Oxford University Commonwealth Law Journal

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rouc20

Corruption and the constitutional position of the Overseas Territories

Paul F. Scott

To cite this article: Paul F. Scott (2023): Corruption and the constitutional position of the Overseas Territories, Oxford University Commonwealth Law Journal, DOI: 10.1080/14729342.2023.2210920

To link to this article: https://doi.org/10.1080/14729342.2023.2210920

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

Published online: 10 May 2023.

Submit your article to this journal

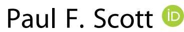
Article views: 100

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at https://www.tandfonline.com/action/journalInformation?journalCode=rouc20

OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL
https://doi.org/10.1080/14729342.2023.2210920



OPEN ACCESS

Corruption and the constitutional position of the Overseas Territories

Paul F. Scott

School of Law, University of Glasgow, Glasgow, UK

ABSTRACT
The report of the recent Commission of Inquiry into possible corruption in the British Virgin Islands exemplifies a number of themes present in previous reports relating to other Overseas Territories. This article considers the question of corruption in the Overseas Territories in the context of the constitutional relationship between the Territories and the United Kingdom, considering the extent to which the UK is responsible for addressing the question and whether it might bear some responsibility for the existence of such corruption in the first place.

ARTICLE HISTORY Received 9 January 2023; Accepted 23 March 2023

KEYWORDS Constitution; corruption; United Kingdom; Overseas Territories

1. Introduction

Britain retains a number of Overseas Territories which are not part of the United Kingdom (UK) itself and therefore not represented within its institutions, but for which the UK remains responsible in international law and for the governance of which it is (albeit to a contested extent) responsible. Some of the Territories attract more attention than others: whether for reasons of political and legal dispute[1] or because they are offshore financial centres which are considered to be tax havens and which undermine the finances and perhaps even the security of the UK and other states. Mostly the Territories are, within limits, self-governing, with executive and legislative institutions of their own operating under a Governor

CONTACT Paul F. Scott Paul.Scott@glasgow.ac.uk

[1]The key example is the British Indian Ocean Territory (alternatively, the Chagos Islands) which has been the subject of a long and ongoing dispute relating to its depopulation to make way for a United States naval base: see, for an overview, Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory* (Springer 2018).

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution License (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.

representing the UK government who is responsible for specified matters.[2] Occasionally, however, the UK government chooses to step in and intervene in the governance of the Territories more directly. The most recent example of this phenomenon took place in the British Virgin Islands (BVI), in response to the latest in a series of corruption scandals relating to one of the Overseas Territories.[3] The intervention took the form of the establishment of a Commission of Inquiry, the report of which was published—shortly following the (apparently unrelated) arrest of the Premier of the BVI in the United States—in April 2022,[4] and recommended the partial, temporary suspension of the Constitution of the BVI.

This article considers the report in the longer context of the problem of corruption and poor governance within the Overseas Territories, demonstrating the recurrence of certain themes in each case. It then turns to consider the wider lessons of these repeated scandals for the constitutional position of the Overseas Territories and their relationship to the UK, arguing that the recurrences of certain key themes indicate that part of the responsibility for the problems in each case lies in that unsatisfactory relationship. The third section turns back from periphery to centre, reflecting on the implication of constitutional responses to corruption within the Overseas Territories for the UK, and noting in particular that the justification for the UK involving itself in these matters when they occur in the Overseas Territories appears to rest upon a commitment to values of good governance which are often not upheld within the UK itself.

2. The constitutional position of the Overseas Territories

In the past decades, several Commissions of Inquiry have addressed the questions of poor governance and corruption in what are known—since 2002—as the British Overseas Territories.[5] There are 14 such territories, which vary significantly in terms of size, population, location, and history. Though some are valuable for strategic reasons—the British Indian Ocean Territory, which hosts a US Naval Base, or Ascension Island, say, which is used for signals

[2]For the legal position see, generally, Ian Hendry and Susan Dickson, *British Overseas Territory Law* (Hart Publishing 2018).

[3]See, eg, Derek O'Brien and Justin Leslie, 'Something rotten in the Turks and Caicos? Britain and its Caribbean Overseas Territories' [2010] Public Law 231. The report discussed is Turks and Caicos Islands Commission of Inquiry 2008–2009, *Report of the Commissioner The Right Honourable Sir Robin Auld into possible corruption or other serious dishonesty in relation to past and present elected members of the Legislature in recent years* (2009). An earlier report had examined the same jurisdiction: Turks and Caicos Islands Commission of Inquiry 1986, *Report of the Commissioner Mr Louis Blom-Cooper QC into Allegations of Arson of a Public Building, Corruption and Related Matters with Appendices* (Cm 21, December 1986). For a discussion of, amongst other things, the relationship between the two reports, see Peter Clegg, 'The Turks and Caicos Islands: the cloud that still hangs' (2009) 58 Social and Economic Studies 227.

[4]BVI Commission of Inquiry, *Report of the Commissioner The Rt Hon Sir Gary Hickinbottom* (4 April 2022).

[5]British Nationality Act 1981, sch 6.

interception[6]—other Territories continue to belong to the UK, of which they are not part, only as a result of historical happenstance. A number of them, including those Caribbean Overseas Territories in relation to which Commissions of Inquiry have taken place over the years,[7] are notable for their role in what is described as 'offshore finance'. Though they do not welcome the label, many are widely considered to be 'tax havens'.[8] And though the UK is in principle willing to grant independence to any Territory which seeks it,[9] none appears likely to take that step in the near future. Until such independence is achieved, the constitutional relationship between the individual Territories and the UK varies, but is marked by certain fundamentals. Even where a Territory possesses the full suite of democratic institutions and is therefore self-governing, the UK remains responsible for matters including international relations and defence, as well as certain, more amorphous, other areas of policy, to which we return below.

The current institutional arrangements of the BVI (the formal name of which is merely Virgin Islands)[10]—to which the most recent Commission of Inquiry relates—exemplify the general constitutional position of the Territories.[11] When the West Indies Federation was created in 1958,[12] encompassing islands from all of the various groupings in the Caribbean, it was joined by all of the other Leeward Islands, but not the Virgin Islands,[13] and collapsed after just a few years.[14] The largest component (former) colonies of the Leeward Islands, Jamaica and Trinidad and Tobago, became independent, while the

[6]Sarah Mainwaring and Richard J Aldrich, 'The Secret Empire of Signals Intelligence: GCHQ and the Persistence of the Colonial Presence' (2021) 43 The International History Review 54.

[7]This includes the Turks and Caicos Islands and the BVI. The other Caribbean Overseas Territories are Anguilla, the Cayman Islands, and Montserrat. These five Territories are considered as a grouping by O'Brien and Leslie (n 3) 232–33, characterising the UK's relationship with them prior to 1999 as 'one of "benign neglect" punctuated by occasional crises'.

[8]See, eg, Tax Justice Network, 'Corporate Tax Haven Index—2021 Results' (Tax Justice Network 2021) <cthi.taxjustice.net/en/> accessed 3 May 2023, which includes prominently a number of British Overseas Territories, including the BVI.

[9]See, eg, UK Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability*, (Cm 8374, 2012) 15:

> Where independence is an option and it is the clear and constitutionally expressed wish of the people to pursue independence, the UK Government will meet its obligations to help the Territory to achieve it.

[10]British Nationality Act 1981, sch 6.

[11]See, for an overview, BVI Commission of Inquiry (n 4) 34–69, and, for a discussion, Susan Dickson, 'The British Overseas Territories of Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands—A Modern Approach to a Traditional Relationship' in Richard Albert, Derek O'Brien and Se-shauna Wheatle (eds), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press 2020).

[12]See British Caribbean Federation Act 1956 and West Indies (Federation) Order in Council 1957.

[13]Howard A Fergus, 'Dependency Politics: The Quality of Parliamentary Governance in the British Virgin Islands' (1996) 42 Caribbean Quarterly 50, 51:

> Situated just 60 miles from Puerto Rico and 3 miles off St. John of the US Virgin Islands with which there are strong social and economic bonds, it embraced a "westward destiny" instead of a British Eastern Caribbean one.

