

# British Overseas Territories Law

Second Edition

Ian Hendry and Susan Dickson

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## *Constitutional Arrangements*

**E**ACH BRITISH OVERSEAS territory is a separate constitutional unit, and accordingly is a distinct legal jurisdiction. None is constitutionally a part of the United Kingdom. Each territory has its own constitution and is administered separately from the others. But at the same time each territory has a constitutional relationship with the United Kingdom, the sovereign power.

Later chapters examine some of the key features of the territories' constitutions. This chapter considers the legal basis for their constitutions, and the constitutional relationship between the territories and the United Kingdom. Important elements of both of these matters are the power of the UK Parliament and the position of the Crown.

This chapter also discusses the powers and procedure for constitutional amendment and review, describes the substance of recent constitutional reforms, and considers future developments.

### LEGAL BASIS FOR THE TERRITORIES' CONSTITUTIONS

Each British overseas territory has a distinct written Constitution, designed to suit its circumstances. In this important respect each territory differs from the United Kingdom, which has no single constitutional instrument. The Constitutions of the overseas territories differ from each other, although they have several features in common; some provisions are even worded identically.

The Constitution of each territory is contained in an Order in Council. It is legally enacted by Her Majesty the Queen, by and with the advice of Her Privy Council, acting on the recommendation of UK Ministers. But the legal basis for such Orders in Council differs as between the various territories.

At common law, the sovereign has prerogative power to establish a constitution for any of the territories.<sup>1</sup> The prerogative remains the sole constituent power for Gibraltar and the British Indian Ocean Territory. For all the other territories there is a statutory constituent power, but in most cases that does not appear to have been treated as exclusive. The Orders in Council providing constitutions for all except Anguilla and Bermuda recite not only the relevant statutory power but add words such as 'or otherwise in Her Majesty vested'<sup>2</sup> or 'and of all other powers enabling

<sup>1</sup> *Phillips v Eyre* (1870) LR 6 QB 1.

<sup>2</sup> Eg British Antarctic Territory Order 1989 (SI 1989/842).

Her to do so'.<sup>3</sup> This suggests that the relevant statutes were not considered to have displaced the prerogative power entirely, or that some matters in the Orders required citation of prerogative powers. In any case the practice has been generally consistent. Even in the cases of Anguilla and Bermuda, where the main constitution Orders recite only the relevant statutory powers, Orders amending them also recite other (unspecified) powers of Her Majesty.<sup>4</sup>

## A. Constitutions Made under Statutory Powers

The Constitutions of 12 British overseas territories are made under powers granted by Acts of the UK Parliament. The Acts in question are the following.

### 1. *British Settlements Acts 1887 and 1945*

These Acts<sup>5</sup> are the statutory legal basis for the constitutions of the following territories: Ascension, the British Antarctic Territory, the Falkland Islands, Pitcairn, South Georgia and the South Sandwich Islands, and Tristan da Cunha. Ascension and Tristan da Cunha are administered as a single territorial grouping with St Helena, so a single constitution governs all three, on the basis also of the power provided by the Saint Helena Act 1833.<sup>6</sup>

The 1887 Act contains a special definition of 'British settlement'. Section 6 provides:

For the purposes of this Act, the expression 'British possession' means any part of Her Majesty's possessions out of the United Kingdom, and the expression 'British settlement' means any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession.

Although the territories now forming the British Antarctic Territory were acquired by annexation, as were (at least partially) South Georgia and the South Sandwich Islands,<sup>7</sup> they were acquired otherwise than by cession or conquest. Neither is within the jurisdiction of a territory legislature constituted otherwise than by virtue of the Act. They therefore fall within the definition and are treated as 'British settlements' for the purposes of the Acts.

Most of the territories acquired by settlement fall outside the definition, because they have their own legislatures constituted otherwise than by virtue of the Act. These territories are the subject of the other statutes referred to below.

<sup>3</sup> Eg Falkland Islands Constitution Order 2008 (SI 2008/2846).

<sup>4</sup> Eg Anguilla Constitution (Amendment) Order 1990 (SI 1990/587); Bermuda Constitution (Amendment) Order 2003 (SI 2003/456).

<sup>5</sup> 1887 c 54 and 1945 c 7.

<sup>6</sup> 1833 c 85; see further below.

<sup>7</sup> See Chapter 1, p 7.

The main constituent powers in the British Settlements Acts for the territories listed above are set out in sections 2 and 5 of the 1887 Act, as follows:

2. It shall be lawful for Her Majesty The Queen in Council from time to time to establish any such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as shall appear to Her Majesty in Council to be necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement.

...

5. It shall be lawful for Her Majesty The Queen in Council from time to time to make, and when made to alter and revoke, Orders for the purposes of this Act.

In addition, as amended by the 1945 Act, section 3 of the 1887 Act provides:

3. It shall be lawful for Her Majesty The Queen from time to time, by any instrument passed under the Great Seal of the United Kingdom including any Order of Her Majesty in Council, or by any instructions under Her Majesty's Royal Sign Manual referred to in such instrument as made or to be made, as respects any British settlement, to delegate to any specified person or persons or authority within the settlement all or any of the powers conferred by this Act on Her Majesty in Council, either absolutely or subject to such conditions, provisions, and limitations as may be specified in such instrument or instructions:

Provided that, notwithstanding any such delegation, the Queen in Council may exercise all or any of the powers under this Act; provided always, that every such instrument or instruction as aforesaid shall be laid before both Houses of Parliament as soon as conveniently may be after the making and enactment thereof respectively.

The powers conferred by the British Settlements Acts have been held by the Court of Appeal to be plenary powers.<sup>8</sup>

The current Constitutions of the territories covered by the British Settlements Acts are set out in the St Helena, Ascension and Tristan da Cunha Constitution Order 2009<sup>9</sup> (for Ascension and Tristan da Cunha); the British Antarctic Territory Order 1989;<sup>10</sup> the Falkland Islands Constitution Order 2008, as amended;<sup>11</sup> the Pitcairn Constitution Order 2010;<sup>12</sup> and the South Georgia and South Sandwich Islands Order 1985, as amended.<sup>13</sup>

## 2. *Saint Helena Act 1833*

This Act<sup>14</sup> was originally called the Government of India Act 1833. Section 112 deals with St Helena. All sections of the original Act have been repealed, except for

<sup>8</sup> *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273.

<sup>9</sup> SI 2009/1751.

<sup>10</sup> SI 1989/842.

<sup>11</sup> SI 2008/2846, as amended by SI 2017/181.

<sup>12</sup> SI 2010/244.

<sup>13</sup> SI 1985/449, as amended by SI 1995/1621.

<sup>14</sup> 1833 c 85.

section 112. The present short title of the Act was given by the Statute Law Revision Act 1948.<sup>15</sup>

Section 112, which is the statutory legal basis for the Constitution of St Helena, provides:

The island of St Helena, and all forts, factories, public edifices, and hereditaments whatsoever in the said island, and all stores and property thereon fit or used for the service of the government thereof, shall be vested in His Majesty, and the said island shall be governed by such orders as His Majesty in Council shall from time to time issue in that behalf.

