Constitutional dissonance and the rule of law in the Turks and Caicos Islands

A. Introduction

The Turks and Caicos Islands (TCI) is one of 14 Overseas Territories (OTs) still overseen by the United Kingdom (UK) (as described by Susan Dickson in Chapter xx). The TCI, as well as the other OTs, is a remnant of the British Empire. The territory, situated 920 kilometres southeast of Miami and about 50 kilometres southeast of the Bahamas, has had a torrid recent political and constitutional history, with weak political institutions and corruption being significant concerns. This chapter focuses on the breakdown in the rule of law that has occurred in the TCI over the last decade or so and the constitutional and political dissonance to which this has given rise in the relationship between the TCI and British Government. The chapter considers the Commission of Inquiry that was established by Her Majesty's Government (HMG) in 2008 to investigate serious allegations of corruption in the territory; the legal challenges both to the very existence of the Commission of Inquiry as well as to its recommendations; the subsequent period of direct rule from London; and, finally, the legal challenges arising from the trial of the former Premier Michael Misick, and a number of his fellow ministers on charges of fraud and corruption. The chapter unpicks the political, constitutional, and legal ramifications of these developments, which include the right of the British Government to impose direct rule on a British Overseas Territory (BOT), to dissolve its duly elected legislature, and to abrogate the constitutional rights of its citizens. In so doing we aim to reveal how effectively (or not) the present relationship operates, and the lessons it offers not just for the TCI but for all of the OTs. Some context is also important to understand what has gone on in the TCI, so the chapter begins with a little background on the territory itself, its key characteristics, and how relations with the UK have gradually formalised over time.

B. Early political and economic developments

Compared to some of the other OTs, the TCI had a more varied history of colonial involvement. The first permanent settlers were salt collectors from Bermuda in the latter half of the 17th Century, and they withstood a series of annexation attempts, and invasions from the French and Spanish. The French finally succeeded in taking control in 1764, but by the start of the 19th century the British had re-taken the islands, and incorporated the TCI into the Bahamas. Then in 1874 the TCI became a dependency of Jamaica; and remained so until 1959. With Jamaica as part of the West Indies Federation, moving towards independence, the TCI was given a new constitution with a Governor for the first time (although this position was filled by the Governor of Jamaica) and a resident Administrator.[1] After Jamaica gained independence in 1962, the TCI was given a new governing framework, with no Governor and just an Administrator reporting to London. But as Cawley argues, 'The change was not ideal considering the islands' geographical remoteness from the Colonial Office, which also had little accumulated experience of how to deal with Turks & Caicos or understand local conditions'.[2] In response, in 1965, the position of Governor was restored; although it was filled by the Governor of the Bahamas. So it is clear that the TCI had limited constitutional and political experience up until the early 1970s.

Indeed it was only in 1976 that the TCI acquired its first separate and fully-formed Constitution, which provided for greater self-rule, a reduction in the authority of the Governor, a more powerful role for the legislature and ministerial government. In turn the

[1] Charles Cawley, *Colonies in Conflict: The History of the British Overseas Territories* (Cambridge Scholars Press 2016) 326.

[2] Ibid.

1976 Constitution gave rise to a political party system led by the Progressive National Party (PNP) and the People's Democratic Movement (PDM).[3] The transition for the TCI, when it eventually happened, from being overseen by neighbouring British colonies with little autonomy, to greater authority and power was quite rapid and therefore local politicians were forced to adjust and respond to this new reality. It can be argued that the transition, added to the fact that independence was being seriously discussed, led to politicians taking liberties with the constitution, and abusing their position in the late 1970s and 1980s. As Blom-Cooper noted, '[Ministers were] inexperienced in sound administration and good government, and flushed with newly-acquired, extensive powers by which they arrogated to themselves an even larger say in government than was warranted by a proper interpretation of the Constitution'.[4]

The quality of governance was undermined further by the significance of transactional politics. Because the political parties were fairly equally matched and ideologically there was little between them the role of transactional politics was very important in securing electoral advantage. As Sullivan argues, '[transactional politics] is the relationship between the electorate and their elected members [that] is based on transactions, and electors expect that their elected members will act entirely in the interests of their individual districts (and

[3] *Turks and Caicos Island Commission of Inquiry (2008-2009).* Report of the Commissioner, The Right Honourable Sir Robin Auld. <www.gov.uk/government/uploads/system/uploads/attachment_data/file/268143/inquiry-report.pdf> accessed 20 June 2017, 20-21 and 22 (hereafter the '*Auld Report'*)

[4] *Report of the Commissioner Mr Louis Blom-Cooper QC 1987*. (London: HMSO) 114 (hereafter *Blom-Cooper Report*).

individual electors for that matter), rather than in the interests of the TCI as a whole'.[5] The result was that party politics quite early on '… [took] a grip on daily life in the Islands', producing '… a rancour and a lack of tolerance and mutual respect …' within society.[6]

The consequences of these weaknesses became apparent in the mid-1980s when serious concerns over corruption and anti-democratic practices were highlighted. In response to an arson attack against an important public building the UK ordered an inquiry undertaken by Sir Louis Blom-Cooper in 1986. Blom-Cooper was highly critical of what he saw, arguing there was 'persistent unconstitutional behaviour (through the application of political patronage)' and 'maladministration by both Ministers and civil servants at every level of government, and intolerable (not to say seditious) conduct by leading opposition members of the Legislative Council [which] are constant blights upon a … society which is already displaying signs of political instability'.[7] In response the UK government imposed 'an

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[5] Kate Sullivan, *Turks and Caicos Islands Constitutional and electoral reform project. Final recommendations for changes to constitutional and electoral arrangements in the Turks and Caicos Islands*, February 2011 (hereafter Sullivan, *Turks and Caicos Islands Constitutional and electoral reform project*) <http://turksandcaicosislands.fco.gov.uk/resources/en/pdf/2011/CER-final-recommendations-Feb-2011.pdf> accessed 9 May 2011.

[6] *Report of the Commissioner Mr Louis Blom-Cooper QC. 1986. Allegations of Arson of a Public Building, Corruption and Related Matters*, December (London: HMSO) 10.

[7] ibid 97.

unusual form of direct rule'.[8] Ministerial government was suspended, and in its place the Governor was given the power to administer the territory through an Advisory Council. The Legislative Council was retained, but the final decision on all matters was taken by the Governor.

Although Blom-Cooper was appointed by the UK government to investigate the concerns in the TCI, there were criticisms of how both Labour and Conservative Governments allowed the problems to grow in seriousness. From the late 1970s onwards, there were stories of improper political patronage and gross mismanagement in the Public Works Department (as highlighted later by Blom-Cooper); more general allegations of corruption and ineptitude under both PNP and PDM administrations; and a weakening economy caused by 'chronic overspending' by government.[9] Little was done by the UK authorities to mitigate these problems. However, the greatest threat was the growing use of the territory as a drug transit centre. Thorndike suggested 'the British governor [in the late 1970s] abhorred any disturbance and refused to cooperate with the US Drug Enforcement Agency and the US Coast Guard'.[10] Chief Minister JAGS McCartney of the PDM criticised the 'Nelsonian attitude of the British government' to the problem, and pointed to the 'continuous pattern of graft and payoffs at our airports'.[11] Thorndike noted that 'British neglect and withdrawal' had 'permitted … a scandalous degree of drug related corruption to

[8] Tony Thorndike, When small is not beautiful: the case of the Turks and Caicos Islands, *Corruption and Reform*, 2 (3) (1987), 259 (hereafter Thorndike, When small is not beautiful)

[9] *Blom-Cooper Report* (n 4) 97; Thorndike, When small is not beautiful (n 8) 261.

