Gibraltar, a possible solution: diffused sovereignty and shared functions

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Theme

Brexit opens a small window of opportunity to attempt to resolve the status of Gibraltar.

Summary

The divorce negotiations over the future relationship agreement between the UK and the EU forces the issue over Gibraltar. In less than a year, the concrete if complex aspects of Brexit should be resolved; at the same time, the possibility will open for a general solution to the controversy surrounding the territory’s status. Although this window of opportunity will not last for long, for the first time in recent history there will be a chance for an agreement. The current moment combines the interest of Gibraltar to remain part of the EU with a constructive Spanish attitude, evident in the proposal for shared sovereignty of the territory and the desire to maintain close relations with London within the context of Brexit. Based on several existing models and proposals, it is believed that a solution acceptable for all implicated parties could be found. Such a solution would contain almost the same substantial elements as ‘co-sovereignty’ but it would involve a different approach to certain symbolic issues and the ultimate definition of the territory’s status.

Analysis

Gibraltar is not the most important issue for Spain on the agenda of the Brexit negotiations. Madrid’s real priorities are the same as those of the other national capitals and the European institutions: (a) to maintain the unity of the 27, along with respect for the basic rules of the Internal Market; (b) to preserve the rights of citizens; and (c) to define a new framework for relations with the future neighbour that implies no loss of prosperity or security. But we should distinguish priorities from peculiarities. Spain enjoys a unique position because it hosts such an enormous number of British citizens (residents, travellers in transit and tourists). Spain is also the only Member State with a favourable balance in the mutual flow of persons with the UK. However, there is no doubt that Gibraltar is the most important, and thorny, ‘peculiarity’ of the negotiations. In the end, what is for London a ‘British Overseas Territory’ is also a territory which the UN considers to be due for decolonisation—and one over which Spain hopes to regain sovereignty—.

The issue has a European dimension, but just as the other Member States have looked to Dublin for a solution to the Brexit-induced border issue with Northern Ireland, the opinion of Madrid will be the key to configuring the EU position on this admittedly less
dramatic matter. The opening argument from the Spanish side is that Gibraltar, according to UK legislation and the Treaties, is not part of the UK but rather a territory whose foreign relations are a British responsibility. Therefore, Spain’s view is that future relations between the UK and the EU do not have to have any direct application to Gibraltar and that the Brexit negotiations cannot cover the disputed territory without the expressed acceptance of Spain within the framework of the bilateral accord between London and Madrid. The objective of acquiring such veto power over everything affecting Gibraltar within the framework of art. 50 of the Treaty –that is, anything stemming from the Brexit divorce, the transition period or future relations with the UK– was fully achieved when this stipulation was incorporated into the 24th orientation of the document approved by the European Council on 29 April 2017, as well as within the directives of the Council on 29 January 2018 dealing with the Brexit transition period to begin on 29 March next year.

In the absence of an agreement like the one analysed below, there is no doubt that Gibraltar will leave the EU along with the UK. The so-called Verja or ‘fence’ of Gibraltar, which today represents the border of the Schengen space, would then become not only external border of the EU but also –unless London opts at the last minute for a softer version of Brexit– the border of the Internal Market. This would be reflected in a modification of the juridical-political status of the territory which would no longer enjoy the privileged conditions defined during the 1970s, before Spain’s entry to the then European Communities. These special conditions allowed Gibraltar to become part of the Internal Market but not the Customs Union or the VAT area. Gibraltar has taken advantage of this privilege to become a kind of ‘tax (and, to a certain extent, regulatory) haven’. Furthermore, with the UK’s exit from the EU, the obligations that Spain assumed in 1986 to allow for free circulation of persons (and, therefore, to renounce its power, recognised by the Treaty of Utrecht to close the land border with Gibraltar at its discretion) would cease to exist.

The biggest short-term worries are over issues of trans-border mobility, joint use of the airport, and fiscal control of the economic activities and illicit traffic that are encouraged by Gibraltar’s peculiar situation. Spain would like to eliminate certain tax, customs and business privileges while respecting the interests of the citizens of the Campo de Gibraltar, the border zone Andalusian area which is highly economically interdependent with Gibraltar and very vulnerable to any changes affecting this border. Madrid and London both accept the idea of special negotiations to deal with these matters (even with the participation of the Gibraltar authorities) and that they should be undertaken on the margins of those pursued by the Commission and London (or in parallel with them, but only assuming the mentioned Spanish right of veto).

The denouement of Brexit should not be allowed to lead to a closing of the border –for numerous reasons, and particularly human ones– although this daily crossing of approximately 13,000 people could begin to fall under more Spanish control. Conditions could be established for those from Gibraltar to access residence or work permits in Spain, but here the negotiations will need to have a reciprocal character to facilitate the

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fluid daily transit across the Line of some 8,000 Spaniards (and thousands of other foreigners) who work on the Rock but live in the Campo de Gibraltar. In the same way, ownership by physical or legal persons from Gibraltar of properties and businesses in Spain could be regulated in a negotiated manner. The Spanish government is also asking for the joint management of the airport so that it will not have to exit from the Single European Sky. A new customs regime will need to be negotiated, and further attention must be given to the fact that the colony will no longer be subject to EU environmental, social and fiscal regulation (which, in any case, has been very advantageous for the Rock and applied in a very relaxed manner). The two sides will need to reconfigure—and fit together within the context of Brexit—many existing ad hoc agreements between the UK and Spain on police and judicial issues and on the protocols for each side to use when air or maritime space is considered to have been violated.