[14]See for discussion Elisabeth Wallace, 'The West Indies Federation: Decline and Fall' (1962) 17 International Journal 269.

other component polities (re)joined the BVI in having the status of British colonies, though most of these later achieved independence. BVI remained a distinct territory throughout, with Constitutions enacted for it in 1967,[15] 1976,[16] and, most recently, in 2007.[17] Under the 2007 Constitution, executive authority rests with the Monarch but is exercised in practice by a Governor.[18] The Governor has explicit constitutional responsibility for certain areas of policy, including external affairs, defence, and internal security.[19]

Responsibility for other areas of policy is in the hands of a Cabinet, made up of a Premier, Ministers, and the Attorney General, who sits in the Cabinet ex officio.[20] The Premier is appointed by the Governor, with the Governor obliged to appoint either the person nominated by the elected members of the largest party in the Assembly or, failing that, the 'elected member of the House of Assembly who, in his or her judgement, is best able to command the support of a majority of the elected members of the House'.[21] Other Ministers are appointed by the Governor on the advice of the Premier from amongst the membership of the House of Assembly,[22] the unicameral legislature known in previous constitutional iterations as the Legislative Council. The size of that House—which, together with the Monarch makes up the legislature[23]—is set by the Constitution at 15: a Speaker, 13 elected members, and the Attorney General ex officio.[24] Of those 13, the Constitution provides that 1 member is to be elected from each of 9 electoral districts, while the entire Virgin Islands is also a single electoral district for the purpose of the election of the other 4 ('at-large') members.[25] The Attorney General is 'the principal legal adviser to the Government of the Virgin Islands' and is appointed by the Governor.[26] In making that appointment, the Governor is to act in accordance with the advice of the Judicial and Legal Services Commission, but he or she can refer the Commission's advice back for reconsideration and may go against it 'if he or she determines that compliance with that advice would prejudice Her Majesty's service'.[27] As is common with Overseas Territories, the Constitution reserves to the Monarch—in exercise of the prerogative—'full power to make laws for the peace, order and good

[15]The Virgin Islands (Constitution) Order 1967, SI 1967/471.
[16]The Virgin Islands (Constitution) Order 1976, SI 1976/2145.
[17]The Virgin Islands Constitution Order 2007, SI 2007/1678.
[18]ibid, s 35.
[19]ibid, s 60
[20]ibid, s 47(3).
[21]ibid, s 52(1).
[22]ibid, s 52(2).
[23]ibid, s 62.
[24]ibid, s 63 (1).
[25]ibid, s 64(2).
[26]ibid, s 58(1).
[27]ibid, s 92(1).

government of the Virgin Islands'.[28] The power thus reserved is a plenary power, and the courts, it was noted in *Bancoult (No 2)*, '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'.[29]

As already stated, BVI is a significant financial centre, widely considered to be a leading tax haven.[30] And relations between the BVI (as well as a number of other Overseas Territories) and the UK have been strained in recent years by events around the enactment of the Sanctions and Anti-Money Laundering Act 2018 (SAMLA), which contains a provision requiring the introduction of a degree of transparency into the ownership of companies formed in the Overseas Territories. The statute had been preceded by reports challenging the Overseas Territories' claim that this represented an illegitimate intervention by the UK into a matter within the jurisdiction of the individual Territories themselves. Rather, said the Foreign Affairs Committee, 'money laundering is now a matter of national security, and therefore constitutionally under the jurisdiction of the UK',[31] demonstrating the malleability of what is sometimes presented as a rather firmer division of constitutional labour.[32] SAMLA imposed a requirement that the relevant members of the UK government prepare an Order in Council by 31 December 2020, requiring any Overseas Territory that has not introduced a 'publicly accessible register of the beneficial ownership of companies' to do so.[33] BVI was one of the Territories which opposed this measure most strongly.[34] Hundreds marched against it in Road Town, the capital of the BVI, and the Deputy Premier stated that the Islands had declared 'open war' against the UK.[35]

[28]ibid, s 119.

[29]*R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)* [2008] UKHL 61 (UK House of Lords) [50].

[30]See, eg, Tax Justice Network (n 8). The Index ranks those jurisdictions 'most complicit in helping multinational corporations underpay corporate income tax' and, in the 2021 Index, the BVI was ranked in first place. Dominic Thomas-James identifies the BVI as one of the Overseas Territories which are financial centres, though he counsels against treating those Territories as a single block, for they are 'fundamentally contrasting jurisdictions despite their prima facie similarities': Dominic Thomas-James, *Offshore Financial Centres and the Law: Suspect Wealth in British Overseas Territories* (Routledge 2021) 46.

[31]UK House of Commons Foreign Affairs Committee, *Moscow's Gold: Russian Corruption in the UK* (HC 2017–19, 932) para 68.

[32]The inclusion of the enactment of SAMLA amongst the examples given to the Commission of Inquiry of action taken by the UK government which demonstrated a lack of respect for the BVI government was though subject to sceptical comment in its report, where it was noted that the Ministers of the BVI had adopted an approach whereby 'any interest of the BVI as they perceive it to be in a devolved area must inevitably trump any other interests of the BVI and/or the UK in reserved areas such as foreign policy' but that '[u]nder the current constitutional arrangements, that is not right'. BVI Commission of Inquiry (n 4) para 13.68.

[33]SAMLA, s 51.

[34]UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the relationship* (HC 2017–19, 1464) para 29.

[35]Esther Durand, 'UK put on notice, BVI has "declared war"—Pickering' (*BVI News Online*, 25 May 2018) <bvinews.com/uk-put-on-notice-bvi-has-declared-war-pickering/> accessed 3 May 2023.

The UK government stated in 2018 that 'if by 2020 there is no public register, for whatever territory, we will then issue an Order in Council, which will then have a requirement for an operational public register by 2023'.[36] When published in late 2020, however, the draft Order in Council stated only that Overseas Territories were required to

> bring into existence, or cause to be brought into existence, a compliant publicly accessible register of beneficial ownership of companies for that Territory as soon as reasonably practicable for it to do so.[37]

In the period leading up to the deadline for the Order's publication, the BVI had become the last of the Overseas Territories to commit to the creation of a publicly available register of beneficial ownership.[38] That commitment, when it eventually came, was made with significant caveats, including that the format of the register which would be introduced 'must be in line with international standards and best practices as they develop globally and, at least, as implemented by EU Member States'.[39] Moreover, the commitment was made 'with all due regard to the protection of, and proportionate safeguards for, all rights secured under our Territory's Constitution, and without prejudice to any interpretation of our Constitution expounded by a Court of law, whether in the past, pending, or in the future'.[40] It remains to be seen, therefore, whether the BVI's register of beneficial interests will meet the standards laid down in the draft Order in Council and, if not, what might follow from that failure. As the Commission of Inquiry was ongoing, a significant new leak of financial papers—the 'Pandora Papers'[41]—demonstrated once again the centrality of the BVI to the global flow of potentially illicit funds.[42]

---

[36]UK House of Commons Foreign Affairs Committee, *Oral evidence: The Future of the UK Overseas Territories* (HC 2017–19, 1464) (18 December 2018), Q 221.

[37]UK Secretary of State, *Draft Statutory Instruments: The Overseas Territories (Publicly Accessible Registers of Beneficial Ownership of Companies) Order 20*** (14 December 2020), art 3(1).

[38]See Thomas-James (n 30) 167–69.

[39]BVI London Office, 'BVI Premier Reiterates Territory's Commitment to an Appropriate Framework for Publicly Accessible Registers' (*BVI London Office*, 22 September 2020) <bvi.org.uk/bvi-premier-reiterates-territorys-commitment-to-an-appropriate-framework-for-publicly-accessible-registers/> accessed 3 May 2023, quoting remarks made in the House of Assembly on the same date.

[40]ibid.

[41]See, for an overview, International Consortium of Investigative Journalists, 'Pandora Papers' (*International Consortium of Investigative Journalists*, October 2021) <www.icij.org/investigations/pandora-papers/> accessed 3 May 2023.

