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The Clanking of Medieval Chains: Extra-Judicial Banishment in the British Empire

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ABSTRACT
Banishment in English law was circumscribed by the Magna Carta and habeas corpus and prohibited except by legal procedure. The Transportation Act of 1718 legalised exile and enshrined convictism in law. The case of *Bancoult (No.2)*, 2008, which considered the banishment of the Ilois of Chagos Island in the 1960s, brought consideration of banishment into the twentieth century and opened the royal prerogative to modern scrutiny. What becomes clear from this case is that banishment relied on royal prerogative without resort to legal process and was surprisingly routine throughout the British Empire. This article considers the implications of this case and some of the wider history of banishment in the empire.

KEYWORDS
Banishment; royal prerogative; transportation; convicts; Bancoult; Chagos Islands; Musquito; Tasmanian Aborigines; Boers in Ceylon; Ehelepola in Mauritius; Arabi

Banishment has, to contemporary minds, a touch of the medieval about it and it is astonishing to see it seriously considered in twenty-first-century British courts.[1] Because it turns on the use and legality of the anachronistic royal prerogative, it evokes, in the favoured phrase, 'the clanking of mediaeval chains of the ghosts of the past'.[2] The fact, though, that they clank at all and are not rusted beyond repair attests to the power of the past and its reach into the present. In examining the ancient exercise of royal prerogative, the need, as the court avers, is to 'conduct an historical inquiry',[3] one which has provided a compelling analysis as well as tools to interrogate the practice of prerogative in the colonial setting.

The recent series of cases arose as a result of the removal and exile of the Ilois from the Chagos Islands in the British Indian Ocean Territory (BIOT), an artificial entity created in 1965 under the Colonial Boundaries Act 1895, principally to allow the creation of the immense US military base on the island of Diego Garcia. As part of that agreement the US required that the territory be uninhabited and by orders in council (royal prerogative) the British government removed the entire population to nearby Mauritius. Mainly ex-slaves, plantation workers and ex-indentured servants, they had lived there for several hundred

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years, so this draconian action was 'not, to say the least … the finest hour of UK foreign policy'.[4]

Action was taken by the Ilois to have the right to return as 'belongers', as the courts quaintly described them. The case finally arriving at the European Court of Human Rights in 2012 without success; it had become a *cause célèbre* for human rights but it is the minute examination of the area of royal prerogative by British courts that lends it such historical importance.

The decision by the House of Lords is clear. Legislation for colonies by royal prerogative through orders in council 'is in the same position as legislation made by Parliament' for the UK.[5] They are plenary powers, 'technically primary legislation … not subject to parliamentary consent or scrutiny'.[6] Royal prerogative exercised within the domestic realm may have gradually shrunk over time but beyond the seas, Lords Rodger and Carswell concede in *Bancoult (No.2)*, the crown retains, as Elliott and Perreau-Saussine point out, 'powers of extraordinary scope and arbitrariness in relation to colonies'[7] with English public law offering a 'dismally modest check on the executive's extra-territorial exercise of Prerogative power'.[8]

The exercise of royal prerogative by James the II was one of the areas of deepest political and legal contention in the events leading up to the Glorious Revolution of 1688. Parliamentary constitutional assertion, along with the Bill of Rights enacted on the ascension of William and Mary, abrogated the exercise of prerogative power by the crown in domestic affairs and firmly established the primacy of parliament. Royal prerogative, the use of orders in council, then, according to the venerable Dicey became the 'the residue of discretionary or arbitrary authority',[9] those powers 'left over from when the monarch was directly involved in government',[10] or so it seemed.

Domestically prerogative powers may have faded to a constitutional exceptionalism but in external affairs, as the court has emphasised, they remain unfettered, and, more importantly, formed, Poole suggests, 'for centuries an important tool of colonial governance'.[11] This, of course has always suited executive government, albeit an executive power arising out of parliament. The use of royal prerogative, without reference to parliament, has allowed governments to 'to sign treaties, engage in armed conflict and … legislate for British colonies in ruthless promotion of the interests of the United Kingdom'.[12] And ruthless and arbitrary are appropriate terms in respect of prerogative powers. In England, parliament was apparently paramount but once governance ventured beyond the white cliffs of Dover, royal prerogative took over.

The continued role of royal prerogative—it may even been seen as expanding in an era of terrorism[13]—underlines the extraordinary importance it had in the past as a critical instrument of empire governance. The national belief was that the British Empire should be governed by the 'rule of law', and this was an 'important, even crucial, idea in the legitimation of empire'.[14] In the grand vision of empire, law was one of the great instruments of Britain's 'civilising'

mission when 'succouring Hottentots' but it really was, as Dyzenhaus emphasises, 'rule of law in England, arbitrary power elsewhere'.[15]

Of course royal prerogative was, as the court has made plain, perfectly 'good law', of sorts, but it was really an elaborate pretence, the cloak of 'rule of law' in the empire when in reality the emperor wore no clothes. Nevertheless it was a powerful myth that infected thinking then and into the present whereas in actuality empire was the 'raw projection of power … unmediated by law'.[16]

The primacy of parliament and the shift of the monarchy from active agent to simple symbol has been part of the Whig narrative; however, essentially residual monarchical discretionary authority simply moved to the executive government. Royal prerogative appears obviously anachronistic and it is all very well for Lord Diplock in 1965 to rail that it is '350 years and a civil war too late for the Queen's courts to broaden the Prerogative'[17] but what he unconsciously reveals is its extraordinary persistence, particularly in the domestic area of state secrecy and, more significantly, its power in the past in colonial affairs.

