PEACE ORDER AND GOOD GOVERNMENT

The Bancoult Cases and the Tapestry of Legislative Power in the Twenty-First Century

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Peace, order and good government may be a very large tapestry, but every tapestry has a border.[1]

"Peace, Order and Good Government" (POGG) is the traditional formula of legislative power common to almost all nations with English colonial origins. In Canada it is regarded as a key expression of the country's social and political life, sometimes said to define Canadian values in a way comparable to "liberty, equality and fraternity" in France or "life, liberty and the pursuit of happiness" in the United States. However, in Nigeria the POGG clause allowed the imposition of military rule under which fundamental rights were abrogated or curtailed for nearly 30 years of its post-colonial history, and in South Africa POGG allowed the apartheid system to flourish for nearly half a century, making racial segregation, internal displacement and deportation legal. In England, the POGG formulation has been used to forcibly remove entire indigenous populations from their homelands, relocate them and prevent them from returning. The successful utilisation of POGG to further authoritarian government, apartheid and colonialism, particularly after the controversial 3-2 majority decision of the Appellate Committee of the House of Lords in the case of Bancoult No 2 (2008), has led to a close examination and questioning of the rigid orthodox Anglo-Australian judicial interpretation of the POGG formula in our twenty-first century era of human rights, liberal democracy and the rule of law.

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1 *R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 (Laws LJ).

When the founding fathers of Australian federation drafted the Commonwealth Constitution,[2] they wrote "peace, order and good government" into it. Section 51 provides that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to" the matters specified in paragraphs (i) to (xxxix). Section 52 sets out the Commonwealth's Parliament exclusive powers to make laws for "the peace, order, and good government of the Commonwealth" with respect to the matters specified in paragraphs (i) to (iii). Section 122 of the Constitution grants the Commonwealth Parliament power to make laws for the internal territories of Australia. Under that provision the Commonwealth has granted both the Australian Capital Territory and the North Territory self-government and each has a unicameral legislature which can make laws "for the peace, order and good government of the Territory."[3]

The Commonwealth Constitution came into operation on the first of January 1901, providing as follows:

> **106—Saving of Constitutions**
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> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.
>
> **107—Saving of power of State Parliaments**
>
> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Section 2 of the *Constitution Act 1889* of Western Australia provides:

> It shall be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good government of the Colony of Western Australia and its Dependencies: and such Council and Assembly shall, subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative Council.

In the case of South Australia, section 5 of the *Constitution Act 1934* provides:

> The Legislative Council and House of Assembly shall have and exercise all the powers and functions formerly exercised by the Legislative Council constituted pursuant to section 7 of the Act of the Imperial Parliament, 13 and 14 Victoria, Chapter 59, entitled "An Act for the better Government of Her Majesty's Australian Colonies."

2 *Commonwealth of Australia Constitution Act 1900*.
3 *Northern Territory (Self-Government) Act 1978* (Cth), s. 6. *Australian Capital Territory (Self-Government) Act 1988* (Cth), s. 22.

Section 5 takes us back to our colonial roots and the *Act for the better Government of Her Majesty's Australian Colonies* passed by the Imperial Parliament in 1850.

That Act provided for the establishment of a Legislative Council consisting of not more than 24 members, of which one-third were to be appointed by the Queen and two-thirds were to be elected by the inhabitants of South Australia. The Governor of South Australia, with the advice and consent of such a Legislative Council, would have authority to make laws for the "peace, welfare and good government" of the colony, provided that no such laws were repugnant to the law of England.

The Legislative Council was established on the 21st of February 1851, elections for its 16 elected members were held in July 1851, and the Council convened for the first time on the 20th of August 1851. In 1855 the Legislative Council passed "An Act to establish a Constitution for South Australia, and to grant a Civil List to Her Majesty" (the *Constitution Act 1856*).[4] By section 1 it provided for the Parliament of South Australia comprising a Legislative Council and a House of Assembly that were to be constituted in accordance with this Act and "have and exercise all the powers and functions of the existing Legislative Council" (namely, to make laws for "the peace, welfare and good government" of South Australia).

Section 8 of the *Constitution Act 2001* of Queensland refers back to the *Constitution Act 1867* which provides in section 2:

> Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.

Similarly, section 5 of the *Constitution Act 1902* of New South Wales provides:

> The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

The Tasmanian Constitution Act 1934 has a long preamble which refers back to the statement of legislative power of "peace, welfare and good government" in the 1850 *Act for the better Government of Her Majesty's Australian Colonies*.

So, the formula of legislative power for the Commonwealth, the Territories and Western Australia is slightly different from that for Queensland, South Australia, New South Wales and Tasmania. "Peace, order and good government" as opposed to "Peace, welfare and good government." How did this semantic mutation occur and what are we to make of it? A lot, according to Dr John Ralston Saul—at least in the case of Canada. This writer and thinker who TIME magazine has described as a 'prophet,' believes that in Canada the change from "peace, welfare and good government" in the first founding documents to "peace, order and good government" in section 91 of the *British North America Act 1867* "fundamentally

4 The elections for the first Parliament were held on the 9th of March 1857, and the two Houses sat for the first time on the 22nd of April 1857. The Parliament continued in session until the 27th of January 1858 when it was prorogued. Eighteen members were elected in the Legislative Council and 36 members in the House of Assembly.

changed the nature of the country, removing the sense of the public good (weal) or welfare of the people."[5] In his book, *A Fair Country: Telling Truths About Canada*, Dr Saul writes:

> Through all of our history, through all of our legal and constitutional documents, all of the precedent-setting declarations, the phrase Peace, Order and Good Government has been used only twice. The rest of the time, from official documents to proto-constitutions to political instructions, the phrase used was fundamentally different—Peace, Welfare and Good Government…
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> …Some will ask: Do these words mean anything? Are they not just empty formulae copied out by colonial officials in London?
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> …In the Quebec Resolutions, Peace, Welfare and Good Government was present as in all earlier documents. On December 4, 1866, they produced the London Resolutions. They had crossed the Atlantic to tie down the details with the imperial government and Welfare was still in its place. Then came three drafts of the British North American Act. Welfare was in each of them, although separate mention of Peace, Order and Good Government abruptly appeared, along with the arrival of Lord Carnarvon, a Conservative, as the new colonial secretary.
>
> In the next draft, Welfare was gone. And in the final Constitution only Peace, Order and Good Government remained. There was no public or written explanation. All we know for sure is that the change was intentional.

In 1985 South Australia passed the *Australia Acts (Request) Act 1985*[6] which (i) requested the Commonwealth Parliament to enact an Act "in, or substantially in, the terms set out in the first schedule, and (ii) requested and consented to "the enactment by the Parliament of the United Kingdom of an Act in the terms of the Schedule to the Act contained in Schedule 2." Section 2 of the two Australia Acts 1986[7] provides as follows:

> **2—Legislative powers of Parliaments of States**
>
> (1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.
>
> (2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

5 See Haroon Siddiqui, 'Unfulfilled nation torn from its aboriginal roots' *The Toronto Star*, 21 September 2008. Saul, *A Fair Country: Telling Truths About Canada* (2008).
6 Act No 95 of 1985.
7 *Australia Act 1986* (Cth) Act No 142 of 1985; *Australia Act 1986* (UK) 1986 c. 2

Note that the Australia Acts use the words "peace, order and good government", despite the the constitutions of Queensland, South Australia, New South Wales and Tasmania using the formula "peace, *welfare* and good government." That might be explained by the fact that in 1988 the High Court of Australia said in *Union Steamship Company of Australia Pty Ltd v King*[8] that

> the power to make laws "for the peace, welfare, and good government" of a territory is indistinguishable from the power to make laws "for the peace, order and good government" of a territory."[9]

However, consult a dictionary and you will find that the words 'order' and 'welfare' are not interchangeable. They do not have the same literal meaning. As a legislative drafter I advise my clients that if a word in a statute is not defined, the word bears its ordinary meaning found in the dictionary. That is a basic principle of statutory interpretation, which you might be led to believe, from that passage just quoted from the *Union Steamship Case*, does not apply to interpretation of the constitution. But in *Tasmania v Commonwealth*,[10] one of the earliest decisions of the High Court on the meaning of the Australian Constitution, all three judges, Griffith CJ and Barton and O'Connor JJ, held that the Constitution was to be interpreted like any other statute. Griffith CJ said that "the same rules of interpretation apply that apply to any other written document."[11]

In support he cited the House of Lords in the *Sussex Peerage Case*[12] in which Tindal LCJ said:

> The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.[13]

Similarly, in *Tasmania v Commonwealth* O'Connor J said

> I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. In this respect the Constitution differs in no way from any Statute of the Commonwealth or of a State.[14]

If that is the case, it is necessary to give meaning to the words in the formula of legislative power.

'Welfare' comes from Middle English (1154-1474) "well fare," a conjunction of the adverb *well* and the verb *fare*. According to the *Oxford English Dictionary* its primary meaning is:

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8 (1988) 166 CLR 1.
9 Ibid. 9.
10 (1904) 1 CLR 329.
11 Ibid. 338.
12 (1844) 11 Cl & F 85.
13 Ibid. 143.
14 Above, n 10, 358.

> Happiness, well-being, good health or fortune, (of a person, community, etc); successful progress, prosperity.[15]

The *Australian Macquarie Dictionary* gives the following definition:

> The state of faring well; wellbeing: *one's welfare*; *the physical or moral welfare of society*.[16]

Hence we can conclude that in a formula of legislative power the word 'welfare' refers to the common or public 'weal.'

'Order' is often used in connection with 'law' as in "law and order," and "peace and order" have a similar meaning. It is 'order' as opposed to "disorder," which is a breach of public order, a public commotion or disturbance (such as rioting).

'Order', also from Middle English, is defined in the *Oxford English Dictionary* as meaning:

> A condition in which the laws regulating the public conduct of members of a community are maintained and observed; the rule of law of constituted authority; absence of riot or violent crimes.[17]

The *Australian Macquarie Dictionary* defines it as

> Conformity to law or established authority; absence of revolt, disturbance, turbulence, unruliness, etc.[18]

To determine why these particular words (rather than others) were used to grant legislative power we have to go back to the *Justices of the Peace Act 1489* enacted during the reign of king Henry VII to reform the system of local government and justice which relied on Justices of the Peace. The Act refers to laws and ordinances made for "the politic weal, peace and good rule" of the shires of the realm. This formula was certainly the forerunner of "peace, welfare and good government." And in the *Statute of Proclamations 1539* enacted during the reign of Henry Tudor's son, king Henry VIII, we find the expression "good and politic order and governance" which can be regarded as a forerunner of "peace, order and good government."

From Tudor England we pass to Stuart England and the very first English colony established at the start of the seventeenth century. Virginia, one of the 50 States of the United States of America, was founded in 1606 by the joint stock Virginia Company of London under a proprietary charter granted by king James I in 1605. A council of 13 persons was empowered "to govern and order all matter and causes" according to the laws, ordinances and instructions signed by the King under the privy seal of the realm of England. In a second charter granted in 1609 extending the boundaries of Virginia, the words 'good government' appeared for the first time in a legal document conferring powers to rule an English territory.