[42]'"Panama Papers" shine spotlight on BVI' (*The BVI Beacon*, 7 April 2016) <www.bvibeacon.com/panama-papers-shine-spotlight-on-vi/> accessed 3 May 2023. The BVI government stated at the time of the leak of these 'Panama Papers' that

> [t]he BVI actively investigates issues of non-compliance and works with foreign competent authorities to detect, prevent and prosecute illegal activities, ensuring that our laws are enforced and action taken transparently when we identify wrongdoing.

See Government of the Virgin Islands Premier's Office, 'Statement by Government of the British Virgin Islands on ICIJ Leak of "Panama Papers"' (*Government of the Virgin Islands*, 5 April 2016) <bvi.gov.vg/media-centre/statement-government-british-virgin-islands-icij-leak-panama-papers> accessed 3 May 2023. A consideration of the jurisdiction later that year noted, however, little sign of it having taken

Though the specific allegations of corruption addressed by the Commission bear no direct relation to BVI's role as an offshore financial centre, it would seem more than merely plausible that the vast sums of money which flow through the BVI go at least some way towards both distorting its domestic political landscape and heightening the sensitivity of domestic political actors to what is perceived as meddling by external forces in internal affairs.[43]

3. Inquiring into corruption in the Overseas Territories

The Commission of Inquiry in relation to the BVI is the latest in a series of investigation into questions of corruption and governance in the (Caribbean)[44] Overseas Territories.[45] In 1986, a Commission of Inquiry headed by Louis Blom-Cooper QC reported on issues which had arisen in the Turks and Caicos Islands (TCI), finding that three named ministers had been guilty of 'unconstitutional behaviour and of ministerial malpractices', rendering them 'unfit to exercise ministerial responsibilities'.[46] His general conclusions as to the situation in the Islands were damning:

> Persistent unconstitutional behaviour (through the application of political patronage) and contraventions of the fundamental freedom of the individual from discrimination on the grounds of political opinions, maladministration by both Ministers and civil servants at every level of government (mostly at middle management level), and intolerable (not to say seditious) conduct by leading opposition members of the Legislative Council are constant blights upon a constitutionally ordered society which is already displaying signs of political instability.[47]

Though he made only very limited findings of actual corruption, Blom-Cooper noted that he was unable to

> simulate deafness to the voices of responsible people in the Islands who complain that there is pervasive corruption in government, if only it could be

steps to address the issues identified by the leaked material: Transparency International, 'British Virgin Islands: Have They Cleaned Up Since the Panama Papers?' (*Transparency International*, 14 October 2016) <www.transparency.org/en/news/british-virgin-islands-have-they-cleaned-up-since-the-panama-papers> accessed 3 May 2023.

[43] See, in this regard, an important 1997 report by the UK National Audit Office which drew attention to the links between financial regulation, corruption, and drug-trafficking in relation to the Caribbean Overseas Territories in particular: UK National Audit Office and Foreign and Commonwealth Office, *Report by the Comptroller and Auditor General: Contingent Liabilities in the Dependent Territories* (HC 1997–98, 13).

[44] A former governor of Montserrat, one of the Caribbean Overseas Territories, has in the past bemoaned the failure of the UK to recognise the particular problems of the Overseas Territories in the Caribbean, identifying, for example, concerns about the standard of governance 'which are supposed to apply to *all* Territories, but which in practice apply mainly to the *Caribbean Territories*' (original emphasis). David GP Taylor, 'British colonial policy in the Caribbean: the insoluble dilemma—the case of Montserrat' (2000) 89 *The* Round Table 337, 343.

[45] O'Brien and Leslie (n 3).

[46] TCI Commission of Inquiry 1986, *Report of the Commissioner Mr Louis Blom-Cooper QC* (n 3) 97.

[47] ibid 97.

> uncovered by diligent and sustained inquiry over a number of areas of governmental administration, all of them outwith my terms of reference.[48]

In response to the Commission of Inquiry report the system of Ministerial government then in place was temporarily suspended, and—following a Constitutional Commission[49]—a new Constitution for the Islands put in place.[50]

Blom-Cooper had said in 1986 that the time had come 'to disperse the cloud that hangs like a brooding omnipresence in a Grand Turkan sky'.[51] That the reforms of the late 1980s did not succeed in doing so was demonstrated by events of twenty years later. In response to the expression of concerns by the House of Commons Foreign Affairs Committee,[52] a further Commission of Inquiry, established under Sir Robin Auld, found that there was a 'high probability of systemic corruption in government and the legislature and among public officers in the Turks & Caicos Islands in recent years', consisting mainly of 'bribery by overseas developers and other investors of Ministers and/or public officers, so as to secure Crown Land on favourable terms, coupled with government approval for its commercial development'.[53] Following the publication of an interim report by the Commission,[54] the UK instituted once more a form of 'direct rule', suspending large portions of its Constitution and placing many of the powers of the representative institutions in the hands of the Governor, with the support of an Advisory Council.[55] Another new Constitution for the Territory was legislated for in 2011 and came into force the following year.[56] Though the TCI was the subject of the only inquiry at this stage, when the Foreign Affairs Committee reported (critically) on the UK government's response to the Commission's interim report, it observed that 'a number of concerns

[48]ibid 98.

[49]TCI Constitutional Commission, *Report of the Constitutional Commission* (Cm 111, 1987). For a consideration of the recommendations of the Commission, see William C Gilmore, 'Problems in Paradise: Public Corruption and Constitutional Change in the Turks and Caicos Islands' [1988] Public Law 32.

[50]The Turks and Caicos Islands Constitution Order 1988, SI 1988/247.

[51]TCI Commission of Inquiry 1986, *Report of the Commissioner Mr Louis Blom-Cooper QC* (n 3) 97. See also Peter Clegg, 'The Turks and Caicos Islands: Why Does the Cloud Still Hang?' (2012) 61 Social and Economic Studies 23.

[52]UK House of Commons Foreign Affairs Committee, *Overseas Territories: Seventh Report of Session 2007–08* (HC 2007–08, 147-I).

[53]TCI Commission of Inquiry 2008–2009, *Report of the Commissioner The Right Honourable Sir Robin Auld* (n 3) para 1.

[54]ibid, app 3.

[55]The Turks and Caicos Islands Constitution (Interim Amendment) Order 2009, SI 2009/701. See also *R (Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWCA Civ 1549 (Court of Appeal of England and Wales (Civil Division)), in which the former Premier of the TCI was refused permission to challenge the Order which would suspend the Constitution. The substance of the 2006 constitution, and its failings, is considered within the longer sweep of the constitutional development of the TCI by Peter Clegg and Derek O'Brien, 'Constitutional Dissonance and the Rule of Law in the Turks and Caicos Islands' in Albert, O'Brien, and Wheatle (n 11).

[56]The Turks and Caicos Islands Constitution Order 2011, SI 2011/1681.

have been brought to our attention in relation to allegations of corruption and poor governance in other Overseas Territories'.[57]

The most recent Commission of Inquiry, relating this time to the BVI, was conducted by Gary Hickinbottom, previously a Lord Justice of Appeal. Its conclusions were unsparing. 'Almost everywhere' in the BVI, the Commissioner concluded, and despite the efforts of successive Governors, 'the principles of good governance, such as openness, transparency and even the rule of law, are ignored':

> In many important areas of government … discretionary decisions are made by elected officials (usually, Ministers) on the basis of no criteria, or patently inadequate and/or unpublished criteria, or criteria which are as often as not simply ignored. They can and do make decisions—which expend huge sums of public money and affect the lives of all those who live in the BVI—as they wish, without applying any objective criteria, without giving any reasons and without fearing any comeback.[58]

Relatively few findings of corruption were made by the Commission, though in relation to the paradigmatic form of corruption—direct personal bribery—the Commissioner noted that, 'given the overwhelming picture of the principles of good governance being ignored and worse, it would be frankly surprising if there were no such corruption'.[59] Following from these damning findings, a number of recommendations were made, two of which fit neatly the pattern of responses to corruption in the Overseas Territories. The first was that there should be a partial suspension of the constitution encompassing those parts of it which assign areas of government to elected representatives.[60] The second was that a 'Constitutional Review' should take place, which would have as its aim 'ensuring that mechanisms are put in place so that abuses which I have identified cannot continue or be repeated; and, more constructively, to ensure that the needs and aspirations of the people of the BVI (including their aspiration for self-government) are met'.[61] The last review to have taken place had been carried out in 2006 and resulted in the Constitution of 2007, which—the Commission of Inquiry had demonstrated—'cannot take the weight it has to bear'.[62] Though these recommendations are no doubt a perfectly rational response to a careful and thorough review of the matters, both the scale of the problems the Commission of Inquiry identified and the lesson of the TCI suggest that even a full and prompt implementation of those recommendations may not suffice to