The current Constitution of St Helena is set out in the St Helena, Ascension and Tristan da Cunha Constitution Order 2009.<sup>16</sup>

### 3. *West Indies Act 1962*

This Act<sup>17</sup> is the statutory legal basis for the Constitutions of the Cayman Islands, Montserrat, the Turks and Caicos Islands, and the Virgin Islands.

The constituent powers in the West Indies Act 1962 for these four territories are set out in sections 5 and 7, which provide (as far as material) as follows:

5.—(1) Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified.

...

(5) The colonies to which this section applies are those included at the passing of this Act in the Federation, and the Virgin Islands.<sup>18</sup>

...

7.—(1) An Order in Council under any provision of this Act may make or provide for the making of such incidental, consequential or transitional provisions as may appear to Her Majesty in Council to be necessary or expedient.

(2) Any power conferred by this Act to make an Order in Council shall be construed as including power to vary or revoke the Order in Council by a subsequent Order in Council.

(3) ... a statutory instrument containing an Order in Council under this Act which does not adapt or modify an Act shall be laid before Parliament after being made.

<sup>15</sup> 1948 c 62.

<sup>16</sup> SI 2009/1751.

<sup>17</sup> 1962 c 19.

<sup>18</sup> The 'Federation' was the Federation of the West Indies established under the British Caribbean Federation Act 1956 (1956 c 63). The Cayman Islands, Montserrat and the Turks and Caicos Islands were included in the Federation on the passing of the West Indies Act 1962.

## 18 *Constitutional Arrangements*

The power conferred by section 5(1) has been held to be a plenary power.<sup>19</sup> The current Constitutions of the four territories are set out in the Cayman Islands Constitution Order 2009, as amended;<sup>20</sup> the Montserrat Constitution Order 2010;<sup>21</sup> the Turks and Caicos Islands Constitution Order 2011, as amended;<sup>22</sup> and the Virgin Islands Constitution Order 2007, as amended.<sup>23</sup>

### 4. *Bermuda Constitution Act 1967*

This Act<sup>24</sup> provides the statutory legal basis for the Constitution of Bermuda. The material provisions are in section 1(1), (3) and (4):

(1) Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of Bermuda.

...

(3) Any Order in Council under this section may be varied or revoked by a subsequent Order in Council thereunder, but otherwise shall not be capable of being varied or revoked except by Act of Parliament.

(4) Any Order in Council under this section shall be laid before Parliament after being made.

The current Constitution is set out in the Bermuda Constitution Order 1968, as amended.<sup>25</sup>

### 5. *Anguilla Act 1980*

This Act<sup>26</sup> provides the statutory legal basis for the Constitution of Anguilla. The relevant provision is section 1(2):

Her Majesty may by Order in Council make such provision as appears to Her expedient for and in connection with the government of Anguilla.

There is no express provision in this Act enabling an Order in Council made under section 1(2) to be varied or revoked. This was unnecessary because its enactment post-dated the Interpretation Act 1978,<sup>27</sup> section 14 of which provides for an implied power to amend or revoke Orders in Council made under an Act.

<sup>19</sup> *R (Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin), upheld by the Court of Appeal: [2009] EWCA Civ 1549.

<sup>20</sup> SI 2009/1379, as amended by SI 2016/780.

<sup>21</sup> SI 2010/2474.

<sup>22</sup> SI 2011/1681, as amended by SIs 2017/181 and 2017/317. This Constitution needs to be read with the Turks and Caicos Islands (Finance) Order 2017 (SI 2017/317), which confers considerable powers of a constitutional nature on the Governor, and provides that it takes priority over all other laws (other than Acts of Parliament) in force in the territory, including the Constitution.

<sup>23</sup> SI 2007/1678, as amended by SI 2015/1767.

<sup>24</sup> 1967 c 63.

<sup>25</sup> SI 1968/182, as amended by SIs 1968/463, 1968/726, 1973/233, 1979/452, 1979/1310, 1989/151, 2001/2579, 2003/456.

<sup>26</sup> 1980 c 67.

<sup>27</sup> 1978 c 30.

The current Constitution is set out in the Anguilla Constitution Order 1982, as amended.<sup>28</sup>

#### 6. *Cyprus Act 1960*

This Act<sup>29</sup> provides the statutory legal basis for the Constitution of the Sovereign Base Areas of Akrotiri and Dhekelia. Section 2(1) provides:

The Republic of Cyprus shall comprise the entirety of the Island of Cyprus with the exception of the two areas defined as mentioned in the following subsection, and—

- (a) nothing in the foregoing section shall affect Her Majesty's sovereignty or jurisdiction over those areas;
- (b) the power of Her Majesty to make or provide for the making of laws for the said areas shall include power to make such laws (relating to persons or things either within or outside the areas) and such provisions for the making of laws (relating as aforesaid) as appear to Her Majesty requisite for giving effect to arrangements with the authorities of the Republic of Cyprus.

Section 2(1)(b) is drafted in terms that confirm and amplify a pre-existing prerogative power of Her Majesty to make both constitutional provision and ordinary laws for the Sovereign Base Areas.

The current Constitution is the Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960, as amended.<sup>30</sup>

### **B. Constitutions Made Exclusively by Prerogative Powers**

The Constitutions of two territories are contained in Orders in Council made exclusively by virtue of the Royal prerogative. These are Gibraltar and the British Indian Ocean Territory. The reason for this apparent anomaly is that, by contrast with the other territories, no Act of Parliament has been passed that deals with their constitutional arrangements. Neither territory is within the scope of the British Settlements Acts 1887 and 1945, because each was acquired by cession and thus falls outside the definition of 'British settlement' for the purposes of those Acts. In territories acquired by cession, as these two are, the Crown has full prerogative power to establish such legislative, executive and judicial arrangements as it thinks fit, and generally to act legislatively and executively, provided the provisions made by the Crown do not contravene any Act of Parliament extending to the territory or to all British territories.<sup>31</sup> Full constituent and legislative power has been expressly reserved to the Crown in the constitutional Orders in Council of these two territories, thus avoiding

<sup>28</sup> SI 1982/334, as amended by SIs 1983/1108, 1990/587 and 2017/181.

<sup>29</sup> 1960 c 52.

<sup>30</sup> SI 1960/1369, as amended by SI 1966/1415.