15 *Shorter Oxford English Dictionary on Historical Principles* (2007) Volume 2, N-Z.
16 *Macquarie Dictionary Sixth Edition* (2013).
17 Above, n 15.
18 Above, n 16.

As the American archaeologist William Kelso put it, "Jamestown," named after King James I, "is where the British Empire began." Today the Commonwealth of Virginia, as the State is officially called, prides itself on having the oldest continuous law-making body in the New World, for in 1621 the Virginia Company gave Virginia an elected legislature, the General Assembly, power "to make, ordain, and enact such general Laws and Orders, for the Behoof of the said Colony, and the good Government thereof, as shall, from time to time, appear necessary or requisite."[19] "Behoof" comes from Old English and means "benefit" or "advantage." The Shorter Oxford English Dictionary gives as one of many examples of its usage a phrase that is almost identical to that conferring legislative powers on the Virginian General Assembly, that is, "for the behoof of."[20]

The oldest document in which "peace, welfare and good government" appears to confer legislative powers in respect of a colony is a proclamation of king George III made in 1763, soon after the end of the so-called 'Seven Years War' (1754-1763). This conflict affected Europe, North America, Central America, the West coast of Africa, India and the Philippines and killed more than 1.4 million people in Europe alone. All the major world powers were involved in the Seven Years War, with England, Prussia, Hanover, some other German principalities, Portugal and Russia fighting against Austria, France, Spain, Saxony and Sweden, and various native American allies of France in North America. The result of the War was four peace treaties, including the Treaty of Paris of February 1763 which ended what was known as the 'French and Indian War' in North America. By this treaty England gained France's Canadian territories ('New France') and the Carribean island of Grenada. It also took what had been the Spanish colony of Florida.[21]

In October 1673 King George III issued a Proclamation by which he announced the grant of Letters Patent to erect "four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada." The Proclamation fixed the boundaries of these "governments." It also announced that by the Letters Patent constituting these governments, express power and direction was given to the governors of these colonies that,

> so soon as the state and circumstances of the said colonies will admit thereof, they shall, with the advice and consent of the members of our council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America, which are under our immediate government; and we have also given power to the said governors, with the consent of our said councils, and the representatives of the people, so to be summoned as aforesaid, to make,

19 *An Ordinance and Constitution of the Treasurer, Council, and Company in England, for a Council of State and General Assembly*, 24 July 1621.

20 *Shorter Oxford English Dictionary on Historical Principles* (2007) Volume 1, A-M.

21 For England there was hardly any respite from war in the eighteenth century. Soon after the Seven Years War came the American War of Independence, the French Revolution, Napoleon Bonaparte's self-coronation as emperor of France and his invasion of Europe and Russia, leading to the Napoleonic Wars. After Napoleon's defeat, there was a period of relative peace in the world, known as the "Pax Brittanica" (the British Peace) when Great Britain became the dominant power and took on itself the role a global policeman. This period lasted a century (1815-1914), and was interrupted only by the Crimean Wars which saw the former enemies Great Britain and France fighting and defeating Russia together.

> constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeable to the laws of England, and under such regulations and restrictions as are used in other colonies.

The case of *Ibralebbe and Another v The Queen*[22] is most often cited as authority for the view that the phrase "peace, order and good government" confers full legislative power. In this case the petitioners sought special leave to appeal to the Judicial Committee of the Privy Council from a decision of the Supreme Court of Ceylon (as Sri Lanka was called until 1972) upholding their convictions in a District Court on charges of causing hurt to certain persons. The Attorney-General of Ceylon did not oppose the granting of special leave to appeal, as it was desirable that confusion owing to a number of conflicting decisions relating to the the joinder of charges from the Supreme Court in the exercise of its criminal jurisdiction on the one hand, and the Court of Criminal Appeal on the other, and also from different judges of the Supreme Court itself. The attention of the Privy Council was drawn to a decision of the Court of Criminal Appeal in Ceylon which challenged the existence of any jurisdiction in the Queen in Council to entertain appeals in criminal matters arising in Ceylon. It was argued that when Ceylon ceased to be a colony and became an independent sovereign state within the British Commonwealth in 1947, the prerogative of the English Crown to hear criminal appeals from Ceylon automatically ceased to exist.

In Norman England justice had been administered by the royal court (*curia regis)* and a right to appeal to the King in Council as a last resort extended to all subjects of the Crown, in England and Wales and beyond the seas. In Tudor and Stuart times that jurisdiction was exercised by the Star Chamber and the President and Council in Wales, the North, Lancaster and Chester. The jurisdiction of the King in Council in England and Wales was abolished by the Habeas Corpus Act in 1640, but not in respect of the Channel Islands and the plantations, colonies and other dominions of the Crown. Thus all the subjects of the monarch, first in England and Wales, and since the Act of Union, in all the United Kingdom, had the right to appeal in the last resort to the King in Parliament, and subjects outside the United Kingdom had an appeal to the King in Council.

The Privy Council held that after independence in 1947, the legislative competence of the Parliament of Ceylon included power at any time, if it thought right, to modify or terminate the Privy Council appeal from its courts, and the true independence of Ceylon was in no way comprised by the continuance of the appeal right, unless and until the "Sovereign legislative body" decided to end it. The judgment was delivered in November 1963 by Viscount Radcliffe who said that the Parliament of Ceylon enjoyed unrestricted legislative power:

> The words "peace, order and good government" connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign.[23]

However in November 2000, Gibbs LJ of the English High Court of Justice (the Administrative Court of the Queen's Bench Division), quoting that passage from the judgment in *Ibralebbe* said:

22 [1964] AC 900.
23 Ibid. at 923.

