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Crafting human rights in a constitution: Gay rights in the Cayman Islands and the limits to global norm diffusion

WILLIAM VLCEK

School of International Relations, University of St Andrews, Arts Faculty Building, The Scores, St Andrews, Fife KY16 9AX, Scotland, UK

Email: wbv2@st-andrews.ac.uk

Abstract: This paper considers the introduction of a bill of rights to a territory's constitution as an example of the transnational transfer of norms. Using the case of the Cayman Islands Constitution promulgated in 2009 this analysis looks specifically at the creation of its bill of rights in light of local debate following the legalisation of homosexuality forced by the United Kingdom in 2000. The unique constitutional structure framing the political relationship between the United Kingdom and its Overseas Territories is outlined as explanation for the nature of the Cayman constitution, as well as the historical trajectory leading to it. This trajectory informs the context for the local debate over homosexuality and substantial local resistance to the transfer of an emerging European norm recognizing same-sex marriage to a Caribbean island firm in its Christian heritage. This case interrogates the transference and reproduction of 'global human rights norms' in the construction of constitutions in postcolonial societies anticipated by proponents of 'norm diffusion' and highlights the contested acceptance offered exogenous norms by the postcolonial society.

Keywords: Cayman Islands; gay rights; human rights norms; Order in Council

The treatment of sexual preference by state legal systems represents both an evolving socio-legal norm and a continuing source of tension between secular and religious groups in society. To frame this issue as a socio-legal norm reflects changing social perceptions on sexual preference as a human right, as well as reflecting the efforts made to enshrine it in laws against discrimination based on sexual orientation (Kollman and Waites 2009: 3–7). At the same time, domestic debates position religious members of society and the tenets of their faith against a secular argument that situates sexual orientation as a right independent of faith. The spread of lesbian, gay, bisexual and transgender (LGBT) rights and the institutionalization of same-sex unions have been used as the case study for the diffusion of norms

by a number of scholars (see, e.g., the contributions to the special issue of *Contemporary Politics*, volume 15, issue 1, 2009). Frequently this norm is presented as an example for the non-coercive diffusion of global norms, guided by the enlightened example of Europe and the value placed on human rights by international society. In contrast to that approach this paper considers the production of a new constitution for the British Overseas Territory (OT) of the Cayman Islands and the concern among its citizens that the introduction of a Bill of Rights was a form of subterfuge intended to force this ostensibly global norm for sexual preference on them.[1] The strong feelings publicly expressed against gay rights in Cayman in direct opposition to the desires of the government of the United Kingdom (UK) for over a decade generate the central question to the present inquiry on the production of a constitution for a non-independent territory, *who decides*? If the accepted wisdom is that citizens should determine the conditions under which they are ruled, as represented by the constitution for the society in which they live, then for a non-independent jurisdiction the question is central to the politics of its relationship with the administering state (Cohen 2011: 130–2). Therefore, when it comes to the specific content for a constitution and the incorporation of internationally promulgated human rights norms, to what extent does the constituent population retain a decision-making role for the acceptance of any externally determined norm? As will be seen for the case of the Cayman Islands, the extent of input available to the citizens when the new constitution was written was constrained by requirements determined by the UK government to be essential prerequisites for the 'modern' constitution that must emerge from the negotiations between the UK and overseas territory.

A case has been made to reframe international relations' analyses of globalization using sociological theories for a 'world society' and a 'world polity' (Albert 2007; Huysmans 2009). A seminal article on world society concepts used the notional example for the interaction of an inhabited 'previously unknown island' with today's international system of states, positing that such an interaction would lead to the emergence in this previously unknown society of state institutions very similar to those found in the modern nation-state (Meyer *et al.* 1997: 145). Yet, while world society approaches speak to the influence of ideational factors that are mirrored from the institutions of European states to postcolonial states they do so without sufficient regard to the role of power embedded in the choices

[1] It should be noted that while the new Constitution had effect from 6 November 2009, the Bill of Rights did not come into effect until three years later (7 November 2012) in order 'to allow the necessary preparations for the introduction of constitutionally enshrined fundamental rights in the territory' (Hendry and Dickson 2011: 152; Privy Council 2009: 2). One preparatory task was the formation and staffing of the Human Rights Commission.

confronting the non-European postcolonial state to embrace these 'world culture' discourses on human rights, gender equality, and development. Consequently, though the case analysed here involves a political relationship between a metropolitan state and an associated semi-sovereign territory, it is emblematic for the power dynamic existing between developed and developing economy and in particular for international human rights norms. The developing economy must 'go along to get along', whether it involves development aid, World Bank loan guarantees, or access to the global financial system, a point that has been the source for criticism about IMF/World Bank conditionality and the Financial Action Task Force (FATF) blacklist against (non-member) non-cooperative countries and territories (Dobbin, Simmons and Garrett 2007: 454–7; Sharman 2009). The specific dynamics in the political relationship between the Cayman Islands and the United Kingdom, over issues such as financial regulation, government revenue collection and the Cayman Islands' government budget, are a significant factor for this case on human rights and a new, modern, constitution for the Cayman Islands (Foreign and Commonwealth Office 2012: 49–62). At the same time, the evolution of human rights norms over the past 50 years incorporating areas not previously considered a 'human right', including sexual preference, is central to the tension in Cayman over the production of the new constitution (Buergenthal 1997).

The following analysis offers a case for the introduction of a norm via the explicit deployment of power rather than via the 'norm cascade'. It describes the process whereby rather than through 'socialization, institutionalization, demonstration' as the means for promoting the diffusion of a norm incorporating gay rights (the norm cascade's 'dominant mechanisms'), the UK followed a more explicit path for the direct imposition of the features for this norm in its overseas territories – through the mechanism of constitutional reform (Finnemore and Sikkink 1998: 898). In this instance the challenge confronting the operation of an advocacy network in the Cayman Islands supporting gay rights, in contradistinction to the norm cascade or the spiral model of Risse, Ropp and Sikkink (1999), is the matter of size. The total resident population of the Cayman Islands is rather small (a little over 51,000) and consequently the nature of the social dynamics present in a small population prevents the emergence of an effective advocacy strategy (Risse, Ropp and Sikkink 1999). In other words, the widespread familiarity among members of the Caymanian community and the dynamics operating in such a small community serve to hinder the emergence of a significant non-conforming resistance to existing social norms (Lowenthal 1987). Which is not to say that there are no proponents for gay rights in Cayman, simply that there are few supporters and they remain generally outside the public discourse. Nevertheless, a group did form shortly before

the referendum vote on the draft Constitution to challenge the compromise language contained in its Bill of Rights (Alexander 2009). Arguably this case may be simply another example of the power relations operating in the international field; however, it is more suitably seen as an example of the negotiated or contested nature of norms and the continued reproduction of norms through contestation (Wiener and Puetter 2009).

The accepted wisdom asserts that a modern constitution incorporates a bill of rights, as a recitation for the human rights (economic, political, social, legal) possessed by the citizens of the jurisdiction.[2] The research question for this study emerged while undertaking fieldwork in support of a project on the 'sovereignty games' performed in the triangular relations between the Cayman Islands as an Overseas Territory of the United Kingdom, the government of the United Kingdom in Westminster and the European Union (in substance the European Commission) in Brussels. The primary purpose was to interview a number of government officials on the nature of Caymanian relations with Westminster and Brussels, with most of the questions focused on two issues, the presence and operation of the Cayman offshore financial centre and the promotion/establishment of human rights, specifically demonstrated in the decriminalization of homosexuality.[3] In addition to those interviews, local perspectives on these questions were collected informally from other residents during the time spent in George Town, Grand Cayman. It emerged that the debate in Cayman reflected a debate on the conceptualization of 'human rights' as much as it was a debate over the legal recognition for homosexuality and same-sex marriage. Aspects of the former debate will emerge in the following discussion, which is developed across three main sections, with the next section providing background on the situation for non-independent territories of the United Kingdom with special reference to the Cayman Islands. It is followed by a section reviewing the debate over these specific human rights issues at Westminster and the Cayman Islands Legislative Assembly. The final section concludes this analysis.

