3-2024

Evolving Sovereignty Relationships Between Affiliated Jurisdictions: Lessons for Native American Jurisdictions

Vaughan Carter

Charlotte Ku
Texas A&M University School of Law, cku@law.tamu.edu

Andrew P. Morriss
Texas A&M University School of Law, amorriss@tamu.edu

EVOLVING SOVEREIGNTY RELATIONSHIPS BETWEEN AFFILIATED JURISDICTIONS: LESSONS FOR NATIVE AMERICAN JURISDICTIONS

Vaughan Carter[*], Charlotte Ku[**], & Andrew P. Morriss[***]

TABLE OF CONTENTS

---

[*] *LL.B., University of Kent; LL.M. (Human Rights and Civil Liberties), University of Leicester; Attorney-at-Law (Cayman Islands). This author is a practicing attorney, specializing in constitutional and administrative law and human rights at Savannah Law in the Cayman Islands, where he is also a Practitioner Tutor at the Truman Bodden Law School, Chairperson of the standing Constitutional Commission, and a Law Reform Commissioner.* *The authors are grateful to the Law & Economics Center's Tribal Law & Economics Program at George Mason University Antonin Scalia Law School for financial support in completing this research. The authors further thank Kelly Fitzgerald, J.D. 2024, Texas A&M University School of Law for valuable research assistance.*

[**] *B.A., American University; Ph.D., M.A.L.D., M.A., Fletcher School of Law and Diplomacy, Tufts University; Professor, School of Law, Texas A&M University.*

[***] *A.B., Princeton; J.D., M.Pub.Aff., University of Texas at Austin; Ph.D. (Economics), M.I.T.; M.Ed.Pysch., Texas A&M University. Professor, Bush School of Government and Public Service & School of Law, Texas A&M University.*

ABSTRACT

Though sovereignty is principally associated with governance over a territory and freedom to act in the international arena, this article examines sovereignty as empowerment. The study tests the applicability to Native American jurisdictions of the experiences of 15 jurisdictions presently associated with the United Kingdom, the Netherlands, and France in shared sovereign relationships. The focus is on the evolution of those relationships and opportunities for development where jurisdictions do not attain full control over their affairs. The case studies examine the relationships from the perspectives of political, economic, and cultural sovereignty. The article further examines the relationships in three dimensions: evolutionary, frictions, and interwoven governance. It concludes with identifying factors of political cohesion, leadership, and entrepreneurship; conditions of good governance; and structures of consultation that allow for leveraging even limited degrees of sovereignty for political, economic, and cultural advancement.

I. INTRODUCTION

"Poverty is not part of our cultural heritage," Chairman of the Crow Nation Carl Venne declared at the 2008 signing ceremony for the Joint Sovereign Uniform Commercial Code (UCC) Filing Compact between the Crow Nation and the State of Montana.[1] The compact was a critical step in the implementation of the Model Tribal Secured Transactions Act to enable the flow of credit to the Crow Reservation—vital for economic development.[2] The ceremony took place nearly 180 years after the Crow Nation signed the 1825 Friendship Treaty accepting the supremacy of the United States over its territory.[3] Despite the devastating impacts such treaties have had on Native American tribes' ability to exist as a people and to thrive, the United States has long recognized that Indian tribes maintain a degree of

---

[1] Quote provided by William H. Henning, Tex. A&M Univ. Sch. of L. and former Exec. Dir. of the Unif. L. Comm'n. Henning was a member of the UCC drafting committee for the Model Tribal Secured Transactions Act and was present at the signing ceremony.

[2] *See Crow Nation, State of Montana Sign Joint UCC Filing Compact*, FED. RSRV. BANK OF MINNEAPOLIS (May 1, 2008), https://www.minneapolisfed.org/article/2008/crow-nation-state-of-montana-sign-ucc-filing-compact.

[3] *See* Treaty with the Crows, U.S.-Crow Tribe, art. I, Aug. 4, 1825, 7 Stat. 266, https://www.ctlb.org/wp-content/uploads/2016/02/1825-Friendship-Treaty.pdf.

sovereignty, even if heavily constrained. In 1932, Chief Justice John Marshall addressed the tribes' status in the majority opinion of *Worcester v. Georgia*:

> The Indian nations had always been considered as distinct independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception . . . which excluded them from intercourse with any other European potentate than the first discoverer . . . . The very term "nation," so generally applied to them, means "a people distinct from others."[4]

Giving substance to *Worcester's* recognition of tribal sovereignty, however, has proven difficult. In the absence of the parties directly negotiating within this unique arrangement, a "maze of Indian statutes and case law tracing back [over] 100 years" has defined the contours of the relationship.[5] This relationship has been characterized as "oscillat[ing] between two poles, with the Supreme Court sometimes applying foundation principles that view tribes as sovereigns 'retaining all their original natural rights,' and at other times treating tribes as mere 'wards subject to a [self-imposed] guardian.'"[6]

Although tribal sovereignty is most often compared to relations between other post-colonial settler states and their indigenous communities (e.g., Australia, Canada, and New Zealand), these are not the only relationships where the division of sovereignty is not well defined and subject to change. Scattered across the globe are jurisdictions that continue to maintain a constitutional relationship with another power, often a former colonial ruler. In this article, we argue that the evolving relationships between various jurisdictions associated with Britain,[7] France,[8] and

---

[4] Worcester v. Georgia, 31 U.S. 515, 559 (1832).

[5] Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of Federal Indian Law Canon*, 51 N.M. L. REV. 300, 300 (2021).

[6] Hedden-Nicely & Leeds, *supra* note 5, at 300.

[7] The remaining United Kingdom Overseas Territories ("UKOTs";-formerly known as British dependent territories or Crown colonies) are: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St Helena and St Helena Dependencies (Ascension and Tristan da Cunha); South Georgia and South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia (Cyprus); and The Turks & Caicos Islands. There are also similarities with the Crown Dependencies, the three island territories within the British Isles, which are not part of the United Kingdom but are self-governing dependencies of the Crown with varying forms of self-administration. The Crown Dependencies comprise the Bailiwick of Jersey, the Bailiwick of Guernsey (which includes Alderney and Sark; and which together with Jersey are also referred to as "the Channel Islands") and the Isle of Man.

[8] The French overseas territories are: Clipperton Island, French Polynesia, French Southern and Antarctic Lands, Guadeloupe, French Guiana, Martinique, Mayotte, New Caledonia, Réunion, Saint Barthélemy, Saint Martin, Saint Pierre et Miquelon, Wallis and Futuna.

the Netherlands[9] offer potential lessons for Native American jurisdictions in managing their relationships with the United States.[10] We draw attention to possible similarities (and differences) from a range of European-associated jurisdictions as these relationships have developed and suggest where tribal governments might derive both positive and negative insights from the experiences.

While the histories and potential trajectories of jurisdictions associated with Europe differ from those of tribal governments, their relationships are similar to those of tribal governments with the United States. Unlike Native American jurisdictions, many (but not all) of the jurisdictions in this case study were once colonies of European powers and most have at least the theoretical prospect of independence. The jurisdictions in this study are also all island jurisdictions and do not have immediate neighbors (except for St. Martin and Sint Maarten, which occupy the same island with a land boundary between them). Native American jurisdictions may share the sense of isolation felt by many island communities, and they also contend with the added complications and limitations of sharing physical land boundaries. Comparing the tribes' relationships with the relationships of their European-associated counterparts is nonetheless appropriate as international standards of good governance place greater emphasis on self-determination and economic development.[11] Understanding how less-than-fully-sovereign jurisdictions worked with these standards to strengthen their political and economic development could provide tribal governments with strategies for shaping their ongoing relationships with both federal and state governments in the United States, notwithstanding their differences with the island case studies.

To overcome a complicated array of names used for these jurisdictions, we have largely opted to use generic designations in this article. Within these designations, we use subsets to differentiate status, some of which overlap with each other. British jurisdictions, for example, include all territories with a British or United Kingdom connection including what are now called United Kingdom Overseas Territories (UKOTs) and Crown Dependencies (CDs). In a similar fashion, French and Dutch jurisdictions are designated as such even though we are tracking changes both in governing structures and relationships for each area over time.

We have also opted to avoid referring to these jurisdictions as "dependent" unless describing a specific form of dependency or discussing a historical context where this terminology more accurately characterized the relationship. This follows

---

[9] The Dutch overseas territories are Aruba, Bonaire, Curaçao, Saba, Sint Eustatius, and Sint Maarten. Denmark, Portugal, and Spain all have territories which we could have considered as well, although each has peculiarities of status which could cause debate over the appropriateness of the comparison.

[10] We also did not consider overseas jurisdictions affiliated with the United States, judging that the highest value in comparisons would come from jurisdictions connected to other countries.

[11] *See, e.g.*, U.N. Charter art. 73.

the United Kingdom's practice seen in the 1999 Government White Paper,[12] noting a change in preferred terminology from what had previously been referred to as "Crown Colonies" or "Dependent Territories" to "UKOTs." While some may dispute the substantive significance of these word changes, they do seem to capture policy shifts in the relationship between the United Kingdom and its overseas territories. UKOTs are therefore "former colonies," which, strictly speaking, is a term that encompasses independent states that were formerly part of the British Empire. At times, we also refer to "remaining overseas jurisdictions" as a generic term for what is now left of the jurisdictions that were formerly part of the British, French, and Dutch colonial empires: namely the UKOTs, the French jurisdictions, and the Dutch jurisdictions.

Our starting point is that both the Native American jurisdictions and the jurisdictions in this study exercise some form or degree of sovereignty, notwithstanding their relationships with or within a sovereign state (France, the Netherlands, the United Kingdom, or the United States). The case study jurisdictions are all geographically smaller than the jurisdiction with which they share sovereignty.[13] Further, the larger jurisdictions maintain shared sovereign relations with multiple other jurisdictions. Our focus is on how the jurisdictions have managed shared sovereignty to promote good governance and to support economic development. We examine both successes and failures to identify common factors and conditions across the jurisdictions to establish a basis for possible application by Native American tribes. In particular, we highlight how these relationships have shifted by varying degrees from hierarchy to partnership, which may be a framework for the future evolution of the tribes' relationships with federal and state governments in the United States.

To capture these relationships, we refer to the Native American jurisdictions and the jurisdictions connected to France, the Netherlands, and the United Kingdom as "micro-sovereigns"; and to France, the Netherlands, the United Kingdom, and the United States as "macro-sovereigns." This is not simply to reference geographic size, but also to distinguish between jurisdictions that exercise powers across the full inter-jurisdictional scope of government responsibility—such as external security and defense, foreign relations, and trade—from those whose sovereignty may be primarily inward-looking or is constitutionally constrained in some manner.[14]

Our key finding is the importance of creating opportunities for ongoing consultation and review of governing arrangements between macro- and micro-

---

[12] FOREIGN, COMMONWEALTH & DEV. OFF., PARTNERSHIP FOR PROGRESS AND PROSPERITY: BRITAIN AND THE OVERSEAS TERRITORIES, 1999, Cm. 4264, at 11 (UK) [hereinafter PARTNERSHIP FOR PROGRESS AND PROSPERITY].

[13] Our non-tribal case study jurisdictions are generally smaller islands that maintained their ties with European powers for varying reasons of economic and political advantage or viability even after the waves of decolonization of the second half of the twentieth century.

[14] Even here, the diversity of arrangements complicates the distinction, as some of the British jurisdictions are increasingly assuming responsibility for international agreements and participating in international bodies in their own capacity. *See* discussion *infra* Part III.A.

sovereigns, including the goals and objectives of each. Often triggered by a particular event, we found that the specific structure and formality of the consultations were less important than regularity and a framework that parties can comfortably use. Our case studies further revealed that the pursuit of priorities potentially carried trade-offs that each jurisdiction must resolve on their own through processes appropriate to their own populations and customs. As the priorities of the macro-sovereign may change, so may the priorities of the micro-sovereign; and processes, which can help flag those changes, would be beneficial to build resiliency into any governing partnership. A final insight is the non-linearity of developing a shared sovereignty relationship that will require the continuous balancing of interests, opportunities, and resources. Efforts to maintain effective balances may result in collaboration or cooperation with neighbors or like-minded jurisdictions for cost-sharing and capacity building.

Part II of this article analyzes the concept of sovereignty and explains what the historical experiences of our case study jurisdictions reveal about the exercise of sovereignty. To capture the multidimensional significance of these arrangements, we examine sovereignty over political, economic, and cultural issues and suggest how this tripartite conceptualization can provide a deeper understanding of sovereign relationships. Part III describes the evolving relationships between micro- and macro-sovereigns, grouped by macro-sovereign. These relationships reveal an evolution of approaches by macro-sovereigns in the management of their associated jurisdictions, with changes—including inconsistent and contradictory ones—appearing over time in response to both internal and external events and pressures. Lastly, Part IV sets out the key insights for the tribes from these jurisdictions' experiences—both positive and negative.

II. SHARING SOVEREIGNTY

There are important commonalities and parallels between the histories of Native American jurisdictions and the jurisdictions in this study. Both have been shaped by related forms of colonialism and by the associated quests for power, land, and natural resources and the atrocities committed in the course of these pursuits. For the purposes of this article, this ignoble history is taken as given;[15] while our thesis and propositions are informed by historical events, we proceed from the premise that Native American jurisdictions and the case study jurisdictions have come to exist in their present forms because of this history, and therefore that there is merit in Native American jurisdictions' consideration of how best to move forward from this particular point in history.[16]

---

[15] *See generally* ERIC WILLIAMS, CAPITALISM AND SLAVERY (3d ed. 2021) (regarding the Caribbean perspective); *see also* RESTATEMENT OF THE L.: THE L. OF AM. INDIANS, (AM. L. INST. 2022) (regarding U.S.-American Indian relations).

[16] There are competing viewpoints, not least within the Native American jurisdictions themselves, as to how they should seek to advance from this juncture. *See, e.g.*, *Native Peoples*, *Tribal Sovereignty, and Regulation*, REGUL. REV. (Mar. 15, 2021),

An important common denominator in both sets of relationships is their evolution, to varying degrees, toward less hierarchical relationships. In 1821, Chief Justice John Marshall termed the tribes "domestic dependent nations" rather than states or foreign nations in *Cherokee Nation v. Georgia.*[17] By 1997, the relationship had advanced sufficiently that U.S. Supreme Court Justice Sandra Day O'Connor referred in an article to "three types of sovereign entities—the Federal government, the States, and the Indian tribes," an indication of progress beyond Marshall's characterization of the relationship as ward and guardian.[18] Similarly, the British, Dutch, and French jurisdictions we examine have advanced toward less unequal relations from their starting point as colonies and colonizers—albeit through very different pathways, with some micro-sovereigns taking on increasing responsibilities that were traditionally left to the macro-sovereign, and others opting for greater integration into the macro-sovereign in at least some dimensions of sovereignty.

There is a range of experiences across the case study jurisdictions: some successful, and some less so, at least in comparison (we recognize that success is a relative term and that certain measures of "success" are not universally welcomed even within a particular territory).[19] Evaluation of success is also dependent upon the intended objectives and the fact that certain jurisdictions have prioritized particular objectives, whether by choice or otherwise and that these priorities may have shifted at different points in their histories. We accordingly set out to identify and explain the factors that have both defined preferences for particular objectives in these jurisdictions and dictated how and whether these objectives were ultimately achieved.

Our focus is on where there is scope, even where sovereignty is limited, to leverage the relationship to the benefit of the less powerful partner in the relationship. We do not intend to suggest that the constitutional arrangements in any one jurisdiction are necessarily universally preferable to any other, but instead to

---

https://www.theregreview.org/2021/03/15/native-tribal-regulation/ (for various views represented by 16 essays in *The Regulatory Review's* collection). While we do not judge the merits of any of these points of view, we do endeavour to offer a different perspective—that of the experiences of territories affiliated with the United Kingdom, France, and the Netherlands—for consideration in this context. Even the Crown Dependencies, which have not been subjected to colonialism (at least on the scale that colonialism impacted the Native American tribes and those jurisdictions that comprised the European empires) have experienced neglect at times. As non-sovereign micro-jurisdictions constitutionally connected to the United Kingdom, the Crown Dependencies share sovereignty with the United Kingdom in ways that are similar to how the UKOTs do and therefore provide useful experience. The distinctive histories of the Crown Dependencies do, however, give rise to certain differences, and these are also instructive in evaluating the extent to which the operations of the Crown Dependencies within the confines imposed by a shared sovereignty arrangement may now assist Native American jurisdictions.

[17] 30 U.S. 1, 17 (1831).

[18] Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

[19] *See generally* J.A. ROY BODDEN, THE CAYMAN ISLANDS IN TRANSITION: THE POLITICS, HISTORY, AND SOCIOLOGY OF A CHANGING SOCIETY (2007).

highlight a spectrum of experiences shaped by particular histories to offer lessons in their own contexts rather than to provide a set template. We draw on these experiences to identify common attributes as a generalizable basis to consider applicability to other situations. We note this to acknowledge the difference between our case study jurisdictions and the Native American jurisdictions. Some of our case study jurisdictions, for example, may become independent, which is not a likely prospect for Native American jurisdictions. Yet, even where the destinations may ultimately differ, many points on the journeys are sufficiently similar so that they are instructive.

The complexity of the relations of sovereigns within these relationships can be usefully considered within three dimensions. First, these are *evolutionary* relationships, changing as the relationship between the micro and macro-sovereign changes with circumstances. For example, Gibraltar's relationship to the United Kingdom was quite different when it played a critical role in British military strategy and was a naval installation than it is today when its economy stands on its own and its military role is minimal.[20] Second, these relationships often involve frictions, both great and small, which play a considerable role in how a particular relationship develops. For example, Britain's insistence that the UKOTs abolish the death penalty and, more recently, recognize at least a functional equivalent to same-sex unions, due to Britain's obligations under the European Convention on Human Rights and other international human rights treaties, has strained constitutional ties between Britain and the Cayman Islands.[21] Third, multiple aspects of these relationships are interwoven in complex ways so that change in one dimension may also be tied to a significant change in another. For example, Mayotte's long campaign for *département* status ended its ability to diverge from French family and inheritance law.[22]

A. Evolutionary Relationships

Despite the ubiquity today of sovereignty in contemporary legal and political consciousness and discourse, the concept emerged as a solution to the specific historic problem of creating authority over diverse and potentially divisive communities in 16th and 17th century Europe.[23] As a response to the religious and political warfare of the time, attributes of sovereignty guided both the development of the domestic orders of actors and the international order in which they functioned. Internationally, sovereignty served as a form of empowerment as expressed through the Peace of Westphalia (1648) that created an order of a "multiplicity of states, each sovereign within its territory, equal to one another, and

---

20 *See* discussion *infra* Part III.A.4.

21 *See* discussion *infra* Part III.A.2.

22 *See* discussion *infra* Part III.C.2.

23 *See* Diane P. Wood, Opening Remarks at American Law Institute (ALI) Annual Meeting (May 12, 2003); *see also* DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT 3 (Dieter Grimm trans., Columbia University Press 2015) (2009).

free from any external earthly authority."[24] Sovereignty within a territory meant self-government and was understood to be absolute and indivisible. Concomitant with the freedom from any outside interference was an expectation that a sovereign would maintain a stable domestic order. Since the early twentieth century, the understanding of that domestic order has evolved to include the expectation that it will reflect the desires of those governed through some expression of self-determination.[25]

Broad acceptance of the proposition that sovereignty was absolute and indivisible within a territory was reflected in numerous writings including William Blackstone's influential *Commentaries on the Laws of England,* in which Blackstone wrote that "there is and must be . . . a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summa imperii* or the rights of sovereignty reside."[26] It was this view imported into the American colonies that contributed to the rise in tensions between the colonies and the King, ultimately leading to the American Revolution.[27] This view was further affirmed during debates over acceptance of the U.S. Constitution. Arguing before the Pennsylvania convention to ratify the U.S. Constitution, James Wilson said: "there cannot be two sovereign powers on the same subject," and that in every society there "of necessity must be, a supreme, absolute and uncontrollable authority."[28] Despite such categorical statements of sovereignty as undivided, the American Founders established a federal system with significant powers reserved to the states and which recognized enough sovereignty for the tribes to include them in the commerce clause empowering Congress to enact legislation to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes."[29] Native American jurisdictions' position as separate sovereign powers within the borders of the United States raises the question of the boundaries of their sovereignty and its relationship to the sovereignty of the federal and state governments. As demonstrated by the Supreme Court's decision in *McGirt v. Oklahoma*,[30] this remains a contested area with U.S. constitutional law.

A core similarity between the tribes and the various overseas jurisdictions is that there is divided sovereignty over a territory and that distribution of that sovereignty is constantly shifting both *de jure* and *de facto*. For example, the Dutch have been in virtually continuous negotiation with their Caribbean territories

---

[24] Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 28–29 (1948).

[25] *See* President Woodrow Wilson, Speech to the U.S. Congress regarding War Aims and Peace Terms (14 Points) (Jan. 8, 1918), https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points.

[26] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 2, at 49 (1st ed. 1765).

[27] *See* Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1432 (1987).

[28] James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), *in* FOUNDERS' CONST., 1986, at Vol. 1, Ch. 2, Doc. 14.

[29] U.S. CONST. art. I, § 8.

[30] 140 S.Ct. 2452, 2459 (2020).

(sometimes against their will) over those jurisdictions' status for decades.[31] The British process provides for regular discussions of constitutional advancement with its dependent territories and the United Kingdom has shown considerable willingness to revisit issues concerning sovereignty, although it also has boundaries over which it will not go if the jurisdictions wish to remain affiliated with the United Kingdom.[32] In most cases, the French experience is more unidirectional, with both France and the overseas jurisdiction seeking closer integration into France, but it is still best characterized as an ongoing dialogue rather than a concluded conversation.[33] While Native Americans have had fewer opportunities to engage in such ongoing review of their sovereign powers, it still appears that the position of the tribes today is quite different from their relationships to the federal and state governments in 1900, even if the evolution has occurred with less formality than has been the case for our case study jurisdictions.[34] We find that there are clear benefits to creating or finding a framework and structure for ongoing consideration of sovereign rights and prerogatives; this is key to advancement even in using limited sovereign powers within a larger sovereign entity. Our finding highlights where Native American jurisdictions might find collaboration fruitful to developing a consultative mechanism and structure for ongoing discussions with the U.S. government.

The goals of the evolving relationships between micro- and macro-sovereigns in our case studies differ across the three groups. The Dutch objective appears mostly focused on containing any problems in their overseas territories and keeping such problems away from the Netherlands itself.[35] Independence is tacitly, and sometimes openly, encouraged since the Dutch European population increasingly sees the islands as a drain on the public purse, without much gain.[36] The Caribbean jurisdictions, while welcoming Dutch financial support, object to the increasing conditions the Netherlands imposes on that support in pursuit of "good governance." France's goal with respect to its overseas territories is to advance those territories becoming "more French," the initial success of which was epitomized by Charles de Gaulle's exclamation of "My God, my God, how French

---

31 *See* discussion *infra* Part III.B.

32 *See* discussion *infra* Part III.A.

33 *See* discussion *infra* Part III.C. New Caledonia is the exception, where the Kanaks and Caldoche have opposing views on the desirability of continued association and integration with France. Jean Chesneaux, *Kanak Political Culture and French Political Practice: Some Background Reflections on the New Caledonian Crisis*, *in* NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY 71–73 (Michael Spencer, Alan Ward & John Connell eds., 1988).

34 *See* Monte Mills, *The Legacy of Federal Control in Indian Country*, REGUL. REV. (Mar. 16, 2021), *available at* https://www.theregreview.org/2021/03/16/mills-legacy-federal-control-indian-country/.

35 *See* discussion *infra* Part III.B.

36 Lammert de Jong, *Repairing a Not So United Kingdom. Can It Be Done?*, *in* THE KINGDOM OF THE NETHERLANDS IN THE CARIBBEAN, 1954–2004: WHAT NEXT? 15–16 (Lammert de Jong & Douwe Boersma eds., 2005) [hereinafter NETHERLANDS IN THE CARIBBEAN].

you are!" during his 1968 visit to the French Caribbean.[37] The British seem to have the most open sets of dialogue with their overseas jurisdictions, being willing to consider more autonomy although limited by the context of a sometimes-elastic definition of its own contingent liabilities as a macro-sovereign.[38]

Shared sovereignty between macro- and micro-sovereigns is thus not a fixed, crystallized relationship but an organic, evolving one. While influenced by history, its future course need not be limited to historical bounds. Not only have the British, Dutch, and French jurisdictions discussed here taken different paths from one another, but even within those sets of macro-relationships the individual jurisdictions have often charted quite different paths to their shared macro-sovereign. For example, not only are Aruba, Curaçao, and Sint Maarten on different paths than Bonaire, Saba, and Sint Eustatius, but Aruba's path has been quite different from both Curaçao's and Sint Maarten's.[39] Thus, although the tribes' often fraught histories with the United States and with various individual states will undoubtedly influence their future courses, our case studies suggest that considerable leeway remains for shaping those relationships in the future, particularly if both the tribes and the U.S. governments develop a framework that recognizes the evolutionary nature of their relationships.