The continued unfettered application of the royal prerogative in colonial matters obviously horrified dissenting judge Lord Mance in *Bancoult (No.2)*. That grand colonial formula, the governing authority's legal obligation to maintain 'peace, order and good government', seemed an astonishing contradiction when applied to the apparent legal right to exile an entire population. This interpretation and application, Lord Mance thundered, implied prerogative power could make laws ' as if they related to nothing more than the bare land, and as if the people … were an insignificant inconvenience … liable to be dispossessed at will for any reason that might seem good to the executive in the interests of the United Kingdom'.[18] The dictum may seem rhetorical but it sums up *exactly* the exercise of prerogative power in colonies in the past and even, it would seem, into the present. When seen in such stark relief, the controversial assertion of *terra nullius*, described by Henry Reynolds[19] in Australia and elsewhere, appears positively prosaic, a universal imperial given.

Bancoult reveals the breadth of prerogative power and commentators have tended to focus on that remarkable breadth. The case though involved, as Lord Mance avers, the banishment of an entire population and it is this power to banish that is of colonial concern in this article, particularly when compared with the power to do so domestically.

It is simply one of those great and unquestionable axioms of British law: banishment or exile—the terms are basically synonymous—is expressly forbidden by Chapter 29 of the Magna Carta, except 'by the lawful judgment of … Peers or by the law of the land'. Blackstone is emphatic: 'No power on earth, except the authority of Parliament, can send any subject out of the land against his will.'[20] This was specifically reiterated and reinforced in the Habeas Corpus Act of 1679 (31 Car II c.2),[21] mainly because it was being ignored, so the principle was firmly held as fundamental. How then can such

foundational principles of law, extra-judicial exile, banishment without conviction, be so flagrantly flouted in a colonial setting?

Again *Bancoult* offers insight. Lord Rodger concluded that it is 'certainly arguable' that it is a 'fundamental principle' of English law that no citizen should be exiled or banished,[22] but, he added, British subjects in a colony may have those rights removed. In a colony, orders in council—as primary legislation—meet Magna Carta's requirement for banishment by being in accord with the 'law of the land'.[23]

It is possible then to resolve one of the puzzles of colonial practice. While subjects residing in Britain could not be banished except by law and by the courts—essentially by conviction—in the possessions of the empire, people could be and were routinely banished without trial. And the reason lay within the royal prerogative, a legal framework for an often capricious system. The often-arbitrary enactment of law in the colonies has given rise to a concept of legal 'pluralism' but, if observed through the prism of prerogative, colonial legal practice often becomes more consistent though no less arbitrary or draconian. [24]

Whitehall exercised prerogative power and shaped, defined and subcontracted it to its colonial agents, quite literally its vice-regal representatives, who were able to act with the same prerogative within the constraints of their commission. As Arthur Bowes Smyth, surgeon on the 'Lady Penrhyn' bound for Sydney, wrote of Governor Phillip's commission, 'it is a more unlimited one than was ever before granted to any governor under the British Crown'.[25]

There were some perceived traditional legal differences depending on whether the colony was ceded, conquered or settled, though *Bancoult* essentially saw this, surprisingly, as inconsequential. In the case of territories ceded or conquered, existing law remained: Dutch law in the Cape (including the useful power to banish), French law in Mauritius and Dutch, Portuguese and even Sinhala law in Ceylon . It remained, though, only until altered by ordinance and at that point prerogative power came into play until cut short by a British Act like the New South Wales Act 1823 (4 Geo. IV c.96) which established a legislative council and a supreme court in New South Wales and Van Diemen's Land.[26]

The Transportation Act 1718 and Judicial Banishment

When it comes to the issue of banishment the loose language applied tends to obscure our vision: transportation, for instance, was routinely described as banishment or exile and still is and it had legislative use as early as 1597 when parliament allowed magistrates the 'power to exile rogues and vagabonds'[27] 'beyond the seas'.

In the clumsy fashion that is English law, exile to America before the Transportation Act, was effected by a flimsy fiction. Prisoners found guilty of capital offences could receive pardon on condition of exile to the Americas,[28] which satisfied the Magna Carta by essentially creating conditional or 'voluntary' exile.[29]

So deeply engrained was ‘this collective wishful thinking’, Atkinson suggests, that, even after the introduction of the Transportation Act, the ‘belief persisted’ that banishment under the act ‘preserved the element of consent’,[30] like a conditional pardon, so the myth persisted that a convict arrived ‘free’.[31]

The problem, as the act itself points out, was that ‘many offenders, to whom the royal mercy has been extended upon condition of transporting themselves … have often neglected to perform the said conditions’.[32] In effect the system was not working and the act aimed for ‘the more effectual transportation of Felons’ . The fiction of voluntary exile was not entirely extinguished by the initial act[33] but later amendments specifically allowed for assignment of labour and by ‘legislative sleight of hand, servile bondage was thus added to the common armoury of the penal law’.[34]

The numbers sent to America before the Transportation Act numbered some 5,000–6,000 but between 1718 and 1776 this expanded to about 50,000, with the loose system of sub-contracted transportation before the act replaced by a more rigid, formal contractual arrangement. None of this compares, though, with the magnitude of the Australian penal experiment. This was a direct government project, an organised convict establishment, that saw 160,000 transported and exiled. At each stage, the penal experiment became more ambitious and more elaborate. Banishment and transportation had become the preferred system of punishment, a cheap way of removing miscreants from British shores.

The sheer ubiquity of the convict system and the overarching presence of transportation as penal policy and a philosophy of punishment make it understandable that historians tend to lump judicial banishment from Britain under the Transportation Act together with extra-judicial banishment by the exercise of royal prerogative in the colonies. This is compounded by the fact that the two often worked in tandem.

Focusing on prerogative and extra-judicial colonial banishment reveals an extensive imperial practice. The global patchwork of colonial possessions formed a giant chessboard of colonial circulation[35] that allowed the extremely widespread and routine practice of shuffling colonial troublemakers about the empire.

Banishment in the Colonies

The Aborigines of Van Diemen’s Land, 1831

The case of *Bancoult* concerned the banishment of an entire populace but it was no singular occurrence. In 1831 the scarred remnants of the Aborigines of Van Diemen’s Land, following a protracted frontier war, were banished to offshore Flinders Island. Unravelling the foundations of this decision is far from simple but the hand of prerogative power hangs over it.

