Institution: University of Oxford

Unit of Assessment: 20 - Law

Title of case study:

Ensuring that the interests of the UK are considered when courts affect the law of a British Overseas Territory

1. Summary of the impact

Professor John Finnis has been engaged in a programme of research in legal and constitutional theory. His work on the legal and political responsibilities of UK ministers when acting to affect the law of a British Overseas Territory played a pivotal role in the decision of the House of Lords to reverse the Court of Appeal's interpretation of the Colonial Laws Validity Act 1865 (CVLA). The Court of Appeal had held that UK ministers *could not* properly legislate in the interests of the UK as a whole (including its dependent territories), but only in the interests of the particular territory itself. Relying on Finnis's arguments, the House of Lords changed that precept. Finnis's work also persuaded members of the House of Lords to express doubts about a central holding of an earlier decision, which concerned the capacity in which ministers acted in legislating in dependent territories. Finnis's arguments have been relied on in legal argument in later cases, and have been recognised and reaffirmed in subsequent Court of Appeal and Supreme Court judgments. In this way, they have helped to change fundamental constitutional principles affecting not only all citizens in the UK, but also those in its Overseas Territories around the world.

2. Underpinning research

Professor John Finnis (Professor of Law and Legal Philosophy at Oxford since 1989) worked throughout the audit period on a series of related problems concerning the nature of political community and the way in which constitutional law and principle help secure its common good. His book, *Aquinas* **[R1],** examined political principles fundamental to law and government, including the nature of justice, human rights, and the rule of law. His paper 'Boundaries' **[R2]** considered some of the social conditions needed for a political community to have sufficient unity to be ruled well, arguing that the relationships of the political community and its citizens with the territory it holds as its own are strongly analogous to legal property rights. Fundamental to both, Finnis argued, is the idea that non-citizens/non-owners may enter only with permission; this right to exclude is conducive to the promotion of justice and human rights worldwide.

The constitutional implications of these reflections were then considered in his 'Nationality and Alienage' paper **[R3]**, which explored the distinction between nationals and aliens in the common law, with a view to determining its relevance to the judicial review of detention pending deportation. The paper combined a close study of the relevant legal history, elucidating and evaluating its principles and continuity, with sharp technical analysis of recent legal materials. The paper elucidated the constitutional principle of nationality and made clear the dangers of judicial neglect of this principle. Finnis also completed the entry on 'Commonwealth and Dependencies' in the 2003 reissue of *Halsbury's Laws of England* **[R4],** which is a comprehensive and authoritative statement of English law. In this work, Finnis examined the constitutional law of the members of the Commonwealth, attending especially to the constitutional law and principles concerning the relationship between the UK and its dependencies (now called British Overseas Territories).

These lines of scholarship came together in his study 'Common Law Constraints: Whose Common Good Counts?' **[R5]**, a paper written for a conference organised by the Centre for Public Law at the University of Cambridge in January 2008 to consider aspects of the decisions of the Divisional Court and the Court of Appeal in the *(Bancoult) (No. 2)* litigation. This paper was delivered at the conference attended by legal representatives of both parties to the then imminent House of Lords hearing, creating a two-way dialogue with the counsel in the case. Finnis had no prior (or subsequent) involvement of any kind with the litigation or those involved in it. His paper **[R5]**

examined the origin, point and legal effect of the CLVA, refuting the Court of Appeal's interpretation of that Act and also its interpretation of the authorities concerning 'peace, order and good government'. The paper then considered the constitutional understanding at work in the recent *Quark* judgment, arguing that it misstated the constitutional position of Ministers of the Crown, and confused the relationship between the UK and overseas territories. Finnis argued that in constitutional law and principle, and supported by arguments in legal theory that he had developed over many years, the UK and those territories form one undivided realm with one common good, for which Ministers properly act in legislating in a particular territory.

