

Empire's Residue

Author : Erin F. Delaney

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Paul F. Scott, [The Privy Council and the constitutional legacies of Empire](#), 71 **N. Ireland Legal Q.** 261 (2020).

On July 1, 1997, sovereignty over Hong Kong was transferred from the United Kingdom to the People's Republic of China, and, so the story goes, the sun finally set on the British Empire. Except it didn't. As Paul Scott masterfully explicates in [The Privy Council and the constitutional legacies of Empire](#), the Empire endures, both in terms of ongoing control over Overseas Territories unlikely to become independent, and in the retention of formal mechanisms of constitutional governance which hide this imperial residue from the domestic constitutional order.

Scott's article is part of a symposium edition of the *Northern Ireland Legal Quarterly*, entitled "The Constitutional Legacies of Empire." This broader project is of a piece with comparative and global constitutionalism's increased—and important—focus on colonialism and decolonization. For example, in an [editorial](#) in March 2020, the editors of *Global Constitutionalism* charged constitutional scholars to "decolonise constitutional law" through "a commitment to analyzing the colonial legacy in constitutional formation, the contemporary rights regime, and international public law, from both theoretical and historical perspectives." Scott turns a critical eye on the British constitution itself and calls for a reckoning "with the legacy, and indeed the ongoing reality, of the British Empire."

He opens by describing the territorial residue: fourteen Overseas Territories (OTs) whose position in the UK's constitutional order both "exclude[s] them from constitutional consciousness," and even "mislead[s] as to their constitutional status." These OTs are without representation in the Westminster Parliament, which nevertheless has ultimate legislative authority over them, and though they are "neither foreign nor Commonwealth," they are under the purview of the Foreign and Commonwealth Office (a successor to the Colonial Office), not the Home Office.

This imperial twilight is managed by the Privy Council, a "black hole", in Scott's words, of the British constitution and the reason that "the UK is able to remain an Empire without being required to acknowledge that fact directly within its constitutional order." Scott paints a picture of an institution shrouded in mystery—one that works a subterfuge, allowing the UK to maintain a domestic and an imperial constitution simultaneously. And he bemoans the lack of critical attention to the Privy Council paid by domestic constitutional lawyers, arguing that scholars must engage with its anomalies in order to confront, in turn, both the UK's imperial past and its "ambiguous imperial present."

The Privy Council has ancient roots; its earliest incarnation, the *Curia Regis*, emerged in the aftermath of the Norman invasion. The Privy Council advises the Sovereign, and there are over 600 Privy Counsellors, including members of the Royal family. As Scott notes, the list on the Privy Council's [website](#) provides no information about individual members of the Council, making it almost "impossible" to figure out "who many of these people are, and why they have been appointed to the Council" without extensive research. Although some Commonwealth countries appear to be represented, there is no obviously "direct or systematic representation" of the OTs.

The Privy Council has both a judicial and legislative role in governing the OTs, presenting what Scott

calls a “substantive continuity” with the imperial constitution. The Judicial Committee of the Privy Council is well known, and its ongoing jurisdiction as the court of final appeal for a number of Commonwealth countries (both monarchies and republics), is an obvious link to Britain’s past Empire. But it retains jurisdiction over the OTs, and, as Scott points out, in some years, “such cases represent[] more than a third of those decided by the JCPC.” Scott argues that if these cases arising from the OTs were to be handled by the UK Supreme Court instead (as presumably would befit a domestic jurisdiction), it might force an acknowledgment of the “ongoing imperial nature of the UK.” It is possible that OT cases could account for upwards of 10 percent of the UK Supreme Court’s work in a given year and would receive the publicity attending decisions of that Court. (The JCPC for example does not have its own Twitter feed.)

The legislative role of the Privy Council also “disguises the substantive reality whereby the government of the UK legislates . . . for a residual empire.” Scott explains that, although Parliament retains a formal power to legislate, in practice law is made for the OTs through the Queen in Council. In operation, this is done by the Lord President of the Council and three other members (current Government ministers who are themselves Privy Counsellors) in the presence of the Queen. Scott criticizes the two primary forms of legislation promulgated as diverging in important ways from expectations under the domestic constitution. Statutory orders in council do not receive “the normal processes” of parliamentary scrutiny, and prerogative orders in council can escape publication and come into force without being seen by Parliament at all. Scott is careful to note that the number of prerogative orders in council is likely small, but quantifying their existence is complicated by inaccessibility. And the underlying problems of principle remain: a lack of democratic accountability and even a threat to “basic standards of the rule of law.”

Scott’s thoughtful study makes an important contribution to the study of constitutionalism and empire. In shining a light onto the Privy Council, Scott argues that it provides “cover for practices that the domestic constitution would rightly reject.” He does not take the final step in his article, but it seems a short distance to the claim that the imperial residue works to undermine the core democratic commitments of the British constitution itself. In this Scott echoes the work of [American scholars](#) confronting U.S. constitutional history. In both cases, an old but still-relevant story: power corrupts, and imperial power perverts.

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