[10] Ibid.

[11] Ibid.

flourish … almost to the point of subversion'.[12] By 1984 the UK began to act against the drug threat, in part because of heavy criticism of its previous inaction by US authorities. One consequence was that Norman Saunders (Chief Minister at the time of his arrest) and two of his PNP colleagues were imprisoned in the US on drugs-related charges in 1985.[13] However, and somewhat unfortunately, the UK government argued at the time of Saunder's arrest 'there is no reason why this unfortunate episode should have any lasting effect on the good government of the islands'.[14] It was only later that the UK deemed it appropriate to establish a Commission of Inquiry. So it is clear that the TCI in this period struggled with its own political and constitutional immaturity, together with a rather disengaged attitude on the part of the UK.

However, with the inquiry Blom-Cooper indicated some hope that the situation would improve and argued that 1986 '…ought to witness a point of departure in the political and governmental life of the Turks and Caicos Islands'.[15] However, he also argued that 'if nothing is done about the depressing state of public affairs, the disease in the body politic that

[12] Tony Thorndike, 'The future of the British Caribbean Dependencies', *Journal of Interamerican Studies*, 31, (1989) 121.

[13] Deborah Cichon, 'British Dependencies: The Cayman Islands and the Turks and Caicos Islands,' in Sandra Meditz and Dennis Hanratty (eds) *Islands of the Commonwealth Caribbean: a regional study* (Washington: Library of Congress, 1989) 561-583.

[14] HC Deb 12 March 1985 vol 75 cols 121-2W. <http://hansard.millbanksystems.com/written_answers/1985/mar/12/turks-and-caicos-islands> accessed 21 July 2011.

[15] Blom-Cooper Report (n 4) 97.

I have identified may all too readily become – if is not already – endemic and ineradicable for the present generation of Islanders'.[16] Unfortunately, as this chapter now goes onto consider, the latter prediction was the more accurate. As Sir Robin Auld argued in his own Commission of Inquiry, '[Blom-Cooper's] general conclusions … suggest that little has changed over the last 20 or so years leading to this Inquiry, except as to the possible range and scale of venality in public life'.[17]

C. The Auld Report[18]

At the time of the appointment of the Commission of Inquiry (the Commission) chaired by Sir Robin Auld, a former Lord Justice of Appeal, the TCI's most recent Constitution ('the 2006 Constitution'), had been in force for barely two years. The 2006 Constitution had replaced the 1988 Constitution, which had restored ministerial government to the country, following its suspension in 1986 but had done little to curtail the maladministration and incompetence identified by Blom Cooper. If anything, these were exacerbated in the intervening period by the high economic growth experienced by the TCI.[19] This new found economic prosperity had emboldened the PNP, led by Michael Misick, which had won a narrow victory in the 2003 general election,[20] to seek more devolution of powers from Britain as a precursor to an eventual move towards independence. This had resulted in the enactment of the 2006 Constitution which, as well as introducing a 'modernized' chapter on

[16] Ibid, 98.

[17] Auld Report (n 3) [1.27].

[18] Ibid.

[19] Ibid [1.31]

[20] Only after the results in two constituencies won by the opposition PDM had been annulled.

fundamental rights and freedoms, made three key changes to the institutions of government. First, the Legislative Council was replaced with a House of Assembly composed of a Speaker, 15 elected Members, four appointed Members and the Attorney General. Second, the Executive Council was replaced with a Cabinet, consisting of the Governor, a Premier and six other Ministers appointed by the Governor on the advice of the Premier from the elected or appointed Members of the House, and the Attorney General. Third, the Cabinet and its members individually were granted, or were enabled to exercise, significantly more discretionary power than they or their predecessors had enjoyed as Members of the Executive Council under the 1988 Constitution.[21]

Though these changes represented a major step along the path to full internal self-government, the tripartite system of governance, which is such a distinctive feature of the BOTs (as described by Susan Dickson in Chapter xx) remained in force. Under this system the Foreign and Commonwealth Office (FCO) retained general oversight and responsibility for the people of the TCI and ultimate control over the Governor. While the Governor was required to consult the Cabinet on matters of policy and in the exercise of all functions conferred on him,[22] the Governor remained responsible for certain reserved matters, namely: defence, external affairs, regulation of international financial services and internal security, including the police force, the public service and administration of the courts.[23] Moreover, the UK Government retained the power to legislate for the TCI by Order in Council; to

[21] Auld Report (n 3) [1.36]

[22] Constitution of Turks and Caicos Islands (TCI), s 25(1)

[23] Ibid, s 33(1)

instruct the Governor in the exercise of his functions to act without consultation with, or contrary to, the advice of the Cabinet; and to disallow any law to which the Governor assented.

This tripartite system was found by the Commission to have proven to be almost entirely dysfunctional. Though some of the factors that contributed to its dysfunctionality were particular to the TCI, such as a booming tourist economy and the limited supply of land for development which was available at a substantial discount to only one category of the TCI's resident population – the *Belongers* (discussed further below) – there were other factors that were not unique to the TCI and which are common to other OTs as well as other small states in the region (see Chapter xx Derek O'Brien). These factors may be grouped under three broad headings which we examine in the sections below: excessive ministerial discretion, ineffective parliamentary oversight, and a malfunctioning electoral system. We will then turn to consider the functioning of the tripartite system itself.

1. Ministerial Discretion

Under the Cabinet system of government, which is common to systems based on the so-called 'Westminster model' (see Chapter xx), executive power is vested in the Cabinet which is the principal instrument of policy. Though the power exercised by Cabinet is modified somewhat in the case of OTs by the supposed oversight of the Governor and the ultimate control of the FCO, Ministers in the TCI Cabinet enjoyed a virtually unlimited, and apparently unsupervised, discretion in three key areas that were critical to the functioning of its economy and the integrity of its governance: the allocation of Crown Land; the award of public works and other governmental contracts; and immigration matters. As the Commission discovered, Ministers were able to abuse their discretionary powers in each of these areas to

maximum effect to consolidate their grip on political power and to accrue the maximum financial benefits for themselves, members of their families and their supporters.

a) Crown Land

Though Crown Land is the TCI's most valuable resource,[24] there were precious few safeguards as to its management or disposal. Under the 2006 Constitution, Crown Land could be disposed of by the Governor, or any person authorised by him in writing,[25] but when exercising this power the Governor was required to act upon the advice of his Cabinet.[26] There was, in addition, the Crown Land Policy, devised in 1980, the aim of which was to ensure that all Belongers would have affordable access to Crown Land for their needs, by permitting them to purchase it at a substantial discount from its market valuation. Under this Policy, disposals of Crown Land for residential use were originally in the grant of the Executive Council only, but following the PNP's election victory, the Policy was changed to allow allocations of Crown Land for residential use to be approved by an individual Minister.[27] Allocation of Crown Land for commercial use required the approval of the Cabinet, but there was no limit on the number of leasehold grants of Crown Land per individual Belonger, whether for residential or commercial use. The system was thus wide open to abuse by Ministers for political and economic gains.

