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The Persistence of Colonial Constitutionalism in British Overseas Territories

Hakeem O. Yusuf *and Tanzil Chowdhury**

Abstract: This article argues that despite the UK Government's exaltations of self-determination of its Overseas Territories, provisions of colonial governance persist in their constitutions. Further, it posits that such illustrations begin to answer the broader question of whether British Overseas Territories (BOTs) are modern day colonies. Such claims are not without merit given that 10 out of the 14 BOTs are still considered Non-Self-Governing Territories by the United Nations and have remained the target of decolonisation efforts. Drawing insights from post-colonial legal theory, this article develops the idea of the persistence of colonial constitutionalism to interrogate whether structural continuities exist in the governance of the UK's British Overseas Territories. The analysis begins to unravel the fraught tensions between constitutional provisions that advance greater self-determination and constitutional provisions that maintain the persistence of colonial governance. Ultimately, the post-colonial approach foregrounds a thoroughgoing analysis on whether BOTs are colonies and how such an exegesis would require particular nuance that is largely missing in current institutional and non-institutional articulations of, as well as representations on, the issue.

Keywords: British Overseas Territories; Colonies; Constitutionalism; Post-Colonial Theory; Self-Determination

'...The maximum of self-government *within* the Empire at the earliest practicable time'.
- Colonel Oliver Stanley, Secretary of State for the Colonies¹

I. Introduction

The governance and day-to-day life in the various British Overseas Territories (BOTs) do not arouse images of 'a distant outpost lorded over by white foreigners who deprive local inhabitants of self-government and extract immense riches for their own profit'.²

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<https://www.cambridge.org/core/journals/global-constitutionalism/latest-issue>

¹ 'Home News British Aims in the Colonies; Progress to Self-Government', (The Times, London, 20th March 1945)

<<http://find.galegroup.com/manchester.idm.oclc.org/ttda/infomark.do?&source=gale&prodId=TTDA&userGroupName=jrycal5&tabID=T003&docPage=article&searchType=AdvancedSearchForm&docId=CS33767540&type=multipage&contentSet=LTO&version=1.0>> (emphasis added)

² R Aldrich, J Connell, *The Last Colonies* (CUP, Cambridge, 1998) 3

Despite the diminution of that imagery, the persistence of colonial governance and the broader question: 'are British Overseas Territories (BOTs) colonies?', has remained a critical issue in constitutional law, international law and international relations. Ten of the fourteen BOTs are on the UN's List of Non-Self-Governing Territories, have been so since 1946 and are the target of decolonisation efforts by the UN.

Notwithstanding stated commitments to self-determination by the Government of the United Kingdom in relation to its BOTs,³ their status remains contested. Indeed, the issue of the status of the BOTs has featured prominently in a number of recent policy statements, commentary and judicial determinations. Testimony to their unsettled nature was most recently highlighted in the *Bashir litigation*⁴ and *Bancoult (No 2)*⁵ through the exacting of the 'new political status' test that considered, for the purposes of determining the (non) application of international treaties to which the United Kingdom had been party to, whether BOTs were continuations of the colonies from which they emerged. Further, the recent *Sanctions and Anti-Money Laundering Act 2018*, which requires BOTs to create public registers of all businesses registered there, was described by the Chief Minister of Gibraltar as an 'unacceptable act of modern day colonialism'.⁶ In addition, settling the status-question of the BOTs has taken on new significance following the 2016 referendum on the UK's membership of the European Union (Brexit)⁷ as it raises the issue of the future relation of the BOTs with the EU and possibly with the UK.

While self-determination underpins the UK Government's position toward its Overseas Territories,⁸ questions remain as to the nature of substantive reforms in the constitutional configurations of the BOTs. Nowhere was this more acutely felt than in the British Indian Ocean Territory (BIOT), where the UK Government forcibly expelled the Chagossian inhabitants for the purposes of leasing the territory to the United States to establish a military base.⁹ Two characterisations of the UK in this episode, as an 'empire striking back'¹⁰ or an 'empire all over again',¹¹ had particularly strong resonances of the persistence of colonial or imperial power. Further, in 2009, following

³ Foreign and Commonwealth Office, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (White Paper, Cm 4264 1999); Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (White Paper, Cm 8374 2012)

⁴ *R (on application of Tag Eldin Ramadan Bashir & Other) v. Secretary of State for the Home Department* [2016] EWHC 954 (Admin); *R (on application of Tag Eldin Ramadan Bashir & Other) v. Secretary of State for the Home Department* [2017] EWCA Civ 397; *R (on application of Tag Eldin Ramadan Bashir & Other) v. Secretary of State for the Home Department* [2018] UKSC 45

⁵ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2008] UKHL 61

⁶ HM Government of Gibraltar, 'Press Release: Letter from Chief Minister to Rt Hon Andrew Mitchell MP' 1 May 2018 available at

<<https://www.gibraltar.gov.gi/new/sites/default/files/press/2018/Press%20Releases/242.3-2018.pdf>>

⁷ HM Government, *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417 2017) 20

⁸ See (n 3)

⁹ See (n 5)

¹⁰ P Sand, '*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)*' 103 AJIL 317, 320

¹¹ HO Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge, Abingdon, 2014) 161-192

a full scale inquiry¹² into alleged corruption in the Turks and Caicos Islands, the UK Government introduced the *Turks and Caicos Islands Constitution (Interim Amendment) Order 2009*¹³ which suspended parts of the Overseas Territory's constitution and established interim, direct rule from Westminster, through the Governor, until the government of the territory had addressed the corruption issues.

The constitutional provisions governing the relationship between the UK metropole and BOTs enabled the above and similar interventions which looked remarkably like colonial style governance to take place. This however oversimplifies a far more complicated extant picture. Many of the BOTs have high-levels of self-government, thriving economies, voted to maintain particular configurations of British Sovereignty through referenda and co-produced political conventions that *de facto* establish greater parity between them and the UK. Thus, the status-question of the BOTs presents a complexity that is arguably not replicated elsewhere.

This article is intended as a prolegomenon of a post-colonial approach to BOT constitutionalism by beginning to unpack the complexity in the determination of whether or not BOTs are modern-day colonies. It does this by drawing insights from post-colonial theory, in particular, the scholarship focussing on the continuity or 'persistence of the colonial'.¹⁴ While the persistence of colonial power can be articulated and identified at the international law level, the global political-economy level, and the domestic level, this article adopts a legalist approach and focuses on the domestic level, specifically, the operative role of constitutionalism in maintaining or abating continuing colonial governance. Post-colonial theory is particularly illuminating as a framework for analysis as it reveals the subtle and often elusive nature of provisions of colonial governance that this article argues still exists in the governance of BOTs.

The article first examines the imprimatur that Britain is 'post-colonial'; a claim that largely refers to a cessation in imperial and colonial governance.¹⁵ This section also focuses that claim with reference to the BOTs, providing an overview of the common constitutional provisions that distinguish them as such, the UK Government's policy orientations on the BOTs, and the general reception of the BOTs at the United Nations.

¹² Robin Auld, *Turks and Caicos Islands Commission of Inquiry* (19 December 2013) 27, available at <<https://www.gov.uk/government/publications/turks-and-caicos-islands-commission-of-inquiry-2008-2009>>

¹³ <<http://www.legislation.gov.uk/ukxi/2009/701/contents/made>>

¹⁴ E Darian-Smith and Peter Fitzpatrick, (eds), *Laws of the Postcolonial* (University of Michigan Press, Michigan, 1999); A Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 1, 315

¹⁵ This is of course, contingent on what constitutes Colonial/Imperial power. See also R Young, *Postcolonialism: An Historical Introduction* (Blackwell, Sussex, 2001) 13-70

The next part presents the theoretical framework for analysis, which draws from a particular stratum of post-colonial legal theory, the 'Persistence of the Colonial'.¹⁶ This challenges the presumption of the 'Westphalian break'¹⁷ that makes the descriptive claim of a cessation of colonialism and imperial power. Rather, this article argues that there is a structural continuity in the fabric of the post-colonial state from the imperial era which is reflected in the persistence of colonial constitutionalism. It then critically examines a small number of BOT constitutions with this conceptual framework to interrogate the tensions between colonial- and self-government. While the focus is levelled on a few BOTs, in particular Gibraltar, it is hoped that this article provides a point of departure for a more holistic and thorough analysis of all BOTs in the future.

II. Post-Colonial Britain? The United Kingdom and Her (British) Overseas Territories

Empire and post-colonialism

Colonialism is one particular articulation and rendering of imperial power. As Edward Said explains, imperialism refers to 'the practice, theory, and the attitudes of a dominating metropolitan centre ruling a distant territory'¹⁸ though debates continue as to whether the compulsion was economic, cultural or both.¹⁹ As part of the typology of imperialism,²⁰ colonialism was initially 'pragmatic and until the nineteenth century generally developed locally in a haphazard way'.²¹ Establishing colonies were either for settlement or the exploitation of natural resources²² and were usually vindicated by alarmist- though often empirically wanting- discourses of Malthusian logics of over-population, scarcity of resources and civilising narratives. With regard to the BOTs in particular, a common justification for their acquisition was the defence imperative. As Sir Ivor Jennings observed, 'England acquired an Empire because her life was on the ocean wave; having an Empire, she found that her battle-line was more than ever the deep...Gibraltar, Malta, St. Helena...became units in a vast scheme of the protection of the lines of communication.'²³

UK colonial law similarly reflected this irregular process by recognising four different methods in which territories were 'acquired' -as it was euphemistically referred to²⁴- *settlement, conquest, cession or annexation*. The method of acquisition was determined

¹⁶ See (n 14) 89-144

¹⁷ N Berman, 'In the Wake of Empire' (1999) 14 *American University International Law Review* 1531

¹⁸ E Said, *Culture and Imperialism* (Chatto and Windus, London, 1993) 8

¹⁹ B Ashcroft, G Griffiths and H Tiffin, *Key Concepts in Post-Colonial Studies* (Routledge, Oxford, 1998) 126; See also A Loomba, *Colonialism/Postcolonialism* (Routledge, London, 2015) 19-39

²⁰ See (n 15) 25

²¹ *Ibid.* at 16

²² *Ibid.* See also Jürgen Osterhammel, *Colonialism: A Theoretical Overview*, trans. Shelley L Frisch. (Princeton, New Jersey 1997) 115

²³ I Jennings *The British Commonwealth of Nations* (3rd edition Hutchinson's & Co (Publishers) Ltd 1956) 115.

