territorial integrity'.[25] The underlying assumption here is clearly that the UK's obligation to decolonise *all* of Mauritius had already been established and the UNGA was discharging *its* obligations with regard to overseeing the UK's implementation of the latter.

Alongside custom, the second main source of international law is treaties. After the UN Charter, the treaty that at first glance would seem to be relevant in the present case was the aforementioned 1965 Lancaster House Agreement. In the *Chagos* Opinion, however, the ICJ took a markedly different view. Showing its awareness of the inherent asymmetrical balance of power between coloniser and colonised, the court effectively rejected its status as a valid international instrument, noting:

17 Mauro Barelli, 'The role of soft law in the international legal system: the case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 International and Comparative Law Quarterly 957, 959.

18 A Boyle, 'Soft law in international law-making' in Malcolm Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 119.

19 *Chagos* Advisory Opinion (n 2) para 151.

20 Ibid paragraph 150.

21 Ibid paragraph 153.

22 Ibid paragraph 152.

23 UNGA Resolution 1514 (n 5) paragraph 5.

24 Ibid paragraph 6.

25 UNGA Resolution 71/292 (n 16) paragraph 3.

> … heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony. Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.[26]

The substantive rules of international law regarding decolonisation and self-determination are clear. Colonial powers are obliged to decolonise without any conditions or reservations. Detachment is incompatible with the purposes of the UN Charter. Every colonial administration must transfer all relevant powers back to the colonised peoples where that is shown to be their will and desire.

2 The ICJ Advisory Opinion

2.1 A surprisingly defiant court?

After the approach adopted in the *Marshall Islands* case[27] and the *Kosovo* Advisory Opinion, where it skirted around the issue of self-determination,[28] there was a general expectation among international lawyers that the ICJ would somehow fudge the *Chagos* Opinion. The 'blockbuster of an advisory opinion'[29] that came out, thus, was as notable as it was surprising.[30]

The main findings were unequivocal. Firstly, the court declared, 'the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago'.[31] Secondly, the ICJ observed that the UK remained 'under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible'.[32] Thirdly, the rest of the UN membership also remained 'under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius'.[33]

2.2 Implications of the opinion: a window into the asymmetry of international law

The court's argument is rich with implications – not least because of the suggestion that at least one aspect of the legal situation created by the decolonisation of Mauritius by the UK gives rise to rights and obligations incumbent upon all other states (obligations *erga*

26 *Chagos* Advisory Opinion (n 2) paragraph 172.

27 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), (Marshall Islands v India), (Marshall Islands v Pakistan)*, Preliminary Objections, Judgment, ICJ Rep 2016, page 833.

28 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep 2010, page 403.

29 Kevin Jon Heller, 'Shaping up to be a blockbuster of an Advisory Opinion! #Chagos #ICJ' (*Twitter*, 25 February 2019) <https://twitter.com/kevinjonheller/status/1100048585704566784>.

30 Marko Milanovic, 'ICJ delivers *Chagos* Advisory Opinion, UK loses badly' (*EJIL: Talk!*, 25 February 2019) <www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/>.

31 *Chagos* Advisory Opinion (n 2) paragraph 174.

32 Ibid paragraphs 183(3) and (4).

33 Ibid paragraph 183(5).

omnes)[34] – but in the present discussion I focus primarily on two points. The first relates to the conditionality of self-determination, specifically the contexts in which the right of self-determination exists and the strong link to decolonisation. The second concerns the legacy of empire on international law today; specifically, recognising the various historical asymmetries created by imperialism, including the imbalances of power arising in questions of representation and recognition.

Self-determination has always been a fraught concept in international law. In the first 30 years following the end of the Second World War, it was most actively invoked by the anticolonial movements struggling for independence and liberation from 'alien subjugation, domination, and exploitation'.[35] Its formulation as a right of 'all peoples' in the two UN human rights covenants,[36] however, gave rise to its potential application outside colonial contexts, and, as President Wilson found out, this produced ambiguities. It is clear the right to self-determination does not belong to *all* ethnic, religious, national or cultural groups. But just what exactly is a 'people'? International law has never clarified what a 'people' consists of and how its limits are to be determined.[37] Furthermore, what precisely does the right to self-determination entitle its subjects to? In the *Chagos* Opinion, it has been claimed, the ICJ effectively restricted the scope of self-determination only to decolonisation contexts. As Jan Klabbers puts it, the ICJ adopted an approach where 'self-determination and the right to decolonization come close to being one and the same thing, with the important corollary that self-determination cannot be invoked in other, non-colonial settings'.[38] This has the advantage of narrowing down the range of potential rights-holders: it is only those people placed under a colonial rule. On the other hand, it goes against much of the contemporary consensus that the scope is wider; something the court itself explicitly acknowledged. The court said it was 'conscious that the right to self-determination … has a broad scope of application' and therefore it was going to 'confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonisation'.[39] The court traces the *emergence* of the right of self-determination to contexts of decolonisation. But the Opinion did not address how self-determination may apply in other contexts. Does this mean that for all practical purposes of application, the right of self-determination is limited to contexts of decolonisation? It is not clear how the court envisages the right applying to contexts of secession, nor whether the court would be so defiant in applying the right in these contexts.

The second point the *Chagos* Opinion brings into relief is the legacy of empire and imperialism in international law. Much has been written about the relationship between

34 For more on this, see: Craig Eggett and Sarah Thin, 'Clarification and conflation: obligations erga omnes in the *Chagos* Opinion' (21 May 2019) <www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/>.

35 UNGA Resolution 1514 (n 5) paragraph 1.

36 International Covenant on Civil and Political Rights 1966, Article 1 'All peoples have the right of self-determination' (99 UNTS 171); International Covenant on Economic, Social and Cultural Rights 1966, Article 1 'All peoples have the right of self-determination' (993 UNTS 3).

37 James Crawford (ed), *The Rights of Peoples* (Oxford University Press 1992); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995); Paul Weismann, 'Peoples' right to self-determination' (2019) 21 International Community Law Review 463.

38 Jan Klabbers, 'Shrinking self-determination: the *Chagos* Opinion of the International Court of Justice' (2019) 8(2) European Society of International Law: Reflections.

39 *Chagos* Advisory Opinion (n 2) para 144.

empire and international law.[40] It is a common thesis today that the formation and development of international law – its form and substance – have been heavily influenced by the experience and practices of imperialism, and at the same time, or indeed precisely because of that, international law has also played an important role in constituting and reproducing imperial regimes. The 'colonial encounter … played a crucial role in the formation of core international legal concepts, categories and doctrines, and especially sovereignty'.[41] As a result of this, international law has also been key to creating and sustaining empires: 'international law is not incidental to or external to the imperial enterprise ... it plays an important constitutive role in the creation and maintenance of the very structures and institutions that enable and make it possible in the first place'.[42] International law is a product of empires and colonial projects. and at the same time empires and colonial projects have been constituted and enabled by international law.