[24] Auld Report (n 3) [3.9]

[25] Constitution TCI, s 94

[26] Ibid, s 25(1)

[27] Auld Report (n 3) [3.11]

In March 2008, a special report (the Robinson Report)[28] prepared by the Acting Chief Auditor, at the request of the Governor,[29] observed that compliance with the Crown Land Policy was 'weak to non-existent'.[30] There was a general lack of openness and accountability in the allocation of Crown Land, which was not determined by reference to the criteria set out in the Crown Land Policy, but rather by 'personal contacts, pressure and influence'.[31] The Robinson Report concluded that there had been:

> [B]latant speculation in Crown Land and misuse of Belongers' entitlements to discounts on dispositions of land for commercial purposes as well as an inequality in the allocation of commercial land, with 40% of such sales in the previous two years being to companies in which the present or past members of the House of Assembly and/or their immediate families had a direct interest.[32]

b) Award of public contracts

Though there were no constitutional or statutory provisions governing the award of public work contracts, they were required to conform to tendering procedures set out in Financial

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[28] Martin Robinson, *Special Report on the Management and Disposal of Crown Land*, (2008), Report No S/08/052/07R. Cited in Auld report (n 3) [3.39] (hereafter Robinson Report)

[29] Who had been alarmed by the contents of three earlier reports into the mismanagement of Crown Land.

[30] Auld Report (n 3) [3.40]

[31] Ibid.

[32] Robinson Report (n 28) Executive Summary, pp 3 – 4.

Instructions issued by the Ministry of Finance, and to generally accepted tendering procedures.[33] As the Auld Report notes, the aim of such procedures is to promote open and competitive tenders to enable those considering them on behalf of the TCI Government to determine, in the public interest, the bidder to whom the contract should be awarded; and to ensure honest dealings between those responsible for the award of public contracts and those bidding for them.[34] However, as a UK 2007 National Audit Office report indicated, there were widespread departures from these competitive tendering requirements in the TCI.[35] This was echoed in allegations to the UK Foreign Affairs Committee and to the Commission itself.[36] A particular area of concern noted in the Auld Report was 'the grant of untendered and/or possibly overpriced contracts to persons or corporate entities with connections with PNP Ministers and/or financial supporters of the PNP.'[37] A number of examples are identified in the Auld Report, including: "contracts of health services, which quickly proved to be a financial disaster; over-priced major construction contracts; major road-building and other public work contracts awarded to companies at a significantly higher price than some other bidders had offered; rental of property by Ministers, their relatives or supporters for Government use at above-market rents; the sale by ministers of property to Government at above market-value; the approval of tourist developments in which Ministers had or were

[33] Ibid, [3.55]

[34] Ibid, [3.56]

[35] Report by the Comptroller and Auditor General, '*FOREIGN AND COMMONWEALTH OFFICE: Managing Risk in Overseas Territories*' HC 4 Session 2007-2008 | 16 November 2007, p58.

[36] Ibid, p5, para 12, and p5, para 147

[37] Auld Report (n 3) [3.62]

granted interests; and the purported employment and actual payment of *ghost* workers in the public service for whom there was little or no work."[38]

c) Immigration matters

The TCI's immigration laws provided for three levels of immigration status in a descending order of entitlement and security to remain in the Territory.[39] The highest was Belongership. Belongers enjoyed certain privileges that were denied to those with a lower immigration status. These included the right to vote and the right to acquire Crown Land either in their own right or as the majority shareholder in a corporate purchaser, and at a substantial discount. Though Belongership usually stemmed from birth or by descent from a Belonger or a spouse of a Belonger of five years standing, exceptionally, it could also be acquired where the Governor, *acting upon the advice of Cabinet*, considered that person had made an outstanding contribution to the economic and social development of the islands. Immediately below this was Permanent Resident status which could be granted by the Governor, *in accordance with the advice of Cabinet*, but was also revocable by the Governor, *in accordance with the advice of Cabinet*, for specified reprehensible conduct and/or failure to comply with the statutory requirements of the grant. Finally, there was a Residence or Work Permit, made or revocable for cause by the Immigration Board. This was subject to an appeal to the Immigration Minister whose decision was final and unreviewable by any court.[40]

[38] Ibid, [3.63]

[39] Ibid, [3.64]

[40] Ibid.

Ministers thus had a key role to play in advising the Governor on the grant of Belongership status to those who claimed to have made an outstanding contribution to the economic and social development of the islands. They also had a key role in advising the Governor both at the stage when a grant of a higher immigration status was sought and where, if granted, revocation was threatened. Even appeals against the refusal or revocation of a Residence or Work Permit lay to a Minister whose decision could not be legally challenged. The Commission heard numerous allegations of abuse by Ministers when tendering advice to the Governor about these matters, resulting in the grant of Belongership or Permanent Residence being awarded 'in return for bribes to questionable individuals, with financial clout or ministerial connections'.[41] At the same time, the Commission heard about residents who had not attained Belongership or permanent residence and 'who lived in a state of constant insecurity lest they were compelled at short notice and at the whim of a Minster or one of his public officials to leave their home and/or employment.'[42]

Though the Auld Report notes that the abuse of the discretionary powers afforded to Ministers in these three key areas was exacerbated by the small size of the community in the TCI, which exposed Ministers to conflicts between their public duty and their private interests, it also criticised the lack of basic and available mechanisms to deter or combat possible corruption by Ministers. We consider below the failure of the traditional mechanisms for holding Ministers to account, such as parliamentary oversight and the ballot box, but the corruption and abuse of power by Ministers documented in the Auld Report is also an indictment of the failure of the principle of individual ministerial responsibility,

[41] Ibid, [3.67]

[42] Ibid, [3.68]

which is supposed to underpin the Cabinet system of government. As well as requiring Ministers to account to parliament for the administration of their departments, the principle of individual ministerial responsibility requires Ministers to adhere to a higher standard of conduct than other citizens. In the United Kingdom this is embodied in the Code of Conduct for Ministers, which enshrines the Seven Principles of Public Life (the so-called Nolan Principles).[43] These make detailed provision for the avoidance of conflicts of interest and for declarations of potentially conflicting private interests which, in the Commission's view, were critical in a small country like the TCI with its closely knit relationships and associations, especially when the sweeping electoral majority achieved by the PNP in 2007 gave it 'virtually impregnable control of the country'.[44] As Cabinet papers, minutes and other public and private documents seen by the Commission revealed, there had been frequent actual or potential conflicts of interests in the public life of the Territory in various contexts. It is true that Cabinet had accepted a Code of Conduct for Ministers in principle in early 2007, but this had never been formally adopted, published or promulgated,[45] and appeared to have had no impact whatsoever on their behaviour as Ministers continued to

[43] See Ministerial Code 2018 < /www.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_MINISTERIAL_CODE_JANUARY_2018__FINAL___3_.pdf. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579752/ministerial_code_december_2016.pdf> accessed 17 January 2018

[44] Auld Report (n 3) [2.15]

[45] Ibid, [2.11]

display a 'seemingly embedded disregard' of their duty to avoid conflicts of interest which might impair their obligation to act in the public interest.[46]

2. Parliamentary oversight

With six out of the 15 elected members of the House of Assembly being members of the Cabinet and thus bound by the principle of collective ministerial policy to toe the government line, and with the other elected members of the legislature who belonged to the governing party fearful of prejudicing their hopes of promotion to the Cabinet if they opposed or criticised government policy, it would have been unrealistic in the extreme to have expected elected members of the legislature effectively to scrutinise the actions or conduct of Ministers. Instead, as the Auld Report notes, much of the responsibility for scrutinising the actions of Ministers fell to two species of constitutional watch dogs: Government Chief Auditors and Parliamentary Oversight Committees (the Public Accounts, Expenditure, and Administration Committees), but while the former 'barked loudly and repeatedly', the latter 'barely showed any signs of life.'[47]

