

# The Privy Council and the constitutional legacies of empire

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## Abstract

*The British Empire is treated as a historical phenomenon, but it enjoys a residual existence in the form of the various Overseas Territories of the UK. This paper considers the constitutional position of those territories. It shows that they are mostly excluded from what is called here the 'domestic' constitution, having no representation in its institutions and, when acknowledged, if at all, conceived of as foreign entities. Instead, the Overseas Territories are governed mostly via a distinct (post-)imperial constitution, primarily via the mechanism of the Privy Council. That institution, which does little work within the domestic constitution, creates a formal divide between the domestic and the imperial. This formal divide both masks the substantive continuities between the domestic and the imperial constitutions and facilitates, as regards the Overseas Territories, forms of governance which would not be tolerated in the imperial centre.*

**Keywords:** empire; Privy Council; Overseas Territories; orders in council.

## Introduction

The end of the British Empire is usually dated to the handover of Hong Kong to China in July 1997, but the UK retains a number of Overseas Territories (OTs) which are best understood as the residue of that Empire: wholly distinct from the UK itself but for a number of reasons unlikely to join many of the former colonies of the British Empire in achieving independence, at least in the near future.<sup>1</sup> This article considers how this residue of Empire is managed constitutionally, arguing that the answer is to be found in the oft-neglected institution of the Privy Council. The Privy Council, which considered from the perspective of what is called here the 'domestic' constitution – that of the UK itself – is something of a black hole, is doubly central to the management of the residue of Empire. On one hand, the Privy Council is a key formal mechanism of governance (understood broadly) for the OTs, which keeps that governance separate from the institutional apparatus with which students of the domestic constitution are intimately familiar: Parliament, the executive, the domestic courts.

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1 See George Drower, 'A rethink on Britain's dependent territories?' (1989) 78 *The Round Table* 12, 13, identifying a move away from the Foreign Office's policy of allowing independence to those who wanted it while not forcing it on undesiring parties. A few years later Drower predicted that the handover of Hong Kong would prompt the realisation that the remaining dependent territories (as they were then called) 'are going to provide Britain with colonial responsibilities until well into the next century – possibly forever': George Drower, *Britain's Dependent Territories: A Fistful of Islands* (Dartmouth Publishing 1992) x.

Simultaneously, however, the Privy Council acts as a constitutional firewall separating that domestic constitution from the constitution of the residual British Empire. That is, the Privy Council ensures a formal (but not substantive) separation of the domestic and imperial constitutions. For the most part, the judges who decide disputes from the OTs are those who sit in the Supreme Court, but they do so not in that capacity but rather as members of the Judicial Committee of the Privy Council (JCPC). Similarly, within the domestic constitution the territories are legislated for not usually by the Crown in Parliament but rather the Crown in Council: the same individuals who comprise the UK's executive make policy for the territories, but they make it not as ministers of the Crown but as members of the Privy Council. Rather than it being a matter of pure formality, or bare arcana, therefore, a key effect of the ongoing existence of the Privy Council is to create an artificial divide between the domestic and the imperial constitutions which both hinders the normal processes of democratic accountability and works to conceal the residue of the British Empire from the view of those who study the domestic constitution. The implication of this account is that reckoning with the Privy Council and its role in the British constitutional order is both necessary and difficult precisely because to do so involves reckoning with the legacy, and indeed the ongoing reality, of the British Empire.

## 1 The residual empire in the domestic constitution

Before turning to the specific role of the Privy Council, it is necessary to consider the nature of this residue of the British Empire and how the constitution of the UK – the domestic constitution – acknowledges and manages (or fails to acknowledge and manage) this artefact. The residue in question includes 14 OTs: Anguilla; Bermuda; the British Antarctic Territory; the British Indian Ocean Territory (BIOT); British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; St Helena; Ascension and Tristan da Cunha; Turks and Caicos Islands; and the Sovereign Base Areas (SBAs) of Akrotiri and Dhekelia on the island of Cyprus.<sup>2</sup> The position of the territories in the UK's constitutional order is not only inadequate, but works both to exclude them from constitutional consciousness and, when that fails, to mislead as to their constitutional status.

Of the various ministers within the Foreign and Commonwealth Office (FCO), the Minister for the Commonwealth, UN and South Asia has the greatest level of involvement with the territories, enjoying responsibility for all of the OTs except the Falklands, Gibraltar and the SBAs in Cyprus.<sup>3</sup> The Falklands and Gibraltar are the responsibility of the Minister of State for Europe and the Americas.<sup>4</sup> The SBAs, previously said to have been 'run as military bases, not colonial territories' and for that reason 'administered by the Ministry of Defence, and not the Foreign and

2 See Hakeem O Yusuf and Tanzil Chowdhury, 'The persistence of colonial constitutionalism in British Overseas Territories' (2019) *Global Constitutionalism* 157. The fullest account of the legal position of the OTs is found in Ian Hendry and Susan Dickson, *British Overseas Territory Law* (2nd edn, Hart Publishing 2018). The territories are to be distinguished from the three Crown dependencies, which were never colonies: the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man. On the constitutional position of the Crown dependencies, see Royal Commission on the Constitution 1969–1973, *Report*, vol I (Cmd 5460, 1973) and, addressing developments since that report, House of Commons Justice Committee, *Crown Dependencies* (HC 56–I, 2009–2010).

3 FCO, *Minister of State (Minister for the Commonwealth, UN and South Asia)*

<[www.gov.uk/government/ministers/minister-of-state-at-the-foreign-commonwealth-office](http://www.gov.uk/government/ministers/minister-of-state-at-the-foreign-commonwealth-office)>.

4 FCO, *Minister of State (Minister for Europe and the Americas)* <[www.gov.uk/government/ministers/minister-of-state-14](http://www.gov.uk/government/ministers/minister-of-state-14)>.

Commonwealth Office, which administers other Overseas Territories',<sup>5</sup> are now listed amongst the responsibilities of the same minister as are Gibraltar and the Falklands. This division between different ministers not only has the effect of implying a hierarchy between the territories – why are most lumped in with the Commonwealth, UN and South Asia even when located very far from there, but others given a more accurate geographical representation? – but also means that the interests of the OTs qua OTs are not represented holistically within government. Though they are culturally and geographically disparate, with significant and perhaps often overwhelming interests of their own, the OTs are nevertheless a single constitutional phenomenon, and the arrangements by which they are represented within the UK's government obscure that fact. From the point of view of the territories themselves, however, the problem is a more fundamental one: that it is the FCO – having inherited the responsibilities of the Colonial Office – which deals with them rather than, say, the Home Office:

Many people question the very fact that the FCO is the primary interface between the UK and its Territories. This stems from the fact that Montserrat and the other Territories are legally British Territories and populated for the most part by British citizens. As such, Montserrat is neither foreign nor Commonwealth.<sup>6</sup>

The matter is of long-standing concern to the territories but has resurfaced recently in the context of a consideration of the OTs by the Foreign Affairs Committee, in the process of carrying out its first major inquiry into the position of the OTs for more than a decade.<sup>7</sup> It is no merely formal point, but it demonstrates very neatly the manner in which the domestic constitution takes every opportunity to place the OTs out of sight and so, politically, out of mind. On the basis of such sentiments, the Foreign Affairs Committee has recently recommended that the government 'commission an independent review into cross-government engagement with the OTs and the FCO's management of its responsibilities towards them'. The review, it suggested, 'should consider alternatives to the FCO and assess the costs, benefits and risks associated with moving primary responsibility for the OTs away from the FCO'.<sup>8</sup>

This, though telling, is by no means the only problem in relations between the centre and the periphery. The Westminster Parliament, though no longer thought of as an imperial parliament, continues to enjoy absolute legislative power over the territories, even those in which there exist domestic democratic institutions. Though it 'tends' only to legislate in areas such as national security and foreign affairs (described by the Foreign Affairs Committee, in a misleading allusion to the modern devolution settlements, as 'reserved' to the UK), there is no legal limit upon Parliament legislating upon those topics which are, by contrast, 'devolved'. It will though normally do so only when the OTs in question consent to it doing so.<sup>9</sup> As with the more constitutionally prominent question of the relationship between the Westminster Parliament and the devolved administrations within the UK, much tension is missed by a bare statement of this position. The key modern example is the Sanctions and Anti-Money Laundering Act 2018, which permits

5 FCO, *The Overseas Territories Security, Success and Sustainability* (Cm 8374 2012) 117.

6 Premier of Montserrat, quoted in House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the Relationship* (HC 1464, 2017–19) [9]. Not all the OTs are in agreement: [11].

7 For the previous report, see House of Commons Foreign Affairs Committee, *Overseas Territories* (HC 147-I, 2007–2008). See also FCO (n 5).

