

British Overseas Territories Law

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BRITISH OVERSEAS TERRITORIES LAW

This is a manual of law and practice relating to the 14 remaining British overseas territories: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; St Helena, Ascension and Tristan da Cunha; South Georgia and South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus; Turks and Caicos Islands; and Virgin Islands.

Most, if not all, of these territories are likely to remain British for the foreseeable future, and many have agreed modern constitutional arrangements with the British Government. This book provides a comprehensive description of the main elements of their governance in law and practice, and of the constitutional and international status of the territories.

It describes their constitutional relationship with the United Kingdom, and goes on to deal with legislative, executive and judicial authority and controls, their sources of law and human rights protection in the territories. It considers the Offices of the Governor and the Law Officers of the Territories. It analyses defence, security and emergency powers in the territories; the nationality and status of people 'belonging' to them; their public finance arrangements; their relationship with the European Union; and the conduct of their external relations. It examines the position of the territories under international law, including their relationship with the United Kingdom in that context and the United Kingdom's international responsibility for them, and contains a description of the means of terminating British sovereignty over them. An Annex sets out key features of each territory in turn, describing briefly its history, status, constitutional structure, courts, law, economy and, in some cases, regional integration.

Foreword

The historian WEH Lecky once said that empires, like the sun, often throw out their most glorious colours when they are on the point of disappearing. In legal terms, it might be said that the twilight of the British Empire has thrown out a more confused, kaleidoscopic range of colours than any sunset could hope to emulate. The ad hoc evolution of the British Empire over a period of centuries, and its piecemeal breakup since the Second World War have between them produced 'an overall pattern of complexity and obscurity'.¹ To modern eyes the problem is further compounded by the fact that many of the legal principles which underlay the development of colonial law, and even the legal vocabulary in which it is expressed, are now so rarely encountered by practitioners that the case-law can seem impenetrable. Indeed, it has even been suggested by one academic commentator that English judges are now so unfamiliar with the applicable principles of colonial law that the House of Lords recently accepted a submission which 'every Colonial or Foreign and Commonwealth Office draftsman during the past 200 years would ... have regarded ... as a theory defunct since the time of William and Mary'.² But in fairness to contemporary judges, even the judiciary of an earlier age which was more accustomed to dealing with arcane questions such as the indivisibility of the Crown sometimes found that the relevant legal concepts tended to 'dissolve into verbally impressive mysticism'.³

There are now only 14 British Overseas Territories, and their combined population is slightly less than that of Norwich. Some, like South Georgia and the South Sandwich Islands, Pitcairn and the British Antarctic Territory, have either a tiny human population or none at all. But others, such as Bermuda, the Cayman Islands and the British Virgin Islands, have substantial populations and thriving economies based on financial services and tourism. And in any event, the mere size of a territory's civilian population bears no relation to the frequency with which legal problems may come before the courts, nor the complexity of the constitutional issues which they may raise. For example, the long-running litigation brought by a number of Chagossians seeking to return to the British Indian Ocean Territory was prompted precisely by the fact that the islands had been depopulated and the islanders were prevented from living where they or their forbears had been born. In recent years there have also been other complex disputes in the English courts covering a range of issues from electoral boundary changes in Bermuda to the capacity in which the Crown acts in relation to South Georgia and the South Sandwich Islands, and from the application to the territories of the Human Rights Act 1998 to the jurisdiction of

¹ K Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens, 1966) 138.

² J Finnis, *Common Law Constraints: Whose Common Good Counts?* University of Oxford Faculty of Law Legal Studies Research Paper no 10/2008, §18, commenting on the decision in *R (Quark Fishing Limited) v Secretary of State for Foreign & Commonwealth Affairs* [2006] 1 AC 529.

³ *Minister for Works for Western Australia v Gulson* (1944) 69 CLR 338, 350, per Latham CJ.

the English Administrative Court in relation to the actions of local officials. Several of these cases have reached the House of Lords, and there has also been the usual diet of Privy Council appeals. The recent suspension of parts of the Constitution of the Turks and Caicos Islands has recently been up to the English Court of Appeal.

It would be wrong to think that the traffic of legal learning is all one way. Many of the British Overseas Territories have enjoyed much longer experience of certain legal issues which have only recently arisen in the UK. For example, Bermuda has had constitutional provisions protecting human rights since 1968, some 30 years before the UK.