It is not difficult to see how the legacy of colonialism plays out in the *Chagos* case. There are three instances where this legacy reveals itself most notably. The first is in the negotiation of treaties between politically unequal parties. International law not only tolerates and legitimates this practice on the pretence it is the formal legal equality between the parties that really matters, but by remaining blind to the asymmetries of power it reinforces and perpetuates the inequality. One of the more understated but decisive factors in the *Chagos* Opinion was the asymmetry in the bargaining power between Mauritius and the UK that led to the detachment of Chagos. The court recounts some of the forceful discussions that took place between the UK and Mauritian representatives in this connection. For example, it notes that it was the stated and long-held preference of the Premier of Mauritius, Sir Seewoosagur Ramgoolam, that the parties agree on a 'long-term lease rather than detachment'.[43] This should be understood as the freely expressed will and desire of Mauritius. The UK Foreign Office and the Ministry of Defence in response recommended a 'forcible detachment'.[44] Forcible here does not mean the use of force, but any tactics that might force the Mauritian representatives to change their position. These intentions came out clearly in a Note prepared by the Private Secretary to the UK Prime Minister, Sir Harold Wilson: 'Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago.'[45] The very 'granting' of independence by the benevolent colonial master was placed under threat if the colony did not accept what was demanded.

Another way in which the legacy of colonialism plays out in this episode can be seen in the function performed by international law's unstructured and decentred process of enforcement. Neither the ICJ nor the UNGA can 'order' a state to comply with their views and opinions, no matter how widespread the support for them may be otherwise. A decentred operationalisation of the legal process typically favours more powerful

40 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2004); Antony Anghie, 'The evolution of international law: colonial and postcolonial realities' (2006) 27 Third World Quarterly 739; Susan Marks, 'Empire's law' (2003) 10 Indiana Journal of Global Legal Studies 449; Akbar Rasulov 'Imperialism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

41 Marks (n 40) 457.

42 Rasulov (n 40) 433.

43 *Chagos* Advisory Opinion (n 2) paragraph 100.

44 Ibid paragraph 103.

45 Ibid paragraph 105.

parties. The principle of non-intervention and the right of every state to determine the extent of its obligations under international law provide states with just enough formal protection to be able to ignore, as a matter of law, the court's findings and the decisions of the UNGA. In these circumstances, only power can force compliance. But not every state has the same ability to withstand political pressure. Poorer and weaker states are more likely to comply even with the 'softest' of legal regimes, out of concern about crippling sanctions, unfavourable treatment in future negotiations, or simply being frozen out. Powerful states, such as the UK, can afford to ignore much of this, even when found in breach of their hard law obligations.

Thirdly and relatedly, the structure and processes of international law are not equipped to deal with peoples, who are the beneficiaries of the right of self-determination. Only states and other recognised legal entities – which does not include peoples – can, in most practical instances, access and use the formal machinery of international law.

In the case of ICJ Advisory Opinions, for example, it is only the UNGA, the UNSC and those 'other organs of the United Nations and specialized agencies which [have been] so authorized by the General Assembly' that may submit requests to the court.[46] The only way a 'people' can meaningfully pursue its legal interests through this channel is by getting one of these international bodies to take up its cause before the ICJ.

In the case of contentious disputes, only states may initiate legal proceedings before the ICJ, any assertion of jurisdiction by the court is grounded in the respective parties' consent, which typically will be limited not only *ratione materiae* but also *ratione personae* due to the requirement of reciprocity. This means that, if a 'people' intends at any point to benefit from the court's contentious jurisdiction, it firstly has to find a suitable third state able to bring a case that would fall within the material and personal jurisdiction of the court and then to convince it to take such action, but only in exercise of *its* sovereign rights, since the court's case law expressly rules out the possibility of third-party actions brought on behalf of the general public (*actio popularis*). Though, technically, this conjunction of events is not entirely impossible – the recent case brought by The Gambia against Myanmar provides a good illustration of how an interested third state can bring action in defence of the rights and interests of a persecuted people where the applicable legal frameworks so enables it[47] – the likelihood of this scenario becoming more regular is extremely low.

None of this, of course, will be news to those acquainted with the literature on international law and subalternity.[48] As scholars like Dianne Otto have argued, it is the very structure of international law's formal processes that often limits the participation and representation of peoples, noting the tension between the 'emancipatory ideas' of international law and the 'current state-based structure of the international community'.[49]

46 UN Charter 1945, 1 UNTS XVI, Article 96.

47 Application Instituting Proceedings and Request for Provisional Measures, Republic of The Gambia v Republic of the Union of Myanmar, 11 November 2019. See in particular section II founding the court's jurisdiction.

48 Dianne Otto, 'Subalternity and international law: the problems of the global community and the incommensurability of difference' (1996) 5 Social and Legal Studies 337; Rahul Rao, 'Subalternity and international law' (2017) 18 Melbourne Journal of International Law 1; Kiran Grewal, 'Can the subaltern speak within international law? Women's rights activism, international legal institutions and the power of "strategic misunderstanding"' in Nikita Dhawan, Elisabeth Fink, Johanna Leinius and Rirhandu Mageza-Barthel (eds), *Negotiating Normativity* (Springer 2016).

49 Otto (n 48) 338–339.

The Chagossian people waited nearly half-a-century for the right conjunction of goodwill and strategic interests among external actors before their cause was finally taken up and their voice could be heard in an authoritative legal forum. Even then, it was not the Chagossians themselves that directly raised their case and had their rights asserted, but Mauritius and the UNGA.

The story of the Chagossians' legal silence – the subaltern that cannot speak even when its destiny is being decided in court – may seem poignant. Yet, there is a long history of this. In the 1995 *East Timor* case – where the court dismissed Portugal's complaint against Australia on the grounds that the dispute between them could not be properly decided without also pronouncing on the legality of conduct by Indonesia, which had refused to accept the court's jurisdiction – one of the judges noted exactly this kind of moment of silenced subalternity. In a candid passage at the start of his Separate Opinion, Judge Vereshchetin writes:

> Besides Indonesia, in the absence of whose consent the Court is prevented from exercising its jurisdiction over the Application, there is another 'third party' in this case, whose consent was sought neither by Portugal before filing the Application with the Court, nor by Australia before concluding the Timor Gap Treaty. Nevertheless, the Applicant State has acted in this Court in the name of this 'third party' and the Treaty has allegedly jeopardized its natural resources. The 'third party' at issue is the people of East Timor.[50]

Vereshchetin goes on to note that given the judgment did not address these people 'one might wrongly conclude that the people, whose right to self-determination lies at the core of the whole case, have no role to play in the proceedings' even though 'the right of a people to self-determination … requires that the wishes of the people concerned at least be ascertained and taken into account'.[51] He did not mean that 'the Court could have placed the States Parties to the case and the people of East Timor on the same level procedurally',[52] only that there is a need 'for the Court … to ascertain the views of the East Timorese representatives of various trends of opinion on the subject-matter of the Portuguese Application'.[53] As things stand, however, he concludes, the lack of any evidence that such views were ever sought should, in principle, have been considered another factor 'leading to the inability of the Court to decide the [present] dispute'.[54]