8 House of Commons Foreign Affairs Committee (n 6) [21].

9 Ibid [26].

the Foreign Secretary to impose upon the territories (by order in council) publicly accessible registers of beneficial ownership should the territories fail to establish such register themselves by the end of 2020.<sup>10</sup> This, it has been noted, is a measure which is understood differently by the UK and the territories, with the former arguing that what the latter see as a purely internal matter in fact implicates issues of both foreign policy and national security.<sup>11</sup>

Even when the system operates without controversy, however, there is of course a major difference between the devolved nations and regions and the OTs. The people of the former are represented in the Westminster Parliament which retains ultimate sovereignty over them, while the latter are not represented either directly or indirectly.<sup>12</sup> This too is, predictably, a source of frustration for the territories:

The Overseas Territories have no direct representation in Parliament which has ultimate authority over its affairs and can pass any law that can impact the Overseas Territories disproportionately ... A modern relationship requires each OT with a representative government to have direct representation in a body that, until independence is obtained, can make any law it pleases. There was great support for the Overseas Territories legislatures to have a veto power over laws passed by the British Parliament affecting them directly in the same way that English MPs have a veto power over laws passed affecting England.<sup>13</sup>

This reference to the ‘English votes for English laws’ system effectively sets the bar even higher than does implicit analogising with the position of the devolved institutions. MPs representing, say, Scottish constituencies enjoy (unlike those representing England) no ability to veto within the parliamentary process a hypothetical Bill relating to devolved matters in Scotland. But no matter where exactly the bar is set, the basic point is that there is no need to decide exactly how to balance the views of those representing the interests of the periphery against the views of those representing the interests of the centre within the legislative process, for as things stand the former are not formally represented at all.<sup>14</sup> There is no logical or practical bar to such inclusion, which occurs in other post-imperial states.<sup>15</sup> But nor is there any serious suggestion that this might be done, in the short term or at all. The result is that the political concerns which are taken up by the UK are not necessarily those which are most important to the people of its territories, while there are

10 Sanctions and Anti-Money Laundering Act 2018, section 51. The Foreign Affairs Committee recommended that the same path should be taken as regards same-sex marriage if necessary: House of Commons Foreign Affairs Committee: (n 6) [73].

11 House of Commons Foreign Affairs Committee (n 6) [27]–[33].

12 House of Commons Foreign Affairs Committee (n 7) [119]–[126].

13 Leader of the Opposition of the British Virgin Islands, cited in House of Commons Foreign Affairs Committee (n 6) [35]. See the discussion in Peter Clegg, ‘The United Kingdom and its Overseas Territories: no longer a “benevolent patron”?’ (2018) *Small States and Territories* 149, 158–160.

14 See the comments in response to a political scandal in the Turks and Caicos Islands: ‘The longer-term recommendations contained in the Report seek to limit the scope for ministerial abuse by reducing the discretionary powers of ministers and buttressing the existing mechanisms for holding ministers to account, such as parliamentary oversight committees, while at the same time introducing new mechanisms of accountability in the form of a Freedom of Information Act and an Integrity Commission. There is, however, something ultimately paradoxical about seeking to strengthen parliamentary democracy within a governing framework where a number of the most important powers are reserved to an unelected and locally unaccountable governor who acts at the behest of the UK Government ...’ Derek O’Brien and Justin Leslie, ‘Something rotten in the Turks and Caicos? Britain and its Caribbean Overseas Territories’ [2010] *Public Law* 231, 239.

15 For example, ‘Overseas France’, which makes up more than 4% of the French population is represented by a total of 27 Members of the National Assembly and 21 senators.

occasional projects to impose rules on the territories without regard to their local popularity.<sup>16</sup> These sorts of decisions will always have an arbitrary appearance while the processes by which the OTs can feed into central decision-making are so weak. Though the UK presents itself as a post-imperial state, it retains a degree and form of control over the territories that suggests otherwise.

In its recent report on the OTs, the Foreign Affairs Committee made only the most anodyne of recommendations in response to this absence of political representation, saying that:

... the time is right to give serious consideration to establishing a formal mechanism by which members of the Foreign Affairs, Justice, International Development, EFRA and other relevant Committees are able collectively to scrutinise the UK Government's administration of, spending on and policies towards the OTs.<sup>17</sup>

While such a move might – or might not – improve the quality of accountability for the administration of the OTs to Parliament, it would do nothing to address the fact that the residents of those territories, though mostly British citizens, are not represented either directly or indirectly in a Parliament which enjoys absolute legal sovereignty over them. This is of particular concern given that in many of the OTs those who do not possess some legal status particular to each territory – often described generically as ‘belongership’ – will not be entitled to vote in elections to the territories’ representative institutions, even when they are British citizens or British OT citizens who are permanently resident in the OT in question.<sup>18</sup> Those who are not ‘belongers’ are doubly disenfranchised, represented neither in the institutions which exercise day-to-day control over them nor in those of the UK in which ultimate sovereignty resides. Such deviation from the precepts of democracy would not be tolerated within the domestic constitutional order.

The overall effect, therefore, is that the position of the OTs within the institutions of the domestic constitution is, though in the modern era mostly stable, undeniably inadequate. From the point of view of the territories, this is unfortunate: their interests are poorly represented within both the executive and legislative branches of the UK, notwithstanding that the power it enjoys over them. Though some in the territories would prefer to resolve the anomaly by acquiring greater autonomy rather than by acquiring greater input into the decision-making of the imperial centre, desire for full independence from the UK is mostly limited and such independence is unlikely to be forthcoming.<sup>19</sup> Some of the territories are unviable as independent states, while others are of such strategic importance that for the UK to voluntarily cede sovereignty is unthinkable.<sup>20</sup> And the territories are not the helpless victims of the UK: though there is in general no

16 For a recent consideration of the relationship between the UK and the OTs, see Clegg (n 13). An earlier period is considered in Peter Clegg and Peter Gold, ‘The UK Overseas Territories: a decade of progress and prosperity?’ (2011) *Commonwealth and Comparative Politics* 115.

17 House of Commons Foreign Affairs Committee (n 6) [38].

18 See the discussion in *ibid* [64]–[67] and, before then, House of Commons Foreign Affairs Committee (n 7) [269]–[275].

19 The Foreign Affairs Committee in 2008 noted that only in Bermuda – where independence was rejected in a 1995 referendum – did the government favour independence: House of Commons Foreign Affairs Committee (n 7) [32].

20 See FCO (n 5) 22 outlining some of the ways in which the OTs ‘contribute to the security interests of the UK and our close allies’. The most obvious example is of course BIOT, discussed further below.

funding of the OTs, most benefit quite substantially in more or less tangible ways from the relationship. From the perspective of the UK the effect of the status quo – the incorporation of the OTs into the domestic constitution either as though they were foreign bodies (made the responsibility of the FCO and given no representation in the legislature) or not at all – is similarly mixed. The UK is capable of exercising authority over these territories without allowing them any direct input into its decision-making and, indeed, does so where the circumstances are thought to demand it. At the same time, however, the OTs are willing and able to make use of the practical latitude which they enjoy in order to act in ways which are potentially harmful to the interests of the UK: the tax haven status of several of the territories – viewed by them as a matter of purely internal significance – is the obvious example. In such a way, the status of the OTs reveals itself to be double-edged, disadvantaging not only the territories but also at times the metropole.

For present purposes, however, what matters are not the questions of which set of interests are to be privileged and where the balance of convenience lies in relation to the territories individually or collectively. What matters are the reasons for which these questions go mostly unasked; that is, the ways in which the UK is able to remain an Empire without being required to acknowledge that fact directly within its constitutional order. Central to this situation is the institution of the Privy Council, the constitutional firewall which operates to separate, more or less successfully in its different guises, and in appearance much more than in reality, the domestic constitution from its imperial counterpart.

## 2 The Privy Council

The Privy Council is a black hole at the centre of the British constitution. Any attempt to explain its functions tends towards vacuity. For example, the *Cabinet Manual* informs the reader that the Council ‘advises the Sovereign on the exercise of the prerogative powers and certain functions assigned to the Sovereign and the Council by Act of Parliament’.<sup>21</sup> This practical nothingness contrasts with, and may in fact be thought to reflect, the richness of the Privy Council’s history. That history is longer than that of most of the institutions which have usurped it within today’s constitution, the Council being a continuation of the Royal Council – the *Curia Regis* – through which governmental power was exercised in the years following the Norman Conquest.<sup>22</sup> Dicey, noting that the role and functions of this Council had been characterised in a range of – to modern eyes – inconsistent ways, argued that such ‘apparent inconsistency ... vanishes on closer inspection, and throws great light on mediaeval history’:

For the ‘Curia Regis’ possessed every attribute which has been ascribed to it. It was the executive. It was also a Law Court. It certainly took part in acts of legislation. Still, at the time of its existence it was no anomaly, since to the men of the eleventh century, not the combination but the severance of judicial and executive powers would have appeared anomalous.<sup>23</sup>

Nowadays, and as discussed further below, the most prominent element of the Privy Council is one which has but a minor domestic significance: the decision-making by the

21 Cabinet Office, *The Cabinet Manual: A Guide to Laws, Conventions and Rules on the Operation of Government* (October 2011) [1.10].