²⁴ I Hendry & S Dickson, *British Overseas Territories Law* (Hart, Oxford, 2011) 6-9

by regular practice or by the courts, and once determined, could not be upended.²⁵ As two eminent colonial law scholars, Sir Ivor Jennings²⁶ and Arthur Keith²⁷ have pointed out, the method was important from the colonial law perspective for establishing which law prevailed at the point of acquisition, and the power of the Monarch to legislate for the territory.²⁸

The interrogation of colonialism often dovetails into an ethical debate about the merits and demerits of the British Empire- a debate that has been persistent and divisive.²⁹ For some, Britain's imperial past is a spectre that haunts (and taints) what contemporary protagonists perceive as its necessary and benevolent role in global affairs. The treatment for such resentment is often imperial amnesia that largely forgets the systematic transgressions of imperial rule. Others however, revel in the glorious days of empire, a nostalgia that lionizes British imperium that 'developed' the Global South, pulling it out from the dark ages and into the thralls of Enlightenment-fuelled progress. At the very least, this camp suggests that Britain ought to 'moderate our post-imperial guilt'.³⁰ What purists from both schools share however, is 'a distinct temporal marker of the colonial process'³¹ that delineates between the imperial era and contemporary 'post-colonial' politics.

Critics of the temporal marker of the colonial process would suggest that an imperial past is a misnomer, for it presupposes that Britain is *ex post factum* the supposed *imperium sine fine*. The contention here is that the 'imperial or colonial',³² *persists* and that this break was either a political fiction or merely a rupture in the expression of a particular type of imperial or colonial power. A recent articulation which evidenced this persistence appeared in 2017 when Liam Fox, the UK Secretary of State for International Trade and Development, called for a boost in trade links with the African Commonwealth nations, dubbed 'Empire 2.0' by Whitehall officials.³³ It is with this; the

²⁵ *Christian v R* [2006] UKPC 47

²⁶ I Jennings and C.M Young *Constitutional Laws of the Commonwealth* (Oxford University Press) 38-46.

²⁷ AB Keith *The Constitution, Administration and Laws of the Empire* (W. Collins Sons and Co. Ltd, 1924) 267-270.

²⁸ *Campbell v Hall* (1774) 1 Cowp 204; *Sammur v Strickland* [1938] AC 678 (PC)

²⁹ W Dahlgreen, 'The British Empire is 'something to be proud of'' (*YouGov*, 26 July 2014)

<<https://yougov.co.uk/news/2014/07/26/britain-proud-its-empire/>>;

³⁰ The recent debate around British Imperialism and the legacies of its empire were stoked when the University of Oxford's Macdonald Centre announced a 5 year interdisciplinary project on 'Ethics and Empire.' See also <<http://www.mcdonaldcentre.org.uk/ethics-and-empire>>. For a rebuttal, see J McDougall, E O'Halloran et al., 'Ethics and empire: an open letter from Oxford Scholars' (*The Conversation*, 19 December 2017) <<https://theconversation.com/ethics-and-empire-an-open-letter-from-oxford-scholars-89333>> and K Malik, 'The Great British Empire Debate' (*New York Review of Books*, 26 January 2018) <http://www.nybooks.com/daily/2018/01/26/the-great-british-empire-debate/>; On the contemporary relevance of decolonisation, see also T Chowdhury, 'What is there to Decolonise' (*Pluto Press Blog*, 26 July 2018) <https://www.plutobooks.com/blog/decolonise-rhodes-must-fall/>. G Bhabra, D Gebrial, K Nişancıoğlu (eds.) *Decolonizing the University* (Pluto Press, London, 2018)

³¹ L Gandhi, *Postcolonial Theory: A Critical Introduction* (Columbia University Press, New York, 1998) 3

³² See (n 15) 15-70

³³ S Coates, 'Ministers aim to build 'empire 2.0' with African Commonwealth' (*The Times*, March 2 2017) available at <https://www.thetimes.co.uk/article/ministers-aim-to-build-empire-2-0-with-african->

persistence of colonialism and the insights it provides as to the constitutionalism of the BOTs, that this article is concerned.

The position that Britain is post-colonial therefore claims that the period of imperial governance is a relic - politically, economically, socially, culturally and constitutionally - of the past. On this view, 'post-colonial' Britain is a term which has 'a clearly chronological meaning, designating the post-independence period'³⁴ typically referring to the period of rapid European decolonisation in the 1940s and 1950s. The 'granting' of independence, the creation of the Commonwealth of Nations and the United Nations, and the establishment of an international system predicated on sovereign equality evidence such a claim. While pondering the challenge of decolonisation and self-government in the British Empire at that time, Jennings offered the view that 'Colonial peoples will not be satisfied with less than independence, and the only question may be whether it shall be independence inside or outside the British Commonwealth.'³⁵ This has, with hindsight, constituted valuable insight.

British Overseas Territories

The BOTs are remnants of British colonial and imperial exploits, though none were acquired by conquest³⁶ but variations or combinations of cession, settlement and annexation. The territories vary in their size, location and population and are constitutionally distinct from one another and the UK, having separate constitutions that reflect the specificities contingent to the circumstances and challenges confronting each territory³⁷ and the 'complex history of the Empire.'³⁸ For example, some BOTs have very small populations³⁹ while others have no permanent population⁴⁰ and this invariably has an effect on the constitutional makeup of the specific BOT.

Some BOTs have high levels of self-government, akin to independent states. In addition, many of the BOTs are largely financially independent of the UK. For example, Gibraltar's GDP for 2016/17⁴¹ was higher than many Western European nations, in part, due to a

[commonwealth-after-brex-it-v9bs6f6z9](#) ; M Hardt and A Negri, *Empire* (Harvard University Press, Cambridge, 2000)

³⁴ See (n 19)186; See also Paul Gilroy, *Postcolonial Melancholia* (Columbia University Press, New York, 2006)

³⁵ See (n 23) 158.

³⁶ With the possible exception of the Sovereign Base Areas. Also, Gibraltar was initially taken by conquest in the Spanish War of Succession but did not transfer into exclusive British hands following that war. It was not until 1713 and the signing of the Treaty of Utrecht that the territory was, for the purposes of law, ceded to the British from Spain.

³⁷ See (n 24) 1

³⁸ See (n 27) 267

³⁹ Pitcairn Island has a population of just 50 people. Available at <<http://www.visitpitcairn.pn/>>

⁴⁰ British Antarctic Territory, British Indian Ocean Territory, South Georgia and the South Sandwich Islands

⁴¹ <<https://www.gibraltar.gov.gi/new/key-indicators>>

flourishing tourism and gaming industry.⁴² The constitutional development of each territory therefore has varied. Their continued status as BOTs has been either due to the inhabitants' wishes to remain under the sovereignty of the UK, the non-viability of independence, or because of the territories strategic value to the UK.⁴³

However, despite constitutional variances, there are common constitutional features that define the BOTs as such.⁴⁴ For example, though they are not constitutionally a part of the United Kingdom, they form part of the 'Crown's undivided realm'⁴⁵ 'in the sense of government, power, ownership and belonging'.⁴⁶ To this effect, all BOTs have a Governor or equivalent as a representative of the Crown. The Governor will often have 'special responsibilities' which allow them to exercise exclusive executive and legislative power.⁴⁷ The Governor therefore 'is appointed by the Crown, represents the Crown, and is responsible to the Crown'.⁴⁸ BOTs do not have a separate status from the UK for the purposes of international relations,⁴⁹ the Judicial Committee of the Privy Council sits as the apex court for all BOTs and, though unsettled, the *Bancoult* litigation left open the possibility that BOT local laws could be reviewed by UK domestic courts.⁵⁰ Further, the UK Parliament retains unlimited power to legislate for the territories⁵¹ and any reforms to the constitutions of the BOTs require amendment by the UK either through an Order in Council or an Act of Parliament.⁵² Additionally, the domestic laws of the BOTs are subject to the 'repugnancy doctrine' enacted by the *Colonial Laws Validity Act 1865* (CLVA), which states that 'colonial laws'⁵³ are void if they conflict with a UK Act of Parliament.⁵⁴

UK policy toward the BOTs

In 1997, a root and branch effort to modernise the BOTs commenced under the Labour government with the publication of the 1999 White Paper, *Partnership for Progress and*

⁴² House of Lords EU Committee, *Brexit: Gibraltar* (2017, HL 116) 7

⁴³ For example, two British Overseas Territories- the Sovereign Base Areas and the British Indian Ocean Territory- are used exclusively as military bases. Indeed, the former was key to the British invasion of Iraq in 2003 and the recent military strikes in Syria in 2015 and 2018. The Falklands Island and Gibraltar are examples of territories that have served dual civilian and military functions.

⁴⁴ These are developed in the section *Colonial Governance: Provisions illustrating the Persistence of Colonial Constitutionalism in the BOTs*

⁴⁵ See (n 5) per Lord Hoffman and (n 24) 23

⁴⁶ *Tito v. Waddell (No 2)* [1977] Ch 106; This was also reaffirmed in *Bancoult (No 2)* (n 5)

⁴⁷ See *The Role of the Governor* below.

⁴⁸ ECS Wade & GG Phillips, *Constitutional Law* (4th edn, Longmans, Green and Co, London, 1951) 403

⁴⁹ The UK retains responsibility under United Nations Charter, Article 73

⁵⁰ See (n 11) 161-192

⁵¹ *Madzimbamuto v. Lardner-Burke* [1969] AC 645

⁵² See (n 24) 22-34

⁵³ See also section *Colonial Laws Validity Act 1865* and the *Interpretation Act 1978*

⁵⁴ These are all discussed in detail relation to the BOTs. See also *Colonial Governance: Provisions illustrating the persistence of Colonial Constitutionalism in the BOTs* below.

