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‘Though it shocks one very much’: Formalism and pragmatism in the *Zong* and *Bancoult*

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Abstract: In *Bancoult*, a majority of the House of Lords upheld the British Government’s use of the royal prerogative to expel the population of the Chagos Islands from their homeland. The majority acknowledged that the Government’s treatment of the Chagossians was disturbing, but held that the law left them with no choice but to hold the orders valid. In this article, I draw a parallel between this decision and the eighteenth century judicial response to the *Zong* affair – where over a hundred slaves were thrown off a ship to drown in the sea. Both decisions are cloaked in formalist rhetoric but, as I show through an examination of the law as it stood prior to each of the decisions, the actual legal reasoning in both decisions is so without basis as to be unsustainable on any formalist or legalist account. Rather, the decision in *Bancoult*, like the decision in the *Zong*, shows all the hallmarks of being a purely pragmatic one, prompted by broader concerns as to the practical impact of a contrary decision and the precedent it would set. The inherent limitations of this mode of judicial reasoning make its deployment in *Bancoult* particularly troubling.

Keywords: Constitutional law, royal prerogative, colonial law, legal history, judicial pragmatism

1 *Introduction: The Enslaved and the Colonised*

On 6 September 1781, a ship called the *Zong* set sail from the Guinea coast, carrying a cargo of 442 slaves for sale in the markets of Jamaica. By 27 November 1781, the ship was near her destination. What happened next is unclear. Instead of making land, they sailed on, passing Jamaica and continuing for nearly three hundred miles. The crew claimed to have mistaken Jamaica for Hispaniola, but not everyone believed this. What was not disputed, however, was that on 29 November, claiming that they were running out of water, the captain of the *Zong* ordered the crew to throw slaves overboard. Over a period of a little over a week, around 132 slaves were thrown overboard to drown in the sea. The ship reached Jamaica on 22 December with its remaining slaves.¹

The incident created an outcry in abolitionist circles in England, and it resulted in legal proceedings. But these were not criminal proceedings against the surviving crewmen, as the

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1 Andrew Lewis, ‘Martin Dockray and the *Zong*: a Tribute in the Form of a Chronology’ (2007) 28 *Journal of Legal History* 357.

abolitionists hoped. They were civil proceedings, brought in the Court of King's Bench by the shipowners against their insurers to recover under their policy for loss of their cargo – the slaves – at sea.

To the shock of many who attended, the case was heard and argued as a simple insurance case.² An initial trial found in favour of the shipowners.³ The insurers applied for a retrial.⁴ In the hearings for the retrial, counsel for the insurers argued that what had happened was a case of murder, for which the perpetrators should be tried at the Old Bailey.⁵ The judges of the King's Bench, presided over by Lord Mansfield, however, gave little sign of treating the case as being anything but a simple case of insurance law. Their final decision was to order a retrial solely to determine the issue of whether the tossing overboard of the slaves was 'necessary', as the term was understood in insurance law.⁶

A little under two hundred years later, in August 1971, a ship sailed to the island of Diego Garcia, the largest island in the Chagos Archipelago, to expel the last of its inhabitants from their homes. The United Kingdom had in the 1960s agreed to lease Diego Garcia, a British colonial possession, to the United States who wished to establish a naval base in the Indian Ocean. Diego Garcia and its surrounding islands were, unfortunately, not empty as the US Government wished. The British government therefore proceeded to remove the inhabitants of the archipelago – called the British Indian Ocean Territory (BIOT) – from their homes, initially by preventing their return from trips to Mauritius and – ultimately – compelling those who remained to leave.⁷ In 1971, an Immigration Ordinance made it illegal for any person – including the native islanders – to enter or remain in the BIOT.

Such an expulsion was contrary to resolutions of the United Nations. As documents in the National Archives demonstrate, the government of the day engaged in an elaborate scheme of lies and deception to hide its actions, involving the making of statements to Parliament and the United Nations that the government knew to be false.⁸ The expelled islanders, the 'Chagossians', to adopt their own demonym, were resettled in Mauritius and Seychelles where they lived in penury, having no livelihood and little means of finding one. A small amount of compensation was paid to them through the Mauritian government, but it was not sufficient to permit them to emerge from poverty.⁹

In 1998 Bancoult, one of the islanders, applied for judicial review of the Immigration

2 See e.g. the anonymous letter 'To the Printer of the Morning Chronicle' *Morning Chronicle and London Advertiser* (London, 18 March 1783)

3 No report of this trial has been found, the only known account being the letter referred to in the previous footnote

4 *Gregson v Gilbert* 3 Dougl 232, 99 ER 629. The hearings were attended by Granville Sharp, a leading abolitionist, who also engaged a shorthand writer to take notes of the case. A longhand transcript based on these notes, titled 'Minutes taken in Court', has been preserved in the National Maritime Museum, Greenwich, (NMM REC/19) together with some other papers by Sharp on the case. The discussion of the case in this article is largely based on this transcript, hereinafter cited as 'Sharp Transcript.'

5 Sharp Transcript (n 4) 22

6 *ibid* 89-90

7 A detailed account of the discussions between the governments of the US and the UK, together with reproductions of several documents, is contained in Peter Sand, *United States and Britain in Diego Garcia: The future of a controversial base* (Palgrave Macmillan 2009). See esp. pp 15-34 and the Appendices. See also David Vine, *Island of Shame: The Secret History of the U.S. Military Base on Diego Garcia* (Princeton University Press 2009) 92-94, 112-115.

8 *ibid* 79, 90-92.

9 *ibid* 126ff.

Ordinance. In 2000, the Divisional Court quashed the 1971 Ordinance.¹⁰ The Foreign Secretary – Robin Cook – indicated that the British Government would accept the ruling, and examine the feasibility of resettling the islands (with the exception of Diego Garcia).¹¹ The Chagossians then filed a suit for compensation, which was dismissed as an abuse of process and on the ground of limitation.¹² In 2004, however, citing the infeasibility of resettlement, the Government, under a new Foreign Secretary, issued two new Orders in Council¹³ whose effect was to restore full immigration control – in effect, putting the islanders back into their position under the Immigration Ordinance 1971. Bancoult once again applied for judicial review. The Divisional Court granted an order quashing the Orders in Council.¹⁴ This decision was upheld by the Court of Appeal,¹⁵ and the government appealed against that decision to the House of Lords.

In 2008, the House of Lords allowed the appeal (Lords Hoffmann, Rodger and Carswell in the majority, Lords Bingham and Mance dissenting), and dismissed the application for judicial review.¹⁶ Unlike inhabitants of the United Kingdom, their Lordships held, the inhabitants of a ceded colony were subject to the plenary legislative authority of the Crown.¹⁷ Neither the Human Rights Act, nor the common law right of subjects of the Crown to enter and remain in the United Kingdom, prevented the Crown from taking away away the Chagossians’ right of abode, or any other right it chose, through an Order in Council without requiring the consent of Parliament.¹⁸ The Orders did not therefore violate any constitutional principle. In English law, the actions of the Government were perfectly legal and justified.

The two cases just discussed are strikingly similar at a number of levels. In both cases the perpetrators of the impugned acts denied that they owed duties to the victims as individuals. The shipowners in the *Zong* argued that the victims, as slaves, did not have a right to water or even life, as the other occupants of the ship did – they could, if their owners chose, be denied both.¹⁹ Similarly, the British Government in *Bancoult* argued that the Chagossians, as a colonised people, did not have a right to abode or to reside in their homeland, as Englishmen did. They could, if the British Government chose, be exiled permanently by executive fiat.²⁰ Accepting these arguments essentially meant accepting an interpretation of the law which assigned an artificially created status to a group of persons, and defined the legal consequences of that status in a way that deprived them of fairly basic rights which most other persons enjoyed.

The courts in both cases clearly understood this, and understood the moral implications of condoning this state of affairs. Nonetheless, in both cases they chose to uphold the existing

10 *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067.

11 J Rozenberg ‘Banished islanders win right to go home’ *Daily Telegraph* (London, 4 November 2000)

12 *Chagos Islanders v A-G* [2003] EWHC 2222 (QB).

13 The Constitution Order 2004, and the Immigration Order 2004

14 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin), [2006] A.C.D. 81

15 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] Q.B. 365 (hereafter referred to as ‘*Bancoult (CA)*’)

16 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 A.C. 453 (hereafter referred to as ‘*Bancoult (HL)*’)

17 *ibid* [31]-[32], [81]

18 *ibid* [45], [102]

19 Sharp Transcript (n 4), 44-51.

20 See the summary of arguments in the Law Reports: [2009] 1 AC 453, 460-462.

order of things. They justified this by invoking formalism – the principle of ‘decision according to rule’, where the duty of a judge is to decide cases purely according to rules of law, unswayed by any other considerations no matter how compelling they may seem.²¹ And the law, they argued, left them with no choice but to uphold the existing order of things, however distasteful the result might seem to them. ‘Though it shocks one very much’, Lord Mansfield said in the *Zong*, in law it made no difference whether the cargo thrown overboard was a cargo of slaves or horses.²² In *Bancoult*, too, the judges refer to the ‘callous disregard’,²³ ‘brutal realities of global politics’,²⁴ ‘unhappy – indeed, in many respects, disgraceful – events’,²⁵ but ultimately say the law is clear. To quote Lord Carswell:

For the reasons which I have given I would allow the appeal and make the order proposed by Lord Hoffmann. I do not do so through any lack of sympathy with the Chagossians. They were undoubtedly treated very shabbily when they were removed from the Islands. They were paid some compensation, but very tardily, while they suffered considerable privations after their removal. No one could fail to feel distressed about their plight at that time. It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to a party who has been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially – in the words of the Book of Common Prayer, truly and indifferently minister justice. It is that imperative which has taken me to the conclusion which I have reached.²⁶

The purpose of this article is to demonstrate that this rhetoric of faithful, formalist, adherence to the law is profoundly deceptive. In reality, existing authority did not constrain the courts to decide as they did. To the contrary, as I show in this article (section 2), what authority there existed on the point at issue in both cases should have led the courts to the opposite conclusion from the one they actually reached. And, indeed, in both cases the manner in which the courts applied the rules they claimed to be applying is so fundamentally and obviously flawed that the decisions are hard to explain on any formalist account. The consequence, I argue (section 3) is that the decisions in both cases can only be understood if we look beyond the formalist language in which the courts clothed them, and instead view them as pragmatic responses to the fundamental legal questions raised by the cases before them.²⁷ Rather than the reluctant fidelity to principles derived from precedent that the language of the decisions suggests them to be, the cases represented a more outcome-focused type of judicial decision-making, specifically, one where the judges were consciously or unconsciously influenced in their decision by the impact they believed the opposite

21 The term ‘formalism’, as a descriptor for an approach to answering legal questions, was first coined by the American realists as a term of opprobrium, and it continues to be used in that sense – ‘blind’ formalism – by a section of modern writers. As I use the term in this article – which I define more fully in section 2 – it is not intended to have those negative connotations..

22 Sharp Transcript (n 4) 2-3

23 *Bancoult* (HL) (n 16) [10]

24 *ibid* [15]-[16]

25 *ibid* [75]

26 *ibid* [136]

27 As I discuss in more detail in Section 3, the term ‘pragmatism’ typically refers to a type of judicial decision-making that is far more outcome-focused than formalism, where judges in deciding cases are influenced by their views as to the desirability or undesirability of the specific consequences that would flow from a decision either way (although pragmatists, like formalists, accept that the range of consequences that can legitimately be taken into account is not unbounded).

conclusion would have had on related areas of law. The hindsight of two centuries gives us a much better ability to understand the factors that weighed upon Lord Mansfield in the *Zong* and that led him to decide the case as he did, than we have in relation to *Bancoult*. But the parallels between the cases run deep, and analysing them side by side sheds much light on the specific factors that influenced the majority of the House of Lords to come to the conclusion they did.

Yet there is more to the decision in the *Zong* than meets the eye. As I show in the final section of this paper (section 4), Lord Mansfield attempted to mitigate the impact of the legal position his judgment created in a way the majority in *Bancoult* did not. The result, I argue is that the cavalier pragmatism that the majority chose to espouse represents a particularly troubling form of pragmatism – one that is unmitigated by any attempt to achieve pragmatic justice.