22 On that history, see James Fosdick Baldwin, *The King's Council in England during the Middle Ages* (Clarendon Press 1913) and Edward Raymond Turner, *The Privy Council of England in the Seventeenth and Eighteenth Centuries, 1603–1784* (2 volumes, Johns Hopkins University Press 1927–1929).

23 A V Dicey, *The Privy Council – the Arnold Prize Essay 1860* (MacMillan & Co 1887) 7.

JCPC, mostly in the context of appeals from a (small, and falling) number of mostly Commonwealth jurisdictions.<sup>24</sup> But the judges who sit on the Committee are only a tiny minority of the Privy Council, whose members number upwards of 600.<sup>25</sup> They include ministers of the Crown and senior members of other political parties at Westminster,<sup>26</sup> the leaders of the devolved governments,<sup>27</sup> judges of the courts of the various UK jurisdictions,<sup>28</sup> and a small number of Bishops of the Church of England.<sup>29</sup> It is this first category of members which gives the Privy Council much of its ongoing constitutional significance, for as a matter of constitutional technicality the Cabinet – that ‘hyphen which joins ... buckle which fastens, the legislative part of the state to the executive part of the state’<sup>30</sup> – is a committee of the Privy Council.<sup>31</sup> Though this overlap is of course unusual if not aberrational, each of these categories is – allowing for certain arcane features of the British constitutional order – recognisable as belonging to the three standard branches of the state: legislature, executive and judiciary. In this sense, it is tempting to simply treat the Council as a legacy of a pre-modern constitutional order, reflecting – as the *Curia Regis* did for Dicey – a period in which the different branches had yet to develop the separation characteristic of enlightenment constitutionalism, and notable – if at all – for demonstrating the singular whole out of which our contemporary, partial, institutions grew. And, certainly, this role is not to be discounted: the Privy Council’s continuing existence does indeed act to remind modern observers of the fact that whatever rationalist ordering is perceptible within our constitution was not there to begin with and has as often been imposed on it from outside as emerged organically from within.

But several elements of the Council’s membership demonstrate that the institution’s present – like its past – goes further than that. One is that the Council is not merely an external source of advice to the Crown, in whose name power is exercised, but includes within its composition both members of the Royal family<sup>32</sup> and members of the Royal household, most notably the Queen’s Private Secretary.<sup>33</sup> Another, more relevant for

24 Amongst the best guides to the contemporary work of the JCPC is the JCPC itself (see JCPC, ‘Role of the JCPC’: <[www.jcpc.uk/about/role-of-the-jcpc.html](http://www.jcpc.uk/about/role-of-the-jcpc.html)>) and, though now slightly out of date, Andrew Le Sueur, *What is the Future for the Judicial Committee of the Privy Council?* (Constitution Unit 2001). On the history of the JCPC, see P A Howell, *The Judicial Committee of the Privy Council 1833–1876: Its Origins, Structure and Development* (Cambridge University Press 2008) and Thomas Mohr ‘“A British Empire court”: a brief appraisal of the history of the Judicial Committee of the Privy Council’ in Anthony McElligott et al (eds), *Power in History: From Medieval to the Post-modern World* (Irish Academic Press 2011).

25 See the full list on the Privy Council’s website: ‘Privy Council members’ <<https://privycouncil.independent.gov.uk/privy-council/privy-council-members/>> It is usually noted that the Privy Council is summoned in its entirety on only two occasions. One is the demise of the Crown and the succession of a new monarch, for which an Accession Council takes place. The other is the announcement by a monarch of his or her engagement, which last took place on 23 November 1839 when Queen Victoria announced her engagement to Prince Albert of Saxe-Coburg and Gotha.

26 See *ibid.*

27 See *ibid.*, which includes Nicola Sturgeon (First Minister of Scotland) and Mark Drakeford (First Minister of Wales).

28 *Ibid.*, including a number of senators of the College of Justice, amongst them Lady Clark of Calton, Lord Clarke, Lady Cosgrove, Lady Dorrian etc.

29 *Ibid.* All those privy counsellors in this category appear to be bishops or archbishops of the Church of England who sit or have sat in the House of Lords.

30 Walter Bagehot, *The English Constitution* (Oxford University Press, reissue 2009) 13 (italics omitted).

31 As acknowledged by the *Cabinet Manual*: ‘Cabinet is the executive committee of the Privy Council.’ Cabinet Office (n 21) [1.14].

32 Amongst them the Duke of Edinburgh, the Prince of Wales, the Duchess of Cornwall and the Duke of Cambridge: Privy Council (n 25).

33 Currently Edward Young CVO. *Ibid.*

present purposes, is that the Privy Council's membership reflects more clearly than perhaps any other institution of the domestic constitutional order the UK's imperial past. Amongst the more than 600 members are a number of senior judges and current or former political actors from Commonwealth states. One survey suggests that perhaps 10 per cent of the members fall into this category.<sup>34</sup> An exhaustive list of those who do so is, however, impossible to provide as the Privy Council provides only a list of names in, remarkably, alphabetical order by first name (or, where a counsellor is one form of peer or another, by his or her title).<sup>35</sup> The effect is that, though the names are available, even the most minimal sense of who many of these people are, and why they have been appointed to the Council requires further, sometimes even extensive, research. Amongst those who represent the Commonwealth in one form or another are Ezekiel Alebua, former Prime Minister of the Solomon Islands; Doug Anthony, former Deputy Prime Minister of Australia; Owen Arthur, former Prime Minister of Barbados. Membership of the Privy Council appears to be limited to political figures from the Commonwealth realms, not (for obvious reason) encompassing the Commonwealth republics. Not all of the former, however, appear to be so represented.

It was noted above how fully the domestic constitution excludes the OTs, acknowledging them – if at all – only in their capacity as 'other' and not as part of a persistent empire. Further evidence of this orientation is to be found in the fact that there does not appear to be direct or systematic representation of the OTs in the Privy Council, though, for the same reason that it is difficult to know exactly who is a member of the Privy Council, it is difficult to be certain that none of the many hundreds of members was appointed in whole or in part due to his or her relationship with one or another of the OTs. This intensifies rather than diminishes the problem which we have identified, for – as we shall see below – of the domestic institutions it is the Privy Council which exercises the most frequent legislative authority over the OTs. To be clear: independent countries which have chosen to retain the monarch as head of state are (mostly) represented on the Council, but territories for whom it makes law are not. They thus have neither direct nor indirect representation within the bodies, Parliament and Privy Council, which still in large part govern them. The Privy Council, it suffices now to note, is an institution of the UK's constitution, but one which – unlike the domestic institutions which are an outgrowth of it, and which in the modern world mostly obscure it – bears, if subtly and without prominence, the marks of the UK as an imperial power. We see this in a number of ways, almost none of which are – not, it is submitted, coincidentally – prominent in the modern constitutional literature, within which the Privy Council features either little or at all.

Though the Privy Council is poorly served by that literature, we can extract from it a number of idealised ways of thinking about the body and its contemporary significance. One comes from the work of Dicey. Like the majority of the texts which follow it, Dicey's *Introduction to the Study of the Law of the Constitution* contains no extended discussion of the Privy Council, but Dicey had written, early in his career, an essay on the body, which won the Arnold Prize in 1860.<sup>36</sup> Though the essay is largely historical, Dicey commends the study of that history, which is 'nothing else than the account of the rise of all the greatest institutions which make up our national constitution':

34 David Rogers, *By Royal Appointment: Tales from the Privy Council – The Unknown Arm of Government* (Biteback Publishing 2015) 291.

35 Privy Council (n 25).

36 Dicey (n 23). In a preface, explaining that he has not updated the essay for its republication, Dicey terms it 'a youthful and immature attempt to sketch out the development of a great institution'.



Our Parliaments and our Law Courts are but the outgrowth of the Council. In its history is seen how not only institutions but ideas assumed their modern form. As we study the gradual separation of judicial, political, and administrative functions, it is perceived that the notions of 'Law,' 'the State,' and 'the Government,' which now are so impressed on men's minds as almost to bear the delusive appearance of innate ideas, themselves grew up by slow degrees; and that the annals of a past age can never be understood till men have ceased to apply to them terms and conceptions which are themselves the product of later periods.<sup>37</sup>

This seems true – the Privy Council is the seed from which much, if not all, else grew – and so one question for constitutional lawyers is why it still exists within our constitution: a very obvious relic of constitutional history but not one which has yet been discarded altogether, nor even reduced to an entirely formal role.

