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Roles and responsibilities of Governors in the UK Overseas Territories: Prerogative power and democratic accountability.

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ABSTRACT: Relations between the United Kingdom (UK) and its 14 Overseas Territories (OTs) are long-standing and multifaceted. Each of the ten inhabited OTs has its own parliament or council, and in most cases, a Cabinet; yet, their governance remains based on a 'partnership' with the UK, with a division of responsibilities between them. The role of the Governor in ensuring that this 'partnership' works effectively is crucial. However, there are concerns about how Governors often exercise their powers (deriving authority from Royal prerogative) and whether a 'democratic deficit' exists. They must also navigate the sometimes-competing interests between the UK and the OTs, which can be challenging. This article highlights and interrogates some of these complexities and difficulties at a time when the power and reach of the British Monarch – and thus by association OT Governors – is under scrutiny. In particular, the article considers: the Governor's softer, day-to-day influencing role; their more formal constitutional powers, where they can and do intervene in legislative matters; and if the 'democratic deficit' inherent in the position can be addressed by greater representation of the OTs in the UK Parliament.

Keywords: democratic deficit, Governor, legislative power, Parliamentary accountability, Royal Prerogative, United Kingdom Overseas Territories

Introduction

Relations between the United Kingdom (UK) and its 14 Overseas Territories (OTs) – which have a combined population of around 270,000 people – are long-standing and multifaceted. Each of the ten inhabited OTs – with populations ranging from 68,000 in the Cayman Islands to only 40 in Pitcairn – has its own parliament (or a council in the smaller territories), and in most cases, a Cabinet; yet, their governance remains based on a 'partnership' with the UK. In practice, this means that a Governor (called an Administrator or Commissioner in the smaller territories) is appointed by the Secretary of State for the Foreign, Commonwealth and Development Office (FCDO) to be the head of government in the OT and is responsible for so-called 'reserve matters', such as external affairs, defence, internal security and the police,

the disposal of crown land, and the public service. Responsibility for the management of the OT's internal affairs, such as the economy, education, health, social security and immigration, lies, however, with the OT's own representative institutions.

The role of the Governor in ensuring that this 'partnership' works effectively is crucial: acting not only as a conduit between the OTs and the FCDO, but also playing a pro-active role in the political affairs of the OTs themselves. As Hendry and Dickson (2018, p. 38) explain:

> Governors are charged … with endeavouring to ensure good government in their territories, as well as representing to local politicians the policies of the UK Government. But a Governor must at the same time represent and explain the views of [OT] governments to London.

This is often a difficult balancing act to get right, especially with regard to the Governor's responsibility for reserve matters. While the Governor will usually consult with the OT's representative institutions when exercising their powers with regard to reserve matters, they are not ultimately accountable to these institutions or to the citizens of the OT concerned. Instead, they act upon the instructions of the FCDO, giving rise to what scholars have termed a 'democratic deficit' (Yusuf and Chowdhury, 2019). In the article, we explore this democratic deficit, highlighting and interrogating the complexities and difficulties inherent in the Governor's role, and considering how the problem might be addressed by greater representation of the OTs in the UK Parliament.

The article is in five sections. The first section examines the political context in which Governors function and the tensions that can arise between the Governor and the OTs' representative institutions when there is disagreement about whether an issue truly concerns a reserve matter or about the way in which the Governor proposes to exercise their reserve powers. It explains how the Governor will usually seek to use their influence (or soft power) to achieve consensus with the OTs' representative institutions. It also explains the reasons why this is not always possible, resulting in the deployment by the Governor of their reserve powers.

In the second section, we examine one of the Governor's most controversial reserve powers: the power to intervene in the legislative affairs of an OT. This can be done by withholding assent to, or reserving for the approval of the FCDO, a Bill passed by an OT's parliament; or by enacting legislation for an OT in defiance of the wishes of the OT concerned. We argue that for some OTs there is a worrying lack of clarity and specificity about the conditions that must be satisfied before these powers can be exercised; this can increase the potential for disagreement between the various stakeholders about whether an intervention in an OT's legislative affairs is justifiable.

In the third section, we examine three recent interventions and one case of a refusal to intervene in the legislative affairs of three OTs: Bermuda, British Virgin Islands (BVI) and Cayman Islands. The interventions concerned, respectively, the withholding of assent to the legalisation of cannabis in Bermuda and the BVI, and the introduction of civil partnerships in the Cayman Islands. They merit close examination because it is rare for a Governor to withhold assent to legislation approved by a local parliament and even rarer for a Governor to enact legislation in defiance of the wishes of an OT's representative institutions (the introduction of civil partnerships in the Cayman Islands being the only example known to these authors of the Governor's use of a reserve power in this way). The refusal by the Governor in Bermuda to intervene by withholding assent to legislation banning same sex marriage also merits close

examination because it denied to members of the LGBTQ+ community in Bermuda a right enjoyed by members of the LGBTQ+ communities in the UK.