The Black War, which had broken out after 1824, had posed the vexed issue of what to do with the Indigenous inhabitants. Banishment had been discussed in the 1820s 'but was initially opposed by the government'.[36] The increasing intensity of conflict, however, compelled the government's Aborigines Committee in 1831 to recommend removal to Flinders Island.[37] The means was uncertain but the legal right was assumed.

The solution was to come in the form of the 'friendly mission' undertaken by George Augustus Robinson, who in 1829, with Governor Arthur's endorsement, began to scour the island encouraging the Aborigines to surrender under sanctuary. Though he was motivated by evangelical Christian concern, the incentive of a bounty on every head spurred his efforts and the interminable conflict made the Aborigines receptive. A further inducement given by Robinson to the Aborigines was a promise they would be able to remain in 'their respective districts'[38] if conflict ceased, and this 'clearly persuaded'[39] them any removal to Flinders Island would be only temporary.

Whether Robinson's desire for success led him to embellish his promises or whether Governor Arthur gave vague undertakings to Robinson that 'he could disown once the Aborigines were safely in exile'[40] is uncertain. Both seem probable, though the result was conclusive. About 220 Aborigines were moved to Flinders Island in 1833. Only 47 remained in 1847, such was the cost of exile. They understood clearly, though, the terms of their banishment and moved about the island at will. They were not prisoners like the convicts sent to build the Wybalenna settlement and would not be put to labour.

Their understanding of their exile was set out in a petition to the crown in 1846. The Aborigines sought repatriation to the mainland, arguing 'Mr Robinson made for us with Colonel Arthur an agreement'[41] to that effect. Henry Reynolds[42] suggests the original agreement may well be construed as a treaty but, however it is seen, Governor Arthur's prerogative powers both sent them and kept them in exile and determined any permission to return, despite the sleight of hand employed to get them there.

Governor Arthur's decision was not unique and was not made in a vacuum. Prior to Van Diemen's Land, Arthur was appointed in 1814 superintendent in Honduras (modern Belize). He understood indigenous conflict in the Caribbean.[43] In 1797 the Black Caribs of St Vincent, after the crippling Second Carib War, surrendered to the British and were banished to the island of Roatán, off modern Honduras,[44] transported without any inkling of irony on HMS *Experiment*. These exiles were within Arthur's realm of responsibility; he even sought to incorporate their descendants in the 'settlement's remarkably democratic constitution'.[45]

Arthur was fully conversant, too, with the exile in 1796 of the 550 rebellious Maroons of Trelawney to Nova Scotia[46] in the wake of the Second Maroon War . Despite taking an oath of allegiance to the crown, the Jamaican Assembly—

white and democratic—passed an Act of Deportation, endorsing the prerogative power of the governor to banish.

In his models of response—his sense that he faced a 'war'; his punitive expeditions; his attempt to use the Black Line to corral the Aborigines; and the eventual exile of the Aborigines to Flinders Island—all these he read from the page of colonial practice irrespective of any evangelical idealism.

Banishing Musquito 1805

As the newly formed Sydney settlement spread into the rich flood plains of the Hawkesbury River, confrontation with the Indigenous people was inevitable and one of the warriors of resistance on this emerging frontier was Musquito. He was named in June of 1805 as a 'Principal of the late Outrages', a leader whose 'apprehension … might effectively prevent any further mischief'.[47] In July a number of those 'concerned in the latest Outrages'[48] were gaoled at Parramatta by the magistrate, the Reverend Samuel Marsden, scourge of the heathen pestilence, whose pressure on his captives ensured the negotiated surrender of Musquito.

Governor King, whose patience with native unrest had worn thin, was bent on retribution but sought legal advice from his judge advocate and fellow inebriate, Richard Atkins. Atkins, no legal genius, probably called upon his convict clerk Michael Massey Robinson, a qualified lawyer, as well as published poet and seditious troublemaker, compulsory attributes of an Irishman.

Given Atkins' ability, the legal opinion that eventually emerged shows more legal thinking than often supposed. The opinion was cautious and sidestepped the fraught problem of hanging an Aborigine, a first that would have been certain to draw attention from the Colonial Office. In fact Atkins preferred cutting them down in the field than wasting the time of the judiciary.

Atkins averred that applying the rigour of the law to acts by Aborigines was impossible because 'the evidence of persons not bound by any moral or religious tie' cannot be construed as 'legal evidence'.[49] From the beginning Aborigines were regarded as without religion—superstition and magic certainly, but not religion. It became a fixed legal view that the evidence of Aboriginal witnesses was inadmissible since 'unless baptized Christians, they could not swear to the truth of their testimony'.[50]

The foundation for the view that Aborigines could not give evidence was nevertheless tenuous. As Judge John Dowling in 1828 pointed out, it was common practice in other jurisdictions for 'natives' to give evidence and to plead,[51] as the drawing in Cordiner's 1807 work on Ceylon illustrates (Figure 1).

Atkins' opinion however did not just question the capacity of Aborigines to give evidence but also to plead. Though 'natives are within the pale' of English sovereignty—that is to say, they were subject to British law—they were unable to plead 'the meaning and tendency of which they must be totally ignorant of'.[52]

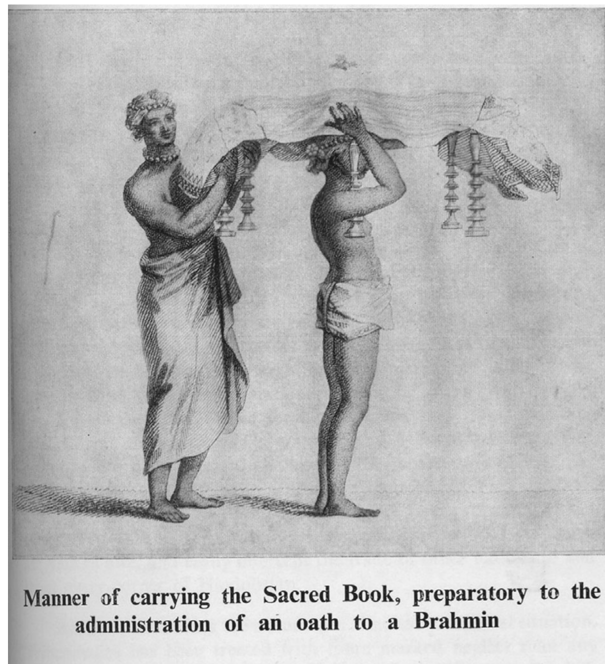

Figure 1. From James Cordiner, *A Description of Ceylon*, Vols 1 & 2, London, 1807. Facsimile reprint Tisara press, Dehiwala, Sri Lanka, 1983, p. 156.