2 Legal Formalism and Legal Error

The essence of formalism as an actual mode of legal reasoning is, as contemporary theorists have shown, that it is focused on legal rules and, in particular, with the language in which legal rules are framed and the rationality that is immanent in them. These are seen as directing the attention of the decision-maker to a selected set of factors, whilst simultaneously screening him off from other factors which ‘a sensitive decision-maker would otherwise take into account.’²⁸

The speeches of Lord Mansfield in the *Zong* and the majority in *Bancoult* clearly suggest that this is the form of reasoning they were following. But this claim to formalist reasoning is problematic for a variety of reasons. In formalist terms, both the *Zong* and *Bancoult* were, literally, unprecedented – there were no cases that were even remotely analogous on their facts. In the *Zong*, counsel appearing for the insurers responded to Lord Mansfield’s statement that the case of slaves throw overboard was ‘just like horses’ by challenging the shipowners to produce a single precedent where money had been paid for loss of slaves under an insurance policy – the only such cases, they argued, were where ships had been lost or captured in enemy action.²⁹ Counsel for the shipowners did not respond. This lack of compulsion by precedent was also true of *Bancoult*. As other writers have pointed out, never before had any British government claimed so high a power of dominion over a colonised people, nor was there any authority to say that such a power existed.³⁰

But the lack of precedent is not the main reason the supposed formalism in these cases is problematic. The key argument I make in this section is that in relation to both cases, their reading of the relevant legal rules, and the meaning they assigned the terms in which those rules were framed departed so radically from that contained in established authority that it is hard to explain the decisions in formalist terms.

²⁸ Frederick Schauer, ‘Formalism’ (1988) 97 Yale LJ 509, 510. See also Ernst J Weinrib, ‘Legal formalism’ in D. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing 1999) 332 - 342.

²⁹ Sharp Transcript (n 4) 20-21

³⁰ Richard Moules, ‘Judicial review of prerogative Orders in Council’ (2009) 68 CLJ 14.

A The Law of Slavery in the *Zong*

The ultimate basis of the shipowners' argument in the *Zong* was that slaves were chattel, and that the case should therefore be treated as one of goods. There was no question of murder or any other offence having been committed. The case was succinctly put in argument by John Lee, then solicitor general, appearing for the shipowners:

Your Lordship will observe this is a case of chattels or goods. It is really so, it is the case of throwing over goods for to this purpose and the purpose of the insurance they are goods and property, and whether right or wrong we have nothing to do with it... If any man of them was allowed to be tried at the Old Bailey for a Murther... if that charge of Murther was attempted to be sustained... it would be folly and rashness to a degree of madness. There is not the least imputation of... impropriety, not in the least...³¹

As such, what had happened in this case was no different from a case of goods being thrown overboard under necessity to preserve the ship, and the policyholders were clearly entitled to recover in accordance with ordinary principles of insurance law, and applying the same ordinary test of necessity that was applicable to jettisoning any goods:

When a person insures slaves as property which he assumes they are [and] they are thrown overboard from necessity as any other irrational Cargo or inanimate Cargo might be, whether he is entitled to recover the Value, there seems to be no doubt about it.³²

In law, he emphasised, slaves were goods, and arguments that they should not be treated as goods amounted to arguments that the law was bad. This, he said, was not a question for the courts.

All the arguments come to this: all our Law is foolish, arbitrary and tyrannical which makes Human Creatures the subject of Property. What has your Lordship to do with it? Nothing.³³

The records of the hearing and the decision indicate that Lord Mansfield did not disagree with this summary of law: it was commercial practice in insurance contracts, he observed more than once, to treat slaves exactly like horses.³⁴ His final decision was to remit the case to a fresh trial to determine whether on the facts of the case the shortage of water actually made throwing the slaves overboard necessary, and if the captain's negligence affected the insurer's liability in terms of the causation of the loss.³⁵ In other words, he treated this as being in legal terms an ordinary case for the recovery on an insurance policy for the loss of goods at sea, as the Solicitor-General urged him to do.³⁶

Yet there was a basic problem with this argument. On a purely formalist reading of the

31 Sharp Transcript (n 4) 47-51

32 ibid 57-58

33 ibid 58

34 ibid 2-3, 20-21

35 ibid 89-90

36 Michael Lobban, 'Slavery, Insurance and the Law' (2007) 28 Journal of Legal History 319.

law, the *Zong* was not a simple insurance case, the legal position of slaves being transported by ship was not the same as horses, and slaves could not be thrown overboard from necessity 'as any other irrational Cargo or inanimate Cargo.' Rather, Lord Mansfield's decision to decide the case as if it was so was a deliberate choice, and one which ran counter to basic principles of the common law as it was then understood by many jurists, including Lord Mansfield himself in *Somerset's case*,³⁷, where he had held that in English law slaves were not chattel or goods.

Somerset was a slave who had been brought back to England from the American colonies by his master. He escaped in 1771, but was recaptured, and his furious master put him on board a ship bound for Jamaica, intending to punish him by selling him into the life of a plantation slave. At the instigation of Granville Sharp, his godparents brought a writ for habeas corpus before the Court of King's Bench.³⁸ Lord Mansfield allowed the writ and held Somerset's detention to be illegal.

Lord Mansfield's rhetoric in that decision was high – so high that it was long thought to have outlawed slavery – but his actual holding in law was narrow.³⁹ There were, prior to *Somerset's case*, broadly speaking two schools of juristic opinion on the question of the status of slaves in England. The first, represented by early 18th century cases such as *Smith v Gould*,⁴⁰ held that slaves were not chattel in English law - slavery, rather, placed the slave in a status similar to villeinage. *Smith v Gould* was an action in trover to recover a slave, which was denied by the Court of King's Bench on the basis that trover lay for chattels, but men could not be the subject of property and as such the power of their masters over them was far more limited than in the case of chattel.⁴¹ The second opinion, associated specifically with Lord Hardwicke, held that slaves were chattel, and that masters had all the powers over them associated with the holding of chattel.⁴²

Both opinions thus recognised the validity of slavery as an institution, but differed substantially on the question of the power a master had over his slave. *Somerset's case* brought the difference between these views sharply into focus. If Lord Mansfield were to have upheld the latter view, Somerset's master could have sent Somerset wherever he pleased and the writ would have had to be denied. By granting the writ and holding the detention to be illegal, he upheld the former view of slavery, and rejected the suggestion that slaves were chattel.

In essence, Lord Mansfield held that English law did not recognise chattel slavery and as a result would not, in the absence of positive law, recognise the master as having a power to force his slave to leave the country. He did not outlaw slavery itself;⁴³ and in later cases he compared the status of a slave in England to that of a villein in gross under feudalism much as *Smith v Gould* had done.⁴⁴ Nonetheless, the rule in *Somerset's case* – and in particular Lord

³⁷ *Somerset v Stewart* Lofft 1, 98 ER 499

³⁸ Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* (Da Capo Press 2005) 1-11, 114.

³⁹ Ruth Paley, 'After Somerset: Mansfield, slavery and the law in England, 1772-1830' in Norma Landau (ed) *Law, Crime and English Society: 1660-1840* (Cambridge University Press 2002).
2 Ld. Raym. 1274, 92 ER 338; 2 Salkend 666, 91 ER 567.

⁴⁰ James Oldham, 'New light on Mansfield and slavery' (1988) 27 *Journal of British Studies* 45, 48-49.

⁴¹ *ibid*

⁴² Ruth Paley, 'Imperial Politics and English Law: The Many Contexts of Somerset' (2006) 24 *Law and History Review* 659.

⁴³ James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press, 2004)

Mansfield's statement that the power Somerset's master claimed would not be recognised in the absence of positive law – ought to have had profound implications for the *Zong*.

Lord Mansfield's reference to positive law went to the heart of his theory of the common law and its relationship with statute. As Lieberman shows, Lord Mansfield consistently held the essence of the common law to be 'reason' and 'principle'.⁴⁵ A rule that was not sanctioned by reason could only be sustained by 'positive law' – that is to say, by statute – or by 'immemorial usage', which in Lord Mansfield's view usually represented the continuance of a principle of positive law after the circumstance that induced its introduction had been lost.⁴⁶ And slavery was authorised by none of these. 'Slavery,' Lord Mansfield held, 'is of such a nature as not to be introduced by inference from principles either natural or political.'⁴⁷ It was 'so odious that it must be construed strictly', to the extent that English law would not recognise the power to compel a slave to leave England unless it was contained in positive law.⁴⁸

Nor was *Somerset's case* an isolated instance of the application of this principle. A few years before *Somerset*, Lord Mansfield brought very similar reasoning to bear in *Evans v Harrison*, also known as the *Cause between the City of London and the Dissenters*.⁴⁹ Dissenters were, by statute, barred from several offices, including that of sheriff of the City of London. The City of London developed a practice of electing Dissenters to the office of sheriff, and imposing a large fine on them for not taking up the office. Harrison was one such Dissenter, and he refused to pay. The case came before the House of Lords, where Lord Mansfield delivered a speech supporting a ruling against the practice of the City of London. Echoing the language he would use in *Somerset*, he declared that the common law of England was 'only common reason or usage'⁵⁰, and that 'persecution for a sincere, though erroneous conscience, is not to be deduced from reason or the fitness of things; it can only stand upon positive law.'⁵¹

All this should have had very clear implications for the *Zong*. The core principle represented by *Somerset's case* and *Evans v Harrison* was clearly applicable – that rules of common law must be sanctioned by immemorial usage or principles deducible from reason, that slavery was so 'odious' that it fit neither, and that as a result it must be authorised by positive law and construed strictly. In *Somerset's case*, the power to compel a slave to leave England could not, as a result, be recognised unless authorised by positive law. If that applied to power to expel from a country, what of the power to put to death, by far a higher dominion, and one expressly rejected in *Smith v Gould*?⁵² Surely that, too, by necessary implication had

318-9 fn 65.

45 David Lieberman, *The Province of Legislation Determined* (Cambridge University Press, 1989) 124-128.

46 *ibid*

47 Lord Mansfield's precise words are reported differently in different reports. Here, I have followed the manuscript report of Serjeant Hill which, for the reasons identified by Oldham, is likely to be the most accurate account of what Lord Mansfield actually said. Oldham, 'New Light on Mansfield and Slavery' (n 40) 55-9

48 George Van Cleve, 'Somerset's Case and its antecedents in imperial perspective' (2006) 24 *Law and History Review* 601 at 633-42.

49 The text of Lord Mansfield's speech is printed in Philip Furneaux, *Letters to the Honourable Mr. Justice Blackstone concerning his Exposition of the Act of Toleration and Some Positions relative to Religious Liberty in his celebrated Commentaries on the Laws of England*, 2nd edition (Robert Bell 1771) 149-167.

50 *ibid* 152.

51 *ibid* 145.

52 2 *Ld. Raym.* 1274, 92 *ER* 338; 2 *Salkend* 666, 91 *ER* 567.

to be authorised by positive law? If slaves were not chattel, as *Somerset's case* had held they were not, and if the power of a master over his slave had to come from positive law and be construed strictly, then it is a necessary consequence that a slaveowner should not have been to claim over his slaves the power of life and death he had over his horses, unless positive law gave it to him.

Lord Mansfield's failure to discuss these questions is made even more puzzling by the fact that they were actually raised in argument. *Somerset's case* was not cited in arguments in the *Zong*, and given the manner in which precedent was used in the seventeenth century, this should not surprise us. Nonetheless, the principles we have just seen – that the master of a slave lacked the power to throw a slave overboard, and that the correct parallels to be drawn were not with horses, but with the way in which other humans were treated, including the sailors on the *Zong* – were raised time and again by counsel in the *Zong*. Heywood, appearing for the insurers, expressly raised the issue that the power to throw slaves overboard as if they were cargo contradicted natural principles, echoing Lord Mansfield's words in *Somerset* and *Harrison*. Heywood did not deny that in certain cases throwing overboard some to save others might be justified in law. But the starting point could not be the level of necessity necessary to justify the tossing overboard of goods. The correct analogy was a case of 'a ship that is wrecked where two get upon the same plank.' Here, the 'Laws of Humanity or Nature' would say that if one of them 'feels the Plank sinking and he is stronger than the other there is no man living but would think himself perfectly justified in throwing off the other.'⁵³ But absent such a high level of necessity, throwing slaves overboard could never be justified. The acts done by the crew of the *Zong* meant that the 'Honor of Humanity and mankind in general' were at issue, and that he and his fellow counsel appeared as 'Counsel for Millions of Mankind and the Cause of Humanity in general.'⁵⁴

Pigot, also appearing for the insurers, similarly declared that the mariners 'ought to be tried for Murther in another place,'⁵⁵ and argued that the slaves had the right to a certain minimum standard of treatment - as human beings, he said, they were as entitled to a share of the water as the mariners:

The life of one Man is like the life of another Man whatever the Complexion is, whatever this colour. If there was a scarcity he would be entitled to that which remains and to a fair Chance for his life... I do contend before your Lordship that to their share of that Thimble full if it was no more those Men were as much entitled and have as good a Right as that Captain that did it or that Governor that advised it or any Man whatsoever.⁵⁶

These arguments echoed those advanced – with success – in *Somerset's case*. Nor were they out of tune with common sentiments at the time. The fate of the slaves became a rallying cause of the abolitionist movement,⁵⁷ and members of the public who witnessed the trial were appalled by the result. Shortly after the conclusion of the first trial, an anonymous letter, apparently written by an individual who had attended the trial, appeared in the *Morning*

53 Sharp Transcript (n 4) 32

54 *ibid* 30

55 *ibid* 22

56 *ibid* 28-29

57 Anita Rupprecht, 'A Very Uncommon Case': Representations of the *Zong* and the British Campaign to Abolish the Slave Trade' (2007) 28 *Journal of Legal History* 329.