In the fourth section, we will interrogate the UK Government's' justification for these three interventions, and for its refusal to intervene in the case of same sex marriage in Bermuda, all of which were based primarily on the Governors' responsibility for external affairs and the need to comply with the UK's obligations under international law. As we seek to argue, however, the precise nature of the UK's obligations under international law in each of these cases was highly contestable and the decision whether or not to intervene was demonstrably affected by the wider political context in which the Governor was functioning. It is thus arguable that in the case of the legalisation of cannabis, the Governor acting, as bound to do, upon the instructions of the FCDO, paid insufficient regard to the interests of the OTs concerned; whilst in the case of same sex marriage, the Governor was prepared to sacrifice the rights of the local LGBTQ+ community in order to maintain good relations with the OTs' representative institutions.

In the fifth and final section, we question whether the democratic deficit inherent in the exercise of the Governor's reserve powers in these cases would have been enhanced if the interests of the OTs were better represented in the UK Parliament or whether this would merely serve to further marginalise and emasculate the OTs' own representative institutions.

Governors, politics and the limitations of soft power

The role of the Governor is highly political (with a small 'p') and they face considerable difficulties in attempting to balance the interests of the UK and the interests of the OT in which they are based. This is further complicated by their responsibility for a wide number of 'reserve matters', which usually include external affairs, defence, internal security and the police, the disposal of crown land and the public service. It is, therefore, a fine balancing act for the Governor to maintain between their responsibilities for reserve matters and their role in daily local politics: what Hendry and Dickson (2018, p. 38) describe as the challenge of wearing "two hats".

When dealing with these matters, consultation with local governments and/or legislatures is required; and, although their advice usually does not have to be followed, the preferred route is consensus and persuasion (Clegg & Gold, 2011, p. 122). Because many Governors also chair the Cabinet and are deeply embedded in the day-to-day functioning of the local body politic, they have ample opportunity to exercise their powers of persuasion. However, such proximity to local politicians is something of a double-edged sword since it also increases pressure on Governors to accept local preferences. Their ability to achieve consensus by means of their powers of persuasion is additionally affected by a number of other factors. It can be difficult, for example, for Governors to fully get to grips with their position, being brought in as they are to an existing and often unique political culture. They sometimes lack the necessary experience and skills for this very particular role; their position can be quite isolated; and they can receive significant and sustained pressure from local politicians to "adopt the local line" (Russell, 2000, p. 349). Moreover, OT ministers regularly "encroach on the Governor's areas of responsibility and to challenge his [*sic*] powers" (Taylor, 2000, p. 339).

Doubts about a Governor's political impartiality can also reduce their power of influence. Difficulties can arise, for example, if the Governor's personal feelings about local politicians are revealed. One instance was seen a decade ago when McKeeva Bush, then

Premier of the Cayman Islands, was tried for misusing a government credit card and Governor Duncan Taylor wrote in an email, "I'm not opening any quiet bubbly until [the trial] is confirmed. When it is, there will be a huge sigh of relief across the Cayman Islands, including a loud one from this office" (Whittaker, 2014). Bush was cleared of the charges. In such cases, where a Governor's political neutrality has been compromised, it is often difficult for them to retain the confidence of local politicians and therefore effective day-to-day working relationships. More recently, personal relations between BVI's Governor, Gus Jaspert, and its Premier, Andrew Fahie, deteriorated to such an extent that the BVI Government refused the UK's offer of help to patrol the borders in the early days of the COVID-19 pandemic. When the Governor invited a British Royal Navy vessel, HMS Medway, anyway, Premier Fahie described the situation as "the tyranny that is unfolding through Governor Jaspert on behalf of the British Empire" (Waldinger, 2020).

This close association of Governors with the British Empire and the Crown – being appointed by the Crown and originally deriving many of their powers from the Royal prerogative (Torrance, 2023) – has also left them increasingly vulnerable to accusations of neo-colonialism as the role of the British monarch has come under more critical scrutiny. This has been partly as a result of Barbados becoming a republic at the end of 2021, but also as a result of a conflation of other events: the Windrush scandal, the continuing claim for reparations for slavery, and the UK Government's threat to impose direct rule on the BVI after the findings of the Commission of Inquiry into allegations of corruption, abuse of office, or other serious dishonesty in relation to elected or public officials (British Virgin Islands Commission of Inquiry, 2022). All have highlighted the less savoury and more problematic historical and contemporary features of the UK's colonial and post-colonial role. The death of Queen Elizabeth II in 2022 is a further factor that has sharpened the debate over the position of the British monarchy and the authority that is derived from it. For example, the Caribbean Community (CARICOM) criticised the recommendation of the BVI Commission of Inquiry to impose direct rule through the Governor as "a retrograde step" with parallels to the "colonial period" (CARICOM Today, 2022). In an effort to knock some of the rougher colonial edges off the role of the Governor there have been calls for OT governments to have a say in Governors' appointment, but this has been rejected by the UK Government on the grounds that it could compromise the standing and efficacy of the role (FAC, 2008, paragraph 36).