The UK Overseas Territories

Today the government of the United Kingdom remains responsible for the foreign affairs, international security and good governance in 14 territories,

[2] Jurisdiction is used in this discussion in order to distinguish and emphasize the fact that the analysis covers a non-self-governing territory of a sovereign state, which possesses a constitution covering those matters not retained by the governing state (defence and foreign affairs).

[3] The research work on 'sovereignty games' was presented as 'Sovereignty Games in the British Caribbean: The Experience of the Cayman Islands' at the *Micropolities in the Margins of Europe – Postcolonial Sovereignty Games* Conference, University of Greenland, Nuuk, Greenland 18–19 April 2011 and subsequently published as (Vlcek 2013).

though not all have permanent resident populations. In addition to the Cayman Islands in the Caribbean are Anguilla, British Virgin Islands, Montserrat, and the Turks and Caicos Islands; and elsewhere Bermuda, British Antarctic Territory, British Indian Ocean Territory, Falkland Islands, Gibraltar, Pitcairn Island, St Helena, Ascension Island and Tristan da Cunha, South Georgia and South Sandwich Islands, and the Sovereign Base Areas on Cyprus.[4] Collectively, these territories provide a case for the explicit transmission of what have been represented as global norms and constructed as a responsibility of the United Kingdom government to incorporate human rights in the constitutional arrangements of the OTs. One of the initiatives for the new Labour government in 1997 was a review of the relationship with the OTs, leading to the publication of a White Paper titled 'Partnership for Progress and Prosperity: Britain and the Overseas Territories' in March 1999.[5] The objective was to identify the nature of a 'modern partnership' and to provide a framework of 'obligations and responsibilities' for both the UK and the OTs going forward. The significant points addressed by the White Paper concerned citizenship, financial regulation (particularly in those OTs hosting an offshore financial centre (OFC), like Cayman) and human rights. The White Paper also outlined an organizational change within the government for managing relations with the OTs and the terminology shift from 'Dependent Territories' (with its pejorative connotations) to 'Overseas Territories'. With respect to the topic of this paper, on the issue of human rights the White Paper stated 'The record of many Overseas Territories was positive, but further work would be needed to ensure compatibility with the commitments which Britain has made on their behalf' (Foreign and Commonwealth Office 1999: 8, 11).

Subsequent to the release of this White Paper, any constitutional review process for an OT was subject to 'the United Kingdom's position [which] was that it would not agree to a new territory constitution which did not contain a fundamental rights chapter' (Hendry and Dickson 2011: 151). Further, Hendry and Dickson (2011) identify those constitutions revised since 2006 as possessing a 'Modern Fundamental Rights Chapter'. As they describe it, the fundamental rights chapter contains features bringing the territory into compliance with the international treaty obligations produced by the United Kingdom's accession and ratification of the European

[4] See <http://www.fco.gov.uk/en/about–us/what–we–do/overseas–territories>.

[5] The Conservative–Liberal Democratic coalition government in the UK released a new White Paper on the Overseas Territories in June 2012; human rights and constitutional modernization is discussed without reference to any specific human right (Foreign and Commonwealth Office 2012: 52–3).

Convention on Human Rights and the United Nations Covenant on Civil and Political Rights (Hendry and Dickson 2011: 155–60). The competing objectives between the UK government and the Cayman Islands government produce a situation described by Gad and Adler-Nissen (2013) as a 'sovereignty game'. While the extent of sovereignty experienced by Cayman may be limited by the UK, equally the UK has chosen to constrain its actions in order to pursue its conception of a 'modern relationship' with the OTs (Foreign and Commonwealth Office 1999: 20). The resulting 'game' consists of interactions that incorporate 'strategic claims about authority and responsibility', and for this case those claims involved the capacity to determine the nature and extent of human rights (Gad and Adler-Nissen 2013: 10). The specific experience as enacted in the constitutional modernization process for the Cayman Islands is presented in the following subsections.

The Cayman Islands – 'he hath founded it upon the seas'[6]

J. A. Roy Bodden makes a case for the Cayman Islands as a 'Frontier Society'. He describes the 'frontier society' at one point as represented by 'clannishness, scheming, and a conspiratorial attitude' (Bodden 2007: 248, note 2). Yet he also describes the Cayman Islands as 'a total colonial frontier society' consisting of settlers predominantly from 'the fringes of society' and consequently the descriptive term emerges from the specific historical experience of the Cayman Islands as 'a totally imported colonial society' because there had been no permanent indigenous Caribbean population on the islands prior to the arrival of Columbus in May 1503 (Bodden 2007: 1, 3). Due to the location of these three small islands (240 km south of Cuba and 268 km north-west of Jamaica) and their 'strategic insignificance' Bodden suggests that most early settlers were likely social outcasts, fugitives and deserters, escaped slaves and speculators. Moreover, because of their limited strategic value and unsuitability for the emerging plantation agriculture regime found in other Caribbean colonies, the Cayman Islands were left alone, with limited oversight from the colonial government based in Jamaica. This situation in turn made the islands a frequent source of water and supplies for pirates and privateers, an historical legacy that George Town, Grand Cayman seeks to profit from today with an annual 'Pirates Week' each November.

With a population estimated at 51,384 (July 2011, CIA World Factbook) the Cayman economy is dominated by two economic sectors, financial

[6] This phrase is the motto of the Cayman Islands and present on its coat of arms; the text is from Psalms 24 and explicitly situates the Christian heritage of the territory on all official documents bearing the coat of arms.

services and tourism. In 1962 the territory was legally reorganized as subordinate directly to the United Kingdom where formerly it had been subordinate to the Governor of the colony of Jamaica. Several years previously (along with Jamaica) it had been part of the West Indies Federation; however, when that proposal collapsed Cayman refused to join Jamaica in becoming independent. The attitude towards independence as part of Jamaica is understandable given the fact that, though previously subordinate to Jamaica in the structure of British colonies in the Caribbean – for 'administrative purposes' – the Cayman Islands had been 'left almost entirely to fend for themselves', a situation which did not create any strong sense of common purpose between the islands (Bodden 2007: 2). Proposals from Caymanian legislators already had been presented to the Colonial Governor in Jamaica in 1960 that contained an economic development plan to guide the Cayman Islands forward as a territory of the UK (Cayman Islands National Archive 1960–1961). The pivotal aspect to the case made by the Cayman Islands Legislative Assembly was that the economic development plan would maintain a situation wherein the Cayman Islands were not 'aid dependent' on the UK. Bodden (2010) concluded that 'the United Kingdom's willingness to entertain the Cayman Islands' request was primarily based on the fact of the islands' financial independence' (Bodden 2010: 85).

The situation today is that Cayman remains financially independent of the UK, such that in the aftermath of Hurricane Ivan in 2004, having been devastated to the point where the island of Grand Cayman was erroneously reported as completely under water, the territory in fact received very little aid for recovery and reconstruction from the UK government (Tonner 2005: 30). Statements made in the House of Commons afterwards reflected a general perception in the UK that the Cayman Islands (as indicated by the questionable measurement of GDP per capita) was a 'substantially wealthy country' and therefore 'the idea that one should take money away from very poor people in other parts of the world to give to the Cayman Islands is wrong' (House of Commons 2004: 11WH). Regardless of the state of financial independence (in terms of local revenue collection and domestic budgetary control) the Cayman Islands remains subject to concerns that it may represent a 'contingent liability' for the UK, not only in the event of catastrophic weather events or financial firm failure, but also with regard to local attitudes on homosexuality and the accompanying potential for anti-discrimination litigation leading to court-ordered compensation exceeding the payment capacity of the Cayman government (Foreign and Commonwealth Office 1999; see also Vlcek 2012a). Consequently, when the Cayman Islands government resisted making the legislative changes requested by the UK government in 1999, Westminster exercised its ability to directly impose legislation on the OT.