According to the Auld Report there were a number of reasons for the failure of these Standing Committees to discharge their constitutional duties effectively. All three Standing Committees had met infrequently, often because they were inquorate due to the non-attendance of PNP Members, 'especially in sensitive areas where back-benchers wished to avoid an appearance of disloyalty.'[48] On those rare occasions when the Committees did meet

[46] Ibid, [2.8]

[47] Ibid, [2.50]

[48] Ibid, [2.55]

their hearings were often held in private and their members lacked experience and expertise in scrutinising accounts.[49] Even when Committee reports were tabled before the House of Assembly, Ministers often did not make themselves available to answer questions arising from them or refused to answer questions.[50] As a result there had been no parliamentary oversight of any significance and the power of the PNP went largely unchecked. Indeed, the possibility of scrutiny of the Government by Standing Committee was completely denied when, at the end of 2008, the Premier prorogued the House of Assembly for over three months and it was not until May 2009 before the Standing Committees were re-established.[51]

3. The Electoral System

The ultimate mechanism for holding government to account in a democracy is, of course, the ballot box. General elections have been described as the 'sovereign political act' of the people,[52] but their effectiveness in holding the Government to account in the context of the TCI was, according to the Auld Report, seriously impaired in at least two respects.

The first was the very limited franchise. Only one category of residents – Belongers (now called TCI Islanders), who represented well below half of the resident population of the TCI – had the right to vote in the TCI. In the Commission's view this not only called into question any claim by the House of Assembly to be a representative and democratically

[49] Ibid, [2.57]

[50] Ibid, [2.55]

[51] Ibid, [2.57]

[52] Robert Blackburn, *The Electoral System in Britain* (Macmillan 1995) 2.

based legislative body, but also made the intimidation of the majority of the territory's permanent residents who lived in fear of their immigration status being downgraded or revoked by Ministers voted into power by a minority of citizens: 'an affront to any society with aspirations to calling itself civilized as well as democratic.' [53]

The second was the complete absence of regulations on campaign financing, which was out of line with UK and international standards, which impose strict rulings on campaign finance to protect against bribery or corruption. The high levels of campaign spending, and the advantage that the more wealthy party, the PNP, had over their opposition was, according to the Auld Report, 'apparent and of concern'. Though the Elections Ordinance 1998 made it an offence to bribe or treat voters, there had been a long standing tradition of wide and open disregard of these provisions;[54] most blatantly, in the 2007 elections, when vast amounts of money were spent on behalf of PNP candidates, in cash, procurement of *ghost* jobs on the Government payroll and entertainment.[55] This had been allowed to happen because there was little or no official system or resources to monitor or police corrupt conduct on such a scale.[56] Even if there had been, the maximum penalty was a fine of $5000 or one year's imprisonment or both. Neither was sufficient to act as a deterrent in the context of small individual constituencies, which ranged from 190 to 882 voters.[57] In such an environment a small number of voters could make all the difference to which party won the elections and

[53] Auld Report (n 3) [5.46]

[54] Ibid, [3.2]

[55] Ibid, [3.68]

[56] Ibid, [3.2]

[57] Ibid, [3.4]

went on to enjoy the spoils of victory, making the temptation to bribe voters correspondingly greater.

4. The Tripartite system of Governance

In the Auld Commission's view the problems of great economic power in a small population, where money-making combines so naturally with politicking, were compounded by the tripartite system of governance common to BOTs. In any such arrangement there are political-financial pressures on the Governor from Cabinet Ministers 'to approve matters of great public and private consequence in respect of which they know more than he does.'[58] This is in addition to the distant guidance or instruction from London, and all around the expectations of the citizens of the TCI that he will stand up for them.[59] As the Auld report notes, the Constitution 'does not…assist as well as it might in balancing the countervailing inters and inputs in this tripartite system of decision-making'.[60] On the contrary, the tripartite system had resulted in a '... lack of effective constitutional checks and balances in the system of governance to protect the public purse, the inefficient from scrutiny, the dishonest from discovery and the vulnerable from abuse'; '... systemic weaknesses in legislation, regulation and public administration'; and '… clear signs of political amorality and immaturity and of

[58] Ibid, [5.6]

[59] Ibid, [5.5]. As the cabinet Agendas and Minutes seen by the Commission revealed – the Governor's approval for proposals was frequently sought as a matter of urgency and on inadequate information.

[60] Ibid, [5.7]

general administrative incompetence…'[61] The outcome was that the TCI's '… democratic traditions and structures [had been] tested almost to beyond breaking point'.[62]

In the light of these concerns the Auld report called for '…urgent and wide-ranging systemic change',[63] and in particular the partial suspension of the 2006 Constitution, interim direct rule from London, and reforms to the Constitution and other aspects of the system of governance in the TCI to help prevent future abuses of power.

C. Legal challenges to the Auld Commission and its recommendations

The proceedings of the Auld Commission ended as they began, amidst a flurry of legal challenges. The first legal challenge was brought by two back-bench PNP members of the House of Assembly, who sought a declaration to restrain the Commission from proceeding with the Inquiry on the grounds that the Commission's Terms of Reference were invalid and that the Chair's appointment was, therefore, of no effect. This challenge was ultimately rejected by the Court of Appeal of the TCI. However, even before the Commission had completed its work, a further challenge was brought by Michael Misick (Misick), the former Premier, to the legality of two provisions of the Turks and Caicos Constitution (Interim Amendment) Order 2009 (the 2009 Order), which was the UK Government's response to the

[61] The Auld Report (n3) pp. 11-12 & 15.

[62] Ibid, p215.

[63] Ibid, p218.

Commission's Interim Report and the recommendation that the 2006 Constitution should be partially suspended.[64]

The first impugned provision was the imposition, for a period of two years, of a system of direct rule by the Governor, subject only to directions from the Secretary of State. The second impugned provision was the suspension, also for a two-year period, of s6(2)(g) of the 2006 Constitution, which declared and affirmed the right to trial by jury. The challenge to both provisions was unsuccessful, as was a further challenge by Misick to the legality of his removal as a member of the House of Assembly, which he brought before the European Court of Human Rights, arguing that it violated his right to a private life under Article 8 of the European Convention on Human Rights.[65] Notwithstanding these judicial setbacks, Misick, his fellow Ministers and their associates continued to seek to frustrate the recommendations of the Auld Report by bringing a legal challenge to the Order for their trial by judge alone, on charges of conspiracy to accept bribes in public office, conspiracy to defraud and associate money laundering, pursuant to the Trial Without a Jury Ordinance 2010 (TWAJO).[66]

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[64] *R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1039 (Admin), [2009] A.C.D. 62 (hereafter *Misick* v *v Secretary of State for Foreign and Commonwealth Affairs*)

[65] *Misick v United Kingdom* (2013) 56 EHRR SE 13

[66] *Misick and others v R* [2015] UKPC 31, [2015] 1 WLR 3215 (hereafter *Misick and others*)

There is not the space in this Chapter to examine all of the arguments advanced in these various legal challenges so we will instead focus here on the challenge to the power of the Crown, by means of an Order in Council, to legislate for the TCI pursuant to sections 5 and 7 of the West Indies Act 1962. We will then return in Part V to examine the rationale underpinning the decision that Misick and his fellow ministers and associates should be denied trial by jury and should instead be tried by a judge appointed ad hoc for the specific purpose of presiding over the trial of these defendants.