Chronicle. After describing the trial, the author of the letter continued:

I waited with some impatience, expecting that the Jury, by their foreman, would have applied to the Court for information how to bring the perpetrator of such a horrid deed to justice... It is hardly possible for a state to thrive, where the perpetrator of such complicated guilt, as the present, is not only suffered to go unpunished, but is allowed to glory in the infamy, and carries off the reward of it.⁵⁸

This, indeed, was the necessary implication of the principle that formed the basis of the ruling in *Somerset's case*. It could no longer be unquestioningly accepted in any case that slaves were chattel, or that the master had untrammelled power over the slave. The common law did not automatically treat slaves as being chattel, but as human beings possessed of rights that were, as Hulsebosch puts it, 'not qualified by race, birthplace or subjectship.'⁵⁹ Their status made them subject to the powers of their master, but these powers were to be strictly construed and must come from positive law. In every case, there must therefore necessarily be an enquiry into the question of whether the act of dominion was sanctioned by positive law in the place where it was sought to be exercised. And, given that in this case positive law did not permit masters to treat their slaves like cargo, or 'just like horses', the result should have been clear. But to these arguments, Lord Mansfield made no reply and he made no such enquiry.

On the face of it, Mansfield's intransigence calls for an explanation. Why did he avoid being drawn into these broader issues? Why did he persist in defining the issues in the case narrowly, in dealing with the case under normal principles of insurance law, as if it were the same as with horses, when it was manifestly not so under English law? Why did he depart from the principles as to common law, reason and positive law that he had so consistently applied up until the *Zong*? I return to this question in the next section. For now, I turn to the parallels with the decision in *Bancoult*, which, as I show, is as difficult to explain in formalist terms as the *Zong*.

B Colonial Law and the Constitution in *Bancoult*

The Chagossians offered two sets of reasons why the Orders-in-Council exiling them were invalid. Of these, the one that has attracted most academic attention in the literature on *Bancoult*, and the one which at least some of the majority in the House of Lords seem to have regarded as being the 'main point' at issue,⁶⁰ was the challenge they brought on standard public law principles – specifically, their argument that the Orders were irrational and an abuse of power, and that they breached the legitimate expectations created by the Government's statement in 2000 that it would accept the ruling of the Divisional Court.⁶¹

58 'To the Printer of the Morning Chronicle' *Morning Chronicle and London Advertiser* (London, 18 March 1783)

59 Daniel Hulsebosch, 'Nothing but Liberty: Somerset's Case and the British Empire' (2006) 24 *Law and History Review* 647 at 656-7.

60 *Bancoult* (HL) (n 16) [52] (Lord Hoffmann)

61 See e.g. Mark Elliott and Amanda Perreau-Saussine, and Margit Cohn, in recent pieces. Mark Elliott and Amanda Perreau-Saussine, 'Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power' [2009] PL 697; Margit Cohn, 'Judicial review of non-statutory executive orders after Bancoult: A unified anxious model' [2009] PL 260; Thomas Poole, 'The royal prerogative' [2010] *International Journal of Constitutional Law* 146; Thomas Poole, 'Judicial review at

But there was another, and constitutionally far more significant, ground on which the Chagossians challenged the Orders-in-Council. The Chagos Islands were acquired by Britain from France through conquest. Unlike colonies that had been settled by emigrants from England, colonies that had been acquired through conquest or cession were ruled entirely through the royal prerogative - laws made for them were seldom taken through Parliament and the arrangements for their governance were not usually formulated or ratified by Parliament. There were exceptions - the grant of independence, for example, usually took the form of an act of Parliament because the sovereign was not thought to have prerogative powers to give up territory - but these were few. Accordingly, the decisions to exile the Chagossians had all been made purely by executive fiat, without Parliamentary consent, as had the constitution of the BIOT and the arrangements for its government.

The Chagossians challenged the ability of the executive to so act without Parliamentary consent. The power of the Executive to legislate for colonies by prerogative, they argued, though vast was not unlimited. There were certain laws that, of their nature, lay beyond the scope of what the executive could do by prerogative: they could only be made by Parliament, and a law exiling a population from its homeland was one of these.⁶² Unlike the challenge on standard public law principles, this ground of challenge was not novel: it was based upon an ancient and well-established jurisdiction. The courts of England had, since at least the time of Lord Coke, asserted the jurisdiction to determine the precise extent of the Crown's prerogative and, thus, to review an exercise of the prerogative to determine whether the power in question actually existed,⁶³ both in relation to England and the colonies.

As in the *Zong*, however, there were no direct precedents on the point of whether the prerogative power of the Crown was broad enough to permit it to dispossess an entire population of its homeland, without seeking or obtaining the consent of Parliament. Never before in recorded history, not even in the darkest moments of colonial rule, had a British government sought to exile a population from its native land, or claimed that it had the power to do so. The question, therefore, had to be answered with reference to general constitutional principles. The main authority was *Campbell v Hall*,⁶⁴ an 18th century decision of (coincidentally) Lord Mansfield. This case had held that in relation to conquered or ceded colonies, and such colonies alone, the Crown could exercise plenary legislative power by royal prerogative, but even so, the prerogative did not extend to letting the Crown make laws which were contrary to fundamental principles.⁶⁵ The question in *Bancoult* was whether the order expelling the Chagossians fell afoul of this limitation on its prerogative powers.

the margins: Law, power, and prerogative' (2010) 60 University of Toronto LJ 81. The argument that the Orders-in-Council were challengeable on standard public law principles was in itself an interesting one, as it involved an expansion of what had traditionally seen to be the limits of the courts' jurisdiction over the prerogative. Until *Bancoult*, judicial review of the exercise of prerogative powers had been subject to a peculiar duality, under which an exercise of the prerogative power could be reviewed with respect to the existence and extent of the power, but not on ordinary principles of judicial review – in other words, whilst courts could determine whether a prerogative power existed, they could not review the manner of its exercise. Although the House of Lords in *In re the Council of the Civil Service Unions* [1985] AC 374 came close to abolishing this distinction, they stopped short of actually doing so. In *Bancoult*, they took this step, although the majority went on to hold that the Orders-in-Council were not irrational, nor did they breach legitimate expectation.

⁶² See the reporter's summary at [2009] 1 AC 453, 466-470

⁶³ *Case of Proclamations*, (1611) 12 Co Rep 74. There is an overview of the historical background in Poole, 'The royal prerogative' (n 61).

⁶⁴ 1 Cowp. 204, 98 ER 1045; Lofft 655, 98 ER 848

⁶⁵ Lofft 655, 741-2; 98 ER 848 (896)

Sedley LJ in the Court of Appeal had answered this question in the affirmative,⁶⁶ as did Lords Bingham⁶⁷ and Mance⁶⁸ in their dissents, each holding that clear authority negated the existence of so broad and so grave a prerogative power. The answer of the majority of the House of Lords, however, was that it did not. There were two different – and mutually incompatible – lines of reasoning that supported the majority decision. The first is contained in the decisions of Lords Rodger and Carswell, and the second in the decision of Lord Hoffmann.

The decision of Lords Rodger and Carswell was based on an application of doctrines of colonial law. Lord Rodger held that, *prima facie*, there did indeed appear to be a fundamental principle of common law recognizing the right to abode.⁶⁹ However, he held (and Lord Carswell agreed), the rule in *Campbell v Hall* had in effect been abolished by the Colonial Laws Validity Act 1865. Section III of this Act provided that no laws passed by a colonial legislature, or by the Crown in Council where a colonial legislature existed, would be ‘void or inoperative’ on the ground of ‘repugnancy to the law of England’, unless they were repugnant to the provisions an Act of Parliament that ‘by express words or necessary intendment’ was applicable to the colony in question, or to orders or regulations made under such an act. This, their Lordships held, meant that an Order in Council could no longer be reviewed on the ground that it violated fundamental principles of common law.⁷⁰ Lord Hoffmann, in contrast, held that the Colonial Laws Validity Act did not apply to review by an English court, but then went on to hold that the action failed because there was no fundamental principle of law regarding the right to abode.⁷¹ As I show in this section, each of these arguments represents a striking departure from the law as it stood prior to *Bancoult*.

I start with the decision of Lords Rodger and Carswell. Setting aside the normative question of whether a contemporary case should be decided with reference to 18th century principles of governance, the argument of Lords Rodger and Carswell was profoundly flawed even on the 18th century principles it claimed to apply, because the specific issue with which the Colonial Laws Validity Act dealt – ‘repugnancy to the laws of England’⁷² – had nothing whatsoever to do with the doctrine of fundamental principles set out in *Campbell v Hall* because it dealt with a fundamentally different relationship. And, as in the *Zong* this ought to have been obvious to the Court because, with the exception of one comment in a Privy Council decision made in a very different context, every other source relied upon by their Lordships as being ostensibly in support of their decision made it unambiguously clear that *Campbell v Hall* and the Colonial Laws Validity Act were not connected, and that the Act did not apply to powers of the type exercised in *Bancoult*. This point was, for example, very clearly made in the key authority relied upon by Lords Rodger and Carswell for their analysis of the Colonial Laws Validity Act, a treatise by Swinfen, which states unambiguously that the ground of repugnancy with which the Act dealt only applied when *Campbell v Hall* did not.⁷³ To understand this point, and to see just how flawed the reasoning of Lords Rodger and

⁶⁶ *Bancoult (CA)* (n 15) [64]-[65] (Sedley LJ).

⁶⁷ *Bancoult (HL)* (n 16) [69] – [71] (Lord Bingham)

⁶⁸ *ibid* [159] – [161] (Lord Mance)

⁶⁹ *Bancoult (HL)* (n 16) [89] (Lord Rodger)

⁷⁰ *ibid* [102] (Lord Rodger), [126] (Lord Carswell)

⁷¹ *ibid* [45]

⁷² See Colonial Laws Validity Act, 28 & 29 Vict., c. 63, ss 2-3.

⁷³ D. B. Swinfen, *Imperial Control of Colonial Legislation 1813-1865: A Study of British Policy towards Colonial Legislative Powers* (Clarendon Press 1970) 53-5.

Carswell was, it is necessary briefly to discuss the ground of 'repugnancy to the law of England' which the Colonial Laws Validity Act restricts.

(i) Repugnancy in colonial law

The ground of repugnancy arose out of the idea that Parliament at Westminster, as an Imperial Parliament, had ultimate sovereignty over the colonies. Any persons or bodies given the power to make laws for the colonies were subject to Parliament's overriding sovereignty. They were Parliament's inferiors, and could not therefore make laws that were repugnant to those made by Parliament. If they did, such laws were void.⁷⁴

The records of the Colonial Office, whose Law Officers were charged with the duty of scrutinising colonial legislation prior to the grant of Royal Assent, show that the scope of this doctrine - and its very existence - had always been controversial. In the course of an exchange in 1858, Sir Herman Merivale pointed out that neither its existence nor its scope had ever been confirmed by any court in Britain. It was, he said, entirely a creation of lawyers.⁷⁵ And to many lawyers, the existence of the principle did indeed seem both obvious and a necessary consequence of the British constitution. As constitutional lawyers of the 18th and 19th centuries understood it, where the Crown had agreed to create a legislature in a colony, the Crown-in-colonial-legislature exercised a kind of sovereign authority in that territory, akin to the authority of the Crown-in-Parliament in relation to England, but subject to the overall sovereignty of the Imperial Parliament. The colonial legislature could not make laws that were repugnant to laws made by Parliament for that colony, because it was subordinate to Parliament.⁷⁶ This frequently found expression in instruments or charters creating colonial legislatures, which restrained them from making laws repugnant to the laws of England. Lawyers took such provisions to be expressions of a broader constitutional principle, and not just specific statutory restrictions.⁷⁷

This much was uncontroversial. But the question did not end there. It was also a constitutional principle that, subject to some qualifications, English settlers carried with them the common law of England as part of their birthright as Englishmen. Did the principle of repugnancy apply to these laws, what may be called the 'general law of England'? After all, it, too, either had been made by Parliament (in the case of statutes) or had the tacit approval of Parliament (in the case of the common law). Did the colonial legislative authorities - the King-in-colonial-legislature and the King-in-council exercising the power of the local sovereign - have the power to make laws that were repugnant to those laws which were not made specifically by Parliament for that colony, but carried there by English settlers? It was evident - and never really disputed - that a colonial legislature had some authority to amend some of these laws, but the question was how far its authority went. This was the question that was at the heart of the controversy over the doctrine of repugnancy, and with which the Colonial Laws Validity Act dealt.