Privy Council and the Royal Prerogative

This capability to legislate directly is a significant feature of the relationship between the government in Westminster and its OTs and one that sets the UK apart from other metropolitan states (Denmark, France, Netherlands, New Zealand and the United States) that administer a non-independent territory. The capability operates via an 'Order in Council', which is a special form of legislation in the United Kingdom made by Her Majesty with the advice of the Privy Council. In essence, it is a common-law power that remains with the Crown, operating through the Privy Council but generally under powers delegated by an Act of Parliament. There are, however, Orders in Council made under the Royal Prerogative and consequently 'primary legislation in the sense that the legislative power of the Crown is original and not subordinate' (Hendry and Dickson 2011: 57). As a result, the Order in Council enacted under the Royal Prerogative is a piece of legislation not subject to Parliamentary debate and 'is normally subject to less judicial scrutiny than other types of legislation' (Antoine 2008: 233). And in those cases where the OT government refuses to legislate following a request from the government in Westminster, as was the case for capital punishment and homosexual conduct, an Order in Council was used to impose the necessary legislation.

An Order in Council, under the Royal Prerogative, was used by the Westminster government to abolish the death penalty in 1991 and to decriminalize homosexuality in 2000 in the Cayman Islands. These examples represent two of the rare instances 'in living memory of the United Kingdom legislating against the will of the territory Government' (Hendry and Dickson 2011: 160). Nonetheless, from the perspective of the affected OT this colonial remnant of imperial power is viewed as the UK's 'nuclear option' to force compliance with its wishes rather than permitting the implementation for any local, democratically determined decision.[7] Moreover, the use of an Order in Council to legislate directly on contentious issues within an OT is justifiably viewed with suspicion by its citizens, understood by some observers as neo-colonial, while at the same time redolent with colonial guilt and paternalistic attitudes on the part of the Westminster government (Poole 2010a; Poole 2010b). In fact, these conflicted attitudes toward the use of an Order in Council may reside behind the hesitancy on the part of Westminster to act forcefully on issues of governance in an OT until such a time as it has become politically

[7] This terminology as the 'nuclear option' was raised in multiple interviews; consequently the potential use of an Order in Council was the 'elephant in the room' during negotiations over Cayman's cooperation with the European Union Savings Tax Directive, see (Vlcek 2013) for further discussion on that case.

embarrassing *not* to act (Clegg and Gold 2011). The apparent hesitancy on the part of the Westminster government to use an Order in Council reflects the desire by the government to act as a progressive modern government is expected to act toward an associated territory. Similarly, Sharman suggests Denmark, the Netherlands and New Zealand accept the costs associated with maintaining their OTs because of a 'logic of appropriateness' that is in keeping with a self-image 'as progressive, advanced members of the international community' (Sharman 2012: 12).

UK human rights conventions, obligations and the inclusion of non-independent territories

As introduced above, the Foreign and Commonwealth Office (FCO) White Paper on the OTs was the product of a convergence of events in the 1990s, including the eruption of the Soufrière Hills volcano on Montserrat, an increased recognition of the impact of geographic isolation on economic development (e.g. St. Helena) and the expanding role of the OFCs on Bermuda, the British Virgin Islands and Cayman Islands in global finance. Naturally, the scope of the White Paper extended beyond addressing just these issues and for the area of human rights the authors of the White Paper explicitly connect human rights standards to 'good government'. It states that any OT that 'chose to remain British should abide by the same basic standards of human rights, openness and good government that British people expect of their government'. To do so requires that the OT comply with the same 'international obligations' of the UK, which the White Paper identified as the European Convention on Human Rights and the UN International Covenant on Civil and Political Rights. The problematic aspect to the decision by an OT, such as Cayman, in choosing to 'remain British' is that the decision does not at the same time represent or indicate the existence of a comparable identity and culture. This point is amply demonstrated in Bodden's designation of Cayman as a 'frontier society' and therefore culturally separated from the UK as a consequence of its own historical trajectory.

Three specific human rights issues were listed in the 1999 White Paper that the UK government felt needed to be reformed. The rationale behind its focus on homosexuality, judicial corporal punishment and capital punishment was that these human rights issues placed the UK government in a position where it risked 'being in breach of important and fundamental international agreements'. In other words, the White Paper argued that the UK was 'exposed' to a 'contingent liability of costs and possibly damages'. Therefore it was necessary that laws permitting corporal and capital punishment and proscribing homosexual conduct had to be changed. Given that the

UK government also declared in the White Paper that it was committed 'to a modern relationship with the [OTs] based on partnership and responsible self-government' the expectation in Westminster was for appropriate legal reform to be accomplished by each respective OT government. Nonetheless, failing local action, the White Paper stated that the UK would legislate change with an Order in Council in order to achieve the necessary legal revision (Foreign and Commonwealth Office 1999: 20).

The Cayman Islands Legislative Assembly held an extensive debate over the substance of the White Paper, including references to the previous use of an Order in Council by the UK government. 'In that case [capital punishment in 1991] there were many in the Cayman Islands who felt that the death penalty should remain on our books. But as long as we were a territory of the UK we had to comply with the same standards the UK set for itself' (Cayman Islands Legislative Assembly 1999: 287). The White Paper contained a similar observation on differences between Cayman and the UK concerning homosexuality; 'some Caribbean communities' continued to be strongly opposed to homosexuality 'based on firmly held religious beliefs' (Foreign and Commonwealth Office 1999: 21). This statement of difference was received approvingly by some Members of the Legislative Assembly; for example, 'I am glad to say that Cayman is one of those jurisdictions based firmly on our religious beliefs.' After prefacing her remarks with an acknowledgement that she could be 'accused of trying to legislate morals' this Member of the Legislative Assembly went on to quote at length from the King James Version of the Bible, which she identified as a foundation document for 'our Christian nation'. This legislative debate took place in an atmosphere fully cognizant of the fact that the UK government had declared its intention to legislate by Order in Council if any OT failed to legislate as desired on this issue. Regardless of that fact, the Member of the Legislative Assembly (and Minister for Community Affairs, Sports, Women, Youth and Culture) declared that it was her belief that when the legislative change was put to a vote it would be a 'conscience vote' on the part of the Legislative Assembly (26 March 1999 in Cayman Islands Legislative Assembly 1999: 322–3).

Local attitudes in the Cayman Islands meant that there would be no legislative change consistent with the 'principles of partnership' defined by the UK government leading to the decriminalization of homosexuality in Cayman. 'Homosexuality has connotations in the Caribbean very different than in Europe'; and because it is such a politically charged issue no politician could be seen to support it.[8] Thus political (re-election) considerations

[8] Interview, Richard Coles, Chairman of the Cayman Islands Human Rights Commission, George Town, Grand Cayman, 9 November 2010.

would override any personal opinion, such as referred to in the opening sentences of this paper. Because there was no public support to change the domestic legislation the result was yet another Order in Council – there was no alternative. The UK government promulgated that change for the Cayman Islands with the Caribbean Territories (Criminal Law) Order 2000. On this issue Peter Clegg observed, 'British action highlighted the determination to enforce basic standards of human rights, but it is interesting to observe that although the law was changed the view of many in the Overseas Territories has not' (Clegg 2006: 140) – a point which may also be seen to indicate a difference of opinion over what constitutes 'basic standards of human rights' between the metropolitan state and the (post-) colonial territory. In addition there is the simple fact that legislation cannot change minds or attitudes in society.

The debate continues, because the decriminalization of homosexuality by the government in Westminster is framed as just the first step down the slippery slope leading to legalisation of same-sex marriage, further corrupting Cayman's (Christian) culture. This logic was made repeatedly in the debate on constitutional reform and the introduction of a Bill of Rights in the new Cayman Constitution. Such concerns are reinforced, for example, by a court ruling in Aruba determining that a Dutch same-sex marriage certificate must be acknowledged as both valid and legal in Aruba by the local government. In turn, due to the fact that the White Paper cited the European Convention on Human Rights, when combined with the trend among European states for the recognition of same-sex marriage, Caymanians appear justifiably concerned that the UK might legislate same-sex marriage for the Cayman Islands with an Order in Council in the future (Cayman Net News 2007). During public consultations for the new constitution this concern was widely discussed, though the observation offered in one interview framed it as not explicitly against 'gay people', rather it involved the view that marriage is a sacrament specified in the Bible and exclusively between a man and a woman. It was also noted that at present the UK also does not permit same-sex marriage, but operates with a civil partnership arrangement for gay couples.[9] As drawn out further below, the emphasis on 'Christian values' is a point of contention for the presence of this term in the Cayman Islands Constitution.