Prosperity: Britain and the Overseas Territories.⁵⁵ Its aim was to establish ‘a renewed contract between Britain and the Overseas Territories’⁵⁶ including a reform in its constitutional relations.⁵⁷ The paper set out four principles that sought to inform this modernisation process; self-determination, responsibilities and reciprocity, the encouragement of self-government and the provision of support for the BOTs in times of emergency. Part of this renewal had to do with contingent liabilities arising from the UK’s responsibilities for the BOTs’ external affairs under international law, but part also from a desire to address and rebalance its relationship with the BOTs. The paper concluded that the options of integration into the UK or Crown Dependency status⁵⁸ were not appropriate alternatives for the BOTs but that arrangements needed ‘to be revisited, reviewed and where necessary revised’.⁵⁹ It recognised that ‘each Overseas Territory is unique and needed a constitutional framework to suit its own circumstances’.⁶⁰ This White Paper may be likened to the BOTs’ equivalent of the ‘temporal marker’ from imperial governance, though certain territories- such as Bermuda- had experienced greater self-government from a far earlier period. In 2001, the British Government invited the BOTs to review their constitutions and submit proposals.⁶¹ In 2002, a shift in Whitehall parlance heralded a legislative change in their names from ‘Dependent Territories’, to their current appellation, with a nod to the UK Government’s commitment to self-determination.

As recently as 2017, the UK has maintained that self-determination has and continues to form the basis of its relationship with all its BOTs. In the most recent annual meeting of the Joint Ministerial Council for the Overseas Territories, which gathers heads of the BOTs and the UK Government, the communique stated

The principle of equal rights and self-determination of peoples, as enshrined in the UN Charter, applies to the peoples of the Overseas Territories. We reaffirmed the importance of promoting the right of the peoples of the Territories to self-determination, a collective responsibility of all parts of the UK Government. ...the

⁵⁵ See (n 3). This was recently reaffirmed in the 2017 meeting of the Joint Ministerial Council for the Overseas Territories. See UK Overseas Territories Joint Ministerial Council, ‘2017 Communique’ (Joint Ministerial Council, London, 28-29 November 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/663983/Joint_Minist_erial_Council_2017_-_Communique.pdf>

⁵⁶ *Ibid.* 4

⁵⁷ See P Clegg & P Gold, ‘The UK Overseas Territories: A decade of progress and prosperity?’ (2011) 49, 1 *Commonwealth and Comparative Politics* 115-135; EW Davies, *The Legal Status of British dependent Territories: The West Indies and North Atlantic Region* (CUP, Cambridge, 1995)

⁵⁸ FCO Partnership (n 3) 13

⁵⁹ *Ibid.* 13

⁶⁰ *Ibid.* 13

⁶¹ House of Commons Library Research Paper, *Gibraltar: Diplomatic and Constitutional Developments*, 06/48 of 11 October 2006, 22

UK will continue to support requests for the removal of the Territory from the United Nations list of non-self-governing territories⁶²

It is also salient to note that many of the BOTs have not expressed a wish for independence from the UK. Indeed, some, like Bermuda and Gibraltar have often articulated this through referenda. There is a larger question which ought to examine the reasons for this- ranging from the strategic value of alliances with the UK to stave off hostile neighbours (as with Gibraltar and Spain; the Falklands and Argentina), the non-viability of independence because of a colonial-induced material and political dependency on the UK⁶³ (as is the case with the smaller populated BOTs), to the values certain BOTs have to British geo-political interests in different parts of the world (military bases in Gibraltar, the Sovereign Base Areas and a US military base in the BIOT).

Self-determination and the UN

Self-Determination⁶⁴ is the preeminent term in understanding the process toward decolonisation. It is mentioned several times in the UN Charter, including Article 1(2), which proclaims the ‘respect for the principle of equal rights and self-determination of peoples’ and Article 55 where it promotes international economic and social co-operation on the basis of ‘equal rights and self-determination of peoples’. It is also recognised in common Article 1 of the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966.⁶⁵ Importantly, UN General Assembly Resolution 1514(XV) focussed self-determination as part of the international law applicable to colonized territories (or Non-Self-Governing Territories as the UN refers to them as). Thus, it can be understood that decolonisation is effected through self-determination. Indeed, in the *Namibia Advisory Opinion*,⁶⁶ the International Court of Justice held that self-determination applied to all peoples in colonial territories and was further recognised as part of customary international law in the *Western Sahara Case*.⁶⁷ Consistent state practice from colonial powers⁶⁸ and the absence of denial or contrary practice have, for some commentators, confirmed⁶⁹ that self-determination is *jus cogens*.

While self-determination and decolonisation may be considered as coterminous, self-determination can more accurately be described as the umbrella term that captures the

⁶² See Communiqué 2017 (n 55)

⁶³ For an introduction to Dependency Theory see (n 15) 49-52

⁶⁴ D Thürer and T Burri, ‘Self-Determination’ in *Max Planck Encyclopedia of Public International Law* (OUP 2008) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873>>; See also A Cassese, *Self-Determination of Peoples: A Legal Perspective* (CUP 1995)

⁶⁵ Both instruments were adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976,

⁶⁶ I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16

⁶⁷ [1975] ICJ Rep 12

⁶⁸ Statement by the UK’s representative in the Security Council on 25 May 1982 (1983) 54 *BYBIL* 371-371

⁶⁹ See (n 64) 140

different *modus operandi* of decolonisation. Resolution 1541(XV) recognised the three different *modus operandi* of decolonisation, which is each examples of self-determination- free association, integration and independence. In October 1970, the UN General Assembly adopted Resolution 2625(XXV),⁷⁰ which reaffirmed the three conventional categories for decolonisation but importantly added the possibility that ‘the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.’ This ‘fourth option’⁷¹ has opened up the possibilities of decolonisation beyond the three categories in Resolution 1514(XV), including the provision for a closer relationship with the metropolitan power,⁷² presenting ‘more flexible options set out in Resolution 1541(XV)’.⁷³

As stated earlier, despite the UK’s expressed policy commitments to self-determination, ten out of the fourteen BOTs are on the UN’s List of Non-Self-Governing Territories and have been so since 1946. They are therefore the target of decolonisation efforts and, under article 73(e) UN Charter, the UK is obliged to submit reports to the UN Secretariat on the economic, social and political configurations of the listed territories. Indeed, according to Minty’s popular classification of colonies, many of the BOTs maybe likened to ‘colonies which possess responsible government subject to a reservation of certain matters for the legislation of the Imperial Government’. ⁷⁴ This is particularly telling in reconciling high levels of self-government under and colonial governance structure- something which we later refer back to.

While it *prima facie* appears that the BOTs are colonies according to the United Nations (and as will be later discussed, UK domestic law), the constitutional, political and economic realities among some of the BOTs reveal a complexity that counters an over reductionist picture of territories under the yoke of brutal and imperial impositions. Therefore, a normative assessment of the claim that they are colonies requires a method of analysis that unravels this complexity.

⁷⁰ UNGA Res 2625 (1970), U.N. GAOR, 25th Sess., Supp. No. 28

⁷¹ JJ Rua Jovet, ‘The Fourth Option: Modern Self-Determination of Peoples and the Possibilities of U.S. Federalism’ (2010) 49 *Revista de Derecho Puertoriqueno* 218

⁷² *Ibid.* 218

⁷³ P Thornberry, ‘Minorities, Human Rights: A Review of International Instruments’ (1989) 38, 4 *International and Comparative Law Quarterly* 875

⁷⁴ L Le Marchant Minty, *Constitutional Laws of the British Empire* (Sweet and Maxwell 1928) 1-2

III. The persistence of the colonial – A conceptual framework

The phenomenon of the continuity or persistence of colonial and imperial power is a strand of post-colonial theory,⁷⁵ which describes how the effects of colonialism have become an inseparable part of the current cultural, legal, educational, and political institutions. This is an umbrella term that attempts to describe the structural continuities between the colonial and postcolony. This persistence, or ‘postcolonial melancholia’,⁷⁶ frames contemporary political and economic matters within the context of imperial relations, either as continuations or rearticulating imperial power. Drawing from the work of Fanon for example, Ngũgĩ wa Thiong’o criticises the cultural dominance of former settler-colonial powers in the post-colonial nation-state, stressing the need for resistance to the imperial residues of language and educational infrastructure by ‘moving the centre’.⁷⁷ Development and Dependency Theory,⁷⁸ make the claim that the restructuring of the global economic system imposed economic reforms on post-colonial states that merely reshaped colonial relations of subjugation.⁷⁹

One popular articulation of this type of persistence of the colonial was by Kwame Nkrumah,⁸⁰ a leading pan-Africanist, anti-colonial activist and the first president of Ghana who coined the term *neo-colonialism*. While acknowledging the legal cessation of imperial power, Nkrumah shrewdly anticipated how newly emerging hegemonic powers, such as the United States, would be able to exercise decisive economic and monetary and fiscal control through supra-national organisations such as the International Monetary Fund, the World Bank, the World Trade Organisation, or through foreign aid dependency. He considered this a far more insidious matrix of power given the lack of a settler colonizer (the absence of which would suggest the end of imperial power). Wing-sang Law similarly observed ‘how colonial power exists and operates as an impersonal force through a multiplicity of sites and channels, through which the impersonal force may still linger in the absence of a discernible colonizer.’⁸¹

In the field of legal scholarship, the persistence of colonialism, sometimes known as colonial continuity or inheritance,⁸² has been used when thematising the different

⁷⁵ For an introduction on Postcolonial theory more generally, see Roy (n 14), Young (n 15) and Ashcroft (n 19). For other foundational texts in postcolonial studies, see E Said, *Orientalism* (Pantheon Book 1978), G Spivak, *Can the Subaltern Speak* in P Williams and L Chrisman (eds.) *Colonial Discourse and Post-Colonial Theory* (Havester Wheatsheaf, Hertfordshire, 1994) 66-111, HK Bhabha, *The Location of Culture* (Routledge, London, 1994), F Fanon, *The Wretched of the Earth* (Grove Press, New York, 1963)

⁷⁶ See (n 34).