<sup>31</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 (HL); *Phillips v Eyre*, n 1 above; *Campbell v Hall* (1774) 1 Cowp 204; *Halsbury's Laws of England*, vol 13, 5th edn (London, LexisNexis, 2009) para 808.

the operation of the common law rule that by establishing legislatures for these territories (or at least Gibraltar, which has an elected legislative body) the prerogative power would otherwise be lost.<sup>32</sup>

The current Constitution of Gibraltar is set out in the Gibraltar Constitution Order 2006,<sup>33</sup> and the current Constitution of the British Indian Ocean Territory is the British Indian Ocean Territory (Constitution) Order 2004.<sup>34</sup>

### C. Parliamentary Scrutiny of Constitution Orders

The statutory powers of the UK Parliament to control or scrutinise Orders in Council providing constitutions for overseas territories are limited. Parliament itself has made inconsistent provision for this in the Acts mentioned above. Orders in Council providing such constitutions under the British Settlements Acts 1887 and 1945, the West Indies Act 1962 and the Bermuda Constitution Act 1967 must be laid before Parliament after being made.<sup>35</sup> But that is all. They do not require an affirmative resolution in either House, and they are not subject to annulment by resolution of either House.<sup>36</sup>

By contrast, constitution Orders made under the Saint Helena Act 1833, the Anguilla Act 1980 and the Cyprus Act 1960 are not even required to be laid before Parliament after being made. The same applies to constitution Orders made exclusively by virtue of the Royal prerogative, that is to say those for Gibraltar and the British Indian Ocean Territory.

Accordingly, Parliament has made little statutory provision for its scrutiny of overseas territory constitutions. However, since 2002 political arrangements have operated whereby most constitution Orders have been sent in draft by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee, where possible at least 28 sitting days before they were submitted to Her Majesty in Council.<sup>37</sup> This political arrangement allows, in most cases at least,<sup>38</sup> timely scrutiny by a House of Commons Committee and goes some way to mitigate the limited parliamentary control provided for in the Acts in question.

<sup>32</sup> *Sammut v Strickland* [1938] AC 678 (PC). See Gibraltar Constitution Order 2006 Annex 2 s 8; British Indian Ocean Territory (Constitution) Order 2004 s 15.

<sup>33</sup> Although not a statutory instrument, the Order was published under Selected Instruments in SI 2006 III p 11503. Also published in Supplement to the Gibraltar Gazette, No 3, 574 of 28 December 2006.

<sup>34</sup> Published in the (2004) 36(1) British Indian Ocean Territory Official Gazette. For convenience, the text of this Order is reproduced below (see Annex, pp 330–36).

<sup>35</sup> British Settlements Act 1887 s 3 (as amended by the 1945 Act); West Indies Act 1962 s 7(3) (second limb); Bermuda Constitution Act 1967 s 1(4).

<sup>36</sup> That is the effect of the Statutory Instruments Act 1946 (1946 c 36) ss 5 and 6.

<sup>37</sup> See House of Commons Foreign Affairs Committee Seventh Report, Session 2007–08, HC 147–1, para 29.

<sup>38</sup> The British Indian Ocean Territory (Constitution) Order 2004 was not sent to the Committee in draft: see House of Commons Foreign Affairs Committee Seventh Report, n 37 above, and *Bancoult* (No 2), n 31 above, Lord Hoffmann, para 27.

#### D. Judicial Control of Constitution Orders

In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*,<sup>39</sup> the House of Lords held unanimously that an Order in Council made by virtue of the Royal prerogative providing a constitution for an overseas territory is subject to judicial review by the UK courts on ordinary principles of legality, rationality and procedural propriety. Although the House of Lords was not in that case considering a constitution Order made under statutory powers, it has been confirmed that such an Order is likewise subject to judicial review, not least as to whether it is within the powers granted by the parent Act.<sup>40</sup>

In *Bancoult (No 2)* the House of Lords had the task of examining the legality of the British Indian Ocean Territory (Constitution) Order 2004, an Order made by virtue of the Royal prerogative. Was that Order ultra vires, and is the prerogative power to grant a constitution to an overseas territory unlimited, there being no statute prescribing the limits of the power? A minority (Lord Bingham and Lord Mance) held that this prerogative power does not extend to excluding from the territory its former inhabitants. But a majority (Lord Hoffmann, Lord Rodger and Lord Carswell) held that there is no such limitation. In the absence of previous judicial authority as to the scope of this prerogative power, the majority proceeded on the basis that it comprised a power to legislate 'for the peace, order and good government of the Territory', partly on the basis that the previous Constitution of the British Indian Ocean Territory had expressly reserved this power to Her Majesty.<sup>41</sup> The majority confirmed a previous line of Privy Council authority that a law made for the peace, order and good government of a territory is not susceptible to judicial review on the grounds of alleged incompatibility with those objects. As Lord Hoffmann said:<sup>42</sup>

[T]he words 'peace, order and good government' have never been construed as words limiting the power of a legislature. Subject to the principle of territoriality implied in the words 'of the Territory', they have always been treated as apt to confer plenary law-making authority. For this proposition there is ample authority in the Privy Council (*R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900) and the High Court of Australia (*Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1). The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the 'peace, order and good government' or otherwise for the benefit of the inhabitants of the Territory. So far as *Bancoult (1)* departs from this principle, I think that it was wrongly decided.

However, the House of Lords also examined the validity of the 2004 Order on grounds of irrationality and procedural impropriety, including an alleged breach of legitimate expectation. A majority of their Lordships upheld the validity of the Order on these grounds too. They also held that the validity of the Order was not affected by international law,<sup>43</sup> and it has since been held that the same applies to a

<sup>39</sup> *Bancoult (No 2)*, n 31 above.

<sup>40</sup> *Misick*, n 19 above.

<sup>41</sup> British Indian Ocean Territory Order 1976 (SI 1976/893) s 15.

<sup>42</sup> *Bancoult (No 2)*, n 31 above, Lord Hoffmann, para 50.

<sup>43</sup> *Ibid* paras 66, 116 and 120.

constitutional Order for the Turks and Caicos Islands made under section 5 of the West Indies Act 1962.<sup>44</sup>

CONSTITUTIONAL RELATIONSHIP  
BETWEEN THE TERRITORIES AND UNITED KINGDOM

The keys to the constitutional relationship between the overseas territories and the United Kingdom lie in the power of the UK Parliament and the position of the Crown. The part played by the courts is also important.

**A. Parliament**

The most fundamental principle of the relationship between the overseas territories and the United Kingdom is the supremacy of Parliament. So, as a matter of constitutional law, Parliament has unlimited power to legislate for the overseas territories.<sup>45</sup>

As noted above, Parliament has not exercised its power to provide directly by Act of Parliament for the constitution of any of the overseas territories. Instead it has, except in the cases of Gibraltar and the British Indian Ocean Territory, enabled the Crown to do so by Order in Council. But Parliament retains the power to alter that state of affairs by legislation in the future if it so wishes.

However, apart from the enabling statutes discussed above, a few Acts of Parliament are important to the constitutional position of one or more territories. First among these is the Colonial Laws Validity Act 1865,<sup>46</sup> which clarified the powers of territory legislatures and is still in force. It is discussed further in Chapter 4. The Judicial Committee Acts 1833 and 1844<sup>47</sup> provide statutory authority for final appeals to Her Majesty in Council from the territories, and these are considered in Chapter 6. The British Nationality Act 1981<sup>48</sup> and the British Overseas Territories Act 2002<sup>49</sup> make provision for the citizenship of people connected with the territories, as discussed in detail in Chapter 11.