> I am unable to accept that those words, even from such an authoritative source, compel this court to abandon the ordinary meaning of language, and instead to treat the expression "for the peace order and good government" as a mere formula conferring unfettered powers on the commissioner.[24]

Gibbs LJ was giving judgment in the Bancoult case (No 1), to which we will now turn our attention. The background to this case is as follows.

In the middle of the vast Indian Ocean south of the Equator there's a tiny tropical island situated halfway between Tanzania and Indonesia. Its land area is only 32.8 square kilometres because technically it's an 'atoll,' a roundish coral reef with a coral rim that surrounds and substantially encloses a lagoon. The atoll is one of seven that comprises more than 60 individual islands and forms part of the Chagos Archipelago, whose native inhabitants are called 'Chagossians.' Politically and legally, the Archipelago is the British Indian Ocean Territory (BIOT), one of 14 British Overseas Territories ("BOT") (being the modern euphemism for a colony) of the United Kingdom.

The island's name is Diego Garcia and it's the site of one of the United State's most important and sophisticated strategic air and naval bases in the world. The facilities include a large naval ship and submarine support base, a military air base, a communications and space-tracking facility, and an anchorage for pre-positioned military supply for regional operations aboard the replenishment and military transport ships of the US Navy which also provide sealift and ocean transportation for all US military services. The population of the island ranges between 3,000 and 5,000, all of which are military personnel and civilian support staff. The US State Department has described Diego Garcia as "an all but indispensable platform" for the fulfilment of defence and security responsibilities in the Arabian Gulf, the Middle East, South Asia and East Africa.

All of this is public knowledge and well known. But what was kept secret from the general public for a long time was that the entire native population of Diego Garcia, Salomon Island and Peros Banhos had been forcibly removed and relocated to other islands in the Chagos Archipelago, or to Mauritius or the Seychelles. This was done because in 1966 the United Kingdom and the United States entered into an Exchange of Notes under which the UK agreed to depopulate almost the whole of BIOT so a US military base could be constructed on Diego Garcia.

The Chagossians removed from Diego Garcia between 1968-1971 were some 2,000 people called 'Ilois,' descendants of those who had settled the previously uninhabited island from the 1790s onwards when the French established coconut plantations there and began to import slaves from Africa. In 1814 Diego Garcia became an English colony and was administered from Mauritius which also came under British rule after the Napoleonic Wars. Diego Garcia became part of Mauritius, but was split off when Mauritius became independent in 1965 and the entire Chagos Archipelago became the British Indian Ocean Territory.

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24 *R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

Secret notes, memoranda and other documents tendered to the Court showed that it had been intended to deny to the outside world that the islanders had been a permanent or semi-permanent population on BIOT. As Laws LJ said in his judgment,

> it is as if some of the officials felt that if they willed it hard enough, they might bring about the desired result, and there would *be* no such permanent population.

That there was a need to pretend that the islanders did not belong to BIOT was for two reasons. First, according to UN Resolution No 1514, any attempt to partially or totally disrupt the national unity and the territorial integrity of a country was incompatible with the purposes and principles of the Charter of the United Nations. Secondly, under Article 73 of the Charter, a Member of the UN was required "to transmit regularly to the Secretary General… statistical and other information of a technical nature relating to economic, social and educational conditions" in the territories for which the Member was responsible.

One public official gave the following advice:

> The territory is a non-self-governing territory and there is a civilian population even though it is small. In practice, however, I would advise a policy of 'quiet disregard'—in other words, let's forget about this one until the United Nations challenge us on it.

Almost as soon as the last of the Chagos islanders were removed from the Archipelago in 1971, legal action and petitions began for compensation for the displaced people and for the right for them to return to their homeland and live there. In 1982 an agreement was reached between the British Government and some Chagossians, but in 1983 a new series of compensation claims were made by an Ilois group called the Chagos Refugee Group, located on Mauritius. In 1999 their leader, Louis Olivier Bancoult, who was born on Peros Banhos, made an application for judicial review to the Queen's Bench Division of the English High Court.[25]

Bancoult's legal team was headed by the South African born Sir Sydney Kentridge QC who had served as an intelligence officer in the South African army during the Second World War. In 1948 Kentridge graduated in jurisprudence from Oxford University and thereafter practised law in South Africa and the United Kingdom until his retirement in 2013. Kentridge played a leading role in the most important political trials in South Africa during the apartheid-era, including the treason trial of Nelson Mandela and the 1977 inquest into the death of the anti-apartheid activist Stephen Biko in police custody.

Bancoult challenged the legality of the action removing the Ilois people from BIOT which had been done under the *Immigration Ordinance 1971* made by the Commissioner for BIOT, an office created by the *British Indian Ocean Territory Order 1965* (the BIOT Order) which was an Order in Council made by the Queen under the powers of the royal prerogative. Section 5 of the BIOT Order created the BIOT colony, and section 8 authorised the Commissioner to "make laws for the peace, order and good government of the Territory"

25 Ibid.

but provided for such laws to be disallowable by the Queen acting through a Secretary of State. Section 19 reserved in Her Majesty

> full power to make laws from time to time for the peace, order and good government of the British Indian Ocean Territory (including, without prejudice to the generality of the foregoing, laws amending or revoking this Order).