⁷⁷ N Thiong’o, *Decolonising the Mind* (Heinemann Kenya, Nairobi, 1986)

⁷⁸ See (n 15) 49-56

⁷⁹ See also W Rodney, *How Europe Underdeveloped Africa* (Tanzanian Publishing House, Dar-Es-Salaam, 1973)

⁸⁰ K Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Panaf. Books 1974)

⁸¹ WS Law, *Collaborative Colonial Power: The Making of the Hong Kong Chinese* (Hong Kong University Press, Hong Kong, 2009) 3

⁸² A Burra, ‘What is “Colonial” about Colonial Laws’ (2016) 31, 2 *American University of International Law Review* 138. This has also underwritten much TWAIL scholarship. See also B S Chimni, ‘Third World Approaches to International law: A Manifesto’ (2006) 8 *International Community Law Review*

strands of an emerging coherent body of post-colonial legal thought.⁸³ It similarly explicated the structural continuities between the imperial power of antiquity and the post-colonial state.⁸⁴ Nathaniel Berman famously illustrated similar concern in the context of international law.⁸⁵ Berman challenged the idea of a 'Westphalian Break' which began in '1648: the break between empire and law'.⁸⁶ In traditional international law discourse, the 'Westphalian Break' is the starting point from which modern international lawyers chart the beginning of the end of warring empires and the ascendancy of sovereign states and the triumph of Enlightenment values (reason, order, sovereign equality) over those of the so-called Dark Ages (religion, hierarchy, tribalism). The creation of the nation state and sovereign equality presaged a break or critical juncture from the imperial age and reached its apogee with the creation of the UN Charter.

Berman argued that the Westphalian Break is deliberately selective. The 'claim of an historical break can only work if you treat imperialism as a single phenomenon that disappears with the death of specific players and legal forms. But decolonisation was only the end of a specific form of imperial domination'.⁸⁷ Thus, focussing on doctrinal or institutional changes, 'while disregarding structural continuity, allows us to think we move "from sovereignty to community"'.⁸⁸ Berman directs part of his criticism at the UN trusteeship and mandate system.⁸⁹ He further argues that failure to pay attention to 'structural continuities' leads to our overestimation 'the extent to which Mandates and Trusteeships broke with imperial domination'.⁹⁰ The victory of sovereignty was not separate from imperial domination but 'acquired its character through the colonial encounter'.⁹¹

The persistence of colonial constitutionalism

In the same way that Berman talks about international law and the UN wittingly or unwittingly lending itself to the designs of colonialism, there is in the circumstance of BOTs, the persistence of colonial constitutionalism. The idea of the persistence of colonial constitutionalism may be likened to the sense in which Chatterjee describes post-colonial legalism as 'the extent to which a set of precommitted foundational laws

⁸³ See (n 14)

⁸⁴ See (n 14) 319

⁸⁵ See (n 17); See also A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge, 2007) and A Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' in Darian-Smith and P Fitzpatrick, (eds), *Laws of the Postcolonial* (University of Michigan Press 1999)

⁸⁶ See (n 17) 1523

⁸⁷ Ibid. 1531

⁸⁸ Ibid. 1542

⁸⁹ Trusteeships or the mandate system has ceased to exist.

⁹⁰ See (n 17) 1541

⁹¹ Anghie in Darian-Smith and Fitzpatrick (n 87) 103

bind the transformative acts of the new regime'.⁹² Laws and legal systems continue to be used as an instrument of control in the post-colonial milieu.⁹³ Specifically, this framework begins to identify the persistence of provisions of colonial governance in the different constitutions of the BOTs drawing from archival, scholarly and legal materials.

The persistence of colonial constitutionalism refers to the structural continuities of colonial constitutional provisions from the colonial era into the postcolony, using Labour's '99 White Paper, with its exaltations of self-determination, as the 'temporal marker' from which to distinguish the contemporary period from the period of British imperial governance. Provisions of colonial governance refer to laws or conventions that enable the United Kingdom to intervene in the domestic and external affairs of its overseas territories. It must also be added that the exercise of such interventions can vary as to their content- from the practically conscientious, whereby the UK will consult the locally elected government in the exercise of 'colonial laws', to the malignant, such was the case in the British Indian Ocean Territory.

The framework is modest in its articulation, predicating itself only on a conception of colonial and imperial power that concerns itself with *constitutional provisions* rather than the multiplicity of sites and channels through which colonial power may materialise⁹⁴ and, as mentioned earlier, how the BOTs service British power in the world. Thus, it does not focus on those issues concomitant at the international law level or those concerning political economy which implicates neo-colonialism in the nature of Nkrumah's analyses. The strength of this conceptual analysis, 'the persistence of colonial constitutionalism', 'lies not in its historical foundations, but in its enormous potential as a set of theoretical and methodological tools for deconstructing the colonial foundations of contemporary power structures'.⁹⁵ As a prolegomenon, this analysis reveals the subtle and elusive expressions of colonial power that are often obscured by policies and provisions that proclaim greater self-determination.

IV. Between self-government and colonial governance: BOTs' constitutionalism and the persistence analysis

This section first begins by looking at the judicial cognizance of the question whether BOTs are continuations of former colonies. This was addressed in Lord Hoffman's common law test of 'new political entities' in *Bancoult (No 2)* and invited recent introspection in the *Bashir* litigation. Following this, the section identifies some of the typical provisions of colonial governance in the BOTs and charts their historical development in Gibraltar⁹⁶ and elsewhere they persist in other BOTs.

⁹² P Chatterjee, 'Postcolonial Legalism' (2014) 34, 2 *Comparative Studies of South Asia, Africa and the Middle East* 225

⁹³ See (n 14) 319; See also R Cooper, 'The Post Modern State' (*The Foreign Policy Centre*, September 15 2006) available at < <https://fpc.org.uk/the-post-modern-state/> >

⁹⁴ See (n 81)

⁹⁵ See (n 14) 342

⁹⁶ The reasons for the focus upon Gibraltar are explained elsewhere. See later *Colonial Governance: Provisions illustrating The Persistence of Colonial Constitutionalism in the BOTs*

BOTs, colonies and the courts

The question of whether BOTs are political continuations of the colonies that preceded them has been considered in both *Bancoult (No 2)*,⁹⁷ with the ‘new political entity test’ established by Lord Hoffman, and the *Bashir* litigation.⁹⁸ The facts of *Bancoult (No 2)* have been well rehearsed elsewhere,⁹⁹ but involved the forced expulsion of the Chagossians from the BOT known as the British Indian Ocean Territory (BIOT). The BIOT was formed from the Chagos Archipelago, situated in the middle of the Indian Ocean, along with Mauritius and was ceded by France to Great Britain in 1814. The Archipelago was governed until 1965 as part of the British colony of Mauritius though Mauritius was some 1000 miles away from the main collection of Islands. The biggest of the Islands, Diego Garcia, had been home to the Chagossians for some 200 years. With Mauritius independence looming in 1965, the British government separated it from the archipelago (including Diego Garcia), with the former creating the BIOT. The core issue in the litigation was the legality of the expulsion of the Chagossians by the UK when it leased parts of the BIOT to the United States for military purposes. Part of the submissions made was whether a declaration made in 1953 to extend the European Convention on Human Rights (ECHR) to the Colony of Mauritius (the antecedent to the BIOT), carried on to the BIOT in 1965. Lord Hoffman ruled that it did not, arguing that such an international obligation only attaches to a ‘political entity’ or a state and not to the land of the territory. Where a part of a territory has been reconstituted into a new political entity, existing legal obligations do not attach to that new entity. Following the independence of Mauritius and the excision of the BIOT,¹⁰⁰ the BIOT constituted a distinct, new political entity and thus, the ECHR no longer applied there.¹⁰¹

Most recently, the application of this test formed the basis of litigation in another BOT, the Sovereign Base Areas (SBAs).¹⁰² The question was whether the Refugee Convention, which was extended to the Colony of Cyprus, extended to the SBAs which had been part of the Colony of Cyprus before the creation of the now Republic of Cyprus. In a judicial review in the SBA Senior Judges’ Court (SBA court),¹⁰³ Collender J looked at the *Treaty of Establishment of the Republic of Cyprus*¹⁰⁴ and the enabling UK statute, the

⁹⁷ See (n 5)

⁹⁸ See (n 4)

⁹⁹ See (n 11) 162-191

¹⁰⁰ Ibid. (n 11) 171. It is relevant to note for completeness that Mauritius has continued to challenge the UK government’s position on sovereignty over the BIOT. In July 2017, the United Nations General Assembly referred the matter to the International Court of Justice for an Advisory Opinion. At the time of writing, the matter is still under consideration.

¹⁰¹ *Bancoult (No 2)* (n 5) para 64-65

¹⁰² Akrotiri and Dhekelia

¹⁰³ *Bashir and Others v Administration of the SBAs and the Secretary of State for Defence* (2010) Judicial Review No 1

¹⁰⁴ This treaty formally granted Cyprus its independence from the UK

*Cyprus Act 1960*¹⁰⁵ and concluded the SBAs were not a new political entity distinguishable from the former Colony of Cyprus and resultantly, the Refugee Convention did apply to it. He stated that such a question could not be answered 'by changes in nomenclature or administrative changes but the origins and nature of the political entity'. Collender J made important factual distinctions with *Bancoult (No2)*¹⁰⁶ in that the SBAs were remnants of the land that now constituted the Republic of Cyprus. However, Rumbelow and Whitburn JJ in the majority concluded that the SBAs were new political entities, each given a new system of government¹⁰⁷ as well as 'fundamental changes in the purpose, nature and governance of the SBAs from those operating within the old colony'¹⁰⁸ (including harmonisation of laws with the new Republic of Cyprus). In an appeal in the SBA court, that court unanimously upheld the decision of the lower court, stating that looking at relevant documents, the SBAs were new political entities.¹⁰⁹

In a further appeal to the Court of Appeal of England and Wales, again in a unanimous decision, Lord Irwin (with Lord Justices Jackson and Briggs) stated that the 'new political entity' test was not easy in its application.¹¹⁰ A territory may undergo substantial internal change with its metropolitan power not shedding its obligations for it under international law.¹¹¹ Interestingly, Lord Irwin noted the post-hearing submissions of the Secretary of State that the colonial institutions of the Colony of Cyprus (Executive Council, Village Commissions, and Municipal Corporations) no longer existed, but clarified that these were not markers of a different political entity.¹¹² Lord Irwin held that the legal context was the most important consideration and that despite the significant changes in the size and internal arrangements of the SBAs, they were 'constitutionally and politically... a continuation of what had gone before' and thus were fundamentally different from the BIOT.¹¹³ As a result, the UK's obligations under the Refugee Convention continued.¹¹⁴ This was recently affirmed in 2018 by the UK Supreme Court.¹¹⁵

¹⁰⁵ On the legal effect of International Treaties in the UK Legal System and its dualist nature - see *MacLaine Watson v DT* [1989] 3 All ER 523 and *R v Lyon* [2002] UKHL 44. This particular Act of Parliament enacted the above international treaty.