B. Frictions

In all three groups, a major point of friction is about how the metropolitan power discharges its responsibility as a sovereign, including ensuring "good governance" in its overseas territories.[40] Friction arises particularly when the macro-sovereign sees discharging this responsibility as requiring imposing directives and policies with little to no input from the micro-sovereign. How, then, can metropolitan powers productively evolve in their relationships with their territories and still discharge their responsibility to provide good governance? Collaboration and frequent structured contact are key to a positive relationship that is respectful and trusting, even within a structurally unequal relationship. Done well, all can benefit, and the overseas territory increases its capacity to take on more

---

[37] WILLIAM F. S. MILES, SCARS OF PARTITION: POSTCOLONIAL LEGACIES IN FRENCH AND BRITISH BORDERLANDS 75 (2014) [hereinafter MILES, SCARS OF PARTITION]; *see* discussion *infra* Part III.C.

[38] *See* discussion *infra* Part III.A.

[39] *See* discussion *infra* Part III.B.

[40] *See* Peter Clegg & Emilio Pantojas-Garcia, *Conclusion* to GOVERNANCE IN NON-INDEPENDENT CARIBBEAN: CHALLENGES AND OPPORTUNITIES IN THE TWENTY-FIRST CENTURY 276 (Peter Clegg & Emilio Pantojas-Garcia eds., 2009) [hereinafter GOVERNANCE IN NON-INDEPENDENT CARIBBEAN] ("[T]he quest by the metropolitan powers to improve standards of governance in the territories has been difficult and divisive. Progress has been made, but the autonomy of the territories can make them reluctant to acquiesce to demands from their metropoles."). "Good governance" is how the Kingdom of the Netherlands defines one of its responsibilities over its constituent nations in the Charter. The British have also referred to "contingent liabilities" while the French say little about the subject at all.

responsibility. Done poorly, the relationship reverts to the unequal, non-consultative, and financially burdensome one that characterizes colonialism and neo-colonialism.

Among the macro-sovereign's responsibilities is to ensure a level of economic well-being in its territories. This can range from allowing movement between and employment in the macro-sovereign's territory to making transfer payments to the micro-sovereign. Transfer payments can be accompanied by the presence of large numbers of macro-sovereign administrators in the territory of the micro-sovereign to administer these funds and to run the programs funded. We see this in both the French and Dutch cases.[41] As such, these direct payment programs are costly to both macro- and micro-sovereigns. They are costly to the macro-sovereign in actual resources spent. Further, they create economic dependency that ultimately retards development of the capacity for indigenous self-governance and enterprise in the micro-sovereign. They are costly to the micro-sovereign in limiting its options to determine its political, economic, and even cultural future by weakening its ability to chart its own course.

Some British jurisdictions, including the ones discussed here, have enjoyed considerable economic success; however, the experience of the UKOTs is by no means uniform. To the extent that positive dialogue can be a driver of economic development, this is dependent on the macro-sovereign being willing and able to cooperate. However, where the macro-sovereign has other overwhelming interests—such as strategic military or resource considerations[42]—the welfare of the micro-sovereign can be set aside with damaging consequences. Any analysis of the performance of UKOTs cannot ignore the sordid history of the British Indian Ocean Territory, the separation of this jurisdiction from what was then the Crown Colony of Mauritius in 1965, and the forced removal of its inhabitants between 1968 and 1973.[43] While these events may pre-date a more enlightened approach taken by the British government from 1999 to its remaining overseas territories, as reflected in the *Partnership for Progress and Prosperity* White Paper,[44] the vigor with which the British government has continued to defend its actions, resisting any

---

41 *See* discussion *infra* Part III.B & III.C.

42 *See* Peter Harris, *Decolonising the Special Relationship: Diego Garcia, the Chagossians, and Anglo-American Relations*, 39 REV. INT'L STUD. 707, 712, 721 (2013). On the lease of Diego Garcia, the largest and most southerly island in the Chagos Archipelago that comprises the British Indian Ocean Territory, to the U.S. in return for a discount on the purchase of Polaris nuclear missiles. *Id.* at 721. Military and strategic considerations have also impacted on other UKOTs, although in the cases of both the Falkland Islands and Gibraltar this has resulted in a strong commitment on the part of the people in those jurisdictions to retain their constitutional connection to the UK.

43 STEPHEN ALLEN, THE CHAGOS ISLANDERS AND INTERNATIONAL LAW 11, 165 (2014); *see also* FIFTY YEARS OF THE BRITISH INDIAN OCEAN TERRITORY: LEGAL PERSPECTIVES (Stephen Allen & Chris Monaghan eds., 2018).

44 The four underlying principles governing the UK's relationship with its overseas territories were stated as: (i) self-determination; (ii) mutual obligations and responsibilities; (iii) freedom of the territories to run their own affairs to the greatest extent possible; and (iv) a firm commitment by the UK to help the territories develop economically and to help them in emergencies; PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 12, at 4–5.

right to return[45] and rejecting the claims to sovereignty pursued by the government of Mauritius in various international arenas,[46] is an enduring reminder of the precarious position of micro-sovereigns.

Even in more contemporary times where the British have encouraged greater local autonomy and development in the UKOTs, the micro-sovereign is still obliged to fulfil its side of the bargain. If the micro-sovereign is unable to provide good governance through its own locally elected ministers and representatives, there will be sanctions, even extending to the reassertion of direct rule in extreme cases. Indeed, the macro-sovereign is ultimately responsible for its territories and therefore maintains a contingent responsibility for them under international law.[47] For example, the Turks and Caicos Islands Commission of Inquiry 2008–2009 Report[48] concluded, amongst other things, that there was "a high probability of systemic corruption in government and the legislature and among public officers in the Turks and Caicos Islands" and that "[o]ver the same period there has been serious deterioration—from an already low level—in the Territory's systems of governance and public financial management and control."[49] These findings resulted in the Turks and Caicos Constitution being partially suspended between 2009 and 2011 (the chapter on fundamental rights remained in force) and an unsuccessful legal challenge to this action from the deposed Premier.[50]

A similar 2022 Commission of Inquiry has also reported in the British Virgin Islands (BVI). Sir Gary Hickinbottom, the Commission of Inquiry's sole commissioner, concluded that:

> The parlous failings in governance identified have not only been allowed by successive informed BVI Governments, but there is evidence that they have been positively endorsed and even encouraged. I have concluded that the elected BVI Government, in successive administrations (including the current administration), has deliberately sought to avoid good governance by not putting processes in place, and where such

---

[45] *See* R v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61; Chagos Islanders v. United Kingdom, App. 35622/04, (Dec. 11, 2012), https://hudoc.echr.coe.int/eng?i=001-115714; R v. Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 35.

[46] *See* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*,* Advisory Opinion, 2019 I.C.J. 95, 97 (Feb. 5), https://www.icj-cij.org/en/case/169.

[47] *See* Philip Loft, *The Overseas Territories: An introduction and relations with the UK*, HOUSE COMMONS LIBRARY (Jan. 20, 2023), *available at* https://researchbriefings.files.parliament.uk/documents/CBP-9706/CBP-9706.pdf.

[48] TURKS AND CAICOS ISLANDS COMM'N OF INQUIRY 2008–2009, REPORT OF THE COMMISSIONER, 2009, (U.K.), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/268143/inquiry-report.pdf.

[49] R (Misick) v. SoSFCA [2015] UKPC 31.

[50] *Id.*

> processes are in place, by by-passing or ignoring them as and when they wish—which is regrettably often.[51]

It followed that "the people of the BVI deserve better and that the UK Government owes them an obligation to protect them from such abuses and assist them to achieve their aspirations for self-government as a modern democratic state."[52] As such, the Commission of Inquiry reluctantly, but nevertheless strongly, recommended the suspension of locally elected ministerial government for two years with a return to direct rule by the British governor.[53] To compound matters, coinciding with the release of the Commission of Inquiry's report, the Premier of the British Virgin Islands was arrested in the U.S. on charges of cocaine possession and money laundering.[54]

However, despite the perfect storm hitting the British Virgin Islands, and notwithstanding the Turks and Caicos precedent, the British government has, in this instance, decided to stay the recommended imposition of direct rule, following the establishment of a local Government of National Unity committed to improving governance through wide-ranging reforms within strict timelines.[55] This decision can only be fully understood in the broader context of:

(i) a deterioration in Anglo-Caribbean relations resulting from the Windrush scandal;[56]

(ii) heightened interest amongst the independent Caribbean states in addressing the outstanding steps to full independence, as reflected by Barbados becoming a republic and St. Lucia stating its intention to

---

[51] BRITISH VIRGIN ISLANDS COMM'N OF INQUIRY, BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY REPORT, 2022 (U.K.), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080503/British-Virgin-Isles-Commission-of-Inquiry-Report.pdf.

[52] *Statement By His Excellency The Governor John Rankin, Cmg, Regarding the Commission of Inquiry Report*, GOV'T OF THE VIRGIN IS. (Apr. 29, 2022), https://bvi.gov.vg/media-centre/statement-his-excellency-governor-john-rankin-cmg-regarding-commission-inquiry-report.

[53] *Id.*

[54] Patrick Wintour, *UK Set to Impose Direct Rule on British Virgin Islands as Premier Faces Cocaine Charges*, GUARDIAN (Apr. 29, 2022), https://www.theguardian.com/world/2022/apr/29/british-virgin-islands-direct-rule-andrew-fahie-drug-arrest.

[55] Alex Therrien, *British Virgin Islands: UK decides against direct rule of territory*, BBC (June 8, 2022), https://www.bbc.com/news/uk-61736373.

[56] The Windrush generation refers to persons who arrived in the UK from various British colonies in the Caribbean between 1948 and 1971 (the MV Empire Windrush was the name of the first ship that brought prospective workers and their families from the Caribbean to help address the post-war demand for labor in the UK) and who believed that they were British citizens on this basis. However, the records of these arrivals and of grants to remain indefinitely were scant and in 2010 the original landing cards were destroyed, making it difficult for many of the Windrush generation to prove their status, especially when the British government adopted a "hostile environment" immigration policy and members of the Windrush generation who had been in the UK for decades were targeted for deportation.

make the Caribbean Court of Justice (CCJ) its final appellate jurisdiction; and

(iii) a greater focus on the imperialist legacy and the desirability of reparations for the victims of slavery and their descendants in the wake of the Black Lives Matter movement.[57]

So, when the BVI Commission of Inquiry recommended the reinstatement of direct rule, regional organizations in the Caribbean were quick to push back, citing the persistence of colonial rule in the area.[58] The situations in both the Turks and Caicos Islands and the British Virgin Islands illustrate that old colonial tensions

---

[57] *See, e.g.*, CARICOM REPARATIONS COMM'N, https://caricomreparations.org [https://web.archive.org/web/20230807203238/https://caricomreparations.org/] (last visited Aug. 10, 2023).

[58] The press release issued by the Caribbean Community and Common Market (CARICOM) stated that:

> CARICOM is however deeply concerned by the Report's recommendation to suspend "those parts of the Constitution by which areas of government are assigned to elected representatives" and taking the retrograde step of restoring direct rule by the Governor in Council as existed in Her Majesty's colonies during the colonial period. CARICOM supports the BVI government and people in their objection to this recommendation. The imposition of direct rule, and the history of such imposition in the Caribbean, was never intended to deliver democratic governance or to be an instrument of economic and social development of our countries and peoples.

Caribbean Community Statement on the Release of the Report of the United Kingdom's British Virgin Islands Commission of Inquiry, CARICOM (May 3, 2022), https://caricom.org/caribbean-community-statement-on-the-release-of-the-report-of-the-united-kingdoms-british-virgin-islands-commission-of-inquiry/ [https://web.archive.org/web/20230928010842/https://caricom.org/caribbean-community-statement-on-the-release-of-the-report-of-the-united-kingdoms-british-virgin-islands-commission-of-inquiry/].

In even more strident terms, the Vice Chancellor of the University of the West Indies (UWI), Professor Sir Hilary Beckles, explained that:

> All the people of the region have fought with all means available to craft a democratic culture in the face of fierce opposition from Britain. They have been murdered, imprisoned, and racially denigrated in the quest for freedom, justice, and democracy. Britain has no authority, moral or otherwise, to teach democracy lessons in the Caribbean, insisting as it does on dominating the people who are seeking Reparatory Justice for centuries of colonial brutality and continuing imperial rule.

Fitsroy Randall, *UWI Vice Chancellor Calls for U.K. to Keep its Hands off BVI*, BVI NEWS.COM (May 9, 2022), https://bvinews.com/uwi-vice-chancellor-calls-for-uk-to-keep-its-hands-off-bvi/.

cannot be ignored, and that the relationship between the macro- and the micro-sovereign still obliges the latter to maintain proper internal governance in order to retain its autonomy and self-government. More generally, the frictions between the macro- and micro-sovereigns we observe in all the cases here illustrate the challenges that shared sovereignty includes and the need for mechanisms to resolve conflicts where the two sovereigns' views of the division of responsibilities differ.

C. Interwoven Governance

The final thematic observation is that micro-sovereigns' relationships with a macro-sovereign are interwoven in complex ways that are not always immediately apparent. For example, the Caribbean UKOTs participate on an a la carte basis in a number of shared regional institutions depending on individual UKOT goals, even as greater degrees of local autonomy are sought from the macro-sovereign. In the Caribbean, these shared institutions include the University of the West Indies (UWI)[59] CARICOM,[60] the Organisation of Eastern Caribbean States (OECS),[61] the Eastern Caribbean Central Bank,[62] the Eastern Caribbean Supreme Court,[63] and the

[59] Six UKOTs—Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands—are affiliated with UWI, along with the eleven English-speaking independent states in the region.

[60] CARICOM is governed by the Revised Treaty of Chaguaramas, which provides, *inter alia*, for integration of efforts in economic matters, co-ordination of foreign policies and functional cooperation in a list of areas including labor administration and industrial relations and social security among subscribing states. *See* CARICOM REPARATIONS COMM'N, http://www.caricom.org/ (last visited Aug. 10, 2023). Montserrat is a full member of CARICOM, despite still being a UKOT, having joined in 1974. Five other UKOTs—Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and the Turks and Caicos Islands—are associate members; while the Dutch Territories of Aruba, Curaçao, and Sint Maarten, and notably also Puerto Rico, have observer status.

[61] The OECS is an international inter-governmental organization dedicated to regional integration in the Eastern Caribbean; comprising six independent states and three UKOTs, namely: Anguilla, the British Virgin Islands and Montserrat; and is governed by the Revised Treaty of Basseterre. *See* ORGANIZATION OF EASTERN CARIBBEAN STATES, https://www.oecs.org/en/ (last visited Aug. 10, 2023).

[62] The Eastern Caribbean Central Bank is an OECS institution, which serves as the Monetary Authority for the six independent OECS states, plus the UKOTs Anguilla and Montserrat. These eight islands share a single currency—the Eastern Caribbean Dollar—while the British Virgin Islands, which is an UKOT OECS member, uses the U.S. Dollar as its *de facto* currency. *See generally* EASTERN CARIBBEAN CENT. BANK, https://www.eccb-centralbank.org/ (last visited Aug. 10, 2023).

[63] The Eastern Caribbean Supreme Court, previously known as the West Indies Associated States Supreme Court, is the High Court and the Court of Appeal for the nine OECS members, including all three affiliated UKOTs. *See* EASTERN CARIBBEAN SUPREME COURT, https://www.eccourts.org/ (last visited Aug. 10, 2023).

Caribbean Court of Justice.[64] Thus, Caribbean micro-jurisdictions are sometimes simultaneously seeking a greater share of sovereignty in their relationship with the macro-sovereign while ceding some degree of their sovereignty to a multi-jurisdictional regional entity or organization.

Further evolution can also occur within the territories themselves.[65] For example, as discussed below, in 1986, Aruba withdrew from the Netherlands Antilles in favor of an autonomous status within the Kingdom of the Netherlands.[66] This division increased political pressure for Curaçao and Sint Maarten to do the same, ultimately leading to the dissolution of the Antilles in 2010.[67] The other three islands (Bonaire, Sint Eustatius, and Saba) of the former Netherlands Antilles became autonomous municipalities within the Netherlands. None opted for full independence.[68]

Somewhat analogous changes in governance occurred in the French jurisdiction of Guadeloupe. In 2000, the French Parliament transferred many powers previously exercised in France to local assemblies including for some aspects of international relations.[69] In a 2003 referendum, the populations of Saint Martin and Saint Barthélemy voted to secede from Guadeloupe, and in 2007, the two former *arrondissements* became overseas *collectivitiés* of France.[70] As such, these jurisdictions are represented in the French National Assembly and Senate in Paris and have an executive (prefect) appointed by the government.[71] At the same time as both the French and Dutch jurisdictions have been altering their relationships with France and the Netherlands, they have also been evolving their relationships with the European Union and with Caribbean regional institutions.[72] Additionally, in some cases, these jurisdictions have adopted the U.S. dollar

---

64 The CCJ has an original jurisdiction in connection with the interpretation of the Revised Treaty of Chaguaramas and the Caribbean Community established thereunder; and an appellate jurisdiction as the final court of appeal for those member states who have determined to substitute the CCJ for appeals that were previously available to the Judicial Committee of the Privy Council. Not all CARICOM members have accepted the appellate jurisdiction of the CCJ and, notably, some independent CARICOM states including Trinidad and Tobago, which is the seat of the CCJ, retain the Judicial Committee of the Privy Council as their final court of appeal. All of those UKOTs that are affiliated with CARICOM similarly maintain the Judicial Committee of the Privy Council. Of the OECS members which all fall under the jurisdiction of the Eastern Caribbean Supreme Court, Dominica has opted for the CCJ as its final court of appeal, while the other independent states, as well as the three UKOTs, still utilize the Judicial Committee of the Privy Council.

65 *See* discussion *infra* Part III.B.

66 *See* discussion *infra* Part III.B.

67 *Id.*

68 *Id.*

69 *See* discussion *infra* Part III.C.1.

70 *See* discussion *infra* Part III.C.1. Matthew Louis Bishop et al., *Secession, Territorial Integrity and (Non)- Sovereignty: Why do Some Separatist Movements in the Caribbean Succeed and Others Fail?*, 21 ETHNOPOLITICS 15 (2021).

71 *Id.*

72 Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C. J. INT'L L. & COM. REG. 146, 154-60 (2005).

(directly, or in Cayman and Bermuda's cases, indirectly via currency boards), ceding elements of monetary sovereignty to yet another jurisdiction.[73]

These shifts illustrate not only the dynamic and evolving relationships between micro- and macro-sovereigns, including the establishment of regional institutions to share the costs of some activities, but also the interconnectedness of developing effective means of governance and the allocation of sovereignty across multiple jurisdictions. The voluntary model of regional collaboration promoted by the British Caribbean jurisdictions (including now-independent states) seems to have provided good results avoiding the political costs of forced federation, as seen in the failed cases of the dissolved Netherlands Antilles and the stillborn West Indies Federation of British territories initially launched in 1958 and formally dissolved in 1962.[74]

D. Dimensions of Sovereignty Dialogues

We have identified three dimensions of the ongoing dialogues about sovereignty between micro- and macro-sovereigns: their evolutionary nature, the role of frictions in driving change, and the interwoven nature of governance. These dimensions provide a framework for understanding these relationships, which we apply in the next section.

III. MICRO-SOVEREIGN CASE STUDIES

In this section we examine the evolving sovereign relationships between the British, Dutch, and French governments with some of their many related micro-sovereigns. We pay particular attention to five characteristics:

1. Availability within a governing relationship to make adjustments through some form of regular consultation including local leadership to advocate and to advance greater autonomy and macro-sovereign leadership prepared to respond and to accept;
2. Movement toward good governance within the micro-jurisdiction either indigenously or imposed/encouraged by the macro-sovereign that itself might be responding to domestic or international political pressure to do so, including developing local capacity to govern;

---

[73] *See* Edward Li, *The Cayman Islands Currency Board and the Cayman Islands Monetary Authority*, 61 STUDS. IN APPLIED ECON. (Sept. 2016), https://sites.krieger.jhu.edu/iae/files/2017/04/Cayman-Islands-Li.pdf; John Stanton, *The Currency Board Monetary System Over 100 Years in Bermuda (1915–2015)*, 50 STUDS. IN APPLIED ECON. 1 (Feb. 2016), https://sites.krieger.jhu.edu/iae/files/2019/12/John_Stanton_Bermuda.pdf; *US Dollar Introduced in Dutch Caribbean Islands*, NETHERLANDS NEWS (Jan. 1, 2011), https://www.expatica.com/nl/general/us-dollar-introduced-in-dutch-caribbean-islands-21898/ (Bonaire, Sint Eustatius, and Saba switch to use of US dollar).

[74] *See* discussion *infra* Parts III.A & III.B.

3. Effectiveness and leadership of micro-sovereign polities to set representative political priorities and agendas;
4. Availability of economic opportunities and entrepreneurs, including the capacity to develop; and
5. Ability and capacity to revisit and to retool relationships with the macro-sovereign over time.

We base our study on fifteen British, Dutch, and French micro-sovereigns, which we selected as either particularly illustrative of the related macro-sovereign's approach or because they have particular relevance to the tribal context.[75] Although space limits forced us to exclude a range of other states and their associated territories, we suspect those relationships could provide additional insights.[76] We also excluded a number of former overseas territories whose paths to sovereignty are interesting and potentially relevant.[77] The jurisdictions we examined are listed in Table 1, along with some basic facts (current population, status, area, and GDP per capita). Six are connected to the United Kingdom, either as Overseas Territories or Crown Dependencies; six are connected to the Netherlands, either as 'nations' within the Kingdom of the Netherlands or municipalities of the European nation; three are connected with France as *départements*. Even where particular jurisdictions share the same nominal status (e.g., Bermuda and the Cayman Islands are both overseas territories; Martinique and Mayotte are both French *départements*; Aruba, Curaçao, and Sint Maarten are all nations within the Kingdom of the Netherlands), there are nuances to their statuses that provide important points of differentiation. Our focus is on moments of constitutional development in each jurisdiction, with particular attention to any specific internal or external events that triggered change.[78]

---

[75] *See* Wouter Veenendaal, *Smallness and Status Debates in Overseas Territories: Evidence from the Dutch Caribbean*, 21 GEOPOLITICS 148, 148 (2016) [hereinafter Veenendaal, *Smallness*] (noting that "virtually all small island territories experienced intensive debates about the constitutional relationship with their former colonizing power or present-day metropolis.").

[76] These included Australia (Ashmore and Cartier Islands, Christmas Island, the Cocos Islands, Coral Sea Islands, Heard Island and McDonald Islands, and Norfolk Island), Denmark (the Faroe Islands and Greenland), New Zealand (Cook Islands, Niue, and Tokelau), Portugal (Madeira and the Azores), Spain (the Canary Islands, Ceuta, and Melilla), and the United States (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands).

[77] These included the Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Palau, Samoa, Tonga, Tuvalu, and Vanuatu.

[78] References to more comprehensive histories of the territories can be found in the footnotes in Part III.

Table 2: Included Jurisdictions

Jurisdiction	Status	Population (Date)	Size (km^2)	GDP per capita (PPP) (Date)
Aruba	Nation within Kingdom of the Netherlands	116,576 (2019)	180	$37,576 (2019)
Bermuda	UKOT	63,913 (2019)	53.2	$117,097 (2019)
Bonaire	Dutch municipality	20,104 (2019)	288	???
Cayman Islands	UKOT	69,656 (2021)	264	$73,800 (2004)
Curaçao	Nation within Kingdom of the Netherlands	155,000 (2021)	444	$35,484 (2021)
Gibraltar	UKOT	32,194 (2021)	6.8	£50,941 (2013)
Guadeloupe	French *département*	384,239 (2019)	1,628	$25,479 (2014)
Guernsey	British Crown Dependency	62,792 (2019)	65	£52,531 (2018)
Isle of Man	British Crown Dependency	84,069 (2021)	572	$84,600 (2014)
Jersey	British Crown Dependency	107,800 (2018)	119.6	$60,000 (2015)
Martinique	French *département*	364,508 (2019)	1,128	$24,964 (2015)
Mayotte	French *département*	299,348 (2022)	374	$10,850 (2019)
Saba	Dutch municipality	1,933 (2019)	13	???
Sint Eustatius	Dutch municipality	3,138 (2019)	21	???
Sint Maarten	Nation within Kingdom of the Netherlands	41,486 (2019)	41.44	$35,342 (2019)

The factors we used to note changes in the sovereign relationships included:

1. Degrees of political autonomy
   - Degree of local representation in the relevant jurisdiction's legislative body; and
   - Degree of local involvement in the selection of the jurisdiction's executive and judiciary, including at the topmost levels.
2. Degrees of economic autonomy
   - Routine government funding, by considering the extent of funding from local revenues;
   - Capital expenditures funding, by considering the extent of funding from local revenues;
   - Unemployment rate; and
   - Local control of constraints on trade.
3. Degrees of cultural identity
   - The degree to which the resident population is fluent in the local language;
   - The share of the resident population that are expatriates;
   - Whether there is local control of educational institutions (curriculum, etc.); and
   - If the jurisdiction is represented separately in sporting and cultural events or as part of a larger grouping with metropolitan or regional groups.