Section 5 of the West Indies Act 1962 empowers Her Majesty to provide by Order in Council for the government of her Caribbean territories, including the TCI. The 2006 Constitution, for example, was made under this section. The relevant part of section 5(1) provides that:

> Her Majesty may by Order in Council make such provision *as appears to Her expedient* for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally *for the peace, order and good government* of the colony or for such limited purposes as may be so specified subject, however, to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified (emphasis added).

In challenging the legality of the 2009 Order before the Administrative Court it was claimed by Misick's lawyers that the Crown's power under section 5 was limited by fundamental

principles of international and/or common law. Thus it was argued that the right to a jury trial could be traced back to Magna Carta, and long-settled practice thereafter; while the right to self-determination through an elected parliament is recognised generally by international law, and specifically by Article 3 of Protocol 1 of the ECHR, which (it was agreed by all) applied in the Territory. This latter argument was, however, overtaken by events as the UK Government announced that it planned to withdraw the application of Article 3 to the TCI once the 2009 Order came into force. The Court, therefore, turned to consider the other potential limitations on the Crown's powers under section 5.

While acknowledging the importance of the rights relied on by Misick, the Court was not persuaded that the right to jury trial was absolute, nor was it persuaded that the right to self-determination was incorporated into, or a free-standing principle of, the domestic laws of the TCI. In any event, the Court did not consider that the rights relied on in this case were any greater than the right of a citizen not to be exiled from their country, which the House of Lords had previously held in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*[67] could be nullified by an Order in Council authorising the Commissioner of the British Indian Ocean Territory to 'make laws for the peace, order and good government of that territory'. Though the Court did accept that an Order in Council made pursuant to section 5 was not entirely immune from legal challenge and could be reviewed on 'ordinary principles' of judicial review – such as legality, rationality and procedural impropriety – in practice this would only happen in the most exceptional

[67] [2008] UKHL 61, [2009] 1 AC 53.

circumstances, which did not include abrogation of the basic rights relied on by the claimant in this case.[68]

On appeal to the Court of Appeal much the same view was taken by Lord Justice Laws, though it was noted that the 2009 Order could be distinguished from *R Bancoult (No2)* in so far as it was not an Order made under a delegated authority to legislate for the peace, order and good government of the TCI, but an Order made directly by the Crown itself.[69] The normal limitations on the scope of legislation made by a delegated authority to interfere with fundamental rights, in accordance with the principle of legality[70] did not, therefore, apply in this case. This did not mean that an Order made by the Crown itself was beyond the scope of judicial review, but the circumstances in which the courts would properly quash an Order on grounds of irrationality, illegality or unfairness would be 'very attenuated'. Certainly, given the breadth of the power conferred by section 5, neither the suspension of jury trial nor the suspension of representative government were sufficient to engage a claim for judicial review.[71]

The respective judgments of the Administrative Court and the Court of Appeal in *Misick* puts beyond any doubt the plenary nature of the powers conferred upon the Crown to legislate for its OTs. This includes the power: to suspend a constitutionally enshrined right to jury trial; to remove the office of the Premier and all ministerial offices; to provide that 'the

[68] *Misick* v *v Secretary of State for Foreign and Commonwealth Affairs* (n 64) [31]

[69] Ibid, [16]

[70] Ibid, [17]

[71] Ibid, [18]

cabinet shall cease to exist'; and to dissolve the House of Assembly and call upon all members of the House to vacate their seats. The extraordinary reach of the Crown's powers recognised in *Misick*, however, gives rise to concerns about the accountability of the Crown for the legality of its actions which the judgments of the Administrative Court and the Court of Appeal do little to dispel. Powers that have such an extraordinary reach ought to be subject to the most rigorous scrutiny. Since Orders in Council of the kind reviewed in *Misick* are not subject to the type of democratic debate that precedes the enactment of ordinary legislation,[72] it is all the more imperative that such Orders are, at least, subject to judicial review in the same way as other secondary legislation. However, both the Administrative Court and the Court of Appeal made it clear that this is only likely to happen in the most exceptional of circumstances, which do not include the abrogation of such rights as jury trial and representative government. As Elliott and Perau-Saussine observed of the House of Lords' judgment in *R (Bancoult),* the possibility of such 'light touch' judicial review of such Orders offers 'a dismally modest check on the Executive's extra-territorial exercise of prerogative power'.[73] Followed to its logical conclusion, such an approach to the review of Orders in Council, they argue, 'could utterly undo the British courts' maintenance of the rule of law'.[74]

D. A new constitution and a return to 'democracy'

As the various court cases were proceeding the British government instituted a wide-ranging review of the TCI's Constitution and governing practices in an attempt to address the serious

[72] See comments of Lord Mance in *Bancoult (No2)* (n 67) at [159].

[73] M. Elliott and A. Perrua-Saussine, 'Pyrrhic Public Law: Bancoult and the Sources, Status and Content of Common law Limitations on Prerogative Power' [2009] PL 697, 722.

[74] Ibid.

concerns raised in the Auld inquiry. A key moment came on 9 December 2010, when Henry Bellingham, the Parliamentary Under-Secretary of State for Foreign Affairs, set out eight specific milestones with regards to good governance and sound financial management that would have to be met before new elections could take place. The milestones were as follows:[75]

1. Implementation of a new Turks and Caicos Islands Constitution Order, in support of recommendations of the Commission of Inquiry, which underpins good governance and sound public financial management.
2. Introduction of a number of new ordinances, including those making provision for: (i) the electoral process and regulation of political parties; (ii) integrity and accountability in public life; (iii) public financial management.
3. Establishment of robust and transparent public financial management processes to provide a stable economic environment and a strengthening of the Turks and Caicos Islands Government's capacity to manage their public finances.
4. Implementation of budget measures to put the Turks and Caicos Islands Government on track to achieve a fiscal surplus in the financial year ending March 2013.
5. Implementation of a transparent and fair process for acquisition of Turks and Caicos Islander status.

[75] House of Commons Library. *The Turks and Caicos Islands*, SN05038. 31 December 2012, 4. <http://researchbriefings.files.parliament.uk/documents/SN05038/SN05038.pdf> accessed 2 January 2018 (hereafter House of Commons Library. *The Turks and Caicos Islands)*

6. Significant progress with the civil and criminal processes recommended by the Commission of Inquiry, and implementation of measures to enable these to continue unimpeded.
7. Implementation of a new Crown land policy.
8. Substantial progress in the reform of the public service.

All of these milestones were important, but of course the most essential piece of work was in relation to writing a new Constitution that would be strong enough and robust enough to reduce the likelihood of a repeat of what took place prior to 2009. A 15-month consultation process was undertaken before the new Constitution was enacted on 13 July 2011. Kate Sullivan, a constitutional and electoral reform adviser, was appointed in early 2010 to lead a review of the 2006 Constitution and to make proposals for a new Constitution and electoral system. In July 2010 Sullivan published a set of initial recommendations, with the final recommendations coming in February 2011.[76]

The new Constitution was substantially longer than the previous one (by 15 pages), and includes a series of provisions to strengthen good governance, extend the role of the Governor, and improve the level of oversight and accountability. Key changes include an enforceable commitment to good governance principles;[77] new powers for the Governor to act contrary to Cabinet advice or to enact legislation to ensure compliance with the Statement of Governance Principles;[78] and improve accountability arrangements for Ministers, require

[76] Sullivan, *Turks and Caicos Islands Constitutional and electoral reform project* (n 5).