Moreover, it reflects the identity held by many of those possessing the right to vote in the Cayman Islands. The nature of democratic and participatory politics and government in a Caribbean overseas territory contains a complexity not found among the prerequisites for the right to

[9] Interview, Suzanne Bothwell, Crown Counsel and Director, Constitutional Review Secretariat, 10 November 2010.

vote in most democratic societies. Citizenship itself, as a British citizen or a British overseas citizen, has been redefined several times since the British Nationality Act 1948 was promulgated, with changes to the citizenship status and privileges for the residents of an OT. The important distinction today between these two forms of citizenship is that 'the right of abode in the UK' is not granted to the British *overseas* citizen. In addition to citizenship the overseas territories established 'belonger' status to identify and grant status and privileges to those individuals 'who are regarded as having connections with a territory close enough to "belong" to the territory' (Hendry and Dickson 2011: 205). This status means that recognition as a 'Caymanian' grants one the right to vote, the right to hold public office and rights for property ownership in the Islands (Privy Council 2009: sections 28, 61, 90). And similar to the citizenship distinction, belongers (Caymanians) may freely live in the territory to which they 'belong', but British citizens who are not at the same time a belonger are not free to live in the territory. Consequently, while the CIA World Factbook may report an estimated population for the Cayman Islands, the population that is in fact *eligible* to vote is substantially less. Belongers with the right to vote can trace their heritage back to those inhabiting the islands before tourism and financial services became the mainstay for the Cayman economy attracting many of today's residents to the islands.

Writing human rights – crafting non-discrimination in the Cayman Constitution

As already discussed, the process of constitutional reform in the OTs was motivated by a desire at Westminster that each OT possess and operate under a 'modern' constitution, which must include a bill of rights. And an essential element for any bill of rights, as a codification for human rights and in particular the UK's international obligations to the international conventions on human rights that it has ratified, is a right protecting the individual from discrimination, in all of its forms. The point of disagreement for the case of negotiating a new constitution for the Cayman Islands involved the determination on the features that an individual possesses for which they may be subjected to discrimination.

The Order in Council

The Cayman Islands Constitution is itself an Order in Council and the product of a negotiation process begun in February 2007 (following earlier constitutional reform negotiations begun in the 1990s and in 2001 that were left unfinished), in part to introduce a Bill of Rights to the Cayman

Islands (The Cayman Islands Constitution Order 2009). The final agreed Bill of Rights includes, for example, a definition for a right 'to marry a person of the opposite sex' (section 14), a definition at odds with the trend identified in many developed states for legal changes in support of same-sex relationships, if not same-sex marriage (Kollman 2007). This clause, however, continues the objective behind an earlier piece of local legislation, the Marriage (Amendment) Bill 2008, which introduced a definition for the term 'marriage' to the Marriage Law (2007 Revision). This action was in response to a concern that without a precise definition for marriage as a relationship between one man and one woman, a Registrar in the Cayman Islands might find they had no legal reason to deny a marriage request by two people of the same sex, or alternatively be expected to recognize a foreign 'same sex' marriage certificate in Cayman (Cayman Islands Legislative Assembly 2009: 326–41). And while the Cayman Constitution provides the framework for political relations between the Cayman Islands and the UK it nonetheless retains the Prerogative for the Sovereign (in the form of the Queen, acting through the Privy Council) 'to make laws for the peace, order and good government of the Cayman Islands' (section 125). Furthermore, while it was negotiated between UK and Cayman government representatives, discussed and debated across the three islands in public forums as well as throughout the media, and then approved by a majority of the votes cast in a referendum, the final approval for the Cayman Islands Constitution to pass it into law occurred in London, 'At the Court at Buckingham Palace, the 10th day of June 2009'. The document opens with the declaration that 'Her Majesty, in exercise of the powers conferred upon Her by sections 5 and 7 of the West Indies Act 1962(a) and of all other powers enabling Her to do so, is pleased, by and with the advice of Her Privy Council, to order, and it is ordered, as follows …' (Privy Council 2009: 1). Even though the Order was then 'Laid before Parliament' on 17 June 2009 and as with similar Orders in Council was not subject to Parliamentary procedures (debate), a draft version had been reviewed and commented on by the Foreign Affairs Committee.

Concerns raised by the House of Commons Select Committee on Foreign Affairs

This historical feature of the Order in Council, that it is not subject to debate and hence *parliamentary* approval, does not necessarily fit comfortably with the Members of Parliament who feel excluded from the government's business as a result. And notwithstanding the quotation from Caribbean-based Professor of Law Rose-Marie Antoine provided earlier, there has been both legislative and judicial interest in the operation of the Privy Council

and Orders in Council issued under the Prerogative. Perhaps the most significant judicial review involves the long-running claim for the right of return by the former inhabitants of the Chagos Islands. They were evicted, and in some instances forcibly removed, in the early 1970s following the archipelago's designation as the British Indian Overseas Territory and the main island established as the pre-eminent American military base in the Indian Ocean – Diego Garcia. These events were conducted under the auspices of Orders in Council, which in turn have been challenged in a series of court cases working their way up the ranks of the British judicial hierarchy, most recently in 2008 at the House of Lords (highest level of appeal in the UK prior to the establishment of the 12-member Supreme Court on 1 October 2009).[10]

Constitutional reform in the OTs has not elicited judicial review, but for the case of the Cayman Islands there was Parliamentary interest in the constitutional text agreed and put to the referendum. The opening paragraph of a letter from the FCO to the Foreign Affairs Committee (FAC, a House of Commons Select Committee) stated that the draft constitutional order for the Cayman Islands was provided in accordance with an agreement made in 2002 between the then Foreign Secretary and the Chair of the FAC. The transmittal letter highlighted a number of changes to be introduced by this new constitutional order, including the introduction of a Bill of Rights (Merron 2009a). At the same time, the nature of Parliamentary relations to the Privy Council and the Royal Prerogative, as described above, is such that the FAC is in a position to do little more than comment and recommend because it has no direct means for influencing the text of an Order in Council.

After reviewing and discussing the draft Constitution for the Cayman Islands the FAC made two points concerning the text of the Constitution in a letter to the FCO. The first aspect over which the FAC expressed a concern began at the Preamble, specifically the statement that 'The people of the Cayman Islands … Affirm their intention to be – (1) A God-fearing country based on traditional Christian values, tolerant of other religions and beliefs' (Privy Council 2009: 8). The Committee felt that the explicit reference to 'Christian values' gave an impression 'even if it is a misleading one, that Christians will be granted more favourable treatment under the Constitution than people of other faiths or of none' (Foreign Affairs Committee 2009b). Subsequently, in the Bill of Rights section of the Constitution the text situates the Bill of Rights as, 'a cornerstone of democracy in the Cayman Islands' but then declares that the Bill of Rights section of the Constitution,

[10] For further analysis on the case and the role of the Order in Council see (Poole 2010a; Poole 2010b: 87–93).

> (a) recognises the distinct history, culture, Christian values and socio-economic framework of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom; (Privy Council 2009: 9)

It was the contention of the FAC that these references to Christian values could provide a space in which Cayman courts 'will not necessarily follow the Strasbourg Article 14 case law in the apparent absence of anything in the Constitution which requires them to do so' (Foreign Affairs Committee 2009b). However, it is the view of Hendry and Dickson (2011) that the fundamental rights chapters for all of the OT constitutions written since 2006 'include provisions to give effect to the rights contained in Articles 2 to 14 of the [European Convention on Human Rights]'. They go on to observe, however, that it was the Article 12 'right to marry' provisions that were the most controversial during negotiations with the Caribbean OTs (Hendry and Dickson 2011: 155, 56). As noted above, section 14 of the Constitutional Order provides an explicit definition for marriage intended to pre-empt attempts to legislate any 'same sex' marriage arrangement (which potentially would be compliant with ECHR Article 12).