These factors capture important degrees of sovereignty in three crucial areas that we think summarize the share of sovereignty the jurisdiction has over its internal governance and development.[79]

A. Jurisdictions Connected to the United Kingdom

We examine three of the fourteen UKOTs (Bermuda, the Cayman Islands, and Gibraltar)[80] and the three Crown Dependencies (Guernsey, the Isle of Man, and

[79] We initially sought to produce a numerical index of sovereignty based on these factors but abandoned that effort as both too complex to accomplish and insufficiently nuanced to accurately illustrate the evolution of shared sovereignty. We plan to return to that project in future work.

[80] We thus omit Anguilla; the British Antarctic Territory; British Indian Ocean Territory; British Virgin Islands; Falkland Islands; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; Saint Helena, Ascension, and Tristan da Cunha; South Georgia and the South Sandwich Islands; the Sovereign Base Areas of Akrotiri and Dhekelia; and the Turks and Caicos Islands). Had space permitted, we would have also included Anguilla, the British Virgin Islands, the Falkland Islands, Montserrat, and the Turks and Caicos Islands. The other jurisdictions are either virtually unpopulated or have relationships which are too far removed from the tribal relationship to the United States to provide relevant examples.

Jersey).[81] We chose these six jurisdictions in part because, while they currently have quite high degrees of political and economic sovereignty, this was not always the case. The United Kingdom has had varied relationships with its overseas territories, at times seeing them as, in the words of one former Foreign and Commonwealth Office official, "rather a nuisance, and the sooner you could get shot of them the better,"[82] and at other times talking of how the overseas territories would "flourish in partnership" with the United Kingdom.[83] Britain's relationships with the Crown Dependencies have also had ups and downs, going back to the English Civil War (1642–1651) when Guernsey and Jersey backed opposing sides, prompting occasional threats by politicians to seek to incorporate them into the United Kingdom as English counties.[84] The development of Crown Dependencies' sovereignty in political, economic, and cultural terms may be particularly likely to offer parallels to the tribes' relationships with the United States, as they occur within a legal and constitutional framework that derives from the same legal family as do the U.S.-United States' tribal relationships, in which similar legal vocabularies are often used. At present, these jurisdictions enjoy high levels of self-government, but their foreign relations (including trade) and defense remain largely in the hands of the UK—another parallel to the relationship of the tribes to the United States.

The British cases further provide the opportunity to examine a range of developments resulting in levels of prosperity and autonomy for the selected jurisdictions. The experiences reveal an iterative relationship of reducing as much as possible the financial burden on the macro-sovereign of governing a territory while carrying out its contingent responsibilities as the ultimate governing sovereign.[85] The Cayman Islands, for example, notes on its official website that:

> The Cayman Islands Government has never depended on the British Government for its recurrent budget, and all aid for capital projects has ceased for over 20 years. Cayman's 2009 Constitution sets a limit (a certain percentage of government revenue) on the amount of money that the Government might

---

[81] We omit Alderney and Sark, islands that have their own unique relationships with the United Kingdom through Guernsey.

[82] GEORGE DROWER, BRITAIN'S DEPENDENT TERRITORIES: A FISTFUL OF ISLANDS 29 (1992) (quoting Evan Luard, former Parliamentary Under-Secretary at the Foreign and Commonwealth Office, describing others' views).

[83] FOREIGN & COMMONWEALTH OFF., THE OVERSEAS TERRITORIES: SECURITY, SUCCESS AND SUSTAINABILITY, 2012, Cm. 8374, at 5 (UK).

[84] RAOUL LEMPRIÈRE, HISTORY OF THE CHANNEL ISLANDS 68 (1974); MARGUERITE SYVRET & JOAN STEVENS, BALLEINE'S HISTORY OF JERSEY 141–42 (rev. ed.) (2011); HENRY MYHILL, INTRODUCING THE CHANNEL ISLANDS 217 (1964) ("On several occasions attempts have been made—the last a century ago by immigrants from the Mainland—to assimilate the Islands to British local government as another county, like the Orkneys or Anglesey.").

[85] *See generally* RODNEY GALLAGHER, SURVEY OF OFFSHORE FINANCE SECTORS IN THE CARIBBEAN DEPENDENT TERRITORIES (1990).

> borrow. Flexibility is given in urgent or extremely important matters.[86]

Each of these jurisdictions has centuries of history, which we have compressed to the most important points for the purposes of this article, providing guidance to the literature on each in the footnotes.

1. Bermuda

Bermuda is the oldest UKOT, first claimed by England in 1612.[87] Although it was founded as a settler colony rather than a plantation colony, slavery was introduced from the beginning, and deep racial divisions have characterized Bermuda ever since.[88] Bermuda acquired an elected local assembly soon after its founding and has maintained a representative government (albeit with rules on voter qualifications that effectively limited the franchise to white property owners until the 1960s and preserved elite control into the 1990s).[89] Bermuda has the most advanced constitution of all the overseas territories, having essentially "*de facto* independence under Britain's protective wing."[90] Despite its often-unrepresentative character, Bermuda's long history of self-governance has been an important factor in its ability to expand its share of sovereignty.

Bermuda's economy has relied on its location—proximity to the United States and on trans-Atlantic trade routes—including success at running blockades during the American Revolution, American Civil War, and American Prohibition.[91] Starting in 1935, Bermuda began to successfully lure overseas (particularly American and British) companies to establish entities there to take advantage of Bermuda's non-taxation of foreign income by Bermudan companies.[92] In large part through the efforts of an expatriate American lawyer (with the support of Bermudan lawyers, bankers, and accountants), Bermuda then developed a significant captive

---

[86] *See* CAYMAN IS. GOV., *Our Finance and Economy*, https://www.gov.ky/about-us/our-islands/finance-and-economy (last visited Feb. 10, 2023).

[87] TERRY TUCKER, BERMUDA TODAY & YESTERDAY:1503–1980S 40 (1983).

[88] WALTON BROWN JR., BERMUDA AND THE STRUGGLE FOR REFORM: RACE, POLITICS, AND IDEOLOGY X, 1944–1998 (2011) (The "dominant theme" in Bermuda history is the "insertion of race into the very fabric of Bermudian society; indeed, race became the prism through which social, political, and economic struggles were refracted.").

[89] QUITO SWAN, BLACK POWER IN BERMUDA 17–18 (Manning Marable & Peniel Joseph eds., 2009).

[90] *Id.* at 193; *see also* Peter Clegg, *Independence Movements in the Caribbean: Withering on the Vine?*, 50 COMMONWEALTH & COMPAR. POL. 422, 423 (2012) (noting Bermuda's greater degree of autonomy than the other Caribbean OTs).

[91] W. S. ZUILL, THE STORY OF BERMUDA AND HER PEOPLE 163 (3d ed., 1999); ELIZABETH W. DAVIES, THE LEGAL STATUS OF BRITISH DEPENDENT TERRITORIES: THE WEST INDIES AND NORTH ATLANTIC REGION 8–9 (1995) [hereinafter DAVIES, WEST INDIES].

[92] ZUILL, *supra* note 91at 188–89; GORDON PHILLIPS, FIRST, ONE THOUSAND MILES. . . BERMUDIAN ENTERPRISE AND THE BANK OF BERMUDA 87–92, 125–28 (1992).

insurance industry beginning in the early 1960s.[93] An important factor in Bermuda's success in attracting insurers to the jurisdiction was its establishment of an effective regulatory regime to reassure outsiders that the companies were legitimate.[94] Bermuda has continued its prominence in insurance by building strong reinsurance (following major hurricanes in the United States in the 1980s and 1990s) and terrorist insurance (after 9/11) industries.[95]

Bermuda provides three relevant insights. First, it represents the maximum degree of political sovereignty of any of the territories we consider (and, indeed, the maximum amount any non-independent territory has, to our knowledge).[96] Thus, it forms a useful benchmark for tribal governments considering the extent to which they can expand their political sovereignty. The Bermuda model suggests that there are considerable degrees of freedom that the tribes ought to be able to recapture from the federal government, although Bermuda's experience also suggests that the process of doing so may be a lengthy and episodic one.

Second, as have several of the United Kingdom-related jurisdictions, Bermuda has effectively monetized its political sovereignty to create a financial services industry. Focusing on insurance, Bermuda has relied on a combination of domestic strengths (a strong local banking industry was crucial to developing the insurance sector), autonomy (creating an effective regulatory scheme), receptivity to outside entrepreneurs, and reliance on a British court of last resort (the Privy Council) to add to outsiders' confidence in the legal system. Bermuda's entrepreneurial use of its sovereignty over banking, insurance, and tax, for example, was crucial to its economic development strategy. Finding aspects of tribal sovereignty that can reinforce individual tribes' economic development strategies—and finding where the macro-sovereign's services can reinforce those strategies in areas where the macro-sovereign retains sovereignty—is thus an important factor to consider in developing tribal economies.

Third, Bermuda successfully—albeit slowly—transitioned from an elite-dominated political system to one with a much greater degree of local legitimacy. This process relied not just on local pressure from below but on regular pressure from British governments, which helped to eventually ensure electoral reforms. An alliance between the under-represented black majority and British colonial officials pressured the predominantly white governing elite to accept change.[97] Establishing a more democratic government, therefore, came from collaboration with the metropolitan power.

---

93 PHILLIPS, *supra* note 92, at 146–48.

94 *Id.* at 220.

95 JONATHAN BELL & ROGER CROMBIE, BUTTERFIELD BANK ONE HUNDRED AND FIFTY: A SESQUICENTENNIAL HISTORY 113 (2008).

96 *See* DAVIES, WEST INDIES, *supra* note 91, at 16 ("Bermuda stands apart from the others in that it has been administered as a separate British territory, with a legislature of its own, since 1620. . . . Bermuda also stands alone in respect of the 1978/9 Royal Commission recommendations that it should be brought to an early independence.").

97 *See, e.g.*, SWAN, *supra* note 89, at 184 ("It is revealing that the Foreign and Commonwealth Office (FCO) officials consistently expressed that Blacks had legitimate grievances that Bermuda's White elite refused to address.").

2. Cayman Islands

The first legal reference to the Cayman Islands is as a footnote to the 1670 Treaty of Madrid between England and Spain ceding Jamaica to England.[98] Coveted for its sugar industry, Jamaica was the prize, but the nearby Cayman Islands, which came to be known as the "Islands that time forgot"[99] because of their relative isolation and inhospitable climate, also passed. While the three Cayman Islands were administered through Jamaica, there was no formal basis for this arrangement.[100] In 1831, Caymanians took matters into their own hands and formed a locally elected assembly to better respond to their needs and circumstances.[101] Cayman's political emergence was thus a spontaneous local creation: the British Parliament did not give birth to it; it did not therefore have the fiat of the Crown either directly or via the Governor of Jamaica; nor had the Jamaican Parliament sanctioned it.

This local creation was formalized with the Act of Government of the Cayman Islands of 1863[102] and the Cayman Islands Government Law of 1893.[103] However, once the constitutional position of the Cayman Islands was on a firm foundation and the sources of Cayman Islands law clarified, little altered in the following decades as far as the day-to-day operations of the Cayman Islands were concerned.[104] The next constitutional moment came from the breakup of the British Empire that followed the Second World War. For the British possessions in the Caribbean, the United Kingdom's initial plan was to grant them independence as part of a newly established West Indies Federation, which was duly established in

---

[98] ELIZABETH DAVIES, THE LEGAL SYSTEM OF THE CAYMAN ISLANDS 9 (1989) [hereinafter DAVIES, CAYMAN ISLANDS].

[99] *See The Islands Time Forgot*, NAT'L GALLERY CAYMAN IS., https://www.nationalgallery.org.ky/whats-on/exhibitions/the-islands-time-forgot (last visited Aug. 10, 2023). The origin of this description has been attributed to the renowned photojournalist, David Douglas Duncan, who spent time in the Cayman Islands in 1939, and who was the subject of an exhibition under this title.

[100] *See* DAVIES, CAYMAN ISLANDS, *supra* note 98, at 23–24 (the description of the historical acquisition of the Cayman Islands by Sir William Dale, *in* THE MODERN COMMONWEALTH 308 (1983)).

[101] *Id.* at 29.

[102] *See generally* Act for the Government of the *Cayman Islands* 1863, 26 & 27 Vict. C.31 (UK).

[103] *See generally* The Laws of Jamaica 1893, cap. 425 (UK) (amended by Law 10/1894; Law 11/1896; Law 13/1906).

[104] *See generally* The Jamaica (Constitution) Order in Council 1944, S.I. 1944/1215 (UK) (making constitutional advancements, including universal suffrage, a limited form of ministerial government and the recognition of political parties, but not applying these constitutional advances to the Cayman Islands).

1957.[105] This necessitated formalizing a direct constitutional link between the Cayman Islands and the United Kingdom to replace the arrangement whereby the Cayman Islands had previously been administered as a dependency of Jamaica.[106] In so doing, the Cayman Islands came to obtain its first formal constitution, which was facilitated by the passage of the Cayman Islands and Turks and Caicos Islands Act of 1958[107] and which, in turn, enabled the Cayman Islands (Constitution) Order in Council in 1959.[108]

British plans for the Federation floundered when Jamaica, closely followed by Trinidad and Tobago, opted not to join and secured their independence separately.[109] For the Cayman Islands, therefore, a key moment in both its political and economic development came with the dissolution of the West Indies Federation in 1962. Choosing to remain with the United Kingdom as a Crown Colony rather than pursue independence, either as part of Jamaica or on their own, the Cayman Islands bucked the trend and charted a different course. This is reflected in legislative developments, starting with the first Companies Law in 1960,[110] which made company registration in the Cayman Islands possible for the first time. Fees were generated to supplement the pre-existing customs duties, ensuring that Cayman did not become financially dependent on the United Kingdom and thereby, in time, allowing it greater room to assert autonomy.[111] This became an integral part of Cayman's strategy to increase its share of the shared sovereignty. As one former Governor, Thomas Russell (1974-1982), told an interviewer: "My job here [in the Cayman Islands] is really a kind of combination of ombudsman and business consultant. I don't interfere very much and the British government leaves us very much alone, largely no doubt because we don't need any kind of grant."[112]

Cayman's continuing link with the United Kingdom helped to ensure fiscal stability, enabling Cayman to carry out an integrated development plan to update public facilities, improve roads and telecommunications, and continue mosquito control.[113] The success of Cayman's collaborative approach was about getting the right mix of ingredients, blending constitutional autonomy with just enough British backing, and encouraging entrepreneurial innovation in financial services, while

---

[105] *See generally* British Caribbean Federation Act 1956, 4 & 5 Eliz. II c. 63 (UK) (passing the West Indies Federation Order in Council 1957, S.I. 1957/1364 (UK); enacted pursuant to the powers conferred).

[106] *See id.*

[107] *See* Cayman Islands and Turks and Caicos Islands Act 1958, 6 & 7 Eliz. II c. 13 (UK).

[108] *See* Cayman Islands (Constitution) Order in Council 1959, S.I. 1959/863 (UK).

[109] *See* Jamaica Independence Act 1962, 10 & 11 Eliz. 2 c. 40 (UK); *see also* Trinidad and Tobago Independence Act 1962, 10 & 11 Eliz. 2 c. 54. (UK)

[110] *See* Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy since 1960*, 45 ARIZ. ST. L.J. 1297, 1314–16 (2013).

[111] *See generally* MICHAEL CRATON, FOUNDED UPON THE SEAS: A HISTORY OF THE CAYMAN ISLANDS AND THEIR PEOPLE 331–60 (2003).

[112] ANTHONY SAMPSON, THE MONEY LENDERS: THE PEOPLE AND POLITICS OF THE WORLD BANKING CRISIS 288 (1981).

[113] CRATON, *supra* note 111.

still keeping government in control. Sir Vassel Johnson, the Financial Secretary during much of the financial sector's formative years, realized that government control of policy-making would be necessary to build an effective and robust regulatory infrastructure, including the establishment of the Cayman Islands Monetary Authority.[114] Between 1960 and 1980, both legally and economically, the Cayman Islands went from being one of the least developed jurisdictions in a poorly developed region to surpassing the United Kingdom in GDP per capita terms and, during that same time-period, creating a sophisticated body of financial law which has continued to grow.[115] A crucial part of Cayman's strategy to develop its economic sovereignty was its investment in institution building to support its development strategy.

Cayman's success posed new challenges. At the start of the new millennium, it became increasingly apparent that the Cayman Islands was facing a constitutional conundrum. The existing constitutional arrangements, which had facilitated its economic development, were nevertheless rudimentary; and as the economy grew, so did local demands for greater autonomy.[116] While Britain agreed some constitutional modernization was necessary, it insisted that there was still a balance to be struck and there would be danger, not least to the economic prosperity of the Islands, if the process resulted in uncertainty.[117] At the same time, the comparative lack of autonomy, even *vis-à-vis* other UKOTs, was increasingly inhibiting locally elected politicians as they sought to implement the manifestos on which they had sought election.[118]

After a decade of deliberations and negotiations with Britain, a new Constitution was agreed on in 2009.[119] Greater local autonomy came in the form of a local Deputy Governor and an elected Minister of Finance, some curtailment of the Governor's executive powers, and a significant increase in the powers of the elected government, who were for the first time granted a role in external affairs and a role in internal security through the establishment of a National Security Council.[120] These political advances were balanced by provisions intended to promote good governance, including limits on public debt, the enhancement of a series of institutions designed to support democracy, the express reference to freedom of information, the appointment of an independent Director of Public

---

[114] *See* SIR VASSEL JOHNSON, AS I SEE IT: HOW THE CAYMAN ISLANDS BECAME A LEADING FINANCIAL CENTRE 103–277 (2001).

[115] *See* Freyer & Morriss, *supra* note 110, at 1314–16.

[116] *See generally* Vaughan Carter, *Evaluating the Cayman Islands Bill of Rights: More Evolution than Revolution*, 4 TEX. A&M L. REV. 385 (2017).

[117] *See* Freyer & Morriss, *supra* note 110, at 1368, 1374.

[118] HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, OVERSEAS TERRITORIES, REPORT, 2007–8, HC 147-II, at Ev 155 (UK).

[119] Cayman Islands Constitution Order 2009, SI 2009/1379 (UK) (The Constitution of the Cayman Islands is contained in Schedule 2 to the Cayman Islands Constitution Order 2009, SI 2009/1379 ("the 2009 Cayman Constitution.")).

[120] *See id.* § 34 (on the Deputy Governor); § 115 (on the Financial Secretary being the advisor to a Minister with responsibility for finance); § 55 (on the special responsibilities of the Governor); § 58 (on the National Security Council).

Prosecutions, and perhaps most significantly, the adoption of a comprehensive Bill of Rights, Freedoms, and Responsibilities.[121] The new constitution demonstrated a greater political maturity to the benefit of Caymanians while maintaining the credibility of and basis for the financial services sector in the Cayman Islands.[122]

Despite this success, a reminder of the fragility of the shared sovereign relationship came in 2018 when the United Kingdom Parliament amended the Bill (which later became the Sanctions and Anti-Money Laundering Act) to include a provision requiring the establishment of public registers of beneficial ownership in UKOTs.[123] Many UKOTs objected to this provision as encroaching on their jurisdiction and asserted that there was at least a requirement to consult with them prior to the enactment of such legislation.[124] This incident triggered a reconsideration of the rules governing relationships with the UKOTs and the Cayman Islands was quick to seize upon this opening.[125]

Following constitutional talks between the United Kingdom and representatives from the Cayman Islands, including the Premier and the Leader of the Opposition, a draft Order in Council was sent to the Cayman Islands to clarify Cayman autonomy and to protect against the arbitrary extension of the United Kingdom's legislation to the islands.[126] The draft Order in Council contained a clause that would have revoked the Governor's reserved powers to legislate and replaced them with only a right for the Governor to address Parliament.[127] This

---

[121] *See* Cayman Islands Constitution Order 2009, SI 2009/1379 §§ 113 (on public debt), 116–22 (for the institutions supporting democracy, including section 122 on freedom of information), 57 (on the Director of Public Prosecutions), 1–28 (for the Bill of Rights, Freedoms and Responsibilities) (UK).

[122] *See* Carter, *supra* note 116, at 385-98 (on the political maturity reflected in the 2009 Cayman Constitution and the process by which this came about); Freyer & Morriss, *supra* note 110, at 1374-76 (on the relationship between the constitution, the rule of law, the independence of the judiciary, good governance and the financial services industry); *see also* Julian Morris, CAYMAN: ENGINE OF GROWTH AND GOOD GOVERNANCE (Cayman Fin. 2021).

[123] Sanctions and Anti-Money Laundering Act 2018, c. 13 § 51 (UK).

[124] *See, e.g.,* Foreign Affairs Committee, Written evidence from Government of the Cayman Islands, 2018, OTS0109, at 3, https://committees.parliament.uk/writtenevidence/95883/pdf/ (UK).

[125] *See also Cayman Islands Constitutional Commission's Responses to Requests for Comments on Potential Revisions to the Cayman Islands Constitution*, CAYMAN ISLANDS CONST. COMM'N (Jun 27, 2008), https://cnslibrary.com/wp-content/uploads/Constitutional-Commission-Response-to-CIG-re-Potential-Constitutional-Revisions-27-June-2018.pdf.

[126] *Explanatory Note on the Proposed Amendments to the Draft Constitution*, CAYMAN ISLANDS CONST. COMM'N (Feb. 17, 2020), https://www.constitutionalcommission.ky/upimages/publicationdoc/ConstitutionalCommissionCoverLetterExplanatoryNotetoCIG_170220_1582828896_1582828903.pdf.

[127] *Id.* at 10. Clause 13 of the draft Order in Council would have revoked the Governor's reserved power to legislate in section 81 of the 2019 Cayman Constitution, available at https://cnslibrary.com/wp-content/uploads/Draft-Cayman-Islands-Constitution-Amendment-Order-2019.pdf, and replaced this with the "Governor's right to address Parliament" in the following terms:

concession, however, was removed after the local Parliament failed to enact legislation permitting a functional equivalent to same-sex marriage as directed by the Cayman Islands Court of Appeal.[128]

As a result of the defeat of the Domestic Partnership Bill 2020 in the local Parliament, the Governor resorted to using the reserved powers in section 81 of the Cayman Islands Constitution, and duly assented to the Civil Partnership Act 2020 and eleven other consequential amendments to legislation.[129] The proposed amendment to reduce the Governor's power was then removed from the new Constitution and the Governor has retained these reserved powers.[130] Despite this setback to local autonomy, the local legislature still supported the broader package of constitutional amendments, which nevertheless included the removal of the powers of disallowance in section 80 of the 2009 Cayman Constitution[131] and the

> If the Governor considers that the enactment of legislation is necessary or desirable with respect to or in the interests of any matter for which he or she is responsible under section 55(1), but after consultation with the Premier it appears to the Governor that the Cabinet is unwilling to support the introduction into the Parliament of a Bill for that purpose or that the Parliament is unlikely to pass a Bill introduced into it for that purpose, the Governor shall be entitled, with the prior approval of a Secretary of State, to address the Parliament.

Draft Cayman Islands Constitution (Amendment) Order 2019, SI 2019/0000 cl 13.

[128] *Deputy Registrar & Att'y Gen. v. Day & Bodden Bush* ¶ 117, [2020 (1) CILR 99] (Cayman Is.).

[129] *An Explanation of the Constitutional Issues Arising from the Day and Bodden Bush Litigation*, CAYMAN IS. CONST. COMM'N, https://www.constitutionalcommission.ky/upimages/publicationdoc/AnExplanationoftheConstitutionalIssuesArisingfromtheDayandBoddenBushLitigation_FINAL_1623105592_1623105603.pdf (last visited Aug. 10, 2023) (explaining the issues that led up to the decision and the Cayman Islands Court of Appeal). The final decision of the Judicial Committee of the Privy Council in the underlying litigation has now been rendered in *Day and another v. The Government of the Cayman Islands and another* [2022] UKPC 6, along with a similar decision concerning Bermuda in *Attorney General for Bermuda v. Ferguson and others* [2022] UKPC 5.)

[130] *See generally* The Cayman Islands Constitution (Amendment) Order 2020, S.I. 2020/1283 (UK).