By contrast, the Human Rights Act 1998 does not extend to the territories as part of their law;<sup>50</sup> human rights protection is provided for in each territory's law, in most cases in the Constitution. This is considered further in Chapter 9.

The power of Parliament to legislate for the overseas territories results in there being a hierarchy of laws in force in each territory, with Acts of Parliament and statutory instruments made under them that extend to that territory being at the apex.

<sup>44</sup> See *Misick*, n 19 above.

<sup>45</sup> See *Madzimbamuto v Lardner-Burke and George* [1969] 1 AC 645 (PC), at 722.

<sup>46</sup> 1865 c 63.

<sup>47</sup> 1833 c 41; 1844 c 69.

<sup>48</sup> 1981 c 61.

<sup>49</sup> 2002 c 8.

<sup>50</sup> 1998 c 42. See *Bancoult No 2*, n 31 above; *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 (HL).

But the local (or subsidiary) legislatures of the territories have very considerable autonomy. Their legislation is not invalid for inconsistency with the law of England except to the extent that it is repugnant to any Act or subordinate legislation that extends to the territory in question. This is the effect of sections 2 and 3 of the Colonial Laws Validity Act 1865,<sup>51</sup> and otherwise, apart from very limited constraints relating to extraterritoriality and major prerogative powers, these legislatures have plenary legislative power. These matters are examined in Chapter 4.

## **B. The Crown: An Undivided Realm**

The position of the Crown in relation to the overseas territories is to some extent complex. The Crown is, of course, the sovereign of both the United Kingdom and the overseas territories, such sovereignty being ‘in the sense of government, power, ownership and belonging’.<sup>52</sup> As such the United Kingdom and the territories form one undivided realm, which is distinct from the other states of which the Queen is monarch. This is the position for international purposes, the territories having no sovereignty of their own, and it explains why, for example, the territories are not separate members of the Commonwealth. Nor can they be separate members of other international organisations except with the authority of the United Kingdom and where the rules of the organisation concerned so allow.

For constitutional purposes, the undivided realm of the United Kingdom and the overseas territories means that Parliament may legislate for both the United Kingdom and the territories as it wishes, and in doing so may weigh the interests of the United Kingdom and the territories as it pleases. This is an inevitable consequence of the supremacy of Parliament.

In the case of *Bancoult (No 2)*<sup>53</sup> discussed above, the House of Lords confirmed that the same principle applies when the Crown exercises legislative power in relation to an overseas territory. As Lord Hoffmann said:<sup>54</sup>

But Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom and will act in the interests of her undivided realm, including both the United Kingdom and the colony: see Halsbury’s Laws of England (4th ed 2003 reissue) vol 6, para 716:

‘The United Kingdom and its dependent territories within Her Majesty’s dominions form one realm having one undivided Crown ... To the extent that a dependency has responsible government, the Crown’s representative in the dependency acts on the advice of local ministers responsible to the local legislature, but in respect of any dependency of the United Kingdom (that is, of any British overseas territory) acts of Her Majesty herself are performed only on the advice of the United Kingdom government.’

<sup>51</sup> 1865 c 63.

<sup>52</sup> See *Tito v Waddell (No 2)* [1977] Ch 106 (Megarry VC).

<sup>53</sup> *Bancoult (No 2)*, n 31 above.

<sup>54</sup> *Ibid* para 47.

Lord Hoffmann continued:<sup>55</sup>

Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom Ministers, to prefer the interests of the United Kingdom. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians.

While *Bancoult (No 2)* concerned an Order in Council made by prerogative powers, there is no reason to suppose that the position is different in the case of legislation, whether constitutional or otherwise, made for an overseas territory by Order in Council under statutory powers. The same principle applies to executive acts of Her Majesty in relation to the overseas territories done on the advice of Her UK Ministers. The Constitutions of all the overseas territories reserve certain executive powers to Her Majesty or to a Secretary of State on Her behalf, and constitutionally the exercise of those powers is a matter for UK Ministers. Those Ministers retain certain responsibilities in respect of the government of any overseas territory and are entitled to exercise them with a view to the interests not only of the territory in question but also of the United Kingdom and of its other territories.<sup>56</sup>

In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*,<sup>57</sup> the House of Lords had earlier warned about the difficulty for a court in exploring governmental motivation and weighing competing interests. In that case an argument that an instruction given by the Secretary of State to the Commissioner for South Georgia and the South Sandwich Islands was given in the interests of the United Kingdom and was therefore an act of a UK public authority (for the purposes of the Human Rights Act 1998) was rejected on the basis that the motivation for the decision was not justiciable,<sup>58</sup> or even if it were justiciable, to explore such motivation would give rise to great uncertainty.<sup>59</sup>

Self-evidently, it is through the retention of legislative and executive powers and, where considered necessary or expedient, the exercise of those powers in the interests of the United Kingdom, or the United Kingdom and its overseas territories as a whole, that the United Kingdom maintains ultimate control of the overseas territories, for which the UK Government is responsible.

<sup>55</sup> Ibid para 49. See also Lord Rodger, para 114 and Lord Carswell, paras 120 and 132.

<sup>56</sup> *Halsbury's Laws of England*, vol 13, n 31 above, para 806; *Bancoult (No 2)*, n 31 above. Similarly, as regards the Crown Dependencies, see *R (Barclay) v Secretary of State for Justice and the Lord Chancellor* [2008] EWCA Civ 1319.

<sup>57</sup> *Quark*, n 50 above.

<sup>58</sup> Ibid, Lord Bingham, para 18 and Lord Hoffmann, para 64.

<sup>59</sup> Ibid, Lord Hope, paras 78–79.

### C. The Crown: In Right of Different Governments

While the United Kingdom and the overseas territories form an undivided realm, it is an established constitutional principle that the Crown can and does act in different capacities in relation to different parts of that realm. This occurs where a distinct Government of Her Majesty has been lawfully established for a part of the realm. So, just as the Scotland Act 1998<sup>60</sup> established a separate Government of Her Majesty in Scotland, the various Constitutions of the overseas territories have established separate governments of Her Majesty in the territories. Each of these governments is a separate legal entity, distinct from each other and from the UK Government; and as each is a Government of Her Majesty, in constitutional terms this distinction is often described as ‘the Crown in right of the Government of the United Kingdom’ as opposed to ‘the Crown in right of the Government of Scotland’ or ‘the Crown in right of the Government of Anguilla’, or of the government of any other overseas territory.<sup>61</sup> Sometimes the formula used is ‘the Crown in right of the United Kingdom’ or, for example, ‘the Crown in right of New Zealand’, but this means the same as the government of the place in question.<sup>62</sup>

This important constitutional distinction was confirmed by the Court of Appeal in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*.<sup>63</sup> In that case it was held that any obligations to the claimants were owed by the Crown in right of the Government of Canada, not the Crown in right of the Government of the United Kingdom. Moreover, Kerr LJ made clear that the principle applied even where the territory concerned had not achieved independence from the United Kingdom. He said:<sup>64</sup>

Indeed, independence, or the degree of independence, is wholly irrelevant to the issue, because it is clear that rights and obligations of the Crown will arise exclusively in right or respect of any government outside the bounds of the United Kingdom as soon as it can be seen that there is an established government of the Crown in the overseas territory in question.