The second point raised by the FAC directly addresses the issue relevant to this paper as the FAC expressed its regret for 'the absence of explicit mention of sexual orientation as a prohibited ground for discrimination in clause 16'. The absence in the Cayman Constitution is then compared by the FAC to the explicit reference that discrimination on the grounds of sexual orientation is prohibited in the draft constitution for St Helena, Ascension and Tristan da Cunha. In the view of the FAC this difference between contemporaneous constitutional negotiations between the FCO and two of Britain's OTs 'makes the omission of reference to sexual orientation in the equivalent Cayman Islands text all the more pointed' (Foreign Affairs Committee 2009b). Along with this letter from the FAC to the FCO on the Committee's website there is an email of 6 May 2009 from the Senior Parliamentary Officer for Stonewall (a campaigning and lobbying charity for the lesbian, gay and bisexual community in the UK, www. stonewall.org.uk). The representative for Stonewall stated that the group was contacted in early 2009 by Caymanians concerned by the language in the draft constitution on discrimination. Because Cayman is a British OT, the group believed that it fell within its remit and consequently the group sought to raise these concerns on behalf of the Caymanians with the FCO. The FCO provided its assurances that the text and expected operation of the Cayman Constitution retained the means to cover discrimination against lesbian, gay and bisexual citizens, even in the absence of an explicit recitation. And failing that, the FCO reminded Stonewall

that Caymanians had a right of petition under the European Convention on Human Rights as 'an avenue of "last resort" in the event that the Cayman Islands should discriminate because of sexual orientation' (Finney 2009).

The FAC also had at hand during its evaluation of the constitutional text additional written remarks from Gillian Merron, the Parliamentary Under-Secretary of State at the FCO and Chair for the third and final round of negotiations over the text of the Cayman Islands Constitution. Noting that the Bill of Rights was one of ten 'outstanding issues' on the agenda for the final negotiations meeting she disagreed with the viewpoint that suggested the agreed text for the Constitution failed to 'provide comprehensive human rights protections for certain groups on the basis that these groups are not specifically named in Section 16 of the Bill of Rights'. Specifically, for those areas not explicitly addressed in the Bill of Rights

> the Legislative Assembly, as the elected representatives of the people of the Cayman Islands, will decide whether and in what form rights should be set out in law, subject to the Governor's assent. (Merron 2009b)

Therefore the government was confident that the agreed text was compliant with the UK's international treaty obligations on human rights. Further details were provided to the FAC in a Memorandum attached to the letter, including background on the constitutional reform process and the efforts made to elicit public debate on the draft constitution in the Cayman Islands. The Memorandum also noted the extent to which local actors provided input for the language used in the Bill of Rights as the compromise text to be presented to the citizens (belongers) of Cayman in the referendum. The overall impression suggested by the FCO was for extensive, local, democratic participation in the drafting of the text of the Constitution. Naturally, as with any successful compromise, not all of the involved parties were completely satisfied with the finished product. And that includes the Foreign Affairs Committee, which restated its disagreement with the compromise text in its 'Human Rights Annual Report' for the 2008/2009 session of Parliament. 'We conclude that the deliberate omission of reference to sexual orientation as a prohibited ground for discrimination in the Cayman Islands draft constitution is deplorable' (Foreign Affairs Committee 2009a). Nonetheless, it was a compromise achieved with the participation of representatives for the Cayman Islands.

The FAC closed its letter of 22 May 2009 with an acknowledgement that because the constitution had been approved in the referendum (which took place on 20 May), 'it would therefore not be realistic for us to recommend that changes be made to the text'. Nevertheless, the Committee

requested the FCO provide it with an explanation for how the FCO expected to 'ensure that law, policy and practice under the new Constitution will be compatible with the UK's obligations under the ECHR' (Foreign Affairs Committee 2009b). The response to the FAC's letter on the concerns it held after evaluating the draft Cayman Constitution was provided by the new Parliamentary Under-Secretary of State, Chris Bryant. First, while the explicit reference to 'Christian values' in the Constitution was requested by the Cayman delegation it had been balanced by the reference inserted at the request of the UK delegation to 'human dignity, equality and freedom'. The result was that the government was satisfied it will not 'have an unhelpful effect on the interpretation of the non-discrimination clause'. Concerning the absence for a specific recitation of 'sexual orientation' as a status subject to the non-discrimination clause, the Under-Secretary of State agreed that the preference of the UK delegation had been for its inclusion in section 16 of the Cayman Constitution. The Cayman delegation, however, was firm against its inclusion and pointed out the fact that sexual orientation had not been explicitly identified in either the European Convention on Human Rights (ECHR) or the UK's Human Rights Act 1998 (which promulgated the UK's ratification of the ECHR into law). As a consequence sexual orientation remains to be recognized as covered within the scope of the 'other status' clause of the constitution's section 16(2), similar to its recognition under ECHR Article 14 (and related decisions by the European Court of Human Rights). And the difference between the text of the Cayman Constitution and the constitution drafted for St Helena, Ascension and Tristan da Cunha was acknowledged, along with the observation that because each document is the result of negotiations with the involved territory it is natural that they would not be identical (Bryant 2009). Left unstated is the point, emphasized above, that in the course of modernizing the OT constitutions the process was expected to reflect a 'modern relationship' that was 'based on partnership and responsible self-government' (Foreign and Commonwealth Office 1999: 20). It was the case that while the UK government would assure its international treaty obligations were adequately addressed in these constitutional arrangements, it was not dictating the detailed wording used in the text because that was not reflective of a 'partnership'.

Regarding the FAC's concern that the UK government retain the ability to ensure the compatibility of any 'law, policy and practice' in Cayman with the UK's international human rights obligations the FCO reminded the Committee that the Governor (appointed by the UK government) retained executive authority in Cayman under the Constitution. That authority includes the role to provide assent, on behalf of the UK government, for all Cayman legislation, which operates as a further control mechanism to

prevent any domestic legislation that might contravene the UK's international obligations. And if at any point the Governor had a doubt about a piece of legislation it would be forwarded to the FCO for review. The Under-Secretary of State further emphasized the Constitutional establishment of a Human Rights Commission to replace and further the work of the 'extremely effective Human Rights Committee, which played an important part in the constitutional review talks' (Bryant 2009).

Debating the constitutional text in the Legislative Assembly

Even though the UK government may be confident that the wording of the Cayman Constitution will serve to protect against discrimination based on sexual orientation, statements made during debate in the Cayman Islands Legislative Assembly indicate a persistent desire among parts of Caymanian society to resist any such liberalization of public morals in the Islands. Events, media reports and letters to the editor are reproduced and re-enacted in the record of debate in order to emphasize any particular Member's unease with specific conduct in public spaces and to demonstrate the hazards confronting Caymanian society and its future generations from these examples of declining morals elsewhere in the world.