[131] The Cayman Islands Constitution (Amendment) Order 2020, S.I. 2020/1283, ¶ 12 (UK). This paragraph revoked section 80 of the 2009 Cayman Constitution which read:

> Any law assented to by the Governor may be disallowed by Her Majesty through a Secretary of State; but no law shall be disallowed until the expiration of a reasonable period notified by a Secretary of State to the Governor with an explanation of the difficulties perceived by the Secretary of State, and the Governor shall forthwith advise the Speaker of that period and those difficulties in order to give the Legislative Assembly an opportunity to reconsider the law in question.

introduction of a new section 126 that requires prior notification of proposed Acts of Parliament extending to the Cayman Islands or Orders in Council extending such Acts of Parliament to the Cayman Islands.[132] This outcome, and in particular that the United Kingdom was prepared to proceed with a series of measures that limited its powers, should be interpreted as a sign of the maturity of the relationship (including trust) between micro- and macro-sovereigns and of the importance of effective communication to work through controversial issues in difficult circumstances.

As with Bermuda, the evolution of Cayman's relationship with Britain provides important lessons for the tribes. First, Cayman's "economic sovereignty first" strategy paid off in the long run, allowing the jurisdiction to negotiate from a position of greater strength in reclaiming political sovereignty than if it had been economically dependent on Britain. Second, the "two steps forward, a half step back" nature of the constitutional disputes over same-sex marriage and controls on the financial sector, driven in large part by Britain's view of its own international obligations, highlight an important constraint on the evolution of relations between a macro- and micro-sovereign: the relationship can only evolve in directions in which the macro-sovereign itself is not constrained. Understanding what those constraints are is thus critical for micro-sovereigns designing a strategy to recapture additional degrees of autonomy. Finally, Cayman highlights even more dramatically than Bermuda the importance of viewing the relationship between macro and micro as an evolving, long-term dialogue. Cayman's constitutional evolution came about through many negotiations and discussions and required Cayman to be willing to accept less than its full goals in order to achieve intermediate steps within the macro-micro sovereign relationship.

Cayman Islands Constitution Order 2009, SI 2009/1379 § 80 (UK).

[132] The Cayman Islands Constitution (Amendment) Order 2020, S.I. 2020/1283, ¶ 14 (UK). This paragraph of the 2020 Amendment Order inserted the new section 126 into the 2009 Cayman Constitution:

> Where it is proposed that — (a) any provision of a draft Act of the Parliament of the United Kingdom should apply directly to the Cayman Islands, or (b) an Order in Council should be made extending to the Cayman Islands any provision of an Act of Parliament of the United Kingdom, the proposal shall normally be brought by a Secretary of State to the attention of the Premier so that the Cayman Islands Cabinet may signify its view on it.

Id.

3. The Channel Islands (Guernsey and Jersey)

The Channel Islands (Guernsey, Jersey, and two smaller jurisdictions connected to Guernsey, Alderney, and Sark), were possessions of the Duke of Normandy.[133] When the Duke of Normandy, William the Conqueror, took the English throne in 1066, these islands became affiliated with the English crown.[134] When King John lost the mainland Norman territories in 1204, the islands continued their affiliation with the English crown.[135] As a result (or perhaps as an enticement to maintain ties), they received jurisdictional recognition by the Crown.[136] Subsequent Royal Charters recognized and sometimes expanded their authority, which serves as the basis for their claim to autonomy today.[137] As a result, they are not part of the United Kingdom, but share the monarchy and some other United Kingdom institutions.[138] This distinction enables them to maintain their separate legal systems, which they have used at various times to promote agriculture, shipping, tourism, light manufacturing, and financial services by selectively aligning and distinguishing themselves from English law.[139] Most recently, the islands have developed robust financial services sectors, building on banking, trusts, funds, and captive insurance. [140]

These sectors rely heavily on both the possibility of appeal of court decisions to the United Kingdom Privy Council and the considerable similarity between Jersey and Guernsey law and English law in key areas like companies and trusts law.[141] This includes large-scale imports of the English law of trusts into what

---

[133] LEMPRIÈRE, *supra* note 84, at 21.

[134] *Id.* at 23.

[135] *Id.* at 28.

[136] SYVRET & STEVENS, *supra* note 84at 43; SIR PHILIP BAILHACHE, A CELEBRATION OF AUTONOMY 1204–2004: 800 YEARS OF CHANNEL ISLANDS' LAW 2 (2005) ("In order to minimize the trauma of the separation from Normandy, and to retain their loyalty, King John conferred a number of privileges upon the Islanders. One of those privileges was the right to be governed by their own laws, that is by the customary law of Normandy and other local customs then in force.").

[137] GORDON DAWES, LAWS OF GUERNSEY 18 (2003) [hereinafter DAWES, LAWS OF GUERNSEY].

[138] BAILHACHE, *supra* note 136, at 2 ("And so the relationship of the Islands is not with the Parliament at Westminster, but with the Crown, by which Channel Islanders mean the sovereign.").

[139] DAWES, LAWS OF GUERNSEY, *supra* note 137, at 20 ("As to whether the United Kingdom Parliament may legislate for the Islands directly, by constitutional convention Westminster does not extend legislation or other (international) obligation to the Channel Islands without first consulting with and obtaining the consent of the Island authorities. Given the lack of representation of the Islands at Westminster there are fundamental democratic imperatives informing this convention.").

[140] MYHILL, *supra* note 84, at 242 (from 1960s Channel Islands "seem well in the swim of the main currents of international finance").

[141] *See, e.g.*, Richard Southwell, QC, *The Sources of Jersey Law,* JERSEY & GUERNSEY L. REV. (1997), https://www.jerseylaw.je/publications/jglr/PDF%20Documents/

were legal systems rooted in Norman customary law.[142] However, both jurisdictions have struck out on their own. Some examples include Jersey's adoption of a statutory version of the English equitable trust law 'rule in *Hastings-Bass*,' which England abandoned in 2013;[143] Guernsey's pioneering of the protected cell company (PCC) in 1997;[144] and Jersey's extension of the PCC to the incorporated cell company in 2005.[145]

Both jurisdictions had economies built around agriculture by the mid-twentieth century.[146] Although there were some relatively small-scale efforts at leveraging differences in Channel Islands and English law before the 1960s, the dramatic rise in British income and inheritance tax rates proved to be a driver for

---

JLR9710_the_sources_of_jersey_law.pdf ("English law has, for obvious reasons of common loyalty to the Crown and valued collaboration between Jersey and English lawyers, taken a major role in the development of Jersey law. This is of long standing."); Gordon Dawes, *A Brief History of Guernsey Law,* JERSEY L. REV. (2006), https://www.jerseylaw.je/publications/jglr/Pages/JLR0602_Dawes.aspx (explaining that since the 19th century and throughout the 20th century the story of Guernsey law has been one of the increasing influences of English common law and statute law).

[142] *See, e.g.*, HARRIET E. BROWN, THE JERSEY LAW OF TRUSTS (4th ed.) 3–4 (2013) (In *Ex parte Viscount Wimbourne*) [1983] JJ 17. The Royal Court confirmed that in the absence of Jersey authority the court could look to English trusts law authority. The Deputy Bailiff did not find the practice of referring to English case law objectionable; this case is of particular interest because it predates The Jersey Law of Trusts and is an indication that looking to English law was acceptable before the law came into force. The significance of this is that many of the provisions in The Jersey Law of Trusts are based on English law, an obvious reason for looking to English law decisions, but this reasoning does not apply in *Ex parte Viscount Wimbourne*. On this basis, the court may also look to English law where the provision in question is not in fact based on English law. ("Jersey is a customary law jurisdiction. Other than its laws passed by the States of Jersey and its case law, the law is provided by the Ancienne Cotume and the Cotume Reformée, and commentators thereon.") *id.* at 2; DAWES, LAWS OF GUERNSEY, *supra* note 137, at 2 ("In the absence of an up-to-date statue the Guernsey Advocate may be required to have regard to what Guernsey case-law there is, ancient customary law, quite possibly eighteenth century French and eighteenth and nineteenth century Channel Island authors, the current law of a number of other jurisdictions, including Jersey, England and France, and then anticipate the solution which the Royal Court and Court of Appeal would adopt.").

[143] Andrew P. Morriss, *International Financial Centers & the Law Market: Jersey and Bermuda's Statutory Adoption of the 'Rule in* Hastings-Bass' (working paper, 2024) (on file with authors).

[144] Joe Truelove, *Guernsey: Twenty Five Years of Protected Cell Companies*, GUERNSEY FINANCE (Jul. 14, 2022), https://www.mondaq.com/guernsey/fund-management-reits/1211656/twenty-five-years-of-protected-cell-companies.

[145] Ogier, *Incorporated Cell and Protected Cell Companies in Jersey*, HEDGEWEEK (Jan. 25, 2006), https://www.hedgeweek.com/2006/01/25/incorporated-cell-and-protected-cell-companies-jersey.

[146] JAMES MARR, THE HISTORY OF GUERNSEY: THE BAILWICK'S STORY 339 (2d ed. 2001); R. C. F. MAUGHAM, THE ISLAND OF JERSEY TODAY 123 (rev. ed. 1950).

the banking industry on both islands.[147] The islands were within the sterling zone and so exchange control did not apply; British banks had operations in the islands; and taxes, while consequential, were well below British rates.[148] Particularly for people returning from the newly independent former British colonies, the Channel Islands provided a safe place for funds they were repatriating, with familiar institutions but without the British tax burden.[149] Their banking industries received a further boost when the United Kingdom shrank the sterling area in 1972 to just the United Kingdom, the Crown Dependencies, and, after a year's delay, Gibraltar.[150]

The islands' development of their economies was the result of deliberate strategies. For example, after receiving a report from an economic consultant, Colin Powell, in 1971, Jersey launched a deliberate effort to build its financial sector.[151] Guernsey lagged somewhat behind in general, but pioneered efforts in captive insurance, an area Jersey initially declined to enter.[152] Both islands took deliberate approaches to mitigate potential negative impacts of their financial sectors on their societies. For example, both jurisdictions sought to control the number of non-locals able to buy real estate on the islands to preserve a housing market for locals.[153]

The islands' experiences suggest three lessons. First, an economic development strategy which promotes economic sovereignty—as the islands' development of tourism and financial services does—may simultaneously undermine and enhance cultural sovereignty. Jersey and Guernsey's cultures are no doubt different from what they were fifty years ago as a result of the influx of British (and other) professionals to serve the financial sector and from the reliance on foreign workers, particularly Portuguese immigrants, in the tourist industry. At the

---

147 Andrew P. Morriss, *Cultivating Trust Law: Four Phases of Offshore Trust Law's Development*, *in* OXFORD HANDBOOK OF TRUST LAW (forthcoming in 2025).

148 TONY GALLIENNE, GUERNSEY IN THE 21ST CENTURY: A VIEW FROM THE FIRST DECADE 78-79 (2007).

149 *See* MYHILL, *supra* note 84, at 233–35.

150 GALLIENNE, *supra* note 148, at 78, 101; JOZEF SWIDROWSKI, EXCHANGE AND TRADE CONTROLS: PRINCIPLES AND PROCEDURES OF INTERNATIONAL ECONOMIC TRANSACTIONS AND SETTLEMENTS 85 (1975).

151 Andrew P. Morriss & Charlotte Ku, *IFCs: Pioneers in Transmission of Legal Innovation*, IFC REV. (Jan. 14, 2021) [hereinafter Morriss & Ku, *Pioneers*], https://www.ifcreview.com/articles/2021/january/ifcs-pioneers-in-transmission-of-legal-innovation/.

152 *Id.*

153 *Housing Crisis May be the Biggest Single Threat to Jersey's Prosperity*, JERSEY EVENING POST (Feb. 18, 2022), https://www.jerseyeveningpost.com/news/2022/02/18/housing-crisis-may-be-the-biggest-single-threat-to-jerseys-prosperity/; James Lawrence, *Residential Status—DO You Qualify for Buying Property?*, VIBERTS, https://www.viberts.com/news-insights/residential-status-do-you-qualify-for-buying-property/; *Population Management*, STATE OF GUERNSEY https://www.gov.gg/populationmanagement; Carey Olsen, *The Implications of Guernsey's New Population Management Law* (May 2016), https://www.careyolsen.com/sites/default/files/CO_GSY_PL_The%20implications%20of%20Guernsey's%20new%20population%20management%20law_5.16%20v2.pdf.

same time, the wealth that these sectors have brought to the islands has enabled historic preservation efforts and local cultural development.[154]

Second, adopting a deliberate strategy for economic development—if it is a sound one—can enable a jurisdiction to monetize its sovereignty successfully. Both islands regularly invest in thinking through their approach to economic development, and despite some less successful efforts at maintaining failing industries like Guernsey's tomato business (finally shut down by competition from the Netherlands, whose lower production costs for greenhouse tomatoes were unbeatable),[155] they have both successfully built robust financial sectors. They have accomplished this only through close collaboration between the financial sector, the government, and the independent regulators both islands created.[156]

Third, the islands have engaged in regular dialogue, both defensively and offensively, with the United Kingdom and the European Economic Community (EEC)/European Union (pre-Brexit) to protect their sovereignty. During Britain's successive EEC applications, the islands correctly worried that their economies faced disaster.[157] When Britain successfully joined the EEC in 1973, the islands managed to preserve sufficient autonomy to continue their economic development.[158] They opened a joint office in Brussels in 2011 to monitor, lobby, and develop research that helped gain them support in London.[159]

4. Gibraltar

The smallest of the British-related territories we discuss is Gibraltar. Gibraltar presents a unique constitutional position, as Britain's claim to the territory derives from its contested cession by Spain in the 1704 Treaty of Utrecht.[160] That

---

[154] *See generally* Janie Beswick et al., *The Portuguese Diaspora in Jersey*, THE CONSEQUENCES OF MOBILITY (2005).

[155] GALLIENNE, *supra* note 148, at 53; Huw Beynon & Stephen Quilley, *The Guernsey Tom: The Rise and Fall of an Island Economy*, 3 FOOD & HIST. 151, 188 (2005).

[156] Morriss & Ku, *Pioneers, supra* note 151.

[157] Philip Johnson, *The Genesis of Protocol 3: The Channel Islands and the EEC*, JERSEY & GUERNSEY L. REV. (2013), https://www.jerseylaw.je/publications/jglr/Pages/JLR1310_Johnson.aspx.

[158] *Id.* ¶¶ 56–57.

[159] *See* Channel Islands Brussels Office, https://www.channelislands.eu, (last visited Dec. 10, 2023).

[160] HOWARD S. LEVIE, THE STATUS OF GIBRALTAR 43 (1983) ("[N]ot altogether without justification, Spain has always believed and still believes that Great Britain has either itself committed, or has permitted the commission of, violations of the provisions of Article X of the Treaty almost from the date of its signature; while the British, on their part, have often felt, rightly or wrongly, that the Spanish were not meeting their obligations under the Treaty."); *see also* Peter Gold, *Gibraltar: When is a Colony Decolonised?*, *in* GOVERNANCE IN NON-INDEPENDENT CARIBBEAN, *supra* note 40, at 244 (noting that "[t]he Treaty of Utrecht was only called into play when it suited the purpose of one of the parties concerned, but also served as reminders that there have always been different interpretations of the meaning of Article X of the treaty.").

treaty's grant of a 'right of first refusal' to Spain should Britain give up Gibraltar takes independence off the table and has proved to be a factor in Gibraltar's constitutional development.[161] Further, the border between Spain and Gibraltar remains a matter of dispute, complicating both day-to-day life at times and collaboration between local authorities on both sides of the border.[162] The long history of smuggling goods into Spain via Gibraltar also complicates relations over the territory.[163]

Until the end of World War II, the territory was governed as a military base with extremely limited civilian participation in governance.[164] Indeed, during the war, virtually the entire civilian population was evacuated, and many were not able to return until the 1950s.[165] The first legislative council was not formed until 1950 and the 1964 constitution was the first to expand local participation in government to provide a majority of elected members.[166] The reform also included the abolition of nominated members and established a ministerial system.[167] Gibraltar began to develop both tourism and financial services to complement the naval shipyard and military base. These sectors expanded when Britain closed the shipyard and dramatically reduced its military presence.[168] Disputes with Spain led to repeated and lengthy border closures from the 1960s to the 1980s.[169] After a rocky start in the 1970s, when a key driver of financial services were customers seeking to avoid Spanish real estate transfer taxes, the jurisdiction developed a significant presence in insurance serving the United Kingdom market, online gaming, and, increasingly, is seeking business in cybercurrencies.[170]

---

[161] PETER GOLD, A STONE IN SPAIN'S SHOE: THE SEARCH FOR A SOLUTION TO THE PROBLEM OF GIBRALTAR 81–82 (1994).

[162] PHILIP DENNIS, GIBRALTAR AND ITS PEOPLE 62 (1990).

[163] David Sharrock, *Spanish Customs Officers Fire Shots at Smugglers Inside Gibraltar,* SUNDAY TIMES (LONDON) (Feb. 5, 2023), https://www.thetimes.co.uk/article/spanish-customs-officers-fire-guns-inside-gibraltar-s6cwxcwqd; *see also* ERNLE BRADFORD, GIBRALTAR: THE HISTORY OF A FORTRESS 142 (1971) ("Even to this day it is an open secret that Gibraltar is one of the hubs of tobacco smuggling throughout the Mediterranean.")

[164] SIR WILLIAM G. F. JACKSON, THE ROCK OF THE GIBRALTARIANS: A HISTORY OF GIBRALTAR 299 (1990).

[165] D. S. MORRIS & R. H. HAIGH, BRITAIN, SPAIN AND GIBRALTAR 1945–90: THE ETERNAL TRIANGLE 1 (1992).

[166] JACKSON, *supra* note 164, at 302–03.

[167] *Id.*

[168] GEORGE HILLS, ROCK OF CONTENTION: A HISTORY OF GIBRALTAR 470 (1974).

[169] JACKSON, *supra* note 164, at 308.

[170] *See, e.g.*, W. G. HILL, THE ANDORRA & GIBRALTAR REPORT: UNDISCOVERED FISCAL PARADISES OF THE IBERIAN PENINSULA 4 (4th ed. 1995) ("Since the Spanish border was reopened in 1985, Gibraltar has grown by leaps and bounds as an offshore financial center.").

Beginning in the late 1980s, Gibraltar's government began to assert itself more.[171] A successful lawsuit in the European Court of Human Rights in 1999, over the right of Gibraltarians to vote for European Parliament representatives, led to its incorporation into a British constituency for those elections.[172] Though Brexit was predicted to be a disaster for Gibraltar[173] and was overwhelmingly opposed by Gibraltarians,[174] it produced an unprecedented agreement between Gibraltar, Spain, and Britain for joint use of Gibraltar's airport.[175] The agreement successfully sidestepped the issue of sovereignty to focus on a practical problem,[176] although problems with the relationship with Spain continue.[177] The high degree of self-government possessed by Gibraltar has led one commentator to conclude it is effectively "an independent state" but one where "Britain aims to maintain a sufficient level of supervision to avoid triggering the alienation provision [of the Treaty of Utrecht]."[178]

As a source for the tribes' discussions of sovereignty, Gibraltar offers three key insights. First, where sovereignty discussions occur among multiple parties, finding the right framework for discussion is considerably more difficult than it is in a bilateral relationship. Given the role that U.S. states play in discussions of the extent of tribal sovereignty, the trilateral Spanish-British-Gibraltarian relationship may provide some useful guidance. The key to Gibraltar's constitutional development went from being a matter of negotiation with Britain alone, as it was for Bermuda, Cayman, and the Channel Islands, to a broader discussion of EEC/EU obligations and, most recently, finding a means to advance joint objectives between Spain and Gibraltar without having to resolve the ultimate question of Spain's claim to the territory.

---

171 Edward Cody, *Gibraltar Moves Toward Greater Independence*, WASH. POST (Apr. 14, 1990), https://www.washingtonpost.com/archive/politics/1990/04/14/gibraltar-moves-toward-greater-independence/0dc018c7-dfc9-4627-91f1-629bba06771c/ (noting the election in 1990 of a more aggressive local government).

172 *Matthews v. United Kingdom,* Application No. 24833/94 (Feb. 18, 1999).

173 *See, e.g.*, William Hague, *Leaving the EU Would be Disastrous for the Falklands, Gibraltar and Ulster*, TELEGRAPH (May 9, 2016, 6:03 PM), https://www.telegraph.co.uk/news/2016/05/09/leaving-the-eu-would-be-disastrous-for-the-falklands-gibraltar-a/.

174 Jennifer Williams, *The Brexit Vote Result Has Reignited a 300-Year-Old Fight Between Britain and Spain*, VOX (Jun. 24, 2016), https://www.vox.com/2016/6/23/12005364/brexit-vote-gibraltar-britain-spain.

175 Ashleigh Furlong, *Gibraltar airport key to Spain-Britain deal, says Spanish foreign minister*, POLITICO (Dec. 10, 2023, 12:51 PM), https://www.politico.eu/article/gibraltar-airport-key-to-spain-britain-deal-says-spanish-foreign-minister/.

176 Christina Gallardo, *UK and Spain Close in on Post-Brexit Deal for Gibraltar*, POLITCO (Dec. 14, 2022, 9:48 PM), https://www.politico.eu/article/uk-and-spain-close-in-on-post-brexit-deal-for-gibraltar/.

177 Ashifa Kassam & Jennifer Elgot, *Spain 'Ready for Any Scenario' as Gibraltar Talks With UK falter*, GUARDIAN (Jan. 2, 2023, 12:35 PM), https://www.theguardian.com/world/2023/jan/02/spain-ready-for-any-scenario-as-gibraltar-talks-with-uk-falter.

178 CHARLES CAWLEY, COLONIES IN CONFLICT: THE HISTORY OF THE BRITISH OVERSEAS TERRITORIES 220 (2015).

Second, Gibraltar's successful development of considerable degrees of sovereignty despite its small size, and its impressive economic record in surmounting the impact of the closure of the naval shipyard and reduction in Britain's military presence, provide an example of a small jurisdiction maintaining sovereignty under challenging conditions. Gibraltar's specific path to greater economic sovereignty may not be applicable to many, if any, tribes, but Gibraltar's ability to find niches that maximize the advantages of an otherwise inhospitable location highlight the value of creating and leveraging a jurisdiction's assets. As Morris and Haigh concluded, "The Gibraltar Government has readily accepted the autonomy which has been bestowed upon it; even though the resulting flexibility has been more the gift of chance than of design."[179]

For example, Gibraltar's success in finding a role in financial services focused on enabling faster formation of new insurers allowing British auto insurance underwriters to serve niche markets more effectively.[180] This strategy has led to twenty percent of United Kingdom auto insurance being underwritten by Gibraltar-domiciled insurers.[181] Moves in online gaming, with a hoped-for extension into cryptocurrencies, show how small jurisdictions can develop niche markets.[182] Searching for ways to develop markets complementary to the broader U.S. economy may thus be useful for the tribes to explore.

5. Isle of Man

The Isle of Man in the Irish Sea, or alternatively, "a tiny speck within the eastern Atlantic archipelago, . . . at the very centre of the British Isles,"[183] became a Crown Dependency in 1765, when the feudal rights of the Lord of Man were "revested" in the English crown.[184] (Previously it had been an independent kingdom, a Norwegian possession, and a possession of various Scottish and English kings and aristocrats). In 1801, Man, along with the Channel Islands, was classified as a Crown Dependency and the British Home Office assumed responsibility for relations with it.[185] Politically, the Tynwald (the local parliament) was "a bicameral

---

[179] MORRIS & HAIGH, *supra* note 165, at 150.

[180] HILL, *supra* note 170.

[181] Financial Conduct Authority, General Insurance Value Measures reporting, 2019, CP19/8, at 13, https://www.fca.org.uk/publication/consultation/cp19-08.pdf (UK).

[182] *See How Gibraltar became a hotspot for gaming and crypto currency*, LANCASHIRE POST (Oct. 29, 2021, 4:56 PM), https://www.lep.co.uk/culture/gaming/why-gibraltar-is-a-hotspot-for-gaming-and-crypto-currently-3437957.

[183] John Belchem, *Introduction* to A NEW HISTORY OF THE ISLE OF MAN, VOL. V: THE MODERN PERIOD 1830–1999, at 2 (John Belchem ed., 2000) [hereinafter A NEW HISTORY OF THE ISLE OF MAN].

[184] John Belchem, *The Onset of Modernity*, *in* A NEW HISTORY OF THE ISLE OF MAN, *supra* note 183, at 18 ("Technically, the last vestiges of 'feudalism' were extinguished when the British Crown acquired the Atholls' manorial rights and privileges in 1829 (at a cost of £417,114), but the onset of 'modernity' has always been identified with Loch's reforming regime.").