Recent literature has paid significant critical attention to the imperial context of Dicey's writings.<sup>38</sup> Considered in that light, it is notable that, though the history of the Privy Council is told by him up to the reign of William IV, Dicey has little to say of its involvement in the governance of the British Empire, though such governance was in the past a major aspect of its work, much of it through that committee known more formally as the Lords of Trade and Plantations and more commonly as the Board of Trade.<sup>39</sup> Other leading considerations of the modern domestic constitution make little if any reference to the Council, though it has often been suggested as a possible solution to some new or newly apprehended constitutional dilemma. J D B Mitchell, for example, argued that the Privy Council ('and I emphasise that I do not mean the Judicial Committee of the Privy Council') should be given a new administrative jurisdiction, like that of the French *Conseil d'Etat*, in recognition of the weakness of parliamentary control of administration.<sup>40</sup> Tony Benn had earlier argued that it should replace the House of Lords.<sup>41</sup> More recent discussion considered whether the monarch, in granting royal assent to Bills passing both the House of Commons and the House of Lords, was acting on the

37 Ibid 146–147.

38 See Dylan Lino, 'The rule of law and the rule of empire: A V Dicey in imperial context' (2018) 81 *Modern Law Review* 739 and 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36 *Oxford Journal of Legal Studies* 751.

39 See the overview in H E Egerton, 'The seventeenth and eighteenth century Privy Council in its relations with the colonies' (1925) 7 *Journal of Comparative Legislation and International Law* 1. The Board of Trade, having been largely dormant in the second half of the twentieth century, was convened once more in 2017, though to no obvious effect.

40 'It is I believe necessary to start at that level for a variety of reasons. First, that it is essential that any new body should be a United Kingdom tribunal, and at that level any difficulties founded upon the Acts of Union would be overcome ... Secondly, since the court will in some senses be a novelty, it is necessary to start it off sufficiently high up the tree to give it strength. To start lower would be to ensure that the enterprise were still-born. Thirdly it is likely that to start it there would be to increase the chances of acceptability by the civil service. Fourthly, by locating it there it would be easiest to secure the mixed composition of lawyers, administrators and others which is essential.' J D B Mitchell, 'The constitutional implications of judicial control of the administration in the United Kingdom' (1967) 25 *Cambridge Law Journal* 46, 55.

41 Anthony Wedgwood Benn, *The Privy Council as a Second Chamber* (Fabian Society 1957). Benn, at 18, noted that the 'characteristic of public service' was one of those elements which distinguished the Privy Council from the House of Lords. Because membership of the Privy Council was much more common amongst peers of first creation than amongst those holding inherited titles, turning the Council into the second chamber meant that 'all but a very few peers now sitting by their inheritance would have been swept away, and the exceptions would all be men who had earned their Privy Councillorship by public service'.

advice of the executive of the day or the Privy Council, or neither.<sup>42</sup> There is then, a sense that when we find ourselves discussing the Privy Council in its contemporary rather than historical role, something must already have gone wrong: we must, by definition, be in the realm of (perhaps slightly fevered) speculation, casting around for a *deus ex machina* by which one constitutional anomaly will resolve the problems caused by another.

All of which is to reaffirm that there is, in the ordinary course of events, a remarkable lack of attention paid to the Council. Post-Dicey, Sir Almeric FitzRoy, Clerk to the Privy Council, published a history of it in 1928.<sup>43</sup> A few years ago, David Rogers, a political advisor (including to William Whitelaw when he was Lord President of the Council), published a book about the Council.<sup>44</sup> That book – by virtue, it would seem, of its sheer novelty (a novelty on which the book trades openly) – was reviewed by Martin Loughlin in the pages of the *London Review of Books*.<sup>45</sup> Loughlin contests Roger's implicit endorsement of 'FitzRoy's claim that the Privy Council triumphantly vindicates Tocqueville's observation that "forms are the fortresses of liberty"':

This kind of Whiggism overlooks the radical change in the Privy Council's function from instrument of monarchical government in a law-framed constitution to instrument of parliamentary government operating through conventional understandings. Tacitus is closer to the mark. The secret of establishing a new state, he says, is to maintain the forms of the old.<sup>46</sup>

That is, the Privy Council has contributed to the emergence of modern democracy by providing a stable form within which the underlying substances has been able to evolve. Though both FitzRoy's and Loughlin's claims are superficially plausible, the length of time between their articulation is indicative of the level of attention paid to the Council by constitutional scholars. The resulting gap in our understanding is perhaps best illustrated by the fact that the Interpretation Act 1978 defines 'The Privy Council' in a fashion so circular as to border on the absurd: it means, we are told, 'the Lords and others of Her Majesty's Most Honourable Privy Council'.<sup>47</sup>

It is perhaps tempting for the domestic constitutional lawyer to simply note this lacuna and move on; to explicitly confine the Privy Council to the realm of the dignified,<sup>48</sup> or to go further and to say that though it is interesting it holds no significance for us as modern constitutional lawyers – we should pay as much attention to it as we do to, say, the Lord Chamberlain, or the Lord Keeper of the Privy Seal. Once the question

42 See Robert Craig, 'Could the government advise the Queen to refuse royal assent to a backbench Bill?' (*UK Constitutional Law Association Blog*, 22 January 2019) and the comments in response, especially that of Sir Stephen Sedley.

43 Almeric FitzRoy, *The History of the Privy Council* (Murray 1928).

44 Rogers (n 34). It is perhaps telling that there is only one index reference for the OTs in the body of the book, and that the discussion to which it refers is in fact a discussion of the Crown dependencies.

45 Martin Loughlin, 'What's it for?' (22 October 2015) 37 *London Review of Books* 29.

46 Ibid.

47 Patrick O'Connor, *The Constitutional Role of the Privy Council and the Prerogative* (JUSTICE 2009) 4.

48 See Peter Billings and Ben Pontin, 'Prerogative powers and the Human Rights Act: elevating the status of orders in council' [2001] Public Law 21, 26 and 27, discussing the designation of prerogative orders in council as 'primary legislation' in the HRA: 'What cannot escape comment, however, is the profoundly arbitrary nature of the application of the Act to some prerogative powers, but not others. It is particularly difficult to justify the amenability to judicial challenge (on human rights grounds) of a declaration of war, or a withholding of a passport, depending on the involvement of the Privy Council – in most other respects a titular, dignified institution of the constitution' and 'what can be more arbitrary than to attribute novel legal significance to the Privy Council, an ancient institution which has hitherto evolved into a largely dignified aspect of the British constitution?'

is considered from the point of view of the UK as an imperial or post-imperial state, however, we see that this temptation must be resisted. Regardless of how it originated, and regardless of what it now means and does not mean for and within the domestic constitution, the Privy Council reflects very directly (perhaps, though nothing turns on it, more directly than does any other aspect of the contemporary constitution) the legacies of the British Empire. To confront the anomalies of the Privy Council is to confront the UK's unambiguous imperial past and, more importantly, its ambiguous imperial present. And so, conversely, the willingness to tolerate the constitutional anomaly of the Privy Council – the fact that rather than seeking to understand it and to mitigate some of its more obnoxious features, we (constitutional lawyers, but also the public more generally) are almost always content to ignore it – indicates the absence of any felt need to confront that legacy. In the following sections I make that case by considering the roles that the Privy Council plays in the governance of the residue of the British Empire, showing – in each case – that the formal institutional distinctions mask a substantive continuity; that the Privy Council, and the imperial constitution of which it forms part, is not a distinct order, but rather the shadow of the domestic constitution.

### 3 The judicial role of the Privy Council

The element of the Privy Council which is most familiar to contemporary observers is the Judicial Committee. Though the Committee was formally constituted only by the Judicial Committee Act 1833, the principle that statute reflects is much older:

The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire ... In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed, and is open to all the King's subjects in those Dominions.<sup>49</sup>

The judicial element of the Council was attested in a variety of other ways: the courts of both common law and chancery were originally elements of the Privy Council, exercising the King's prerogative to dispense justice, and remained that way until replaced by the High Court and the Court of Appeal following the enactment of the Supreme Court of Judicature Act 1873.<sup>50</sup> The 1833 Act, which in creating the Judicial Committee reaffirmed that 'from the decisions of various courts of judicature in the East Indies, and in the plantations, and colonies and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council', does not create a judicial body as we would normally understand it. Rather it perpetuates the prior situation in which the judgment of the JCPC is not in fact a legal determination, but rather advice to the sovereign as to the judgment that should be made.<sup>51</sup> An Act of 1844 created the power 'to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments ... of any court of

49 *Nadan v The King* [1926] AC 482, 491–492.