[57]UK House of Commons Foreign Affairs Committee, *Turks and Caicos Islands: Seventh Report of Session 2009–10* (HC 2009–10, 469).
[58]BVI Commission of Inquiry (n 4) 7.
[59]ibid, 9.
[60]ibid, 689–90.
[61]ibid, 691–92.
[62]ibid, 11.

prevent the need for such a Commission again in the future. In the event, the UK's response was to decline to suspend the constitution, at least in the short term, and rather to provide the new BVI 'Government of National Unity', which had been formed following the removal of the Premier, 'an opportunity to demonstrate their commitment to reform through the implementation of the 48 COI recommendations and the further measures they have proposed'.[63] Its progress in doing so would be monitored and, in the event that it was insufficient, the constitution would be suspended.[64] In the next sections I consider the responsibility of the UK, constitutional and factual, for the issues of corruption in the Overseas Territories.

4. The UK's responsibility for good governance in the Overseas Territories

The repeated institution of Commissions of Inquiry for particular Overseas Territories, prompted either by suspicions of corruption or more general concerns about the quality of governance prevailing, bring into focus the uncertainty which exists as to the extent of the UK's responsibility for the Overseas Territories. In particular, it speaks to the line to be drawn between matters which have external implications and in relation to which the UK may, or perhaps must, act, even where to do so puts it at odds with the Territories in question, and those which are of purely internal concern, to be addressed—if at all—by the representative institutions of the Territory. The background here is that, as a matter of law, the UK Parliament, which is still in this sense an Imperial Parliament, can legislate without limit for the Overseas Territories notwithstanding that these Territories have no representation within it. In practice, however, it does not generally do so. Law-making for the Overseas Territories, instead, takes place by means of Orders in Council, and even that is largely limited to a small number of areas which are described—in a somewhat misleading analogy to the modern devolution settlements within the UK—as 'reserved' matters. The standard account of the UK's relationship with the Overseas Territories identifies those matters which are reserved to the centre as defence and international relations, managed in the first place by the Governor, as well as the rather more

[63] UK Secretary of State for Foreign, Commonwealth and Development Affairs, 'FCDO update' (HC Deb 8 June 2022, UIN HCWS81).

[64] ibid:

> If it becomes clear that this approach is not delivering the reform the people of the BVI want and deserve we will take action. This may require the swift implementation of the final Report recommendation.
>
> In order to be able to do so quickly if required, the UK Government has submitted an Order in Council to the Privy Council that would allow this administration to be introduced. The Order will be laid in Parliament, but not brought in to force. Should it prove necessary to do so, I will instruct the Governor to make a proclamation in the BVI Gazette appointing a day that the Order will come into force.

amorphous topic of 'internal security'.[65] Even that account, however, demonstrates a certain malleability through time and space. As noted above, in relation to SAMLA, the question of whether there existed a register of beneficial ownership was frequently reframed not as a question of internal policy, whether of property or tax law—and so of no legitimate concern to the UK—but rather as a matter touching upon the UK's national security and therefore the legitimate object of its interference even without the support, and even against the direct wishes, of the Territories.[66]

That malleability apart, there is a striking lack of certainty in explanations of what exactly the UK is responsible for under the heading 'governance' and why. We see these ambiguities at work first of all in the Auld report, which justified the suspension of the TCI's Constitution and various reforms not only by reference to what was called, rather loosely, 'systemic venality', but also the 'clear signs of political amorality and immaturity and of general administrative incompetence'.[67] We see it more clearly again in the announcement of the BVI Commission of Inquiry, in which it was said that:

> The UK Government is responsible for ensuring the security and good governance of BVI. We have a constitutional and moral duty to protect the interests of the people of BVI. We cannot ignore such serious allegations.[68]

There are several points of note here: one is that 'good governance' has migrated from the standard backstop power of the UK over its Territories ('peace, order and good government') to the domain for which the UK is practically responsible—rather than empowering the UK to act, it seems here instead to oblige it to do so. The other is that the alleged constitutional duty (not mere power) to protect the interests of the people of the BVI has been given the belt and braces treatment via a more general (and hence less easily falsified) 'moral' duty. Striking too—a point to which we will return below—is the description of the nature of the allegations into which

[65]UK House of Commons Foreign Affairs Committee, *Overseas Territories: Seventh Report of Session 2007–08* (n 52) para 10: 'In the majority of Territories the Governor has special responsibility for defence, external affairs and internal security (including the police, the public service, and administration of the courts)'; UK Foreign and Commonwealth Office (n 9) 14: 'Governors or Commissioners are appointed by Her Majesty The Queen on the advice of Her Ministers in the UK, and in general have responsibility for external affairs, defence, internal security (including the police) and the appointment, discipline and removal of public officers'. See also Hendry and Dickson (n 2) chs 10, 13.

[66]See, eg, UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories* (n 34) para 28, noting that it had received evidence which 'suggests that the lack of publicly available and transparent information on [Overseas Territory]-registered companies has foreign policy and national security implications', but that evidence from the Overseas Territories themselves 'suggests that they see it solely as a financial services matter, which is a devolved area'. It noted further, at para 33, that in enacting SAMLA 'Parliament has judged public registers of beneficial ownership to be a matter of national security'.

[67]TCI Commission of Inquiry 2008–2009, *Report of the Commissioner The Right Honourable Sir Robin Auld* (n 3) para 1.6.

[68]UK Secretary of State for Foreign, Commonwealth and Development Affairs, 'Update on Overseas Territories' (HC Deb 18 January 2021, HCWS716).

the Commissioner would inquire. It would, the UK government said, look at whether 'there is information to substantiate claims that corruption, abuse of position and serious impropriety has taken place in public office in recent years' and make recommendations.[69]

This same lack of clarity as to what exactly makes these matters the UK's business is evident in the Commission of Inquiry's report, which characterises the relationship between the UK and the Overseas Territories as an 'inherently complex one'.[70] Within it, the UK is obliged to 'devolve powers to the elected BVI Government to the maximum extent possible, consistent with its sovereign responsibilities', said responsibilities including 'the obligation to ensure the advancement (including the political and economic advancement) of the people of the BVI, their just treatment, and their protection against abuses'.[71] On the other side, the British Overseas Territories are 'obliged to adopt the highest standards of probity, law and order, and good governance':

> That is not simply because the UK Government as a matter of principle is committed to such standards of government irrespective of place: the inhabitants of [British Overseas Territories] are generally not only British citizens, they are British citizens for whom the UK Government has obligations to ensure their security, their good governance and (expressly in article 73(a) of the [United Nations] Charter) their protection from abuses.[72]

Once again, the question of 'good governance' has become an obligation rather than a power. The reference to the United Nations Charter, however, is not only unconvincing (it is by no means clear that the 'abuses' to which the Charter refers is best understood as encompassing the sort of internal governance issues to which the Commission of Inquiry relates) but also serves to highlight the absence of authority for the claim that the UK has obligations to ensure the good governance of the people of the Territories. As a result, not only is the nature of the duty (legal, constitutional, or moral) left unclear, but so too is its scope. One possible explanation for this vagueness is that it reflects an unwillingness to identify a central concern, which is financial—the UK bears contingent liability for the Overseas Territories[73] and so poor governance in the Territories, even where it does not rise to the level of corruption, carries with it not only a reputational but also financial risk for the UK. Whether or not that is the case, this pervasive lack of precision matters, it is submitted, because a review of the various

[69]ibid.
[70]BVI Commission of Inquiry (n 4) para 1.37.
[71]ibid para 1.37(x).
[72]ibid para 1.38.
[73]UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories* (n 34): 'The UK bears contingent liability for all Overseas Territories but most of them do not receive direct financial assistance from the UK and, in theory, those that do are on a path to financial self-sufficiency'. See also UK National Audit Office and Foreign and Commonwealth Office (n 43).