> What about our children? What about our culture? What about our way of life? If they want to see that they can go to Los Angeles, they can go to 42nd Street in New York, or they can go to London. (First Elected Member for Cayman Brac and Little Cayman, 8 May 2008 in Cayman Islands Legislative Assembly 2009: 86)

In turn, the compromise solution reached on the text used in the Bill of Rights was described to the Legislative Assembly as the conclusion from a 'struggle' to produce a text that satisfied the UK's international obligations 'while at the same time respecting Caymanian sensitivities, moral standards and values' (Leader of Government Business, 11 February 2009 in Cayman Islands Legislative Assembly 2009: 810). Representatives for the Seventh Day Adventist Church in the Cayman Islands were part of the negotiating team from the Cayman Islands and it was noted that their participation had been questioned. The Fourth Elected Member for George Town stated that the presence of this civil society group had been beneficial, 'and brought much to the table from a very large portion of our community whose views were well articulated by those who represented them' (Fourth Elected Member for George Town, 23 February 2009 in Cayman Islands Legislative Assembly 2009: 862). The participation of this church group was pivotal, not so much for their presence itself, but due to the fact that because they were present their views had to be accommodated during the

negotiation process. Also present was the Human Rights Commission (included in the Cayman Islands negotiating team 'so that the views of the vulnerable and the minorities, the *more liberal minded* [emphasis added] would be presented'), which argued for a free-standing non-discrimination clause that these other participants (church groups) actively resisted (Minister for Education, 23 February 2009 in Cayman Islands Legislative Assembly 2009: 865). The issue raised was that a free-standing provision could create additional government obligations because government benefits may be no longer restricted to Caymanians. Crucially, however, it was because 'the Churches objected strenuously' as they believed a free-standing non-discrimination clause would imply acceptance for 'the kinds of lifestyles' that they did not approve of, specifically 'gay lifestyles'. The compromise text limiting non-discrimination to those rights present in the Constitution was necessary in order to gain the agreement of 'the Seventh Day Adventists in particular' (Minister for Education, 23 February 2009 in Cayman Islands Legislative Assembly 2009: 867). The Human Rights Commission was never satisfied with this compromise solution and sought to introduce an additional question on the point in the referendum ballot paper (Cayman News Service 2009).

It is true that extensive negotiations were held between the UK and Cayman governments, a situation which to a certain extent was different from past Constitutional Orders applied to the territory. Furthermore, the Caymanian government actively sought participation from across the community in the negotiation process. The Leader of Government Business (as the Premier was known in the Cayman Islands under the previous Constitution) stated in his report to the Legislative Assembly on the outcome of the February 2009 final round of negotiations concerning constitutional modernization,

> To ensure that the people were represented at the negotiating table by other than political voices from Government and the Opposition, we decided to include the church, the private sector and the Human Rights Committee on the national negotiating team. Compared with other UK Overseas Territories which have also undergone constitutional modernization, the approach taken by the Cayman Islands stood out for its uniqueness. As a result, the end-product of the negotiations with the UK Government is a People's Constitution firmly anchored on a national consensus. (11 February 2009 in Cayman Islands Legislative Assembly 2009: 808)

The decision to put the text of the Constitutional Order before a referendum following an extensive and widespread public discussion was also exceptional. Nonetheless, the decision (yea or nay) for the draft Constitution was made

by that fraction of the residents of the Islands possessing belonger status. This contrast, between those living in Cayman with a right to vote and those living in Cayman without that right, was recognized in advance of the referendum and remarked on during the debate in the Legislative Assembly.

> Accept that Cayman is in a unique position; one of the few countries in the world where the vast majority of the population cannot vote because they do not have a sufficient connection to the Islands. But I do not believe that we have yet reached the point where the Caymanian population who can vote are prepared to simply say that because there are more of you who can't vote who have more liberal views our constitutional document ought to reflect those views. (Minister for Education, 23 February 2009 in Cayman Islands Legislative Assembly 2009: 869)

In other words, simply because the majority of *residents* may be more relaxed about gay rights, same-sex marriage or 'immoral' conduct in public does not mean that the Constitution should reflect those views rather than the conservative Christian values of the *belongers*. The announced final tally of referendum votes was 7045 votes cast in favour of the Constitution, 4127 against and 72 rejected ballot papers, representing a total of 11,244 votes out of the group of 15,361 eligible voters (Winker 2009). And because the right to serve in public office is the same as the right to vote – one must be a belonger – then the debate in the Legislative Assembly may be seen as reflecting the views of belongers. The views held by other residents of the Cayman Islands may or may not surface in debate in the Legislative Assembly, though they may perhaps be reflected in parts of the media and other forms of public discourse.

These views resonate with the cultural identity reproduced among belongers, while at the same time representing some of the cultural differences that are a source for tension between belongers and non-belongers in the Cayman Islands. The difficult times during the decades before tourism and financial services developed in the 1970s as the mainstay for the economy produced a resilient core to the Cayman cultural identity (Williams 2012). That core builds, in turn, on traditions recalled and retained by belongers and provides a basis for the sense of identity distinguishing them from the non-belongers arriving to work in those growing economic sectors of Cayman society (Bodden 2007: 31–2). The issue over same-sex marriage was framed in one interview by a reminder that culturally Cayman is predominantly Christian and most schools were started by a church.[11]

[11] Interview, Suzanne Bothwell, Crown Counsel and Director, Constitutional Review Secretariat, 10 November 2010; recall that it is necessary to be a belonger in order to hold public office.

From this framing the identity features that Bodden named as a Frontier Society evolved over time to become the conservative Christian identity found among many belongers today. And it remains prominent in public discourse with a recitation of Christian ideals as a point of difference from the conduct and beliefs displayed by many visitors and non-belongers in the Cayman Islands.

The seemingly dominant view (at least among belongers) opposed to legalizing and accepting homosexuality and gay rights in Cayman is not unique among the Caribbean islands, and therefore should not be interpreted as a particular reflection of its economic and cultural relationship to the United States (e.g. the dominance of US television stations in Caymanian media). A similar view holds in its near neighbour, Jamaica, which in turn garnered headlines during the December 2011 election campaign with sufficient exposure to generate an article in *The Economist* following the election results ('Go, sista: Sodom and Mrs Simpson Miller' 2012). The new incoming Jamaican Prime Minister had stated during a campaign debate on 20 December 2011 in what was otherwise recorded as a 'disappointing' event that she would 'revisit the buggery laws and would initiate a conscience vote on the matter' (Spaulding 2011). A subsequent editorial in *The Gleaner* commended her 'courage in taking this stance' toward homosexuals along with her declaration that sexual preference was not a factor in selecting the most capable individuals to serve in her cabinet. The editorialist situated this perspective as courageous for occurring during an election campaign 'in a largely homophobic Jamaica' (Editorial, 'Courageous Stance Worthy of Replication' 2011).[12] But with its larger population Jamaican society has more space in which a gay rights NGO can exist (e.g. Jamaica Forum for Lesbians, All-Sexuals and Gays, J-FLAG) and for them to confidently present their case in the media. For example, an op-ed piece called for legislative change on this human rights issue that highlighted for readers the relevant paragraph in the November 2011 review by the United Nations Human Rights Committee (UNHRC) of the third periodic report submitted by Jamaica. The UNHRC encouraged Jamaica to 'amend its laws with a view to prohibiting discrimination on the basis of sex, sexual orientation and gender identity' (Gordon and Thomas 2012; Human Rights Committee 2011).[13]

[12] This depiction for Jamaican society is reinforced by the content of most of the comments accompanying the online newspaper article and related letters to the editor.

[13] With regard to the Cayman Islands, the singular reference made in the 2008 review by the UNHRC of the UK's sixth periodic report involved its law on deportation. The review contained no discussion on gay rights either for Cayman or the UK as a whole (Human Rights Committee 2008).

Global norms (constitutionally) or righteous Western states?

Essentially the preceding discussion represents a 'case-in-miniature' for considering more traditional power relations among states and the transfer of rules, norms and practices from leading/dominant states to the remainder of the international community for compliance, cooperation and implementation. The more explicit imposition of security related practices has been explored elsewhere in the context of money laundering and terrorist finance (Vlcek 2012b). Here the investigation involved a social/cultural norm reflective of domestic politics, yet embedded in a transnational regime of human rights. And while 'belonger' status explicitly identifies a governing elite, as a form of limited suffrage within a larger society, actual political practice in other liberal democratic societies may similarly experience limited participation guiding the legislation affecting the lives of the entire population. If an argument is to be made that human rights represent global norms and should be universally accepted/implemented, then for a logic of theory development in which falsifiability is a crucial component the experience in the Cayman Islands demonstrates a point of weakness for any such theory situating human rights as (emerging) global norms. A small territory with European roots and high GDP per capita (the latter taken by some commentators to indicate economic, and consequently social, development) should represent an easy, compliant recipient for global norms as promulgated by developed European states. Such was not the case, however, because attitudes toward the legalization of homosexuality and ongoing resistance to any potential legalization of same-sex marriage argues the situation in Cayman has not adjusted since that legislation was imposed. In these circumstances where a metropolitan state retains the final determination on important constitutional features, norms that may otherwise be felt to 'float freely' must in fact be externally imposed. The forced application of the policy arguably demonstrates that it should not be considered a norm, by definition, but rather a non-religious (anti-religious?) cultural policy. It is a situation where Cayman resembles more its closer large-state neighbour (the US) than it does the metropolitan state (the UK) and *its* European neighbours that are the source for the norm in question, and the international treaties on which the forced legalization of homosexuality was justified.