50 'The Judicial Committee of the Privy Council is basically a court of law, exercising, as I have tried to explain, by delegation the residual powers of the Curia Regis remaining attached to the Crown after the Courts of Common Law and Chancery had been hived off and the jurisdiction of the Papal Curia and various other statutory jurisdictions had been added.' HL Deb 21 April 1971, vol 317, cols 754–72 (Lord Chancellor).

51 Judicial Committee Act 1833, section 3. Minty noted in 1947 that 'for centuries their advice has always been accepted, and the reading of their decision at a Court at St James's Palace some weeks later is a mere picturesque formality': L M Minty, 'The Privy Council: new issues arise in the British Commonwealth' (1947) 33 American Bar Association Journal 1016, 1017.

justice within any British colony or possession abroad'.<sup>52</sup> In an evocative account of the JCPC, Viscount Haldane suggested that its real work was 'that of assisting in holding the Empire together'.<sup>53</sup>

That element of the Committee's jurisdiction which is most prominent is that by which it acts as a court of final appeal for a number of Commonwealth jurisdictions, both monarchies (Antigua and Barbuda, the Bahamas, Cook Islands and Niue (Associated States of New Zealand), Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Tuvalu) and republics (the Republic of Trinidad and Tobago, Mauritius and Kiribati – the jurisdiction in relation to the latter being very limited).<sup>54</sup> Geographically broad and diverse as these jurisdictions are, this represents a significantly lesser reach than was once possessed by the Privy Council: Pollock noted early in the twentieth century that 'no other Court in the world has a jurisdiction of such variety and complexity'.<sup>55</sup> It was 'at its height' in the period following the First World War, 'at a time when almost all the Overseas Territories acquired by Great Britain during the period of her expansion still remained intact as an integral part of the British Empire and when Great Britain had in addition accepted from the League of Nations a Mandate for a number of ex-enemy colonies and possessions'.<sup>56</sup> Though the largest of the Commonwealth states have abolished the Privy Council's jurisdiction thereover – something first made possible by the Statute of Westminster, which provided that henceforth no Act of a dominion parliament would be 'void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom'<sup>57</sup> – what remains is nevertheless a very obvious reminder of the UK's imperial past.<sup>58</sup>

From the perspective of the present study, however, another aspect of the JCPC's work is more directly relevant – that which relates to the UK's OTs,<sup>59</sup> including the SBAs

52 Judicial Committee Act 1844, section 1.

53 Viscount Haldane, 'The work for the Empire of the Judicial Committee of the Privy Council' (1922) 1 Cambridge Law Journal 143, 154. He continued: 'My own view is that it is a disappearing body, but that it will be a long time before it will disappear altogether ... [A]t present we have constant indications that we are a useful body in vast regions where it is not always easy to get a common point of view. Our function is not to claim any fresh rights to interfere, but to act as statesmen should, being willing to help if called in, but not pressing assistance where assistance is not desired.'

54 See JCPC (n 24). There are also a number of – mostly rather arcane – domestic jurisdictions, including (for example) appeals from the Disciplinary Committee of the Royal College of Veterinary Surgeons and appeals from the Court of Admiralty of the Cinque Ports.

55 F Pollock, 'The jurisdiction of the Privy Council' (1906) 7 Journal of the Society of Comparative Legislation 330, 332.

56 H H Marshall, 'The Judicial Committee of the Privy Council: a waning jurisdiction' (1964) 13 International and Comparative Law Quarterly 697, 698.

57 Statute of Westminster 1931, section 2(2).

58 A second of the JCPC's jurisdictions is of constitutional interest, though no special relevance to empire past or present: section 4 of the Judicial Committee Act 1833 permits the monarch (acting, presumably, on advice from the executive) to refer to the Committee 'for hearing or consideration any such other matters whatsoever as His Majesty shall think fit', in which event the JCPC 'shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid'. Though relatively little use has been made of the provision, this sort of advisory jurisdiction is of course wholly (perhaps entirely) distinctive in the UK's legal orders. It provides, a Lord Chancellor once said, 'a convenient method of ascertaining the law when no other jurisdiction is available'. HL Deb 21 April 1971, vol 317, col 769 (Lord Chancellor).

59 Anguilla, Bermuda, British Antarctic Territory, BIOT, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, St Helena, Ascension and Tristan da Cunha, Turks and Caicos Islands.

in Cyprus.<sup>60</sup> Where the Committee's Commonwealth jurisdiction reflects the UK's imperial past, this jurisdiction is better understood as representing its imperial present. Though it attracts far less attention than does the jurisdiction over Commonwealth realms and republics, this element of the JCPC's jurisdiction is by no means marginal. To take first the OTs, the following are figures for the number of cases relating to these places decided between 2010 and 2019:<sup>61</sup>

<b>Year</b>	<b>No of cases decided</b>
2010	8
2011	4
2012	3
2013	13
2014	11
2015	9
2016	11
2017	7
2018	6
2019	8

The number of cases from each OT is as follows:

<b>Overseas Territory</b>	<b>No of cases decided</b>
Anguilla	5
Bermuda	23
British Antarctic Territory	0
British Indian Ocean Territory	0
British Virgin Islands	28
Cayman Islands	14
Falkland Islands	0
Gibraltar	6
Montserrat	2
Pitcairn Islands	1
St Helena, Ascension and Tristan da Cunha	0
Turks and Caicos Islands	9
Sovereign Base Areas of Akrotiri and Dhekelia	1

In 2013, the year with the highest number of decided cases from the OTs, such cases represented more than a third (34) of those decided by the JCPC. This is, it bears

<sup>60</sup> Identified separately by the JCPC: JCPC (n 24).

<sup>61</sup> Figures are my own.

repeating, not a marginal or secondary aspect of the JCPC's jurisdiction – indeed, given the very small populations of most of the OTs, it is probably a much higher per capita recourse to the Committee than is made by any of the Commonwealth states for which it continues to act as a final court of appeal.

But these figures are high not only as a proportion of the JCPC's work. They are high also as a proportion of the work of the UK Supreme Court, which in that same year (2013) decided 81 cases. To spell out the obvious: it makes a certain amount of sense to separate the work of the courts in relation to the 'undivided realm' from that of other states, and so it is not inherently illogical, considered in historical context, to have two bodies doing such similar work. It is, however, less obviously reasonable for the OTs to be dealt with by the latter (the JCPC) rather than by the former (the Supreme Court). Indeed, this might be thought to be the judicial equivalent of the lamented arrangements discussed above, whereby the OTs relate to the UK via the FCO rather than the Home Office. If such a change were made – that is, if appeals from the OTs went to the UK Supreme Court rather than the JCPC – we could crudely estimate that they would in at least some years account for more than 10 per cent of the Supreme Court's work. In such a situation, the ongoing imperial nature of the UK would be far more difficult to overlook than is currently the case. It would be present on the website of the highest court in the land (rather than a separate site) and the cases would be tweeted out by it (the JCPC does not have its own Twitter feed, and the UK Supreme Court's does not routinely tweet about the judgments of its alter ego).

The effect, then, is that the Privy Council acts as a constitutional firewall which separates the UK – the post-imperial state, with a domestic constitution which is post-imperial – from its reality as an ongoing imperial entity. For, of course, these are not in substance two different entities: the same individuals who act as justices of the Supreme Court on one floor of the old Middlesex Guildhall move to a different floor of that same building to act in their capacity as members of the JCPC when deciding cases which arrive from the OTs. The Privy Council is a formal barrier which disguises the substantive identity of the body at work and allows the UK to maintain two constitutions in operation simultaneously: one domestic and another imperial.

#### 4 The legislative role of the Privy Council

The same dynamic which characterises the judicial role of the Privy Council is evident also in its legislative role in relation to the OTs: issues of form work to create an artificial divide, disguising the substantive reality whereby the government of the UK legislates, through the Council, for a residual empire. The starting point is that the territories in most cases have representative institutions of their own. Parliament, however – still an imperial Parliament – retains the unfettered right to legislate for the territories as and when it sees fit, notwithstanding the lack of democratic representation therein discussed above. In practice, it does not often do so. Instead, law is made for the territories by the Privy Council. The formal legislator is not the 'Queen in Parliament' but rather the 'Queen in Council'.