The tensions raised in *Chagos* and in *East Timor* continue into the present day. Most recently in relation to the oral submissions in *The Gambia v Myanmar Genocide* case,[55] as a tactic to give voice to those who could not speak in the court, a group of civil society institutions representing the Rohingya people set up a series of unofficial events on the periphery of the ICJ proceedings in the hope of giving the Rohingya people a 'right of reply'[56] to Myanmar and Gambia's oral submissions. This reply cannot be 'legally heard' by the court. There is growing pressure to hear and accommodate the voices of the peoples most affected and who cannot bring cases for themselves. In this case, the Rohingya were reliant on The Gambia to instigate a case. Although without legal effect,

50 *Case Concerning East Timor* (n 8) Separate Opinion of Judge Vereshchetin, 135.

51 Ibid.

52 Ibid.

53 Ibid 138.

54 Ibid.

55 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Oral Proceedings 18–21 December 2019.

56 Video of the meeting held on 11 December 2019, 15:00, the Nutshuis, The Hague <www.facebook.com/watch/live/?v=1205861036269715&ref=watch_permalink>.

periphery events may certainly impact the awareness of international lawyers and seem to be, at least, a step in the right direction.

Conclusions

Empire and colonialism are not just a part of Britain's history but also of its present. Chagos remains a colony of the UK. The desire of Mauritius is that the islands are returned to it, and the desire of the Chagossian people is to return to their land. The ICJ Advisory Opinion confirmed all of this and left no ambiguity about the legitimacy of these demands. But it did so without giving a voice to the Chagossians or securing compliance from the UK. The incorporation of the Chagos Archipelago into the British Indian Ocean Territory in 1965, the court concluded, meant that the decolonisation of Mauritius by the UK had not been lawfully completed. The UK's continuing assertion of sovereign control over the islands means that colonialism still very much remains a part of the UK's role and place in contemporary international relations and international law.[57]

There is no doubt that colonialism is unlawful under international law, and yet the very design and operationalisation of the international legal system mean this fact in itself will often have little discernible impact on the practical realities of decolonisation, and virtually no influence over the laws and politics of the respective colonial powers. There are no enforcement mechanisms that can force the UK to hand Chagos back to Mauritius and to allow the return of Chagossians. The very framework of international law and the political architecture that supports it are set up in such a way that nothing can meaningfully be done to compel the UK to change its position on these matters. Because of its veto power with regard to the UNSC, the UK remains legally invulnerable to any pressure coming from the UN. Despite being effectively found in violation of its obligations under the UN Charter, it cannot lose its UNSC seat – just like Russia and the US did not lose their seats on the UNSC for their breaches of the UN Charter. In a decentralised legal system wedded to the principles of sovereign consent and legal non-interference, more often than not it is power that forces compliance. Weak states comply because they must. Powerful states find ways to act as they wish.

None of this means, of course, that the *Chagos* Advisory Opinion is meaningless. From the international law perspective, it is, I think, very likely that the Opinion will have a long-lasting effect – but more so perhaps for pedagogical and academic purposes. There are some clear and uncompromising statements from the court. The law was clarified and the substance of UNGA Resolution 1514 (XV) as customary international law was put beyond a doubt. All of this seems very useful from the standpoint of international legal education. Outside this context, however, it is not at all clear what the broader real-world impact of the Opinion might be. It seems almost certain, however, that it is not going to have any immediate effect on the lives of the most tragic *dramatis personae* in this act: the displaced, silenced and still un-self-determined Chagossian people.

57 As of February 2020, the UN 'returned' the Chagos Archipelago to Mauritius in its map of the world. While this designation, of course, is not legally binding, it is highly symbolic and shows the UN is willing to take interesting steps to secure decolonisation. See <https://www.un.org/Depts/Cartographic/map/profile/world.pdf>.

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Law's empire? *Mutua* and *Kimathi*

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Abstract

This is an analysis piece discussing the rule of law in two recent claims regarding historical abuses during the Mau Mau insurgency in Kenya by the colonial government. The piece argues that these two cases represent the tendency of the Diceyan concept of the rule of law to divide into either very strong or very weak review of government action. It urges careful consideration of the kinds of case, including those involving Britain's colonial past, where review is more likely to be of the latter character.

Keywords: Mau Mau; rule of law.

Introduction: the rule of law's imperial blindspot and the Diceyan dialectic

Most, if not all, discussions in UK public law feature the work of Victorian jurist A V Dicey. In line with that tradition, his work on the rule of law proves a useful jumping-off point for the discussion here of two recent cases wherein the courts have had to grapple with the UK's colonial past. Of particular relevance is the third aspect of A V Dicey's concept of the rule of law; that rights in the UK are those developed gradually by the courts via the common law.[1] This articulated a Benthamite mistrust of broadly defined bills of rights, preferring to place faith in the common law to provide rights protections.[2] It is pertinent here for two reasons.

Firstly, reliance on the common law to protect individual rights has been found wanting in the face of a constitution dominated by a strong executive and a periodically deferential judiciary.[3] This point bites particularly hard here, since legal scrutiny of the acts of colonial administrators has proven a blind spot for Diceyan conceptions of the rule of law.[4] Secondly, a further and more subtle problem for Dicey's broader constitutional schemata is that of what Matt Lewans terms the 'Diceyan dialectic'.[5] Comprising both a legally omnipotent supreme legislature *and* seeking to rely on rights protections within the common law, Dicey's jurisprudential outlook could bifurcate

1 See A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Classics 1982).

2 J Bentham, 'Anarchical fallacies' in J Waldron (ed), *Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man* (Methuen 1987) 29.

3 See e.g. *Liversidge v Anderson* [1942] AC 206 (HL).

4 D Lino, 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 Modern Law Review 739.

5 M Lewans, *Administrative Law and Judicial Deference* (Oxford University Press 2016) chapter 2.

between strong and weak review; both judicial activism *and* deference. The ways in which this dialectical dynamic emerges within the cases is analytically useful in terms of scrutinising the rule of law itself.

In this piece I illustrate these issues in two recent cases addressing the legacies of empire; *Mutua v Foreign and Commonwealth Office*[6] and *Kimathi v Foreign and Commonwealth Office*.[7] Both cases concern the Mau Mau uprising in 1950s Kenya and the abusive counter-insurgency deployed by imperial administrators. The interplay between the two cases exposes the limits of the common law to remedy the sins of empire.[8] More specifically, while *Mutua* opened the door to legal redress for historic abuses, *Kimathi* slammed it shut again in a discursive interplay repeating the pattern of dissent and oppression seen in the uprising and the British counter-insurgency. This should, I argue, cause us to consider more broadly the identity of those whom the rule of law protects. The remainder of this piece proceeds to consider the historical background to the two cases, before considering each case in turn and offering some reflections on their implications.