Alternatively, it may be the case that the Cayman Islands represents an outlier, in other words that a very small non-independent territory should not be considered an appropriate example for *state* conduct on the acceptance and institutionalization of an emerging global norm. Further, that the imposition of a Bill of Rights by the metropolitan state simply reflects the acceptance of the norm in the UK and consequently the Cayman

Islands cannot be taken as an example for an analysis of norm diffusion because it represents only a part of a state. Yet the perception in Cayman that they possess a choice, and can therefore resist the introduction of any foreign practices (since they would not categorize it as a norm, which following Finnemore and Sikkink (1998) is defined 'as a standard of appropriate behaviour for actors with a given identity') would suggest otherwise. Consequently the situation in Cayman is understood as one that was forced on them. Again, the decision to remain a British Overseas Territory does not reflect the existence for a strong common set of current social attitudes. Considered in the larger context of global norms, however, the forced nature of this particular human rights norm in Cayman serves to reinforce the criticism made on the coercive power implicit in the global diffusion of norms (Inayatullah and Blaney 2012). As such, this explicit use of power for norm transmission represents a counter-example for the work of scholars utilizing world society approaches to explain globalization and the apparently cooperative global acceptance of norms.

Admittedly, one specific case suggesting that arguments for norm diffusion and world society are not universally applicable in no way refutes the case made by proponents for these theories and their generalizability (though the case of Jamaica may further reinforce such a claim for the Caribbean region). Nevertheless, persistent resistance by Caymanian citizens over the course of a decade against the pressure for the acceptance of homosexuality as a human right does support the observation that the transference of norms, and in this specific instance a distinctly *social* norm (abstracted here from the debates over the universality of human rights and focusing rather on their socially constructed nature), is not as smooth or as readily apparent as implied by these theoretical perspectives (cf Bailey 2008). At the level of analysis on an individual norm, the introduction of a Bill of Rights to the new Cayman Islands Constitution was less contested, independent of the gay rights/same-sex marriage component of that debate. Yet it also highlights the use of an evolving concept for an international standard against which the modern liberal democratic state and its constitution is to be evaluated. However, this case may offer a means to better understand the resistance to this same human rights norm in the United States as compared to the European Union, because it is substantially a matter of cultural acceptance. The sheer physical size and diversity of the US and the recognized cultural variance that exists between urban and rural areas is typified by the East and West coasts' cultural divergence from large areas of the centre of the continent (Midwest, South, Intermountain West, etc). As such, this situation is yet another example for the cultural content embedded in socially constructed norms and the inter-cultural differences that hamper norm acceptance and assimilation.

Beyond the divergent cultural contexts found in Europe and the United States is the language used in the construction of global norms and norm diffusion. As noted by some critics, the literature on norms in the International Relations literature is heavily weighted toward the progressive, modern norms, e.g. women's rights, along with historical analysis for the diffusion of a similar 'good' norm found in the end of slavery among European states (Epstein 2012). This literature offers little explanation for what Epstein identifies as the 'bad' norms that had been equally accepted by many states as proper conduct, including slavery and the secondary status of women, practices that continue to exist in some societies, and even where those states may be signatories to the relevant international convention.

The wider question for the specific case of the Cayman Islands is the extent to which the external imposition of legislation to decriminalize homosexuality in 2000 represents a forced transfer of 'modern' norms, or if it rather represents an example for imperialist/neo-colonial 'modernization' of the native? Subsequent debate surrounding the Bill of Rights for the new Constitution suggests the transfer, as such, has not taken hold. This question, however, is subsumed within the question first posed in the opening paragraph for this paper, who decides on the content and textual construction for a jurisdiction's constitution? Or alternatively, whose constitution is it? If the position of the Westminster government, from its responses to the questions of the Foreign Affairs Committee, is that the content and wording of the Cayman Constitution satisfies the *United Kingdom's* international obligations, and that same content and wording satisfies, or at least mollifies, a large (or at least vocal) segment of Caymanian (aka belonger) society, then the text achieves the objectives established for it. The UK has brought a 'modern' constitution to Cayman containing a Bill of Rights while many concerned Caymanians accept that the text does not at the same time *explicitly* condone or encourage conduct they personally find abhorrent. And it is worth recalling at this point the quotation contained in the section title above the background history for the Cayman Islands provided above. This is a jurisdiction proud of its Christian heritage to the extent that it is declared in the national motto and embedded in its coat of arms, an extract from Psalms 24. Members of the Legislative Assembly are comfortable with quoting from the Bible at length in debate, something that would be less likely, if even permitted, in the more secular legislative cultures of the UK, US and other developed states. And at the same time it was this pride for a Christian heritage that so concerned a secular Foreign Affairs Committee in Westminster that it may produce privileged treatment for Christians, and thus discriminate against non-Christians (and in particular gays, whether Christian or not).

Nonetheless, the expectation of the Westminster government as relayed in the letters to the FAC indicates that it feels the Constitution *implicitly* provides a prohibition on discrimination based on sexual preference. Yet that expectation remains to be tested, by either the newly established Human Rights Commission or the courts of the Cayman Islands. Consequently, it is the membership and operation of the Human Rights Commission that should emerge as the contested space over gay rights and discrimination in the Cayman Islands once the Bill of Rights is formally in force in November 2012.

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References

Albert, Mathias. 2007. "'Globalization Theory': Yesterday's Fad or More Lively than Ever?" *International Political Sociology* 1(2):165–82.

Alexander, Carlene. 2009. E-mail from Carlene Alexander, Chair, Equality Cayman, to House of Commons Foreign Affairs Committee. OT 335, Westminster: Houses of Parliament, last revised 27 March, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/memo/overterr/ucm33502.htm>.

Antoine, Rose-Marie Belle. 2008. *Commonwealth Caribbean Law and Legal Systems*, 2nd edn. Abingdon: Routledge-Cavendish.

Bailey, Jennifer L. 2008. "Arrested Development: The Fight to End Commercial Whaling as a Case of Failed Norm Change." *European Journal of International Relations* 14(2):289–318.

Bodden, J. A. Roy. 2007. *The Cayman Islands in Transition: The Politics, History, and Sociology of a Changing Society*. Kingston, Jamaica: Ian Randle Publishers.

—— 2010. *Patronage, Personalities and Parties: Caymanian Politics from 1950–2000*. Kingston, Jamaica: Ian Randle Publishers.

Bryant, Chris. 2009. Letter from Chris Bryant, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, to the Chairman of the Committee: Draft Cayman Island Constitution. OT 380, Westminster: Houses of Parliament, last revised 23 June, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/memo/overterr/uc38002.htm>.

Buergenthal, Thomas. 1997. "The Normative and Institutional Evolution of International Human Rights." *Human Rights Quarterly* 19(4):703–23.

Cayman Islands Legislative Assembly. 1999. Official Hansard Report. 1999 Session, available at <http://www.legislativeassembly.ky/>.

—— 2009. Official Hansard Report, Electronic Version. 2008/09 Session, available at <http://www.legislativeassembly.ky/>.

Cayman Islands National Archive. 1960–1961. "Attitude of the Smaller Dependencies of the West Indies towards the Federation." London. UK PRO reference CO 1031/4271.

Cayman Net News. 2007. "Gay Marriage Law Imminent?" 1 May, available at<http://www.constitution.gov.ky/pls/portal/docs/PAGE/CMIHOME/NEWS/NEWSPAPER/2007/GAYMARRIAGELAWIMMINENTFINAL.PDF>.