The Immigration Ordinance was "preceded by an exchange of minutes which demonstrates the earnest desire of the British government to ensure that its making should be attended by as little publicity as possible." A minute in January 1971 to the British Foreign Office stated as follows:

> "The ordinance would be published in the BIOT Gazette, which has only very limited circulation both here and overseas, after signature by the Commissioner. Publicity will therefore be minimal."

Laws and Gibbs LJ held the Immigration Ordinance to be unlawful and granted the writ of *certiorari* sought by Bancoult. Gibbs LJ said that

> Each of the words "peace," "order" and "good government" in relation to a territory necessarily carries with it the implication that citizens of the territory are there to take the benefits. Their detention, removal and exclusion from the territory are inconsistent with any or all of these words. To hold that the expression used in the Order could justify the provisions of the Ordinance would thus in my judgment be an affront to any reasonable approach to the construction of language.

After analysing the case law Laws LJ said:

> The authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion marches with the cases on the Colonial Laws Validity Act, and I have dealt with that. But the colonial legislature's authority is not wholly unrestrained; peace, order and good government may be a very large tapestry, but every tapestry has a border.

He then came to the following conclusion:

> S.4 of the Ordinance effectively exiles the Ilois from the territory where they are belongers and forbids their return. But the "peace, order, and good government" of any territory means nothing, surely, save by reference to the territory's population. They are to be *governed*: not removed. In the course of argument Gibbs J gave what with respect seems to me to be an illuminating example of the rare and exceptional kind of case in which an order removing a people from their lawful homeland might indeed make for the territory's peace, order and good government: it would arise where because of some natural or man-made catastrophe the land had become toxic and uninhabitable. Short of an extraordinary instance of that kind, I cannot see how the wholesale removal of a

> people from the land where they belong can be said to conduce to the territory's peace, order and good government. The people may be taxed; they should be housed; laws will criminalise some of the things they do; maybe they will be tried with no juries, and subject to severe, even brutal penalties; the laws made for their marriages, their property, and much besides may be far different from what obtains in England. All this is vouchsafed by the authorities. But that is not all the learning gives. These people are subjects of the Crown, in right of their British nationality as belongers in the Chagos Archipelago. As Chitty said in 1820, the Queen has an interest in all her subjects, who rightly look to the Crown —today, to the rule of law which is given in the Queen's name—for the security of their homeland within the Queen's dominions. But in this case they have been excluded from it. It has been done for high political reasons: good reasons, certainly, dictated by pressing considerations of military security. But they are not reasons which may reasonably be said to touch the peace, order and good government of BIOT.

Laws LJ (Sir John Grant McKenzie Laws), a British classical scholar who studied at Oxford and is an outspoken champion of the rule of law and human rights, compared the British government to that of ancient Rome:

> The apparatus of s. 4 of the Ordinance has no colour of lawful authority. It was Tacitus who said: They make it a desert and call it peace – *Solitudinem faciunt pacem appellant* (Agricola 30). He meant it as an irony, but here, it was an abject legal failure.

Gaius Cornelius Tacitus (56-177 AD), the most important first century AD Roman historian, wrote a book called *Agricola*, a biography of his father-in-law, the Roman general Agricola[26] who was the Roman governor of Britain and commander of the Roman army in Britain during the reign of Domitian (81-96 AD). In the book, these famous words are spoken by a man who Scottish nationalists today regard as hero, namely, Galgacus, a chieftain of the Caledonian Confederacy which fought Agricola's army in the Grampians in the highlands of north-eastern Scotland[27] circa 83-84 AD. Inciting more than 30,000 men to battle gainst the invaders, Galgacus said to them:

> To us who dwell on the uttermost confines of the earth and of freedom, this remote sanctuary of Britain's glory has up to this time been a defence. Now, however, the furthest limits of Britain are thrown open, and the unknown always passes for the marvellous. But there are no tribes beyond us, nothing indeed but waves and rocks, and the yet more terrible Romans, from whose oppression escape is vainly sought by obedience and submission. Robbers of the world, having by their universal plunder exhausted the land, they rifle the deep. If the enemy be rich, they are rapacious; if he be poor, they lust for dominion; neither the east nor the west has been able to satisfy them. Alone among men they covet with equal eagerness poverty and riches. To robbery, slaughter, plunder, they give the lying name of empire; they make a desert and call it peace.[28]

26 Gnaeus Julius Agricola (40-93 AD).
27 The Battle of Mons Graupius.
28 See the end of this paper for the full text of Agricola 30.

To Tacitus and his fellow Romans 'peace' meant not merely the absence of war as we understand it, but "the situation that existed when all opponents had been beaten down and lost the ability to resist."[29]

Immediately following the Bancoult decision the Secretary for Foreign and Commonwealth Affairs Robin Cook MP made a surprising announcement, giving the impression that it was the British government which had been "beaten down" by the Chagossians. He said:

> I have decided to accept the Court's ruling and the Government will not be appealing. The work we are doing on the feasibility of resettling the Ilois now takes on a new importance. We started the feasibility work a year ago and are now well underway with phase two of the study. Furthermore, we will put in place a new Immigration Ordinance which will allow the Ilois to return to the outer islands while observing our Treaty obligations. This Government has not defended what was done or said thirty years ago.

On the same day, the BIOT Commissioner revoked the 1971 Immigration Ordinance and made the *Immigration Ordinance 2000*. This more or less replicated the provisions of the 1971 Ordinance but contained a new section 4(3) which provided that the restrictions on entry or residence imposed by section 4(1) should (other than in relation to Diego Garcia) not apply to anyone who was a British Dependent Territories citizen by virtue of his connection with BIOT.