This debate over accountability and legitimacy is heightened further when Governors use their powers to intervene directly in the legislative affairs of the OTs. Where consensus is not possible and/or push-back from local representative institutions goes beyond the day-to-day rough and tumble of local politics, Governors may feel themselves, or with reference to the UK Secretary of State, that stronger and more formal action is needed.

Power to intervene in the legislative affairs of an OT

OT Governors can intervene directly in the legislative affairs of their respective OT in three distinct ways. The first is through the Governor's power to withhold assent to a Bill approved by a local legislature; the Governor's assent being a necessary pre-condition for a Bill to become law. It is all too easy to presume that the role of the Governor who is, after all the Monarch's representative in each OT, resembles that of the Monarch granting assent to Bills approved by the UK Parliament. There is, however, an important difference. In the UK, the granting of royal assent to legislation is regarded as no more than a formality. By contrast, in all but two OTs (BVI and St Helena), the Governor is empowered by the constitution to refuse assent to Bills approved by the OT's legislature (s69 Anguilla, s35 Bermuda, s79

Cayman Islands, s52(2) Falkland Islands, s33(2) Gibraltar, s74(2) Montserrat and s73(2) Turks and Caicos Islands). In the case of the BVI and St Helena, the Governor cannot refuse assent: they must either grant assent or reserve the Bill for the approval of the FCDO before granting assent (s79(2) BVI and S74(2) St Helena). In those OTs in which the Governor is empowered to refuse assent, no grounds for refusing assent are specified in the constitution, with the exception of Gibraltar where the Governor can withhold assent if a Bill is repugnant to good government, or incompatible with any international legal obligations (s33(2)(b)).

The second way of intervening is through the exercise of the Governor's power to reserve a Bill, which has been passed by an OT's legislature, for approval by the FCDO. Unlike the power to withhold assent, the grounds upon which the Governor may reserve a Bill for the approval of the FCDO are specified in each OT constitution. The most common grounds are that the Bill is inconsistent with the OT's constitution, is inconsistent with the UK's international obligations, or is likely to interfere with the exercise of the Crown's prerogative powers (s57(2) Anguilla, s78(2) Cayman Islands and s73(2) Turks and Caicos Islands). Additional grounds upon which Bills may be reserved for approval by the FCDO include: Bills that determine or regulate the privileges, immunities or powers of the House of Assembly or of its members (in the case of Anguilla, Cayman Islands and Turks and Caicos Islands); Bills that affect any of the Governor's reserved responsibilities over matters such as defence, internal security and external affairs (in the case of Bermuda, s35(2), Cayman Islands, s78(2) and Turks and Caicos Islands, s73(2)); Bills that affect the integrity of the public service (in the case of Cayman Islands, s78(2) and Turks and Caicos Islands, s73(2)); Bills that relate to currency or banking (Bermuda, s35(2)); and Bills that are inconsistent with the Statement of Governance principles (in the case of Turks and Caicos Islands, s73(2)).

The third and final way of intervening concerns the power of the Governor to make laws in all but three OTs: Bermuda (s37), Montserrat (s71), and St Helena (s76). Leaving to one side the power of Governors (or their equivalent) to make laws for the 'peace, order and good governance' of an OT, which is most relevant to those OTs with no permanent or no substantial population, and therefore, no legislature (Sovereign Base Areas of Akrotiri and Dhekelia, British Indian Ocean Territory, Pitcairn, British Antarctic Territory, and South Georgia and the South Sandwich Islands), it is the power of Governors to make laws for OTs with legislatures, and in defiance of the wishes of those legislatures, which is of most interest for present purposes. While the conditions for exercising this power differ between OTs (see s29(1) Antigua, s81 BVI, s54 Falkland Islands and s72 Turks and Caicos Islands), they most commonly include where it is necessary in respect of any of those reserved matters for which the Governor is responsible, such as defence and external affairs (s81 Cayman Islands and s34 Gibraltar). In the case of Anguilla, the Governor can exercise this power where they consider it 'expedient' in the interests of 'public order or good faith' (s29(1) Anguilla). In the BVI, the Governor can exercise this power where they consider it an urgent necessity to comply with international obligations (s81 BVI). In the Cayman Islands and Gibraltar, the Governor can exercise this power where they consider it necessary or desirable with respect to any reserved matters for which they are responsible, such as external affairs, police, internal security, and defence (s81 Cayman Islands and s34 Gibraltar). In the Falkland Islands, the Governor may exercise this power if they consider it to be necessary provided they have informed the Executive Council of their intention to do so (s54 Falkland Islands). Finally, in the Turks and Caicos Islands, the Governor can make laws provided they can justify doing so on one of four grounds: meeting an international obligation; ensuring compliance with the Statement of Governance principles; securing sufficient funding for the operation of the House of Assembly committees, the courts, the Attorney General and the institutions protecting good governance;

or giving effect to recommendations contained in a report of an electoral district boundary commission (s72 Turks and Caicos Islands).