¹⁰⁶ See (105) para 60

¹⁰⁷ Ibid. para 16

¹⁰⁸ Ibid. para 17

¹⁰⁹ See *Eldin (CA)* (n 4) para 47-48

¹¹⁰ Ibid. 51

¹¹¹ International Law does not take cognizance of domestic constitutional arrangements. See also *Treatment of Polish Nationals in Danzig (1932)* PCIJ, Ser A/B No 44, 4 February 1932-

¹¹² See *Eldin (CA)* (n 4) 54-55

¹¹³ Ibid. 57

¹¹⁴ Ibid. 62.

¹¹⁵ *R (on application of Tag Eldin Ramadan Bashir & Other) v. Secretary of State for the Home Department* [2018] UKSC 45 para 69-71

There are several important points to take from this judgment. The first is that Lord Hoffman's test is not presumed to have been defeated in the face of the metropolitan's continuing obligations for the territory under international law.¹¹⁶ Second, new political institutions do not amount to satisfaction of the test. As Lord Irwin stated 'even very major constitutional or political changes cannot be said automatically to create a new political entity.'¹¹⁷ The majority and minority rulings in the SBA Senior Judges Court were arguably analogous but focussed on different facts that produced different conclusions. Thirdly, and perhaps most relevantly, the judgment appears to be a tacit admission that colonial governance structures *persist* in at least some of the BOTs and demonstrates the UK courts' willingness, albeit indirectly, to deal with the question of whether BOTs are modern day colonies.

Colonial Governance: Provisions illustrating the persistence of colonial constitutionalism in the BOTs

Identifying the persistence of colonial constitutionalism involves tracking specific markers in constitutional developments in the BOTs from the imperial era to the post-colonial period to consider whether they further the design of colonial governance. There are several types of constitutional provisions and conventions that demonstrate colonial governance. In other words, they enable the United Kingdom to intervene in the domestic and external affairs of its overseas territories. While the following is not an exhaustive list,¹¹⁸ they identify some of the archetypal provisions of colonial constitutional intervention.

As this is only intended as an inauguration of post-colonial constitutional theory as applied to BOTs, there is a concentrated focus on Gibraltar and the historical development of such types of provisions in the territory, with occasional references to other territories. Among the fourteen BOTs, Gibraltar is the only one that is a member of the European Union and exhibits- perhaps beside some of the Caribbean-based BOTs- one of the highest-levels of self-government and financial independence. It is one of only two *European* BOTs and so intuitively, appears to be anathema to the notion of a post-colonial Europe (which undertook rapid decolonisation in the 1940s, 50s and 60s). Further, notwithstanding their desire for greater constitutional reform, elected officials in Gibraltar have often strongly contested at the United Nations that the territory is governed by a colonial relationship. In this vein, after the passing of United Nations General Assembly Resolution 1541(XV),¹¹⁹ a former Chief Minister of Gibraltar, Joshua Hassan, emphasised that the relationship between the UK and Gibraltar was not a

¹¹⁶ See UN Charter (n 49)

¹¹⁷ See *Eldin* (CA) (n 4) para 53

¹¹⁸ For example, there is no extensive discussion of the role of the Judicial Committee of the Privy Council, whether the UK courts have jurisdiction to review laws of local BOT legislatures, or the Governor's emergency powers to name but a few. For further discussion see also (n 24) 98-124, 175-196

¹¹⁹ See (n 71)

colonial one.¹²⁰ Over the years, Gibraltar has made persistent representations at the UN to secure recognition of its right to self-determination.¹²¹ Indeed, it has a high GDP, a diverse economy and the scope of ministerial powers is broad. Moreover, political conventions mean that, despite not being able to commence, negotiate and conclude international treaties, the UK will typically consult Gibraltar on such matters.¹²² However, the provisions of colonial governance, as evidence of the persistence of colonial constitutionalism, are prevalent in all BOT constitutions and have endured since the time of their initial acquisition by Great Britain.

Powers of the monarch: Prerogative instruments, POGG powers, disallowance and royal assent

The powers of the Monarch in the BOTs are a major mode of colonial governance which demonstrates the persistence of the colonial. They are manifested in a series of prerogative instruments - in particular, the Peace, Order and Good Government (POGG)¹²³ provisions - the powers to disallow local legislation, the power of the Governor to reserve bills 'for HM signification', and various land acquisition powers.

Firstly, it is important to briefly outline how the Monarch's powers operate over their territories. In the BOTs, HM would retain general legislative and executive powers to act for those territories through the Royal Prerogative. However, if the Royal Prerogative is used to establish a representative assembly,¹²⁴ such general legislative power is displaced, unless that power is then expressly reserved.¹²⁵ This is the case for instance, in eight out of the fourteen BOTs,¹²⁶ which have representative assemblies. The Royal Prerogative can be used to issue a range of different types of prerogative instruments. These may include proclamations, letters patent or Royal Instructions issued to the Governor to perform a particular set of tasks. However, the obligation upon the Governor to exercise the powers of his office in accordance with instructions issued by

¹²⁰ J Garcia, *Gibraltar: The Making of People* (MedSun, Gibraltar, 1994) 133

¹²¹ House of Commons Library Research Paper, *Gibraltar's Constitutional Future*, 02/37 of 22 May 2002, 52-53; House of Commons Library Research Paper, *Gibraltar: Diplomatic and Constitutional Developments*, 06/48 of 11 October 2006, 18-21

¹²² UK Government, 'Guidelines on extension of treaties to overseas territories' (19 March 2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308103/Extension to OTs guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308103/Extension_to_OTs_guidance.pdf)>

¹²³ See (n 11) 6-36

¹²⁴ See (n 53), s.3

¹²⁵ *Sammut* (n 28); See also (n 24) 19

¹²⁶ St Helena, Ascension and Tristan da Cunha Constitution Order ss 151 and 216; Pitcairn Constitution Order s.36(1); South Georgia and South Sandwich Islands Order 1985 s.9(1); British Antarctic Territory Order 1989 s13(1); British Indian Ocean Territory (Constitution) Order 2004 s. 10(1); Sovereign Base Areas Order in Council 1960 s4(1)

her Majesty¹²⁷ persists till today.¹²⁸ Bermuda¹²⁹ and Pitcairn Islands¹³⁰ for example, provide for the Governor to act subject to such instructions as maybe issued by HM.

The royal prerogative and the peace, order and good government power

The 'peace, order and good government' (POGG) power is a major expression of the prerogative powers enshrined in the constitutions of the BOTs. The POGG powers are as old as British colonialisation efforts¹³¹ and are constitutional provisions that confer large, plenary legislative powers on the grantee.¹³² As the House of Lords affirmed in *Bancoult No. 2*,¹³³

the POGG power is equal in scope to the legislative power of Parliament ... it is not open to the courts to hold that legislation enacted under a power described in those terms does not, in fact, conduce to the peace, order and good government of the territory.¹³⁴

The POGG powers have a chequered history in Gibraltar. They first appeared in 1830 with the issuing of the *Fifth Charter of Justice*¹³⁵ which effectively gave the Crown exclusive legislative powers which were to be exercised on the 'advice and consent' of the Westminster Parliament, HM Privy Council or the Governor of Gibraltar.¹³⁶ The POGG power also appeared in Letters Patent issued in 1910.¹³⁷ Here, the power was bifurcated between the Governor, who exercised the primary 'day-to-day' POGG powers ('primary POGG'), and residual or reserve POGG powers apportioned to the Crown ('HM residual POGG') with accompanying *Royal Instructions*¹³⁸ setting limitations on the exercise of the Governor's POGG powers.

¹²⁷ Gibraltar Constitution Order 1969, s.19

¹²⁸ Gibraltar Constitution Order 2006, s.27(3)

¹²⁹ Bermuda Constitution Order 1968, s.17(2)

¹³⁰ Pitcairn Constitution Order 2010, ss.37-40

¹³¹ See (n 11); See also *R (Jackson) v Attorney General* [2005] EWCA Civ 126 para. 52 and Mark D. Walters 'The Common Law Constitution in Canada: Return of *lex non scripta* as Fundamental Law' (2001) 51, 2 *University of Toronto Law Journal* 91

¹³² See for instance, *Riel v The Queen* (1885) 10 App Cas 675; *Union Steamship Co. of Australia Pty. Ltd. v. King (Union Steamship)* (1988) 166 CLR 1.

¹³³ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453.