1 The Kenya emergency

The early twentieth century saw European settlement of Kenya, which became a crown colony of the British government in 1920. The colonial government placed restrictions on land ownership and agriculture which promoted and protected settler interests, with particular impact on the Kikuyu tribe. The Mau Mau were a militant society, primarily receiving support from the Kikuyu people, who pursued the cause of greater political representation in the early 1950s by targeting settler farms. In 1952 the colonial governor of Kenya, Sir Evelyn Baring, faced with increasing levels of Mau Mau violence, proclaimed a state of emergency (the Emergency) under section 3 of the Emergency Powers Order-in-Council 1939 (1939 Order). The Emergency lasted until Kenyan independence in 1963. When proclaiming the Emergency, Governor Baring also issued the Emergency Regulations 1952 under powers conferred by the 1939 Order. Those regulations contained wide powers of arrest and detention of suspected persons. From 1953 onwards detention camps were built to hold large numbers of persons detained under these powers.

The process of British counter-insurgency using these powers was systematic and brutal. In the period between declaration of the Emergency and Kenyan independence, thousands of Kenyans were placed in detention camps. Camp officials engaged in widespread acts of abuse, including systematic beatings, castration, rape and other sexual assaults. The nadir was the Hola Massacre in 1959, in which 11 camp detainees were clubbed to death and 77 others sustained permanent injuries. While for many years the extent of culpability of the British state was unclear, academic research in the 2000s directly connected the policy of counter-insurgency to the highest levels of government.[9]

6 [2011] EWHC 1913 (QB); [2012] EWHC 2678 (QB).

7 [2018] EWHC 2066 (QB).

8 On which see C R G Murray, 'Back to the future: tort's capacity to remedy historic human rights abuses' (2019) King's Law Journal 426.

9 For accounts of the period and the role of the government, see D M Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (Phoenix 2006); C Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Owl 2006).

2 *Mutua v Foreign and Commonwealth Office*

In 2009, relying on the work of academic historians, the law firm Leigh Day & Co launched five test claims in the UK High Court on behalf of victims of the detention. The claimants alleged that they had been subject to a range of abuses under the regime constituted by the proclamation of the Emergency, including torture, rape, castration and severe beatings, for which the Foreign and Commonwealth Office (FCO) was vicariously liable. The FCO vigorously resisted the claims. But, fatally as it would turn out in terms of their legal defence, the FCO did not deny that the claimants had been abused. Rather, it sought to resist the claims on two technical grounds. Firstly, that as a matter of public international law the proper defendant was the Kenya republic, which the FCO argued had inherited any legally liability on Kenyan independence.[10] Secondly, the FCO attempted to rely on the time bar in section 33 of the Limitation Act 1980, arguing that a fair trial was no longer possible.[11]

Two protracted and detailed hearings took place before Mr Justice McCombe (as he was at the time). He held that there was no argument that the claimants had been subject to torture and abuse.[12] The UK government, not the Kenyan republic, was the appropriate defendant.[13] On the limitation point, the claimants argued that the case could not have been brought sooner, given that prior to 2005 there was a lack of scholarship linking abuse in Kenya to the British government. McCombe J agreed with the claimants, finding that it was entirely possible to hold a trial that was not unduly prejudicial to the defendant's ability to resist the claim.[14] He was, it should be noted, aided on this point by the defendant's discovery during proceedings of the Hanslope archives, which provided detailed records from various colonial governments.[15]

With its back now to the wall and hamstrung by its acceptance of the factual truth of the allegations made, at this point the government agreed to pay £19.9 million damages to over 5000 claimants. The then Foreign Secretary, William Hague, made a statement to the House of Commons admitting the abuse and expressing Britain's regret:

> … Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place, and that they marred Kenya's progress towards independence. Torture and ill treatment are abhorrent violations of human dignity which we unreservedly condemn.[16]

In *Mutua* the common law method thus arguably vindicated Diceyan orthodoxy, to the extent that it urges reliance on the common law to protect individual rights. Dicey's view was that the British constitution was built upon rights developed and sustained by the common law.[17] However extraordinary, for example, the powers conferred by a statute, they will nonetheless be controlled by the interpretation imposed by judges who are 'influenced by the feelings of the magistrates no less than by the general spirit of the

10 [2011] EWHC 1913 (QB) [50]–[70] (McCombe J).

11 [2012] EWHC 2678 (QB) [68] (McCombe J).

12 Ibid [27] (McCombe J).

13 *Mutua* (n 10) [102]–[110] (McCombe J).

14 *Mutua* (n 11) [86] (McCombe J).

15 On the Hanslope archives see e.g. D M Anderson, 'Mau Mau in the High Court and the "lost" British Empire archives: colonial conspiracy or bureaucratic bungle?' (2011) 39 Journal of Imperial and Commonwealth History 699.

16 W Hague, HC Deb 6 June 2013, vol 563, col 1692.

17 Dicey (n 1) 271.

common law'.[18] In holding that the claims in *Mutua* were justiciable McCombe J opened the possibility that rights in private law could and would hold the British state to account. In turn, the possibility of a legal route of accountability spurred the political constitution into action. Yet, as noted in the introduction, the deferential face of the Diceyan dialectic rapidly showed *Mutua* to be something of a false dawn.[19]

3 *Kimathi v Foreign and Commonwealth Office*

Kimathi was on a wholly different scale to *Mutua*, in terms of the extent of the government's potential liability. In this case, a claim involving a further 40,000 victims was brought against the FCO. A claimant known as TC34 was the test case for the claim. TC34 made a series of allegations regarding ill-treatment for which he argued the FCO was legally responsible, including assault, torture, unlawful detention, detention under poor conditions, denial of medical treatment, forced labour and threats of castration.

After an epic hearing lasting 233 days, Mr Justice Stewart handed down a 500-paragraph judgment.[20] In *Kimathi*, however, the claims were dismissed. This decision has since been upheld by the Court of Appeal, on the basis that it would not interfere with Stewart's J's exercise of judicial discretion unless it disclosed an error of law.[21] The remainder of the analysis here addresses only the High Court decision. As in *Mutua*, the time bar in the Limitation Act 1980 was central to the FCO's defence. Section 33 of that Act provides that otherwise time-barred claims can be heard, provided to do so is equitable. The question of equitability turns on the balance of prejudice to the claimant and the defendant.[22] Stewart J concluded, after extensive consideration of the relevant materials, that it would be inequitable to extend time in TC34's case.