[77] Turks and Caicos Islands Constitution Order, 2011 No. 1681 s 28.

[78] Ibid, s 29.

regular Cabinet meetings, and increase the transparency of Cabinet business.[79] Also, measures are included to improve the effectiveness of the House of Assembly via a strengthened committee system and more regular sittings, and reinforcing the position of several key institutions, such as the Auditor General, Director of Public Prosecutions, and the Integrity Commission by giving them constitutional protections.[80] In addition, there are new provisions in relation to Crown Land, including its disposal to be prescribed by Ordinance and to be in conformity with the Statement of Governance Principles.[81]

In parallel to the constitutional changes, other reforms were made so the milestones could be achieved. A series of wide-ranging changes were undertaken to improve the impartiality and professionalism of the public service. They included reducing the number of Ministries from nine to five; appointing a new generation of Permanent Secretaries on fixed-term, performance-monitored contracts; introducing new working methods; and reducing the workforce by 300-400.[82] Further, the rules governing 'TCI Islander' status, formerly known as 'Belongership' became more transparent.[83] However, there was strong local resistance to

[79] Ibid, s 34; s 38; and s 39.

[80] Ibid, s 64; s 66; s 97; s 98; s 100; and s102.

[81] Ibid, s 107.

[82] 'Governor Issues Detailed Report on Milestones' *TCI Free Press* (19 January 2012) <http://tcfreepress.com/index.php?option=com_content&view=article&id=3211:governor-issues-detailed-report-onmilestones&catid=18:local&Itemid=26> accessed 8 September 2017

[83]'Immigration Law Signed' *Turks and Caicos Weekly News* (undated) <http://tcweeklynews.com/immigration-law-signed-p2754-1.htm> accessed 8 September 2017

the suggestion put forward by Sullivan that five-years of permanent residency should be sufficient to allow an application to be made for TCI Islander status; 10 years was agreed.[84] This was related to the desire of locals to restrict expansion of the franchise as much as possible. Measures were also implemented to restructure the TCI's economy and to reduce the high levels of public debt, unfunded liabilities, and uncontrolled spending bequeathed by the PNP government led by Misick. A three-year economic rescue package was agreed in 2010, including a UK-backed loan guarantee for bank lending of up to US$260 million; this was supplemented by £30 million in loans from the Department for International Development (DFID).[85] The reforms appear to have paid off at the macro-economic level, with the TCI government achieving an unaudited operating surplus of US$68.5 million in the 2015/16 financial year; a figure which takes into account the final repayment in February 2016, of the loan guarantee.[86] However, the process of economic reform was difficult and controversial, with discontent expressed, including public sector strikes, in response to decisions such as reducing public sector pay; improving tax collection and enforcement; introducing new revenue-raising measures, and improving financial management and reporting.

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[84] Kate Sullivan; TCI Ministry of Border Control and Employment, [4] & [9] https://www.gov.tc/bordercontrol/ps/turks-and-caicos-islander-status> accessed 6 April 2019

[85] House of Commons Library. *The Turks and Caicos Islands*, (n75) 4-5

[86] United Nations. Turks and Caicos Islands. *Working Paper prepared by the Secretariat of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,* 15 February 2017. <https://daccess-ods.un.org/TMP/5689020.15686035.html> accessed 16 June 2017(hereafter United Nations. Turks and Caicos Islands)

Another aspect of the reform effort was the establishment of a Special Investigation and Prosecution Team (SIPT) to investigate and prosecute allegations of corruption highlighted in, and related to, the 2009 Commission of Inquiry report. In terms of the SIPT's work itself, there were two main strands. First, a civil recovery team was created to reclaim Crown land wrongly granted and to recover money owed to the local government. The second strand, which we consider in more detail below, was the pursuit, by way of criminal proceedings, of those who had been centrally involved in the corruption allegations. The initial work of the SIPT was limited by inadequate funding being put in place. The British government believed that the British taxpayer should not fund the SIPT, 'on the grounds that the former TCI Government was responsible for the present parlous economic state of the Islands, and therefore it is the Islanders who should pay to clean up the mess they have created'.[87] This position was heavily criticised by the House of Commons Foreign Affairs Committee, which stated 'the failure of the Government to put in place adequate funding arrangements for the SIPT is of grave concern'.[88] The Committee went on to argue, 'the longer this damaging delay continues, the greater the risk that the moves to eradicate corruption from public life in TCI may founder, not least by enabling some of the individuals potentially facing investigation to liquidate their assets and put funds beyond the reach of the authorities'.[89] The

[87] House of Commons Foreign Affairs Committee. *Turks and Caicos Islands, Seventh Report of Session 2009-10*, (HC 469. 31 March 2010) 3. <https://publications.parliament.uk/pa/cm200910/cmselect/cmfaff/469/46902.htm> accessed 16 June 2017.

[88] Ibid, 2.

[89] Ibid.

report also included criticisms of the funding situation from Sir Robin Auld and Helen Garlick who had been appointed to head the SIPT.

In response to these criticisms the British government did relent and started to provide some financial support to cover the costs of the investigations.[90] With funding more secure the work of the SIPT began in earnest. Progress was steady and by the start of 2013, 2,500 acres of Crown land had been recovered and various financial settlements had been negotiated worth US$19.5 million.[91] A substantial part of that (US$12 million) was paid by Sandals Resorts International, a Jamaican-based tourism operator.[92] The total amount spent on the SIPT up to September 2016 was US$36 million, with the cost being equally shared between the UK and TCI governments.[93] However, funding has remained an issue of contention. In September 2016, for example, the British government forced the TCI government to pay US$3 million in legal aid to the SIPT, despite the TCI Cabinet denying the initial request. As was noted, 'The Minister for the Overseas Territories, Baroness Anelay, wrote to the Governor on 13 September instructing him under Section 3(4) of the

[90] House of Commons Library Turks and Caicos Islands (n75) 6.

[91] United Nations, Turks and Caicos Islands (n86)

[92] 'Corruption investigation results in fiscal windfall' *The Economist* (31 January 2013). <http://country.eiu.com/article.aspx?articleid=770103661&Country=Turks%20and%20Caicos%20Islands&to_6> accessed 17 January 2018.

[93] 'FCO approves additional $3 Million for SIPT legal aid – Despite Cabinets denial.' *Turks and Caicos Weekly News* (26 September 2016) <http://tcweeklynews.com/fco-approves-additional-million-for-sipt-legal-aid-despite-cabinets-de-p7409-127.htm> accessed 2 January 2018.

TCI Chief Financial Officer Ordinance 2012 to direct the CFO to make the necessary arrangements for the budget allocation primarily for legal aid for the defendants in the trial as requested by the Chief Justice to be made available'.[94] This is a tangible example of how the new Constitution and related Ordinances have been applied. Notwithstanding, there are concerns locally about the cost of the SIPT and its impact on the public purse.

As the work of the SIPT was ongoing, preparations for the return of self-rule continued. With a new constitution agreed and the milestones largely met the interim administration came to an end on 9 November 2012 when elections were held. Perhaps surprisingly the PNP, despite the allegations surrounding its former government ministers, won a tightly fought election eight seats to seven. Turnout was a high 84 per cent, but the number of voters remained a small proportion of the total population – 6,393 compared to 31,458. Despite the elections taking place there was significant resentment both locally and regionally about the greater level of engagement by the Governor and London via the new Constitution and Ordinances. For example, in September 2013, the House of Assembly established a constitutional review committee to review the 2011 Constitution and suggest changes to it. The final report was passed by the House in January 2015, and included such proposals as reinstating the automatic right to trial by jury, and seeking greater local control over Crown land and the police.[95] However, in August the British government responded and declined to accept the proposals. In a statement by Grant Shapps, Minister of State in the FCO, read out to the House of Assembly, the message was clear: 'I agree with the committee that we need to move on from the past, but that does not mean that we should forget the lessons learned,

[94] Ibid.