¹³⁴ *Ibid.* 109

¹³⁵ J Restano, *Justice So Requiring* (Calpe Press 2012) 353

¹³⁶ This would be constitutionally necessary given the common law rule of prerogative powers in territories. See also *Campbell* (n 28) and *Sammut* (n 28)

¹³⁷ Letters Patent 1910- on file with author

¹³⁸ Royal Instructions 1910- on file with author

The bifurcation of the POGG power persisted in the *Gibraltar (Legislative Council) Order in Council 1950*. However, there were two important changes to the primary POGG power. First, the establishment of a newly created Legislative Council meant the Governor lost exclusivity. Instead, the power had to be exercised on the 'advice and consent' of the partially elected Legislative Council, a moderate concession to self-government. Second, the drafters built in a contingency provision into the primary POGG power¹³⁹ in providing the Governor with a *reserve power* to enact bills in the 'interests of peace, order and good government' should the Legislative Council fail to do so. Though this came attached with an obligation to notify the Secretary of State for the Colonies and members of the Council could voice objections, it fundamentally gave the governor (as the representative of the Crown) considerably wide legislative scope to usurp the power of the legislative council.¹⁴⁰ This bifurcation followed the line of classic colonial constitutional law described by Keith thus:

The wide power of the Crown to create constitutions has resulted in the existence for the vast majority of existing colonies of a double power. The constitution recognises the necessity of, and provides a local legislature, but at the same time the right of the Crown to legislate by Order in Council is asserted. Such legislation may be used to enact some measures which it would be difficult to pass through the local legislature without raising undue resentment, or merely for some ground of convenience¹⁴¹

In the 1969 Constitution, the newly created Legislature exercised the primary POGG power but this consisted of 'the Governor and the Assembly.'¹⁴² Further, the exercise of the primary POGG power was still 'subject to the provisions of the constitution'. In 2006, the primary POGG and HM residual POGG remained largely unchanged from the 1969 Constitution except that 'the Legislature' had been redefined to 'consist of Her Majesty and the Gibraltar Parliament'.¹⁴³ This means the Governor is no longer constitutionally a part of the newly named legislature presaging a greater advance toward self-government. However, unusually, a new, third POGG-related contingency power is given to the Governor to withhold assent or reserve bills for the signification of HM's pleasure if they are repugnant to 'good government'.¹⁴⁴

Further, a fourth POGG power is established under s.38(3) allowing the Governor to ignore the advice of the Chief Minister to dissolve Parliament or do so in the absence of such advice 'if he considers that the good government of Gibraltar requires him to do so.' Given the manner in which this has been judicially interpreted- to give the appointee plenary powers- this opens up the possibility of the Governor to dissolve the

¹³⁹ Gibraltar (Legislative Council) Order in Council 1950, s. 21(1)

¹⁴⁰ It was this power that caused the 1955 tax crisis. This prompted protest and provoked subsequent reform. See (n 120) 86

¹⁴¹ See (n 27) 269.

¹⁴² See (n 127) s.24

¹⁴³ See (n 128) s.24

¹⁴⁴ Ibid. s.33(2)(b); This is analogous to the 1950 POGG-related contingency power of the Governor under s.21 (1), although this is a power of *disallowance* rather than *enactment*

Gibraltar Parliament for a potentially broad and wide-ranging number of reasons. Further, and perhaps most importantly, all these observations must be coupled with the fact that the most enduring feature of Gibraltarian constitutionalism is, without question, HM residual POGG power; the pristine form of colonial governance,¹⁴⁵ which has persisted largely unchanged from 1830. The nature of reform therefore, may be likened to *constitutional somersaulting* whereby concurrent advances in self-government are undermined by constitutional provisions of colonial governance. This tension, symptomatic of BOT constitutional reform across the board, is well captured thus:

there arose as elsewhere in the British Empire a tension between good government and self-government, between authoritative and paternalistic administration according to the standards, expectations and goals of those in imperial authority on the one hand and the perceptions, interests and indeed self-interests of the civilian population on the other¹⁴⁶

Constantine's observations here reflect the core issue with the governance and status of the BOTs in how they illustrate the persistence of the colonial.

Moreover, HM reserve POGG powers exist in every single constitution of the BOTs except for Bermuda which only has a primary POGG power that underwrites the legislative power of its Parliament.¹⁴⁷ The use of the reserve POGG powers have also been the source of much litigation. For example, in the Turks and Caicos Islands, HM reserve POGG powers¹⁴⁸ were used by the UK government to exercise direct rule, through the Governor, after allegations of corruption levelled by the *Auld Report*.¹⁴⁹ Challenges to the legality of HM POGG began on behalf of the former Premier of the Turks and Caicos, pending implementation of one of the recommendations of the report.

In *R (on the Application of Misick) v. Secretary of State for Foreign and Commonwealth Affairs*,¹⁵⁰ the former Premier sought permission for judicial review pertaining to the legality of the *Turks and Caicos Islands Constitution (Interim Amendment) Order 2009*¹⁵¹ (2009 Order). This would have the effect of temporarily suspending parts of the Territory's constitution, including removing the right to trial by jury, enshrined in s.6 (g) of the Turks and Caicos 2006 Constitution and replacing the representative government by a system of direct administration by the Governor of the territory. Indeed, the UK government used this power of direct rule on Turks and Caicos from

¹⁴⁵ See (n 11) 19

¹⁴⁶ S Constantine, *Community and Identity: The making of modern Gibraltar since 1704* (Manchester University Press 2009) 4

¹⁴⁷ See (n 129) s.34

¹⁴⁸ Turks and Caicos Island Constitution Order 2006, s.10

¹⁴⁹ Auld (n 12)

¹⁵⁰ [2009] EWHC 1039

¹⁵¹ <<http://www.legislation.gov.uk/ukxi/2009/701/contents/made>>

2009 to 2012. The 2009 Order was made pursuant to the HM POGG powers in s.5 (1) *West Indies Act 1962* (which also provided the basis for the territory's constitution).

Similarly, HM POGG powers were at the centre of the *Bancoult* litigation following the forced expulsion of the Chagossians in Diego Garcia. This expulsion was done under the Immigration Ordinance 1971 made by the Commissioner purportedly acting under powers conferred on him to make laws for the peace, order and good government of the BIOT.¹⁵²

Disallowance of, and assent to legislation

In addition, the Crown also has the power of disallowance that enables it to nullify locally enacted legislation. This is a significant colonial governance mechanism though it is used rarely and, ostensibly, exists primarily to disincentivise objectionable local laws such as those which may be unconstitutional or those that might undermine international obligations.¹⁵³ Gibraltar once again is an interesting case among the BOTs on this issue. It has had powers of disallowance codified in its various constitutional instruments since antiquity including s.24 *Gibraltar (Legislative Council) Order 1950* and s.37, *1969 Constitution*. However, in the 1999 consultation, the Gibraltar Assembly's Select Committee on Constitutional Reform suggested the removal of this provision.¹⁵⁴ Now, Gibraltar stands as the only BOT among the fourteen where the Crown has no power of disallowance- a significant advancement toward self-government.

In the Bermudian constitution, the powers of disallowance are uniquely narrow.¹⁵⁵ Nonetheless, a typical disallowance provision in the other BOTs' constitutions, say for example in the BIOT¹⁵⁶ or St Helena, Ascension and Tristan da Cunha,¹⁵⁷ confers power on the Crown to disallow any law which the Governor has assented to and the notice of disallowance - significant for the courts - comes into effect the moment it is published in the *Gazette*. Note here how the justification for the disallowance powers speaks to the persistence of colonial constitutionalism, namely that the peoples of the BOTs are perceived to lack the maturity to be entrusted with their own affairs, even in the context of a democratic polity. The propriety of this justification can only stand in the context of imperial paternalism that substantially foregrounded the colonial enterprise from centuries ago.

Relatedly, each territory with a legislative assembly will require assent by or on behalf of HM. However, there are variations among the BOTs that outline the circumstances in

¹⁵² British Indian Ocean Territory (Constitution) Order 2004, ss.11 & 19

¹⁵³ See (n 24) 76

¹⁵⁴ Gibraltar House of Assembly, Select Committee on Constitutional Reform (2003) 2-5

¹⁵⁵ See (n 129) s.47

¹⁵⁶ See (n 152) s.11

¹⁵⁷ St Helena, Ascension and Tristan da Cunha Constitution Order 2009, ss.152 & 217

which the Governor may give or withhold assent or the instances in which they may or must reserve a bill 'for the signification of Her Majesty's pleasure.' This stock phrase requires bills to be sent to London for assent by HM on the advice of her UK government ministers (rather than those of the territory). In Gibraltar's current 2006 Constitution for example, the Governor may only reserve assent for HM signification if a bill appears to be 'repugnant to or inconsistent with the constitution'¹⁵⁸ and may only withhold assent, if it is incompatible with any international legal obligation or repugnant to good government¹⁵⁹- though the latter, as a lexical variation of POGG powers, may have plenary scope.¹⁶⁰ This situation is in contrast to that in the British Virgin Islands where, for example, the Governor has no power to withhold assent but only a limited choice of assent or reservation for HM signification in certain scenarios.¹⁶¹ Still, whether it is the former or the latter of these variations, the presence of these provisions emphasises the persistence of the colonial in the political, social and legal structures of governance in the BOTs.

The role of the Governor

The existence of the office of Governors¹⁶² and more fundamentally, their powers, is a clear signifier of the persistence of colonial constitutionalism in the BOTs. Governors serve as the Crown's representative and head of government in the Territories, and are significant vestiges of colonial governance. Though Governors may be considered to wear two hats- as a voice of the territory to the UK government and as the Crown's representative in the territory- constitutionally, their role is very much the latter. Given that their office flows from its position as representative of the Queen, the Governor is the head of government of the BOT,¹⁶³ and generally exercises varying levels of both executive¹⁶⁴ and legislative functions.

Governors' executive powers

Commonly, Governors' executive functions include responsibility for external affairs, defence, internal security and responsibility for the public service, assignment of responsibilities of local Ministers, proroguing powers, powers of appointment, and powers to constitute offices, powers of pardon, powers to dispose of Crown Land and emergency powers among others. In BOTs with permanent populations, the tendency is for the Governor to share powers with the local executive and legislative institutions. In

¹⁵⁸ See (n 128) s.33(2)(a)

¹⁵⁹ Ibid. s.33(2)(b)

¹⁶⁰ See (n 11) 9

¹⁶¹ Virgin Islands Constitution 2007, s 79(2)

¹⁶² Or other named executive official such as Commissioner or Administrator

¹⁶³ As opposed to the elected head of government in BOTs with a representative legislature from which ministers are selected

¹⁶⁴ These typically include responsibility for external affairs, defence, internal security (often considered 'Special Responsibilities'), responsibility for public service, assignment of responsibilities of local Ministers, proroguing powers, powers of appointment, powers to constitute offices, powers of pardon, powers to dispose of Crown Land and emergency powers.