Cayman News Service. 2009. "Local Activists Support HRC." 16 February, available at <http://www.caymannewsservice.com/headline-news/2009/02/16/local-activists-support-hrc>.

Clegg, Peter. 2006. "The UK Caribbean Overseas Territories: Extended Statehood and the Process of Policy Convergence." In *Extended Statehood in the Caribbean: Paradoxes of Quasi Colonialism, Local Autonomy and Extended Statehood in the USA, French, Dutch and British Caribbean*, edited by Lammert De Jong and Dirk Kruijt, 125–56. Amsterdam: Rozenberg Publishers.

Clegg, Peter, and Peter Gold. 2011. "The UK Overseas Territories: A Decade of Progress and Prosperity?" Commonwealth & Comparative Politics 49(1):115–35.

Cohen, Jean L. 2011. "Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)." *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 2(1):127–58.

Dobbin, Frank, Simmons Beth and Geoffrey Garrett. 2007. "The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?" *Annual Review of Sociology* 33:449–72.

Editorial, "Courageous Stance Worthy of Replication." 2011. *The Gleaner* (Jamaica) 23 December, available at <http://jamaica-gleaner.com/gleaner/20111223/cleisure/cleisure1.html>.

Epstein, Charlotte. 2012. "Stop Telling Us How to Behave: Socialization or Infantilization?" *International Studies Perspectives* 13(2):135–45.

Finnemore, Martha, and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change." International Organization 52(4):887–917.

Finney, Jonathan. 2009. E-mail from Jonathan Finney, Senior Parliamentary Officer, Stonewall, to Andrew Mackinlay: Cayman Islands Constitution. OT 349, Westminster: Houses of Parliament, last revised 6 May, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/memo/overterr/uc34902.htm>.

Foreign Affairs Committee. 2009a. Human Rights Annual Report 2008. HC 557, London: The Stationery Office, last revised 9 August, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/557/557.pdf>.

—— 2009b. Letter to Gillian Merron MP, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, from the Chairman of the Committee: Draft Cayman Islands Constitution Order. OT 359, Westminster: Houses of Parliament, last revised 22 May, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/memo/overterr/uc35902.htm>.

Foreign and Commonwealth Office. 1999. "Partnership for Progress and Prosperity: Britain and the Overseas Territories." London: HMSO, available at <http://www.fco.gov.uk/>.

—— 2012. "The Overseas Territories: Security, Success and Sustainability." London: TSO, available at <http://www.fco.gov.uk/>.

Gad, Ulrik Pram, and Rebecca Adler-Nissen. 2013. "Introduction: Postcolonial Sovereignty Games." In *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories*, edited by Rebecca Adler-Nissen and Ulrik Pram Gad, 1–4. London and New York: Routledge.

"Go, Sista: Sodom and Mrs Simpson Miller." 2012. *The Economist* 7 January, available at <http://www.economist.com/node/21542404>.

Gordon, Corbin, and Tyler Thomas. 2012. "Let's Do More to Protect Gay Rights for Jamaica 50." *The Gleaner* (Jamaica) 29 January, available at <http://jamaica-gleaner.com/gleaner/20120129/cleisure/cleisure5.html>.

Hendry, Ian, and Susan Dickson. 2011. *British Overseas Territories Law*. Oxford: Hart Publishing.

House of Commons. 2004. The Caribbean. Westminster Hall, 2004–2005 edn, London: Hansard, last revised 2 December, available at <http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo041202/halltext/41202h01.htm>.

Human Rights Committee. 2008. "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations". General distribution, CCPR/C/GBR/CO/6. Geneva: United Nations Human Rights Committee, available at <http://daccess–dds–ny.un.org/doc/UNDOC/GEN/G08/433/42/PDF/G0843342.pdf?OpenElement>.

—— 2011. "Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations." Advanced unedited version, CCPR.C.JAM.CO.3. Geneva: United Nations Human Rights Committee, available at <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.JAM.CO.3.doc>.

Huysmans, Jef. 2009. "Introduction to the Forum on Global Society." *International Political Sociology* 3(1):109–9.

Inayatullah, Naeem, and David L Blaney. 2012. "The Dark Heart of Kindness: The Social Construction of Deflection." *International Studies Perspectives* 13(2):164–75.

Kollman, Kelly. 2007. "Same-Sex Unions: The Globalization of an Idea." *International Studies Quarterly* 51(2):329–57.

Kollman, Kelly, and Matthew Waites. 2009. "The Global Politics of Lesbian, Gay, Bisexual and Transgender Human Rights: An Introduction." *Contemporary Politics* 15(1):1–17.

Lowenthal, David. 1987. "Social Features." In *Politics, Security and Development in Small States*, edited by Colin G. Clarke and Anthony Payne, 26–49. London: Allen & Unwin.

Merron, Gillian. 2009a. Letter from Gillian Merron MP, Parliamentary Under-Secretary of State, to the Chairman of the Committee: Cayman Island Constitution. OT 341, Westminster: Houses of Parliament, last revised 21 April, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/memo/overterr/uc34102.htm>.

—— 2009b. Letter from Gillian Merron MP, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office: Draft Cayman Island Constitution Order [2009]. OT 350, Westminster: Houses of Parliament, last revised 7 May, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmfaff/memo/overterr/uc35002.htm>.

Meyer, John W., John Boli, George M. Thomas and Francisco O. Ramirez. 1997. "World Society and the Nation-State." *American Journal of Sociology* 103(1):144–81.

Poole, Thomas. 2010a. "United Kingdom: The Royal Prerogative." *International Journal of Constitutional Law* 8(1):146–55.

—— 2010b. "Judicial Review at the Margins: Law, Power, and Prerogative." *University of Toronto Law Journal* 60(1):81–108.

Privy Council. 2009. The Cayman Islands Constitution Order 2009. Statutory Instruments, 2009 No 1379, At the Court at Buckingham Palace, last revised 10 June.

Risse, Thomas, Stephen C. and Kathryn Sikkink, eds. 1999. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.

Sharman, J. C. 2009. "The Bark is the Bite: International Organisations and Blacklisting." *Review of International Political Economy* 16(4):573–96.

—— 2012. "International Hierarchies and Contemporary Imperial Governance: A Tale of Three Kingdoms." *European Journal of International Relations OnlineFirst*. DOI:10.1177/1354066111425262.

Spaulding, Gary. 2011. "Disappointing." *The Gleaner* (Jamaica) 21 December, available at <http://jamaica-gleaner.com/gleaner/20111221/lead/lead1.html>.

Tonner, Dominic. 2005. *Ivan: The Full Story – The Storm That Changed a Nation Forever*. George Town, Grand Cayman: Focus Communications.

Vlcek, William. 2012a. "Contingent Liability or Moral Hazard after the Global Financial Crisis: Cayman, Westminster and Global Finance." In *The Non–Independent Territories of the Caribbean and Pacific: Continuity or Change?*, edited by David Killingray and Peter Clegg, 143–62. London: Institute of Commonwealth Studies.

—— 2012b. "Power and the Practice of Security to Govern Global Finance." *Review of International Political Economy* 19(4):639–62.

—— 2013. "Sovereignty Games and Global Finance: The Cayman Islands." In *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories*, edited by Rebecca Adler-Nissen and Ulrik Pram Gad, 115–29. London and New York: Routledge.

Wiener, Antje, and Uwe Puetter. 2009. "The Quality of Norms Is What Actors Make of It: Critical Constructivist Research on Norms." *Journal of International Law and International Relations* 5(1):1–16.

Williams, Christopher A. 2012. "Perpetuation, Imagination, and Subjectivity: Investigating the Effects of Expressed Traditionalist Caymanian Memories." *Memory Studies OnlineFirst*. DOI:10.1177/1750698012454213.

Winker, Carol. 2009. "New Constitution Coming." Caymanian Compass (George Town, Grand Cayman) 24 May, available at <http://www.caycompass.com/cgi–bin/CFPnews.cgi?ID=10382562>.