A key problem for the *Kimathi* claimants was the significant delay in bringing the claim, which was heard more than half a century after the relevant events. In particular, Stewart J was rightly concerned about the effects of the delay on the possibility of hearing the claim in a way which was fair to the defendant.[23] The passage of time between the alleged abuses and the hearing was significant. More importantly, this had led to significant depletion in the cogency of the evidence available.[24] At this distant point there was, furthermore, a lack of witnesses.[25] With regard to TC34 in particular, there was a lack of evidence relating to the conditions of the claimant's detention,[26] or the medical conditions alleged to have resulted from his ill-treatment.[27]

Unlike in *Mutua*, the court was unimpressed by the explanation give for the delay in bringing the claim.[28] The claimant sought to argue that TC34 was illiterate, impecunious and a non-speaker of English. Furthermore, as a member of a proscribed organisation which had suffered significant ill-treatment at the hands of the British state, it was argued that TC34 was unsurprisingly hesitant to put himself to the fore. Stewart J gave relatively short shrift to these arguments. The key issue for him was that TC34 had provided no

18 Ibid lxii.

19 Murray (n 8) 452–456.

20 *Kimathi* (n 7).

21 *Kimathi and others v Foreign and Commonwealth Office* [2018] EWCA Civ 2213.

22 Ibid [112] (Stewart J).

23 Ibid [441] (Stewart J).

24 Ibid [188] (Stewart J).

25 Ibid [217]–[232] (Stewart J).

26 Ibid [189] (Stewart J).

27 Ibid [239]–[242] (Stewart J).

28 Ibid [144] (Stewart J).

concrete evidence explaining the delay.[29] Overall, Stewart J considered that it would be 'essentially impossible' for the FCO to have a proper opportunity to find witnesses or evidence to rebut TC34's claims.[30]

I noted at the outset that the deferential aspect of the Diceyan 'dialectic' stemmed from the supremacy of Parliament in the UK constitution, combined with reliance on the common law to protect individual rights. In that context the fact that Stewart J's concluding remarks turned on Parliament's intention in passing section 33 is noteworthy. He determines that the entire point of that section is to shield defendants from claims which it would be unjust to hear given the passage of time.[31] Statutory provisions seeking to restrict or exclude access to the courts have fallen within the dynamic interplay of deference and activism to which the Diceyan dialectic can give rise. Since the resurgence of judicial review in the 1960s, and the case of *Anisminic* in particular, it has been clear that provisions purporting to exclude review will be subjected to strict interpretation.[32] And yet the doctrine of parliamentary supremacy, in its pure form, must mean that it is legally *possible* for review by the courts to be excluded. A bifurcation between intensive judicial scrutiny and reliance solely on the political constitution thus emerges. This dialectic has been seen at the highest level in the Supreme Court's recent decision in *Privacy International*.[33] In that case, the Supreme Court considered whether the ouster clause in section 67(8) of the Regulation of Investigatory Powers Act 2000 successfully excluded judicial review of decisions of the Investigatory Powers Tribunal (which had jurisdiction to consider, *inter alia*, decisions relating to the conduct of the Security Service, the Secret Intelligence Service and the Government Communications Headquarters). A majority of the court found, in line with the principles laid down in *Anisminic*, that section 67(8) would not exclude review on the basis of errors of law.[34] Lord Sumption and Lord Wilson, in dissent, interpreted the provision as successfully excluding review.[35] In short, differing views on the requirements of the rule of law led to starkly different readings of section 67(8); one strongly legalistic, the other rather more deferential. Indeed, more generally, the legalism of *Anisminic* has been periodically tempered by judicial deference in circumstances where the application of a statutory provision permits of a range of permissible approaches.[36] In *Kimathi*, the court arguably tacked toward the more deferential line when applying its discretion under section 33 of the Limitation Act 1980. While Stewart J structured his discretion in applying the requirements in the Limitation Act with reference to principles distilled from the relevant case law,[37] the effect was to immunise the state from TC34's claim.

It is also worth noting that potentially relevant provisions of international law were deemed to add nothing to the claim in *Kimathi*. The claimants asserted that there had been breaches of Articles 3, 4, 5 and 8 of the European Convention on Human Rights

29 Ibid.

30 Ibid [463] (Stewart J).

31 Ibid [451]–[452] (Stewart J).

32 See, classically, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

33 *R (Privacy International) v Foreign and Commonwealth Secretary* [2019] UKSC 22, [2019] 2 WLR 1219.

34 Ibid [105]–[112] (Lord Carnwath).

35 Ibid [206] (Lord Sumption); [224] (Lord Wilson).

36 E.g. *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557. Jack Beatson has persuasively argued that this kind of approach was the inevitable result of abolishing the distinction between jurisdictional and non-jurisdictional errors of law. See J Beatson, 'The scope of judicial review for error of law' (1984) 4 Oxford Journal of Legal Studies 22, 44–45.

37 E.g. *McDonnell v Walker* [2009] EWCA Civ 1257.

(ECHR). They also sought to bring to bear various provisions of the UN Charter, the UN Convention against Torture, and the Forced Labour Convention. The point of such material, the claimants argued, was that in circumstances where the UK stood accused of flagrant and deliberate breaches of human rights protections in international law, the section 33 time-limit should be set aside. The court held that such matters added nothing to the section 33 exercise.[38]

The point is unsurprising, perhaps. There are limits to the extent to which the ECHR will apply retrospectively in the domestic courts.[39] And Diceyan orthodoxy means that statutory provisions will not generally be superseded by provisions of international law.[40] But it is worth keeping in mind that at least one Supreme Court justice has taken a very different view, as we shall see, on the extent to which international law can and should impact upon the domestic exercise of judicial discretion (context is everything in public law, of course).

In *R (SG) v Secretary of State for Work and Pensions*, the Supreme Court had to determine whether the government's controversial 'benefits cap' policy, which fixed maximum benefit levels per household, was unlawfully discriminatory for purposes of Article 14 taken with Article 1 of the First Protocol to the ECHR.[41] The case also required the court to consider the effects of relevant provisions of the UN Convention on the Rights of the Child (UNCRC). The court held that the relevant legal standard was whether the Secretary of State's decision was 'manifestly without reasonable foundation', thus framing the case as one in which the court will afford leeway to the executive. Yet, when it came to the effects of the UNCRC, the majority and dissenting justices took radically different approaches. Lord Reed, who gave the lead judgment for the majority, took the line that, while the UNCRC may be of relevance to questions involving children's rights under the ECHR, *SG* was a question involving discrimination against women.[42] It was not open to the UK courts to interpret or apply treaties to which Parliament has not given effect.[43]

For Baroness Hale and Lord Kerr in dissent, however, the influence of the UNCRC was the determining factor. In Baroness Hale's judgment, the question of whether there had been a breach of the claimants' rights under Article 14 ECHR had to be approached with the best interests of children as an overriding principle. Applying such an approach, she found on the facts that the impacts of the policy outweighed its aims.[44] Lord Kerr went several, admittedly constitutionally significant, doctrinal steps further in finding the UNCRC to be both directly applicable and substantively breached.[45] The relevance to the current discussion here is that in *R (SG)* judicial discretion, comparing the legal analyses of the majority and the dissenting judges in terms of the effects of international law, swung between deference on questions of social policy and requiring the executive to comply with international legal norms. This will be pertinent to the discussion in the concluding section.