There are two primary forms of legislation for which the Queen in Council is formally responsible. Though both are 'orders in council', one is statutory in nature, the other prerogative.<sup>62</sup> Statutory orders in council are a form of 'statutory instrument' to which

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<sup>62</sup> A separate form of secondary legislation – which can be either statutory or prerogative – is the order of (rather than 'in') council, which is as a matter of law made by the privy counsellors themselves rather than the monarch. Most such orders relate to the regulation of professions in the medical field.

the provisions of the Statutory Instruments Act 1946 apply.<sup>63</sup> The key consequence of being so designated is that statutory instruments must be published. That secondary legislation is a statutory instrument does not in itself determine that it must be laid before Parliament nor the extent (if any) of parliamentary scrutiny that it undergoes, both of which are determined by the parent Act. Though they differ in their conception from other types of statutory instrument – being made by the Queen in Council, usually with the Lord President of the Council and three other of its members present<sup>64</sup> – statutory orders in council do not necessarily raise any great issues of constitutional principle: Parliament, after all, has empowered their making. Nevertheless, the use of such orders to legislate for the OTs – even to provide them with constitutions, which Parliament has in the past not done directly but rather empowered the Crown in Council to do – is deeply unsatisfactory. In most cases the relevant orders in council are not subject to the normal processes of parliamentary scrutiny, and so the requirement that they be printed is the sole obligation.<sup>65</sup> Even in the case of orders in council creating constitutions for the territories, the usual obligation is solely to lay them before Parliament, and that does not apply in all cases.<sup>66</sup> That Parliament is denied the oversight role it would ordinarily play in the making of secondary legislation might be considered less significant in light of modern understandings of how weak is that oversight, both in its negative and affirmative forms,<sup>67</sup> but the principle must be insisted upon. There should be scrutiny, guaranteed by law, and yet the forms of the Privy Council work, very often, to evade that requirement, obscuring a practice that would not be accepted in other circumstances.<sup>68</sup>

63 Statutory Instruments Act 1946, section 1 – the Act applies where ‘power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown’ either ‘by this Act or any Act passed after the commencement of this Act’. Statutory orders in council made under authority which pre-dates the coming into force of the 1946 Act are not necessarily statutory instruments and so are not subject to the requirements of the 1946 Act, but only those of the parent Act (which may in practice be broadly equivalent).

64 Michael Everett, *The Privy Council* (House of Commons Library Briefing Paper CBP7460, 8 February 2016) 14: ‘The Privy Council meets on average about once a month, and these meetings are held in the presence of the Queen. Only current Government Ministers (themselves Privy Counsellors) attend these meetings. The quorum for a meeting of the Privy Council is three Privy Counsellors, although four Ministers usually attend each meeting. One of these is the Lord President of the Council.’

65 See Hendry and Dickson (n 2) 60–63 discussing the various ways in which both the constitutions of the OTs and the statutes under which those constitutions are (mostly) made reserve the legislative power of the Queen in Council.

66 They do not apply to Anguilla or the SBAs: House of Commons Foreign Affairs Committee (n 7) [28]. At [27]–[30] the Committee notes the informal processes which exist in order to permit the Committee sight of constitution orders (but not others) before they are made.

67 See, for example, Adam Tucker, ‘Parliamentary scrutiny of delegated legislation’ in A Horne and G Drewry (eds), *Parliament and the Law* (Hart Publishing 2018).

68 The other issue raised by statutory orders in council relates to the question of when it is considered appropriate to empower the making of statutory instruments which take that form rather than, for example, some other type of secondary legislation. Certain secondary legislative powers invariably provide for the making of such orders – powers, for example, to extend the force of legislation to the Channel Islands or the Isle of Man – but it is unclear what (if any) specific principles account for the decision to employ it elsewhere. One suggestion is that ‘[i]t is more dignified and impressive for an independence constitution, or an instrument giving effect to an extradition treaty or creating new parliamentary constituencies or altering electoral boundaries, to be made by Her Majesty in Council’. Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books 1994) 161, quoted in Everett (n 64) 6. O’Connor glosses this point as meaning that the use of orders in council is ‘purely cosmetic’: Patrick O’Connor, *The Constitutional Role of the Privy Council and the Prerogative* (JUSTICE 2009). Reliance upon statutory orders in council therefore would seem to indicate, in general terms, the constitutional significance of what is being provided for.

The second form of order in council, more significant both for present purposes and from the point of view of constitutional principle, is the prerogative order in council.<sup>69</sup> Such orders do not fall within the definition of statutory instruments in the 1946 Act and so are not subject to the rules as to publication: as discussed further below, they are often not published in a form accessible to the public at large, or even in some cases at all. Nor, being non-statutory in nature, can a parent Act impose procedural obligations upon the legislating body – there is in relation to such orders no parent Act. Prerogative orders in council therefore can and do come into force without having been published by Her Majesty's Stationery Office and without Parliament having been given sight of them, quite apart from being given the opportunity to scrutinise and perhaps even reject them.

The scope of what might be done via prerogative order in council in the UK itself has been severely limited for several centuries. Most authorities trace the limitation to the decision in the *Case of Proclamations* and Coke's dictum that 'the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament'.<sup>70</sup> Proclamations could only go with the grain of the existing law, and not against it.<sup>71</sup> Such orders therefore were – and are – in that sense not always truly legislative. But Coke's dictum, it transpires, applies (at least in its fullest form) only to England and later the UK. As with the rule in *Entick v Carrington*,<sup>72</sup> the great principles of English common law are, it would seem, geographically constrained, and the outside – the OTs included – is constituted as a necessarily inferior 'other'. That is, amongst those few genuinely legislative acts which might still be done by prerogative order in council are – crucially – the making of law for the OTs. Prerogative legislation remains a key tool for the governance of the residual British Empire notwithstanding that it has dwindled almost to nothing within the domestic constitution.

The prerogative encompasses in the first a power to make constitutions for the OTs. This power has been augmented (rather than placed in abeyance) by statute,<sup>73</sup> with the majority of the OTs being subject to constitutions made on the basis of one or the other statute.<sup>74</sup> The points made above about the procedural deficiencies of many statutory orders in council – not required even to be laid before Parliament – apply also to orders in council creating constitutions for those territories where there is no statutory basis for

69 'Prerogative Orders in Council are anachronistic because in substance they are executive legislation made without parliamentary approval or scrutiny.' Richard Moules, 'Judicial review of prerogative orders in council: recognising the constitutional reality of executive legislation' (2008) 67 Cambridge Law Journal 12.

70 *Case of Proclamations* (1610) 12 Co Rep 74. See also *The Zamora* [1916] 2 AC 77. For discussion of these cases in relation to the prerogative, see Glendon A Schubert, Jr, 'Judicial review of royal proclamations and orders-in-council' (1951) 9 University of Toronto Law Journal 69. The implications of this element of *Case of Proclamations* were of course considered in recent times by the Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

71 'These proclamations have then a binding force, when ... they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts, concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary.' Blackstone, *Commentaries*, I, 270.

72 See Paul F Scott, *The National Security Constitution* (Hart Publishing 2018) 270–273.

73 British Settlement Acts 1887 and 1945.

74 Hendry and Dickson (n 2) 14–5.



doing so; where they are, that is, prerogative orders in council.<sup>75</sup> The OTs in this category are Gibraltar and the BIOT. Their constitutions were made solely under the prerogative, with the prerogative to make 'ordinary' law explicitly reserved in the relevant orders. Moreover, a continuing power to legislate by order in council (deriving 'at least in part' from an Act of Parliament)<sup>76</sup> is reserved in relation to all of the territories other than Bermuda and the SBAs.<sup>77</sup> Without such reservation, as we shall see shortly, the creation of representative bodies in a territory would suffice to deprive the Queen in Council of the power to legislate under the prerogative.

To explain briefly the position of Parliament and prerogative as regards colonies: the common law distinguished between those which were settled, to which English law would apply without further action, and those which were ceded or conquered, in which existing laws would apply until changed.<sup>78</sup> Those changes might be made by either Parliament or Crown. In *Campbell v Hall*,<sup>79</sup> Lord Mansfield gave an influential account of the legal position of colonies acquired by conquest, starting from the proposition that a country 'conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain'.<sup>80</sup> He emphasised that, though the King was permitted to legislate for a conquered territory, his legislation was necessarily inferior and subject to limits which did not apply to Parliament:

... if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles ...<sup>81</sup>

In normal circumstances, therefore, a conquered colony was subject to these dual authorities: one absolute and one limited, however slightly and however imprecisely. In *Campbell*, however, Mansfield held that, though the King generally had authority to make laws for conquered territories, he had in respect of Grenada handed it over to a representative assembly and a governor. For that reason, a later attempt to impose taxation via the prerogative was void.<sup>82</sup> The exercise of the prerogative to empower the legislature to make laws for the colony operated as a ratchet, which could be done but not undone by the Crown. Once so empowered, the local legislature could have its power diminished only by the imperial Parliament.

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75 Though as Hendry and Dickson *ibid* at 20 note, this is true also of some constitution orders made under statutory authority, while even those statutory orders which do require to be laid before Parliament need be so laid only after being made and are not subject to either the negative or affirmative procedures.

76 *Ibid* 59.

77 *Ibid* 60.

78 '[I]f an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force ... Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony ... But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.' Blackstone, *Commentaries*, I, 107.

79 *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045.

80 98 ER 1045, 1047.

81 *Ibid* 1048.

82 *Ibid* 1050.