As the foregoing survey demonstrates, there is considerable variation between OTs in terms of a Governor's ability to intervene in an OT's legislative affairs. The usual explanation for this variation is the difference in each OT's particular history, the method of their acquisition (OTs were acquired by four different methods: settlement, conquest, cession, or annexation), and the challenges they face, which are contingent upon their specific circumstances (Clegg et al., 2016). However, even accepting that there is a valid explanation for this variation, there exists a worrying lack of clarity and specificity regarding the grounds that must be satisfied before a Governor intervenes: for example, by withholding assent to legislation, or using their reserve powers to enact legislation which has been rejected by an OT's legislature. As a consequence of this lack of clarity and specificity, there is considerable scope for disagreement between the various stakeholders about whether the grounds relied upon justify a Governor's intervention or even a Governor's refusal to intervene.

Three interventions and one refusal to intervene in the legislative affairs of OTs

Legalisation of cannabis

In Bermuda, two months after winning a second landslide victory in the general election on a manifesto that included the further liberalisation of the existing cannabis laws (which were already more liberal than the equivalent laws in the UK), the Progressive Labour Party (PLP) introduced the Cannabis Licensing Act 2020 to the House of Assembly. The Act provided a legal and regulatory framework for a Bermuda based cannabis industry and would have made the use of cannabis for both recreational and medicinal purposes legal. This would have entailed the creation of a new cannabis regulator to advise the responsible Minister on cannabis policy as well as take charge of the issue of cannabis business licences to participants in a Bermuda cannabis industry. The Bill was approved by the House of Assembly and was referred to the Governor for Royal Assent in March 2022. In May 2022, however, the Governor announced that she was reserving the Bill for approval by the FCDO. Four months later, in September 2022, the Governor announced that she had been instructed by the FCDO not to assent to the Bill on the grounds that the legalisation of cannabis was not consistent with the UK's and Bermuda's obligations under the 1961 Single Convention on Narcotic Drugs and the 1971 Convention on Psychotropic Substances (Government of Bermuda, 2022).

The Governor's refusal to grant assent to the Bill provoked an angry response both within and outside Bermuda. In Bermuda, the PLP had presented the Bill as an attempt to eradicate the stain of colonialism by redressing the disproportionate impact of the continuing criminalisation of cannabis on Bermuda's Black community, and felt that the FCDO's decision was a clear encroachment into domestic policy. This in turn led some to call for independence (Duffy, 2022), although it was not a serious suggestion, but rather a gut response to the UK's intervention. A number of UK MPs were also critical of the UK Government's stance. Labour's Lloyd Russell-Moyle, for example, comparing the Governor's withholding of assent to the Cannabis Licensing Bill with the Governor's assent to legislation prohibiting same-sex marriage (see further below), described it as "hypocritical at best and despotic at worst" (quoted in Duffy, 2022).

At about the same time as Bermuda was attempting to establish a medicinal cannabis industry, BVI's House of Assembly approved the Cannabis Licensing Bill, the provisions of which were broadly similar to the equivalent legislation in Bermuda in terms of the regulatory framework that it proposed. In addition, The Drugs (Prevention of Misuse) Amendment Bill 2020 would have expunged the previous convictions of offenders in possession of less than 50 grams of cannabis. Six months after these Bills had been approved by BVI's parliament and under growing pressure to explain why he still had not assented to the Bills, the Governor issued a statement, on 10th December 2020, explaining the reasons for the delay (Government of the Virgin Islands, 2020). These appear to have been twofold. The first was concern with the establishment of a medicinal cannabis industry. The Governor had received advice from the UK Home Office that before this could happen there would need to be a Memorandum of Understanding between the UK and the BVI Governments transferring responsibility for the licensing of narcotics in the BVI from the Home Office to a newly established authority in the BVI. The second concerned the decriminalisation of possession of small amounts of cannabis. Acknowledging that refusal of assent to a Bill was not a power to be used "lightly", the Governor sought to justify the refusal on the grounds that the Bill required further consideration "at the most senior levels in London in order to reassure the people of BVI and international partners" (Government of the Virgin Islands, 2020). The Governor did, however, recognise the importance of the medical cannabis industry and the opportunities it offered in terms of diversifying the BVI's economy as well as creating jobs and growth, and ended his statement on an optimistic note, expressing the wish that both Bills could receive assent soon (Government of the Virgin Islands, 2020).

Notwithstanding, consideration of the Cannabis Licensing Bill was quickly overtaken by the appointment, in January 2021, of the Commission of Inquiry. The subsequent report, published in April 2022, was highly critical (British Virgin Islands Commission of Inquiry, 2022), and precipitated a period of significant political upheaval. As a consequence, it was not until January 2023 that the (new) Premier of the BVI was able to announce that, following talks with the FCDO, a way forward had been found and that the BVI Government would be "proceeding to put the necessary regimes in place" for the establishment of a medicinal cannabis industry (BVI News, 2023). There have, however, been no further announcements at the time of writing, and neither the BVI nor the Bermuda governments have been given the green light for their plans to legalise cannabis use for other purposes.