3. References to the research

[R1] J. Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford, Oxford University Press, 1998)

[R2] J. Finnis, 'Natural Law & the Re-making of Boundaries' in A Buchanan and M Moore (eds), *States, Nations and Boundaries: The Ethics of Making Boundaries* (Cambridge, CUP, 2003), reprinted as 'Boundaries' in *Human Rights and Common Good*, *Collected Essays: Volume III* (Oxford, OUP, 2011), 124-32

[R3] J. Finnis, 'Nationality and Alienage' (2007) 123 *Law Quarterly Review* 417-45, reprinted in part in *Human Rights and Common Good*, *Collected Essays: Volume III* (Oxford, OUP, 2011), 133-49

[R4] J. Finnis, 'Commonwealth and Dependencies' in *Halsbury's Laws of England*, Vol. 6 re-issue (4th edn, London: Butterworth), 409-518

[R5] J. Finnis, 'Common Law Constraints: Whose Common Good Counts?' Oxford Legal Studies Research Paper No. 10/2008 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628 –

Note:

- The final item **[R5]** was not re-published separately (that is, outside of the Research Paper series) precisely because it was in that form that it received immediate and authoritative judicial recognition and discussion. Online dissemination was critical to it being immediately available to counsel and courts, and to it having the impact that it had.

4. Details of the impact

The UK has residual legal responsibilities for some Overseas Territories in which the royal prerogative authorises Her Majesty to legislate by Order in Council. The scope of this authority, including the objects for which it may properly be exercised, is of fundamental constitutional importance, as is the related question of on what grounds, if at all, the courts may review the exercise of this authority. John Finnis's research on the boundaries of political communities and the nature of the 'common good' was found helpful by the House of Lords in deciding these questions. His arguments are expressly reflected in a critical ruling, and then relied upon again in other judgements. Finnis' work helped reshape an aspect of constitutional law affecting everyone in the UK and its Overseas Territories.

In the *Bancoult (No 2)* litigation **[C1]**, English courts were invited to quash an exercise (or purported exercise) of the prerogative power to legislate, reinstating restrictions on entry and residence in the British Indian Ocean Territory; these restrictions, made by Order in Council, had been struck down four years earlier in separate litigation. The restrictions, which excluded the Chagos Islanders from returning to the territory, had been introduced to facilitate the building and maintaining of a US military base at Diego Garcia, with the agreement of the UK Government.

The Court of Appeal upheld the Divisional Court's decision to grant the application and to quash the Order in Council: *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2007] EWCA Civ 498, [2008] QB 365. The Court of Appeal reasoned first that the CLVA

did not block the application, and second that the Order had improperly been made in the interests of the UK itself rather than the territory in question, for whose good the power should instead have been exercised.

In the important and controversial final decision in *Bancoult* **[C1]** the House of Lords reversed the Court of Appeal's judgment, narrowly upholding the legality of the Order. Counsel for the appellant relied on Finnis's paper, 'Common Law Constraints: Whose Common Good Counts?' **[R5]** and counsel for the respondent sought to answer that paper in argument before the court. The paper is quoted with approval a number of times in the leading judgment of Lord Hoffmann [paras.37-39] and also in the concurring judgment of Lord Rodger in paragraphs approved also by Lord Carswell.

In paragraph 39, Lord Hoffmann relies on Finnis's refutation of the Court of Appeal's interpretation of the CLVA. In paragraph 47, Lord Hoffmann rejects the argument that Her Majesty must exercise her powers of prerogative legislation solely in the interests of the territory in question. Rather, he says, this power is to be exercised upon the advice of her ministers in the United Kingdom who properly act in the interests of the undivided realm which includes the UK and the territory. Hoffman's authority for this proposition is paragraph 716 of *Halsbury's* **[R4],** written by Finnis, which he quotes at length (in his paragraph 31, he also quotes paragraph 823 of *Halsbury's*). Immediately thereafter, in paragraph 48, he says that having read Professor Finnis's paper he is now inclined to think his earlier reasoning in the *Quark* case was not sound. (*R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529) Thus, writing for the majority, Lord Hoffmann adopted Finnis's account of the constitutional relationship between the UK and its overseas territories (and its rationale, namely, that they have *one* common good) and followed Finnis, thus reversing his own position in *Quark*, to affirm the constitutional principle that prerogative legislation may properly be made in the interests of the undivided realm. Hence, the challenge to the Order failed.