While not grammatical, Atkins' opinion enunciates a core element in the evolutionary roots of common law. To sustain a conviction for a crime like murder two conditions must be satisfied, *actus reus* and *mens rea*, an intentional act and a mind capable of conceiving the implications of that act.[53] Simply stated, Atkins was not simply suggesting that Aborigines have no religion, what is more important is they had, in his opinion, no mind capable of conceiving the import of their actions. In the words of the legal maxim, *non actus reus nisi mens sit rea*—the accused is not guilty unless his mind is guilty .

That is the legal problem and Atkins was correct in common law. From an Aboriginal point of view, of course, there was no guilty mind because their actions within Aboriginal law were not wrong, though Atkins was not that subtle. Atkins simply saw them as savages devoid of a capacity to know right from wrong, like infants or idiots. Judge Dowling again picked up this implication. If Aborigines were precluded from pleading, he pointed out, they stand 'before the court in the same light as a dumb man—as void of all intellect … He is incapable of making any defence.'[54]

The legal issues that flowed from Atkins' advice echoed through the nineteenth century until the issue was resolved by statute, but the immediate result in the case of Musquito was the exercise by Governor King of prerogative powers and the extra-judicial banishment of Musquito to Norfolk Island. The distinction between conviction and extra-judicial banishment was often

blurred since in one sense a governor's determination employing prerogative power was judicial, like Solomon's. The governor's instructions, however, were that Musquito and his companion Bulldog be 'kept, and if they can be brought to Labour will earn their food—but as they must not be let to starve … they are to be victualed from the Store'.[55] They were not strictly speaking convicts and were not compelled to labour whereas for convicts penal servitude was not an optional extra.[56]

Musquito remained on Norfolk Island until it was abandoned in 1813 and the population transferred to Van Diemen's Land. While there he was employed as a servant and assisted in tracking bushrangers but he was free to move about at will though not to return. Again he was generally held within the convict system though not as a convict or assigned servant, more like the Irish exiles of the 1788 Rebellion, Michael Dwyer, the 'Wicklow Chief'[57] and Joseph Holt,[58] the United Irish general 'voluntarily' exiled in New South Wales. They too, since Ireland was arguably an 'overseas colony', were subject to the clear exercise of prerogative power. Permission was granted for Musquito's repatriation on three separate occasions, once on Norfolk Island and twice in Van Diemen's Land for his good behaviour and service rendered to the government but this was never fulfilled.

In 1824 he became once more notorious for his attacks on white settlement, seen even as a catalyst in the eruption of violence that became the Black War since the 'Darkies were as quiet as dogs before Musquito came'.[59] Captured and tried for aiding and abetting the wilful murder of William Hollyoak in November 1823, he was now shown none of the leniency of his initial capture 20 years before. The accepted conventions of Aboriginal evidence that obtained at that time were applied and he was neither given representation nor the right to offer evidence. Found guilty he was hanged in Hobart in 1825, though his final bitter observations summed his contempt for white culture, 'Hanging no good for black fellow. Very good for white fellow, for *he* used to it.'[60] And the inference was they probably deserve it.

Banishing Dual or Dewal

Dual is again one of those troublesome natives engaged in frontier confrontation. Eighteen-sixteen saw a surge in the movement of settlers into the Appin and Cowpastures area of the Sydney region, creating the usual mix of simple naked violence, conflict over women and Indigenous resistance.

Despite an earlier conciliatory attitude to Aboriginals, Governor Macquarie determined to drive the Aboriginal clans from these frontier areas and sent three military detachments with instructions to take prisoners, shoot any that resisted and hang their bodies on trees to 'strike the greater terror into the survivors'.[61] He was under considerable political pressure and it is suggested he was crumbling under that weight,[62] making repressive decisions in a number of areas.

One of those named as a leader of those 'flagrant and sanguinary'[63] attacks was Dewal or Dual. He was captured and incarcerated but never tried; Governor Macquarie instead published a prolix proclamation, an inflated 'pageant of law' that Ford suggests lacked the 'the substance of jurisdiction' and was the 'high point of colonial jurisdictional abstinence'.[64] It was certainly an extraordinary high point, not of abstinence however, but of judicial assertion, a jurisdictional concentration of magisterial prerogative and a florid demonstration of entirely legal pro-consular power.

Unlike Governor King, Macquarie adopts an explicitly judicial mantle in his exercise of prerogative power, wrapped in legalese and the conventions of courts and conviction while acknowledging the recurring justification that Aborigines were, by their savagery, ignorant of the law and unable to plead. Here was an utter conflation of the legal process, of trial, judgment, sentence and executive mercy by the exercise of prerogative.

The notice of public order declared it was 'expedience'—a dazzling understatement—that Dual should 'meet with condign Punishment' in order to deter others, given he was a danger 'to the Peace and Good Order of the Community'—that legal formula again. Despite, however, the 'Crimes and Offences' Dual had 'been guilty and personally concerned in', Macquarie was magisterially 'moved with Compassion towards the said Criminal' and, considering his 'Ignorance of the Laws and Duties of civilised Nations', he intended by the power '*vested in*' him to commute his summary sentence 'into Banishment' for seven years, the typical sentence of transportation. It was, as Ford justly suggests, an extraordinary legal gesture, but these were powers 'vested in' him nonetheless.