Civil partnerships

In 2019, the Grand Court of the Cayman Islands, in *Day and Bodden v Governor of the Cayman Islands* (unreported but available on file with authors) held that Cayman's Marriage Law, which defined marriage as a union between a man and a woman, violated the Constitution's prohibition of discrimination on the grounds of sexual orientation when read in conjunction with multiple, overlapping rights under the Constitution; in particular, the right to a private and family life as guaranteed by s9. The Grand Court additionally ruled that the Marriage Law also violated Article 8 of the European Convention on Human Rights (ECHR), which is identical to s9, and which has applied to the Cayman Islands since the ECHR was applied to all of the UK's permanently inhabited OTs (with the exception of Pitcairn) in 2012 (Loft, 2023).

The judgment was greeted with dismay by religious groups opposed to same-sex marriage, who held demonstrations outside the steps of the local Legislative Assembly; and by members of the Legislative Assembly itself who called not only for the removal of the Chair of the Human Rights Committee for publicly supporting the Grand Court judgment, but also the deportation from the Cayman Islands of one of the legal team acting on behalf of the applicants in the case. Faced with this barrage of criticism of the judgment of the Grand Court, the Government of the Cayman Islands wasted no time in filing an appeal. The appeal was, however, only partially successful. On the one hand, the Cayman Government succeeded in having the Grand Court's ruling on the need to make provision for same-sex marriage overturned, on the basis that the European Court of Human Rights (ECtHR) had ruled in *Schalk and Kopf v Austria* (2010-IV Eur. Ct. H.R. 409) that the ECHR did not impose a positive obligation on States to make provision for same sex marriage. On the other hand, the Court of Appeal also held that, based on the ECtHR's ruling in *Oliari v Italy* (Applications nos. 18766/11 and 36030/11, 2015-IV Eur.Ct. H.R. (Grand Chamber)) with regard to Article 8 ECHR and the rights of same sex couples, the Cayman Government had a positive obligation to introduce legislation providing for civil partnerships which would have the equivalent legal protection to marriage.

Despite the Court of Appeal's ruling on the need for the Cayman government to act "expeditiously" to implement the necessary legislation, it was a further eight months before the Domestic Partnership Bill was finally placed before Cayman's Legislative Assembly, only to be promptly rejected by an overwhelming number of members of the Legislative Assembly, the Premier having released his ministers from the convention of collective responsibility. This meant not only that the Cayman Islands Government was in breach of its obligations to abide by the ECHR, but also that the UK Government was answerable in respect of any proceedings which might be brought before the ECtHR. In the Governor's view, this was a reserve matter for which he was responsible under s55(1) (b) of the Cayman Islands Constitution, which specifically allocates responsibility for external affairs to the Governor. Accordingly, having consulted with the Premier, and having informed the FCDO that there was no likelihood of the Cayman Legislative Assembly enacting the necessary legislation, the Governor was instructed by the FCDO to exercise his reserve powers under s81 of the Constitution and approve the Bill (now renamed the Civil Partnership Law). The legality of the Governor's decision to exercise his powers under s81 was subsequently challenged in judicial review proceedings, *Anglin v Governor of the Cayman Islands* (Kattina Anglin v Governor of the Cayman Islands CICA (Civil) Appeal No.6 of 2022) (unreported, but available on file with authors); but the challenge was rejected by both the Grand Court and the Court of Appeal.

Same-sex marriage

Though, generally speaking, a Governor's decision not to intervene in the legislative affairs of an OT might be viewed positively as a sign of respect for the OT's autonomy, this may not be so where the refusal to intervene impacts on the fundamental rights of the OT's citizens, as occurred in Bermuda in 2018. On this occasion, the Governor refused to withhold assent to legislation which was designed to reverse the ruling of Bermuda's Supreme Court in the case of *Godwin and De Roche v Registrar General* (Supreme Court of Bermuda Civil Jurisdiction 2016 No. 259), which had legalised same sex marriage. Having been elected on a manifesto pledge to reverse the ruling in *Godwin,* the incoming PLP wasted no time in securing approval of the Domestic Partnership Act 2018 ('DPA') which explicitly provided that: "Notwithstanding anything in the Human Rights Act 1981, any other provision of law or the

judgment of the Supreme Court in *Godwin and De Roche*, a marriage is void unless the parties are respectively male and female".

In place of same sex marriage, the DPA made provision for the introduction of civil partnerships. The Governor's decision to grant assent to the DPA was subject to considerable criticism in the UK Parliament. One of the fiercest critics was the Labour MP, Chris Bryant, who described the DPA as "a deeply unpleasant and very cynical piece of legislation", before adding:

> In all the history of legislation, I have never seen a measure [the DPA] that so clearly declares from the outset that it is inconsistent with all the other laws in the land, including the Human Rights Act, the Constitution, and the judgment of the Supreme Court (Hansard, 2018, column 648).