The Colonial Office had long taken a relatively narrow view of the ground of repugnancy. Sir James Stephen, during his time as Law Officer at the Colonial Office, raised the ground of repugnancy on more than one occasion, but does not appear to have ever

⁷⁴ *ibid* 53.

⁷⁵ CO 323/87, Merivale to Carnarvon, 376v-379f

⁷⁶ See e.g. CO 323/87, Rogers to Merivale to Carnarvon, 368v-370f

⁷⁷ Swinfen (n 73) 53.

rejected a colonial law solely on that ground. He eventually came around to the view, which he expressed in the course of reviewing a law made in relation to Van Dieman's Land, that the phrase 'repugnant to the law of England' only referred to Acts of Parliament made for that colony.⁷⁸

A more significant discussion of the ground of repugnancy took place in the Colonial Office in 1858, in the course of considering whether Royal assent should be granted to the South Australia Marriage Act, which sought to allow widowers to marry their deceased wife's sister. Sir Frederic Rogers in his report on the law argued that it was repugnant to fundamental principles of English law and as such probably void, but agreed that this was a controversial ground and that it was better dealt with by withholding Royal assent.⁷⁹ More senior administrators had an even less favourable view of the ground of repugnancy. Merivale's notes to Sir Frederic's report, cited above, suggest that he disagreed strongly. The repugnancy doctrine, he said, was a creation of lawyers' minds. No court had ever held that the ground of repugnancy extended to preventing legislation contrary to uncodified fundamental principles of English law, and such purported repugnancy should not be a ground on which assent was refused.⁸⁰

The response of Lord Stanley, the then Secretary of State for the Colonies, to the views of Rogers and Merivale explains why the Colonial Office took such a narrow view. He was, he said, of the view that the Act should be assented to, on the 'general ground of colonial independence' and 'colonial freedom to legislate on such matters independently of England.'⁸¹ And in practice, this view was the dominant one in the Colonial Office. Whilst the notion of repugnancy did come up from time to time in discussions of individual laws, there are no examples of a formal declaration that a colonial law was void. Whatever views officers such as Sir Frederic Rogers may have held on the validity of colonial laws repugnant to general principles of English law, in nearly every case where they raised the ground of repugnancy, it was merely cited as one ground amongst others to support a recommendation to disallow a law by withholding the Royal Assent.⁸²

In contrast, colonial courts, and as far as the record reveals, only colonial courts, sometimes took the broader view that Merivale says lawyers favoured. In the 1860s, this was perceived as having gotten out of hand, and the Colonial Laws Validity Act was passed to give statutory force to the view that had long prevailed in the practice of the Colonial Office.⁸³ This was the rule Lords Rodger and Carswell claimed to apply to counter the argument that the Orders in Council violated fundamental principles of common law. Yet, as I will show in the next section, in point of fact, none of this had anything to do with the rule in *Campbell v Hall*, which was concerned with an entirely different relationship.

(ii) 'Contrary to fundamental principles'

Campbell v Hall - despite being well known to constitutional lawyers - is not as much as

78 CO 323/50, Note by Stephen, 398v-400f

79 CO 323/87, Rogers to Merivale, 366f-376v

80 CO 323/87, Merivale to Carnarvon, 376v-379f

81 CO 323/87, Note by Lord Stanley, 379v-380f

82 These include the colonial laws cited by Swinfen as examples of Stephen's early attitude towards repugnancy. Swinfen (n 73) 56-7; CO 323/43, Stephen to Bathurst, 75f; CO 323/44, Stephen to Bathurst, 45f. See also CO 323/53, Stephen to Glenelg, 331v-332v; CO 323/40, Stephen to Bathurst, 59f-59v

83 Swinfen (n 73) 167-183.

mentioned in any of the discussions in the Colonial Office concerning repugnancy. Merivale was quite unambiguous in stating that no British court had ever recognised the ground of repugnancy to uncodified general principles of English law.⁸⁴ This is because *Campbell v Hall* was not concerned with the superiority of Imperial legislative authorities over colonial legislative authorities, or with the principle of repugnancy. As even a perfunctory reading of the case makes clear, it dealt with a far more fundamental constitutional issue, namely, the separation of powers between Crown and Parliament and the ultimate supremacy of Parliament in every aspect of the relationship between Crown and Parliament, including in relation to the Empire. *Campbell v Hall*, in other words, was concerned with the basic issue of the supremacy of the Imperial Parliament over the Imperial Monarch under the British Constitution.

The context for *Campbell v Hall* was this. It had long been the law in England that although Englishmen carried common law – to the extent applicable – with them in settling a new colony, English law did not automatically apply to a ceded or conquered colony. In relation to the latter, the Crown had plenary power to legislate, and until the crown exercised this power the old laws continued.⁸⁵ The question upon which Lord Mansfield pronounced in *Campbell v Hall* was how far this power extended. To what extent could the Crown legislate for a conquered territory without requiring the authority of Parliament?

In the reign of James I, the courts had given one answer. The case was *Calvin's Case*⁸⁶ and the judge was Lord Coke. In relation to a conquered colony, he said, the King had the powers of an absolute monarch, and he could make whatever laws he chose by mere exercise of the Royal Prerogative. He was not restricted from legislating by prerogative in any way.

This decision must be understood in the context of the constitutional questions that arose in the time of the first Stuart kings.⁸⁷ James I claimed the right to rule as an absolute monarch, leading to many conflicts both with Parliament and the judiciary – notably with Coke himself in the *Prohibitions del Roy*.⁸⁸ Coke's decision in *Calvin's Case* reflects the 17th century English understanding of why the King of England was not, and could not be, an absolute monarch ruling by divine right. Kings might have this power elsewhere, and it might even be the default power which kings had, but it was not the law of England.⁸⁹ Colonies governed by the law of England, therefore, could not countenance an absolute monarch, but others could and would.

Lord Mansfield's decision in *Campbell v Hall* has to be read and understood as a reaction to this position. He rejected Lord Coke's ruling that the Crown had the powers of an absolute monarch in relation to conquered and ceded colonies, and gave an answer that was even more restrictive of the Crown's powers. While the King did have a plenary power to legislate for conquered or ceded colonies, Lord Mansfield held, he could not by prerogative make legislation that was contrary to fundamental principles.⁹⁰ The King (or Queen) of

84 CO 323/87, Merivale to Carnarvon, 376v-379f

85 Swinfen (n 73) 53-55

86 7 Co. Rep. 1

87 See generally G.E. Aylmer, *The Struggle for the Constitution* (Blandorf Press 1968).

88 12 Co. Rep. 63. See the discussion in J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century, 1603-1689* (Cambridge University Press 1957) 34-60.

89 Gavin Loughon, 'Calvin's Case and the origins of the rule governing 'conquest' in English Law' (2004) *Australian Journal of Legal History* 8.

90 1 Cowp. 204, 210; 99 ER 1045, 1048

England, though he may be monarch of the Empire, was himself when acting in council (i.e., without the consent of Parliament) exercising an authority subordinate to that of the King in Parliament, and as such could not have more than a limited power to legislate without the consent of Parliament. Parliament, and only Parliament, had the power to transcend or alter fundamental principles.⁹¹

The constitutional basis, and practical effect, of the doctrine of fundamental principles was fundamentally different from the ground of repugnancy. No conflict with an Act of Parliament was needed here, nor was a subordinate colonial legislature involved. Lord Mansfield, as is well known, was a committed Whig of the old corps,⁹² and *Campbell v Hall* embodies that Whiggish understanding of the Constitution.⁹³ Since ultimate sovereignty vested with Parliament, it was only Parliament - and not the Crown - that had unlimited legislative power. The Crown, even in his capacity as monarch of a conquered colony, was subject to Parliamentary authority and as such did not have the power to make legislation contrary to fundamental principles, unless he had specifically been given the authority to do so. Lord Mansfield's judgment leaves little doubt about the constitutional principle on which his decision is based:

[I]f the King has power (and when I say the King, I mean in this case to be understood "without concurrence of Parliament") to make new laws for a conquered country, this being a power subordinate to his own authority, as a part of the supreme Legislature in Parliament, he can make none which are contrary to fundamental principles⁹⁴

This restriction – and the power of courts to review laws that were made in violation of it – was not dealt with by the Colonial Laws Validity Act. The only ground of nullity of colonial legislation discussed in the Colonial Laws Validity Act was the ground of repugnancy. In consequence, the only relationship with which it was concerned was the one between the empire and the colonies. It made no reference to, was not concerned with, and was not intended to affect, the relationship between crown and Parliament. As a result, the only prerogative power with which it dealt was the prerogative power which the king had under the local constitution of a colony to legislate without the consent of the colonial legislature – for example, powers granted under a colony's charter. *Campbell v Hall* in contrast dealt with the prerogative power of the Crown under the British constitution itself – the power to legislate for a conquered country by prerogative without being subject to the legislative power of Parliament. The contrast between these two types of prerogative was a well established one in colonial constitutional law. In *Abeyesekera v Jayatilake*⁹⁵ the Privy Council (in relation to Ceylon, also a ceded colony) described the difference as being between 'an exercise of the royal prerogative by the King in Council, as the supreme executive officer

91 As the contrast with *Calvin's case* also suggests, the type of principles were substantive not - as Lord Rodger suggests - only the dispensing power or – as Lord Carswell suggested – the power to grant valuable privileges. *Bancoult (HL)* (n 16) [90] (Lord Rodger); [125] (Lord Carswell)..

92 Frank O'Gorman, *The Long Eighteenth Century: British Political and Social History 1688-1832* (Arnold 1997) 212.

93 Despite his courtish leanings, Lord Mansfield appears to have held to a stricter understanding of this doctrine than Chatham or Camden. See e.g. John Lord Campbell, *The Lives of the Chief Justices of England, from the Norman Conquest till the Death of Lord Tenterden*, vol 2 (2nd edn, John Murray 1858) 468

94 Lofft 655, 741-2; 98 ER 848, 896

95 [1932] AC 260

of the Island’ and ‘the exercise by His Majesty, as Sovereign, of the legislative powers inherent in him by his title derived from conquest and cession of Ceylon, so far as he had not parted with any of them by acts of his own.’⁹⁶

This distinction, established in constitutional law for over two hundred years, was correctly summarised by the counsel for the Chagossians as being the difference between vires or limits on power on the one hand and repugnancy on the other.⁹⁷ This was not a case of the making of a law which was within the ordinary legislative competence of a colonial legislature, but which was invalid because of a conflict with another law. The British government here purported to make a law which, under the British Constitution as it was understood up to that time, it did not have the power to make without Parliamentary consent: a law that, therefore, lay beyond its legislative competence. Yet this distinction was perfunctorily dismissed by the House of Lords in *Bancoult* – Lord Hoffmann rejecting it as being ‘too fine to be serviceable.’⁹⁸ And, overruling centuries of settled jurisprudence in relation to the fact that Parliament alone has unlimited sovereignty, and that, in consequence, the prerogative of the Crown-in-Council, as a subordinate power, is necessarily subject to substantive bounds,⁹⁹ Lords Rodger and Carswell held, in effect, that the Crown had unlimited power to legislate in relation to conquered colonies – that, in relation to these colonies, the British government of the day has the powers of an absolute monarch, and could rule as they pleased without needing to obtain the consent of Parliament and without responsibility to Parliament – or, indeed, any elected body. By doing so, they took the British constitution back to *Calvin’s case* and the reign of James I.¹⁰⁰

One would expect that a decision this momentous would not be made unless it rested on the foundation of solid authority. But there was no such authority to support the decisions of Lords Rodger and Carswell. There was no binding authority in support of the proposition that the Colonial Laws Validity Act had overruled *Campbell v Hall* and removed all restrictions on the executive’s legislative power to legislate for colonies without the consent of Parliament. *Liyanage*,¹⁰¹ to which they referred, was a decision of the Privy Council, and its statements on *Campbell v Hall* did not speak to the specific point at issue in *Bancoult* which, as both Sedley LJ¹⁰² and Lord Mance¹⁰³ pointed out, preceded the question of repugnancy. Even more fundamentally, the powers of the Ceylonese Parliament which were at issue in *Liyanage* had been conferred by Parliament under the Ceylon Independence Act, not an Order in Council. They were therefore not derived from the Royal Prerogative, and were not subject to the restrictions set out in *Campbell v Hall*.

Against this single throwaway comment stood every other authority cited in the decisions of Lords Rodger and Carswell. Yet their Lordships, against the express words of the very authorities they cited in support of their decision, chose to interpret the law in a way that conferred upon the executive an unprecedented amount of power at the expense of

⁹⁶ *ibid*, p. 266

⁹⁷ See the reporter’s summary at [2009] 1 AC 453, 470.

⁹⁸ *Bancoult (HL)* (n 16) [39 (Lord Hoffmann).]

⁹⁹ As discussed earlier in this section: see text to n 79.