However, in 2004 the *British Indian Ocean Territory (Constitution) Order 2004* (the Constitution Order) was made by the Queen in Council, declaring that no person had the right of abode in BIOT nor the right to enter and remain there without authorisation. As it transpired later, the US government had made it quite clear to the UK government that, in its view, "an attempt to resettle any of the islands of the Chagos Archipelago would severely compromise Diego Garcia's unparalleled security and have a deleterious impact on [American] military operations." The US considered that the geographic location of the Chagos Archipelago, its isolation and uninhabited state made it unique among operating bases throughout the world. The military facilities on Diego Garcia had "exceptional security from armed attack, intelligence collection, surveillance and monitoring, and electronic jamming" and the US was determined to keep it that way. It warned that any decline in Diego Garcia's military utility from resettlement of any part of the Archipelago would have "serious consequences" for the "shared defence interests" of the United States and the United Kingdom.

Louis Bancoult brought another action, this time in the Divisional Court of the High Court of Justice.[30] He sought orders that the 2004 Constitution Order was *ultra vires* and unreasonable, and that the British government had violated legitimate expectation by making that Order after having given the impression that the Chagossians were free to go home. Bancoult claimed the Order to be unlawful on the basis that while Parliament could remove the rights of the Chagossians, the Queen by Order in Council could not do so.

29 Pax Romana in Wikipedia, available at http://en.wikipedia.org/wiki/Pax_Romana

30 *R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin).

Alternatively, if the Queen by Order in Council could remove these rights, then the purported exercise of the power was unlawful.

The UK Government argued that an Order in Council made for a British Overseas Territory is not justiciable and is immune from all judicial review by any court.

Hooper LJ said that

> if the defendant's argument is right, then an Order drafted by a Secretary of State in relation to a colony to which Order the Queen in Council has assented, enjoys the same sovereign immunity at least as that of Parliament. That might be thought by many to be extraordinary and indeed as long ago as 1774 Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp. 204 stated that, at common law, the powers of the Queen in Council to legislate for a colony were restricted.

He went on:

> Reliance was placed by the defendant on the fact that the claimant had not lived in Perhos Banhos since the age of three, with the implication (so it seemed to us) that there was therefore no substance in his complaints. If that is what the defendant was suggesting, then we reject it. In "Recalling Community in Cape Town" a book (not referred to in argument) which examines the clearance of District 6 in Cape Town under the apartheid regime, a member of an evicted family states:
>
> > "Some may say I was too young to remember, but now that I am older how could" I forget?"
>
> Likewise in the foreword to a book entitled "A Prisoner in the Garden" Nelson Mandela wrote:
>
> > "In the life of any individual, family, community or society, memory is of fundamental importance. It is the fabric of identity."

The judiciary again sided with Bancoult. Hooper LJ said that

> The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing so for the "peace, order and good government" of the Territory is, to us, repugnant.

But it was unnecessary for the court to base its decision on the POGG formula. It held that section 9 of the Order was irrational on public law grounds:

> In our view irrationality must be judged by reference to the interests of BIOT and we see no good public law reason why this court cannot assess irrationality in a case of this kind, provided that the well known limitations inherent in the exercise of *Wednesbury* principles are borne in mind. The interests of BIOT must be or must primarily be those whose right of abode and unrestricted right to enter and remain was being in effect removed.

The court quashed the *British Indian Ocean Territory (Constitution) Order 2004* and declared that section 5(1) of the Order section 5(1) of the *British Indian Ocean Territory (Immigration) Order 2004* could not lawfully be applied to a person who was (a) a British overseas territories citizen, or (b) the spouse or a dependent child of such a person, except in respect of his or her entry to or his or her remaining in Diego Garcia.

The UK Government unsuccessfully appealed to the Court of Appeal. It then appealed further to the Judicial Committee of the House of Lords which found in a majority decision of 3-2 that the Order was was valid and, although proceedings for judicial review could examine Orders in Council, the national security and foreign relations issues in the case prevented this. In addition, the Law Lords said that Robin Cook's statement had not been clear and unambiguous enough to provide legitimate expectation.

Bancoult's lawyers submitted that the powers of the Crown were limited to legislation for the "peace, order and good government" of BIOT. Applying the reasoning of the Divisional Court in the first Bancoult case, this meant that the law had to be for the benefit of the inhabitants, and this could not possibly be said of a law which excluded them from the Territory. Lord Hoffmann disagreed. He said that

> the prerogative power of the Crown to legislate for a ceded colony has never been limited by the requirement that the legislation should be for the peace, order and good government or otherwise for the benefit of the inhabitants of that colony. That is the traditional formula by which legislative powers are conferred upon the legislature of a colony or a former colony upon the attainment of independence. But Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom and will act in the interests of her undivided realm, including both the United Kingdom and the colony.[31]

He then quoted *Halsbury's Laws of England* in support and went on to say that

> 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. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians.

Lord Hoffmann then referred to the POGG clause:

> The words "peace, order and good government" have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality implied in the words "of the Territory", they have always been treated as apt to confer plenary law-making authority. For this proposition there is ample

31 *R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453.

> authority in the Privy Council (*R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900) and the High Court of Australia *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1). The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the Territory. So far as Bancoult (1) departs from this principle, I think that it was wrongly decided.