A number of MPs also pointed to the damage that would be done to the UK's international reputation as a champion of equality and fundamental rights if the Governor assented to the DPA (Hansard, 2018, column 654). As Bryant observed, it would diminish the UK's authority when it sought to convince countries like Russia, India, Pakistan or Indonesia to respect the rights of LGBTQ+ people, as such countries were likely to respond by pointing out that: "The first territory in the world to repeal same-sex marriage is British Bermuda, and they did it with your express permission" (House of Commons Hansard, 2018, column 1650). Nonetheless, the Governor went ahead and granted his assent to the DPA.

Justifying the decision to intervene or not to intervene

Interrogating the justifications for intervening or refusing to intervene in the legislative affairs of an OT is important because to intervene in a matter which is not the UK government's responsibility is a serious breach of the partnership with its OTs, but so too is a failure to intervene in a matter that does fall under its responsibility. As we have seen, in each of the interventions, and the one instance of a refusal to intervene, discussed above, the UK Government sought to justify its actions by reference to its obligations under international law. However, in each case the reliance on the UK's obligations under international law was problematic, and not always for the same reasons.

In the case of the withholding of assent to the legalisation of cannabis in Bermuda and the BVI, the invocation of the UK's obligations under the UN drugs control conventions is problematic because it directly conflicts with another key principle underpinning the partnership between the UK and its OTs; namely, that the citizens of the OTs should exercise the greatest possible control over their own lives. This is a principle the governments of OTs guard zealously. As a result, the UK's refusal to permit Bermuda and the BVI to establish medical cannabis industries was perceived by both Governments, not only as depriving them of a significant opportunity to diversify their economies, but also as a direct attack on their autonomy. Indeed, the Premier of Bermuda, David Burt, has spoken of the withholding of assent as potentially "destroy[ing] the relationship that [Bermuda] had with the UK" (Coletta, 2022).

In its defence, the UK Government would argue that it could not have granted assent to the legalisation of cannabis, whilst acting compatibly with the UN conventions on drug control (Walsh & Jelsma, 2019). The difficulty with this defence is, however, that a growing number of countries that are also parties to the UN Convention on drug control, (such as Uruguay and

Canada, as well as 21 of the 50 states in the United States) have all adopted policies that permit the recreational use of cannabis, without having denounced or withdrawn from the UN Convention on drug control. More recently, a number of other countries have announced or set in motion steps to legalise cannabis, such as Germany, Luxembourg and Malta in Europe, Mexico and Colombia in the Americas, South Africa and Thailand (Walsh, 2023). This leaves the UK open to the charge of exceptionalism and the criticism that its Ministers are adopting "a cautious and conservative approach to the interpretation of the international drug conventions … while others are re-interpreting the conventions to allow for change" (Connolly, 2022). This 'conservative' approach to the interpretation of the UN Convention on Drug control is particularly hard to reconcile with the UK Government's past willingness to forge ahead with the Northern Ireland Protocol Bill at the risk of breaching its international obligations (Curtis, Webb, Cowie et al., 2022), and the inclusion of a provision in the Illegal Immigration Act 2023 which permits a Minister to ignore a Rule 39 interim measure issued by the ECtHR when determining whether or not to remove a person from the UK.

The invocation of the UK's obligations under international law with regard to the enactment of the Civil Partnership Act by the Governor of the Cayman Islands is much easier to defend. Following the ruling of the ECtHR in *Oliari v Italy*, it was clear that the UK Government would have been liable before the ECtHR had it not acted to make provision for civil partnerships. If there is any criticism to be made of the UK Government in this instance it is that, instead of relying on the local justice mechanisms and processes to resolve the issue, it should have intervened much sooner and gone much further by legislating directly for the introduction of same-sex marriage. This would surely have been controversial, but so too was the decriminalisation of homosexuality between consenting adults, and like that measure, it would have better protected the rights of the local LGBTQ+ community who, as OT citizens, have a right to expect that their government "should abide by the same basic standards of human rights … that the British people expect of their government" (FCO, 1999, p. 20).

The same criticism could be made of the Governor's refusal in Bermuda to intervene by withholding assent to the introduction of the DPA. The UK Government argued that, because of the ECtHR's ruling in *Schalk and Kopf* that States were not under a positive obligation under the ECHR to introduce same sex marriage, it could not impose such an obligation on its OTs. This is problematic for at least three reasons. Firstly, because the ECtHR's reasoning in *Schalk and Kopf* has been subject to considerable criticism by several leading human right scholars who argue that it is based on a fundamental misunderstanding of the intentions of those who drafted the ECHR who wanted only to ensure that men and women should have an equal right to marry, and certainly did not want to limit the right to marry under the ECHR to opposite sex couples (Hamilton, 2018; Johnson, 2013). Secondly, because even if *Schalk and Kopf* was correctly decided, it does not follow that the ECtHR would permit a State which had legalised same-sex marriage, subsequently, to ban it. As Chris Bryant, argued at the time, in a debate on this issue in the House of Commons, what made Bermuda's DPA especially egregious was its retrogressive nature:

> It would have been one thing if the Bermudan Government had introduced civil partnerships as a forward step when there was no such provision in law in Bermuda, but this is a retrograde step – it is taking a step backwards – that deliberately limits the rights currently enjoyed by many Bermudians (House of Commons Hansard, 2018, column 649).