38 *Kimathi* (n 7)[121], [173] (Stewart J).

39 On which see *Re McCaughey* [2012] AC 725.

40 J Bell and G Engle, *Cross on Statutory Interpretation* (3rd edn, Butterworths 1995) 23–31.

41 [2015] UKSC 16, [2015] 1 WLR 1449.

42 Ibid [86]–[89] (Lord Reed).

43 Ibid [90] (Lord Reed).

44 Ibid [229] (Baroness Hale).

45 Ibid [254], [257] (Lord Kerr).

Discussion and conclusion: relativity and the Diceyan dialectic in the rule of law

Returning to our two Kenyan cases, the question is how to distinguish *Kimathi* from *Mutua*. It is important to note that the claims were of a different order, and that the government's litigation strategy in the second claim learned the hard lessons from the first. *Mutua* was a much narrower claim than that in *Kimathi*. Vitally, and conclusively in the event, in *Mutua* the FCO did not deny that abuse had taken place.[46] Without any issue of fact to decide, the government's section 33 arguments in *Mutua* were rather easier for McCombe J to dismiss than they had been for Stewart J. There is a wider issue here which warrants reflection, however, in terms of the interplay between the two claims and their implications in terms of the rule of law.

At the outset I described a dialectical dynamic inherent in the Diceyan view of the rule of law, wherein the standard of review can shuttle between strong rights protections and deference to state actors. The claims in *Mutua* and *Kimathi* demonstrate that movement in practice. Without prejudice to Stewart J's careful and extensive review of the evidence underpinning TC34's claim, it is worth taking a global view of the classes of person whose claims tend to be treated with suspicion by the courts. A series of high-profile cases involving historic abuses by the British colonial regime have failed in recent years. The Chagos islanders have notoriously received raw treatment not only by the British government but by the courts.[47] In *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* the Supreme Court rejected a claim seeking an inquiry into events occurring while the UK was the colonial power in the Federation of Malaya.[48] In short, while the British Empire extended to such places and peoples, law's empire more often than not will stay its hand.[49] The deferential aspects of this movement of bifurcation would appear to de-privilege, *inter alia*, the victims of empire.

For some commentators the law's reticence in this area, and the rejection of the Mau Mau claims in particular, is a necessary protection for the government against unfair judicial proceedings.[50] Indeed, on this view it is a vindication of the rule of law itself. Yet, there is something of an accountability gap here.[51] Of course, the accountability of the present for historic abuses is a fraught area. One only need contemplate the vigorous debates over reparations for slavery in the USA to understand the complexities.[52] And one has to keep in mind the limits to what the courts can achieve in this context. The bipolar nature of the process of adjudication is designed for a particular purpose,[53] and cannot be expected to remedy every wrong, however morally reprehensible. As Stewart J was careful to point out in his judgment, civil proceedings are not and cannot approximate a public inquiry, and TC34's claim had to be assessed under normal principles of civil litigation.[54] Further, it is impossible to disagree, in practical terms, with Stewart J's conclusions about the significant evidential difficulties that the *Kimathi* claims would have posed for the FCO. It would, in terms of due process and the rule of law,

46 *Mutua* (n 11) [16] (McCombe J).

47 *R (Bancoult) v Foreign Secretary (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

48 [2015] UKSC 69, [2016] AC 1355.

49 The reference is, of course, to R Dworkin, *Law's Empire* (Hart 1988).

50 J Duke-Evans et al, T*he Collapse of the Kenya Emergency Group Litigation* (Policy Exchange 2018).

51 Murray (n 8) 445–449.

52 See e.g. B Bittker, *The Case for Black Reparations* (2nd edn, Beacon Press 2003); R Robinson, *The Debt: What America Owes to Blacks* (Plume 2001).

53 See L Fuller, 'The forms and limits of adjudication' (1978–1979) 92 Harvard Law Review 353.

54 *Kimathi* (n 7) [20]–[21] (Stewart J).

have posed significant practical unfairness on the department for the claim to proceed. Yet, when applying the test in section 33, the nature and impacts of that unfairness need to be balanced against the demands of justice in holding states accountable for documented historic violence. It is clearly not good enough to suggest that the nature of the British state's (admitted) abuses in Kenya should mean that any and every claim should proceed. However, the dynamics here put an onus on us to reflect with care on the idea of the rule of law itself; the kinds of case, and kinds of applicant, that are likely to enjoy its protection.[55]

55 On the ideologies of the rule of law, see M Loughlin, *Public Law and Political Theory* (Clarendon 1992).

NILQ 71(2): 325–330

Book review

(B)ordering Britain: Law, Race and Empire by Nadine El-Enany

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In *(B)ordering Britain: Law, Race and Empire*[*] Nadine El-Enany offers a quietly scathing account of the manner in which the legal order of imperial and post-imperial Britain has operated (and continues to operate) so as to lock in the injustice of empire – the gains of those who took, and the losses of those from whom it was taken. This review, written after the papers for the special issue of the *Northern Ireland Legal Quarterly* were already complete, operates as a conclusion to this special edition, using El-Enany's book – now surely the leading account of the way in which the law, including constitutional law, works both to manage and in fact to perpetuate the legacies of empire – in order to explore the limitations of the perspectives contained in those papers and possible lessons for future research in the field of post-imperial constitutional law.

An overview of the book gives some sense of the manner in which it builds a single and compelling thesis of imperial continuity via a chronological treatment of the various bodies of law relating most directly to the ability to enter, and remain in, the UK. That thesis, briefly stated, is as follows. Having enriched itself massively and unjustly through its imperial endeavours, Britain has throughout the twentieth century sought – and for the most part managed – to resist the efforts of its colonial subjects to so much as enter the imperial homeland, and certainly to share in the wealth accumulated via the extractive mechanisms of empire. Chapter 1 argues that British immigration law is a continuation of British imperial power – and the white supremacist project which it sustained – such that the 'categorisation of people into those with and without rights of entry and stay sustains and reproduces colonial practices of racial ordering' (17). Chapter 2 considers the subject/alien distinction – how it is created by law and how it was used and abused in service of the idea of the unity of the British Empire, in which all subjects were equal. This leads into a discussion of the racialised origins of the Aliens Act 1905. That statute, though it was not aimed at different intra-imperial racial groups, nevertheless prefigures later attempts to use apparently neutral legal categories in order to maintain a hierarchy that was, barely below the surface, very obviously reflective of racial categories and racial hierarchies.