[185] DAVID W. MOORE, THE OTHER BRITISH ISLES 113 (2005).

parliament of medieval patricians" but was said to be "no more representative of the people of Man than of the people of Peru."[186]

Modernization of the political system began with Lt. Governor Henry Loch (1862–82).[187] Crucially, Loch managed to combine political autonomy desired by the Manx with fiscal and political reforms desired by the British Parliament to broker a deal giving each some of what it wanted in exchange for meeting the demands of the other party.[188] Much of his success has been attributed to the island's need for financing a new breakwater in Douglas after a storm, giving him the leverage needed to persuade the Manx to accept the reforms sought by the British.[189] A landmark 1866 fiscal reform, the Isle of Man Customs, Harbours and Public Purposes Act, gave the Manx control over a portion of the customs revenues the Crown had taken in the revetment.[190] While this new authority was carefully circumscribed since the Lieutenant Governor retained a veto and the Treasury had to approve public works, the principle of local autonomy over fiscal affairs was established.[191]

Putting the principle into action took much longer. Not until 1958 did the British Parliament's Isle of Man Act allow the transfer of control of finances to the local legislature, the Tynwald.[192] Ministerial government began in 1983 to replace a system of boards staffed by Tynwald members, though the process was not completed until 1990 with the creation of the position of Tynwald president elected by all members.[193] The upper house, however, remains indirectly elected.[194] Once the Tynwald's directly elected House of Keys had control over the finances, it reduced taxes, cutting income taxes to a fifteen percent rate and committing to not create estate, capital gains, or capital transfer taxes (which rose in Britain).[195] A

---

[186] MOORE, *supra* note 185, at 113–14.

[187] Derek Winterbottom, *Economic History*, *in* A NEW HISTORY OF THE ISLE OF MAN, *supra* note 183, at 221–28.

[188] Winterbottom, *supra* note 187, at 19.

[189] *Id.* at 76.

[190] *Id.* at 227–28 (explaining that the initial arrangement proved overly cumbersome to administer and a revised deal was negotiated in the 1890s that continues, by which customs duties are initially paid to the UK Treasury and then a share paid back to Man based on the proportion of the population in Man).

[191] Belchem, *supra* note 183, at 79; *see also* David Kermode, *Constitutional Development and Public Policy, 1900–79*, *in* A NEW HISTORY OF THE ISLE OF MAN, *supra* note 183, at 95 ("reserve powers kept by the UK authorities were considerable" in 1866–1902 period). Further fiscal autonomy followed in the Isle of Man (Customs) Act 1887, which gave Tynwald the right to vote on Lt. Gov. nominations for membership to Harbor Board and control of harbors. *Id.* at 97.

[192] Winterbottom, *supra* note 187, at 95.

[193] *Id.* at 186, 188.

[194] *See generally* Alistair Ramsay, *Tynwald Transformed*, *in* A NEW HISTORY OF THE ISLE OF MAN, *supra* note 183, at 188.

[195] A string of laws also eased new residents into the jurisdiction, starting with the Trustee Act 1961 and the Variation of Trusts Act 1961 and continuing with the Perpetuities and Accumulations Act 1968. TOLLEY'S TAX HAVENS: A PRACTITIONER'S GUIDE TO THE

major feature contributing to Man's prosperity was that it did not impose residency requirements to block immigration, unlike the Channel Islands. This led to a flood of "When I's" ("so named for their propensity to perorate on 'When I was in Rhodesia' and so on") as the British Empire broke up.[196] British marginal tax rates, which hit ninety-eight percent in the 1960s, made Manx rates all the more attractive; as the Channel Islands imposed residency restrictions, Man became increasingly appealing to tax refugees.[197] A follow up report in 1975 found that the financial sector had grown from 8.5% of the economy in 1969–70 to 18.4% in 1973–74 and that bank deposits grew faster (a three-fold increase) than in either Britain and Jersey in the same period.[198] The growing economy produced a small population boom, with the population growing from 48,000 in 1960 to 76,000 in 2001, with the Manx-born becoming a minority (forty-nine percent) in 1991.[199]

The Isle of Man offers three important lessons. First, the reclamation of sovereignty is a long-term project. The low point in Manx political sovereignty was the 1765 reinvestment and not until the late nineteenth century was meaningful progress made in recovering any significant portion of it, with another hundred years necessary to reach the level of political sovereignty it has today.

Second, the reclamation of sovereignty requires compromises. A significant one was the concession made for direct election to the House of Keys to obtain greater political sovereignty. The move was opposed by important interests at the time and the upper house remains indirectly elected. Having a dedicated, fair advocate, as Man did with Lt. Gov. Loch, made progress possible. His successor did not share his views and progress stalled. Other compromises that may appear costly to outsiders seemed largely uncontroversial when they were adopted, such as the repeated decisions to lure outsiders to the island to gain economic benefits from their presence. Ultimately this has diluted Manx cultural sovereignty in areas such as language, but the presence of so many people from "across" enabled the Manx to obtain a much greater degree of economic sovereignty.[200]

Third, gaining fiscal sovereignty is crucial. The recovery of fiscal powers in the late 1950s is thus one of the most important landmarks in Manx development

---

LEADING TAX HAVENS OF THE WORLD 303 (Adrian Ogley ed., 1st ed. 1990). The lack of stamp duty for trusts was highlighted as a "particular advantage" by another guide beginning in 1969 as was the lack of tax treaties with countries other than an "old and obsolete one" with the UK. TAX HAVENS: A WORLD SURVEY 67–68, 70 (Milton Grundy ed., 1st ed. 1969); GRUNDY'S TAX HAVENS: A WORLD SURVEY 118 (John Walters ed., 4th ed. 1983) (treaty obsolete).

196 Belchem, *supra* note 183, at 3–4.

197 Winterbottom, *supra* note 187, at 267. A 1970 government-commissioned economic study of the island concluded that '[t]he Island benefits from a net gain on capital account generated from the movement of new residents to the Island.'" *Id.* at 268.

198 *Id.* at 269.

199 There were some arson attacks on "foreigners" homes in the 1970s and 1980s. MOORE, *supra* note 185, at 123; Ramsay, *supra* note 194, at 192.

200 Belchem, *supra* note 183, at 22 ("While the Manx language went into rapid decline, other aspects and inflexions of Manxness—constitutional, legal, political and fiscal distinctiveness—were jealously guarded by the insular legislature and the Castletown clique.").

since it enabled the island to distinguish itself from Britain. Prioritizing gaining fiscal sovereignty can thus be a viable strategy, although the price may be accepting reductions in the level of cultural sovereignty ultimately achievable.

6. Lessons from the British Jurisdictions

Perhaps the most important lesson from the British jurisdictions is the importance of having a continuing conversation about sovereignty. Far more than the French, who treat discussions of political sovereignty as more lecture than conversation, discussions of cultural sovereignty as primarily about integration, and generally ignore those about economic sovereignty; or the Dutch, who give the impression of having wandered into an uncomfortable and unpleasant conversation which they wish would go away; the British have been willing to regularly hold meaningful conversations with the overseas territories and Crown Dependencies about their governing relationships. And while the British attitude in these conversations is not always one of equality between the participants, it is more often about partnerships than dictates. However, the existence of these conversations has enabled the British jurisdictions examined here to successfully claim (or reclaim) more effective sovereignty than have either the French or Dutch jurisdictions. Further, the British-connected jurisdictions have had far more latitude to choose their own trade-offs among the various dimensions of sovereignty.

One possible reason for this success is that the British constitutional system appears more flexible than the French or Dutch, and so better able to accommodate variations among the jurisdictions affiliated with it. As described below, the current Dutch relationship with the BES islands in the Caribbean is marked by a particular Dutch view of what a "direct relationship" with the Netherlands entails. Similarly, although the number of different statuses possible for French overseas jurisdictions has expanded in recent years, the French attitude toward these jurisdictions remains relatively inflexible, forcing, as we describe below, a difficult choice on Mayotte. And the French approach is selectively differentiated, denying its overseas jurisdictions a level of social support comparable to European France ("the Hexagon") on the grounds their circumstances are different while imposing French laws and practices where it suits the central government to do so.

B. Jurisdictions Connected to the Netherlands

The Kingdom of the Netherlands includes six Caribbean jurisdictions (a seventh, Suriname, became independent in 1975), the islands of Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius, and Saba. (The latter are discussed here as the "BES islands," as they have similar statuses within the Kingdom.) Until the discovery of oil in Venezuela led to the establishment of oil refineries in Curaçao and Aruba to process Venezuelan crude, the islands were largely backwaters and

seen by the Dutch as uneconomic possessions.[201] There was even a brief move in the early twentieth century to consider selling them.[202] The islands are in two separate groups separated by 900 kilometers and have "geographical, historical and cultural differences" that "prevented the emergence of an Antillean nation or sense of common identity."[203] Indeed, the six islands had "strong insular antagonisms."[204] While several are small compared to many other Caribbean jurisdictions, they are "among the most socially complex."[205]

Before 1936, the collective colony (which went by the name of "Curaçao and Dependencies") was governed by an appointed governor and appointed colonial council.[206] In 1954, the six were grouped into the Netherlands Antilles, a nation within the Kingdom, when a new Kingdom Charter reorganized its colonial possessions.[207] Despite this forced togetherness, the Antilles, during its 56-year existence, exhibited a singular lack of national consciousness and identity.[208] It was made up of six economies, and, even in tourism, had six separate approaches to developing the industry with no national coordination.[209]

---

[201] John Mayes & John Auers, *"Back to the Islands": An Update on Caribbean Refineries, Part 2 – Trinidad, Aruba, and Curacao*, TURNER, MASON & CO. (Dec. 1, 2020), https://www.turnermason.com/blog/back-to-the-islands-an-update-on-caribbean-refineries-part-2-trinidad-aruba-and-curacao/.

[202] Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles,* 45 TEX. INT'L L.J. 377, 385–86 (2009)*; see also* LAMMERT DE JONG, BEING DUTCH, MORE OR LESS: IN A COMPARATIVE PERSPECTIVE OF USA AND CARIBBEAN PRACTICES 160 (2010) ("[C]enturies ago these Caribbean islands were labeled *Islas Inutiles*.") [hereinafter DE JONG, BEING DUTCH].

[203] Wouter P. Veenendaal, *The Dutch Caribbean Municipalities in Comparative Perspective*, 10 ISLAND STUD. J. 4, 20 (2015) [hereinafter Veenendaal, *Dutch Caribbean*].

[204] *Id.*; *See also* Michael H. Allen, *Struggle and Synthesis: Toward Theory for the Dutch Caribbean Experience*, *in* THE DUTCH CARIBBEAN: PROSPECTS FOR DEMOCRACY 271 (Betty Sedoc-Dahlberg ed. 1990) ("The problem of insularity is both structural and attitudinal.") [hereinafter THE DUTCH CARIBBEAN].

[205] Allen, *supra* note 204, at 269.

[206] Peter C. Verton, *Politics and Government in Curaçao*, *in* THE DUTCH CARIBBEAN, *supra* note 204, at 65; Ank Klomp, *Bonaire within the Dutch Antilles*, *in* THE DUTCH CARIBBEAN*, supra* note 204, at 104; Fabian Badejo, *Sint Maarten: The Dutch Half in Future Perspective*, *in* THE DUTCH CARIBBEAN*, supra* note 204, at 132 ("No matter how it is referred to, the government of the Netherlands Antilles has always been identified with Curaçao.").

[207] Alma H. Young, *Decolonization in the Dutch Caribbean: Lessons from the Commonwealth Caribbean*, *in* THE DUTCH CARIBBEAN, *supra* note 204, at 254.

[208] Badejo, *supra* note 206, at 132–33,

[209] *Id.* ("Except for Dutch and Antillean flags, the islands share no common symbols of nationhood. Each island, however, has made sure to hoist its own flag, design its own coat-of-arms, intone its own 'national' anthem and establish its own 'national' day, each distinct from the other."); Harry Hoetink, *The Future of the Netherlands Antilles*, *in* THE DUTCH CARIBBEAN, *supra* note 204, at 244–45 ("The emphasis on insular symbols (flag, hymn), myths and heroes has the effect of a self-fulfilling prophecy. When feelings of insular identity prevail over those of federal identity, apolitical federation is hard to sustain. In this way, cultural emancipation leads to cultural segregation.").

The Kingdom Charter was designed in 1954 to persuade Indonesia to remain within the Kingdom.[210] Indonesia opted for independence, but the Netherlands Antilles benefited from the considerable amount of autonomy provided.[211] The Charter resulted in the removal of the Dutch Caribbean islands from the UN's list of non-self-governing territories.[212] With flourishing economies based on processing Venezuelan crude oil and Suriname's bauxite mining, the collective territory was prosperous and did not figure prominently in Dutch politics.[213] Despite the quiescence of the arrangement, there was a sense of the temporariness to the arrangement which led the Dutch to adopt a *laissez faire* attitude toward the Caribbean and for Kingdom institutions and procedures "to divide rather than unite. . . . In reality, the Kingdom does not operate as a unit."[214] Nor did the Antilles act as a unit: politics remained island-based, leading to a system of patronage politics, frequent infighting, and no common identity or agenda.[215]

The Kingdom's formal constitutional structure was three constituent, equal nations: the Netherlands, the Netherlands Antilles, and Suriname.[216] Each had considerable autonomy with its own legislature, for instance, and appellate judiciaries; while the Kingdom retained responsibility for foreign affairs, good

---

[210] Lammert de Jong, *The Kingdom of the Netherlands: A Not So Perfect Union with the Netherlands Antilles and Aruba*, *in* EXTENDED STATEHOOD IN THE CARIBBEAN: PARADOXES OF QUASI-COLONIALISM, LOCAL AUTONOMY AND EXTENDED STATEHOOD IN THE USA, FRENCH, DUTCH AND BRITISH CARIBBEAN 86 (Lammert de Jong ed., 2005) [hereinafter de Jong, *Not So Perfect*]; GERT OOSTINDIE & INGE KLINKERS, DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE 69 (2003).

[211] DE JONG, BEING DUTCH, *supra* note 202, at 163 ("[T]he Charter was not meant to last eternity; one day the Caribbean countries were to become independent. But that was not how things evolved."); Lammert de Jong & Ron van der Veer, *Reformation of the Kingdom of the Netherlands: What Are the Stakes?*, *in* THE NON-INDEPENDENT TERRITORIES OF THE CARIBBEAN AND PACIFIC: CONTINUITY OR CHANGE? 61, 63 (Peter Clegg & David Killingray eds., 2012) ("The arrangements that were then conceived had not been meant for these much smaller territories.").

[212] Ernst M.H. Hirsch Ballin, *Introduction* to NETHERLANDS IN THE CARIBBEAN, *supra* note 36, at 9. Subsequent analyses have concluded that the UN would have been unlikely to accept the Kingdom Charter as sufficient to constitute decolonization had it been evaluated after 1960, largely because of the appointment of the executive, the Governor, by the Kingdom, and the retention of powers of intervention in Antillean affairs. *See* Steven Hillebrink, *Constitutional In-Betweenity: Reforming the Kingdom of the Netherlands in the Caribbean*, *in* NETHERLANDS IN THE CARIBBEAN, *supra* note 36, at 105–06.

[213] Rosemarjin Hoefte, *The Difficulty of Getting It Right: Dutch Policy in the Caribbeans*, 25 ITINERARIO 59, 60 (2001).

[214] DE JONG, BEING DUTCH, *supra* note 202, at 165*; see also* STEVEN HILLEBRINK, THE RIGHT TO SELF-DETERMINATION AND POST-COLONIAL GOVERNANCE: THE CASE OF THE NETHERLANDS ANTILLES AND ARUBA 160 (2008) [hereinafter HILLEBRINK, RIGHT TO SELF-DETERMINATION] (noting that the three countries "seem to aim to do as little together as possible").

[215] Verton, *supra* note 206, at 76.

[216] Although the matter has not been definitely settled, "it is generally assumed that only the Kingdom as a whole possesses statehood." Hillebrink, *Constitutional In-Betweenity*, *supra* note 212, at 102.

governance, and the court of last resort.[217] Described as "Kingdom-lite,"[218] de Jong enumerated the Antilles' and Aruba's responsibilities in 2004 as "government finance, social and economic development, cultural affairs and education. They make their own political choices and do so in view of local conditions and specific local needs, political aims, budgetary constraints, and personnel capacity."[219] Nonetheless, there were sufficient ambiguities remaining in the constitutional structure to cause problems regularly as to the future of the islands.[220] For example, the islands did not have the right to amend much of their own constitutions, which required approval by the Kingdom government.[221] At the same time, since changes to the Charter require unanimous consent of the member nations, the Caribbean jurisdictions had bargaining power when the Dutch wanted changes.

Each island retained its own local government and patronage-based politics reinforced the growth of public sector employment.[222] Although this was intended to provide autonomy to each island, in practice, the Antillean government began with substantial powers which it did not delegate and which grew as Dutch development aid began to flow through it, leading to a conviction among many that insular autonomy "meant little more than paternalism and condescension from the center (Curaçao)."[223]

Although the Charter remained largely unchanged on paper for over five decades, the functioning of the Kingdom evolved as it became clear that the islands were not interested in independence.[224] This new focus led to changes in the relationship, including the eventual curbing of local autonomy.[225] In 1987, the Netherlands shifted its economic assistance to the Caribbean islands from the initial development budget to a "development cooperation" in recognition of the higher level of the Caribbean islands' per capita income, which exceeded the

---

[217] de Jong, *Not So Perfect*, *supra* note 210, at 87.

[218] *Id.* at 17.

[219] de Jong, NETHERLANDS IN THE CARIBBEAN, *supra* note 36, at 89.

[220] Hillebrink, *Constitutional In-Betweenity*, *supra* note 212, at 107.

[221] *Id.* at 104; HILLEBRINK, RIGHT TO SELF-DETERMINATION, *supra* note 214, at 173.

[222] Verton, *supra* note 206, at 76 (noting that by 1970s, the number of political appointees rivaled the "thousands" who worked at the Shell refinery).

[223] Badejo, *supra* note 206, at 131.

[224] de Jong, *Not So Perfect*, *supra* note 210, at 86. Island politicians make occasional expressions of "secessionist sentiments" but "the islands have steadfastly rejected independence." Veenendaal, *Dutch Caribbean*, *supra* note 203, at 4. The greater interest in their independence comes from the Netherlands, although Hillebrink makes a convincing case that the Netherlands cannot force the islands to become independent. HILLEBRINK, RIGHT TO SELF-DETERMINATION, *supra* note 214 at 172. The idea has been floated in the Netherlands. *Id.* at 245–46.

[225] During the 1970s, the Netherlands began to recognize that "aid alone does not automatically lead to positive change that can be labeled development. It became clear that as donor and recipient, Holland and the Antilles were not thinking along the same lines." Verton, *supra* note 206, at 213. There were no results in agriculture, fisheries, or industry. *Id.* The Netherlands came to realize that "[d]evelopment aid was making the Antilles more dependent, not less." *Id.*

internationally recognized level of under-development.[226] This change of vocabulary had consequences: "[n]ow the nature and direction of the aid itself were measured in Netherlands' politics. The obligation of the Kingdom to safeguard principles of *good governance* and democratic law in the overseas countries became a significant factor in the appropriation of the aid budget."[227] This led to budget cuts that hit at a time of economic downturn in the region due to the U.S. cancellation of the extension to the Antilles of its tax treaty with the Netherlands and repeal of withholding tax (ending the lucrative business of using Antillean entities to avoid the withholding tax).[228]

A broader shift in the 1990s to issues of good governance and fiscal responsibility led the Netherlands "to increase its own political clout on the islands by reasserting the Kingdom's responsibilities in the fields of good governance and the rule of law,"[229] bringing new stresses to the relationship as the islands saw this as an infringement on their autonomy.[230] Dutch political support to maintain its relationship has eroded in the face of ongoing governance problems in the islands and a shifting of responsibilities for the region within the Dutch government. Starting in 1998, the Ministry of the Interior and Kingdom Relations assumed responsibility, bringing greater coherence to Dutch policy.[231]

Curaçao is by far the largest and most populous of the six islands, and its dominance of the Antilles proved to be a constant irritant for the other islands. In 1954, it was also the most economically advanced due to a refinery built for processing Venezuelan crude oil (although Aruba also had a refinery).[232] Curaçao served as the administrative capital of the six-island colony and continued to play an outsized role in the Antillean government. This irritant has defined much of the political agendas for the other five islands: to separate themselves from Curaçao.[233]

---

[226] Verton, *supra* note 206, at 213. This forced the Antilles to develop long-term strategies rather than individual projects. *Id*. However, transfers deemed too important. As a result of transfers, in 1998, Aruba and the Netherlands Antilles both had per capita GDP higher than the new member countries of the EU. de Jong, *Not So Perfect*, *supra* note 210, at 86.

[227] de Jong, *Not So Perfect*, *supra* note 210, at 20.

[228] Miriela G.L. Garolina & Lennie Pau, *The Shadow Economy of the Netherlands Antilles*, 54 SOC. & ECON. STUD. 4, 70 (2007).

[229] Wouter Veenendaal, *Why Do Malfunctioning Institutions Persist? A Case Study of the Kingdom of the Netherlands*, 52 ACTA POLITICA 64, 75 (2016) [hereinafter Veenendaal, *Netherlands*].

[230] Hoefte, *supra* note 213, at 59–60.

[231] de Jong, *Not So Perfect*, *supra* note 210, at 90.

[232] Verton, *supra* note 206, at 70.

[233] DE JONG, BEING DUTCH, *supra* note 202, at 160–61 ("More than a trace of truth is contained in an Antillean maxim that *The Netherlands Antilles only exists in the Netherlands.* But was this configuration ever really viable? In retrospect, the concept of an Antillean nation-state, stringing six islands together, offered the Netherlands an easy way out of its post-colonial plight in the Dutch Caribbean."); *see also id.* at 175–76 ("For Sint Maarten the impetus was driven by a desire to distance itself from Curaçao. Similarly, Curaçao was determined to free itself from any responsibility for the small islands Bonaire, Saba and Sint

Aruba successfully negotiated its own separate status within the Kingdom, separating from the Antilles in 1986, and was described in 2010 as a "permanent state of re-structuring."[234] A 1993 Dutch proposal to give each island a direct relationship with the Netherlands was rejected in a Caribbean referendum.[235] As de Jong colorfully concluded, "[o]nce the Netherlands' assistance to the Caribbean countries resembled a Christmas tree with hundreds of projects of all sorts of activities. Now the budget has become formatted in a clear categorization of a two-pronged Dutch policy of Kingdom relations."[236]

Unlike the French experience, in which European integration has been a vehicle for development aid to its overseas territories, or the British experience, in which Britain's now-terminated relationship with the EEC/EU put additional stress on its overseas territories as they came into conflict with European initiatives aimed at reducing their advantages in financial industries, but also provided Britain a role as protector, Dutch integration into Europe has "eroded" the ties within the Kingdom because the Netherlands kept the Caribbean islands apart from its membership in the EEC/EU.[237]

Discontent continued in the remaining four smaller islands, and, after a series of referenda in the early 2000s and some hesitation on the part of the Dutch, the Antilles, and the Netherlands, agreed that the Antilles would dissolve.[238] As negotiations progressed over the dissolution, further concessions toward "good governance" were made by the islands. For example, the Netherlands, Curaçao, and Sint Maarten agreed in 2006 to allow the Dutch Minister of Justice to instruct the public prosecutors in Curaçao and Sint Maarten, once they had become separate nations within the Kingdom, "to safeguard fundamental human rights, legal

---

Eustatius. Indeed, the latter had lost all trust in the governing capacity of the Netherlands Antilles, not in the least because of its poor fiscal management."); de Jong, *Not So Perfect*, *supra* note 210, at 98 ("The other islands perceive the national government of the Netherlands Antilles to be dominated by Curaçao, while Curaçao maintains that its interests are twisted by the needs and financial burden of the *needy islands*."); HILLEBRINK, RIGHT TO SELF-DETERMINATION, *supra* note 214, at 177 ("[T]he unity of the territory was continually threatened by centrifugal forces."); Hoefte, *supra* note 213, at 65 (noting ethnic tensions between the primarily Latino Arubans and the Afro-Curaçaoans); Veenendaal, *Netherlands*, *supra* note 229, at 4 (Observing that the islands always "adamantly opposed the postcolonial political construction of the Netherlands Antilles in which they were united.")

[234] DE JONG, BEING DUTCH, *supra* note 202, at 175; *see also* Hoefte, *supra* note 213, at 65 (noting importance of "controversial" 1977 referendum that showed majority support in Aruba for *status aparte* and the influence of the strikes in Aruba in changing the Dutch position); Hoetink, *supra* note 209, at 240 ("Not only did Aruba leave the federation, but within the remaining five islands of the federation, a process of decentralization continued.").

[235] de Jong, *Not So Perfect*, *supra* note 210, at 100.

[236] *Id.* at 97; *see also* DE JONG, BEING DUTCH, *supra* note 202, at 158 ("The Caribbean islands may have reached a dead end as far as 'dependent development' is concerned.").