[95] United Nations (n 86) 5.

one of the key lessons was the need to put in place a series of robust checks and balances to ensure that the TCI meets international recognised standards of good governance, the rule of law and sound financial management'. The statement continued, '[I] have concluded that to amend the constitution in ways proposed would risk the hard won progress that was made, I do not believe that this is a risk that we can afford to take'. After the statement was read Premier Rufus Ewing stated: 'I stand flabbergasted over the audacity of the British government to see it in their wisdom to think that they can sit up in Whitehall and send a letter totally denying the people of the Turks and Caicos Islands the right to self-determination'.[96] Criticism of the new Constitution also came from the Caribbean Community (CARICOM) who stated that 'the restoration of true democracy was still a far way off'. It was further argued that 'the 2011 Constitution, conceived in London and thrust upon the people of the Turks and Caicos Islands when they were without representation, was viewed as a mere by-law for the continuance of direct rule under the pretext of representative democracy'.[97]

On first sight the differences between TCI politicians and the British government over the 2011 Constitution appeared deep-seated, with a growing desire on the part of the former to move the Territory towards independence. However, it can be argued that this over-states the

[96] 'UK says no to change – Gov't and Opposition upset but not surprised', *Turks and Caicos Weekly News* (24 August 2015). <http://tcweeklynews.com/uk-says-no-to-change-govt-and-opposition-upset-but-not-surprised-p6459-149.htm> accessed 2 January 2018

[97] 'Restoration of true democracy a far way off, CARICOM.' *Turks and Caicos Weekly News* (undated) <http://tcweeklynews.com/restoration-of-true-democracy-a-far-way-off-caricom-p3537-1.htm> accessed 2 January 2018

reality. The PNP was clearly leading the conversation, and in recent years (including under Misick) they had talked up the option of independence. For example, the party announced in October 2011 that it would seek a referendum on independence if it won the next general election (held in 2012).[98] But during the PNP's term nothing of substance was done to prepare the ground for a referendum or explain what independence might mean for the TCI. The party made a political calculation that a strong anti-British and pro-independence position would strengthen its political and electoral hand, but ultimately it actually weakened it. The enthusiasm of independence on the part of some politicians was not shared by many of the population, who remained concerned that the Territory's new political arrangements were still not sufficiently embedded. Indeed, two notable examples of poor governance were seen in 2014. First, Premier Rufus Ewing was accused of having a conflict of interest. It was disclosed that his family had a stake in a Canadian healthcare provider; a company that had won a controversial tender back in 2009 to provide health care services in the TCI.[99] Second, a report by the auditor-general into the TCI's 2012/13 fiscal accounts highlighted 'material weaknesses' and 'significant deficiencies' in the way in which the government managed them.[100] Indeed, when the next general election was held on 15 December 2016, the PNP suffered a clear defeat at the hands of the PDM, with Sharlene Cartwright-Robinson, becoming the country's first female Prime Minister. Past PNP excesses were also

[98] 'Turks and Caicos', 34(40), *Caribbean Insight* (London 7 November 2011)

[99] 'The premier's private interests spell trouble.' *The Economist* (6 May 2014) < http://country.eiu.com/article.aspx?articleid=201786204&Country=Turks%20and%20Caicos%20Islands&topic=Politics&subtopic=Forecast&subsubtopic=Political+stability> accessed 17 January 2018

[100] 'Report suggests poor management of public finances' *The Economist* (21 May 2014).

highlighted, not just by the continuing criminal trials, but also by Misick's attempt (as an independent) to return to the House of Assembly. In the event he failed to gain sufficient votes to win one of the at-large seats. This was a positive indication perhaps that the strong level of support Misick had in the immediate aftermath of the corruption allegations coming to light had waned significantly and the detailing of those allegations in the criminal trial highlighted the extent of his corruption, mismanagement and arrogance.

E. The legal challenge arising from the trial of Michael Misick and other Cabinet Ministers by judge alone

Following the investigations undertaken by the SIPT, 14 people (including Misick and several former cabinet ministers) were charged with serious criminal offences, including bribery, conspiracy to receive bribes, conspiracy to defraud the TCI government, conceal or transfer the proceeds of criminal conduct, and conspiracy to pervert the course of justice. Misick had fled to Brazil for a time, but after losing an appeal against extradition he was sent back to the TCI in early 2014.[101] The trial officially began on 18 January 2016. In his opening statement the Prosecutor for the Crown, Andrew Mitchell QC, told the court: 'The Cabinet Ministers loyal to Misick during the period between 2003 and 2009 were the beneficiaries of payments totalling millions of dollars paid to them or to the Progressive National Party'.[102]

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[101] 'Former Premier Extradited to Turks and Caicos' *UK Government* (7 January 2014). <https://www.gov.uk/government/world-location-news/former-premier-extradited-to-turks-and-caicos-islands> accessed 10 January 2014.

[102] 'Misick finally stands trial in 'pay to play' corruption scandal' *Turks and Caicos Weekly News* (25 January 2016) < http://tcweeklynews.com/misick-finally-stands-trial-in-pay-to-play-corruption-scandal-p6793-149.htm> accessed 30 January 2016

More than 100 people were expected to be called as prosecution witnesses. However, the trial's progress has been slow and is unlikely now be completed before the end of 2019. Reasons for the delay have included Misick's lead counsel (on two separate occasions) stepping down from the case, an unsuccessful application by Misick and his lawyers for a mistrial,[103] and a challenge to the decision that the trial should be by judge alone. Though this challenge was, ultimately, unsuccessful, the issues that it raised could yet have far-reaching political consequences both locally and regionally and it is, therefore, worth examining in more detail.

In accordance with the Auld Report's recommendation, the 2011 Constitution did not contain the right to trial by jury which had been enshrined in the 2006 Constitution.[104] Though jury trial would remain the norm for serious offences in the TCI, it was no longer an absolute right. Instead, the Governor had enacted the Trial Without a Jury Ordinance 2010 ('TWAJO'), which by section 4 allowed a judge to order a trial without a jury if satisfied that this was required by the interests of justice, having regard to: the nature of the charges; the complexity of the issues or matters to be determined; the length of the trial; the likelihood of pre-trial publicity influencing the decision of the jury; and any information tending to suggest that jury tampering might arise.