Commission of Inquiry reports suggests that the problems of poor governance and corruption in the Overseas Territories are at times exacerbated by the constitutional relationship between the UK and those Territories. When the UK steps in to address the problem of governance—as it has repeatedly felt both compelled and entitled to do—it may at times be attempting to solve a problem partly of its own making.

5. The UK's responsibility for corruption in the Overseas Territories

The various Overseas Territories are the remnants of the once-vast British Empire. The processes by which they came to be within that Empire, and how they remained within it while other colonies—sometimes closely aligned with the remaining Overseas Territories—became independent, of course vary significantly. So too do their prospects as independent states. Nevertheless, the key implication of that status is that they remain subject, ultimately, to the legislative competence of the sovereign Parliament at Westminster and, on a more regular basis, to law-making by the Crown in Council. They share too in the common law,[74] and benefit from the work of the Judicial Committee of the Privy Council, which in deciding appeals from the courts of the Overseas Territories is naturally influenced by the work of the UK Supreme Court on which most of its judges also sit. The Overseas Territories generally, and their legal systems in particular, therefore, have been and continue to be shaped to a considerable extent by the UK, which for that reason alone enjoys a considerable level of responsibility for their present state of being. This applies both to what it has done in their regard as well as what it has not.[75]

This has resulted over time in the drawing of somewhat uncertain lines. We have already noted that in the economic domain Parliament—albeit not originally with the support of the UK government—has legislated to require the Overseas Territories to establish registers of beneficial interests, with it being argued by, for example, the Foreign Affairs Committee that the absence of such a mechanism represented a threat to the UK's national security and

[74]Paul Sagar, John Christensen, and Nick Shaxson, 'British Government Attitudes to British Tax Havens: An Examination of Whitehall Responses to the Growth of Tax Havens in British Dependent Territories from 1967–75' in Jeremy Leaman and Attiya Waris (eds), *Tax Justice and the Political Economy of Global Capitalism, 1945 to the Present* (Berghahn Books 2013), 107: '[T]he extension of English Common Law practices to colonial territories provided a favourable legal milieu for developing tax haven activity, particularly for creating offshore trusts and non-resident companies'.

[75]On the reluctance of successive governments to act in relation to the TCI, see Clegg (n 51) 36–42, noting—amongst other things—that the UK takes a less assertive approach to the Overseas Territories where the question of independence is on the agenda, and that the

> tendency is for government to re-engage with the territories and show particular interest in them after a grave crisis, and then after a while that interest fades, and it is not until another crisis that interest is returned to the desired level.

so fell within the sphere of responsibility of the UK rather than of the Territories themselves.[76] No such claim is usually made about the loss of revenue caused by the tax policies of the various Territories that are tax havens, even though they no doubt deprive the UK exchequer—along with those of all manner of other states, many of whom no doubt need the money more than the UK does—of vast revenue. The UK stood back, at least at first, as some of the Overseas Territories moved towards tax haven status—at times on the basis, it appears, that the development of these Territories as financial centres would reduce the UK's future liabilities[77]—which they were able to have in part because they benefitted from the security guarantees which flow from their status as colonies, then Crown colonies, then Overseas Territories, of the UK. They emerged as centres of offshore finance partly because of their common law heritage, and also because they shared the relatively lax regulation of the City of London but not its high taxes, and because their locations either aligned them temporally with financial centres in the United States or permitted them to act as bridges between financial centres in the UK and those in far-flung time zones.[78] Though the resulting intensity of financial activities in the Overseas Territories may indeed have succeeded in ensuring that certain of the Territories did not become financially dependent upon the UK,[79] it has created significant externalities and may have set the stage for the sort of corruption that has repeatedly been identified. Elsewhere, the UK government was in the past willing to go over the heads of the governments of the Territories to abolish the death penalty for murder in the Caribbean Overseas Territories,[80] as well as to repeal laws criminalising homosexual conduct.[81] It has not, yet, however required that same-sex marriage be available in the Territories,

[76]See text accompanying n 30 above.

[77]See the discussion in, and the tentative conclusion offered by, Sagar, Christensen, and Shaxson (n 74).

[78]Ronen Palan, 'The second British Empire and the re-emergence of global finance' in Sandra Halperin and Ronen Palan (eds), *Legacies of Empire: Imperial Roots of the Contemporary Global Order* (Cambridge University Press 2015).

[79]For the financial position of the Overseas Territories, see UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories* (n 34) ch 3, which begins with the observation, already quoted, that '[t]he UK bears contingent liability for all Overseas Territories but most of them do not receive direct financial assistance from the UK and, in theory, those that do are on a path to financial self-sufficiency', but adds that '[i]n practice, the situation is more complicated'. Though both the BVI and TCI are identified as amongst those which are self-sufficient, it is also noted (at para 39) that 'catastrophes such as Hurricane Irma have severely impacted their economies and made them vulnerable'.

[80]Caribbean Territories (Abolition of the Death Penalty for Murder) Order 1991, SI 1991/988.

[81]Caribbean Territories (Criminal Law) Order 2000. It was suggested though that even many years later there remained an important distinction between policy and practice in this area: Peter Clegg, Fred Dunwoodie-Stirton, and Phillip Cole, 'Human rights in the overseas territories: in policy but not in practice?' (2016) 54 Commonwealth & Comparative Politics 46. The authors contrast this (at 63) with the situation of child rights, where there is 'greater willingness to on the part of the territories to engage with the issue and a more proactive approach by the UK Government'.

notwithstanding the urging of the Foreign Affairs Committee.[82] More recently, the UK's responsibility for the Overseas Territories in international law has seen it resist legislative initiatives that would liberalise the law relating to cannabis.[83]

In addition to this issue of delineating the UK's scope of responsibility over the Overseas Territories, the UK has neglected to address the existence and consequences of what is known in the Overseas Territories as 'belongership'.[84] Belongership is a status which exists (often under a Territory-specific label) in the legal orders of many of the Territories, including both the BVI and TCI. In the former 'Belonger status' is usually used; in the latter it is now known as 'Turks & Caicos Islander Status'. The significance of the status is often explained in terms of immigration. It grants the right of abode—the right to live in the Territory in question without restriction—something that is not possessed simply by virtue of being a UK citizen or even an Overseas Territory citizen.[85] However, the implications of having (or not having) belongership status often go beyond that. Only those who possess it can vote or hold elected office and, in some cases, they also enjoy privileges relating to, for example, the acquisition of land and employment.[86] Those who are UK citizens but not belongers—even if permanent residents of the Territory—lack some or all of these rights. The significance

---

[82]In 2019, it was argued in UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories* (n 34) para 63 that,

> [i]t is time for all [Overseas Territories] to legalise same-sex marriage and for the UK Government to do more than simply support it in principle. It must be prepared to step in, as it did in 2001 when an Order in Council decriminalised homosexuality in [Overseas Territories] that had refused to do so. The Government should set a date by which it expects all [Overseas Territories] to have legalised same-sex marriage. If that deadline is not met, the Government should intervene through legislation or an Order in Council. [Original emphasis removed.]

In response, the UK government said that its 'relationship with the Overseas Territories is based on partnership and therefore as policy on marriage law is an area of devolved responsibility it should be for the territories to decide and legislate on', but that it was 'working to encourage those Territories that have not put in place arrangements to recognise and protect same sex relationships, to do so, and continue to engage with all the Overseas Territories to ensure that their legislation is compliant with their international human rights obligations': UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the relationship: Government response to the Committee's Fifteenth Report* (HC 2017–9, 2174), 5. For an assessment and critique of this strategy, see Derek O'Brien and Rhian Minty, 'The challenges of multi-layered governance and the fight for same sex marriage in Bermuda and the Caribbean Overseas Territories' [2021] Public Law 106.

[83]See the answer by UK Minister of State for the Americas and the Overseas Territories, 'British Overseas Territories: Politics and Government' (HC Deb 19 October 2022, HCWA 59137).