BOTs with no permanent population (and thus in the absence of any locally elected governmental body), the Governor (or Commissioner/Administrator) will effectively¹⁶⁵ be the principal executive authority. For example, in the BIOT, the Commissioner has exclusive executive powers.¹⁶⁶ Similarly, the Commissioner in the British Antarctic Territory has exclusive executive authority.¹⁶⁷ In the Pitcairn Islands, with a population of around 50 and which does have an elected Island Council¹⁶⁸, the Governor exercises executive authority on behalf of the Crown.¹⁶⁹

The demands for self-determination by peoples of various BOTs as well as the UK government's declared policy recognising the legitimacy of such demands has led to significant changes in the Governors powers compared with those during the colonial period. Still, a careful examination of the changes demonstrates the persistence of colonial constitutionalism. This is particularly evident in Gibraltar despite significant changes in the local governance. Indeed, the Gibraltar experience is arguably a poignant representation of Lord Irwin's view in the *Bashir* case¹⁷⁰ (stated earlier) that even major constitutional or political changes do not automatically create a new political entity. Primary executive power was vested in the Governor in its 1969 constitution¹⁷¹ though the partially elected Gibraltar Council¹⁷² were consulted in the formation of policy, with several broad exemptions.¹⁷³ Further, the Governor was obliged to act in accordance with the advice of a locally elected body - effectively a quasi-government- called the Council of Ministers¹⁷⁴ in defined domestic matters,¹⁷⁵ albeit with copious exceptions.¹⁷⁶

The circumscription of the powers of the Council of Ministers as 'defined domestic matters' was scrapped in the 2006 Constitution. Instead, the Constitution outlines the Governor's executive powers under 'Special Responsibilities'¹⁷⁷ which includes external affairs, defence, internal security and such functions relating to public appointments. These powers must be exercised in consultation with the Chief Minister 'as far as is practicable'. Positive though this is, to all intents and purposes, the Government of Gibraltar still has no constitutionally recognised right to conduct executive affairs which fall under the Governor's 'Special Responsibilities'. In other words, though this creates

¹⁶⁵ These powers may be subject to Royal Instructions issued by the Crown and/or run parallel to a reserve plenary law making power that the Crown has. See *Powers of the Monarch* below

¹⁶⁶ See (n 1152) s.7(1); In reality, they are assisted by an Administrator working in London and the Commissioner's representative who is an officer in charge of the Royal Navy contingent in Diego Garcia. See also (n 24) 303

¹⁶⁷ The British Antarctic Territory Order 1989, s10

¹⁶⁸ See (n 130) s.7

¹⁶⁹ Ibid. s.33

¹⁷⁰ *Eldin* (n 4)

¹⁷¹ See (n 127) s.45(1)

¹⁷² Ibid. s.46

¹⁷³ Ibid. s.49

¹⁷⁴ Ibid. s.47

¹⁷⁵ Ibid. s.55

¹⁷⁶ Ibid. s.50

¹⁷⁷ See (n 128) s.47

an obligation to consult the Chief Minister on such a broad range of governance issues, the Governor is not obliged to accept or implement the outcome of such consultation. It is important to keep in mind that these powers include negotiating international treaties and control of the police force which are significant

The persistence of the colonial in this regard is even more marked in Bermuda. The Bermuda Constitution¹⁷⁸ does not obligate the Governor to either consult or act in accordance with advice from the Cabinet or minister in relation to external affairs¹⁷⁹ though it does provide the Governor with a discretionary power to delegate special responsibilities, including external affairs, to the Premier or other minister.¹⁸⁰ Even if, as Hendry and Dickson point out, the practice has been that of partial delegation of those powers,¹⁸¹ the critical point is that the Governor is under no obligation to do so and thus, unlike the Gibraltar situation, a case cannot be sustained for even the need for consultation. The practice is mostly then a matter of the Governor's political preferences (and by direct extension, the UK government) rather than a matter of constitutional obligation that advances self-government in that BOT.

Furthermore, in relation to the external affairs component of the Special Responsibilities of the Governor, the picture is rather different in some of the other BOTs. While leaving overall responsibility for external affairs to the Governor, there are constitutional provisions that involve locally elected ministers in the exercise of these powers. The Constitutions of the British Virgin Islands (BVI), Montserrat and Cayman Islands provide for even greater degrees of devolved responsibility pertaining to external affairs. Thus, there is a mandatory requirement for the Governor to delegate responsibility to ministers for the conduct of external affairs that fall within their portfolios in the BVI,¹⁸² Cayman Islands¹⁸³ and Montserrat.¹⁸⁴ In addition, in the Cayman Islands, the Governor is obliged to consult the Cabinet in the exercise of external affairs insofar as it is reasonably practicable to do so and unless the matter is not materially significant such as to require consultation.¹⁸⁵ This ordinarily makes the provisions similar to that of Gibraltar. However, virtually uniquely, the Governor cannot commence, negotiate or approve a treaty or any international agreement that would affect internal policy or require implementing legislation without obtaining the agreement of the cabinet, unless instructed otherwise by the Secretary of State.¹⁸⁶ Thus,

¹⁷⁸ Bermuda has had certain matters relating to external affairs delegated to it by the UK Government through letters of entrustment. For more on entrustments generally, see (n 24) 237-239

¹⁷⁹ See (n 129) s.21(2)(a) and s.62(1)(a)

¹⁸⁰ Ibid. s.62(2)

¹⁸¹ See (n 24) 229-230

¹⁸² See (n 161) s.60(2)-(4)

¹⁸³ Cayman Islands Constitution Order 2009, s.55(2) and (4)

¹⁸⁴ Montserrat Constitution Order 2010, s.39(2)-(4)

¹⁸⁵ See (n 183) s.32

¹⁸⁶ Ibid. at s.55(3)

the external affairs provisions provide an interesting focal point to observe the tensions between persistent colonial governance and the advance toward self-government.¹⁸⁷

Governors' legislative powers

The delineation of the Governor's legislative powers, like the executive powers, are also contingent on whether there are locally elected ministers or not and, relatedly, whether the BOT has a permanent or substantial population. In six out of the fourteen BOTs,¹⁸⁸ the Governor or variations thereof¹⁸⁹ are the principal legislative authority with varying obligations to consult, though not necessarily to follow, a local quasi-legislature/executive body.¹⁹⁰ These BOTs are those with either no permanent population or where the population is not substantial.

In those BOTs with a substantial population, there are variations too of the legislative powers of the Governor. The variations notwithstanding, the persistence of colonial constitutionalism are evident. Governors may have reserve powers that enable them to pass through legislation that may not be passed by the local democratic assembly, however defined. In Gibraltar, the Governor previously had plenary legislative powers,¹⁹¹ subject only to limitations by the Crown (rather than any domestic government or legislature) up until the mid-20th century. However, the introduction of the *Gibraltar (Legislative Council) Order in Council 1950* required the Governor to make laws 'with the advice and consent of the council', referring to a newly-created, partially democratic legislative assembly into the law making process. Nonetheless, this was subject to a reserve power¹⁹² that enabled the Governor to enact bills in the 'interests of peace, order and good government' should the Legislative Council fail to do so. The *Gibraltar Constitution Order 1969* subsequently removed this reserve power. The exercise of the newly formed Legislature's¹⁹³ law-making power however, was still 'subject to the provisions of the constitution'. This included the Crown's powers of disallowing legislation¹⁹⁴ the Governor's powers of withholding assent or reserving signification of bills for Her Majesty (HM)¹⁹⁵; and the Governor's exclusive legislative power for matters outside 'defined domestic matters'.¹⁹⁶

¹⁸⁷ It is important to remember that overall responsibility for external affairs, regardless of the nature of the hybrid power, ultimately remains vested with the UK Government under international law.

¹⁸⁸ St Helena, Ascension and Tristan da Cunha Constitution Order ss 151 and 216; Pitcairn Constitution Order s.36(1); South Georgia and South Sandwich Islands Order 1985 s.9(1); British Antarctic Territory Order 1989 s13(1); British Indian Ocean Territory (Constitution) Order 2004 s. 10(1); Sovereign Base Areas Order in Council 1960 s4(1)

¹⁸⁹ Referred to as the Commissioner in SGSSI, BAT and BIOT and the Administrator in the SBAs

¹⁹⁰ See (n 130) s.36(1) and (3)

¹⁹¹ 1910 letters patent- on file with author

¹⁹² Gibraltar (Legislative Council) (n 141) s.21(1)

¹⁹³ This was formed of the democratically-elected local Assembly and the Governor

¹⁹⁴ Gibraltar 1969 (n 127) s.37

¹⁹⁵ Ibid. s.33(2)

¹⁹⁶ These were areas of exclusive competence for the Gibraltar council. See also Gibraltar 1969 (n 127) s.55(1)

Further, despite not having a blanket reserve power, the Governor could enact bills outside 'defined domestic matters'¹⁹⁷ if it was unlikely to be passed by the Assembly or introduced by the Gibraltar Council¹⁹⁸ or in a limited number of areas within defined domestic matters in the interests of the 'financial and economic stability of Gibraltar'.¹⁹⁹ Relatedly, an ouster clause precluded the possibility of review by the courts on 'any question whether a matter is a defined domestic matter' thus protecting imperial interests by empowering the Governor to have the final say.²⁰⁰

Therefore, while advances toward self-government were made in some respects by partially devolving the Governor's legislative powers in Gibraltar, there were several imperial contingencies that ensured stop-gap measures for the Governor and, by extension, the UK metropole to maintain power. In the *Gibraltar Constitution Order* 2006, the Governor was removed from the Legislature, and the categorisation of defined domestic matters for law-making was removed. However, in a somersault that demonstrates again the persistence of colonial constitutionalism, the Governor was given the power to withhold assent or reserve bills for the signification of HM's pleasure if they were repugnant to 'good government'.²⁰¹ Similarly, in Anguilla, the Cayman Islands, and the Falkland Islands, their constitutions also provide the Governor with a reserve legislative power which may be invoked to enact a bill in prescribed areas or to push through bills they anticipate won't be passed by the local legislature.²⁰²

The persistence of colonial constitutionalism framework of analyses reveals a *spectrum of coloniality* which discloses varying degrees of executive and legislative power exercised by the Governor (and *de facto* the metropolitan centre). Some BOTs evince greater advancement toward self-determination and self-rule, while others are governed almost entirely by the UK metropole through the Governor.