The period within which legal attempts to manage race shattered the pretence of imperial unity is addressed in the long chapter 3, bookended as it was by two British Nationality Acts, that of 1948 and that of 1981. The former introduced the category of

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citizen of the UK and the colonies (CUKC) and, in doing so, set the stage for migration from the peripheral colonies to the UK, the imperial centre. In the meantime, the UK rushed, in the early 1960s and again at the tail end of the decade, to address the unintended effects of the legislation. Bit by bit it reduced the rights of those CUKCs who did not possess a suitably close link with the UK. These amendments not only progressively and substantially undermined the alleged unity of imperial citizenship but did so once more on grounds that must be understood, and indeed were often explained, as reflecting racist imperatives. The Immigration Act 1971, then, which brought to an end the right of Commonwealth and colonial citizens to enter Britain, set the stage for a crucial break, in the form of the British Nationality Act 1981. That statute replaced the category of CUKCs by one of British citizenship from which colonial subjects were mostly excluded. After hundreds of years of imperial efforts, a space of just a decade or so proved sufficient in order to redraw the law of the land to protect Britain from the undoing of its imperial deeds. Wealth had been taken from Britain's colonies, but very few of the people of those colonies would now be permitted to enter and to share in that wealth. The fourth chapter assesses the regime of asylum and immigration which resulted after the British Nationality Act 1981 created the new legal category of citizen specifically of the UK. Now, the book shows, those who had until very recently had a legal right to enter the UK were forced into processes which were discretionary and would enjoy – at best – statuses which were precarious. El-Enany critiques in particular the claim that these processes of migration were 'spontaneous', a claim, she shows, which serves to obscure the historical processes of exploitation and subjugation within the British Empire which made them in fact inevitable.

The fifth chapter addresses the relationship of Britain to the EU, to which El-Enany extends her thesis. There are three imperial or post-imperial dimensions to this narrative. The first relates to British entry into the EU, which in this account was an attempt to protect or even extend Britain's international influence in the context of the decline of its Empire. It includes an illuminating account of the ways in which the UK worked to reassure other member states that those hailing from its various imperial possessions would not be able to avail themselves of freedom of movement rights. One element of this was the reform of immigration law in the run-up to accession, with the right of abode limited in order that it might serve as the marker of those who would thereafter be holders of rights under EU law. Not for nothing, we see, did the Immigration Act 1971 come into force on the same day as the European Communities Act 1972. The second dimension is the status of the EU itself – an 'appropriated continent' – to which the same basic thesis is extended. Much of the wealth of the EU is the stolen wealth of the colonies of its member states, people from which are unjustly excluded from the scope of EU law and denied access to the continent by what we now know as 'fortress Europe'. By making nationality of member states crucial to the enjoyment of EU citizenship, EU law too effects, indirectly, a racial preference.

At a high level of generality these claims are made out and are a useful corrective to accounts which tell the tale of the EU's origins in largely, or even uniquely, economic terms. As with the position of Northern Ireland to the UK, however – discussed below – there are elements in the modern history of the EU which do not sit easily within this framing. It would be useful, for example, to see the EU's expansion after 1995 incorporated explicitly into this analysis. The third dimension relates, of course, to the 2016 referendum, which should – it is argued – be 'understood as another in a long line of assertions of white entitlement to the spoils of colonialism' and which was conducted on terms that 'are symptomatic of a Britain struggling to conceive of its place in the world

post-Empire'. Similarly, the proposed, or even merely hypothetical, post-Brexit (re)turn to the Commonwealth, and the tension which exists between that project and Brexit, should be understood as a form of national liberation. Or, one might note, which would exist were it not assumed by its proponents that a reinvigorated Commonwealth would not see Britain as one state amongst many – a status it could not accept in the EU – but rather, as a reflection of or return to imperial patterns, with Britain *primus inter pares*.

In the final chapter, the book turns to possible solutions to the colonial trajectory on which Britain remains. Though the law of citizenship and immigration has been shown – compellingly – to represent the problem, it is made clear that any solution is not to be found there. Rather, the solution is a 'counter-pedagogy' to the law and classifications it imposes on the world: inside and out, subject and alien, lawful and unlawful immigrant and so on. Specifically, immigration – not 'irregular' but 'irregularised' – must be understood as an act of 'anti-colonial resistance'. This act involves the rejection norms whose alleged (racial) neutrality disguises that they serve the project of perpetuating the imperial project, excluding from its spoils those who were subjugated and exploited before that project was domesticated in the second half of the twentieth century. This line of argument avoids having to claim – as would be contrary to all that has gone before – that the historic injustices perpetuated by Britain (and other European states) might be undone by a greater willingness to allow those from its former colonies to enter the state and to facilitate their acquisition of citizenship. It is unthinkable that Britain would be willing to go far enough for such a route to have any significant impact. And any attempts to do so are likely to benefit disproportionately those within its former colonies who are already relatively wealthy, perhaps themselves the beneficiaries of other, more subtle, processes of exploitation.

But this anticolonial pedagogy can only be a first step, one which – by allowing, or perhaps forcing, us to see what is really at stake – sets the stage for an intervention that is not conceptual but material. What that material intervention might be cannot be easily answered by extrapolating from the analysis offered here. There is no suggestion, for example, that reparations might work to counteract (for they could surely never undo) the injustices of empire as they have accumulated over time. But without it we are left at an impasse, in which even if we can see the inheritance of empire in all its injustice, we cannot undo it. Nor can we even hope to envisage with any precision what the world might look like had a small number of countries not taken so much from so many others for so long. Those who have lived and still live on the wrong side of imperialism would be entitled to want more, and, if we are to conclude that it cannot be provided, then we must say so and consider what follows from that.

As this summary hopefully reflects, a key strength of the book – what makes it distinctive amongst post-imperial and critical race writing on contemporary Britain – is the close attention to the precise origins and effects of specific rules of law. Sometimes that is case law, as with the critique in chapter 4 of three cases relating to the legal position of those seeking asylum in the UK. More often, however, the subject is statutory rules whose formulation offers the modern reader no hint at the underlying policy, with that policy being reconstructed here from a range of parliamentary and other material. If nothing else, for present purposes the argument that emerges from that approach is for a more widespread focus upon the details of citizenship law, which is not – it would seem – usually taught as part of constitutional law, notwithstanding that it is the key task of constitutional law not only to define the polity but also to say who belongs to it and, conversely, who does not. Given the relative stability of citizenship law for the last four decades, it seems likely that it has been allowed to fade into the background, not part of

the day-to-day material of those who do not specialise in it. So too is the case for immigration law, which far from being stable, is subject to incessant tinkering. In this regard, El-Enany discusses the *Windrush* scandal and its lessons, but the use of the deprivation of citizenship as a tool of national security might also turn out in the long term to be a strategic error by the state if – as seems possible – it draws attention to the manner in which citizenship law inscribes questions of race into one's legal rights and liabilities.

