

Point of View

Brexit, Human Rights and Self-determination— a Perfect Storm in the British Crown Dependencies and Overseas Territories?

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As the UK tears itself apart over Brexit, scrapping the human rights protections in the EU Charter and limiting the powers of Parliament in a bid to “take back control,” we should not forget that the ripples of Brexit reach far beyond the shores of Britain. The UK is responsible for the international obligations of three Crown Dependencies and 14 Overseas Territories (CDOTs) around the world. Their citizens are all British but, except for Gibraltar, because they have never been part of the European Union, they were excluded from voting in the referendum despite the impact the result would have on them.

Each CDOT is unique in its historical, geographical, social and cultural make-up and this has influenced the different ways they have developed their relationships with the UK and Europe. Some rely on international arrangements to function as financial centres or to sell their produce into the European Union, others rely on UK and European development aid to help keep them sustainable. Some are geographically European like the Isle of Man; the Channel Islands; Akrotiri and Dehekelia; and Gibraltar. Others are far from Europe in the Caribbean, or isolated in the Pacific and South Atlantic with complex historical identities and interests. It is impossible to generalise about the CDOTs, but one thing they do have in common is that, through Brexit, they have lost their voice.

The Overseas Territories are, in many ways, the last remnants of Britain’s imperial past. Those with permanent resident populations are classified as “non-self-governing territories” for the purposes of the UN Charter¹ and the Special Committee on Decolonisation². The UK has assumed the responsibility for these territories recognising

“the principle that the interests of the inhabitants of these territories are paramount, and accept[ing] as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;”³

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¹ Charter of the *United Nations* (UN Charter), Ch. XI, United Nations, <http://www.un.org/en/sections/un-charter/chapter-xi/index.html> [Accessed 1 August 2018].

² *United Nations* and Decolonization, United Nations, <http://www.un.org/en/decolonization/nonselfgoverterritories.shtml> [Accessed 1 August 2018].

³ UN Charter, art.73, *United Nations*, <http://www.un.org/en/sections/un-charter/chapter-xi/index.html> [Accessed 1 August 2018].

The UK's relationship with the Crown Dependencies of the Isle of Man and the Channel Islands derives from historical links to the Crown rather than to Britain's colonial past. But they have a significant amount of independence internally and in recent years, the UK has supported the development of their international identity. In a framework for developing the international identity of the Isle of Man⁴ signed in 2007 the UK committed to not acting internationally on behalf of the Island without prior consultation and recognised, in particular, that the interests of the Island may differ from the interests of the UK in relation to the EU.

Gibraltarians were able to vote in the referendum and voted over 96% in favour of remaining in the EU—a reflection of the importance of the EU to their society and their livelihoods. Shortly after the vote, the Chief Minister of Gibraltar said that a hard Brexit was an “existential threat to Gibraltar's economy”.⁵ The fate of the thousands of workers who cross the border with Spain on a daily basis and their contribution to life on the rock still remains unclear.

For those in Overseas Territories who did not get to vote, the impact of Brexit on their rights and their ability to sustain themselves may be equally dramatic. The Falkland Islands have seen new threats to their security as a result of Brexit with Argentina sensing that Britain may lose the support of the European Union for its control of the islands.⁶ Their fishing industry, which accounts for 41% of their economy and two-thirds of the corporation tax they collect, relies almost entirely on tariff free access to the EU market with 94% of their products being sold in the EU.⁷ Other territories that rely on aid from the EU and the UK to sustain themselves and provide basic services like health and social care to their populations such as St Helena, Montserrat and Pitcairn will see their aid budgets cut significantly when they are no longer eligible for EU development aid as overseas countries and territories of the EU. Under the 11th European Development Fund British Overseas Territories will receive a total of 76.8 million Euros until 2020. For small communities development funding may be crucial for their continued viability. After Brexit the special relationship will be broken and it remains to be seen how the UK will plug the financial gap to ensure it fulfils its obligations to guarantee the economic, social and cultural rights of its citizens in those territories.

And yet, the interests of the CDOTs were not taken into account in the decision to hold a referendum on UK membership of the EU despite the obvious impact it would have on them. This is not just a question of politics; it is an issue that will fundamentally affect their rights, including the economic, social and cultural rights, of people in the CDOTs in some ways more acutely than it will those in the UK. The scale of small island economies means that they are more vulnerable to shocks and less able to diversify. Their Governments understand this, but their input has been minimal.

The right to self-determination is a core principle of international law arising out of customary international law and recognised in the United Nations Charter⁸ and the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights.⁹ It is the right of all peoples to define their destiny in the international order and it has increasingly been recognised as including “internal” self-determination and intra-State relations.

The peoples of the British CDOTs have their own governments and the UK has a responsibility to support them in the development of their right to self-determination. But while the UK has dedicated time and effort to supporting the internal constitutional development of the OTs with the introduction in recent

⁴ Statement of intent agreed on 11 January 2006, the Chief Minister of the Isle of Man and the UK Secretary of State for Constitutional Affairs, <https://www.gov.im/media/622895/iominternationalidentityframework.pdf> [Accessed 1 August 2018].

⁵ A. McSmith, “Gibraltar faces ‘existential threat’ to its economy if there’s a ‘hard Brexit’ deal, its chief minister warns” (20 August 2016), *Independent*, <https://www.independent.co.uk/news/uk/gibraltar-existential-threat-economy-hard-brex-it-deal-eu-fabian-picardo-a7201211.html> [Accessed 1 August 2018].