¹⁰⁰ As an aside, it is worth noting that even *Campbell v Hall* was seen as being too conservative by Radical Whigs, and was the target of biting criticism for allowing the King near-despotic powers. See e.g. Francis Maseres, *The Canadian Freeholder: Dialogue II* (B. White, 1779)

¹⁰¹ *Liyanage v Queen* [1967] 1 AC 259

¹⁰² *Bancoult (CA)* (n 15) [28] (Sedley LJ).

¹⁰³ *Bancoult (HL)* (n 16) [148] (Lord Mance)

Parliament. In much the same way as with Lord Mansfield in the *Zong*, they chose to accept as law an argument that is, legally, so difficult to sustain that the willingness of Lords Carswell and Rodger to accept it demands an explanation.

(iii) The right of abode

The decision of Lord Hoffmann, although based on a different ground, is no less problematic in law. In contrast to Lords Rodger and Carswell, Lord Hoffmann held that the Colonial Laws Validity Act did not apply to review by an English court. Nonetheless, he held that there was no fundamental principle of law regarding the right to abode. It was a creation of law which the law could take away, and it was not recognized by the laws of the Chagos Islands.

What these citations show is that the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right... But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer. The importance of the right to the individual is also something which must be taken into account by the Crown in exercising its legislative powers... But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it.¹⁰⁴

The reference to the constitution of BIOT upon which this argument turns was clearly wrong. A plain reading of *Campbell v Hall* makes it obvious that the restriction on the royal prerogative which Lord Mansfield set out in that case is a restriction imposed by the British constitution on the powers of the Crown as a conquering sovereign. It must therefore be judged with reference to those principles that are fundamental to the British constitution. What the law of the Chagos Islands may say is irrelevant. If the Crown could not by prerogative make a law denying the Chagossians' right of abode, it could not by prerogative make a constitution for the colony which denied their right of abode.

And, judged by the standards of the British constitution, there is evidence to suggest that even in the eighteenth century, exiling an entire population was thought to be impermissible. Although Lord Mansfield did not elaborate in *Campbell v Hall* on what the 'fundamental principles' that restricted the scope of the prerogative actually were, there were other cases where he considered the scope of the powers of the Crown, or of governors appointed by the Crown. Most telling are his observations in *Mostyn v Fabrigas*,¹⁰⁵ decided a few years before *Campbell v Hall*. Fabrigas, a resident of Minorca, a conquered colony, had been imprisoned by the Governor of the island, the defendant Mostyn, for ten months and then compulsorily transported to Carthagen in the dominions of the King of Spain. On Mostyn's return to Britain, Fabrigas brought an action against him for assault and false imprisonment. Mostyn contended that he governed Minorca 'as all absolute Sovereigns do', in response to which counsel for Fabrigas argued that he could have no such power, for the

104 *Bancoult (HL)* (n 16) [45]

105 1 Cowp. 160, 98 ER 1021

King did not and hence could not delegate it to another.¹⁰⁶ Lord Mansfield agreed. And on the specific facts of the case, he said that in times of war, he said, a governor might legitimately ‘judge it proper to send an hundred of the inhabitants out of the island from motives of real and genuine expediency,’ but not in times of peace.

In tone and in the principle on which it was based, this ruling has a close parallel in Lord Mance’s dissent in *Bancoult*.¹⁰⁷ But the contrast with the majority ruling in *Bancoult* is stark. Even in a time of war, when faced with real and genuine expediency, Lord Mansfield conceived of the power of the Crown – and its governors – as extending, perhaps, to the exile of a small proportion of the inhabitants of a conquered colony. As Lord Mance rightly pointed out, it is hard to imagine him, or the courts of his time, holding that the executive could by prerogative exile the entire population of a colony in peacetime, where no pressing expediency mandated it.¹⁰⁸ Nor was this view confined to Lord Mansfield. The records of the proceedings before the King’s Bench in the *Case of Thomas Picton*¹⁰⁹ suggest that other jurists may have been prepared to go even further. In proceedings arising out of the alleged torture of inhabitants of Trinidad by its governor, General Thomas Picton, it was strongly urged on behalf of the prosecution that torture could never be authorised by the Crown, for it was contrary to fundamental principles and hence would contravene *Campbell v Hall*, and that the doctrine of fundamental principles embraced the Magna Carta and all laws that fell within the class of ‘fundamental laws’ as discussed by Blackstone and Coke.¹¹⁰ No decision was ever issued in that case, but the argument gives a clear view of how broad legal conceptions of ‘fundamental principles’ could be.

Yet we find no trace of any discussion of this in Lord Hoffmann’s decision which – without any support in authority and contrary to established precedent – treats the question of fundamental principles as being one of the local constitution of the colony, rather than the imperial constitution, and does not even discuss what restrictions, if any the British constitution might place on the royal prerogative. And, much as was the case with Lord Mansfield in the *Zong*, Lord Hoffmann’s approach is characterised by its narrowness. The true question at issue was not whether or not the law could take away the right of the Chagossians to their abode – under the British constitution, any right can be taken away through Parliamentary action. The question was, rather, whether such a law could be made by royal prerogative, without the consent of Parliament. Lord Hoffmann’s reasoning blurs this distinction, suggesting that the Crown has whatever authority Parliament has, and is subject to no greater restriction than Parliament. In explaining the reasons for his decision, Lord Hoffmann quoted Blackstone’s statement that ‘no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will,’ and continued:

That remains the law of England today. At common law, any subject of the Crown has the right to enter and remain in the United Kingdom whenever and for as long as he pleases... The Crown cannot remove this right by an exercise of the prerogative. That is because since the 17th century the prerogative has not

¹⁰⁶ 1 Cowp. 160 (167), 98 ER 1021 (1025)

¹⁰⁷ See esp. *Bancoult* (HL) (n 16) [158] (Lord Mance).

¹⁰⁸ *ibid* (Lord Mance).

¹⁰⁹ T.B. Howell and Thomas Jones Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783, with Notes and other Illustrations* (Longman, Hurst, Rees, Orme and Brown 1822) 883-960.

¹¹⁰ *ibid* 937-942.

empowered the Crown to change English common or statute law. In a ceded colony, however, the Crown has plenary legislative authority. It can make or unmake the law of the land.¹¹¹

Implicit in this line of reasoning is an analogy between the Crown's prerogative powers over conquered or ceded colonies and the powers of Parliament over England. But this analogy has no basis in authority, and is manifestly opposed to *Campbell v Hall*. If the powers of the Crown in relation to a ceded colony are as wide as those of Parliament in relation to England, then, contrary to the rule in *Campbell v Hall*, there is nothing that cannot be done by prerogative. Lord Hoffmann suggested that ordinary principles of judicial review – legality, rationality and procedural impropriety – were sufficient to enable courts to prevent the use of executive fiat to legitimate certain acts such as torture.¹¹² The basis of this argument is unclear, but even if it is true, the category of executive acts that would of their nature necessarily be irrational or disproportionate is rather small, and certainly smaller than the restrictions imposed by *Campbell v Hall*. No less than the decisions of Lord Rodger and Carswell, this decision – without the support of authority – in effect eliminates the restrictions on the prerogative imposed by *Campbell v Hall*.

In both the *Zong* and *Bancoult*, therefore, the strong formalist rhetoric invoked by the courts – that the law was what it was and the courts had little choice but to apply it, however appalling the results – was at best misleading. The legal positions articulated by the courts in their judgments did not have the support of authority that the courts claimed. In terms of the authorities, the arguments they rejected were by far the stronger.

What explains this outcome? Why did the courts choose to uphold the denial of basic rights to a class of people – a denial with which they were clearly uncomfortable – on the basis of apparently formalist arguments that were so obviously weak and flawed? In the next section, I turn to this question, and argue that the decisions are best explained as an approach to interpreting the law which is heavily influenced by pragmatic considerations.

3 Legal Consequences and Judicial Pragmatism

At the core of pragmatism is a focus on what its proponents term 'standards' rather than 'rules', and on consequences – specifically, on the consequences of the action complained of and the consequences of judicial intervention – rather than on moral or political theories. Pragmatic adjudication is, consequently, characterised by a marked preference for considering questions of remedies rather than focusing on theoretical questions concerning the underlying rights, and by a preference for narrow rulings rather than broad ones.¹¹³

It is the presence of all these factors in the decisions in the *Zong* and *Bancoult* that renders them far more intelligible when viewed as pragmatic decisions. Both cases demonstrate a reluctance by the courts to deal with the question of the limits of the power that the defendants had over the victims – the power of the executive to rule by prerogative in

¹¹¹ *Bancoult (HL)* (n 16) [44]

¹¹² *ibid* [35]

¹¹³ This is the view of pragmatism that is most frequently presented and defended by its proponents. See e.g. Richard Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2003) 59-60. On the distinction between standards and rules, see below, note 118 and text. On the issue of rights and remedies, cf also P.S. Atiyah, *Pragmatism and Theory in English Law* (Stevens & Sons 1987) 112-125.

Bancoult and the power of slaveowners to treat slaves as they wished in the *Zong* – despite the importance of these issues to the cases and the clear evidence of numerous authorities that these limits really did exist. In both cases, the reluctance was supported by a narrow definition of the issues, a narrow reading of the authorities and a narrowly expressed conclusion.

This reluctance is most clearly visible in the *Zong* where, as we have seen, Mansfield failed to take into account the implications of the ruling on the nature of slavery that he had himself made in *Somerset's case*. But the decisions of the majority in *Bancoult* are strikingly similar to Mansfield's decision in the *Zong* in their reluctance to engage with the details or the basis of the legal rules were at issue. And, much like Mansfield's decision in the *Zong*, they are strongly influenced by the outcome their decision would produce – and, particularly, what they believed to be the true motives of the Chagossians in bringing the action.

Most strikingly, the majority's marked preference for the ordinary grounds of judicial review is characteristic of the pragmatic preference for what its proponents call 'standards' – broad, loosely defined principles that give judges considerable latitude in relation to the factors they take into account – over more narrowly defined 'rules'.¹¹⁴ Whilst a pragmatic approach to adjudication can, and not infrequently will, find pockets where a rule-based approach is useful,¹¹⁵ its general preference is for the scope to take a greater variety of facts into account that standards give.¹¹⁶ 'Proportionality', 'legality' and 'reasonableness' are canonically standards; whereas absolute limits on powers are rules. A pragmatic court will almost inevitably favour the former at the expense of the latter.

But the speeches of the majority also display a number of other clear features of a pragmatic approach, particularly when contrasted with the speeches of the minority. Consider again, for example, Lords Rodger and Carswell's dismissal of the principle in *Campbell v Hall*. Both, in addition to holding that the principle had been abolished by the Colonial Laws Validity Act, questioned whether Lord Mansfield had any substantive principles at all in mind when stating that the King's prerogative would not exceed to contravening 'fundamental principles.' All he had in mind, they said, was the dispensing power.¹¹⁷ Yet, as we have seen above, Lord Mansfield's own decisions in cases such as *Mostyn v Fabrigas*¹¹⁸ (a case noted and cited in the speech of Lord Rodger¹¹⁹) make it very clear that he did have in mind wider substantive principles – so much so that, as Lord Mance rightly noted in his dissent,¹²⁰ it is hard to imagine him finding that the prerogative power extended to the making of Orders-in-Council such as those that were the subject of *Bancoult*. Yet there is no engagement in the majority decisions with the considerable evidence as to the principled basis of *Campbell v Hall* or what the rule articulated by Lord Mansfield actually meant. All we see is the impressionistic assertion – characteristic of pragmatism – that he could not possibly have meant what the Chagossians claimed he did.

A similar reluctance to engage with the principles underlying *Campbell v Hall* – and,

¹¹⁴ Posner, 'Law, Pragmatism and Democracy' (n 113) 61-71.

¹¹⁵ For instance, because it makes compliance easier. See *ibid*

¹¹⁶ Richard Posner, *The problems of jurisprudence* (Harvard University Press 1993) 42-61.

¹¹⁷ *Bancoult (HL)* (n 16) [90] (Lord Rodger); [125] (Lord Carswell).

¹¹⁸ 1 Cowp. 160, 98 ER 1021 (1865). See text at n 98.