These observations of Kerr LJ, as well as the reasoning of the Court of Appeal, were approved by the House of Lords in refusing leave to appeal.<sup>65</sup>

<sup>60</sup> 1998 c 46.

<sup>61</sup> Although administered as a single territorial grouping under a single Constitution, St Helena, Ascension and Tristan da Cunha have distinct governments: see St Helena, Ascension and Tristan da Cunha Constitution, ss 31, 44(1), 46(1), 112, among others (relating to St Helena); 145, 150(2), 179, among others (relating to Ascension); 210, 215(2), among others (relating to Tristan da Cunha).

<sup>62</sup> In *Quark*, n 50 above, Lord Bingham said (para 13): ‘From *The Queen in Right of Alberta v Canadian Transport Commission* (1977) 75 DLR (3d) 257, 259, is derived the proposition, which cannot I think be doubted, that the Crown in right of Alberta may be equated with the Government of Alberta.’

<sup>63</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta* [1982] QB 892.

<sup>64</sup> *Ibid* 927.

<sup>65</sup> See *ibid* 937–38. See also *Tito v Waddell (No 2)*, n 52 above; *R v Secretary of State for the Home Department, ex p Shadoo Bhuroshah* [1968] 1 QB 266, [1967] 3 All ER 831; *Manuel v Attorney-General* [1983] Ch 77.

More recently, the principle was confirmed in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs*.<sup>66</sup> The House of Lords reviewed the previous authorities and reaffirmed them.<sup>67</sup> In that case the question before the House was whether the claimant could sue for damages under the Human Rights Act 1998<sup>68</sup> in respect of loss allegedly suffered as a result of an instruction given by the Secretary of State to the Commissioner for South Georgia and the South Sandwich Islands. The majority held that the instruction had been given by the Crown acting through the Secretary of State in the context of the government of South Georgia and the South Sandwich Islands, in the operation of the Constitution and governmental machinery of that territory and under its law. The Secretary of State had therefore acted on behalf of Her Majesty in right of the territory and not of the United Kingdom. Accordingly, the Secretary of State was not a UK public authority for the purposes of section 6 of the Human Rights Act 1998, and there could be no claim for damages under the Act.<sup>69</sup>

Is there a minimum governmental structure that would qualify the government of an overseas territory to be legally separate from the UK Government? The majority in *Quark* suggests not. The territory of South Georgia and the South Sandwich Islands has only a Commissioner as the executive and legislative authority, although it has its own courts, law, public officers and public funds. In the same case, however, Baroness Hale suggested that the distinction between the Crown in right of the United Kingdom and the Crown in right of each overseas territory ‘may have less validity in the case of territories which are in reality governed by and from the United Kingdom’, and Lord Bingham accepted that the matter might need to be viewed from a different perspective if there were in a given territory no government, or no government worthy of the name, other than the UK Government.<sup>70</sup> *Halsbury’s Laws of England* states that:

on the grant of a representative legislature, and perhaps even from the setting up of courts, a legislative council and other such structures of government, Her Majesty’s government in an overseas territory or dependency is distinct from Her Majesty’s government in the United Kingdom.<sup>71</sup>

But the reference here to ‘a legislative council’ clearly exceeds the finding of the majority in *Quark*.

The decision in *Quark* has been the subject of academic criticism, where it is argued that the capacity in which the Crown acts, in the United Kingdom, in relation to an overseas territory must be in right of the United Kingdom—or in right of the United Kingdom and the territory concerned—because in so acting the Queen

<sup>66</sup> *Quark*, n 50 above.

<sup>67</sup> See in particular *ibid*, Lord Bingham, paras 13–19 and Lord Hope, paras 72–76.

<sup>68</sup> 1998 c 42.

<sup>69</sup> In *R (Barclay) v Secretary of State for Justice and Lord Chancellor* [2009] UKSC 9, the Supreme Court mentioned, but declined to revisit, this reasoning in the context of constitutional reform in Sark, there being no need to do so for the purpose of deciding that case.

<sup>70</sup> See *Quark*, n 50 above, Baroness Hale, para 95 and Lord Bingham, para 19.

<sup>71</sup> *Halsbury’s Laws of England*, vol 13, n 31 above, para 806.

can constitutionally act only on the advice of UK Ministers.<sup>72</sup> Thus, acts of Her Majesty or of a Secretary of State on Her behalf would be done in right of the UK Government. Indeed, this would fit with the position taken in the House of Lords in *Bancoult (No 2)*, where it was accepted that in making the Order in Council under review Her Majesty acted in right of the United Kingdom.<sup>73</sup> By contrast, acts done in a territory or by a territory authority would be acts in right of the government of the territory. But these critics do not argue that the territories do not have governments distinct from the UK Government. They point out that the capacity in which the Crown acts in certain circumstances is a different issue from the existence of distinct governments of the Crown.

It is submitted that the correct legal position is indeed that each overseas territory<sup>74</sup> has a government distinct from the UK Government. That is the plain intention of the Orders in Council establishing a distinct Constitution for each territory, most of which expressly refer to ‘the Government’ of the territory<sup>75</sup> and some to the Crown ‘in right of the Government’ of the territory.<sup>76</sup> Each territory has its own legislative and executive authorities separate from those of the United Kingdom. Each territory has its own courts, laws, public services and public funds,<sup>77</sup> again separate from those of the United Kingdom. This situation is not altered by the fact that some territories are more susceptible to direction from London than others.

The importance of this principle lies in the determination of the rights, powers, obligations and liabilities of the distinct governments of the Crown. This is crucial in settling legally which government—or put another way, the Crown in right of which government—has particular rights, such as title to Crown land and other property in a particular territory, which government has power to take particular action, which government owes statutory or contractual obligations to particular persons, and which government is liable to others for particular acts or omissions. The consequences of a failure to determine correctly the possessor of such rights, powers, obligations and liabilities hardly need spelling out.

The principle of distinct governments of the Crown is reflected in section 40(2)(b) of the Crown Proceedings Act 1947,<sup>78</sup> the effect of which limits to the Government

<sup>72</sup> See J Finnis, *Common Law Constraints: Whose Common Good Counts?*, University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2008, available at <http://papers.ssrn.com/Abstract=1100628>); A Twomey, ‘Responsible Government and the Divisibility of the Crown’ (2008) *Public Law* 742.

<sup>73</sup> *Bancoult (No 2)*, n 31 above, paras 76 and 127.

<sup>74</sup> And each of St Helena, Ascension and Tristan da Cunha has a separate government: n 61 above.