Thirdly, because in terms of rights protection, the ECHR should be regarded as a floor not a ceiling. Even if the UK Government was not positively obliged by the ECHR to make provisions for same sex marriage, the citizens of Bermuda, like the citizens of the Cayman Islands, have a right to expect that they should be entitled to enjoy the same legal rights as British citizens.

In the case of both Bermuda and the Cayman Islands it is difficult to avoid the conclusion that the principle of equality between UK citizens and the citizens of OTs together with the rights of the LGBTQ+ communities in these OTs were accorded a lower priority than the need for the UK Government to maintain good relations with each OT government.

Role of the UK Parliament in scrutinising interventions

Post-Brexit, the question of whether the OTs should have a more 'direct voice' in the UK parliament has come once again to the fore (Clegg et al., 2022). Currently, there are a number of different ways in which OTs can engage directly with the UK Parliament. Firstly, they can make direct representations to the designated minister for the OTs in the FCDO, either individually or collectively through the UK Overseas Territories Association (UKOTA). Secondly, they can engage with individual MPs who take an interest in the OTs and who can ask oral or written questions to the Secretary of State in the FCDO. Thirdly, there are presently 11 informal All-Party Parliamentary Groups composed of members of the House of Commons and House of Lords, which have no official status within Parliament but represent the interests of the OTs, such as British Overseas Territories All-Party Parliamentary Group, Falkland Islands All-Party Parliamentary Group, and All-Party Parliamentary Group for Bermuda. And fourthly, there is the Overseas Territories Joint Ministerial Council, which brings together annually political leaders from the OTs and UK Ministers, and which is the principal forum for reviewing and implementing the shared strategy for promoting the security and good governance of the OTs.

Recently, however, there have been renewed calls for the OTs to have more formal representation in the UK parliament. Possibly, the most radical proposal in this regard is for the direct representation of one or all OTs within the UK Parliament: see, for example, John Penrose, a Conservative MP and former minister (Whale, 2020) and in Gibraltar with the Representation in Westminster Movement. But, as the 2019 report of the Foreign Affairs Committee (FAC) noted, opinion on this option amongst the OTs themselves is mixed (FAC, 2019). More recently, in 2022, the then OT Minister, Amanda Milling, declared that in her dealings with the OTs, none had raised the idea of formal representation in the UK Parliament, and in the view of the FCDO, the fundamental basis of the current relationship was correct (UK Parliament, 2022a). Indeed, the issue of parliamentary representation for the OTs is not new and as the FAC noted back in 1998, it "raises a number of substantial constitutional questions" (FAC, 1998a, paragraph 62). There are also potential risks to the autonomy of the territories in having a closer relationship with the UK Parliament, for instance in relation to the possible adoption of UK taxation rates. As a consequence, such significant reform is unlikely.

The merits of a select committee?

An alternative proposal, which is less radical, is for the creation of a committee of MPs in Parliament to scrutinise the OTs. This proposal "has gained wider support" (Loft, 2022, p. 3) and was recommended by the FAC in their most recent report on the UK's relationship with the OTs, observing 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 [Environment, Food, and Rural Affairs] and other relevant Committees are able collectively to scrutinise the UK Government's administration of, spending on, and policies towards the OTs" (FAC, 2019, paragraph 38). This would presumably entail the creation of a select committee dedicated to the affairs of the OTs. It is not clear whether this would replace or merely supplement the FAC's current responsibility for scrutinising the FCDO's policies towards the OTs; but, in either case, it would increase the visibility of the OTs in the UK Parliament and demonstrate that their concerns were being taken seriously. Though individual MPs would still be able to question the OT Minister in Parliament, a dedicated select committee, which is non-partisan and which has more resources than any individual MP, should result in more focused and more extensive scrutiny of the FCDO's policy towards the OTs. It would also allow individual MPs who sit on the committee to develop their own expertise with regard to issues specific to OTs, thereby enhancing the quality of scrutiny. Such a select committee would be able to amass evidence from experts as well as from those affected by decisions of the FCDO (Elliott and Thomas, 2020).

In the four examples we have looked at above, we can see the added value that a dedicated select committee might have given to consideration of the legalisation of cannabis as well as the legalisation of same-sex marriage. In relation to the former, the committee would have been able to hear representations from the political leaders of Bermuda and BVI regarding the importance of establishing a cannabis industry to the diversification of their economies. They would also have been able to question legal experts about the growing global consensus with regard to the legalisation of cannabis and the options available to the UK Government to permit the legalisation of cannabis whilst complying with its obligations under the UN conventions on drug control. The FCDO, in turn, would have been obliged to defend its policy before a committee of MPs, rather than merely issuing a rather bland statement through the office of the Governor.