¹¹⁹ *Bancoult (HL)* (n 16) [88]

¹²⁰ *ibid* [159]

more generally, the theory that the power to legislate by prerogative is of necessity a limited one – is visible in the decision of Lord Hoffmann. Thus, as we have seen, he characterised the constitutional questions as ‘extreme arguments’, and said that it was the ‘application of ordinary principles of judicial review’ that was ‘the main point in this appeal’¹²¹ going on, ultimately, to simply assert, without citing any authority or constitutional principle, that the royal prerogative over a conquered colony extended to the making of any laws that Parliament was competent to make for the UK.¹²²

The contrast with the dissenting judgments of Lords Bingham and Mance in the House of Lords could not be greater. Far from being an ‘extreme’ argument to be perfunctorily dismissed, the issue of the scope of the prerogative was to them the more important one.¹²³ In contrast to the majority, they did not simply draw impressionistic parallels between the power of the executive to legislate by prerogative in relation to conquered colonies and the power of Parliament to legislate in the domestic realm. Instead, they explored the question of whether this analogy was supported by the authority of precedent and the constitutional principles which the precedents reflected. And they found – as they were bound to – that it was not. As Lord Mance pointed out, historically, the prerogative power to legislate for colonies had always been seen to be limited by principles that had no application to Parliamentary legislation.¹²⁴ As both also recognised, there is a fundamental difference between the representative and deliberative nature of Parliamentary action, and the secretive nature of executive legislation by prerogative.¹²⁵ This difference has long been constitutionally significant, and it remains so today. Whilst Parliament can legislate as it may, the power of the prerogative is at best a historical anachronism, which cannot be said to exist unless evidence is produced that it has actually existed in the past.¹²⁶ No such evidence existed – indeed, what evidence existed suggested that it would not have been seen as being so extensive in the 18th century. It was hardly possible, he thought, that given the nature of the British constitution, the latitude it gives to the executive to act without Parliamentary consent could have *expanded* since then.¹²⁷

What we see in the dissents¹²⁸ is thus a meticulous examination of the legal principles which justify the grant by the common law to one of power over another, and which must be shown to be satisfied when the existence of an unprecedented power is asserted. This level of engagement with the meaning of the principles embedded in legal rules, and consideration of the historical and theoretical foundations of constitutional rules and of the authorities establishing them, is the very essence of principled, formalist reasoning; yet there is little if any trace of it in the majority decisions. What we see instead is precisely the sort of superficial fact-based engagement with precedent and the overweening preoccupation with

¹²¹ *ibid* [52]

¹²² *ibid* [53]-[54]

¹²³ Thus Lord Mance made it clear that this question was the ‘primary basis’ on which he would dismiss the appeal *Bancoult (HL)* (n 16) [186]. Lord Bingham too dealt with the ordinary judicial review grounds only as an alternative to his principal conclusion on the power to make the order by prerogative, *ibid* [71].

¹²⁴ *ibid* [143]-[149] (Lord Mance)

¹²⁵ *ibid* [70] (Lord Bingham), [161] (Lord Mance).

¹²⁶ *ibid* [69] (Lord Bingham). Compare this with Lord Mansfield’s ruling in *Somerset’s case* that the power of a master over his slave must be construed strictly, and could not be held to exist unless authorised by positive law.

¹²⁷ *ibid* [159] (Lord Mance)

¹²⁸ And, for that matter, in the judgment of Sedley LJ in the Court of Appeal

remedies¹²⁹ that is characteristic of pragmatism.

As we shall see in the next section, *Bancoult* is not an isolated example of the adoption of a pragmatic approach to the limits of the executive's power: it is just one instance – albeit a particularly troubling one – of a broader, worrying trend which began manifesting itself in the final years of House of Lords. As I argue, the basis of this trend, and the severe limitations it imposes on the process of adjudication, stand in sharp contrast to the much more nuanced role pragmatism played in Lord Mansfield's decisions. Cumulatively, these show the decision of the majority in *Bancoult* in a far worse light than the *Zong*.

4 *The Source and Limits of Pragmatic Adjudication*

A Accounting for Pragmatism

What, then, were the consequences that so troubled the courts, and that led them to decide these cases pragmatically, with so little attention to the underlying questions of principle? It is relatively easy to rule out the most obvious explanations. Neither court was inherently inimical to formalism, as Mansfield's decision in *Somerset's case* and Lord Hoffmann's speech in *Simms* demonstrate.¹³⁰ Equally, Mansfield's decision in the *Zong* was not the result of an essentialist worldview, or of any sort of ideological support for slavery. We know that Mansfield was not personally racist.¹³¹ We also know that he was not among the many vocal defenders of slavery who existed at that time. Unlike Lord Chancellor Hardwicke, who as an advocate vocally defended the institution of slavery and as a judge took every opportunity to judicially confirm the views he had earlier espoused,¹³² Mansfield's description of slavery in *Somerset* – an institution 'so odious that it must be construed strictly' – was no mere rhetorical flourish, and is likely to have represented his true view of the common law position on the rights and liabilities of slaves.¹³³

Equally, his decision was not a result of a deference to Parliament in terms of policy making. Mansfield's views of Parliament as a giver of laws were mixed, and he did not always defer to the policies it sought to implement. On the contrary, he could be quite activist when it came to defending vulnerable minorities from oppression. The starkest examples of this are the actions he took to protect religious freedom, particularly for Catholics. The Penal Laws were in force at this time, and a band of professional informers made it their business to track down Catholics attending clandestine masses and collect a share of the fines that were charged. Mansfield put an end to this practice through an innovative interpretation of the

¹²⁹ Lord Hoffmann, in particular, placed a great deal of emphasis on what he believed were the true motives of the Chagossians – an attempt to pressure the Government to fund settlement – and on the undesirability of the Courts giving assistance to such pressure: see *Bancoult (HL)* (n 16) [53]–[56], and especially his statement at [54] that 'if one keeps firmly in mind the practical effect of section 9 of the Constitution Order, the issues in this appeal fall into place.' and his repeated references to the necessarily symbolic effect of a ruling in favour of the Chagossians. Lords Carswell and Rodger appear to have agreed to this analysis: see [110] (Lord Rodger) and [134] (Lord Carswell). Contrast this with Lord Mance's curt dismissal of this point as 'not supported by any reference in the written case' *ibid* [168] (Lord Mance) and Sedley LJ's ruling in the Court of Appeal that to focus on this was to miss the point: the true point was 'that the two Orders in Council negate one of the most fundamental liberties known to human beings, the freedom to return to one's homeland' *Bancoult (CA)* (n 15) [71].

¹³⁰ *R v Secretary of State for the Home Department, Ex parte Simms*, [2000] 2 AC 115.

¹³¹ Jeremy Krilker, 'The *Zong* and the Lord Chief Justice' (2007) 64 History Workshop Journal 29 at 40–2.

¹³² Cleve (n 48) 619–21.

¹³³ Oldham, 'English Common Law in the Age of Mansfield' (n 44) 305.

statute that so increased the evidentiary burden as to make successful prosecutions virtually impossible - the prosecution now had to prove that the priest in question was ordained by the Church at Rome, and that the words being said were the actual Latin Rite and not merely words in Latin.¹³⁴ For this, he paid a heavy personal price – his house was razed by an irate mob during the Gordon Riots, and his entire library destroyed.¹³⁵

Similarly, the decision in *Bancoult* cannot simply be treated as an instance of the courts deferring to the judgment of the executive on a matter of national security. The House of Lords did not uniformly defer to the executive's – or even the legislature's – judgment in matters of national security, as is amply demonstrated by cases such as those relating to the Belmarsh detainees¹³⁶ or the use of secret evidence in proceedings for the issue of control orders.¹³⁷ And, in any event, the extent to which *Bancoult* actually raised issues of national security is questionable. Lord Bingham in his dissent pointed out that there was no evidence at all to show that the Chagossians posed any threat,¹³⁸ and the Court of Appeal noted that the defence of national security – a recognised defence in judicial review of the prerogative – had not been raised in the case.¹³⁹ Additionally, there are already a substantial number of non-Americans present on the base. Running the base requires at any time the presence of civilian workers who are, for the most part, flown in from the Philippines, Sri Lanka and other sources of cheap labour.¹⁴⁰ No arguments were presented to show why a permanent population of Chagossians would pose any greater security hazard than these workers. In any event, resettlement was not at issue as the courts at each level were at pains to stress – even the Divisional Judge, despite being prepared to hold the Orders in Council to be invalid, was unwilling to so much as grant a hearing on the issue of ordering relief specifically related to resettlement.¹⁴¹ Finally, according to Vine, yachts sailing the Indian Ocean frequently land at the Outer Islands of the Chagos Archipelago without any action being taken to stop them.¹⁴² The only individuals in relation to whom such action was deemed necessary are the Chagossians.

Rather, both decisions reflect a particular sort of judicial pragmatism, of a type to which – as Atiyah pointed out – the English legal process is particularly susceptible.¹⁴³ Lord Mansfield's stubborn refusal to countenance any attempt to broaden the dispute to include issues outside insurance law provides an important clue as to the factors that lay behind his approach in the *Zong*. A decision on the issues which the insurers sought to raise would have forced a decision on a much more basic question. If slaves were not chattel, but were human beings, how, then, should they be treated on transatlantic voyages? This was not a question on which Lord Mansfield was prepared to pronounce.

There were two reasons for Lord Mansfield's reluctance to rule on this point. First, a decision that at common law slaves could not be treated as cargo would have had ramifications that went far beyond the narrow issue of insurance. In insurance terms, the

134 *ibid* 243-6.

135 *ibid* 246.

136 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 A.C. 68

137 *Secretary of State for the Home Department v AF* [2009] UKHL 28, [2010] 2 A.C. 269

138 *Bancoult (HL)* (n 16) [72]

139 *Bancoult (CA)* (n 15) [102] (Waller LJ)

140 Vine (n 7) 7.

141 I am grateful to Richard Gifford for this information.

142 Vine (n 7) 15.

143 Atiyah (n 113) 3-8.

effect would have been relatively minor. A decision holding the policy void, whether on the ground of illegality or on the narrower ground that the owners lacked an insurable interest in the slaves because they were not the owners' chattel, could have easily been circumvented by taking out life insurance policies on the lives of the slaves.¹⁴⁴ But its effects elsewhere would have been far more potent. Unlike a statute, whose effect could be as narrow or broad as Parliament chose, a decision that on *principle* slaves could not be treated as cargo unless positive law authorised it would have affected not only the sort of insurance contracts that were at issue in the *Zong*, but the entire system of carriage of slaves across the Atlantic. It was beyond question that the entire transatlantic slave trade was based around treating slaves as if they were chattel. They were stored like cargo, treated like cargo and insured like cargo, and their treatment was reflected in the fact that mortality on slave ships was significantly higher than mortality on other transatlantic voyages.¹⁴⁵ If they were, in any way, different from horses for the purpose of transatlantic shipping, much of the basis of the slave trade and the manner in which it was carried out would have been called into question. The effect of accepting – or even pronouncing on the validity of – the insurers' arguments would have been to hold that the laws of England did not actually permit slaves to be treated as goods in being transported across the Atlantic.

The slave trade could not have survived such a ruling. From a mercantile point of view, the transatlantic slave trade depended on a complex network of supporting agreements, ranging from financing agreements to arranging for supplies to sustain the crew and the slaves being shipped. Although the profits from a successful voyage were very high, the risks inherent to the crossing of the Middle Passage by a slave ship were also high.¹⁴⁶ An alteration to the manner in which the trade was carried out as fundamental as that which would result from a ruling that slaves could not be treated as chattel would destroy this balance. Yet on this trade depended the economy of much of the northwest of Britain. The consequences of a broader decision, in other words, could have been very severe for the British economy.

We know that Mansfield was aware of the potential consequences of decisions which touched upon the legal validity of slavery or its incidents. Persons known to have been close to him wrote exaggerated polemics about the disastrous consequences which any moves towards abolition or regulation of the slave trade would have. Economic losses, it was claimed, would run into the billions. Mansfield himself, in two cases relating to slavery, made it clear that he was concerned about the social and economic consequences of broad holdings.¹⁴⁷ 'The setting 14,000 or 15,000 men at once loose by a solemn opinion', he declared in *Somerset*, 'is very disagreeable in the effects it threatens.'¹⁴⁸ He went on to quantify the monetary loss it might cause and the questions in relation to their wages, or 'actions for any slight coercion by the master.' In *Stapylton's case*,¹⁴⁹ he worried about the consequences of a decision that slaves automatically became free on coming to England, and hoped that the question would never be decided: 'for I would have all masters think them free,

¹⁴⁴ I am grateful to Michael Lobban for drawing my attention to this point.

¹⁴⁵ Herbert S. Klein et al., 'Transoceanic Mortality: The Slave Trade in Comparative Perspective' (2001) 58 William and Mary Quarterly 3d Series 93.

¹⁴⁶ Stephen D. Behrendt, 'Markets, Transaction Cycles, and Profits: Merchant Decision Making in the British Slave Trade' (2001) 58 William and Mary Quarterly 3d Series 171 at 170-180.

¹⁴⁷ Oldham, 'English Common Law in the Age of Mansfield' (n 44) 306-8.

¹⁴⁸ *Somerset v Stewart* Lofft 1, 17; 98 ER 499, 509

¹⁴⁹ The case was not reported, but Lord Mansfield's trial notes of the case are printed in James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (University of North Carolina Press 1992) 1242-43

and all Negroes think they were not, because then they would both behave better.’¹⁵⁰ And, in *R v Inhabitants of Thames Ditton*,¹⁵¹ decided a few years after the *Zong*, he echoed the concerns he first raised in *Somerset*, saying that he had always denied suits by slaves seeking recovery of wages.