Dual was subsequently sent to Van Diemen's Land but was later repatriated, an exercise of prerogative and privilege that was extended but never fulfilled in respect of Musquito whom Dual must have encountered in his service as tracker of bushrangers.

What recurs in these examples is the routine way prerogative powers are exercised though they are often couched in deceptively judicial language that deflects our gaze and scrutiny. Even studies that specifically focus on Indigenous convictism[65] do not subject such foundational legal practice to close scrutiny. The understandable tendency is to see prerogative practice as simply a pedestrian part of the wider legal umbrella of convict transportation and to be misdirected by the legal exceptionalism that was often applied to Indigenous miscreants.

The service of *Bancoult* to historical understanding is to reveal the ubiquity of prerogative practice in colonialism and to disclose the legal exercise of prerogative as a consistent feature of colonial practice rather than part of the loose legal 'pluralism'[66] that was undoubtedly cobbled together on the frontier.

The Banishment of Ehelepola to Mauritius

The usurpation of Ceylon in 1796 begins in hyperbole in contrast to the dour Dutch who, in mournful anticipation of the ravages of the orient, brought with them to a colony of pungent and profitable spice their tombstones as ship's ballast. Inscribed with their personal details, the only omission was their date of death.[67] The more optimistic—and devious—British secured Ceylon from the Dutch by the defection, for £4,000, of the de Meuron Regiment, a Swiss mercenary force owned by the Compte Charles de Meuron of Neuchatel. Instructions to his brother Pierre-Frederick de Meuron were sent on a trading vessel bound for Colombo, secreted, with culturally appropriate piquancy, inside an Edam cheese.[68]

The first British governor of Ceylon was Frederick North (1768–1827), son of Lord North who had been made prime minister in time to lose the American colonies. An obsessive philhellene North constructed a residence at Aripo in the Doric style (Figure 2), adjacent to the rich pearling beds on Ceylon's west coast, and thus stamped his reign with eccentricity .

From the time of the Portuguese in 1505, the Sinhala kingdom, independent for some 2,500 years, had shrunk to a mountainous fastness, dominated by intrigue involving their Malabar kings, the Sinhala aristocracy and European colonial interests. The kings' chief adviser or adigar, Pilima Talavva, inveigled the British into hostilities and North declared war on 29 January 1803 with Major General Hay MacDowell taking Kandy in February 1803.

By April the Kandyan natural defences of mud, rain and precipitous paths were augmented by malaria and leeches that hung like grapes from flesh, the torrential bleeding leaving open wounds that quickly ulcerated and became gangrenous. The British were forced to retreat, leaving behind a small garrison that later surrendered and was slaughtered almost to the man.

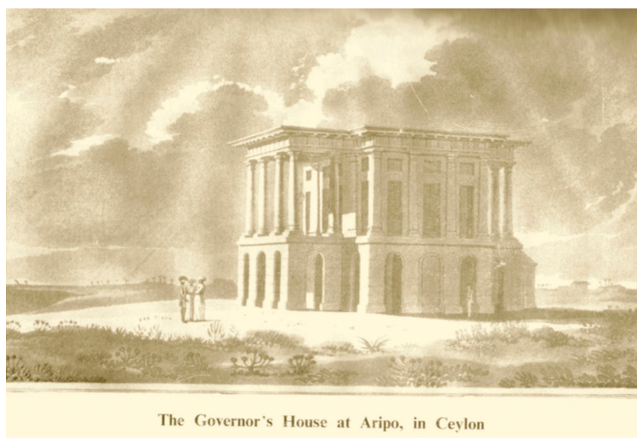

Figure 2. Governor North's Doric Folly in Ceylon, from James Cordiner's *A Description of Ceylon*, vols 1 & 2, London, 1807. Facsimile reprint Tisara press, Dehiwala, Sri Lanka, 1983.

North's Kandyan intrigues and humiliating defeat sullied his reputation. His reflection when he wrote 'I hope I have not done wrong, but I am not yet certain whether I have acted like a good politician or a great nincompoop'[69] requires no comment. North left unfinished the colonial conquest of Kandy but also left a legacy in the form of young acolytes like John D'Oyly (1774–1824) who had a taste for the language, culture and intrigue. D'Oyly assiduously cultivated the various chiefs, traders, monks and royal personages, building a formidable network of information. Brownrigg, who became governor in 1812, particularly encouraged his clandestine endeavours as he hungered for the opportunity to take the Kandyan kingdom.

The continual tensions in Kandy encouraged the chief Kandyan minister, Ehelepola (the Maha Adikaram), into discreet contact with D'Oyly to urge British intervention. Realising he was under suspicion he fled to Colombo in 1814 and in so doing provided the justificatory drama required.

Ehelepola's wife and family were held in Kandy and were now condemned by the king for his betrayal. One by one Ehelepola's children were decapitated 'by one blow of a sword' and, their heads 'streaming with blood', were thrown in a rice mortar and their mother forced to pound the skulls with a pestle (Figure 3). One, an infant at breast, was 'plucked from the mother's breast to be beheaded' and when 'severed from the body, the milk it had just drawn in ran out mingled with its blood'. After this grief and horror Ehelepola's wife and sister were weighed with stones and thrown into the Kandyan lake to drown.[70]

This monstrous description understandably lent itself to outrage, though Davey's description is probably exaggerated: a village mortar lacks the capacity suggested.[71] The scene though was set and the excuses readied. Some Moor traders from Puttalam, rightly suspected by the king as part of D'Oyly's network of spies, were mutilated, their hands severed and hung about their necks, their ears and nose hewn from their faces, and then sent dying back to Colombo.