In *Kable v Director of Public Prosecutions (NSW)*[32] Dawson J said that

> no non-territorial restraints upon parliamentary supremacy arise from the nature of a power to make laws for peace, order (or welfare), and good government or from the notion that there are fundamental rights which must prevail against the will of the legislature. The doctrine of parliamentary supremacy is a doctrine as deeply rooted as any in the common law. It is of its essence that a court, once it has ascertained the true scope and effect of an Act of Parliament, should give unquestioned effect to it accordingly.[33]

In the *Union Steamship Case* the High Court said that the POGG formulation of legislative power

> is a plenary power and it was so recognised, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies. The plenary nature of the power was established in the series of historic Privy Council decisions at the close of the nineteenth century... They decided that colonial legislatures were not mere agents or delegates of the Imperial Parliament...
>
> The words "for the peace, order and good government" are not words of limitation.[34]

In one of those nineteenth century cases, *Hodge v The Queen*,[35] Sir Barnes Peacock said that by the *British North America Act 1867*, the legislature of Ontario enjoyed

> authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament.[36]

But the decision in *Hodge* was not based on the POGG clause. In fact, it was not relevant to the issue in the case which was about section 91 of the British North America Act.

Anyway, it seems odd to say that a legislature that gets its powers from a POGG clause has the same authority as the Imperial Parliament, since Britain does not have a written constitution. The Imperial Parliament gets its powers from the common law, and the common law is whatever the judges say it is.

32 (1996) 189 CLR 51.
33 Ibid. 76.
34 (1988) 166 CLR 1, 9.
35 (1883) LR 9 AC 117.
36 Ibid. 132.

In Victoria there is no mention of POGG. Section 16 of the *Constitution Act 1975* provides that:

> The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.

This statement of legislative power dates back to the Victorian *Constitution Act 1855*[37] which provided in section 1 that:

> There shall be established in Victoria, instead of the Legislative Council now subsisting, One Legislative Council and One Legislative Assembly, to be severally constituted in the Manner herein-after provided; and Her Majesty shall have Power, by and with the Advice and Consent of the said Council and Assembly, to make Laws in and for Victoria, in all Cases whatsoever.

Soon after the *Union Steamship Case* Ian Killey, a Melbourne lawyer, wrote an article entitled, *Peace, Order and Good Government: A Limitation on Legislative Competence*,[38] in which he argued that

> If 'peace, order (or welfare) and good government' is essential for a grant of power to be regarded as plenary, as the Victorian Constitution does not use that expression then Victoria has received a lesser grant of power than the other States. On the other hand, if all the States and the Commonwealth are regarded as possessing plenary powers, then the phrase 'peace, order (or welfare) and good government' must have some alternative operation, unless it is mere verbiage.[39]

Killey noted that the Victorian Constitution Act 1855 was drafted by a committee of 12 members of the Legislative Council, based on its report setting out the resolutions of the committee. Resolution 45 was "That the Parliament should be empowered to make laws for the good government of the colony of Victoria." The wording of section 1 was not debated in the British Parliament. Killey suggests that the wording "derived from a sense of colonial individualism," as the committee believed that it was not necessary "for local legislatures that uniformity of institutions should prevail," given the "great extent of Australia, and the widely different circumstances of its several colonies."[40]

In a book entitled *Colonial and Post-colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government*, published in January 2014, the distinguished Nigerian jurist Dr Hakeem Yusuf calls for a rethink of the subjective approach to the interpretation of the POGG formula, arguing that its origins "in an anachronistic feature of British constitutionalism marks it out as a constitutional element that ought to be critically interrogated in an age of human rights and democracy."

37 18 & 19 Victoria c. 55.
38 *Melbourne University Law Review* [Vol 17 June 1989] 24.
39 Ibid.42.
40 Ibid. 27-28.

"Good government" implies a value judgment and a meaning which is the opposite of 'bad.' One would think that Parliament cannot validly make a law for the "bad government" of the State. But who is to judge what is good or bad? Dr Yusuf quotes Sir Ivor Jennings (1903-1965):

> [I]n its classic formulation, it is considered that 'neither a judge nor any other person is entitled to say that any statute is invalid because it is conducive to disorder or bad government.'[41]

In another book Jennings prophetically wrote the following:

> The British Constitution provides no check against a Conservative Government which really intended to go 'authoritarian', because a Government which had majorities in both Houses could do what it pleased through its control of the absolute authority of Parliament. It is possible that the Queen might intervene and exercise some of her dormant legal powers. Subject to this, we always run the risk, because we have no written Constitution limiting the power of Parliament. Even a written Constitution, however, is but a slight check—as many dictators have shown—and the foundation of our democratic system rests not so much on laws as on the intention of the British people to resist by all the means in its power attacks upon the liberties which it has won.[42]

Dr Yusuf concludes *Colonial and Post-colonial Constitutionalism in the Commonwealth* by saying:

> As Laws LJ rightly considered in [*Bancoult No* 1], the POGG power may suggest 'a very large tapestry, but every tapestry has a border.' This view was approved by Lords Bingham and Mance in their dissents in *Bancoult No 2* (HL) and supported by many commentators, as the appropriate interpretation that should be placed on this ubiquitous clause in Commonwealth constitutions. However, the prevailing judicial view remains that the words confer plenary, unchecked powers of a Parliament even where that 'Parliament', as in the Chagos Islands experience, is of dubious legal configuration—colonial, dispossessing and unrepresentative. The judicial preference for this view steeped in colonialism and reinforced by the common law principle of precedent in Commonwealth jurisdictions has continued to defy the objective meaning of the words and sometimes the need to respect the principles of international human rights. In this event, POGG has assumed the status of a *Grundnorm* of sorts to legitimise not only colonialism but also its political progenies, namely authoritarianism and apartheid. As a result there is a strong argument to address the implications of the dominant interpretation of 'peace, order and good government' in an age of rights, self-determination and democracy to check abject failures of justice and the rule of law which have sometimes hallmarked the use of the power as exemplified by the experience of the Ilois.[43]

41 Ivor Jennings, *Constitutional Laws of the Commonwealth* (Oxford University Press, 1957) 49.
42 Ivor Jennings, *The British Constitution* (Cambridge University Press, 1962)
43 Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge, 2014) 241.