Lord Rodger in paragraph 98 also notes and adopts Finnis's answer to the Court of Appeal's argument that unless the CLVA is narrowly interpreted the courts will not be able to correct some injustices. Lord Rodger expressly agrees with Finnis's explanation of the point and legal effect of the CLVA, and so overturns the Court of Appeal's judgment on point. (Lord Carswell follows Lord Rodger's analysis at paragraph 126). Finnis's authoritative refutation of the main lines of argument in the Court of Appeal judgment proved decisive, persuading a narrow majority to reject the confused proposition that in legislating for the UK's dependencies Her Majesty, acting on advice of her responsible ministers in the UK, may not act for the good of the UK and its dependencies, which form one realm. In all, Lords Hoffman, Roger, and Carswell make heavy reliance on the critical arguments of Professor Finnis **[C5].**

The holding in *Quark* was not strictly overruled in *Bancoult (No 2)*, it being common ground in the latter case that the Order in Council was made by Her Majesty in right of the United Kingdom. However, it is clear from the *Barclay* litigation **[C2, C3]** that Finnis's paper has persuaded the superior courts that the holding is untenable. *(Barclay) v Secretary of State for Justice* [2008] EWCA Civ 1319, [2009] 2 WLR 1205 at paragraph 21 noted that Lord Hoffmann's remarks in *Bancoult* undercut *Quark*. At paragraph 106, Phil LJ noted Lord Hoffmann's reliance on Finnis's paper, and then quoted from that paper, tacitly affirming his proposition, contra *Quark*, that in giving instructions Her Majesty acted in right not only of her dependent territory but also and indeed primarily in right of the UK, which forms one undivided realm. When *Barclay* reached the Supreme Court on appeal **[C3]**, the leading judgment of Lord Collins (with whom all their Lordships concurred) says, also at paragraph 106, that the authority of the majority in *Quark* was weakened by Lord Hoffmann's statement in *Bancoult*, and that in light of Finnis's paper criticising the decision of the Lords in *Quark* and the Court of Appeal in *Bancoult*, he thought Lord Nicholls right. So while the Supreme Court did not strictly overrule *Quark* in *Barclay*, as the question did not need to be decided and had not been properly argued, the *Barclay* judgment makes clear that *Quark* is now of dubious authority, and is very likely to be formally overruled in due course.

Finally, in the Kenya colonial torture litigation **[C4]** proceedings in the High Court in London in 2011, the paper **[R5]** was cited to the court by the claimants and referred to with approval in

several paragraphs of the court's judgment: *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB) at paragraphs 63, 64. The paper was also attached to the United Kingdom's case in *Chagos Islanders v United Kingdom* in the European Court of Human Rights, in which the court, by a majority, ruled that as the Chagossians had accepted compensation from the UK, they had effectively renounced their 'right to return' and as such their case was inadmissible **[C6].**

Thus, John Finnis's work was decisive in persuading a majority of the House of Lords in *Bancoult* to restore the central constitutional principle governing the relationship between the UK and its dependencies, which bears on the scope of Her Majesty's prerogative power to legislate. The paper persuaded Lord Hoffmann to abandon his earlier position in *Quark*, concerning the capacity in which Her Majesty acts in her dependencies—this change of mind will very likely culminate, as subsequent cases suggest and confirm, in the Supreme Court expressly overruling *Quark* when a suitable case presents itself. Channelling many years' work on the fundamental principles that govern the constitutional and lawful rule of a complex political community, Finnis's argument constitutes a very powerful intervention in legal discourse, helping rescue the courts from the confusion that Professor Finnis identified in *Quark* and in the minority and Court of Appeal judgments in *Bancoult*.

5. Sources to corroborate the impact

[C1] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [2009] AC 453 at paras. 39, 48, 98, 122, 126.

[C2] *R (Barclay) v Secretary of State for Justice* [2008] EWCA Civ 1319, [2009] 2 WLR 1205 at para. 106.

[C3] *R (Barclay) v Secretary of State for Justice* [2009] UKSC 9, [2010] 1 AC 464 at para. 106.

[C4] *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB) at paras. 63, 64.

[C5] Thomas Poole, "The Royal Prerogative" (2010) 8 International Journal of Constitutional Law 146-55 at nn. 32, 42 noting that the Court 'relied heavily on John Finnis'.

[C6] UK submission to ECtHR in *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE15.