[103] See 'Misick Attorneys to Seek Retrial in Turks and Caicos' *The Gleaner* (Jamaica 2 February 2016). <http://jamaica-gleaner.com/article/lead-stories/20160202/misick-attorneys-seek-retrial-turks-and-caicos> accessed 1 August 2017

[104] TCI Constitution s 6(2)(g)

On appeal to the JCPC by Misick and his co-accused against the order of the trial judge that they should be tried alone, the appellants claimed that the judge could only have made such an order if he had been 'satisfied' so that he was 'sure', or 'beyond reasonable doubt', that this was required by the interests of justice. This argument, however, failed to gain any traction with the JCPC. Instead, the JCPC agreed with the judgment of the New Zealand Court of Appeal in *R v Iti*,[105] concerning a similar legislative provision, that such a decision requires the evaluation of all relevant factors rather than being amenable to analysis in terms of standard of proof in criminal cases. While the JCPC accepted that in common law countries, any suggested curtailment of trial by jury is met by the greatest caution at the level of parliamentary and public debate (a somewhat dubious claim given the absence of parliamentary and public debate that preceded the suspension of the right to trial by jury pursuant to the 2009 Order), it did not follow that any departure from the norm of a jury trial depended on an analysis of the decision in terms of the standard of proof.[106]

In refusing to overturn the decision of the lower courts the JCPC had regard to the fact that the documentation in this case was voluminous (15,000 pages); that the trial was likely to last between three to four months; and that the pool from which jurors could be drawn was in practice limited to those of the 6000 'Belongers' of the TCI who live on either Providenciales or Grand Turk.[107] The relentless publicity that this highly unusual and controversial case had attracted and the close-knit nature of the community on the TCI also meant that:

[105] [2011] NZCA 114

[106] *Misick and others* (n 66) [35]

[107] Ibid, [55]

> [I]t would be highly impracticable to find a jury composed of those with no prior knowledge of, or opinion upon, the issue at stake, and that even if such were possible, the identity of jurors would inevitably become known, thus exposing them to inevitable extra-evidential opinions and/or information, whether innocently communicated or not.[108]

Before concluding, the JCPC could not resist the opportunity of pointing out that Misick had previously argued before the Auld Commission that he would not get a fair trial by jury in the TCI because of the likely contamination of the jury as a result of the adverse media publicity surrounding the case (an argument endorsed by the lawyers representing all of the other appellants before the Auld Commission). This would seem to be a classic example of an appellant being hoist by his own petard or, as the JCPC witheringly put it:

> The present attempt to put the submissions made to [the Auld Commission] into dramatic reverse is most kindly to be described as a change of strategy, or perhaps as a changed appraisal of currents of press or public opinion.[109]

Though the concerns that motivated Misick and his fellow Ministers to challenge the decision to deny their right to jury trial may have been more instrumental than principled, this should not be allowed to detract from the concerns expressed both locally and in the wider region about the whole process. The trial court, for example, was described in a leading Jamaican newspaper as ‘a court set up by the British Government specifically for the Misick

[108] Ibid.

[109] Ibid, [56]

case, with an imported judge and foreign prosecutors'.[110] Within the Commonwealth Caribbean there is, at the very least, a vestigial memory of a period when the right to trial by jury was a right enjoyed only by English (later British) settlers because of their blood ancestry, whilst slaves were tried by the Governor in Council alone.[111] Though the comparison may not be exact, it is close enough to be exploited for political ends and for the trial of Misick and his fellow Ministers to be held up as another example of a right to trial by jury being denied as a result of an ordinance enacted by the British Government's representative in the TCI, the Governor. The suggestion that there may have been an element of racial bias in the prosecution of Misick and his fellow Ministers was also noted in the report of a CARICOM Ministerial Fact-Finding Mission, which visited the TCI in June 2013. The Mission thus reported that it had detected amongst those who had been interviewed a feeling that foreign developers who had bought Crown Land had been allowed to return the land and to pay compensation in order to avoid prosecution, a dispensation not afforded to Misick and his fellow Ministers.[112] Indeed, the Governor was at one point obliged to issue a denial of the assertion that 'white people can buy justice, while black people go to jail'.[113]

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[110] Eric Barton, 'The Peculiar Case of Michael Misick' *The Gleaner (*Jamaica 25 June 2014)

[111] See Derek O'Brien, 'Magna Carta, the "Sugar Colonies" and "Fantasies of Empire"' in R Hazell and J Melton (eds) *Magna Carta and its Modern Legacy* (Cambridge University Press 2015) 99, 104.

[112] <http://www.tcinewsnow.com/documents/caricom_report_june2013.pdf> accessed 2 January 2018

[113] 'Fact finders note suspicions of compromised judicial system' *Turks and Caicos Weekly News* (undated). <http://tcweeklynews.com/fact-finders-note-suspicions-of-compromised-judicial-system-p4159-1.htm> accessed 2 January 2018

F. Conclusion

In this chapter we have sought to highlight the very fragile nature of the UK's relationship with one of its most troublesome OTs and the tensions that exist between the understandable desire of an OT for greater autonomy and the UK Government's overarching responsibility for the good governance of its OTs. Whilst it is arguable that some of the problems that arose in connection with the TCI are specific to the TCI, several factors, such as a relatively small electoral base, a transactional political culture based on the closeness of the relationship between members of the legislature to their constituents, and its potential for exploitation by overseas investors are common to other OTs in the region, such as the Cayman Islands and the British Virgin Islands, which also share some of the same constitutional weaknesses and imbalances that were identified in the Auld report. In addition, the UK's reluctance – at least initially – to intervene too strongly in the affairs of the TCI, despite growing concerns of corruption and mismanagement in the Territory – is based on an approach which is common across the other OTs, namely that as democratic and economically self-sustainable entities, the UK should give them adequate space to govern themselves.

Ultimately, however, in the face of the breakdown of the rule of law and the norms of democratic governance, disclosed in the report of the Auld Commission, the UK was forced to impose measures, including the overthrow of a representative government and the abrogation of constitutional rights. Though these measures do not sit comfortably with the values embodied by the rule of law and constitutional democracy the UK Courts refused to intervene, affording the Crown an alarmingly wide area of discretionary judgment in relation to the governance of its OTs. It is, of course, to be hoped that the far-reaching reforms introduced under the 2011 Constitution and the recent election of a Government, untainted by

the corruption and scandal of the Misick administration, will help to secure the democratic future of the territory. However, much will depend on whether these reforms take root, and whether they are sufficient to transform the transactional nature of the political culture of the territory, which for the last 20 or so years has shown itself to be remarkably resistant to the norms of democratic governance. Much will also depend on the eventual outcome of the trial of Misick and his fellow Ministers and public perception of its legitimacy, which could affect the already very fragile nature of the relationship between the TCI and the UK Government.

A final consideration (and post-script) is the report published by the House of Commons Foreign Affairs Committee in February 2019, which offered a wide-ranging review of the OTs, a decade after its last report. One area that the Committee focused on, with significant resonance for the TCI, was in relation to the franchise and its possible expansion; something which TCI Islanders had long resisted. The Committee stated quite clearly, that 'Belongership and its equivalents are wrong', and argued that 'we do not accept that there is any justification to deny legally-resident British Overseas Territory and UK citizens the right to vote and hold elected office'.[114] The Committee recommended that a pathway is put in place for all resident UK and British Overseas Territory citizens 'to be able to vote and hold elected office in the territory'.[115] The response from the OTs was swift and strong. TCI Prime Minister Sharlene Cartwright Robinson was very critical, stating that 'we [cannot] accept the unbridled influx of British citizens to be added to our voting

[114] House of Commons Foreign Affairs Committee. Global Britain and the British Overseas Territories: Resetting the relationship. Fifteenth Report of Session 2017-19, (HC 1464. 21 February 2019) 26

[115] Ibid, 26 – 27.

population'.[116] It is up the UK government to decide whether to accept the Foreign Affairs Committee's recommendation or not, but it is interesting to note that an important proposed reform from the Auld Commission is still resisted so strongly by the TCI's political elite.

[116] Turks and Caicos Sun, 8 March 2019, Premier Robinson responds to Foreign Affairs Committee Report, <http://suntci.com/premier-robinson-responds-to-foreign-affairs-committee-report-p3974-129.htm> accessed 6 April 2019.