This fear, or wariness, of the consequences of tampering with the institution of slavery is likely to have been strengthened by a second, related, factor – Mansfield’s close identification with the mercantile interest, and the grand project that was the major focus of his judicial career: the construction of English commercial law.¹⁵² Mansfield’s chosen method for this was the incorporation of commercial custom into English law. And commercial custom recognised slavery, and the treatment of slaves as goods. Mansfield was aware of this, and it appears to have troubled him, but to totally deny recognition to something so unambiguously recognised in commercial practice, and which had the sanction of custom as immemorial usage, would have set a precedent that had the potential to damage the attempt to reshape the law in accordance with commercial custom. If commercial custom in relation to slaves was overruled on the basis that it contradicted the common law, then could the same not be done in relation to commercial custom on negotiable instruments? This was not an idle or hypothetical question, for Lord Holt was reputed to have done precisely that only a few decades earlier.¹⁵³ Whilst a negative finding on the specific issue involved in this case (the status of slaves as cargo in insurance law) would not have caused any significant damage to the law merchant, the precedent it would have set – that commercial customs which conflicted with the common law would not be incorporated into English law – could potentially have been used to challenge the entire basis of Mansfield’s project.

Something of the difficulty faced by Mansfield in reconciling the conflict between his moral and commercial imperatives comes across in the transcripts of the cases he decided. In the *Zong*, he repeatedly points to the fact that, ‘though it shocks one very much’, merchants – the merchant jury in the first trial, and other merchants with whom he made enquiries – had told him that the situation with slaves was for the purpose of insurance practice treated as being the same as with horses.¹⁵⁴ A similar point was made in *The Wasp Trader*,¹⁵⁵ a later case also involving loss of slaves at sea, but in that case following a failed insurrection. In both cases, Mansfield went to great pains to frame the issues in terms of ordinary insurance law, for to do otherwise would have been to admit that the validity of the law merchant could be questioned on the basis of principles of common law. This would have called into question the project to which he had devoted so much of his judicial career, and it was not a step he was prepared to take.¹⁵⁶

The recentness of the *Bancoult* decision makes it harder to accurately pinpoint the specific consequences that troubled the House of Lords, unlike the *Zong* where we have the

150 Quoted in *ibid* 1223

151 4 Douglas 300, 99 ER 891

152 Lieberman (n 45) 110-116

153 In *Clerke v Martin* (1702) 2 Ld Raym 757. See James Steven Rogers, *The early history of the Laws of Bills and Notes* (Cambridge University Press, 1995) 177ff for a discussion of this case and what Lord Holt actually said, in contrast to what he was perceived to have said.

154 Sharp Transcript (n 4) 2-3, 20-21

155 This case is discussed under the name *Little v Schmoll* in a footnote to the report of *Robertson v Ewer* 1 TR 127, 130; 99 ER 1011, 1012. A fuller account of the case was published under the name *Little v Small* in the *Universal Daily Register* 1 July 1785 p. 3

156 Krilker (n 131) 42-4.

benefit of two centuries of historical hindsight. A comparison with the *Zong* does, however, provide some hints as to what these factors might be.

As we have seen, the majority in the House of Lords in *Bancoult* - unlike the minority - refused to be drawn into the question of the limits of the executive's authority to act by prerogative, going to the extent of denying that this was really at issue in the case, in much the same way that Mansfield declined to involve himself in the question of the limits of masters' powers over their slaves. As with the *Zong*, this was part of a broader trend also visible in other decisions of the House of Lords in cases involving a question as to the power of the executive – and, specifically, on restrictions based on rights or competence as distinct from other ordinary grounds of judicial review.

The past decades have seen, as political scientists have pointed out, the executive accumulate significant amounts of power at the expense of Parliament,¹⁵⁷ which has once again brought to the fore the question of where the limits of executive power are appropriately drawn, and what types of checks are appropriate. Against this background, it is arguable that, much as the questions posed by the rise of commerce was the focus of much of Mansfield's judicial work, the House of Lords, too, has devoted a significant amount of attention to defining and restricting the scope and limits of judicial authority over the government and other public bodies.¹⁵⁸ The jurisprudence of the House of Lords is not as consistent as that of Lord Mansfield: there are real differences between judges,¹⁵⁹ reflecting no doubt the fact that no single judge has dominated the House as Mansfield dominated the Court of Kings Bench in his day.¹⁶⁰ Some trends can, however, be broadly discerned, and these trends show very strong parallels to the approach of the majority to *Bancoult*.

On the one hand, recent years have seen the expansion of judicial review through the 'constitutionalisation' of administrative law,¹⁶¹ centred around the principle of legality.¹⁶² In England, this has also been accompanied by the rise, under the influence of the European Convention on Human Rights, of the standard of 'proportionality',¹⁶³ which has had a significant impact on judicial review generally.¹⁶⁴ These concepts are, as we have seen in section 3, predominantly 'standards-based' in the Posnerian sense discussed above.¹⁶⁵

Yet these developments have been accompanied by an equally strong *decline* in the

157 Christopher Foster, *British Government in Crisis* (Hart Publishing 2005).

158 Lord Hoffmann, speaking extra-judicially, called this 'an important theme' of recent judicial work. Lord Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' (2002) *Judicial Review* 137 at 137.

159 Brice Dickson, 'Close calls in the House of Lords' in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing 2010).

160 It is worth pointing out that Lord Bingham, who is often taken to have dominated the House of Lords, dissented not only in *Bancoult*, but also in virtually every other recent case I discuss in this paragraph as forming part of this project, such as *Van Colle*.

161 David Dyzenhaus, Murray Hunt and Michael Taggart, 'The Principle of Legality in Administrative Law: Internationalisation and Constitutionalisation' (2001) 1 *Oxford University Commonwealth LJ* 5.

162 The idea, as Lord Hoffmann put it, that general words in statutes will be construed as having been intended to be subject to the rights of the individual, in the absence of express words or necessary implication to the contrary *R. v Secretary of State for the Home Department, ex p. Simms*, [2000] 2 AC 115, 131 (Lord Hoffmann); *R. (Morgan Grenfell) v Special Commissioners of Income Tax* [2002] UKHL 21 [8] (Lord Hoffmann)

163 Thomas Poole, 'The Reformation of English Administrative Law' (2009) 68 *CLJ* 142.

164 Julian Rivers, 'Proportionality and variable intensity of review' (2006) 65 *CLJ* 174.

165 See text at n 113.

willingness of the Law Lords to impose absolute limits, which are necessarily ‘rule-based’,¹⁶⁶ on the powers of public bodies or bodies exercising statutory functions. This is most striking in private law. As Professor Steele has recently shown, only one single tort action against a public body was successful before the House of Lords in its final five years – and that related to a case where liability had already been admitted by the public body in question.¹⁶⁷ Cases such as *Marcic*,¹⁶⁸ *Van Colle*,¹⁶⁹ and *Watkins*¹⁷⁰ – the last of which expressly rejected an argument based on ‘constitutional’ rights – testify to a strong reluctance to recognise duties of care or other private law rights against public bodies. Nor has this situation altered significantly since.¹⁷¹

In public law cases, too, there has been a general reluctance in cases involving constitutional rights to impose absolute limits on the powers of the executive by holding it to lack Parliamentary authority. There was, in the wake of *Simms*,¹⁷² considerable expectation that the House of Lords would, like the High Court in *Witham*,¹⁷³ systematically link the idea of common law constitutional rights with judicial review.¹⁷⁴ And there are cases where the *Simms* principle has been forcefully applied. A particularly strong recent example is the decision in *Ahmed*,¹⁷⁵ where the majority of the Supreme Court refused to construe a general provision in section 1 of the United Nations Act 1946 as authorising the making of asset-freezing orders.¹⁷⁶ But, as Professor Tomkins has recently argued,¹⁷⁷ there is also a litany of cases where it has not been applied or where its meaning has been eroded – where, for example, the words of the statute in question have been declared to be unambiguous even in the absence of specific evidence that Parliament intended to authorise the imposition of restrictions upon rights.¹⁷⁸ This latter class of case includes cases such as *Gillan*,¹⁷⁹ *Al Jedda*,¹⁸⁰ *Austin*,¹⁸¹ and *RB (Algeria)*¹⁸² in addition to *Bancoult* itself.

¹⁶⁶ *ibid*

¹⁶⁷ Jenny Steele, ‘(Dis)owning the Convention in the Law of Tort’, in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing 2010) 101.

¹⁶⁸ *Marcic v Thames Water* [2003] UKHL 66, [2004] 2 A.C. 42

¹⁶⁹ *Chief Constable of Hertfordshire Police v Van Colle* [2008] UKHL 50, [2009] 1 A.C. 225

¹⁷⁰ *Watkins v Home Office* [2006] UKHL 17, [2006] 2 A.C. 395.

¹⁷¹ Thus, for example, only nominal damages were awarded in *R. (WL) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 W.L.R. 671, and the court expressly refused to award vindictory damages for the infringement of the claimants’ rights.

¹⁷² *R. v Secretary of State for the Home Department, ex p. Simms*, [1999] 3 WLR 328.

¹⁷³ *R. v Lord Chancellor Ex p. Witham*, [1998] Q.B. 575.

¹⁷⁴ Mark Elliott, *The constitutional foundations of judicial review* (Hart Publishing 2001) 212-6.

¹⁷⁵ *HM Treasury v Ahmed* [2010] UKSC 2, [2010] 2 A.C. 534

¹⁷⁶ It is worth noting that the Supreme Court appears to have been influenced by the fact that the restrictions in question had the effect of restricting the freedom of movement of the persons to whom they applied. *ibid* [4] (Lord Hope). The restrictions in *Simms* itself had this effect – through depriving an individual of the ability to have his conviction overturned – and the principle has been applied most consistently, though not exclusively, where individuals have been subject to some form of incarceration or other long-term deprivation of personal liberty

¹⁷⁷ Adam Tomkins, ‘The role of the courts in the political constitution’ (2010) 60 *University of Toronto LJ* 1, 7-14.

¹⁷⁸ *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 A.C. 110 [181] (Lord Hoffmann), also holding that the principle had been largely superseded by s. 3 of the HRA; *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 A.C. 908

¹⁷⁹ *R (Al Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 A.C. 332.

¹⁸⁰ *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 A.C. 307.

¹⁸¹ *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 A.C. 564

¹⁸² *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 A.C. 110

The trend these cases reflect, at their core, is one where the House of Lords are disinclined to set absolute boundaries on the power of the executive, or to establish clear rules as to when executive action will require specific Parliamentary authorisation. The preferred route in reviewing executive action is to review that specific instance of the exercise of a power using broad ‘standards’- based tests such as reasonableness or proportionality, rather than examining the question of the constitutional limits of the executive’s powers vis-a-vis Parliament – or, indeed, the principles underlying the constitutional understanding of their respective powers. As *Ahmed* indicates, this is a trend rather than an absolute bar. But that is exactly what we should expect of pragmatism which, as Posner argues, is always content to let islands of principled rules survive in a sea of pragmatic standards.¹⁸³

I do not propose to comment here on the desirability or otherwise of this general trend, or on the general appropriateness of pragmatism in constitutional cases – to do so would be beyond the scope of this article. But it should be clear that the consequences in *Bancoult*, at least, were disastrous. It is an unfortunate feature of pragmatism’s emphasis on outcomes as opposed to rights¹⁸⁴ that when it comes to a case of a conflict between individual rights that have few direct ramifications beyond the immediate case on the one hand, and a broader outcome-oriented project that does on the other, it is the rights that have to give, no matter how much one has to stretch the law in the process. That in doing so the majority conferred upon the executive a far broader prerogative and far greater independence from Parliament than has existed since the time of James I shows how far they were prepared to go, and how far removed their decision actually was from the formalist application of existing law their language suggests it to be.

B ‘Though the heavens fall’: Pragmatic lawmaking and pragmatic justice

Yet, whilst tolerance of human suffering is a possible incident of pragmatism, it is not a necessary one. There is one way in which the decision in the *Zong* differs significantly from *Bancoult*, and it does not favour *Bancoult*.

The decision in the *Zong* at first sight presents a puzzle that the decision in *Bancoult* does not. Why was Mansfield, who as we have seen could go to great lengths to achieve a ‘just’ result, so committed to the commercial interest that he was willing to let it override the rights which were asserted in favour of slaves? Why, in other words, did he put his sentiment for commercial law ahead of his evident qualms about the excesses of the slave trade?

The answer to this question is complex, and is closely connected with the reasons behind Mansfield’s commitment to the cause of commercial law. Mansfield was a product of his times. Since the seventeenth century, lawyers and judges in England had closely identified themselves with the emerging commercial sector, and defended it against those who sought to encroach on commercial liberty – monarchs and Parliaments who sought to use commercial rights as tools of patronage; guilds who sought to preserve their control over entire sectors of commerce.¹⁸⁵ The legal profession in early modern England stood against this, moved in part by the idea that law was an important tool in restraining the ‘over-mighty’.¹⁸⁶

¹⁸³ Posner, ‘Law, Pragmatism and Democracy’ (n 113) 61-71.