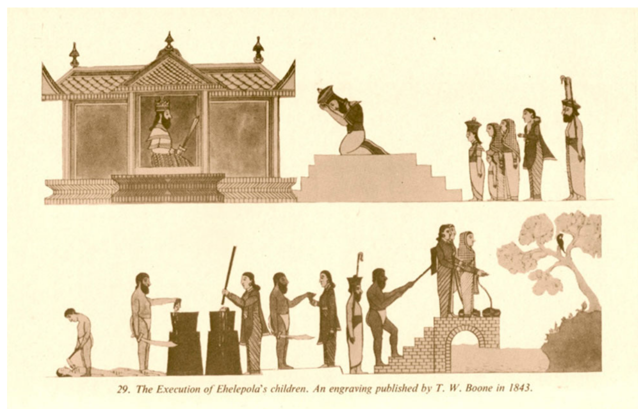
29. The Execution of Ehelepola's children. An engraving published by T. W. Boone in 1843.

Figure 3. The execution of Ehelepola's children, an engraving published by T. W. Boone, 1843.

On 10 January 1815, the invasion of Kandy began but, unlike in 1803, the Kandyan defence did not materialise. The king was finally deserted. The work of D'Oyly was everywhere apparent. The only blood that was spilled, so they said, was from the leeches. The fall of Kandy should have been a gala event celebrated with imperial pomp except that the news arrived in London the day after celebrations for the Battle of Waterloo, and thus was somewhat of an anti-climax.

The Kandyan elite, however, saw the British as only a temporary intrusion to rid them of the Malabar menace and in 1817 rebellion broke out—a two-year revolt that saw the deaths of over 1,000 British and the utter destruction of the people and province of Ouva. The declaration of martial law—yet another manifestation of prerogative power—saw wholesale destruction and summary execution. Trials did take place under its rules and atmospherics and many of the chiefs were sentenced to execution or banishment to Mauritius.

The exception was Ehelepola. Arrested early in the outbreak of rebellion and held throughout in Colombo under close house confinement, he had remained loyal to the British. The suspicion remained, however, that his hand was behind the revolt,[72] but, while Ehelepola undoubtedly harboured ambitions for power, even the crown, he remained steadfast and aloof. The problem for Governor Brownrigg was that, while Ehelepola remained as the senior Kandyan chief, he potentially provided a focus for possible future dissent and revolt. The rebellion had been a close fought affair, which the British nearly lost. In fact the Colonial Office view was to abandon the region if hostilities persisted.

Even though it was well after the 1817–18 Great Rebellion, in 1825[73] Governor Barnes banished Ehelepola to Mauritius because the 'influence' he possessed had prevented 'his enlargement [free movement] being allowed without probable danger and disturbance to the government'.[74] It had been made clear to him by Governor Brownrigg that he would never be allowed to return to Kandy but Governor Barnes' resolve to further exile him was a determined desire to see the British rid of a 'source of embarrassment to British justice'[75] as well as a potential focus of revolt. He petitioned repeatedly for an enquiry to clear his name, claiming he 'had committed no wrong … or caused others to commit any',[76] but all that he succeeded in securing was further discomfort in his captors.

He lived out his remaining years, some distance from his fellow Kandyan exiles, at the Powder Mill at Pamplemousses, Mauritius, labelled a 'state prisoner',[77] a term employed to emphasise the political nature of the banishment and his distinction from a convict—a difference clearly understood. As for most banished persons, there was no question of penal servitude; in fact they were well cared for even down to tastes in Sinhala foods. Ehelepola, however, became a 'listless, mild old man with white hair, who liked European society and young children'.[78] He died on the island in April 1829, a broken man. He had lost his family in appalling circumstances and lost power and status, all for his collusion with the British. 'I wore out my body to help the Government which I trusted and all that I achieved is as a line traced in water.'[79]

It would be difficult to find a more blatant example of colonial caprice than the banishment of Ehelepola. It was pure prerogative based on little more than whim and convenience but it is an example that shows more clearly than most the sheer arbitrariness that often infected such decisions. In 1831 the Royal Commission of Eastern Inquiry (the Colebrooke-Cameron Commission) established in 1829 recommended the 'Governor's powers to banish individuals from the Island without trial should be strictly limited'.[80] Not abolished, just limited. The commission was clearly aware of the legal disparity between British domestic and colonial policy on banishment; they squirmed but never squibbed it. A Charter of Justice was introduced in 1833 along with an appointed legislative council[81] but it would be sanguine to see this as a belated sense of justice or an attempt to curb prerogative.

The commission was more about economic and administrative reform as well as giving the Colonial Office a conduit for information outside the control of the governor so as to more effectively ensure Whitehall's prerogative control.[82] It was merely velvet concealment of the mailed fist. Even as late as 1915, Governor Chalmers, the sensitive Pali Buddhist scholar, imposed martial law on his Sinhala subjects, unleashing retributive acts of summary execution by colonial officers as well 34 being executed by military courts. Governor Anderson later described events of the 1915 Riots as deserving 'the loathing and disgust of every decent Englishman'.[83]

The Scope of Prerogative and Banishment

The examples provided do not begin to cover the scope and scale of colonial non-judicial banishment that extends even into the wider realm of British foreign policy and war to provide a further store of stories of banishment and arbitrary interference. For instance, the late-nineteenth-century strategic adventurism that led to meddling in Egyptian affairs and control of the Suez Canal saw an inevitable nationalist backlash. One leader of this reaction and insurrection, Colonel Arabi,[84] was arrested and tried in 1882 by an Egyptian court but it was a judicial artifice manipulated by London.