In relation to same-sex marriage, the select committee would again have been able to question legal experts about the status of same sex marriage under international human rights law, which is not as clear cut as the FCDO appears to assume. A select committee would also have been able to hear directly from representatives of the LGBTQ+ communities in Bermuda and the Cayman Islands about the symbolic and practical impact of the ban on same sex marriage on their daily lives and their self-worth. Contrast this with the FCDO's response to Labour MP Yasmin Qureshi's written question about same-sex marriage in the Cayman Islands and Bermuda: "The UK Government continues to engage with and encourage remaining Territories that have not put in place arrangements to recognise and protect same sex relationships do so" (UK Parliament, 2022b). It is difficult to imagine that such a response would have withstood scrutiny by a select committee.

Select committees are able to exert influence on the UK Government. They encourage more careful consideration of policy within government departments and many of their recommendations go on to be implemented (Russell & Benton, 2011). Even if scrutiny by select committees may not have affected the final outcome in the four examples we have examined above, it would at least have ensured that the views of the elected representatives of the OTs concerned as well as the views of marginalised groups, such as the LGBTQ+ community, that are not represented in OT legislatures, were heard directly by members of the UK Parliament. The difference that having their voice heard can make to those affected by a decision should not be underestimated.

It is important, however, to add a corrective to the assumption that the establishment of a dedicated select committee will cause the problem of a democratic deficit in relations between the UK and its OTs to disappear entirely. The reports and conclusions of select committees are not always well received by the OTs: one example is the 2019 FAC report which considered same-sex marriage and Belongerships (the way in which local OT citizenship is organised). Such situations certainly strain relations between the territories and the House of Commons committee system. The same is equally true of the FAC's recent recommendation that the UK Government should impose on OTs an obligation to introduce publicly accessible beneficial share ownership registers. It is a difficult balancing act to strike between, on the one hand, a select committee highlighting areas for improvement, but, on the other, retaining the confidence of the OTs in the system. Moreover, despite the fact that some legislatures in the territories are small and lack oversight capacity, the UK Parliament cannot and should not usurp democratic mechanisms in the OTs themselves. A more engaged oversight role for the UK Parliament in UK-OT affairs should be encouraged; and yet, it should not engineer, either by accident or design, its own 'democratic deficit' in marginalising and emasculating parliamentary democracy in the OTs.

Conclusion

The role of Governors within the context of the present relationship between the UK and its OTs is crucial. As we have seen, the office-holder is responsible for a wide-range of reserve matters with corresponding reserve powers to ensure that they can discharge these responsibilities, which gives rise to concerns about a potential democratic deficit between the powers of Governors and their accountability to those affected by their decisions. As we have highlighted, the role of a Governor is not easy. Politics with a small 'p' is an ever-present concern, which means that decision-making by the Governor who is placed right at the heart of the political system of each OT (and the UK Government) is shaped by political calculations, even when supposedly based on an agreed division of responsibilities between the UK Government and the OT. The Governor must balance their responsibility for reserve matters whilst all the time maintaining good relations in their informal and day-to-day encounters with decision-makers, and on occasion, the population more generally, in their OT. This relationship is most in danger when Governors are unable to achieve consensus by means of their powers of persuasion and must fall back on their reserve powers.

Arguably, the most high-profile and contentious of these reserve powers are those that permit a Governor to intervene in the legislative affairs of their OT. Recent experience suggests that the power to intervene has been used relatively frequently. In the examples discussed, the UK Government sought to justify the Governor's intervention, and in one case the Governor's refusal to intervene, on the basis of the UK's obligations under international law. However, in each of the instances, there was more than one way of interpreting the UK's obligations under international law, thereby casting doubt on whether the interventions were justifiable; or, in the case of the Cayman Islands, went far enough to protect the rights of OT citizens. Conversely, it is equally arguable that the decision not to intervene in the case of Bermuda's same sex marriage law, irrespective of international law norms, was, unquestionably, in breach of the UK Government's promise to ensure that OT citizens can expect the same rights as British citizens.

Being unaccountable to both the elected representatives and the citizens of the OTs concerned, and deriving their power from the Crown, at a time when the role of the Crown is being increasingly questioned across the Commonwealth, there is a strong case for arguing that the UK Government should have been obliged to justify these decisions by Governors before a dedicated select committee of the UK Parliament to ensure that there is at least some measure of political accountability for what are essentially political decisions, even if cloaked in the language of the UK's obligations under international law. There are no easy solutions to unpick and enhance the role of the Governor and his or her democratic *bona fides*. However, a dedicated select committee would have had the collective depth, expertise and experience to better understand the impact of these decisions upon the OTs concerned; although, as we have also argued, there should be clear limits to this oversight so as not to emasculate local OT parliaments.

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