¹⁸⁴ See Atiyah (n 113) 112-119.

¹⁸⁵ Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge University Press 2008) 338-391.

¹⁸⁶ *ibid* 208-285.

In the eighteenth century, this notion was amplified by the idea that a new type of order was emerging – a commercial society, which had ‘rendered obsolete much that had been believed about society before’, and whose needs the law must adapt to meet.¹⁸⁷ These ideas were intrinsically tied to the notions of civic humanism that started to entrench themselves in late seventeenth century Britain. Civic humanists were concerned with the question of how persons could be given the degree of autonomy necessary to participate fully in the polity as a citizen.¹⁸⁸ The role of commerce caused significant divisions. On the one hand, the more ‘republican’ thinkers who emphasised the need for civic virtue saw commerce as being a vehicle for the introduction of ‘corrupting’ luxury. At the other end of the spectrum were thinkers who emphasised the importance of liberty, and who saw commerce and the luxury that it produced in society as being a means through which self-interested action could promote the common good.¹⁸⁹

A number of English and Scottish legal thinkers held views close to the latter position, and saw commerce – and commercial liberty – as being of central importance to broader civil and personal liberty¹⁹⁰ and thus, ultimately, to replace the classical notion of civic virtue. Lord Kames – Mansfield’s closest Scottish counterpart – was much influenced by this idea: the manners and way of life of people and society, he argued, were changing, and the commercial society had rendered the historical law insufficient to contemporary purposes. If the moral imperatives of the law were to continue to have effect, the law must be transformed.¹⁹¹ Research in recent decades has revealed the extent to which Adam Smith’s views on law and jurisprudence influenced his economic theories¹⁹² and, indeed, the extent to which he held moderate Whiggish views that would have been of the same philosophical roots as those which Mansfield was known to hold.¹⁹³

The destruction of most of Lord Mansfield’s papers in the Gordon Riots makes it impossible to ascertain the precise extent to which he was influenced by these ideas, but there is much reason to believe that these ideas – of civic humanism, and the felt need to adapt the law so it met current needs rather than protecting the mighty of foregone eras – were amongst the motivations behind Lord Mansfield’s project to reshape English commercial law. We know that Smith and Kames were much attracted to Mansfield’s positions. Smith went as far as to send a presentation copy of the first edition of *The Wealth of Nations* to Lord Mansfield.¹⁹⁴ Lord Kames for his part kept up a long-standing correspondence with Lord

187 David Lieberman, ‘The legal needs of a commercial society: the jurisprudence of Lord Kames’ in: Istvan Hont and Michael Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge University Press 1983) 210.

188 J.G.A. Pocock, ‘Civic Humanism and its Role in Anglo-American Thought’ in: J.G.A. Pocock (ed) *Politics, Language and Time: Essays on Political Thought and History* (University of Chicago Press, 1989) 90-103.

189 J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 1975) 486-497. For a broader discussion of the debate between these two camps, see Istvan Hont, ‘The early Enlightenment debate on commerce and luxury’, in Mark Goldie and Robert Wokler (eds.) *The Cambridge History of Eighteenth-century Political Thought* (Cambridge University Press 2006) 379-418.

190 Duncan Forbes, ‘Sceptical Whiggism, Commerce and Liberty’, in Andrew S. Skinner and Thomas Wilson (eds), *Essays on Adam Smith* (Clarendon Press 1975) 179-201.

191 Lieberman, ‘Jurisprudence of Lord Kames’ (n 197) 208-12.

192 D. D. Raphael, *Adam Smith* (Past Masters, Oxford University Press 1985).

193 Donald Winch, *Adam Smith’s Politics: An essay in historiographic revision* (Cambridge University Press 1978).

194 W.R. Scott, ‘A Manuscript Criticism of ‘The Wealth of Nations’ in 1776 by Hugh Blair’ (1936) 3 *Economic History* 47, 50.

Mansfield and even opened the second edition of his *Principles of Equity* with a letter to Lord Mansfield in which portrayed himself as pursuing the same programme as Lord Mansfield, and concluded by hoping that the book would gain Lord Mansfield's approbation.¹⁹⁵ It is entirely reasonable, therefore, to conclude that Lord Mansfield's dedication to commercial law, like that of Adam Smith and Lord Kames, had a moral, rather than merely pragmatic base. The conflict between the commercial interest and the interests of the slaves was, in late eighteenth century terms, at heart a conflict between two notions of liberty, both grounded in humanism.

The result was that Mansfield was not merely aware of the moral implications of his holding in the *Zong*, but also appears to have tried to do something to mitigate the mischief which his holding could have caused. While the facts of the *Zong* were, as Mansfield repeatedly pointed out, 'most uncommon', they were not wholly unexpected. Webster has pointed to documents showing that at least some captains thought that tossing slaves overboard was a legitimate, and sensible, response to certain types of emergencies, because it would permit the organisers of the voyage to recover on their insurance policies, whereas permitting slaves to die natural deaths on board would not.¹⁹⁶ The deep-running dispute about the facts, and the question of whether a state of necessity existed, strongly suggest a suspicion that this was what the crew of the *Zong* had done. This may have been a shocking case, and it may have been that – as Webster suggests – Collingwood was a particularly callous captain who did something few others would have done.¹⁹⁷ But the decision in the *Zong* helped ensure that it stayed that way. By putting the shipowners to strict proof of the issue of necessity, it ensured that the sort of callous mass killing seen in the *Zong* would not happen again.

And, as it transpired, in the *Zong* itself, there was no second trial – the shipowners appear to have abandoned their action once it became clear that they would be put to strict proof of necessity and of causation. It is not too much of a stretch to suppose that this was precisely what Lord Mansfield intended, for this type of decision was typical of Lord Mansfield's approach to doing justice. Twice in his judicial career, he invoked the lofty maxim, 'fiat justitia ruat caelum' – do justice though the heavens should fall. The first case arose out of the outlawry of John Wilkes, a populist dissident the targets of whose vicious attacks had included Mansfield himself. Wilkes challenged his outlawry and in his trial, as in the *Zong*, arguments relating to fundamental principles and freedoms were repeatedly raised. Mansfield, however, had no truck with those. After repeating this maxim, he proceeded to dismiss the outlawry not on the ground of the fundamental freedom of the individual to free speech or of the liberty of the press, but on the technicality that the indictment failed to name the county in which it was granted.¹⁹⁸ The second time he cited the maxim was in *Somerset*, where he then proceeded to issue a very narrow holding which for all its rhetorical force only dealt with the specific power at issue in that case.

Mansfield attracted criticism both in his time and in ours for this seeming gap between his high rhetoric and the actuality of his actions.¹⁹⁹ But this misses the point. To Mansfield,

195 Henry Home Kames, *Principles of Equity*, (2nd edn, A. Millar 1767) iv.

196 Jane Webster, 'The Zong in the Context of the Eighteenth Century Slave Trade' (2007) 28 *Journal of Legal History* 285, 292-3.

197 *ibid*

198 *R v Wilkes* 4 Burr. 2527, 98 ER 327

199 Edmund Heward, *Lord Mansfield: A Biography of William Murray 1st Earl of Mansfield 1705-1793* (Barry Rose Law Publishers 1979) 117.

doing justice meant not reshaping the law in a way that was ‘more just’ according to an external standard, but using the law pragmatically, to do what could be done on the facts of the case to achieve a result that was just in terms of its actual practical effects. In relation to Wilkes, it meant finding a technicality somewhere that could serve as a ground to release him – not a radical revision of the law on freedom of the press. In relation to Somerset, it meant delivering him from slavery even at the cost of departing from the conflicts rules which Mansfield ordinarily used which, as Watson shows, should have led to an orthodox application of Virginian law.²⁰⁰ But it did not mean radically altering the law to abolish slavery. In relation to the Catholics, it meant creating new evidentiary rules preventing their persecution by professional informers, not changing the constitutional position of the Anglican church. And in relation to the *Zong*, it meant doing what was necessary to ensure that it would remain forever a ‘most uncommon case’ and that the shipowners would not profit from the acts of their crew. It did not mean completely changing the nature of slave transport across the Atlantic. There was, in other words, a second aspect to Mansfield’s pragmatism - that even where broader considerations led him to choose a weaker, and morally less defensible, legal position, he tried to do what was pragmatically possible to mitigate the effects of his choice. In the *Zong*, no less than in relation to the persecution of Catholics, his actions were not ineffectual.

Mansfield’s pragmatism thus shared with modern pragmatism one of the characteristics identified by Atiyah – an overriding concern with outcomes.²⁰¹ But the second of Atiyah’s characteristics – his apparent reluctance to consider the full implications of principles established by precedent – was not what it seemed. He was fully aware of the principle and of its importance; and, in a situation where two principles were in conflict, he attempted to strike a pragmatic balance that preserved some aspects of both.

It is this second aspect – the attempt to strike a pragmatic balance, and to deliver pragmatic justice – that is missing from the form of pragmatism we see exhibited by the House of Lords in *Bancourt*. The motivations that lie behind the move to limit state liability are a lot less clear than those that motivated Mansfield to build commercial law. As we have seen, they may reflect a response to what some have called the increasing ‘constitutionalisation’ of administrative law.²⁰² They may represent an attempt to protect government departments from having their work disrupted by the ever-present threat of litigation, a topic that has also attracted the attention of the Law Commission.²⁰³ They may, as has been suggested by some authors, including Lord Hoffmann (in his personal capacity), reflect a particular view of the separation of powers, where the courts, in the name of Parliamentary sovereignty, exercise restraint in reviewing executive action in areas that they deem more appropriate for legislative decision.²⁰⁴

The last of these is perhaps most consistent with the decision in *Bancourt*. Critical to it is a conflation of the legislature and executive, and the assumption that recognition of the supremacy of the legislature necessarily implies deference to the executive. The House of

200 Alan Watson, ‘Lord Mansfield; Judicial Integrity or its lack; Somerset’s Case’ [2007] *Annals of the Faculty of Law Belgrade: Int’l Ed.* 18.

201 Atiyah (n 113) 113 – 125.

202 Dyzenhaus et al. (n 161).

203 Law Commission, *Administrative redress: Public bodies and the citizen* (Law Com CP no 187, 2008) 61-67, 75-82

204 Hoffmann (n 158) 139-41.

Lords' dismissal in *Bancoult* of the constitutionally important distinction between Parliament's supremacy over colonial legislatures and its supremacy over the imperial executive, and their readiness to find the latter excluded from judicial review because the former was, are only too symptomatic of such a conflation of legislature and executive. They are also a stark illustration of the failure of pragmatic approaches to properly investigate the principles that lie behind the specific precedents and rules they claim to apply.²⁰⁵

The consequences of this are evident in the majority decision in *Bancoult*. Unlike the *Zong*, there was no attempt by the majority of the House of Lords in *Bancoult*, not even in part, to pragmatically redress the underlying issue of the possession of power by the mighty over a legally disenfranchised group. There is, consequently, nothing that mitigates the effect of their flagrant denial of a vulnerable group's rights, or their refusal to deal with the fundamental questions of constitutional law it raised. As with the *Zong*, what we see in *Bancoult* is only presented as formalism. In reality, it is pragmatic lawmaking at its peak. But, unlike the *Zong*, it is untrammelled and unmitigated by any attempt to achieve pragmatic justice.²⁰⁶

The repeated expressions of sympathy by the majority in *Bancoult* suggest that they would not have been averse to finding a pragmatic balance. But, as they ought to have realised, a pragmatic balance is harder to achieve in judicial review. Judicial review lacks the wide range of personal and monetary remedies, and the many means of reducing, enhancing or denying these, that characterise private law, and that have made pragmatism such a powerful and successful tool in private law.²⁰⁷ These inherent limitations of pragmatism, of which judges of the highest court of the land should not have been unaware, make its deployment in *Bancoult* even more troubling, and even harder to justify. For that reason, it stands as a stark example of the dangers of a pragmatic approach to constitutional questions.

205 Cf. Atiyah's discussion of *Harman v Home Office* [1983] 1 A.C. 280 and an unnamed writ of habeas corpus: Atiyah (n 113) 112-119. See also his discussion of the problems with a narrow view of precedent: ibid 125-128.

206 This is made worse by the fact that unlike the *Zong*, the victims of the actions in *Bancoult* are not dead; to the contrary, they continue to suffer the effects of their expulsion. In the *Zong*, the fact that the victims were dead meant that a remedy would have been merely symbolic; in *Bancoult*, despite the protestations of the majority, it would not.

207 Cf. the discussion of pragmatism's strengths – conducted almost entirely in the context of private law – in Atiyah (n 113) 55-78.