Once a colonial legislature existed, the question necessarily arose of the relationship between its laws and those of England. The basic rule was widely understood to be that colonial laws were void if 'repugnant' to the laws of England, though there was significant uncertainty as to the practical meaning of that rule, and – in particular – whether the law in question included only legislation of the imperial Parliament or encompassed also rules of the English common law.<sup>83</sup> Lord Mansfield's bare reference, in the passage from *Campbell v Hall* quoted above, to 'fundamental principles' had muddled the waters, and judges in some of the colonies were keen to exploit the ambiguity.<sup>84</sup> The difficulty was resolved – in part – by the Colonial Laws Validity Act 1865 (CLVA), whose long title states its intention as being 'to remove Doubts as to the Validity' of the laws in question. The Act, for present purposes, does a number of things. First, it confirms the inferiority of colonial law to the laws of the imperial legislature, whether primary or secondary.<sup>85</sup> From now on, colonial law was void if 'repugnant' to Acts of the imperial Parliament or their equivalent, but not otherwise.<sup>86</sup> Loose and uncertain talk of fundamental principles of the common law was no longer a threat to the validity of laws made by colonial legislatures.

The meaning of the 1865 Act has been explored in a number of cases, most importantly *Bancoult*, which pertains to (what is now) the BIOT. The territory, often known as the Chagos Islands, was famously (and disgracefully) depopulated in the 1960s in order to permit the construction of a US naval base.<sup>87</sup> In *Bancoult (No 1)* it was held that the Immigration Ordinance 1971 by which that depopulation was effected – made under the British Indian Ocean Territory Order 1965, a prerogative order in council – was unlawful. An order in effect exiling the population could not be said to be made 'for the peace order and good government' of the territory.<sup>88</sup> When the government responded with a new order in council – the British Indian Ocean Territory (Constitution) Order 2004 – it argued that prerogative orders in council, being acts of the Queen in Council,

83 See the discussion in Anne Twomey, 'Fundamental common law principles as limitations upon legislative power' (2009) 9 Oxford University Commonwealth Law Journal 47.

84 Many of the doubts were the result of the decision-making of a single judge, Benjamin Boothby, who repeatedly held constitutional laws to be void in accordance with Lord Mansfield's dictum in *Campbell v Hall*: see D B Swinfen, *Imperial Control of Colonial Legislation, 1813–65: A Study of British Policy towards Colonial Legislative Powers* (Oxford University Press 1970).

85 CLVA 1865, section 2: 'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.'

86 CLVA 1865, section 3: 'No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.'

87 See, amongst a voluminous literature, Stephen Allen, *The Chagos Islanders and International Law* (Hart Publishing 2014) and Stephen Allen and Chris Monaghan, *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer 2018). The reason for the depopulation was the construction of a military base, on which see David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press 2011).

88 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* [2000] EWHC Admin 413. It was argued here that the Queen's Bench Division had no jurisdiction to make the order sought, there existing a separate court structure for BIOT in which it could be challenged. The Divisional Court rejected the claim that the Order in Council was an act of the government of BIOT rather than that of the UK, with Laws LJ saying (at [28]) that it represented 'an abject surrender of substance to form': 'Nothing is plainer ... that the making of the Ordinance and its critical provision, section 4, were done on the orders or at the direction of Her Majesty's ministers here, Her ministers in right of the government of the United Kingdom.'

were immune from judicial review. At first instance, the Divisional Court rejected this, holding that the decision to make the 2004 Order 'was in reality that of the Secretary of State, not of Her Majesty' and so could be challenged by way of judicial review 'in the ordinary way'.<sup>89</sup> The CLVA, being concerned only with repugnancy, did not prevent the review of the order on rationality grounds,<sup>90</sup> and the claim that the order was indeed irrational was accepted by the High Court.<sup>91</sup>

The conclusions as to the implications of the 1865 Act were challenged on appeal, where it was argued that the effect of that Act was that an order in council applicable to the colonies could be challenged only on the basis of its repugnancy to an imperial statute and on no other grounds. Crucial here was that the 'colonial laws' whose status was clarified in 1865 were defined in the Act to include 'laws made for any colony ... by Her Majesty in Council'.<sup>92</sup> Sedley LJ was sceptical as to the logic of this inclusion, suggesting that it was a 'fair inference' that orders in council 'were included by the parliamentary draftsman in the definition of colonial laws in s 1 for completeness, since they too were a source of colonial law, with the consequence that they acquired the same limited protection as local colonial statutes'.<sup>93</sup> Nevertheless, the notion of repugnancy was only a live one when the relevant 'colonial law' was first validly made, and so the 1865 Act did not preclude a challenge to the validity of the 2004 Order.<sup>94</sup> Nor did the subject matter of the order – specifically, the fact that it related to colonial governance – in itself preclude judicial review: 'one can readily accept that the colonial use of the prerogative power is for the most part beyond the reach of judicial review, but not that it is always or necessarily so'.<sup>95</sup> In holding that the 2004 Order was unlawful by reason of being an abuse of process, the Court of Appeal took the view that it had been done not in the interests of BIOT, but rather of the UK:

The governance of each colonial territory is in constitutional principle a discrete function of the Crown. That territory's interests will not necessarily be the interests of the United Kingdom or of its allies. This is not to say that the two things are mutually exclusive: they will often, perhaps usually, be interdependent, so that the defence of a colony from attack, and even its use as a base to protect the United Kingdom, may serve both its and the United Kingdom's interests. But that is not the case here ...<sup>96</sup>

On the first point the House of Lords agreed, holding that prerogative orders in council making provision for the OTs are in principle subject to judicial review: the 1865 Act did not immunise them against such review.<sup>97</sup> So, too, it is clear, might statutory orders in council be subject to such review.<sup>98</sup> Nevertheless, the law lords allowed the appeal of the FCO. First, it held, the Crown's legislative power was plenary, not limited by the traditional formulation of 'peace, order and good government'. To the extent that *Bancoult*

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89 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin) [163]. See Richard Moules, 'Judicial review of prerogative orders in council' (2009) Cambridge Law Journal 14.

90 [2006] EWHC 1038 (Admin) [165]–[169].

91 *Ibid* [110]–[122].

92 See Twomey (n 83) 61–64.

93 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498 [26].

94 *Ibid* [30].

95 *Ibid* [46].

96 *Ibid* [67].

97 See Twomey (n 83) 66–70.

98 *R (Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin) and [2009] EWCA Civ 1549.

(*No 1*) had suggested otherwise, it was wrong.<sup>99</sup> Though it was accepted by all the law lords that some rights might be so fundamental as to limit the plenary power of the Crown, the majority held that the right of abode is not such a right. Second, the order could not be invalid for being contrary to the interests of the Chagossian people, for there was no obligation to act on their behalf. 'Her Majesty exercises her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom' said Lord Hoffmann, 'and will act in the interests of her undivided realm, including both the UK and the colony.'<sup>100</sup> What this means in practice is that the interest of the part might be – as they indeed seem to have been – sacrificed in pursuit of those of another part of the whole:

Her Majesty in Council is therefore entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom.<sup>101</sup>

Though the effect of the *Bancoult* litigation is to confirm the possibility of legal challenge to prerogative orders in council as they apply to OTs, much more was lost than won. The decision of the House of Lords demonstrates a number of points. First, the emptiness of even the minimal limits implied by the language – common to the instruments governing all of the OTs – of 'peace, order and good governance'. Second, the poverty of fundamental rights discourse as it applies to those territories – entirely compatible, the majority held, with the depopulation of the islands. Third, and more generally, law might be made for those territories, over the head of their inhabitants, in pursuit of the interests of an 'undivided realm' whose centre of political gravity sits many thousands of miles away. The logic at work in this decision is, palpably, the logic of empire.<sup>102</sup> And the decision in *Bancoult* (*No 2*) – which one would strain to call even a Pyrrhic victory<sup>103</sup> – appears even less edifying once we remind ourselves of the underlying position whereby the rules governing such territories can in many cases be made without prior statutory authority and little or no democratic oversight. There is no democratic oversight in the imperial Parliament at Westminster, and none either in the representative organs of the OT in question (if such things even exist). To reaffirm: the power for the Queen in Council to make laws in exercise of the prerogative is reserved in relation to the majority of the OTs. Such orders in council are subject to no procedural obligations vis-à-vis Parliament, while statutory orders in council are in many cases subject only to the requirement that they be published after being made.

99 [2008] UKHL 61 [50].

100 Ibid [47]. See on this point *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Quark Fishing Limited* [2005] UKHL 57.

101 [2008] UKHL 61 [49].