[84]See, generally, Hendry and Dickson (n 2) 220–25.

[85]Eg, the Virgin Islands Constitution Order 2007 (n 17), s 18(1), which protects freedom of movement generally, limits the constitutionally protected right to enter and leave the Islands to those who belong to the Virgin Islands or on whom residence status has been conferred by law. S 18(3) confirms that, with limited exceptions, restrictions may be imposed on those who do not belong to the Islands.

[86]Eg, the prohibition on discrimination in the Virgin Islands Constitution Order 2007 (n 17), s 26(4)(b) excludes from its scope laws making provisions

> with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, the Virgin Islands of persons who do not belong

of these limitations is compounded by the difficulty of acquiring the status, which has at times been subject to rules which are not consistently adhered to. All this means that those not born into the status cannot acquire it by right, but only subject to the apparent discretion of the government of the day.

Against this background, it is unsurprising that belongership status has been identified as a factor in the corruption evident in certain of the Overseas Territories. In the second TCI report, it was observed that belongership could be given to those the Cabinet considered had made 'an outstanding contribution to the economic and social development of the Islands'[87] but that there had been a number of complaints of the 'grant of Belongership or Permanent Resident Certificates in breach of the legal requirements in return for bribes to Ministers or officials, and also of Belongerships to questionable individuals, with financial clout or ministerial connections, via the exceptional grounds route'.[88] This was compounded by the fact that, as a matter of policy, only belongers could acquire Crown land:

> There is no legal restriction, however, on the number of plots each Belonger may acquire, and the same privileges are accorded to prominent and wealthy persons, including developers and others who have been accorded Belongership on *exceptional* grounds. Nor is there any restriction in practice on a Belonger immediately *flipping*, that is, quickly selling on to a developer a parcel of Crown Land granted to him, or from *fronting* for a developer in the transaction, so as, in either transaction, to enable the developer to acquire the land at a substantially discounted price. Sometimes, Belongers *flip* in unison with other Belongers to the same developer, thereby enabling him to acquire a large acreage of land on advantageous terms. Sometimes, it appears, the *flipping* Belongers are only informed by government authorities shortly before or afterwards. In that event they are to be or have been used as intermediaries in this way - possibly or possibly not - with a small profit for themselves.[89]

Conversely, those who did not possess the status—at times denied it despite apparently qualifying—lived in fear that their permission to remain in the Territory might be revoked and comported themselves accordingly. 'Such a system', said Sir Robin Auld in his 2009 inquiry report, 'and/or abuse of it is not acceptable in what purports to be a modern democracy'.[90] He recommended significant reform of the process for the grant of the status, with the UK government making such reform a precondition of the holding

to the Virgin Islands, or for any other purpose with respect to such persons to the extent that the provision is reasonably justifiable in a democratic society.

[87]Turks and Caicos Immigration Ordinance (Revised edition) (cap 5.01, 31 August 2009), s 3(4).

[88]Turks and Caicos Islands Commission of Inquiry 2008–2009, *Report of the Commissioner The Right Honourable Sir Robin Auld* (n 3) para 3.67.

[89]ibid para 2.45 (original emphasis).

[90]ibid para 3.69.

of elections in the Territory. The new Constitution, enacted in 2011,[91] contains rules about Turks and Caicos Islander status which have been fleshed out, within the confines of the Constitution, in an Ordinance of 2015,[92] but the question of belongership remains a point of contention in the Islands.[93] A little over a decade later, against the background of practices that were both bureaucratically and legally suspect, the BVI Commission of Inquiry recommended that there should take place 'a review of processes for the grant of residency and belongership status, and in particular the open discretion currently held by Cabinet to make grants' of the status. 'Any such powers', it said, 'should only be maintained where necessary; and, where any such powers are maintained, then they should be subject to clearly expressed and published guidance'.[94]

Though the issue of belongership has now been repeatedly identified as an aspect of actual or potential corruption in particular Overseas Territories, the regulation of belongership in the Territories generally has not been amongst the topics on which the UK government has been willing to confront the Overseas Territories, making no appearance in the major policy papers of recent decades (which admittedly predate the most recent Commission of Inquiry),[95] even as the Foreign Affairs Committee has repeatedly argued for such a move. This came first in the form of a suggestion that the government take steps to encourage even mild reform of the rules.[96] Later, a greater (though still by no means drastic) change was argued for,[97] this time in strong terms:

> Belongership and its equivalents are wrong. While we recognise that the Overseas Territories are small communities with unique cultural identities, we do not accept that there is any justification to deny legally-resident British Overseas Territory and UK citizens the right to vote and to hold elected office. This elevates one group of British people over another and risks undermining the ties that bind the UK and the Overseas Territories together in one global British family.[98]

[91]The Turks and Caicos Islands Constitution Order 2011, SI 2011/1681. See in particular s 132.

[92]Turks and Caicos Islander Status Ordinance 2015 (Ordinance 18 of 2015).

[93]'Legal Challenge to Turks and Caicos Islander Status Application Highly Likely, Predicts Attorney' (*Turks and Caicos Sun*, 15 March 2022) <suntci.com/legal-challenge-to-turks-and-caicos-islander-status-application-highly-like-p7307-129.htm> accessed 3 May 2023, noting the possibility of legal challenge to severely delayed applications but also quoting a local attorney as stating that such a challenge might provide 'some insights on the apparent strength of feeling against having a system of Islander acquisition by qualifying application at all'.

[94]BVI Commission of Inquiry (n 4) 23.

[95]See, eg, UK Foreign and Commonwealth Office (n 9) and UK Secretary of State for Foreign and Commonwealth Affairs, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (Cm 4264, 1999).

[96]UK House of Commons Foreign Affairs Committee, *Overseas Territories: Seventh Report of Session 2007–08* (n 52) para 275.

[97]UK House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories* (n 34) para 67: 'The UK Government should initiate a consultation with the elected governments of the Overseas Territories and work with them to agree a plan to ensure that there is a pathway for all resident UK and British Overseas Territory citizens to be able to vote and hold elected office in territory'.

[98]ibid.

No steps of the sort argued for have been taken. In response to the Committee's observations, the UK government said that it would 'continue to support and encourage consistent and open political engagement on belongership and its territory-specific equivalents, whilst respecting the fact that immigration decisions are primarily a matter for [Overseas Territory] governments'.[99] If, however, addressing the question of belongership is going to be a recurring feature of corruption or other misgovernance in particular jurisdictions it would seem more prudent to address the matter in relation to the other Territories in order to avoid the possibility that it gives rise to the sorts of issues identified in the TCI and BVI.

What we are left with is this. The BVI Commission of Inquiry, like its predecessors in relation to the TCI, speaks to the existence of corruption and related phenomena within a particular British Overseas Territory. The fact that multiple such reports have made findings of this type, and the conditions which they identify as, if not causing, then certainly facilitating corruption, makes it at least possible that similar corruption will take place, and perhaps be identified as such, in the future. Though recent attention paid to the Overseas Territories and their role in tax avoidance may work, indirectly, to undermine the conditions for corruption—reducing the volume of money of dubious origin entering the Territories—it may conversely work to strengthen the conditions for corruption, if lawful means of self-enrichment are curtailed by means of (say) the introduction of registers of beneficial ownership.

What is interesting in this picture, however, is not merely the question of whether corruption exists in the Overseas Territories and, if so, what form it takes, but also the light it sheds on both the relationship between centre and periphery and responses to corruption in that centre—the UK—itself. On the first of these points, we have already noted the constitutional ambiguity which exists as to what exactly the UK is responsible for. Corruption is not in and of itself a matter of international relations or (national) security, those areas of policy most frequently identified as the UK's responsibility. The 'peace, order, and good governance' formulation notwithstanding, it has not generally been thought that the quality of governance in the Territories per se is the responsibility of the UK. If that supposition is thought to be wrong, more would need to be done to distinguish merely poor governance which is within the range of legitimate outcomes of the democratic process in a self-governing Territory from situations in which the governance process is itself corrupted, such that apparent self-government is no such thing. And if the view is simply that intervention is legitimate because poor governance threatens the financial position of any Territory in which it takes hold, and the UK

[99]UK House of Commons Foreign Affairs Committee, *Government response to the Committee's Fifteenth Report* (n 82) para 9.

bears contingent liability for all of the Territories,[100] then it would seem necessary to think through the implications of that view for the very possibility of self-government in the Overseas Territories.