[237] Ballin, *supra* note 212, at 12; de Jong, *Not So Perfect*, *supra* note 210, at 87.

[238] The Netherlands had previously been hostile to the dissolution of the broader structure; after 2004, it came to see it as a possible solution to the failures of the Antillean government. Hillebrink, *Constitutional In-Betweenity*, *supra* note 212, at 103.

certainty and[/or] good government," an agreement that was particularly controversial in Curaçao.[239]

The 2006 agreement created a framework for three islands (Curaçao, Aruba, Sint Maarten) becoming nations within the Kingdom, providing for a common court, central bank (for Sint Maarten and Curaçao), and cross-border collaboration on criminal law enforcement.[240] For the BES islands, an agreement set out a "special public entity" status.[241] A remaining conundrum for the islands as a group is reconciling the belief that "'[f]iscal responsibility and self-reliance' would enhance autonomy through the curtailment of autonomy in pursuit of those objectives."[242] This increasing Dutch involvement is "broadly resented and perceived as a loss of autonomy in the face of Dutch 'recolonization.'"[243] Overall, the reforms largely left the institutional structure of the Kingdom intact.[244] At the same time, there seemed little capacity for self-governance in the islands or even the opportunity to develop any local capacity. The Netherlands Antilles ultimately dissolved on October 10, 2010.[245]

The hoped for "period of stability and tranquility" did not appear, and, "on all six of the Dutch Caribbean islands, the contemporary relationship with the metropolis seems to be particularly fraught with tensions and frustration, resulting in constant ambiguities about the continuing relationship with the metropolitan Netherlands."[246] Tensions were further heightened by the new board of financial supervision's efforts to increase supervision of Curaçao's government in 2012, a Kingdom investigation into corruption in Sint Maarten in 2013, and a hunger strike by the Aruban prime minister in 2014 over Dutch refusal to approve his budget.[247] Despite these ongoing negotiations, there seems little progress towards developing any durable governing partnership between the macro- and micro-sovereigns involved. In the BES islands, conflicts with the Netherlands developed over Dutch insistence that the islands accept legalization of abortion, same sex marriage, and euthanasia as part of becoming jurisdictions within the European nation.[248]

---

239 HILLEBRINK, RIGHT TO SELF-DETERMINATION, *supra* note 214, at 155.

240 *Id.* at 179.

241 *Id.*

242 Hoefte, *supra* note 213, at 69.

243 Veendendaal, *Netherlands*, *supra* note 229, at 65.

244 *Id*.

245 Veenendaal, *Smallness*, *supra* note 75, at 157.

246 *Id.* at 158–59.

247 *Id.* at 159.

248 Wouter Veenendaal, *Integration With the Metropolis: The Dutch Caribbean 'municipalities' after 2010*, *in* EURO-CARIBBEAN SOCIETIES IN THE 21ST CENTURY: OFFSHORE FINANCE, LOCAL ELITES, AND CONTENTIOUS POLITICS 162, 164 (Sébastien Chauvin, Peter Clegg & Bruno Cousin eds., 2018) [hereinafter EURO-CARIBBEAN SOCIETIES]; Chelsea Schields, *Intimacy and Integration: The Ambivalent Achievement of Marriage Equality in the Dutch Caribbean, 2007–2012*, *in* EURO-CARIBBEAN SOCIETIES, *supra* note 248, at 176, 179 ("Hero Brinkman, member of Dutch parliament, "echoed the majority of parliamentarians: 'If the BES islands indicate that they would like to be part of the

There are no formal restrictions on migration from the Caribbean jurisdictions to the Netherlands, although this has become a divisive topic in the Netherlands in recent years.[249] The numbers are large for the Caribbean countries: Curaçao's population fell almost fifteen percent between 1997 and 2001.[250] The categorization of Caribbean migrants with other foreigners by the Netherlands is a continuing source of irritation.[251] However, there are restrictions on European *Nederlanders* movement to the Caribbean jurisdictions.[252]

Though the economies and cultures of the six islands are distinct, three general points can be made about the Antillean economies as a group. First, "[b]eing Dutch in the Caribbean is primarily a deal to secure a better life."[253] In particular, "[f]ree migration is seen as a lifeline on the Caribbean islands, it is one of the Kingdom's most valuable assets."[254] Second, the informal economy remains substantial on all the islands, complicating development efforts.[255] Third, no strong Dutch economic benefit has yet been identified to remaining connected to the Caribbean.[256]

Politically, the islands share common concerns/interests. First, a permanent struggle over significant governance issues—constitutional status, safeguarding democratic law and order, local autonomy and metropolitan control, a fragmentary Netherlands citizenship, and preservation of *Nos Patrimonio Nashonal*.[257] Second, the islands' inability to match a Dutch advantage in highly trained legal and technical experts.[258] Third, "[o]ver and over again the relations

---

Netherlands, then some things go with this. In negotiations is should then be very simple and one-dimensional: if you want that, that is fine, but then you must also accept gay marriage.'").

249 DE JONG, BEING DUTCH, *supra* note 202, at 172–73.

250 de Jong, *Not So Perfect*, supra note 210, at 102.

251 *Id.* at 104–05.

252 *Id.* at 101, 106.

253 DE JONG, BEING DUTCH, *supra* note 202, at 155.

254 de Jong, *Repairing a Not So United Kingdom*, *supra* note 36, at 16; de Jong, *Not So Perfect*, *supra* note 210, at 107 ("Many islanders consider the right of citizenship that the extended statehood the Kingdom of the Netherlands provides of paramount importance."); DE JONG, BEING DUTCH, *supra* note 202, at 157 ("In addition, freedom of movement in a world that has become increasingly restrictive has become a highly prized asset of being constitutionally allied to the metropolitan.").

255 Garolina & Pau, *supra* note 228, at 65, 67 (By the early 2000s, estimates of the size of the shadow economy were over 10%.).

256 DE JONG, BEING DUTCH, *supra* note 203, at 179; Veenendal*, Netherlands*, *supra* note 229, at 77 ("on the Dutch side the ratification of the Kingdom Charter increasingly came to be seen as a historical mistake, while in reverse it became a strategic line of defense for the Caribbean countries.").

257 DE JONG, BEING DUTCH, *supra* note 202, at 156.

258 Hoetink, *supra* note 209, at 250. These experts may be the group most advantaged by the Dutch Caribbean.

> Classical colonialism was the exploitation of the colony for the benefit of the mother country. Neo-colonialism is the exploitation of the

with the metropolitan have soured over how much and which areas of government will be left to autonomous Caribbean rule, and to what extent Caribbean island government affairs can be kept free from metropolitan interference."[259] Fourth, there is evidence that among many islanders that the Dutch play an important role in keeping local politicians' in check.[260] Fifth, the islands all tend to have politics based on clientelism, which has limited citizens' roles in discussions of status.[261] Sixth, "[t]he Netherlands' citizenship in the Dutch Caribbean is of different content than on the mainland; it is a citizenship Ltd."[262] The Kingdom is not obliged to provide to the islands social security, education, health or other entitlements available in the Netherlands. To the extent that it does so, it is on a voluntary basis.[263]

Elsewhere, we have emphasized the importance of the ongoing conversations about sovereignty between jurisdictions. The Dutch case illustrates that talking is not an end in itself. As one Caribbean observer noted:

> An endless parade of Dutch political parties and Ministers of Antillean and Aruban affairs have issued volume upon volume of

---

> colony for the benefit of agents of the mother country, its most visible form being technical and other forms of 'assistance'. Technical assistants earn many multiples of what a similarly, or better qualified local can expect to earn, live in exclusive enclaves and in general enjoy a luxurious season in Paradise. Big infrastructural projects end up in the hands of contractors of the donor country and the colony or recipient country is little more than a transfer point for the money. Precious little real development ever comes from 'technical assistance' or 'project grants and financing' . . . This is the reality of the 'new colonialism' or 'neo-colonialism'.

Denicio Brison, *Denicio Brison to Fancio Guadeloupe*, *in* NETHERLANDS IN THE CARIBBEAN, *supra* note 36, at 60.

259 DE JONG, BEING DUTCH, *supra* note 202, at 159.

260 Veenendaal, *Smallness*, *supra* note 75, at 163 (showing that a survey found that many voters saw the link to the Netherlands as important for the restraint it imposed on local politicians.); *id.* at 161 ("as in other small societies, in the Dutch Caribbean islands a discrepancy appears to exist between formally democratic political structures, institutions, and regulations on the one hand, and a more authoritarian practical political reality on the other hand").

261 *Id.* at 162 (explaining that for all six islands, "individual politicians to a large extent steered status debates, while individual citizens were largely sidelined in the discussion.").

262 DE JONG, BEING DUTCH, *supra* note 202, at 169. This does not just concern money. For example, the air quality issues caused by the refineries in Curaçao and Aruba also revealed Antillean environmental standards to be below their Dutch counterparts. de Jong, *Not So Perfect, supra* note 210, at 112.

263 DE JONG, BEING DUTCH, *supra* note 202, at 169. This does not just concern money. For example, the air quality issues caused by the refineries in Curaçao and Aruba also revealed Antillean environmental standards to be below their Dutch counterparts. de Jong, *Not So Perfect, supra* note 210, at 112.

> studies, reports, aide de memoirs and have held endless round-table meetings and lecture series on the relationship, but until such events as the riots in Curaçao in 1969 or those in Aruba in 1977, Holland does not act. We can therefore safely conclude two things: meetings, lecture-series and round-table discussions will not bring about any constitutional change. The public is apathetic, Holland is clueless and the Antillean political elite too smitten with the colonial complex to bring about meaningful constitutional change.[264]

Culturally, language divides the islands, both from each other and from the Netherlands. "In the Dutch Caribbean different languages are spoken than simply Dutch, as on the mainland: Papiamentu in Curaçao and Bonaire; Papiamento on Aruba; and English on Sint Maarten and Sint Eustatius."[265] Dutch is the language of governance; the other languages are spoken at home and on the streets.[266] By the 1980s, Dutch's role in daily life began to recede, potentially signaling cultural estrangement from the Netherlands.[267] This has further alienated some in the Netherlands: One Dutch writer suggested that if the islands abandoned the Dutch language, it would allow the Netherlands to withdraw from the Kingdom unilaterally.[268]

The Dutch jurisdictions fall between the British and the French in many ways. Even the BES islands are less integrated with the Netherlands than the French *départements*. Aruba, Curaçao, and Sint Maarten have levels of autonomy close to that of the more constitutionally advanced UKOTs and CDs in many respects. A key difference between them and the British jurisdictions is the more skeptical attitude of the Netherlands toward its Caribbean jurisdictions. Although formal equality is present in the Charter for other nations within the Kingdom, in practice, the Netherlands exercises greater political control over them than Britain does over Bermuda, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, or Jersey.

These jurisdictions offer three lessons. First, smallness can be a hindrance to informed public debate over sovereignty—Veenendaal notes that the smaller Dutch islands' discussions leading up to October 10, 2010 were distorted by weak news media and personalized politics related to their small sizes.[269] Their economic weakness and dependence on transfer payments from the Netherlands hinder their ability to reclaim sovereignty. Unlike the French jurisdictions, which have embraced their close relationship with the Hexagon, the Dutch jurisdictions seem to wish for a relationship defined by little beyond financial transfers and free entry

---

264 Denicio Brison, *The Kingdom Charter (Het Statuut): Fifty Years in the Wilderness*, *in* NETHERLANDS IN THE CARIBBEAN, *supra* note 36, at 42.

265 DE JONG, BEING DUTCH, *supra* note 202, at 171.

266 *Id.* at 171.

267 Hoetink, *supra* note 209, at 243.

268 *Id.* at 245–46.

269 Veenendaal, *Smallness*, *supra* note 75, at 149.

to the Netherlands and Europe. This level of political cohesion, self-governance, and self-determination is insufficient to build a constructive partnership.

Second, human rights issues with a cultural connection are a flash point, just as they have proven to be in the British Caribbean jurisdictions. The conflict between the BES islands and the Netherlands over abortion, euthanasia, and gay marriage mirrors the conflicts Bermuda and Cayman have had with Britain over gay marriage. Unlike those conflicts, however, the Netherlands simply "pulled rank" and imposed the legislation on the BES islands, whose integration left them with no room to resist.

Third, constitutional conversations require good faith efforts by both sides to be productive. The Netherlands' relationships with its Caribbean territories have included ignoring them, encouraging them to become independent, and relatively heavy-handed interventions in the name of good governance. These abrupt shifts in goals and tone have not encouraged a relationship of trust with the islands; nor has island politicians' often hostile relationship with the Netherlands helped in that process. Perhaps the combination of the formal equality of the Charter and de facto Dutch predominance within the Kingdom raises unattainable expectations among the Caribbean populations resulting in cynicism and disappointment.

Forming their political agendas by reacting to the moves made by the Dutch macro-jurisdiction may also have robbed the islands of opportunity to develop their own political priorities and to strengthen their institutions and processes of self-governance. Without a clear separate political strategy and agenda, the islands weakened their bargaining power in the face of an increasingly intrusive Dutch government—despite the veto power provided them in the Kingdom Charter. In contrast, the British relationship with its Overseas Territories (OTs) and CDs, which lacks the Kingdom Charter's quasi-federal structure, involves more of a real partnership (at least at times).

Tribal relationships with the U.S. government may share the "formal equality, de facto inequality" character of the Dutch jurisdictions' relationship with the Netherlands in contrast to the more flexible British relationship with the OTs and CDs. Developing clear political strategies and agendas, maintaining financial self-sufficiency, and finding ways to move tribal relations with the U.S. towards the British style of consultation through which to develop those strategies may therefore be desirable.

C. Jurisdictions Connected to France

France has ten overseas territories with a variety of legal statuses. We discuss Guadeloupe and Martinique, two *départements* in the Caribbean (where France's territories include St. Barthélemey and St. Martin, *collectivités d'outre-mer,* which recently separated from Guadeloupe), and Mayotte, a *département* in the Indian Ocean. We thus do not consider France's Pacific jurisdictions (French Polynesia, New Caledonia, and Wallis and Futuna), its second Indian Ocean jurisdiction (Réunion), Guyane (a *département* in the Caribbean on the South

American continent), or Saint Pierre and Miquelon (a *collectivité d'outre-mer* in the North Atlantic).

The French relationship with its overseas territories differs from the British relationship with its UKOTs. As one analysis put it, the French view was that "France did not colonize, it civilized."[270] Indeed, historically France's relationship with all its colonies (including those that later became independent) was one shaped by the idea of France's mission to bring its civilization to the rest of the world.[271] The result: "This was the ideal of French decolonization: not independence (which, according to French logic, would be a form of ungrateful rejection) but rather full juridical integration into the Republic, as voluntarily requested by the formerly colonized."[272] Those jurisdictions that chose not to remain with the French system often found themselves cut off from close ties to their former colonial power.[273]

The French jurisdictions illustrate the opportunities and dangers of an assimilationist strategy. Despite the intent to use *département* status as a means of advancing their local economies without sacrificing their cultural and political sovereignty (the law transforming Guadeloupe, Martinique, and Réunion into *départments* was authored by one of the leading cultural figures of the French Caribbean),[274] the result in all three cases has been to reduce some aspects of cultural sovereignty while creating economies most notable for their dependence on transfer payments from France and the European Union.[275] There is no mystery as to why this has been the case—France's explicit goal with its overseas territories has long been to make them French.[276] Only relatively recently has some degree of recognition of the value of distinct cultures within France crept into the political discourse.[277]

While dependency has left the French islands economically better off than many of their neighbors, it nonetheless produced fragile economies whose

---

[270] MORT ROSENBLUM, MISSION TO CIVILIZE: THE FRENCH WAY 5 (1986).

[271] *Id.* at 7–8 ("England set up colonies to expand markets and secure raw materials for its revolutionized industry. France, while also seeking profits, had a different revolution to fuel. With legions of priests and poets, France ordered itself on a *mission civilsatrice,* a mission to civilize. From Moorea to Mali, redeemed savages learned the stations of the cross and Rabelaisian ribaldry. Black, yellow, and brown schoolchildren studied from books that began, 'Our ancestors the Gauls were big and robust.'").

[272] MILES, SCARS OF PARTITION, *supra* note 37, at 72.

[273] DAVID BIRMINGHAM, THE DECOLONIZATION OF AFRICA 30–31 (1995).

[274] ROBERT ALDRICH, GREATER FRANCE: A HISTORY OF FRENCH OVERSEAS EXPANSION 281 (1996) (law introduced by Aimé Césaire).

[275] William F.S. Miles, *Fifty Years of 'Assimilation': Assessing France's Experience of Caribbean Decolonization Through Administrative Reform*, *in* ISLANDS AT THE CROSSROADS: POLITICS IN THE NON-INDEPENDENT CARIBBEAN 63 (2001) ("[E]conomic growth in the French islands is mainly the result of public and social transfers.").

[276] MILES, SCARS OF PARTITION, *supra* note 37, at 87.

[277] Justin Daniel, *Extended Statehood in the Caribbean—the French Départements D'Outre Mer, Guadeloupe and Martinique,* ROZENBERG QUARTERLY https://rozenbergquarterly.com/extended-statehood-the-french-departements-doutre-mer-guadeloupe-and-martinique/ (last visited Oct. 15, 2023).

continued prosperity depends on the continued generosity of France and its EU partners rather than on local resilience.[278] And when compared to the successful UKOTs, the French success is less impressive than it is when compared to the independent Anglophone Caribbean nations. Bermuda, Cayman, and Gibraltar (as well as the Crown Dependencies) have outperformed the French territories economically and obtained substantially more political sovereignty as well, suggesting that a measure of distance can yield benefits under the right circumstances.

1. Guadeloupe and Martinique

Both islands became French possessions in the early seventeenth century. Despite a strong identification as part of France for most of their history, it was not until 1946 that their status shifted from being parts of the French Empire to being part of France itself.[279] As many French colonies were seeking separation from France (e.g., the French colonies in Indochina), these two islands were seeking closer integration with France. The effort partly succeeded. The islands elect members to the French Assembly, vote in French presidential elections, and are generally subject to French laws.[280] France also successfully had the islands removed from the UN's list of territories to be decolonized.[281] There are some differences to adapt laws to specific circumstances in the islands including in different social welfare benefits, and diluting the promise of equality with the Hexagon.[282] Moreover, French civil servants stationed on the islands receive pay

[278] Clegg & Pantojas-Garcia, *supra* note 40, at 272 ("The French DOM have taken a quite different economic path, with their political and legal assimilation linked to enormous injections of money from mainland France and increasingly from the EU, which has produced high levels of development.").

[279] Fred Constant, *Alternative Forms of Decolonization in the East Caribbean: The Comparative Politics of the Non-Sovereign Island, in* THE POLITICAL ECONOMY OF SMALL TROPICAL ISLANDS: THE IMPORTANCE OF BEING SMALL (Helen M. Hintjens & Malyn D.D. Newitt, eds.) 51, 54 (1992) ("After 1946 increasingly direct penetration by the French state and by its value system had a subtle effect on local political allegiances. Political institutions were substantially altered in being transferred to the islands from France, and the effect of departmentalization (that is, the process of being transformed from colonies into fully fledged French departments), has been to bring both the political elites and the masses into the structures of the French nation state.").

[280] MILES, SCARS OF PARTITION, *supra* note 37, at 97–98.

[281] KRISTEN STROMBERG CHILDERS, SEEKING IMPERIALISM'S EMBRACE: NATIONAL IDENTITY, DECOLONIZATION, AND ASSIMILATION IN THE FRENCH COLONIALIZATION 81 (2016).

[282] Constant, *supra* note 279, at 55 ("From the 1960s to the early 1980s, the political debate in Martinique and Guadeloupe centered on the failure of the French state to provide real equality of citizenship for the inhabitants of the overseas departments."); CHILDERS, *supra* note 281, at 88 ("On the last day of December 1947, the very night before all metropolitan laws were to go into effect in the new DOMs, the government surreptitiously passed a law codifying different salary scales for metropolitan civil servants, guaranteeing

supplements to account for the higher cost of living that their local colleagues do not.[283]

In one sense, the islands are an economic success. For example, GDP per capita is much higher in the French jurisdictions than in the independent Caribbean.[284] However, the economies of the two islands are largely dependent on transfer payments from France, the European Union, and public employment.[285] This is in part due to the application of French laws in what are developing economies. For example, French labor laws help keep costs high, particularly when compared to other jurisdictions in the Caribbean.[286] This led to a transformation "from producer economies to heavily assisted welfare-based ones. The result is that a large majority of required foods are imported and exports amount to only one seventh of imports, high unemployment is endemic, and crime levels are increasing."[287]

In general, economic success has gone hand in hand with economic dependency. Local discontent fuels demand for more autonomy but not for independence. In addition, it focuses on the local economic elites, who have maintained considerable economic power for hundreds of years. For example, in

---

them more substantial salaries than those offered to 'indigenous' civil servants in the new departments."). *See also* YARIMAR BONILLA, NON-SOVEREIGN FUTURES: FRENCH CARIBBEAN POLITICS IN THE WAKE OF DISENCHANTMENT 23 (2015) ("The 1946 law officially transformed the former colonies of Guadeloupe, Martinique, Guiana, and Réunion into full departments of France, and decreed that their political systems would be equal to those of the metropolitan departments—but for exceptions specified by law. This final clause opened the door to precisely the kind of 'colonial' or 'tropical' exceptionalism that Césaire had sought to prevent.").

[283] BONILLA, *supra* note 282, at 26; Guy Numa, *Colonial heritages and continuities in Guadeloupe and Martinique: An economic perspective*, *in* EURO-CARIBBEAN SOCIETIES, *supra* note 248, at 102, 106. Césaire called the combination of outward migration to the metropole and the inward flow of bureaucrats "genocide by substitution." BONILLA, *supra* note 282, at 26. He came to argue against "assimilation" defined as a political and philosophical doctrine which tends to eliminate the particular aspects specific to a people and to kill its personality. "Well I clearly say assimilation hence understood and hence defined, I am against assimilation. I feel that We, Martinicans, we have a personality, a personality which is absolutely not a French personality; which is neither an African personality; a personality which is an own personality, a Martinican personality. And I feel we must preserve this very personality, we must cultivate it, we must develop it,"; Justin Daniel, *Recent Developments in the French Antilles: The Political-Institutional Debate and the Difficult Reconciliation of Conflicting* Aspiration, *in* GOVERNANCE IN NON-INDEPENDENT CARIBBEAN, *supra* note 40, at 78–79, n. 5.

[284] HELEN M. HINTJENS, ALTERNATIVES TO INDEPENDENCE: EXPLORATIONS IN POST-COLONIAL RELATIONS 38 (1995).

[285] Matthew Lewis Bishop, *The French Caribbean and the Challenge of Neoliberal Globalisation: The Silent Death of* Tricolore *Development*, *in* GOVERNANCE IN NON-INDEPENDENT CARIBBEAN, *supra* note 40, at 120.

[286] Audrey Célestine, *A Post-Colonial Economy? Protesters, Lobbyists and Small Business Owners in Martinique After 2009*, *in* EURO-CARIBBEAN SOCIETIES, *supra* note 40, at 116–17.

[287] Clegg & Pantojas-Garcia, *supra* note 40, at 273.

Martinique, a group of white *békés* (the local elite) hold over 50% of the agricultural land.[288] At the same time, the islands have successfully channeled efforts into preserving a degree of cultural sovereignty, exemplified by an April 2002 speech by Louis Boutrin: "I say with force . . . that there exists a Martinican people and nation. That this nation is conscious of itself, but it doesn't have an international, legal existence. And I say so with all the sincerity I am capable of: 'This Martinican nation is a Natural Nation.'"[289]

These two French territories illustrate the perils of giving up sovereignty. By attaching themselves politically to France, they have received considerable transfer payments that have enabled them to maintain a higher standard of living than many of their neighbors. Even this is, at best, partial success, for the failure to bring social welfare standards to their level in the Hexagon means that the nominal equality of French citizens in the Caribbean with their compatriots in Europe is still imperfect. And as de Jong notes in comparing them to the Dutch Caribbean islands, their "prosperity may only be superficial for the most part" since it is dependent on transfer payments.[290] Nonetheless, they have maintained their distinctiveness, "in Césaire's formulation, not wholly a part of France, but Frenchmen wholly apart."[291]

2. Mayotte

Mayotte (Maore in the local language) was once described as "France's Gibraltar of the Indian Ocean."[292] Like Britain's claim to sovereignty over Gibraltar, France's claim is contested by the Comoros Islands, a four-island archipelago to which Mayotte belongs, although the Comorian claim is not asserted nearly as vigorously as Spain's over Gibraltar.[293] Located off the coast of Africa in the Indian Ocean, Mayotte became a French colony in 1841, before the other three islands in the archipelago.[294] All four had longstanding ties to the Arabian peninsula.[295] As French colonies, they were administered by France from

---

[288] *See* Numa, *supra* note 283. There is a general perception that a similar pattern exists in Guadeloupe, although a majority of the total land area is owned by the departmental council; Célestine, *supra* note 286,

[289] Daniel, *supra* note 283, at 80, n. 13.