<sup>75</sup> See eg Anguilla Constitution s 25(1); Bermuda Constitution s 102(1); British Indian Ocean Territory (Constitution) Order 2004 s 15(3)(a); Cayman Islands Constitution s 124(1); Falkland Islands Constitution s 100(1); Gibraltar Constitution s 45(1); Montserrat Constitution s 107(1); Pitcairn Constitution s 35(1); St Helena, Ascension and Tristan da Cunha Constitution ss 44(1), 150(2) and 215(2); Sovereign Base Areas of Akrotiri and Dhekelia Order in Council 1960 s 2; Turks and Caicos Islands Constitution s 131(1); Virgin Islands Constitution s 56(1).

<sup>76</sup> See eg Gibraltar Constitution s 54(2)(c); Pitcairn Constitution s 30; St Helena, Ascension and Tristan da Cunha Constitution ss 31, 145 and 210. Cayman Islands Constitution s 58(4), and Virgin Islands Constitution s 57(3), recognise the distinction between ‘Her Majesty’s interest’ in respect of the United Kingdom and the territory.

<sup>77</sup> *Halsbury’s Laws of England* appears to accept that what may be decisive for many purposes ‘is the existence of separate treasuries or consolidated funds’: see vol 13, n 31 above, para 806, n 5.

<sup>78</sup> 1947 c 44.

of the United Kingdom and the Scottish Administration the capacity granted by the Act to bring proceedings against the Crown in the UK courts. Section 40(2)(b) provides:

(2) Except as therein otherwise expressly provided, nothing in this Act shall—

...

(b) authorise proceedings to be taken against the Crown under or in accordance with this Act in respect of any alleged liability of the Crown arising otherwise than in right of His Majesty's Government in the United Kingdom or the Scottish Administration, or affect proceedings against the Crown in respect of any such liability as aforesaid.

So the Act does not authorise proceedings in the UK courts against the Crown in right of any overseas territory government. This situation is reciprocated by equivalent provisions in the Crown proceedings legislation of the overseas territories.<sup>79</sup>

#### D. The Courts

The formal relationship between the overseas territories and the United Kingdom in the judicial sphere resides in all the territories having as their final court of appeal Her Majesty in Council. This means that, as a final appeal in circumstances prescribed by law,<sup>80</sup> a litigant may go to the Judicial Committee of the Privy Council, which formally advises the Queen as to the judgment to be delivered. The Judicial Committee normally sits in London, although its members are not exclusively from the United Kingdom. But many of them also sit in the Supreme Court. Having the Privy Council at the apex of the judicial system in each territory contributes to coherence in the administration of justice in the territories.

It follows that decisions of the Privy Council, or of Her Majesty in Council to use the correct terminology, are the highest judicial authority for each overseas territory and are binding on its courts.

By contrast, the courts of the United Kingdom are not courts of the overseas territories, and their decisions are in most circumstances persuasive authority, rather than binding, for the courts of the territories.<sup>81</sup> This does not mean that the decisions of UK courts have little importance for the constitutional relationship between the territories and the United Kingdom. The contrary is true, not least because they determine the lawfulness of the actions of the UK Government.

The law relating to the overseas territories owes a great deal to the jurisprudence of both the Privy Council and the UK courts, as is demonstrated by the judgments

<sup>79</sup> See eg Crown Proceedings Act 1951 (Laws of Gibraltar 1951-10); Crown Proceedings Act 1966 (Laws of Bermuda (1989 Revision) Title 8, Item 105); Crown Proceedings Act (Laws of Montserrat Cap 2.06). Even the British Antarctic Territory has such a law, which refers to the Crown in right of the Government of the Territory: see Crown Proceedings Ordinance 1990 (Laws of the British Antarctic Territory, Ordinance 7 of 1990).

<sup>80</sup> Or in cases where the Judicial Committee grants special leave to appeal.

<sup>81</sup> See further Chapter 8.

referred to in this and other chapters. Difficulty and confusion are likely to arise where the Privy Council and UK courts reach different conclusions on the same point of principle, as has sometimes happened, because each carries a different weight of authority in the territories and the United Kingdom, respectively. But the risk of this occurring in serious cases should be reduced by the substantial overlap of judges sitting on the Supreme Court and the Privy Council. The importance of this from the standpoint of legal certainty is obvious.

## CONSTITUTIONAL AMENDMENT AND REVIEW

As the Constitutions of the overseas territories are contained in Orders in Council, they may be amended or replaced by further Orders in Council. They could also, of course, be amended or replaced by Act of Parliament.

### **A. Provisions for Local Amendment**

A territory constitution may include provision for its amendment by the legislature of the territory. There are very few examples of this. One relates to the fundamental rights provisions in sections 1 to 15 of the Gibraltar Constitution. Section 18(9) and (10) of that Constitution provide:

- (9) Any right or limitation thereof set out in sections 1 to 15 may be amended if—
  - (a) a motion proposing that amendment is carried by a majority of at least three-quarters of the total number of Members of the Parliament;
  - (b) the Parliament's vote on such motion is thereafter supported by a simple majority of the votes cast in a referendum of all persons entitled to vote in elections to the Parliament; and
  - (c) the consent of Her Majesty signified through a Secretary of State has been obtained before any such motion or referendum.
- (10) Subsection (9) is without prejudice to the power of Her Majesty to amend or revoke any provision of this Chapter by Order in Council.

Thus, the consent of Her Majesty through a Secretary of State is required before the local parliamentary and referendum procedures can be undertaken, and the power to amend or revoke any provision of the fundamental rights chapter by Order in Council is preserved.

Another example concerns changing electoral constituencies. Section 27 of the Falkland Islands Constitution provides:

- (1) The Falkland Islands shall be divided into two constituencies, Camp and Stanley. Camp shall return three elected members to the Legislative Assembly and Stanley five elected members and the members shall be elected in such manner as shall be prescribed by Ordinance.
- (2) For the purposes of this section the boundaries of the Stanley constituency shall be such as shall be prescribed by the Ordinance which shall make provision for elections to the Legislative Assembly and 'Camp' shall be the remainder of the Falkland Islands.

(3) Subsections (1) and (2) may be amended by Ordinance; but no Bill for any such Ordinance shall be enacted unless it has been supported in a referendum by at least two-thirds of those voting who are registered as electors in each constituency.

This represents a careful balance in a territory where the overwhelming majority reside in Stanley. The referendum requirement is designed both to ensure direct public approval of any change and to afford some protection to the minority of voters who reside in the Camp constituency.

Section 52(3) of the Bermuda Constitution provides that the names and boundaries of the constituencies of Bermuda are those set out in the Second Schedule to the Constitution. It goes on to provide that the Second Schedule may from time to time be modified by order made by the Governor in accordance with section 54(6). Such an order must be made by the Governor if a draft of it has been submitted by the Premier to the House of Assembly to give effect (with or without modifications) to the recommendations of a Constituency Boundary Commission and the draft has been approved by the House of Assembly.