⁶ R-J Bartunek, “Argentina eyes Brexit advantage in Falklands dispute”, (20 April 2017), *Reuters.com*, <https://www.reuters.com/article/us-britain-eu-argentina-falklands-idUSKBN17M2AW> [Accessed 1 August 2018].

⁷ J Stone, “Brexit: Falkland Islands government sounds alarm on leaving single market” (12 May 2018), *Independent*, <https://www.independent.co.uk/news/uk/politics/brexit-falklands-islands-single-market-trade-eu-fishing-loligo-squid-government-a8347696.html> [Accessed 1 August 2018].

⁸ See UN Charter art.1(2) and art.55.

⁹ Identical arts 1(3) in the ICCPR and the ICESCR.

years of new constitutions enshrining human rights domestically in several OTs such as the Cayman Islands and St Helena, there has been very little development of the right to self-determination in terms of the territories' ability to engage internationally and define their own destiny while continuing to be British.

In past decades, some OTs like the Falkland Islands and Gibraltar have voted overwhelmingly to remain British in domestic referenda on independence. But for some, remaining British without the benefits of EU citizenship and special access to the EU, may be a very different proposition. And Brexit is not the only issue that has moved the right to self-determination up the political agenda in CDOTs.

In May of this year Westminster passed the Sanctions and Anti-Money Laundering Act 2018 which gave the British Government powers to require Overseas Territories to introduce publicly accessible registers of the beneficial ownership of companies if they have failed to do so by the end of 2020.¹⁰ Interestingly, these powers applied only to Overseas Territories, not Crown Dependencies. It has been argued that this was due to the different constitutional relationships the UK has with its Crown Dependencies which would make it impossible to legislate in this way for them without sparking a constitutional crisis.¹¹ However, in those Overseas Territories in the Caribbean most acutely affected, there have been allegations that this distinction has more to do with the fact that the Crown Dependencies are European than any real constitutional difference.¹²

Douglas Parnell, the Chairman of the ruling party in the Turks and Caicos Islands said

“... this action highlights for us as a people the attitude towards us. If it suits their interests, an Order in Council is easily passed. Our constitution is an Order in Council and could just as easily be changed if there was the political will in the UK. It is time that we seriously consider a different, more empowering relationship with the UK. This should be seen for what it is – a constitutional smack down by our overseers ...”¹³

And the Deputy Prime Minister of the British Virgin Islands (BVI), Dr Kedrick Pickering, addressing a crowd protesting about the legislation said BVI was “declaring war” on the UK, spoke of the need to discuss divorce from the UK and called for experts from across the world to consider new constitutional options for the BVI separate from the UK.¹⁴ Their concerns were reflected in the recent Joint Ministerial Council meeting in London where the OTs put the question of their constitutional relationship with the UK firmly on the agenda with assertions that the recent action of the “UK Parliament to impose legislation on the OTs was undemocratic, a step backwards and a clear contradiction to UK policy statements and commitments to the OTs and the UN.”¹⁵

For some OTs, this incursion on their sovereignty represents a tipping point. As the benefits of being British become less clear against the backdrop of Brexit, with the loss of EU citizenship and preferential access to EU markets, it seems likely that the constitutional fallout of the decision to leave the EU may not be restricted to relationships between the “home countries” in the UK. The mantra that Brexit would

¹⁰ Section 51 of the Sanctions and Anti-Money Laundering Act 2018

¹¹ See : <https://www.gov.im/news/2018/may/10/chief-minister-statement-on-uk-sanctions-and-anti-money-laundering-bill-and-beneficial-ownership-registers/> [Accessed 1 August 2018]

¹² See : “OECS Urges UK Parliament To Reject Discriminatory Amendment To Anti-Money Laundering Bill” (2 May 2018), *Caribbean360*, <http://www.caribbean360.com/news/oecs-urges-uk-parliament-to-reject-discriminatory-amendment-proposal-to-anti-money-laundering-bill> and “Overseas territories react to UK legislation requiring public disclosure of beneficial ownership” (3 May 2018), *Caribbean News Now*, <https://wp.caribbeannewsnow.com/2018/05/03/overseas-territories-react-to-uk-legislation-requiring-public-disclosure-of-beneficial-ownership/> [Both accessed 12 July 2018].

¹³ Reported in “Overseas territories react to UK legislation requiring public disclosure of beneficial ownership” (3 May 2018), *Caribbean News Now*, <https://wp.caribbeannewsnow.com/2018/05/03/overseas-territories-react-to-uk-legislation-requiring-public-disclosure-of-beneficial-ownership/> [Both accessed 12 July 2018].

¹⁴ E Durand “UK put on notice, BVI has ‘declared war’ — Pickering” (25 May 2018), *bvnews.com*, <http://bvnews.com/new/uk-put-on-notice-bvi-has-declared-war-pickering/> [Accessed 1 August 2018]

¹⁵ Discovermni team, “Premier Romeo Meets with OT and UK Ministers at Pre-JMC in London” (21 June 2018), *discovermni.com*, <https://discovermni.com/2018/06/21/premier-romeo-meets-with-ot-and-uk-ministers-at-pre-jmc-in-london/> [Accessed 1 August 2018].

allow Britain to “take back control” has shown the people of the British CDOTs how little control they really have within their current constitutional relationships.

While the needs and desires may vary significantly between territories, what is clear is that the UK must pay attention to its obligations under international law to listen to the aspirations of the people in its CDOTs and to ensure their well-being and human rights are protected as a matter of urgency. Brexit may have started with ideas of British sovereignty and exiting the EU, but it may well end with a new constitutional map to guarantee the right to self-determination in the UK and its dependent territories.