[290] DE JONG, BEING DUTCH, *supra* note 202, at 158.

[291] CHILDERS, *supra* note 281, at 204.

[292] IAIN WALKER, ISLANDS IN A COSMOPOLITAN SEA: A HISTORY OF THE COMOROS 86 (2019) [hereinafter WALKER, COSMOPOLITAN SEA]. Mayotte was largely depopulated at the time due to Malagasy slave raids and inter-island conflicts. *Id.* France's initial ambitious plans for a fortress were abandoned when it was realized that, far from being a strategic entrepot, Mayotte was an isolated island with few advantages and fewer resources that would be costly to maintain. *Id.*

[293] *Id.* at 85.

[294] *Id.* at 139.

[295] Abdourahim Saïd Bakar, *Small Island Systems: A Case Study of the Comoro Islands,* 24(2) COMP. EDUC. 181, 182 (1988).

Madagascar, and all but Mayotte were protectorates under a local ruler.[296] During the colonial period, the legal system distinguished French citizens from natives, allowing local law to govern the latter.[297] Thus, polygamy and other local customs were permitted to continue.[298] Disputes between non-natives and natives were heard by a French court applying French law; disputes among natives were left to local customary law courts, which relied on a thirteenth-century Islamic law text as the sole source of authority.[299]

After World War II, the four islands were detached administratively from Madagascar and organized as a *territoire d'outre-mer*.[300] The economy, almost entirely based on agriculture (in particular the cultivation of cloves, pepper, ylang ylang, and vanilla), was dominated by a local aristocracy, which was as "ruthless" as any colonialist.[301] In 1961, the islands obtained self-governing status, under which they had considerable autonomy.[302] Independence became an issue only in the late 1960s and early 1970s. In an independence referendum, in which France insisted that each island vote separately, all but Mayotte opted for independence.[303] Mayotte continued its quest for securing French *departement* status,[304] motivated primarily by economics. As Maoaris told Walker, "It's all about money. . . . If it wasn't the French it would be someone else."[305] Despite its independence, the Comoros has not had a stable government and France has continued to intervene in Comorian politics, "effectively treating the country, and its leaders, as if it, and they, were still French, often calling ministers to account and guiding government

---

[296] Iain Walker, *Mayotte, France and the Comoros: Mimesis and Violence in the Mozambique Channel*, *in* ACROSS THE WAVES: STRATEGIES OF BELONGING IN THE INDIAN OCEAN ISLAND SOCIETIES 204 (Iain Walker & Marie-Aude Fouédé, eds., 2022) [hereinafter Walker, *Mimesis*].

[297] *Id.* at 116–17.

[298] Angelique Chrisafis, *Welcome to France: Home of Sun, Sea, Sand, Polygamy and the Indian Ocean,* GUARDIAN (Mar. 25, 2009), https://www.theguardian.com/world/2009/mar/26/mayote-referendum-polygamy-islam.

[299] WALKER, COSMOPOLITAN SEA, *supra* note 292, at 116–17 ("[U]ntil 1934, when the role of the *cadis* was formally recognized and a tribunal of *cadis* was established. The sole admissible text with regard to Islamic law was the *Minhaj al-Talibin,* a commentary on Shafi'i law written by the thirteenth-century jurist al-Nawawi and long used in the islands. The *juge d'instance* also served as an appeal court for all, and was expected to have some knowledge of both Islamic law and custom.").

[300] WALKER, COSMOPOLITAN SEA, *supra* note 292, at 113.

[301] *Id.* at 152.

[302] Simon Massey & Bruce Baker, *Comoros: External Involvement in a Small Island State,* CHATHAM HOUSE PAPER AFP 2009/1 9 (2009), https://www.chathamhouse.org/sites/default/files/public/Research/Africa/0709comorospp.pdf.

[303] Walker, *Mimesis*, *supra* note 296, at 204.

[304] *Id.* at 213 ("For half a century the dominant political project on Mayotte was aimed at securing the status of a French department.").

[305] *Id.* at 215.

policy—such as it was."[306] This dissuaded potential donors from stepping in, as the government continually deferred to the French. The largest single source of income for the Comoros is the Comorian diaspora, which is largely in France (including Mayotte, Réunion, and the Hexagon).[307]

Mayotte's comparative prosperity comes largely from transfer payments from France, as the application of French labor laws has rendered the agricultural economy largely unprofitable.[308] Mayotte's relationship with France has many similarities to Guadeloupe's and Martinique's. A key difference is the much stronger indigenous culture in Mayotte, which departmentalization has placed under considerable pressure. Both the decline in the local languages and the replacement of Islamic customary law by French law (particularly family law) are bringing considerable changes to Mayotte society and culture.[309] Like the Caribbean islands, Mayotte's economy is largely a transfer economy.[310] Unlike the Caribbean islands, this has prompted massive illegal immigration from neighboring islands.[311] This immigration—defended by the immigrants as merely a continuation of traditional

---

[306] WALKER, COSMOPOLITAN SEA, *supra* note 292, at 172; *see also* Guy Martin, *France and Africa,* in FRANCE IN WORLD POLITICS 117 (Robert Aldrich & John Connell, eds., 1989) ("On the basis of this analysis, the inevitable conclusion has to be reached that this policy is essentially neo-colonial because it is designed to perpetuate the dominance/dependency pattern prevailing in Franco-African relations, and because it is clearly favourable to the conservative interests of the Western world in general, and of France in particular.").

[307] Vincent da Cruz, Wolfgang Fengler, & Adam Schwartzman, *Remittances to Comoros—Volume, Trends, Impact and Implications,* WORLD BANK AFRICAN REGION WORKING PAPER SERIES No. 75 1, 2 (2004), available at https://www.marketlinks.org/sites/default/files/media/file/2020-10/Remittances%20to%20Comoros%20–%20Volume%2C%20Trends%2C%20Impact%20and%20Implications.pdf (noting that there are 85,000 to 150,000 Comoranians living in metropolitan France, sending over US$36 million back annually plus US$15-20 million in goods).

[308] WALKER, COSMOPOLITAN SEA, *supra* note 292, at 21 ("French labour laws render even the harvest of cloves or ylang ylang unprofitable").

[309] *Id.* at 204 ("The full incorporation into France implied a number of challenges that many Maorais—for whom departmentalization was merely a means of escaping Comorian hegemony—had not fully understood or expected: the abolition of Islamic civil law, touching particularly on inheritance and marriage (polygamy would henceforth be illegal), the imposition of various laws concerning taxation, labour, employment and so on, the loss of customary systems of land tenure: the list was long, and while France promised that changes would not be imposed overnight, it was clear that the implications were that Mayotte would eventually be as French as the rest of France, prompting some social unease."); Walker, *Mimesis*, *supra* note 296, at 216 ("France was imposing its rules, collecting land taxes, demolishing illegally constructed houses, banning polygamy, introducing legislation that an older generation finds opaque.").

[310] WALKER, COSMOPOLITAN SEA, *supra* note 292, at 204 ("Economically, the island is no more productive than its neighbors, and only survives thanks to subsidies from the mainland.").

[311] *Id.* at 7 (estimating that "a significant minority of the population of Mayotte are deemed to be illegally present on French territory.").

inter-island movement—also puts pressure on the local culture.[312] Moreover, the comparison between the relative success of Mayotte and the neighboring Comoros suggests that, despite the costs of integration with France, there are considerable offsetting benefits.

The French micro-sovereigns' experience provides three important lessons for the tribes. First, to a far greater extent than any of the micro-sovereigns connected to Britain or the Netherlands, those tied to France have traded cultural and political sovereignty for economic benefits. By opting for *département* status, all three have sacrificed opportunities to protect distinctive cultures and develop greater political autonomy in return for transfer payments that enable a higher standard of living. Second, as the cost of integration became apparent—and the promise of the rewards of *département* status were repeatedly delayed—local demands for greater autonomy and greater emphasis on local, rather than simply French, culture increased. When the French government decentralized some power in France as a whole, the Caribbean islands were able to reclaim some of the sovereignty they had ceded after World War II. Mayotte appears to have been less successful in retaining local sovereignty over cultural and political matters, perhaps because it is even more dependent on transfers than the Caribbean jurisdictions. Finally, the "conversation" over sovereignty within France appears to be more of a lecture delivered by France than a genuine dialogue. French decolonization in Africa in the 1960s was a "take it or leave it" affair, with France withdrawing support from colonies that refused to go along with France's vision of the post-colonial relationship. Perhaps as a legacy of that approach, there has been far less experimentation and diversity in constitutional arrangements than has been present in either the Dutch or British micro-jurisdictions.

IV. LESSONS FROM THE CASE STUDIES

While there are important formal and historical differences between the tribes' relationships with the U.S. governments and that of overseas territories with their affiliated powers, there are also similarities. The right of self-determination is foundational in both relationships, even if sometimes recognized belatedly.[313] For example, the United Kingdom's continued connection with Gibraltar is based on

---

[312] *See* Iris Deroeux, *Mayotte: Four Key Dates to Explain the Migratory Tensions on the French Department,* LE MONDE (Aug. 27, 2022), https://www.lemonde.fr/en/les-decodeurs/article/2022/08/27/mayotte-four-key-dates-to-explain-the-migratory-tensions-on-the-french-department_5994998_8.html; Tommy Trenchard, *Oceans Apart: A Neglected Migration Crisis off the African Coast,* HARPER'S (Dec. 14, 2019), https://pulitzercenter.org/stories/oceans-apart-neglected-migration-crisis-african-coast; Edward Carver, *Mayotte: The French migration frontline you've never heard of,* NEW HUMANITARIAN (Feb. 14, 2018) https://www.thenewhumanitarian.org/feature/2018/02/14/mayotte-french-migration-frontline-you-ve-never-heard.

[313] STEVEN ANDREW LIGHT & KATHYRN R. L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE 5 (2005) ("At the heart of tribal sovereignty is tribes' inherent right of self-determination.").

Gibraltarians' exercise of their right to self-determination, as is the case with the remaining overseas territories, who maintain ties with the European states because their residents have chosen to continue those relationships. Moreover, both tribes and the various jurisdictions that we discussed have relationships with their macro-sovereigns that are shaped by, and best understood in the context of, their histories.[314]

Though sovereignty is principally associated with governance over a territory, our examples offer a view of sovereignty as empowerment where micro-sovereigns can control their own economic and even political destinies as long as they work within the limits of its relationship with the macro-sovereign. This can extend to the ability to take different positions from the macro-sovereign in international negotiations, as it has occurred with some of the British territories. However, this empowerment is enabled only where there is sufficient internal governance within territories and jurisdictions to have clear positions and objectives that represent the desires and will of the local population. Today's international standards of self-determination in internal governance create the conditions for developing political strategies. This can evolve into a more indigenous, locally based, constitutional setup with directly elected representatives and ministers. Or, as in the Dutch and French situations, there can be a heavy reliance on administrators from the macro-sovereign. The dependency, once created, can become a long-term liability as it limits the level of local capacity to govern and to pursue economic opportunity which in turn limits the ability of a jurisdiction to generate the resources to strengthen locally based internal governance and programs.

The analysis of a range of jurisdictions in the preceding section and an evaluation of the development of their respective political, economic, and cultural sovereignty over a span of some 60 years, reveals several themes that may provide insight into how Native American jurisdictions could benefit from the level of sovereignty they currently possess. It further places our case studies within a wider global context to highlight how externally changed circumstances and conditions shaped the evolution of relationships between macro- and micro-sovereigns. The timeframe begins with a period when rapid decolonization and changing economic and strategic interests in Europe created the need (and opportunity) to consider the nature of the ties between the major colonizers and their associated territories. Many former colonies became independent while others did not. Our case studies draw from those that maintained their ties with a macro-sovereign but have done so following phases of re-evaluation and restructuring of their relationships. Our conclusions come from examining how the case study jurisdictions managed interactions with their macro-sovereigns during phases of restructuring to produce varying degrees of economic and political advancement. The selection of 1990 as a milestone is useful as it sits at the end of a decade of global economic growth and change that created development opportunities for entrepreneurial jurisdictions.

---

[314] LIGHT & RAND, *supra* note 313, at 156 ("What is 'fair' must be determined against the backdrop of the long history of federal Indian policy and tribal-state relations, as well as within the context of indigenous views of tribal sovereignty.").

A. Regularized Consultation and Collaboration

One fundamental and common theme that emerges prominently from the case studies is that better outcomes result where the overseas territories and the relevant metropole are engaged in ongoing discussions regarding matters affecting a particular territory, but which are also of ongoing interest to the metropole. These would include, but not necessarily be limited to, constitutional advancement, good governance, and human rights; economic opportunities, public finances, and fiscal responsibility; defence, security, and disaster management; and social and cultural policies. The likelihood of identifying such areas of common interest is greater where the macro-sovereign was open to regular consultations and/or where there was a designated forum for these to take place. For example, regular consultations in UKOTs have become more formalized in recent years with the establishment of the Overseas Territories Consultative Council. However, the importance of even irregular consultation is seen by comparing the general approach in the British Territories with that in the French and Dutch Territories.

In the French Territories, in particular, it is apparent that there has been a more determined agenda on the part of the macro-sovereign to integrate the territories into the metropole and, consequently, less of an opportunity for dialogue about how individual relationships might evolve over time. In contrast to the French one-size-fits-all approach, the United Kingdom has exercised greater pragmatism and flexibility in its relationships with individual UKOTs and the Crown Dependencies. While the United Kingdom has not always operated altruistically, as its remaining overseas territories have become smaller in size and potentially less economically self-sufficient, the United Kingdom has tended to negotiate with these territories more on an individual basis, providing opportunities for the territories to advance their political autonomy, particularly where this is backed by financial strength.

These negotiations have taken place through periodic consultations on constitutional development over the years. While these reviews may not always have been undertaken as promptly as the territories desired or produced all that the territories wished for, the record reveals a pattern of development and evolution, which is more palpable in the UKOTs than in those OTs associated with France and the Netherlands. The lesson here, however, is not so much the outcome—given that there is not the scope for Native American jurisdictions to pursue constitutional advancement in exactly the way in which the Cayman Islands did, for example, between 1999 and 2009, but more about the process. In the context of the same example, the decade of debate and discussion that preceded the establishment of a new constitutional settlement in the Cayman Islands illustrates the benefits of engagement to develop a form of sovereignty partnership.

By contrast, the often-contentious Dutch-Caribbean discussions over their relationships suggest how such conversations can introduce new problems rather than resolve existing ones. The BES islands, particularly Sint Eustatius, did not consent to conversion into Dutch municipalities when they had, at most, opted for a "direct relationship" with the Netherlands. This demonstrates how *not* to conduct

a conversation about sovereignty. Put simply, a consultative relationship, based on mutual respect, is more likely to be productive where both "partners" take this engagement seriously and raise the prospect of meaningful policy changes, which are not limited to constitutional advancement as in the context of UKOTs, but which may assist Native American jurisdictions.

Native American jurisdictions have historically faced intransigent U.S. federal and state governments and there is no guarantee that the U.S. government will be any more receptive to engaging in the future or stand by the results of these consultations. Indeed, the resolute French refusal to discuss constitutional advance for the New Hebrides and insistence on prioritizing its settlers' interests for many years is perhaps the closest analogue to the historical treatment of tribal governments by the United States. Nonetheless, the growing political clout of at least some tribes and occasional demonstrations of greater sensitivity to the history of the U.S.-tribal relations suggests there could be openings which would allow pursuing such dialogues. This realization crystalizes a key challenge for Native American jurisdictions, which is how they might be able to develop a platform for ongoing dialogue including what this platform might look like and how it can be most profitably used by the Native American jurisdictions both individually and in partnerships between certain Native American jurisdictions who may share common interests. The partnerships and interests they represent may differ depending on whether the issues involved pertain to the federal government, state government, or both. As we saw in the case of Gibraltar, negotiating within a three-part relationship can create both additional challenges and opportunities.

The creation of the Overseas Territories Consultative Council by the United Kingdom in conjunction with the UKOTs is an example of such a platform. It establishes a basis upon which the United Kingdom and its remaining territories meet regularly to discuss the issues of mutual interest that may be a useful template for the Native American jurisdictions to consider and potentially to replicate.[315] As a standing forum, the United Kingdom Overseas Territories Consultative Council has strengthened relationships between the United Kingdom and the UKOTs; provided some impetus for better representation of the UKOTs by the United Kingdom in the international arena; and focused on how the United Kingdom could work together with the UKOTs to assist the commercial and economic development of the Territories.[316]

By contrast, the French overseas territories' relationships to Paris have no parallel formal structure, leaving cross-jurisdictional collaboration to personal connections among overseas officials. The elimination of the Netherlands Antilles as a jurisdiction at the instigation of the Caribbean islands also left them without an (admittedly dysfunctional) platform for joint approaches to the Dutch. This abandonment was due in large part to Curaçao's longstanding domination of the

---

[315] David Killingray, *British decolonization and the smaller territories: the origins of the UK Overseas Territories*, *in* THE NON-INDEPENDENT TERRITORIES OF THE CARIBBEAN AND PACIFIC: CONTINUITY OR CHANGE? 13–14 (Peter Clegg & David Killingray, eds., 2012).

[316] *See, e.g.*, *Communiqué from Overseas Territories Consultative Council*, FOREIGN & COMMONWEALTH OFF. (Nov. 18, 2010), https://www.gov.uk/government/news/communique-from-overseas-territories-consultative-council.

Antillean government, which made it fall short of its potential as a collaborative forum.

In addition to dealing with matters of general interest across all UKOTs, the Overseas Territories Consultative Council meetings have also enabled specific issues concerning smaller groupings of UKOTs, such as the Caribbean OTs and Bermuda or the South Atlantic OTs, to be addressed in a collective fashion. While it is not impossible for an individual territory or jurisdiction to chart a path forward by engaging with the macro-sovereign on their own, the experience of the United Kingdom's Overseas Territories Consultative Council illustrates that there can be benefits to working collectively.

The Overseas Territories Consultative Council has proved to be mutually beneficial both for the United Kingdom from an oversight and business management perspective and for the Territories themselves in advancing their individual, regional, and collective agendas. Recognizing and articulating that there may be certain advantages for the U.S. government, a similar Native American consultative body may be one way in which the Native American jurisdictions could entice the federal government into the development of such an entity.

The experiences of the UKOTs also provide insight into persuading a macro-sovereign to accept an ongoing, but flexible responsibility for the micro-sovereign, even where the governance arrangements do not necessarily involve any strict legal obligation. As the United Kingdom's National Audit Office accepted in 1997, a contingent liability still arose even where no actual legal duty existed to bail out an overseas territory in the event of an economic downturn, since there could still be moral, political, and practical duties to account for.[317]

The concept of contingent liabilities may well now assume greater credence as a result of the Black Lives Matter movement and the resulting heightened attention being given to the atrocities committed in the name of empire and colonialism. There is therefore a possibility that the process by which moral obligations, which have already led the United Kingdom to acknowledge certain contingent liabilities, could also gain some traction in the U.S. context. It then follows that if the federal government is persuaded that such obligations exist, it may be more inclined to engage in positive and productive dialogue with the Native American jurisdictions on a regular basis.

Assuming a platform for dialogue can be instituted, the experiences of the UKOTs suggest that there will be opportunities for Native American jurisdictions, both individually and collectively, to advance their objectives. In addition, a further ancillary lesson that can also be derived from the experience of the United Kingdom's Overseas Territories Consultative Council emanates from the practical approach taken by the UKOTs prior to the Consultative Council meetings, whereby the UKOTs meet beforehand to explore how they can best engage with the United Kingdom at the full Consultative Council meeting. The learning here for Native American jurisdictions is therefore twofold: firstly, that there are benefits in engaging regularly with the macro-sovereign, and secondly, that there are

---

[317] *See generally* WILLIAM VLCEK, OFFSHORE FINANCE AND SMALL SOVEREIGNTY, SIZE AND MONEY (2008).

advantages in talking amongst themselves and establishing common positions to pursue through the consultative mechanism.

Of course, dialogue between Native American jurisdictions need not be restricted to the confines of a framework either established or overseen by the U.S. government. Indeed, there is no reason why micro-sovereigns cannot work together independently from the macro-sovereign. It is interesting to note in this context that UKOTs assist one another, for example, with the provision of technical and/or emergency support; and even those UKOTs whose financial services industries are in competition will nevertheless find common ground where necessary to collectively defend these industries if they come under attack. When Native American jurisdictions are considering what options may be available to them, they ought not to automatically assume that they will necessarily be in competition with one another, and, as the experiences of the UKOTs reveal, there are often greater advantages to be attained by working together.

That said, there are also clear advantages to micro-sovereigns in establishing and remaining on good terms with their respective macro-sovereign. For example, as John Belchem noted: "To attract such 'come-overs', the Manx needed to retain favorable fiscal, duty and other differentials, no mean achievement as successive British governments, driven by administrative convenience and ideological imperative, displayed decreasing tolerance for anomalies and deviations from fiscal, constitutional, and other norms."[318] The message here is that a micro-sovereign need not just be tolerated by a macro-sovereign and that it is possible in a mature and nuanced partnership for the macro-sovereign to go out of its way to actively defend the interests of the micro-sovereign even where these do not align entirely with those of the macro-sovereign.[319] Limits to how far the macro-sovereign will be prepared to go in this regard nevertheless remain.[320] We see the opposite of this experience in the contentious relationship between the Netherlands and its Caribbean jurisdictions.

---

[318] Belchem, *supra* note 183, at 4.

[319] The UK has, for example, often defended the offshore financial services sectors of various UKOTs.

[320] Where a micro sovereign is able to establish a strong relationship with the macro sovereign, the macro sovereign may be inclined to go further in advocating for the micro sovereign. However, in order to achieve the level of trust required for the macro sovereign to act in this way, the micro sovereign will need to actively nurture this relationship. This is apparent in the relationship between the Cayman Islands and the United Kingdom, where the Cayman Islands has a long track record of tangible commitments to concepts such as good governance and human rights, which have been encouraged and welcomed by the United Kingdom. It was precisely this dynamic that was at play when the Cayman Islands stepped forward to be the first UKOT to accept the re-extension of the right of individual petition to the European Court of Human Rights; and also, when the Cayman Islands enshrined a range of institutions to support democracy and the rule of law in the new 2009 Cayman Constitution. For further analysis of these initiatives, *see* Carter, *supra* note 116. Such is the strength of the relationship between the Cayman Islands and the UK, the UK often uses the Cayman Islands as an exemplar for other OTs and this, in turn, puts the Cayman Islands in even greater standing and potentially with more credit to call upon when required.

B. Prioritizing Particular Aspects of Sovereignty at Different Points in Time

The analysis of the territories considered revealed that different territories prioritized different aspects of sovereignty at different points in time. These decisions were influenced by a variety of factors, including what the macro-sovereign was prepared to entertain. These decisions were not therefore entirely free and without constraints. However, whether influenced by their particular histories, their economic positions, their cultural heritages, or indeed any number of other relevant and inter-related factors peculiar to a particular jurisdiction, within the scope available, jurisdictions had and did make choices. Indeed, the indigenous community in the New Hebrides succeeded in preserving its culture largely by being ignored, to a large extent, by the French and the British, enabling culture to serve as a rallying point for the population in constructing Vanuatu once it gained independence.[321]

All of the case study jurisdictions remain micro-sovereigns and have not become independent sovereign nation-states. Insofar as the overseas territories are concerned, they are the remnants of empires in which many larger, more developed jurisdictions opted for independence. For those jurisdictions, political sovereignty was the priority. While the jurisdictions which chose political independence undoubtedly also cherished their culture—which in the Caribbean was very much a part of the project of nation-building and decolonization—and also understood that it was important to control the economy in order for their newly independent nations to thrive. Ultimately, they made these aspects of sovereignty subservient to the primary goal of full political sovereignty and independence.

In contrast, for territories, which have not pursued or been able to attain independence, political sovereignty did not assume this overarching position and was considered and balanced alongside other aspects of sovereignty. Bermuda is an interesting case on point. This jurisdiction was able to advance its political sovereignty towards full internal self-government on the basis that it was on track to attain independence and that this was the penultimate step in so doing. However, Bermuda failed to take that final step and found itself in a sweet spot—with the best of both worlds—relatively free to govern its own affairs with minimal interference

---

[321] John S. Champion, *John S. Champion CMG, OBE, British Resident Commissioner, 1975-1978*, in TUFALA GAVMAN: REMINISCENCES FROM THE ANGLO-FRENCH CONDOMINIUM OF THE NEW HEBRIDES 147 (Brian J. Bresnihan & Keith Woodward, eds., 2002) ("[F]or half a century at least, there was little pressure for change, either from the still unsophisticated New Hebrideans, who continued to live their lives relatively undisturbed by expatriate society, or from the largely indifferent metropolitan governments. In the 1970s, however, the increasing pace and complexity of development, the spread of education, employment opportunities in New Caledonia, and (most important) the heady scent of independence blowing down wind from Fiji, Western Samoa, Tonga, Nauru, Papua New Guinea, and then the Solomons and the Gilbert and Ellice Islands, all brought more New Hebrideans into contact with the outside world. The result was the emergence of authentic indigenous, political movements.").

from the macro-sovereign,[322] but with the protection afforded to territories that remained constitutionally connected to the United Kingdom. Bermuda successfully exploited its position by creating a sophisticated financial services industry primarily based around insurance.