6. Corruption in the periphery and corruption in the metropole

We have so far considered the questions of whether the UK enjoys—as it sometimes claims to—a constitutional responsibility for the quality of governance (including the problem of corruption) within the Overseas Territories, and the extent to which the problems of governance which have been repeatedly identified are partly a function of the constitutional relationship between the UK and the Overseas Territories. In this section I turn back from periphery to centre—from the Overseas Territories, the remnant of the British Empire, to the UK itself—and reflect on the implication for the UK itself of successive governments' approach to addressing concerns about the quality of governance and, in particular, corruption in the Overseas Territories. I suggest, in short, that the approach of the UK to these issues in the Territories often appears to be at odds with that taken towards these same issues within the 'domestic' constitution.

We see a first indication of this divergence already in the announcement by the UK government of a Commission of Inquiry in the BVI, which—it was said—would inquire into whether there was information capable of substantiating 'claims that corruption, abuse of position and serious impropriety has taken place in public office in recent years'.[101] Here, the language is telling. In the UK itself, within the 'domestic' constitution, the language of corruption is usually avoided, replaced with a series of euphemisms—as to, for example, the importance of maintaining 'standards in public life' or, at a further step of remove, the need to adhere to the 'Nolan Principles'[102]—which, amongst other things, blur the distinction between public and private misconduct. To use the language of corruption, and to invoke so directly the possibility of such corruption having taken place, in the context of the BVI (as had been the case also in the terms of reference for

[100]See UK National Audit Office and Foreign and Commonwealth Office (n 43) and BVI Commission of Inquiry (n 4) para 1.170, noting the introduction of borrowing guidelines in the Overseas Territories in the early 2000s:

> Whilst of course the UK Government has contingent liabilities in respect of the [British Overseas Territories], which would in any event warrant such guidelines, it also has an obligation to assist each [British Overseas Territory] to develop self-government to which financial stability of course contributes. These guidelines were intended to contribute to the financial stability (and, thus, the financial reputation) of the BVI by evidencing its commitment to responsible Government.

[101]UK Secretary of State for Foreign, Commonwealth and Development Affairs, 'Update on Overseas Territories' (n 68).

[102]UK Committee on Standards in Public Life, *Standards in Public Life, Volume 1: Report* (Cm 2850, 1995).

the second TCI Commission of Inquiry)[103] implies, if not the existence of an outright double standard, then certainly a sense that the bar is in practice set at a different height where the Overseas Territories are concerned. It also implies that aspersions can be cast on the operation of political systems in the Overseas Territories that would be considered unfair or even illegitimate if made of the UK. This is not, of course, to say that the suspicions of corruption were misguided—the reports show in both cases that they were not—or should have been hidden behind euphemistic phrasing. Rather, it prompts the question of whether—and, if not, then why—the same standards can be applied in identifying and (if necessary) responding to similar problems which may exist in the UK. It seems probable that one is significantly more likely to identify corruption if one sets out to look for it, and that doing so involves an implicit but crucial acceptance that such corruption might exist.

In keeping with this willingness to speak the name of corruption—whether in addition to or, more often, as an aspect of good government—what is striking also is the way in which the Commission of Inquiry was not only set up at all, but was designed and operated in a fashion which facilitated useful findings and a timely response. To take the latter point first: initially the Commission's report was to be delivered in 6 months, but a number of factors—most obviously the ongoing COVID-19 pandemic, but also the volume of materials to be considered—resulted in repeated delays to its work. A six-month extension to its work was granted in mid-2021;[104] a second extension, this time of three months, was granted in January 2022.[105] Though the initial schedule proved impossible, it nevertheless indicated a haste that would be unthinkable in the domestic constitutional order of the UK itself, allowing the problems identified to be addressed within a reasonable time frame. The impressive speed with which the review was completed is compounded by a second, more striking factor. That is, the Commission (again, like the Auld Commission before it)[106] had a broad, thematic, remit, and so was not limited to the investigation of specific incidents enumerated in advance. Rather, it was to 'establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to

[103]Quoted in TCI Commission of Inquiry 2008–2009, *Report of the Commissioner The Right Honourable Sir Robin Auld* (n 3) para 1.1.

[104]Governor John Rankin, 'Statement from Governor John Rankin CMG: Extension of Commission of Inquiry' (*Government of the Virgin Islands,* 14 July 2021) <bvi.gov.vg/media-centre/statement-his-excellency-governor-john-rankin-extension-commission-inquiry> accessed 3 May 2023.

[105]Governor John Rankin, 'Statement by His Excellency the Governor John Rankin, CMG on the Extension of the Commission of Inquiry' (*Government of the Virgin Islands*, 4 January 2022) <www.bvi.gov.vg/media-centre/extension-commission-inquiry> accessed 3 May 2023.

[106]Quoted in TCI Commission of Inquiry 2008–2009, *Report of the Commissioner The Right Honourable Sir Robin Auld* (n 3) 1.1: 'To inquire into … [w]hether there is information that corruption or other serious dishonesty in relation to past and present elected members of the House of Assembly (previously known as the Legislative Council) may have taken place in recent years … '

officials, whether statutory, elected or public may have taken place in recent years'.[107] If such information came to light, the Commissioner was to 'consider the conditions which allowed it to take and whether they might still exist, and (if appropriate) to make recommendations with a view, inter alia, to improving the standards of governance in the Islands'.[108]

This too creates—at least impressionistically—a contrast with the position in the UK, where the 'standards landscape' is notably fragmented, and the day-to-day upholding of such standards frequently relies upon bodies which are hampered by narrow terms of reference, weak (or absent) powers, an inability to enforce their recommendations, and subservience to political actors. Though an approach of the sort seen in inquiries in relation to Overseas Territories is no doubt impractical in the UK itself—at least not without significant and likely intolerable trade-offs in terms of the number of people involved in carrying out the inquiry and the length of time it might take—it is nevertheless almost certainly more effective than would be its metropolitan equivalent in identifying and addressing different forms of corruption in relation to one another and the wider political and economic context in which such corruption takes place. In other words: if a Commission of Inquiry with equivalent terms of reference and equivalent powers were set up to inquire into the standard of governance in the UK, it would hardly be surprising if examples of corruption were to come to light. And even if they did not, the broad language of good government which is deployed, at times without clear constitutional justification, to ground the UK's oversight of the Overseas Territories, would—if applied consistently—certainly be capable of identifying shortcomings in the systems of governance which operate within the UK.

As it stands, therefore, the approach of the UK to issues of corruption within the Overseas Territories might be thought paternalistic and in at least some degree of tension with the idea that they are self-governing entities entitled, should they desire it now or in the future, to full independence. And if the charge of paternalism seems ill-founded or is thought to follow inevitably from the constitutional relationship between these bodies, that approach is certainly at least somewhat hypocritical. That is, the diligence shown in relation to corruption in the Territories, however occasional and sporadic, is nowhere to be seen on dealing with issues of actual or potential corruption in the UK. The announcement of the Commission of Inquiry in the BVI made open reference to allegations of corruption and was not undercut by the use of the various euphemisms more familiar in the domestic context. The Commission possessed the necessary powers, worked quickly, and produced a report that was exceptionally critical of the quality of government

[107] BVI Commission of Inquiry (n 4) para 3.2.
[108] ibid.

in the Islands, at times seeming to apply to the BVI a set of standards that are not generally applied—indeed, could not be applied without considerable discomfort—in the UK or to its institutions.