The other examples relate to increasing the number of elected members of the local legislative body and the number of Ministers.<sup>82</sup>

Apart from these few cases, in the absence of an Act of Parliament constitutional amendment requires an Order in Council in exercise of the same powers as those used for the Order providing the constitution for the territory in question. At first sight it might appear that section 5 of the Colonial Laws Validity Act 1865<sup>83</sup> provides a limited exception. This provides, in part, that:

every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

A 'representative legislature' is defined in section 1 as any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony. But in none of the territories with an elected legislative body does the legislature comprise only that body.<sup>84</sup> Even if it did, the legislative power of each territory legislature is expressed in the Constitution to be 'subject to this Constitution' and 'for the peace, order and good government' of the territory.<sup>85</sup> In *Chenard v Arissol*,<sup>86</sup> the Judicial Committee of the Privy Council stated that the power to make laws for peace, order and good government does not authorise alteration by a colonial legislature of its constitution or powers. Section 5 of the Act would therefore be trumped

<sup>82</sup> See Virgin Islands Constitution ss 47 and 63; Cayman Islands Constitution ss 44 and 60; Gibraltar Constitution ss 25(2) and 45(2); Montserrat Constitution ss 32 and 48.

<sup>83</sup> 1865 c 63.

<sup>84</sup> Because it also includes Her Majesty, or the Governor or, in Bermuda, the appointed Senate. See further Chapter 4, p 66.

<sup>85</sup> See Chapter 4, p 66.

<sup>86</sup> *Chenard v Arissol* [1949] AC 127 (PC).

by section 2, which renders territory legislation void to the extent of repugnancy to any Act or subordinate legislation that extends to the territory, at least as regards constitution Orders made under Acts passed after the 1865 Act.<sup>87</sup>

## B. Procedure

An Order in Council amending, or revoking and replacing, a territory constitution is recommended to Her Majesty in draft by UK Ministers. The Order itself is formally made by Her Majesty with the advice of Her Privy Council. Apart from these final stages, there is no prescribed procedure. The practice in recent years has been, with very few exceptions, to reach political agreement on the text of constitutional amendments, or of a new constitution, by negotiation between UK representatives and representatives of the territory concerned.<sup>88</sup>

The policy of the UK Government has been to seek evidence of popular acceptance in the territory of a politically agreed text, whether by resolution of the locally elected body, by referendum, or by less formal means of public consultation. Different territories have chosen different methods. In Gibraltar, a referendum approved in draft the 2006 Constitution, and in the Cayman Islands a referendum approved in draft the 2009 Constitution. In the Falkland Islands, Montserrat and the Virgin Islands, the current Constitutions were approved in draft by the local Legislative Council following a process of public consultation on the text. In St Helena, the new Constitution was approved in draft by a majority of Legislative Councillors, and in Ascension, Tristan da Cunha and Pitcairn, the Constitutions were approved in draft by the respective Island Councils.

Almost all recent constitutional review negotiations have taken place on the basis of proposals emanating from the territories themselves.<sup>89</sup> Such proposals have been formulated either by local constitutional reform commissions<sup>90</sup> or by committees of the local legislative body,<sup>91</sup> and have been put forward either unchanged or with adjustments by the governments of the territories. In one case, proposals were made exclusively by the government of the territory.<sup>92</sup> This process followed the UK

<sup>87</sup> See Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens, 1966) 403–5. See also E Davies, *The Legal Status of British Dependent Territories* (Cambridge, Cambridge University Press, 1995) 161–63, who cites authority from the Cayman Islands Grand Court that s 5 must be read subject to s 2. Given the non-applicability of s 5, it was necessary to confer specific powers to alter the composition of the legislative bodies in the Constitutions listed in n 82 above.

<sup>88</sup> Territory representatives have predominantly been locally elected political representatives, but in some cases others have been included in territory delegations such as expert advisers and representatives of civil society.

<sup>89</sup> The only exceptions are Ascension, Tristan da Cunha and Pitcairn, but in each case drafts prepared by the UK Government were negotiated, and the resulting text fully agreed, with the Island Council concerned.

<sup>90</sup> The Virgin Islands, Montserrat, the Cayman Islands.

<sup>91</sup> Gibraltar, the Falkland Islands, St Helena.

<sup>92</sup> Bermuda.

Government White Paper of 1999 entitled *Partnership for Progress and Prosperity: Britain and the Overseas Territories*,<sup>93</sup> which included the following paragraph:

2.7 The link between the UK and the Overseas Territories is enshrined in the constitution of each territory. The Overseas Territories believe that their constitutions need to be kept up to date and where necessary modernised. Each Overseas Territory is unique and needs a constitutional framework to suit its own circumstances. Suggestions from Overseas Territory governments for specific proposals for constitutional change will be considered carefully.<sup>94</sup>

Constitutional changes in recent years imposed by the UK Government have been rare and exceptional. Two quite recent instances have each involved a need perceived by the UK Government to take close control of the territory. One was the making of the British Indian Ocean Territory (Constitution) Order 2004, the circumstances surrounding which were examined in *Bancoult (No 2)*.<sup>95</sup> The other was the temporary suspension of parts of the Constitution of the Turks and Caicos Islands following a judicial commission of inquiry into allegations of corruption in the territory.<sup>96</sup> Each case provoked controversy and challenge by way of judicial review.<sup>97</sup> That is not particularly surprising. The UK Government remains responsible for the overseas territories, including their constitutional arrangements. But in making such constitutional arrangements, its actions are always subject to judicial review by the UK courts and political responsibility to the UK Parliament. The 2011 Constitution of the Turks and Caicos Islands, which restored ministerial government and an elected House of Assembly to the territory, was largely imposed by the UK Government, although there was prior public consultation within the territory and several provisions were negotiated between the UK Government and territory representatives.<sup>98</sup>

### C. Substance of Recent Constitutional Reforms

The substance of the recent constitutional review negotiations with Gibraltar, the Falkland Islands, the Cayman Islands, the Virgin Islands, Montserrat, St Helena, Ascension and Tristan da Cunha, and Pitcairn, resulting in new Constitutions for those territories, followed a similar pattern. Each territory was keen to increase local autonomy and to reduce the reserved powers of the Governor and the United Kingdom. The outcome in each case marked an advance in local self-government. The reserved powers were reduced to those that were considered necessary and sufficient to ensure that the UK Government could discharge its responsibilities. A revised balance of powers was achieved that both sides could accept and that

<sup>93</sup> Cm 4264.

<sup>94</sup> 1999 White Paper p 13.

<sup>95</sup> *Bancoult (No 2)*, n 31 above.

<sup>96</sup> See Turks and Caicos Islands Constitution (Interim Amendment) Order 2009 (SI 2009/701), amended by SI 2009/1755.

<sup>97</sup> See *Bancoult (No 2)*, n 31 above, and *Misick*, n 19 above.

<sup>98</sup> See Turks and Caicos Islands Constitution Order 2011 (SI 2011/1681).

better suited modern conditions.<sup>99</sup> Exceptionally, in view of its recent history, the 2011 Constitution of the Turks and Caicos Islands contains more reserved powers for the Governor and the Secretary of State than the others.