Cayman is similar in this latter regard. It too has leveraged its continued connections with the United Kingdom, including a final Court of Appeal at the Judicial Committee of the Privy Council in London, to emphasize the rule of law and good governance credential of its governance in order to enhance the range of financial services that it offers. The Cayman Islands, however, did not have the benefit of the political development historically enjoyed by Bermuda or indeed that Bermuda managed to attain in 1968; and this brings the decisions taken by the Cayman Islands around its sovereignty into much starker relief.

When the Cayman Islands opted to remain a Crown Colony in 1962, rather than become independent with Jamaica, there may not have been a clear plan to establish a financial services industry. However, once this industry was in place and significant economic benefits began to be realized, it can be argued that economic sovereignty was prioritized over political sovereignty.[323] It is in this context that the relative lack of advancement in the constitutional arrangements in the Cayman Islands between 1962 and 2009 on the one hand—and the significant economic development on the other during this period—can be juxtaposed and understood.

This does not mean that there were not pressures and demands for greater local autonomy in the Cayman Islands during this time, because there were. However, it may explain why, despite this pressure, attempts to modernize the Constitution nevertheless went unfulfilled until 2009. It is also notable that by the mid-2000's the pressure for greater local autonomy had reached such a level that this had become the primary local goal in a prolonged constitutional modernization process.

There are a number of lessons that can be distilled from this case study, which may prove useful for Native American jurisdictions. Firstly, there are many margins along which sovereignty can be shared and, inevitably, in partnerships/relationships where sovereignty is divided in some way between a macro-sovereign and a micro-sovereign, there are tradeoffs among different margins of sovereignty. Secondly, any arrangement is usually not a once-and-for-all deal and there may be gains to be made by thinking tactically and playing a long game. As the Cayman Islands experience demonstrates, sometimes it may be advantageous to focus on one aspect of sovereignty first—in this example economic sovereignty—to get more on another aspect of sovereignty—in this instance political sovereignty—in due course. In this scenario, the lesson is not simply that

---

322 At least compared with the other UKOTs.

323 There is also an argument that cultural sovereignty suffered at this time, as traditional Caymanian values were challenged by an influx of workers arriving from elsewhere to service this financial services industry. This is a complex dynamic worthy of far greater analysis that is possible here and is explored by, amongst others, J.A. ROY BODDEN, *supra* note 19. However, it is nevertheless fair to say that in small territories, in particular, that have facilitated immigration for economic reasons, there has generally been a resulting challenge for local culture.

different territories prioritized different aspects of sovereignty, but that different territories prioritized different aspects of sovereignty *at different times*. There may even be a case made where advancement in one aspect of sovereignty may strengthen a micro-sovereign's ability to pursue additional aspects of sovereignty or autonomy.

The margin of discretion for making the choices may have been greater in some jurisdictions than others. Not surprisingly, compared with the British Territories where greater flexibility was afforded, in the French territories, the micro-sovereigns had less leeway because the macro-sovereign's priority was integration. However, even in these circumstances, certain important decisions were made which had significant subsequent ramifications for the territory. For example, Mayotte's reliance on transfer payments from France have increased the non-native population on the island at the cost of prevalence of the local language and use of Islamic law in areas like family law. What may nevertheless be concluded is that in most instances there was a benefit in a territory retaining its distinctiveness, which was evidenced both in the value ascribed to cultural sovereignty in certain territories[324] and in the general preference for independence or free association, rather than integration, in the context of political sovereignty and as a platform for developing (economic) opportunity.

Given these observations, the questions that then arise—and some things that Native American jurisdictions may want to consider—revolve around how to approach any discussions around the concept of sovereignty and how this may potentially be leveraged. The case studies illustrate that this is a complex problem that involves negotiating on multiple margins. This creates both opportunity and potential pitfalls, putting a premium on clarity as to the goals being pursued in any engagement.[325] The case studies show where there is some consensus on what priority to pursue in some of the jurisdictions; for others, the only point of convergence is dislike of another (Curaçao) or a desire to receive transfer payments. So, political agendas and priorities can be set both by specific action, for example, building institutions, in which case there is a consensus surrounding a positive advancement; or by inaction, where the path of least resistance results in the retention of the status quo.

The case studies further indicate that it is important to choose your counsel wisely. This point applies equally to the conditions for economic prosperity (see below), as it does to defining the sovereignty relationship itself, and all the evidence points to the benefits of identifying expertise that is respected by the macro-

[324] In this context, it is also relevant to note the concerns regarding property ownership, particularly in successful jurisdictions and the restrictions on so doing that have been introduced in Jersey and Bermuda, for example. This can be contrasted with the more open market in the Cayman Islands, which has seen a significant increase in property prices and an emerging concern for young Caymanians seeking to access the property market, notwithstanding that ownership is facilitated by stamp duty concessions for the first-time Caymanian purchasers.

[325] The unhappiness of BES islands with the Netherlands and Mayotte's discontent with France are both examples of the problems that can arise if negotiations with the macro sovereign are not conducted in this way.

sovereign. The Oxbridge educated pioneers of the financial services industry in the Cayman Islands evidently had the connections and credentials sufficient to satisfy the United Kingdom of the *bona fides* of this initiative; and similarly, the engagement of the renowned constitutional lawyer, Sir Jeffrey Jowell KC, as constitutional advisor to the Cayman Islands government. This was instrumental in both navigating the constitutional negotiations with the United Kingdom for the conclusion of a new constitutional settlement, as well as responding to issues that then arose under the new constitutional arrangements. Recognizing once again the significance of these relationships being part of an ongoing process, Jowell's appointment also demonstrates that there can be a benefit in engaging experts in long-term relationships and especially, as in this example, where the relationship was not affected by political changes in the micro-sovereign's local government. This point should not, however, negate the need to build local capacity; nor should it be interpreted to suggest that reliance on outside expertise is necessary. The authors are also cognizant that there has been a long history of attempts to exploit the Native American jurisdictions by outsiders, as can also be found in our case study jurisdictions.

C. Conditions for Economic Prosperity

By utilizing their sovereignty as a resource, a number of British Overseas Territories and Crown Dependencies have successfully developed sophisticated international financial centers, specializing in different types of transactions.[326] Curaçao had its moment as a leading offshore jurisdiction but lost it in the 1980s when the U.S. blocked its use. This strategy has resulted in significant economic development. In many instances, the economic success of these jurisdictions has enabled them to have a greater degree of effective sovereignty than many fully independent but economically dependent jurisdictions possess.[327]

The key factor behind the enduring success of these financial services industries in the territories considered, and the reason why those that have been most successful have been able to survive a raft of international initiatives designed to limit their operations, has been the ability to develop robust, appropriate, and in

[326] The leading territories operating as offshore financial centers considered here are Jersey, Bermuda and the Cayman Islands, although there are other territories both within our remit (Guernsey) and outside (British Virgin Islands) that are also active in this space.

[327] It is interesting to compare the economic performances of Jamaica and the Cayman Islands following their parting in 1962. Referencing the work of Truman M. Bodden, Fryer and Morriss point out that: "World Bank data for 2010 ranked the Cayman Islands 8th in "'gross national income per capita,' equal with the Isle of Man, three ahead of the Channel Islands, and close to third-ranked Bermuda. Cayman was far ahead of former British Caribbean colonies such as Jamaica, which was ranked 111th." Freyer & Morriss, *supra* note 110, at 1380 (referencing Truman M. Bodden, *UK Dependent Territory Succeeds: An Analysis of Cayman's Successful Development*, *in* SURVEYING THE PAST, MAPPING THE FUTURE (Livingston Smith, Stephanie Fullerton-Cooper, Erica Gordon & Alexandra Bodden, eds.)).

some instances, bespoke or distinct regulatory arrangements.[328] Here, lessons from failures may also be valuable: Antigua fell victim to Alan Stanford's fraudulent enterprises, in part because its local political culture allowed Stanford to capture the regulatory apparatus there.[329] These regulatory challenges are well known to Native American jurisdictions.[330]

Further, those overseas territories that have chosen to develop financial centres as part of their economic development strategies can find themselves as dependent on the metropolitan powers for regulatory forbearance as Native American tribes are on the federal government when they pursue gaming as a strategy.[331] Just as a federally established gaming regulatory agency sets standards for tribes' gaming operations, so metropolitan and multinational entities set standards for dependent territories and independent nations' financial sectors.[332] The negative image of "casino Indians" parallels that of parasitical offshore "tax havens."[333] Tribal governments are either "untrustworthy stewards of new-found gaming wealth and political clout" or (sometimes, and) "too naïve or inexperienced to realize their own best interests, easily corruptible, guilty of seeking to influence the political system to their own benefit, and out for 'revenge.'"[334]

Tribes with gaming operations are portrayed as having won or purchased recent political clout in ways that fundamentally differ from other participants in the American political system. Gaming tribes are accused of collectively being a "rich, powerful special interest" that is corrupting state politics and turning state capitals into "casino central." At the same time, tribal sovereignty is seen as giving

---

[328] *See generally* Winterbottom, *supra* note 187. An example of the creation of a specific regulatory regime targeting particular transactions is the "stamp free" regime for newspapers adopted by the Isle of Man in the 19th century. *Id.* at 174.

[329] *See* Nick Davis, *Allen Stanford: Antigua Feels the Fallout of Ponzi Case,* BBC NEWS (Mar. 8, 2012), https://www.bbc.com/news/business-17298267.

[330] LIGHT & RAND, *supra* note 313, at 26 ("The federal legal doctrine of tribal sovereignty may be summarized as follows: tribes, while ostensibly recognized as independent, self-governing sovereigns by federal law, are subject to federal authority, and tribal sovereignty may be limited or even extinguished by Congress.").

[331] LIGHT & RAND, *supra* note 313, at 36 ("In practice, then, tribal sovereignty, from the indigenous perspective of inherent self-determination, clearly is compromised in the context of Indian gaming: the decision to open a casino is an exercise of a tribe's sovereign right; yet federal law requires a tribal casino to submit to federal and state regulation, circumscribing that tribe's sovereign right. Through IGRA, Congress has mandated that these tribes that choose to open casinos must compromise their inherent sovereignty in order to pursue gaming as a strategy for reservation economic development.").

[332] *Id.* at 52; Richard Gordon & Andrew P. Morriss, *Moving Money: International Financial Flows, Taxes, and Money Laundering,* 37 HASTINGS INT'L & COMP. L. REV. 1 (2014); Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign Against Harmful Tax Competition,* 4 COLUM. J. TAX L. 1 (2012).

[333] LIGHT & RAND, *supra* note 313, at 124 ("The discourse of the inauthentic 'casino Indian' provides a license to use stereotypes and to otherwise express pre-existing as well as newly manifested prejudice and backlash. Exaggerated analogy or outmoded and offensive historical imagery are reflected in hyperbolic criticism of tribal authenticity and Indian gaming."); Gordon & Morriss, *supra* note 332.

[334] LIGHT & RAND, *supra* note 313, at 128–29.

tribes an unfair advantage in the political process. Wealthy tribes like the Pequots are described as Goliath to state and local government Davids.[335]

Similarly, overseas territories and indeed independent nations, which have chosen to pursue financial services as an economic development strategy, are routinely portrayed as bad actors.[336] Both are portrayed as unable or unwilling to control crime in their jurisdictions.[337] The parallels here are evidently strong and the tribes would accordingly benefit from a full appreciation of how the successful offshore financial services centres in the overseas territories and Crown Dependencies have traversed this regulatory minefield while others have fallen by the wayside.

Along with value-added regulatory regimes, a key strength of all overseas territories that have enjoyed significant economic prosperity has been their ability to develop what can be termed "rule of law services." These provisions, allied with the continuing relationship with the macro-sovereign, serve to establish confidence in jurisdiction amongst investors, developers, financial services customers, and professionals in other jurisdictions and so form the basis upon which the more successful industries and economies have been constructed. Other important components in these "rule of law services," which Native American jurisdictions may wish to take note of, include the establishment of a well-respected, expert and independent judiciary. This safeguards against corruption and various other institutions that support democracy and good governance—all key to advance and to ensure self-government.[338]

Another salutary lesson that came to the fore in the Cayman Islands during the 2008 financial crisis is the importance of maintaining control of public finances. A failure to exercise sound stewardship of the economy could undermine all the hard-earned confidence engendered by the adoption of new regulatory structures and any number of institutions intended to support democracy and the rule of law. At this time, the Cayman Islands came under increased pressure from the United Kingdom to adopt some form of direct taxation in order to balance its books. While this was ultimately resisted, the Cayman Islands government was prepared to accept fiscal controls. These were first introduced in legislation at the behest of the United Kingdom and subsequently enshrined in the Constitution—a concession that was accepted without significant opposition because there were benefits to doing so.

---

335 LIGHT & RAND, *supra* note 313, at 130.

336 *See, e.g, The Price of Offshore—Revisited*, TAX JUST. NETWORK (June 17, 2014) https://taxjustice.net/2014/01/17/price-offshore-revisited/; NICHOLAS SHAXSON, TREASURE ISLANDS: TAX HAVENS AND THE MEN WHO STOLE THE WORLD (2011).

337 LIGHT & RAND, *supra* note 313, at 129 ("Among the social ills ascribed to tribal casinos is a rise in crime, whether inside the casino or in the community. Tribal governments are portrayed as unwilling or unable to control criminal behavior."); Tax Justice Network, *supra* note 336; SHAXSON, *supra* note 336.

338 The 2009 Cayman Islands Constitution, *supra* note 108, for example, contains a Human Rights Commission, a Commission for Standards in Public Life, a Constitutional Commission, a Complaints Commissioner, and an Auditor General, as well as provisions for freedom of information and a Bill of Rights, Freedoms and Responsibilities, the contents which exceed the rights that are domestically protected in the UK itself.

In summary, good governance is critical to the economic success of all micro-sovereigns. Divert from this path, like the Turks and Caicos Islands,[339] and the macro-sovereign, in this case the United Kingdom, has the power to step back in and assume direct control of local governance. As with several of the case study jurisdictions, there may be opportunity for Native American jurisdictions to leverage their sovereignty in developing sophisticated (yet sensitive; and potentially distinctive) regulatory systems and putting in place good governance institutions and practices to establish themselves in new industries and marketplaces and to attract business and be competitive. The residual benefits are the resources to support these institutions of good governance and a higher level of governance generally within the jurisdiction as compared to those without such businesses.

D. Reinterpreting Relationships and Re-tooling Institutions

The case studies and general themes point to a strong basis for seeing the value of developing a working partnership between a macro- and micro-sovereign. This may apply even in the French situation where integration is the goal, taking into account local capacities and conditions. Indeed, a core problem in the French relationship with France's overseas jurisdictions is misalignment between the two parties' view of the relationship. In all three jurisdictions surveyed here, an important factor in seeking *département* status has been the desire for social welfare benefits to be set at Hexagon levels; in each case this has not happened.[340] Worse, in Mayotte's case, important local legal institutions that were intimately connected

---

[339] *See Turks and Caicos Islands Commission of Inquiry 2008-2009*, GOV.UK (Dec. 19 2013) https://www.gov.uk/government/publications/turks-and-caicos-islands-commission-of-inquiry-2008-2009, at 12 (reporting into possible corruption or other serious dishonesty in relation to past and present elected members of the Legislature, along with a summary that concluded, amongst other things, that there was "a high probability of systemic corruption in government and the legislature and among public officers in the Turks & Caicos Islands" and that; "Over the same period there has been serious deterioration —from an already low level—in the Territory's systems of governance and public financial management and control".). These findings resulted in the Turks and Caicos Constitution being partially suspended between 2009 and 2011 (the chapter on fundamental rights remained in force) and an unsuccessful legal challenge from the deposed Premier. *Id.* at 218, *See R (Misick) v SoSFCA* [2009] EWCA Civ 1549.

[340] This may account, in part, for the overwhelming preference of Caribbean voters for left-wing populist Jean-Luc Mélenchon in the first round of the 2022 French presidential election, who finished third nationally; he received 56.2% and 53.1% of the vote in Guadeloupe and Martinique, respectively, compared to 22% overall. Perhaps even more astonishingly the first round second-place overall finisher, right-wing populist Marine Le Pen, received 17.9% and 13.4% in the two Caribbean jurisdictions, while incumbent Emmanuel Macron received 13.4% and 16.3%. This made the overall populist vote over two thirds on both islands. In the second round, Le Pen received 69.6% in Guadeloupe and 60.8% in Martinique. *See* Jon Henley, *French Election: Why Did Le Pen Do So Well in Overseas Territories?,* GUARDIAN (Apr. 25, 2022), https://www.theguardian.com/world/2022/apr/25/le-pen-thanks-forgotten-france-after-election-gains-in-overseas-territories.

to the culture were sacrificed in pursuit of a political integration that appears more chimerical than real.

This more desirable, malleable, and dynamic relationship allows for adjustments as needed by all partners. It does not presume that the demands will only be one way from the micro- to the macro-sovereign, or that it is only the macro-sovereign who can come up with a solution or remedy to a particular governance or economic problem. A partnership approach in specifying sovereign responsibilities and prerogatives can set the broad terms of a relationship without pre-determining outcomes on specific questions. It allows for the probing and testing of conditions to advance either a constitutional arrangement and relationship or to retool institutions to better address needs of a moment. Gibraltar's success in working with the UK (if sometimes by pushing the UK government faster forward than the UK might have wished) in developing its economy and advancing its constitution may also inspire strategies for the tribes.

Understanding the bounds of the partnership in advance but allowing for consultation about those bounds through regular and ongoing contact to test the resiliency of the partnership may allow for less costly adjustments as needed and more efficient seizing of opportunity for development. Effective sovereign partnerships seem strong models to fulfil both the general principles of self-determination and international responsibility without pre-judging how these principles will be needed and implemented. By doing so, it seems to have the promise of adding to the resources and opportunities for the micro-sovereign, but not at great expense and potentially to the benefit of the macro-sovereign. In the non-hierarchical global environment, this flexibility seems appropriate for the effective operation of such partnerships.

V. CONCLUSION

Sovereignty is not absolute, despite many theoretical and rhetorical assertions to the contrary. A review of constitutional developments over time, whether in the U.S. or in other countries, reveals the evolutionary character of the attributes of sovereignty, including defining power, authority, and responsibility. Evolution further characterizes the relationship among the units within any sovereign association, however derived. We have examined this phenomenon through a selection of case studies. Through smaller jurisdictions, size has enabled a more comprehensive review of these evolutionary experiences, facilitating the ability to pinpoint significant factors that may be applicable both to larger jurisdictions and more complicated political dynamics. Even within the stories of these small jurisdictions, the capsule summaries above reveal the changing dynamics within governing relationships brought on by domestic pressures, either at the metropole or within the territories, or through forms of international pressure. We observed that these changing dynamics did not always result in better circumstances—broadly defined across political, economic, and cultural factors—for the lesser power within the relationship.

We further observed that policies and dynamics could be subject to change at the whim of the metropolitan power. Such changes could be precipitated by domestic politics within the metropole—for example, the Dutch desire to be rid of its territories leading to a desire for greater efficiency in the management of its territories that did not wish to be set free or the French desire to continue its mission of spreading French culture. A first step towards a beneficial relationship therefore cannot be assumed to start a straight line of progress towards productive levels of autonomy. Progress is therefore not necessarily linear and may be subject to various twists and turns, depending on pressures that can be exerted by the metropole; for example, in the area of international human rights, the acceptance of requirements to abolish the death penalty, and to allow for gay marriage and other rights for the LGBTQ+ community.

How metropolitan powers have used their associations with international fora is interesting, particularly in the case of the United Kingdom that has, from time to time, taken positions not consistent with its own either within the EU (when it was still a member) or in international financial regulatory bodies. Such advocacy serves as a means to set out the terms of responsibility between the macro-sovereign and a micro-sovereign by acknowledging the differing needs of the micro-sovereign and understanding the pursuit of that need as part of its responsibility as a macro-sovereign. Such advocacy can serve as an important opportunity to build trust and understanding between the parties.

Our case studies reveal the role historic circumstances can play in a jurisdiction's development. Several of our case study jurisdictions served specific strategic purposes with military installations around the world. This created some infrastructure, some governance, and a connection to the metropole that could be turned into another industry—tourism, for example. Even in the financial services sector, where there was some tie with the metropole's legal and financial systems, facilitated access to markets and the development of products that could readily and credibly meet global standards. The Crown Dependencies provide a unique example of constitutional ties to the British Crown that they effectively leveraged (pre-Brexit) to serve as a gateway to the EU for non-EU based enterprises. Indeed, during the withdrawal phase, Crown Dependency officials were called on to advise elements of the British government on the implications of no longer functioning within the EU. During its thirty-year membership within the EU, more than a generation of British officials had passed without any experience working outside of the EU.

The key challenge and question to our study was how did jurisdictions that managed to find effective ways to leverage their statuses do so? Creating opportunities for ongoing consultation and review of arrangements including goals and objectives of both of the metropole and its territories is key. These consultations developed over time initiated by some particular action or individual and gaining structure and formality. Specific structure and formality are less important than regularity and a framework that parties will comfortably use. The challenge is to maintain the delicate balance of interests and responsibilities between entities of unequal power. But, as the British discovered through the evolution of its practices, liabilities and annoyances could be reduced if it engaged with its territories in

meaningful ways to allow for appropriate burden sharing and autonomy. However, even the best structures will be subject to stress as issues arise or interests change.[341] Parties within these relationships therefore must be watchful and able to invite discussion as matters arise and guard against the erosion of trust, which may be hard to win but easily lost.

Our case studies further revealed that the pursuit of priorities potentially carried trade-offs where, for example, economic success might bring in more non-natives with implications for the maintenance of local language and custom. These are trade-offs that each jurisdiction must resolve on its own through processes appropriate to their own populations and customs. As the priorities of the macro-sovereign may change, so may the priorities of the micro-sovereign and processes which can help flag those changes would be beneficial to build resiliency into any governing partnership.

Non-linearity appeared as a feature throughout our studies. This may apply as well to identifying and building like-minded or similarly situated interests and jurisdictions outside of the immediate macro/micro governing relationship. The key consultation is between the relevant macro- and micro-sovereigns. However, the pursuit of common interests across jurisdictions, and even the establishment of trans-tribal institutions, might also be effective for sharing costs, capacity building, and maximizing political clout.

From an academic perspective, wading through these histories and experiences has been a fascinating exercise in observing change in governing relationships. We see that this is not static and subject to change—precipitated possibly not quite in equal measure, but with comparable significance by either the larger or the smaller entity. We see that the dynamism can be harnessed for development and positive change if managed by partners committed to seeking a mutually beneficial outcome. It can also be used to create less productive conditions on the scale of political and economic development. The important policy finding is that there is opportunity for choice by all in a governing relationship. Creating the best conditions and developing appropriate capacities over time for the best outcomes across multiple dimensions is the key.

For tribal jurisdictions, this might mean generating means to determine a community's priorities within maintaining cultural heritage, political autonomy, economic development, and a good working relationship with the macro-sovereign. For tribes, the political landscape is complicated by having to navigate the agendas and politics of the federal government and increasingly state governments keen to generate revenue from tribal lands and enterprises and to consolidate control over territories within their jurisdictions. Lessons drawn from the case study surveys are

---

[341] The issue of same-sex marriage is one that has caused much soul-searching across many overseas territories, particularly in the Caribbean, as has the abolition of the death penalty. The death penalty was unilaterally abolished for the UKOTs by the United Kingdom through an Order in Council, an action that was criticized by many at the time as undemocratic but which could nevertheless be considered convenient for local politicians who were spared the challenge of dealing with such a problematic issue head-on. In the context of marriage equality and the prospect of constitutional tension in the Cayman Islands; *see* Carter, *supra* note 116.

that situations and conditions can change to shape the interests, positions, and objectives of both macro and micro-sovereigns. These need to be understood and managed to create the greatest level of opportunity and benefit for the tribes. To do so requires an internal political coherence and structure to support negotiation and bargaining with the macro-sovereign. Internal good governance, leadership, and reliability can go a long way to equalize an inherently unequal relationship. The sovereign of today, however, is not the free agent of history, but one subject to higher levels of accountability and scrutiny. For the micro-sovereign, this provides an opportunity to craft a path towards a more productive shared sovereign relationship worthy of further consideration.