This led to questions in the House and even a quixotic effort by British benefactors imbued with a belief in 'British justice' to lend legal aid to the embattled Arabi since no one doubted British policy at work. The end result of banishment to the Kandyan hills of Ceylon was, however, a foregone conclusion. There he was held at the pleasure of the crown, prerogative power, and was granted repatriation only as he aged and became ill.[85]

The residual prerogative power of the crown to wage war without the consent of parliament presents further examples. In the Boer War of 1899–1902 over 26,000 Boer prisoners of war were scattered about the empire, deported to Ceylon, India, St Helena and Bermuda.[86] In Ceylon 5,089[87] were incarcerated mainly at Diyatalawa in the Ouva highlands (now an army barracks for the

Sri Lankan army) and not far from where Colonel Arabi spent his exile in Kandy. They were not simply Afrikaners as one would expect but Americans, Austrians, Belgians, Norwegians, Russians, Spanish, French, German and Greek as well as seven English and five Scots who had fought with the Boers. This indicates the diaspora drawn to the mining wealth that precipitated conflict with the Boer Republics in the first place. The contingent also included 250 Boer children accompanying their fathers and brothers. It was an international as well as an imperial affair with even the frozen meat coming from Australia.[88]

The cessation of hostilities would normally have seen the automatic repatriation of prisoners but the British government made it a condition that the Boers recognise British sovereignty and swear allegiance to the British crown.[89] Most reluctantly agreed but there was a group of 'Irreconcilables' who refused. Some 16 later agreed to be sent to Java by arrangement with the Dutch government, rather than submit, but five held out.

There was public disquiet in Ceylon over such 'childish punitive precautions'[90] and in September 1903 the Ceylon colonial secretary's office released all the prisoners on condition they did not return to South Africa. Bacgot and van Rooyen were transferred north to Jaffna, H. H. Engelbrecht and Rogers south to Hambantota and Goldenhuis east to Batticaloa, all with a basic living allowance of Rs2/- per day. Goldenhuis, then over 70 and ever determined—he never took off his topee even indoors—died in 1904. Rogers gained permission to go to Holland in 1905 and Bacgot and van Rooyen finally and bitterly relented and returned to South Africa.

Only Engelbrecht held out and lived out his life as warden of the Yala Game Sanctuary where his hunting prowess was legendary as was his stern defence of the sanctuary. His fierce intractable nature earned him suspicion however, during the First World War, when the German raider the *Emden* sailed down the coast of Ceylon. Engelbrecht was accused of assisting the ship with supplies and was gaoled. The charge though was baseless and he was later released, exonerated and allowed to return to Yala where he died on 25 March 1922.

The extreme pettiness of his continued banishment and the capricious exercise of imperial prerogative indicate the length and breadth of its reach and imposition, even well into the twentieth century. The scope and scale, as indicated, provide a rich field of endeavour, collating and revealing the sheer ubiquity of the practice.

The clanking of medieval chains that is the exercise of royal prerogative, particularly to banish at will, made a fearful din in the conduct of empire but until the scrutiny of *Bancoult* it has not received the credit—or opprobrium—it deserves. The empire may have been moved by a misty-eyed belief that the 'rule of law', that axiom of empire, 'followed the flag', as the courts and public firmly believed but in reality it was preceded by prerogative, the ancient exercise of residual, unfettered and arbitrary royal power.

Notes

1. *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* (2001) QB 1067; R (*Bancoult*) *v Secretary of State for Foreign and Commonwealth Affairs (No.2)* (2008) UKHL 61; Prior: Divisional Court ([200] EWHC Admin 413; Court of Appeal ([2007] EWCA Civ 498).
2. *United Australia Ltd v Barclays Bank Ltd* [1941 A.C. 1, 29 (Lord Atkin) quoted by Lord Roskill in *Council of Civil Service Unions v Minister the Civil Service* [1985] A.C 374, 417 and endorsed by Hooper LJ in the *R (on behalf of Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038; [2006] ACD 81 ('the Chagos Island case'), 158.
3. *R (Bancoult) No. 2,* 69. Lord Bingham.
4. Rammell, Foreign and Commonwealth Office, Parliamentary Undersecretary of State, *House of Commons Debates*, 7 July 2004, *Hansard*.
5. *R (Bancoult) No. 2,* 109. Lord Rodger .
6. Moules, 'Judicial Review of Prerogative Orders in Council', 13.
7. Elliott and Perreau-Saussine, 'Pyrrhic Public Law', 21.
8. Ibid., 21.
9. Dicey, *Introduction to the Study of the Law of the Constitution*, 424.
10. Poole, 'The Royal Prerogative'.
11. Ibid.,, 147
12. Elliott and Perreau-Saussine, 'Pyrrhic Public Law', 1.
13. Principally, as in *Bancoult*, because the courts feel barred from questioning 'political' decisions arising out of the use of royal prerogative touching on 'national security'. See also Lord Roskill on prerogative powers immune from judicial review. *Council of Civil Service Unions v. Minister for the Civil Service* (1985) A.C 374, 418.
14. Dyzenhaus, 'The Puzzle of Martial Law', 15.
15. Ibid., 15.
16. Ibid., 58.
17. BBC v. Johns (HM Inspector of Taxes); (1964) EWCA Civ 2 (1965) Ch 32; (1964) 2 WLR 1071; (1964) 1 All ER 923; (1964) RVR 579; (1964) RVR 579; 10 RRC 239; 41 TC 471; (1964) 43 ATC 38; (1964) TR 45.
18. *R (Bancoult) (No.2)*, 157. L. Mance.
19. Reynolds, *The Law of the Land*
20. Blackstone, *Commentaries on the Laws of England*, vol. 1, 137.
21. Halliday, *Habeas Corpus.*
22. *R (Bancoult) (no.2)*, 89.
23. *R (Bancoult) (no.2)*, 86.
24. For a discussion of these complex issues, see: Cover, 'Nomos and Narrative'; Dyzenhaus and Ripstein, eds, *Law and Morality*; Dyzenhaus, *Legality and Legitimacy*.
25. Flannery, *The Birth of Sydney,* 62; Bowes Smyth, *The Journal of Arthur Bowes Smyth*.
26. This is not to suggest there were no legal restrictions. The judge advocate from 1788 to1814 was required to obey the governor's orders, according to the rules and disciplines of war and, though governors up to 1824 could make proclamations in the absence of a legislature, they still were supposed to be consistent with the laws of England. As this article shows, interpretation could be loose .
27. Ekirch, *Bound for America*, 1. See also Beattie, *Crime and the Courts in England*; Balak and Lave, 'The Dismal Science of Punishment'.
28. Maxwell-Stewart, 'Convict Transportation'; Meredith and Oxley, 'Condemned to the Colonies'.