I note in ending this session that the decision in the second Bancoult case (October 2008) was one of the last to be made by the Appellate Committee of the House of Lords. By the *Constitutional Reform Act 2005* (UK) which came into operation on the 1st of October 2009, the judicial functions of the House of Lords (other than in relation to impeachment) were vested in the new Supreme Court of the United Kingdom.

FULL TEXT OF AGRICOLA §30

"Whenever I consider the origin of this war and the necessities of our position, I have a sure confidence that this day, and this union of yours, will be the beginning of freedom to the whole of Britain. To all of us slavery is a thing unknown; there are no lands beyond us, and even the sea is not safe, menaced as we are by a Roman fleet. And thus in war and battle, in which the brave find glory, even the coward will find safety. Former contests, in which, with varying fortune, the Romans were resisted, still left in us a last hope of succour, inasmuch as being the most renowned nation of Britain, dwelling in the very heart of the country, and out of sight of the shores of the conquered, we could keep even our eyes unpolluted by the contagion of slavery. To us who dwell on the uttermost confines of the earth and of freedom, this remote sanctuary of Britain's glory has up to this time been a defence. Now, however, the furthest limits of Britain are thrown open, and the unknown always passes for the marvellous. But there are no tribes beyond us, nothing indeed but waves and rocks, and the yet more terrible Romans, from whose oppression escape is vainly sought by obedience and submission. Robbers of the world, having by their universal plunder exhausted the land, they rifle the deep. If the enemy be rich, they are rapacious; if he be poor, they lust for dominion; neither the east nor the west has been able to satisfy them. Alone among men they covet with equal eagerness poverty and riches. To robbery, slaughter, plunder, they give the lying name of empire; they make a desert and call it peace."

* * *

(Latin original: "Quotiens causas belli et necessitatem nostram intueor, magnus mihi animus est hodiernum diem consensumque vestrum initium libertatis toti Britanniae fore: nam et universi co[i]stis et servitutis expertes, et nullae ultra terrae ac ne mare quidem securum inminente nobis classe Romana. Ita proelium atque arma, quae fortibus honesta, eadem etiam ignavis tutissima sunt. Priores pugnae, quibus adversus Romanos varia fortuna certatum est, spem ac subsidium in nostris manibus habebant, quia nobilissimi totius Britanniae eoque in ipsis penetralibus siti nec ulla servientium litora aspicientes, oculos quoque a contactu dominationis inviolatos habebamus. Nos terrarum ac libertatis extremos recessus ipse ac sinus famae in hunc diem defendit: nunc terminus Britanniae patet, atque omne ignotum pro magnifico est; sed nulla iam ultra gens, nihil nisi fluctus ac saxa, et infestiores Romani, quorum superbiam frustra per obsequium ac modestiam effugias. Raptores orbis, postquam cuncta vastantibus defuere terrae, mare scrutantur: si locuples hostis est, avari, si pauper, ambitiosi, quos non Oriens, non Occidens satiaverit: soli omnium opes atque inopiam pari adfectu concupiscunt. Auferre trucidare rapere falsis nominibus imperium, atque ubi solitudinem faciunt, pacem appellant.")

CASES AND LEGISLATION

Cases

Hodge v The Queen (1883) LR 9 AC 117

Ibralebbe and Another v The Queen [1964] AC 900

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51

R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067

R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs [2006] EWHC 1038 (Admin)

R (On the Application of Bancoult) v The Secretary of State for Foreign and Commonwealth Affairs [2009] AC 453

Sussex Peerage Case (1844) 11 Cl & F 85

Tasmania v Commonwealth (1904) 1 CLR 329

Union Steamship Company of Australia Pty Ltd v King (1988) 166 CLR 1

Legislation

Australia Act 1986 (Commonwealth)

Australia Act 1986 (United Kingdom)

Australia Acts (Request) Act 1985 (South Australia)

Australian Capital Territory (Self-Government) Act 1988 (Cth)

Australia Colonies Government Act 1850 (United Kingdom)

British North America Act 1867 (United Kingdom)

Commonwealth of Australia Constitution Act 1900 (United Kingdom)

Constitution Act 1902 (New South Wales)

Constitution Act 1867 (Queensland)

Constitution Act 1902 (Queensland)

Constitution Act 1856 (South Australia)

Constitution Act 1934 (South Australia)

Constitution Act 1934 (Tasmania)

Constitution Act 1855 (Victoria)

Constitution Act 1975 (Victoria)

Constitution Act 1889 (Western Australia)

Justices of the Peace Act 1489 (Henry VII)

Northern Territory (Self-Government) Act 1978 (Commonwealth)

Statute of Proclamations 1539 (Henry VIII)

BIBLIOGRAPHY

Articles

Killey, Ian D. 'Peace, Order and Good Government': A Limitation on Legislative Competence (1989) 17 *Melbourne University Law Review* 24

Books

Jennings, William Ivor. *The British Constitution* (Cambridge University Press, 1962)

Saul, John Ralston. *A Fair Country: Telling Truths About Canada* (Viking Canada, 2008)

Yusuf, Hakeem Olayinka. *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge, 2014)