Colonial Laws Validity Act 1865 and the Interpretation Act 1978

As will become clear, it remains striking that the *Colonial Laws Validity Act* 1865 (CLVA) and the *Interpretation Act* 1978 have not been amended or even repealed altogether given their legal definitions that essentially class BOTs as colonies. These two important pieces of colonial legislations ought at least to have been amended since 1999 when the government formally set into motion its policy of self-determination for the BOTs and at the latest, by 2002 when the *British Overseas Territories Act* was enacted. Specifically, considering its visibility in the arguments of the UK government in two important

¹⁹⁷ See (n 139) s.34; These were areas of exclusive competence for the Council of Ministers. See also (n 127) s.55(1)

¹⁹⁸ Not to be confused with the Legislative council. The Gibraltar Council was a body selected from officers from the UK with some domestically elected ministers. See (n 127) s.46

¹⁹⁹ The Despatch, attached to the end of the 1969 Constitution, justified the provision on the basis that Gibraltar was facing 'economic problems at this time' and that such laws needed to be 'fully co-ordinated'

²⁰⁰ See (n 127), s.55(2)

²⁰¹ See (n 128), s.33(2)(b)

²⁰² Anguilla Constitution 1982, s56; Cayman Islands Constitution 2009, s81; Falklands Islands Constitution 2008, s.55. Virgin Islands Constitution 2007, s.81

recent cases involving BOTs; *Bancoult No.2* and *Misick*²⁰³ it is telling that the government has proceeded with its declared policy of 'partnership' and commitment to self-governance and self-determination in the BOTs without efforts to repeal the CLVA as a whole or at least certain parts of it as well as Schedule I of the *Interpretation Act 1978*.

The common constitutional provisions of all fourteen BOTs, such as the unlimited power of the UK Parliament to legislate for the BOTs, and the UK's overall responsibility for their external affairs, effectively class them as colonies under Schedule 1, *Interpretation Act 1978*. The *Interpretation Act* provides that 'colony' means

any part of Her Majesty's dominions outside the British Islands except...territories for whose external relations a country other than the United Kingdom is responsible...and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed for the purposes of this definition to be one colony²⁰⁴

Similarly, the CLVA would deem the BOTs as colonies despite the nomenclatural change from 'dependent territories'²⁰⁵ because Section 1 provides that

The term colony shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature as hereinafter defined except the Channel Islands and the Isle of Man...the term 'legislature' shall...signify the authority other than Imperial Parliament or Her Majesty in Council, competent to make Laws for any colony.

Further, Section 1 of the Act also defines 'colonial law' as laws made for any colony either by a colonial legislature²⁰⁶ or by Her Majesty in Council.²⁰⁷ Section 2 states that colonial laws are subject to the 'repugnancy doctrine'. The repugnancy doctrine means 'colonial laws' so-defined are void and inoperative if they are counter to any Westminster Act of Parliament which extends to the BOTs, either expressly or by necessary intendment.²⁰⁸ For the purposes of the CLVA therefore, all local laws (as

²⁰³ [2009] EWHC 1039 (Admin)

²⁰⁴ < <http://www.legislation.gov.uk/ukpga/1978/30/schedule/1> >

²⁰⁵ British Overseas Territories Act 2002, s. 1

²⁰⁶ Effectively any law making body other than the Imperial Westminster Parliament

²⁰⁷ See (n 53), s.1. A statutory Order in Council must of course conform to the enabling Act of Parliament and to apply the repugnancy doctrine would undermine the discretion of the Westminster Parliament to legislate for the BOTs. Prerogative Orders in Council have the substance of primary law (as they are not derived from statute) but the effect of the repugnancy doctrine is that it must conform with any Westminster Act of Parliament extended to it and is void if repugnant. See also (n 5) para 97 and 126

²⁰⁸ See (n 53), s.2; This does not apply to Westminster Acts of Parliament which extend to BOTs voluntarily by virtue of a local law

colonial laws) made by the Legislatures of the BOTs are vulnerable to the repugnancy doctrine.

Importantly, Gibraltar and BIOT, who have Prerogative Orders in Council, rather than a Westminster Act of Parliament, as the legal bases of their constitutions (as is the case with the other twelve BOTs), are also considered colonial laws. This means their constitutions are vulnerable to the repugnancy doctrine and are only superior to local laws as a matter of statutory construction, namely that judges in the domestic jurisdictions will interpret provisions of the constitution as such. Contrastingly, the constitutions of the other twelve BOTs, whose legal bases *are* Westminster Acts of Parliament, are not colonial laws vis-à-vis Section 1 CLVA, are immune to the repugnancy doctrine, and importantly, are supreme over local laws. However, while this may seem like a qualitative distinction, it must be noted that the 12 BOTs whose constitutions are superior over local laws are only so by virtue of what is foundationally an imperial imposition by the Westminster Parliament. In other words, the supremacy of these constitutions derives from the UK rather from the domestic constitutional principles of sovereignty or supremacy; a classic case of the persistence of colonial constitutionalism.

BOTs and Westminster Parliament's Legislative Supremacy

Another of the multiple mechanisms of colonial governance is the UK Parliament's legislative supremacy, which also extends to all BOTs and provides Westminster with unlimited power to make laws for them.²⁰⁹ Indeed, 'there is no such thing as an illegal act of the Imperial Parliament; its power of legislation is plenary, and its edicts must be enforced in every court of law throughout the British Dominions, Possessions, and Protectorates'.²¹⁰ In contemporary practice, Acts of Parliament will often explicitly extend to the BOTs but will sometimes apply through necessary intendment. As stated earlier, the recent *Sanctions and Anti-Money Laundering Act 2018*, is a model reference point in this issue. A longstanding example is the equally controversial *Colonial Prisoners Removal Act 1884* which requires the BOTs to extradite convicted criminals to the UK at their request to serve their sentences which was in fact used as recently as 2017.²¹¹ As is typically the case however, UK Acts of Parliament will usually confer power on a UK Government Minister to legislate for the BOT through an Order in Council.²¹² One particularly telling example is the *Emergency Powers (Overseas Territories) Order 2017*²¹³ made in exercise of several Acts of Parliament.²¹⁴ This provides the Governor or equivalent administrator of the nine of the BOTs with broad intrusive powers which include proclaiming a public emergency and the ability to make

²⁰⁹ See (n 51)

²¹⁰ See (n 27) 16

²¹¹ B Fuller, 'Convicted killer Osbourne Douglas sent to United Kingdom' (*Cayman Compass*, June 25 2017) <https://www.caymancompass.com/2017/06/25/convicted-killer-osbourne-douglas-sent-to-united-kingdom/>

²¹² See (n 24) 56-57

²¹³ < <http://www.legislation.gov.uk/ukxi/2017/181/made> >

²¹⁴ Saint Helena Act 1833, s.112, the British Settlements Acts 1887 and 1945, Cyprus Act 1960, section 2(1)(b), West Indies Act 1962, s.5, Anguilla Act 1980, s.1(2)

regulations to restore order that range from detaining individuals,²¹⁵ requisitioning civilian property²¹⁶ to limiting the free movement of its inhabitants.²¹⁷

Moreover, there is no constitutional obligation upon the UK Parliament to consult the BOTs, though 'consultation is normally undertaken where practicable' on laws that extend to them. Indeed, there is a general reluctance to use Westminster Acts of Parliaments to legislate on certain issues in the BOTs.²¹⁸ Fundamentally however, though there may be a reluctance to legislate for the territories through Westminster Acts of Parliament - along with a convention of consultation with the BOTs if they do so -, the principal criticism with this governance mechanism is, to put it mildly, a 'democratic deficit'. BOTs are not constitutionally a part of the UK and have no representation in the Westminster Parliament. They are therefore subject to laws over which they have no constitutionally recognised role in. This is another enduring feature of colonial governance that has persisted since antiquity.

V. Conclusion

The persistence thesis drawn from post-colonial legal theory is a veritable tool for unravelling the descriptive assertions - from both the UK and local territory governments- that self-government is the telos of BOT constitutions and constitutional reform. What it begins to reveal is that something gets lost in the worthwhile pursuit of self-determination; something this article's analysis tries to find. The persistent and enduring provisions of colonial governance in these constitutions can often be lost among the reforms that advance self-government.

The foregoing analysis is by no means an exhaustive exegesis of the constitutional developments and designs of the BOTs. Nonetheless, *prima facie*, it appears that the status of the territories align more closely with the statement made by Oliver Stanley; then Secretary of State for the Colonies,²¹⁹ at the berthing of decolonisation under international law in the post-second world war period. This policy statement captures the reality of the constitutional developments and governance of the BOTs. Rather than the exaltations of self-determination that have continued to be stated from 1999 in successive Government White Papers, through the granting of new constitutions, the correct position as to the status of BOTs is arguably not that they have ceased to be colonies. Rather, as the foregoing analysis demonstrates, the position is that some are more of colonies and others are less so- though paradigmatically, they still operate within the structure of colonial governance.

²¹⁵ S.6(3)(b)

²¹⁶ Ibid. (c)

²¹⁷ Ibid. (e) and (f)

²¹⁸ This was the case in back in 1999 with the continuing existence of capital punishment in Bermuda where the UK Government pressed the local government to change the laws or would otherwise intervene to do so. See also *FCO Partnership* (n 3) 21

²¹⁹ See the quote at the top of this article.

What we have now with regard to the status of the BOTs is a 'spectrum of coloniality'; a persistence of colonial constitutionalism where Bermuda is arguably the least constitutionally colonised with Pitcairn Islands, BAT and SBAs at the other end. Other notable BOTs such as Gibraltar, Anguilla and Turks and Caicos occupy a space in between on the spectrum, though more toward the Bermuda side. As a final word then, if it would be properly asserted that the word 'nuance' is to be applied in constitutionalism, international law and international relations, it should be with reference to the status of BOTs.