29. See Emerson Smith, *Colonists in Bondage*, for the argument of banishment prior to the conditional pardon inaugurated under the protectorate, 1655.
30. Atkinson, 'The Freeborn Englishman Transported ', 93.
31. While it is the view of an amateur legal historian, Bert Rice's short article 'Were the First Fleet Convicts Bond or Free?' suggests the persistence of this view, calling on Coke and company for the quite considerable legal support they offer.
32. Atkinson, 'The Freeborn Englishman Transported', 96.
33. Kercher, 'Perish or Prosper', 5 .
34. Atkinson, 'The Freeborn Englishman Transported', 97.
35. See, for example, Anderson, *Convicts in the Indian Ocean*
36. Reynolds. *A History of Tasmania*, 70.
37. *Aborigines Committee Minutes*, 24 Oct. 1831, CBE/1, Tasmanian Archive and Heritage Office (hereafter TAHO).
38. Plomley, *Friendly Mission*, 427.
39. Reynolds, *A History of Tasmania*, 77.
40. Ibid., 78.
41. Plomley, *Weep in Silence*, 747.
42. Reynolds, *A History of Tasmania*, 79.
43. Levy, *Governor George Arthur*, 24–25.
44. Chun Kim, 'The Caribs of St Vincent and Indigenous Resistance'.
45. Lester, 'Personifying Colonial Governance', 1476 .
46. Lockett, 'Deportation of the Maroons of Trelawney Town'; Fortin, '"Blackened Beyond Our Native Hue"'.
47. *Sydney Gazette*, 9 June 1805, 4.
48. *Sydney Gazette*, 7 July 1805, 2.
49. Atkins to King, 8 July 1805, 502–04, 1:5, Historical Records of Australia (hereafter HRA).
50. Johnston, *The Paper War*, 180.
51. Ibid., 182.
52. Atkins to King, 8 July 1805, 502–04, 1:5, HRA
53. The concept of *mens rea* was part of the evolution of common law from roots of strict liability.
54. R v. Binge Multo (1828), Decisions of the Supreme Court of NSW, 1788–1899. http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1828/r_v_binge_mhulto/
55. King to Piper, 8 Aug.1805, NSW Colonial Secretary's Office Correspondence, State Records Office of NSW (SRNSW).
56. King's letter to Camden however envisaged the 'expedient of sending them to another Settlement to labour'. King to Camden, 20 July 1805, 497, 1:5, HRA.
57. O'Donnell, 'Michael Dwyer'.
58. O'Shaughnessy, ed., *A Rum Story*.
59. Bonwick, *The Lost Tasmanian Race*, 78.
60. Melville, *The History of Van Diemen's Land*, Part 1, 33.
61. Instructions to Cpt. Shaw, 9 March 1816, [4/1734] Reel 6045, 164, CSP, 1788–1825, State Records NSW.
62. Ritchie, *Lachlan Macquarie*,152.
63. Public Order, *Sydney Gazette*, 30 July 1816.
64. Ford, *Settler Sovereignty*, 43.
65. For example, Harmen *Aboriginal Convicts*. In this work, Musquito and Dual feature conspicuously and the term 'exile' appears prominently in the subtitle, yet there is little defining scrutiny given to this central legal motif .

66. See Ford, *Settler Sovereignty*, *passim*.
67. Noted by the author in the crypt of a Dutch Reform Church in Colombo. It underscores the colonial fact that Europe had little of value to trade with the East and required ballast for the out journey.
68. Cleghorn, *The Cleghorn Papers*.
69. Hulugalle, *British Governors of Ceylon*, 17.
70. Davey, *An Account of the Interior of Ceylon*, 240–41.
71. Pieris, *Sinhale and the Patriots*.
72. Powell, *The Kandyan Wars*, 248ff.
73. Brohier, *Golden Age of Military Adventure in Ceylon*.
74. Barnes to Cole (Governor of Mauritius), RA59, National Archives of Mauritius. See Hordvik and Clarke, *Villains of Ceylon?* ,
75. Appuhamy, *Rebels, Outlaws and Enemies to the British*, 127.
76. Ibid., 151–54. Ehelepola continued to petition the Colebrooke Commission but was largely ignored or dismissed.
77. Bandaranayake, *Betwixt Isles*, 80.
78. Pieris, *Sinhale and the Patriots*, 416.
79. Ibid., 417. See also Bandaranayake, *Betwixt Isles*.
80. Appuhamy *Rebels, Outlaws and Enemies to the British*, 129.
81. de Silva, *A History of Sri Lanka*, 263 .
82. One of the original members was John Thomas Bigge who had investigated Governor Macquarie in New South Wales and Van Diemen's Land. A scathing critic with a utilitarian economic agenda of self help and self sufficiency, his presence once more indicates the circulation of colonial *dramatis personae* .
83. Fernando, 'The British Raj and the 1915 Communal Riots in Ceylon', 254.
84. Galbraith, 'The Trial of Arabi Pasha'.
85. The Sri Lankan archives at this time are peppered with requests from influential Moors on the island for his repatriation, all ignored or refused. He was obviously held in high regard and affection by the island's Muslim community. Arabi's home in Kandy is now the Egyptian Embassy and a museum to Arabi.
86. Benbow, *Boer Prisoners of War in Bermuda*
87. Brohier, 'The Boer Prisoners of War in Ceylon (1900–1902)', 36, no.1, July 1946, 5.
88. Brohier, 'The Boer Prisoners of War in Ceylon (1900–1902)', 36, no. 2, 36–37.
89. Brohier, 'The Boer Prisoners of War in Ceylon (1900–1902)', 36, no. 4, 110–20.
90. Ibid., 110–20.

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