102 The imperial dimensions of the litigation are brought out by Murray and Frost, arguing that the Chagos litigation 'must be understood in the context of broader jurisprudence on the management of Empire': Tom Frost and C R G Murray, 'The Chagos Islands cases: the empire strikes back' (2015) 66 Northern Ireland Legal Quarterly 263, 265. See also C R G Murray and Tom Frost, 'The Chagossians' struggle and the last bastions of imperial constitutionalism' in Allen and Monaghan (n 87).

103 Mark Elliott and Amanda Perreau-Saussine, 'Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power' [2009] Public Law 697.

The scale of the practice of prerogative legislation is presumably now small. Its extent, however, appears difficult and perhaps impossible to discern exactly, as there are very significant issues relating to the accessibility of prerogative orders in council, including to those most affected by them; issues which of course are a direct function of the procedural void in which they are made. These issues are of such gravity as to perhaps call into question their status as law. Though it is not unique in this regard, the BIOT case is the most egregious example given the appalling treatment of the native people by the UK and the quantity of associated litigation. One study of the case outlines the position as to the accessibility of the relevant legal rules:

There is no official website with authoritative copies of the legislation. The official government website for legislation has a small number of BIOT statutes, but none made under the Royal Prerogative ... The one place that BIOT legislation is published is in the British Indian Ocean Territory Gazette. Once again, the Gazette is not available online. According to the FOI response from the FCO, the current total global distribution list of the Gazette is 20. Of these, 16 go to an emanation of the government. The remaining 4 on the list are all British law libraries ... One copy does go to Mauritius, but it is to the British High Commission there.<sup>104</sup>

Though the point is not always quite so vital as in the context of BIOT, a cursory search will demonstrate that the difficulty of obtaining legislation applies also in the context of the other OTs. The British Library's guide to the research of legislation, for example, says this about prerogative orders in council:

Other instruments, though not SIs, may be included in the annual volumes of these as a kind of appendix. Still others may be issued as parliamentary papers, printed in the London Gazette or reprinted in the British and Foreign State Papers, all of which are indexed. Some may be issued separately but many are unpublished in any form and are available only as original documents at the National Archives, where enrolled copies should be among the chancery records. More recent Orders in Council may be available directly from the Privy Council Office.<sup>105</sup>

The problem is perhaps worse than this account may suggest, for prerogative orders in council often confer the power to make legislation on the governor in lieu of a legislature. Such ordinances are, of course, subject to even more attenuated political control than are the orders under whose authority they are made, with the intervention of the Queen in Council in relation to the latter acting to distinguish what is merely pseudo-democratic from what is entirely undemocratic.

Even if one accepts the need to have broad law-making powers in relation to the OTs, in short, much might be done to improve the status quo. There is, for example, no reason that the making of such legislation could not be placed in its entirety upon a statutory footing. And – the previous example shows – this could easily be done without taking responsibility from the Privy Council, if it was desired to retain the distinction between what is done by the (UK) executive and what is done by the Crown in Council. Nor would it be at all onerous to make prerogative legislation widely and easily available, by – for example – giving it the status of statutory instruments and so making it subject to the relevant rules as to publication. The status quo, whereby new prerogative orders in

<sup>104</sup> Ronan Cormacain, 'Prerogative legislation as the paradigm of bad law-making: the Chagos Islands' (2013) 39 *Commonwealth Law Bulletin* 487, 503–505.

<sup>105</sup> British Library, *Social Sciences Collections Guides: Official Publications: Legislation of the United Kingdom: Subordinate Legislation* (nd) 4.

council are published in a messy, unsearchable form on the website of the Privy Council and older ones have disappeared into a juridical black hole, is completely intolerable. More ambitiously, but still straightforwardly, the making of orders in council, both statutory and prerogative, for the OTs might be made subject to the approval of Parliament. Provision might be made for the involvement, in some form, of the relevant institutions of the territory in question. What the *Bancoult* litigation shows, however, is that such formal improvements, no matter how urgent, will only go so far to improve the status quo. The issue of plenary legislative power for the territories within the prerogative, underpinned by the logic of an undivided realm is more dangerous, for it neatly encapsulates both the vulnerability of the territories and the persistence of the deep logic of empire. The territories are separate when it suits the metropole – as when it comes to such matters as democratic accountability, or basic rule of law standards – but part of a single whole when it does not.

It is also significant that prerogative orders in council are, unlike their statutory equivalent, primary legislation for the purposes of the Human Rights Act 1998 (HRA).<sup>106</sup> On this basis, it was argued in *Bancoult* that, having equal status to Acts of the Westminster Parliament, they were immune from review by the courts. This was – quite rightly – rejected. Whatever their formal status, prerogative orders in council lack the democratic character of Acts of Parliament: though such an order ‘may be legislative in character, it is still an exercise of power by the executive alone’.<sup>107</sup> But the designation of these instruments as primary legislation by the HRA has related consequences: the courts have no power to strike them down, but may only – where appropriate – make a declaration of their incompatibility with the European Convention on Human Rights.<sup>108</sup> Moreover, a prerogative order in council may provide a defence for a public authority which has been required by it – contrary to the general principle found in section 6 of the Act – to act incompatibly with the Convention rights.<sup>109</sup> This notwithstanding that there has been no parliamentary oversight of their content and no minister has been required to make a statement of their compatibility with the Convention, as is required of Bills laid before Parliament.<sup>110</sup> How, but also if, any incompatibility arising from a prerogative order in council is remedied is left to others to determine – not Parliament, but rather the executive, which will be permitted to act unilaterally in framing the remedy and in putting it before the monarch for approval.

Given that one significant element of the use of prerogative orders in council relates to the governance of the OTs, the effect of what appears at first sight to be a relatively technical point about their status under the HRA reveals itself to be the potential source of great injustice, allowing the government of the day to both have its constitutional cake (by not subjecting prerogative orders in council to any form of direct democratic

106 Along with orders in council which amend primary legislation in its ordinary sense or which are ‘made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998’: HRA 1998, section 21(1). See Peter Billings and Ben Pontin, ‘Prerogative powers and the Human Rights Act: elevating the status of orders in council’ [2001] Public Law 21: ‘equating an Order in Council with primary legislation blurs an established boundary concerning the legal sources of the British constitution in a way that raises serious issues of constitutional principle.’

107 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 [35]. See also *The Zamora* [1916] 2 AC 77.

108 HRA, section 4.

109 *Ibid* section 6(2).

110 See O’Connor (n 47) 15: ‘This is a problem of real substance: well beyond mere harmless and quaint ceremonial. It is surely a loophole in our constitutional safety net: a way in which hard law can be directly created, affecting fundamental rights, whilst by-passing Parliament and any prior accountability.’

oversight) and eat it (by nevertheless insulating them from fundamental rights challenges as though they were an expression of Parliament's clear will). It would be reasonable to identify, once more, a certain constitutional contempt for the OTs, again both given effect but also simultaneously hidden from domestic view by the institution of the Privy Council. To repeat the point made above in the relation to the judicial role of the Council: these legislative powers are not being exercised by the Privy Council in its entirety, with its absurdly large and eclectic membership. They are being exercised by the government of the day, the formal constitutional distinction serving most obviously to disguise the substantive continuity. The form of the Privy Council works to create an artificial separation between the domestic order and that which is the residue of empire, hiding the latter from public view and, in the legislative case, providing cover for practices that the domestic constitution would rightly reject.

### Conclusion

It is not for nothing that the Privy Council attracts so little attention in the modern constitutional literature. It is much less important than it once was, having been transcended within the domestic constitution by a series of institutions which might be best understood as outgrowths of it. Its functions within that domestic constitution are residual, and mostly formal. Even those few which are of practical significance are carried out in a fashion which is often considerably less visible, less accessible, than are their analogues in Parliament. But the Privy Council is not only, and not in the first place, an institution of the domestic constitution. Rather, it is better understood, both in the judicial and legislative senses, as representing the beating heart of what remains of the imperial constitution. Here, its functions are no more visible, no more accessible – in fact in many cases they are much less so – but are significantly more important. In relation to some of the OTs, almost all that there is by way of law derives directly from the operation of the Crown in Council and only indirectly, if at all, from that of the Crown in Parliament.

Some of this is not just knowable, but in fact known – though the JCPC's work in relation to the Commonwealth attracts much more attention than does that in relation to the OTs – but other elements are mostly closed off, hidden from the view even of constitutional observers. The Privy Council acts as a constitutional firewall, keeping the residual empire largely separate from the domestic constitution of the UK, even where the allegedly distinct institutions are in substance identical. The result is that the imperial constitution is a shadow constitution, eclipsed by a domestic constitution whose values it would if visible work to undermine. It is for this reason that, notwithstanding its apparent constitutional insignificance, any attempt to remove the Privy Council from our constitutional order, or to turn its relative formality into absolute formality by depriving it of all substantive powers, is highly unlikely. To do so would require the UK to grapple not only with the considerable constitutional legacy of empire, but also with its ongoing reality.