This is, of course, a manifestation of sovereignty. The Territories are constitutionally subordinate to the UK, which is therefore entitled as a matter of law—and considers itself, we have seen, obliged as a question of morality—to oversee to a greater or lesser degree the operation of their domestic institutions, as well as being financially incentivised to do so. The UK, which is not only a sovereign state but one which—the unfolding of the Brexit process shows—highly values its sovereignty, both actual and formal, is not subject to, and would strongly resist any attempt to impose, any such oversight from the outside. And in the absence of a constitutional superior of some sort who can play the role for the UK that it plays for its Overseas Territories—something which not only does not exist, but whose existence would be unthinkable—the only option is a form of self-regulation. The doctrine of parliamentary sovereignty, however, means that both the standards which apply and the bodies which apply them in such self-regulation would be within the reach of the ordinary political process and therefore unable to stand entirely apart from or even pronounce dispassionately upon its functioning. This situation persists despite the fact that the financial justification sometimes offered for the UK's intervention in the Territories—that the UK bears contingent liability for the Overseas Territories, and so poor governance in those Territories would weaken the UK's own financial position—would seem to apply a fortiori to poor governance in the UK itself.

It is, in these circumstances, hardly unlikely that notwithstanding the various factors which militate against them—a vastly larger population, a better-developed civil society, a more powerful legislature, and a better-resourced media—problems of low quality of governance, even corruption, will arise in the UK itself and, if they do, they will go unaddressed. O'Brien and Leslie claim that the events giving rise to the more recent of the two TCI Commissions of Inquiry demonstrate the difficulty of replicating the Westminster model within Overseas Territories, in which 'the temptation to misuse political power for personal gain is so great',[109] but if the presence of such temptation is a decisive factor, then there is much cause for concern, for there is no reason to assume its absence in the UK. As things stand, however, the same colonial or postcolonial relation which allows the centre to impose standards of good governance on the periphery, to intervene in the case of apparent corruption to whose existence it may in fact have contributed, insulates the imperial centre against such interventions. The point of this observation is not to argue for some sort of external overview of governance in the UK akin to those which it itself periodically carries out for its

[109]O'Brien and Leslie (n 3) 239.

Overseas Territories. Rather, it is to point out the discrepancy which exists and to suggest that it might be valuable to consider what the implications would be if the post-imperial centre applied to itself the standards it applies, however sporadically and inconsistently, to its post-imperial periphery.

7. Conclusion

The constitutional organisation of the residue of the British Empire—the UK as centre and the Overseas Territories as periphery—works to put distance between the two political formations, obscuring the power the UK enjoys over the Territories and the considerable responsibility it bears for the ways in which they have and have not developed over time. Only occasionally does some development force the matter onto the political agenda in the UK itself. The effect is that it is usually in those situations in which the division of responsibility is most contested—perhaps because genuinely unclear—that the relationship between centre and periphery is considered. So it is with the question of corruption, which often begins from quotidian processes very obviously within the constitutional domain of the Territories' own institutions, in relation to which the UK's representatives are rightly hesitant to exercise their (limited) powers to intervene, but which may come to undermine the governance of the Territory to such an extent that the UK feels itself to have no choice but to act. The BVI Commission of Inquiry demonstrates some of the pathologies of such cleft governance. It first creates the conditions necessary for corruption to take hold in (some of) the Overseas Territories while hesitating to make ongoing attempts to improve the quality of governance, which it perceives to be on the boundary of its constitutional responsibilities. Only late in the day, when the dam breaks and the problems are no longer those of mere poor governance but, perhaps, simple corruption, will the centre show a concern sufficient to respond to problems which more interest at an earlier stage might have worked to head off.[110] Moreover, when the centre eventually intervenes, there are inevitably questions of legitimacy, both because of the ambiguities around the substance of the issues which give rise to the concern and how to characterise them, and also because the division of constitutional responsibility for that substance is so uncertain and manipulable, for good or for ill.

This pattern also reflects badly on the centre, the UK, itself, creating an awkward contrast with the manner in which issues of corruption are—or, more normally, are not—addressed within the domestic constitution of

[110] See, making a similar point in a different context, Taylor (n 44) 344 :'[T]he British Government cannot just keep holding the line in the Caribbean, reacting pragmatically to events and proposals and fearing the worst without realizing that the worst when it comes may be partly of their own making'.

that state. Therein, there is no constitutional overlord capable of swooping in and addressing disparate issues as part of a single inquiry into the quality of governance and the possibility of corruption. Instead, the series of fragmented and often ill-functioning anti-corruption mechanisms of the domestic constitution trundle on, being amended only sporadically and usually on an entirely ad hoc basis which (perhaps by design) never sees the anti-corruption landscape considered as a single whole. Corruption is barely hinted at, and it is very rarely suggested in official terms that it exists or that it might represent a threat to good governance. The standards against which the UK regards it as its constitutional and moral duty to assess the Overseas Territories are not routinely applied within the domestic constitutional order UK to itself, and any suggestion that they might be so applied risks being considered a constitutional solecism. Against that background, it is notable that the BVI Commission of Inquiry attracted significant media attention in the UK only when one of these sporadic outbreaks of concern about the outside earnings of Members of Parliament took place, prompted on this occasion by an abortive attempt to reform the standards process which had resulted in the recommendation that Owen Patterson MP be suspended for breach of the rules against advocacy.[111] In the resulting atmosphere of (temporarily) heightened interest in MPs' second jobs, one example stood out: the former Attorney General, Geoffrey Cox, was belatedly noticed to be representing the government of the BVI at the Commission of Inquiry,[112] including appearing before it—it was claimed—by video link from his office in the House of Commons.[113]

In the report of TCI Commission of Inquiry in 1986, Louis Blom-Cooper QC contested Simon Winchester's thesis that the key problem of the governance of the residual British Empire was that those who administered it simply did not care enough, having (in Blom-Cooper's words) 'neither the energy nor the inclination to turn their gaze away from the cosmic problems of the international community and deal with the less pressing problems associated with the few tiny islands … that remain geographically remote and politically peripheral reminders of a lost empire'.[114] This, he said, was refuted by the 'considerable resources devoted to the

[111]Aubrey Allegretti, 'Standards committee drops attempt to limit time MPs spend on second jobs' (*The Guardian*, 24 May 2022) <www.theguardian.com/uk-news/2022/may/24/standards-committee-drops-changes-to-limit-time-mps-spend-on-second-jobs> accessed 3 May 2023.
[112]Patrick Wintour, 'Sir Geoffrey Cox, tireless defender of tax haven against the Foreign Office' (*The Guardian*, 9 November 2021) <www.theguardian.com/politics/2021/nov/09/sir-geoffrey-cox-the-infatigueable-rides-to-the-defence-of-tax-haven-against-uk-foreign-office> accessed 3 May 2023.
[113]Rowena Mason and others, 'Geoffrey Cox accrued at least £6m from second job while a parliamentarian' (*The Guardian,* 10 November 2021) <www.theguardian.com/politics/2021/nov/10/geoffrey-cox-accrued-at-least-6m-from-second-job-while-a-parliamentarian> accessed 3 May 2023.
[114]TCI Commission of Inquiry 1986, *Report of the Commissioner Mr Louis Blom-Cooper QC* (n 3) 98.

establishment and conduct' of the Commission of Inquiry.[115] This seems, with respect, an inadequate response and it is notable that, like its successor two decades later, the 1986 Commission of Inquiry considered these issues as an internal matter, distinct from questions about the relationship between the Territory and the UK. The pattern is repeated in the BVI report in 2022, which recommends that the centre intervenes to correct the failings identified on the periphery but shows little interest in how the constitutional relationship between the two might have contributed to those failings in the first place. It seems, on the contrary, hardly implausible that the corruption and other failings identified in these reports is to some extent facilitated—perhaps even encouraged—by the constitutional relations in question, and that the periodic interventions by the UK into the affairs of one or the other Territory on the basis of an alleged concern for good governance are in this sense misleading or short-sighted. Taken together with the way in which the standards of governance against which the Territories are judged appear at times to be more demanding than those applied within the UK itself or, if not, then at least applied more rigorously and more decisively than they are applied in the metropole, the picture which emerges is of a constitutional relationship which serves neither the centre nor the periphery well.

Notes on contributor

Paul F. Scott is a Senior Lecturer in Law at the School of Law, University of Glasgow, Glasgow, United Kingdom.

ORCID

Paul F. Scott http://orcid.org/0000-0003-3933-7826

[115]ibid.