Similarly, events in Hong Kong will likely draw further attention to the various legal statuses possessed by people around the world which create a link between them and the UK but which reflect the logic of empire in falling far short of citizenship. Before the 1997 deadline, many Hongkongers registered as British nationals (overseas), which gives them a right to a British passport but no right of abode. Those who did not and had no other nationality became British overseas citizens. They joined in that category those who had been CUKCs before the British Nationality Act 1981 but did not become either a UK citizen or a British overseas territory citizen on its entry into force. There exist too the neglected categories of British subjects (without citizenship) and British protected persons. As the Hong Kong example shows, it cannot be assumed that the tactic of deploying these distinct (and inferior) categories in order to manage the legacy of empire will succeed in keeping them permanently out of the public mind. Those who work outside of the critical tradition to which this book belongs would do well to study carefully the manner in which it carefully explores both the origins of specific legal rules but also the manner in which their effects ripple out into the wider world. A consideration of these origins and implications, which are not separate from or outside of the law, are not incompatible with the doctrinal study of law but a large part of what makes such study worth doing in the first place.

Writing the history of British citizenship and immigration law through a racial lens – and showing the racist motivations, and effects, which were present at every stage – is very welcome. There are though occasional hints in the book at issues which are similarly neglected in the legal literature but which cannot most fruitfully be addressed in racial terms – or at least not the same racial terms that El-Enany relies upon here. One is Northern Ireland. So, for example, right at the beginning of her book, El-Enany says that she is referring to 'Britain' rather than to the 'UK' because she wants her readers to imagine Britain ('if you possibly can') as it appears on the book's cover: that is, 'without its colonies'. The implication is that Northern Ireland is one of those colonies. That Ireland was colonised by England is no doubt correct, though there is a question as to whether it remained a colony after 1800 and indeed up until the creation of the Irish Free State. This speaks, in turn, to the question of whether Northern Ireland – which is what exists in the gap between the concepts of Great Britain and the UK – is in the here and now a colony rather than, say, as Colm O'Cinneide asked at the 'Constitutional Legacies of Empire' workshop, a 'fragment of Empire'.

If we take the latter view, then much of El-Enany's analysis does not account for it: Northern Ireland has been on the inside rather than the outside of all of the legal distinctions and categories which are herein discussed. The Good Friday Agreement guarantees to those born there more rather than fewer rights than are those born in the Britain to which analysis is confined in the book. To point to Northern Ireland, of course, is to neither assert nor deny the utility of viewing it through the lens of empire. Nor is it to suggest that the case of Northern Ireland invalidates or even undermines in any way the argument of this book. It may, in fact, do nothing more than emphasise what any observer of the constitution should know by now. Northern Ireland is an anomaly within

the UK. Constitutional lawyers have often chosen to ignore it rather than attempt to explicitly incorporate it into analysis of the UK and put at risk the complacent generalisations with which the very existence of Northern Ireland, never mind the manner in which it has been governed in the last century, is incompatible.

This relates to a second point. Though the basic narrative of imperial extraction here is compelling, it is only the background to rather than the substance of the book's main claims. But the riches plundered were not – as the author would no doubt accept – evenly distributed within the metropolis. That inequality is surely also reflected in legal rules which – like those of nationality and immigration – are facially neutral. Unlike those bodies of law, however, rules which distribute within the metropolis (rather than policing the boundary between inside and out) could not have reflected – at least in the first place – the logic of race. Which leads to a second question: what of those who made it to Britain despite the many and varied obstacles thrown up by the law of citizenship and immigration? They were, we know, hardly allowed to share in the spoils. So, for example, we hear about the *Windrush* generation, and how the changing law and modern 'hostile environment' has impacted upon it, but there would seem to be scope for further discussion of the manner in which the law ensured the continuity of the imperial project within the state, and even in relation to those who became permanent residents or citizens. And who else – not colonial subjects – did the law exclude from sharing in the stolen wealth of empire, and how? To ask these questions is not to suggest that a critical race analysis should be replaced, or even augmented by, an analysis based on class, but rather to suggest that the book provides a model of analysis that might be extended forward. It might also, however, be extended backwards, in order to show how specific legal doctrines, enacted by Parliament or formulated by the courts, gave effect to and managed the process of imperial extraction which stands behind the substance of this book.

(B)ordering Britain captures exceptionally well that the UK as it is exists today is an artefact of empire and that the legacies of empire are the legacies of the extraction of wealth which was always and everywhere the central animating logic of imperial projects. As the British Empire collapsed, the cruel racialised (and often openly racist) interaction of citizenship law and immigration law prevented those who had been colonial subjects from sharing in the enjoyment of the (to them, no doubt bitter) fruits of empire. In recent years we have seen the same logic, turned not only against those from former colonies but also from those from certain parts of the EU. One question that the book prompts is how long this logic might continue to do in future the work it has undoubtedly done in the past. Britain, that is, for all its historic exploitation of other peoples, is not as rich as it thinks it is. And yet the same imperial arrogance which allows one country to steal from another and then respond with indignation when that other asks for that fact to be recognised prevents an open acknowledgment of Britain's true position in the world. In order to maintain its relative wealth, then, one might argue that Britain has had to go far beyond simply keeping out its former colonial subjects to include, for example, the promotion of systems of international co-operation which systematically privileges countries which are already wealthy over those which are not.

Some question therefore emerge. First, what other aspects of the contemporary UK, both legal and not, are part of the same project described here, of resisting the recognition of imperial injustice while perpetuating at least some of its effects? Second, following from that, what would it mean for the UK to recognise its post-imperial status, not only for the law of citizenship and immigration, but in all of its internal politics and external relations? How else might the country understand itself? One possibility is that there is no other way; that an appreciation of the extent of the imperial extraction and

the manner in which the law has been used to protect that wealth since the end of the British Empire leads inexorably – for those not minded to defend the imperial project – to the realisation that that is all the UK was, and is.

Finally, what are the broader lessons of the book for the study of constitutional law? The first is that it is necessary to historicise, to understand legal disputes and legal rules in the context not (or not only) of their predecessors and successors, but to understand the specific practical contexts in which they arose and operated. There could be no better lesson of the way in which apparently neutral, often technical, rules often fail to reflect clearly the policy considerations which stand behind them, and the effect which they are intended to achieve. The second lesson is that it is necessary to criticise. *(B)ordering Britain* is a book about law: it offers a detailed and compelling assessment of British immigration law (broadly conceived) through the twentieth century and beyond. It is also though a book about race and draws on literatures which are likely unfamiliar to those who write about constitutional law in the pages of our leading law journals – literatures which may confuse, or even intimidate, such people. And yet the result is such as to make more barely doctrinal work seem arid, or perhaps anaemic. The lesson is not to replicate the approach, but to learn from it: to be willing to adopt a thickly normative perspective and to deploy that with enthusiasm, and even – where it is justified – with anger. Anyone who knows any significant amount about the British constitution knows that there is much to dislike, even despise, in it. It is deeply refreshing to see Nadine El-Enany willing and able to say so in terms which legal scholars cannot (or at least should not) dismiss as the work of somebody involved in a different project.