Some symbolic changes were made, which the territories concerned regarded as important. In Gibraltar, the House of Assembly was renamed the Gibraltar Parliament. In the Virgin Islands and the Turks and Caicos Islands, the Legislative Council was renamed the House of Assembly, and in the Falkland Islands and Montserrat it was renamed the Legislative Assembly. In the Virgin Islands, Montserrat and the Turks and Caicos Islands, the title of Chief Minister was changed to Premier and the Executive Council was renamed the Cabinet. The latter change had earlier been made in the Cayman Islands, but in the 2009 Constitution the Leader of Government Business became the Premier.

In the Cayman Islands, the Virgin Islands, St Helena, Ascension and Tristan da Cunha, and Pitcairn, enforceable fundamental rights Chapters were included for the first time in the new Constitutions.<sup>100</sup> The previous Constitutions of Gibraltar, the Falkland Islands, the Turks and Caicos Islands and Montserrat already contained fundamental rights Chapters, and these were updated and expanded in the new Constitutions.

There are some novel provisions in the new Constitutions. Judicial Service Commissions were established in Gibraltar, the Cayman Islands, the Virgin Islands, the Turks and Caicos Islands, St Helena and Ascension.<sup>101</sup> The Cayman Islands, Turks and Caicos Islands and Virgin Islands Constitutions provide for Human Rights Commissions, and the Montserrat Constitution provides for a Complaints Commission.<sup>102</sup> In the Cayman Islands, the new Constitution also set up a Commission for Standards in Public Life and a Constitutional Commission.<sup>103</sup> These new bodies were designed to contribute to good government and to enhance local involvement in that effort. The Turks and Caicos Islands Constitution established several politically independent ‘institutions protecting good governance’, namely, an Auditor General and National Audit Office, a Complaints Commissioner, a Director of Public Prosecutions, a Human Rights Commission, an Integrity Commission and a Supervisor of Elections.<sup>104</sup>

The Constitution of St Helena, Ascension and Tristan da Cunha sets out a list of ‘partnership values’ which form the basis of the partnership between each island and the United Kingdom and of the relationship between the three islands. The values include good faith, the rule of law, good government, sound financial management, the impartial administration of justice and the impartiality of the public service.

<sup>99</sup> The exceptional step taken in 2009 to suspend parts of the Turks and Caicos Islands Constitution resulted not from the distribution of powers made by that Constitution but from the use of powers by some territory politicians.

<sup>100</sup> Cayman Islands Constitution Pt I; Virgin Islands Constitution Ch 2; Constitution of St Helena, Ascension and Tristan da Cunha Ch 1 Pt 2, Ch 2 Pt 2, Ch 3 Pt 2; Pitcairn Constitution Pt 2.

<sup>101</sup> See further Chapter 6, pp 118–21.

<sup>102</sup> Cayman Islands Constitution s 116; Turks and Caicos Islands Constitution s 101; Virgin Islands Constitution s 34; Montserrat Constitution s 105.

<sup>103</sup> Cayman Islands Constitution ss 117 and 118.

<sup>104</sup> Turks and Caicos Islands Constitution ss 97–105.

Each local organ of government is obliged to give effect to the values.<sup>105</sup> Similar provisions are included in the Pitcairn Constitution.<sup>106</sup> The Turks and Caicos Islands Constitution empowers a Secretary of State to issue a Statement of Governance Principles, to which all organs of government have a duty to give effect.<sup>107</sup>

The Constitutions of the Virgin Islands, the Cayman Islands, the Turks and Caicos Islands, Montserrat and St Helena, Ascension and Tristan da Cunha include Preambles, mostly drafted locally, that express something of the history, culture and aspirations of the people of the territory concerned. This was an innovation, and helps to give some local 'ownership' to the constitution that governs the territory.

The Gibraltar Constitution Order 2006 contains an important Preamble, the first paragraph repeating that in the Gibraltar Constitution Order 1969, the second paragraph being new. It reads:

Whereas Gibraltar is part of Her Majesty's dominions and Her Majesty's Government have given assurances to the people of Gibraltar that Gibraltar will remain part of Her Majesty's dominions unless and until an Act of Parliament otherwise provides, and furthermore that Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes;

And whereas the people of Gibraltar have in a referendum held on 30th November 2006 freely approved and accepted the Constitution annexed to this Order which gives the people of Gibraltar that degree of self-government which is compatible with British sovereignty of Gibraltar and with the fact that the United Kingdom remains fully responsible for Gibraltar's external relations.

#### FUTURE DEVELOPMENTS

At the time of writing, negotiations for a new Constitution for Anguilla had not advanced beyond the preliminary stage, and it remains to be seen whether they will eventually come to fruition. As for Bermuda, important constitutional changes were made in 2001 and 2003 to establish, for the first time, single-member constituencies for elections to the House of Assembly and to provide for an Ombudsman.<sup>108</sup> The fundamental rights Chapter of the Bermuda Constitution, which dates from 1968 and clearly needs updating, is under review.

The 2012 White Paper entitled *The Overseas Territories: Security, Success and Sustainability*<sup>109</sup> contains the following passage:

We have reviewed the constitutional status of the Territories. Each Territory has its own unique constitution. The previous government launched in 1999 a process of modernising the constitutions of the inhabited Territories. We are continuing this work with a view

<sup>105</sup> Constitution of St Helena, Ascension and Tristan da Cunha ss 2, 3, 4, 121 and 186.

<sup>106</sup> Pitcairn Constitution s 1.

<sup>107</sup> Turks and Caicos Islands Constitution s 28. The Statement of Governance Principles in effect at the time of writing is reproduced at Annex, pp 375–77.

<sup>108</sup> See SI 2001/2579 and SI 2003/456.

<sup>109</sup> Cm 8374.

to equipping each Territory with a modern constitution. We expect these constitutions to continue to evolve and to require adjustment in the light of circumstances. But we believe that the fundamental structure of our constitutional relationships is the right one: powers are devolved to the elected governments of the Territories to the maximum extent possible consistent with the UK retaining those powers necessary to discharge its sovereign responsibilities. We believe that at this point in the history of our relationships with the Territories, when a decade of constitutional revision is coming to a close, the time is not right to embark on a further round of constitutional change. Rather our strategy is to ensure the constitutional arrangements work effectively to promote the best interests of the Territories and the UK. The Government recognises that it is important to continue to reflect on the constitutional relationship. We will ensure that a dialogue on these issues is sustained with all those Territories which wish to engage.<sup>110</sup>

That statement represented the position of the UK Government in 2012, and no change to it has been discerned at the time of writing. Minor amendments have since been made to the Constitutions of the Cayman Islands<sup>111</sup> and the Virgin Islands,<sup>112</sup> as well as incidental amendments to the Constitutions of Anguilla, the Falkland Islands and the Turks and Caicos Islands.<sup>113</sup> Other adjustments and amendments can be expected in due course. But, with the possible exception of Anguilla, it seems that major constitutional reform in the territories is most unlikely in the foreseeable future.

<sup>110</sup> *Ibid* 14.

<sup>111</sup> SI 2016/780.

<sup>112</sup> SI 2015/1767.

<sup>113</sup> SI 2017/181 art 12, and also, for the Turks and Caicos Islands, SI 2017/317 art 3(1)(a).