Nearly half a century ago, an enormous amount of light was thrown onto the legal position of the colonies and their relations with the UK by a former legal adviser to the Commonwealth Relations Office and the Colonial Office, Sir Kenneth Roberts-Wray. His book, *Commonwealth and Colonial Law* (1966), preserved a wealth of learning which might otherwise have been lost to later generations. However, much has happened in the last 44 years, and the time has long since passed for a fresh study to be published. Here it is. Now, a new generation of practitioners will have cause to thank two Foreign and Commonwealth Office lawyers who between them can boast a unique level of knowledge and unrivalled experience of the British Overseas Territories. Their book wears its learning deceptively lightly, but it is thoroughly comprehensive. It is also written in a clear, lucid style which is more than welcome in such an obscure field of law. The book examines each aspect of the subject in turn—the constitutional arrangements, the sources of law, the office of Governor, the executive, legislative and judicial branches of government, human rights, defence and public order, nationality and belonger status, public finance, external relations and the application to the territories of international and EU law. At the end, there is an invaluable Annex covering each of the 14 territories in turn.

No one is better placed to write this book than Ian Hendry and Susan Dickson. They are to be congratulated and thanked for their industry and insight. This book now stands as a worthy successor to Roberts-Wray in the study of colonial law, and it is unlikely to be equalled for another generation.

Jonathan Crow QC
9 June 2010

Preface

The aim of this book is to describe succinctly the law and practice relating to the British overseas territories. Our deliberate objective is to state what the position is, as we understand it, not what we think it ought to be or whether it is justified. We are legal practitioners, and academic analysis or criticism is better done by others more qualified to do so. Our intention is to try to explain a somewhat misty field of law that has been largely ignored by writers, especially for the benefit of those who have to grapple with the wide variety of problems thrown up in the administration of these British territories. At the same time, we hope that this book will be of general interest to lawyers and others, touching as it does on constitutional, international, human rights, and European Union law, always in the context of the organisation and operation of small jurisdictions in a close relationship with the United Kingdom.

Much of the planning for this book took place on the deck of the Royal Mail Ship *St Helena*, the only means of access to that beautiful island, as we steamed serenely to hold meetings with its people. But the idea long preceded that. Throughout our careers as Foreign and Commonwealth Office legal advisers, learning about the law and practice of the overseas territories was never easy. The great authority on the subject, Sir Kenneth Roberts-Wray's *Commonwealth and Colonial Law*, was published in 1966 and thus, although still immensely helpful on many issues, is inevitably out of date on many others. For the most part we learned from our colleagues and mentors, from our many friends among the Attorneys General and Judges of the territories themselves, and from bitter experience. Something reasonably comprehensive and up to date was plainly required.

The timing also seemed right. Most of the territories have been granted new constitutions during the past five years. We had the privilege of playing a central role in the negotiation of these constitutions, every word of which had to be agreed with territory representatives. The British Overseas Territories Act 2002 restored full British citizenship to the vast majority of the people of the territories, and gave statutory recognition to the modern term 'British overseas territory', rather than the outdated terms 'dependent territory' or 'colony'. Some important legal issues have been considered recently by the courts, and judgments of considerable constitutional significance have been delivered by the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court and the Court of Appeal, as well as by the European Court of Justice and the European Court of Human Rights.

But timing can never be perfect. In the Turks and Caicos Islands, ministerial government and the elected House of Assembly were temporarily suspended in 2009, following a Commission of Inquiry into allegations of corruption, and the 2006 Constitution of that territory is under review. The outcome was not known at the time of publication. In Anguilla, constitutional reform has been discussed sporadically for several years, but whether it will come to anything substantial cannot yet be predicted. Finally, the judgment of the European Court of Human Rights in the

case brought on behalf of the Chagos Islanders is still awaited. These are among the matters we would ideally have liked to cover, but the curtain must come down some time.

We are immensely grateful to the many colleagues from whom we have learned so much, to those who have helpfully commented on parts of the text, and to those who have helped us produce the text, notably Laura Hayman and the FCO librarians. Others have contributed unwittingly by their requests for advice over the years. Our sincere thanks go to our families, especially Annabel Hendry, whose constant patience and encouragement kept us going throughout. Above all, we wish to pay tribute to our friend and colleague in the constitutional review negotiating team, Michael Bradley, who passed away in February 2010. As a former Attorney General of several territories and Governor of the Turks and Caicos Islands, Michael's knowledge and experience were unrivalled, as was his generosity in passing on to us what he knew.

The opinions expressed in this book are our own, and should not be taken as an expression of official government policy. The writing of this book has not been subsidised by any public or private source.

We have tried to state the law as at 15 October 2010, but we have been able to take account of some developments after that date.

IDH
SJD

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