The state of the bilateral relationship at the outset of such negotiations is not especially bad. The Spanish Minister of Foreign Affairs has publicly praised the Gibraltar authorities for their predisposition to cooperate on tax fraud and contraband tobacco traffic. In such circumstances—and thinking beyond the concrete, practical aspects of the border issues mentioned above, which generally have a short-term impact—does it make sense to take advantage of Brexit to propose the possibility of an agreement on the final status of Gibraltar and the many existing related territorial controversies (including the possibility of Spain regaining the Rock and the city ceded in the 18th century, the isthmus occupied in the 19th and the maritime and air spaces in dispute since the 20th)?

The previous Spanish Foreign Affairs Minister, José Manuel García-Margallo, was active on the question of Gibraltar. In the spring of 2016 he linked the still uncertain Brexit to a near certain recovery of Spanish sovereignty over the territory. Nevertheless, the stance adopted by Madrid over the last year and a half has been more low profile. In the Brexit negotiations, Madrid has closed ranks with the Commission, but it has also demonstrated—as a consequence of the intense business and interpersonal relations between the two countries—a more agreeable and constructive attitude towards the UK. Spain has chosen to underline its higher interest in preserving the future bilateral relationship with London. With respect to Gibraltar, the message has changed: final status is not presented by Madrid as an objective to be negotiated this year or, even less so, as a pre-condition for dealing with the many other concrete issues. On the contrary, Spain has made explicit that while the recovery of sovereignty remains an aspiration, it is not on the agenda of these negotiations.

Nevertheless, Spain has taken advantage of the circumstance to renew the offer it floated more than 15 years ago for ‘shared sovereignty’. Despite the theatrical fuss of certain nationalist sectors in the UK and the apparently inflexible position of the local Gibraltar authorities, it cannot be denied that there is now a window of opportunity to

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2 The Minister of Foreign Affairs and Cooperation has recently published a paper that while not reflecting an official position does contain a detailed reflection on this issue, pointing to imaginative potential solutions to the question of sovereignty. See Magdalena M. Martín Martínez & José Martín y Pérez de Nanclores (Coords.) (2017), El Brexit y Gibraltar: un reto con oportunidades conjuntas, Escuela Diplomática, Madrid, www.exteriores.gob.es/Portal/es/Ministerio/EscuelaDiplomatica/Documents/coleccion%20ED%2023_para%20web.pdf.
resolve this contentious issue. Spanish diplomacy has preferred to highlight the idea that it does not desire to use the current circumstances to make a bid for its historical claim, but the conjuncture does raise the possibility. And it exists not because of any weakness on the UK side (which Spain would be advised not to try to take advantage of, given that it would not only be disloyal but also counterproductive, almost certainly producing a hardening of positions), but rather mainly because Gibraltar must face the prospect of soon leaving the Union against its will and interests.

This is to say that for Spain the question continues to have a middling level of importance, but its resolution is not seen as particularly urgent at this time. On the other hand, the importance, and urgency, for Gibraltar to resolve its new status and relationship with Europe is clearly apparent. This leads to the conclusion that it would be worth the effort to explore –before March 2019– the possibilities for a formula to allow Gibraltar to maintain a link with the EU via Spain. It goes without saying that this would be a complicated objective to achieve; but it is also true that, for the first time in many years, there is an incentive for Gibraltar's citizens to consider possibilities that they (and, obviously, Madrid and London as well) could accept so that all interests and stakeholders might gain. It would be an extraordinary dividend of Brexit, a process very likely condemned to provoke overall net losses, if it were to help resolve this long-standing conflict (that has neither victors nor vanquished). It might then also help to clarify and redefine the very necessary Spain-UK bilateral relationship to the benefit of the prosperity of Gibraltar and the neighbouring Andalusian provinces.

But how to do it? It is clear that the recent relaxation of Spain’s maximalist objectives – renouncing complete recovery of the territory– has helped a solution begin to emerge. Just after the 2016 referendum, Spain detailed for London a ‘joint sovereignty’ offer which distanced itself from the traditional Spanish position of claiming a full re-integration. The co-sovereignty proposal is organized around four lines: (1) dual nationality for Gibraltar citizens; (2) preservation of the current governing institutions within the framework of a broadly autonomous regime consistent with the Spanish constitutional system; (3) a special fiscal regime for the territory which is compatible with EU ordinances; and (4) a dismantling of the border (‘the line’).

Although Gibraltar voted to remain part of the EU and has a lot to lose from leaving it, it could take advantage of the opportunity for this possible solution. The Spanish defenders of the proposal (and there are British supporters as well) have stressed that the offer is generous: (a) Gibraltar would retain all the advantages that it enjoys through its link to the UK, including citizenship, military presence and a special connection with the UK in all respects; (b) Gibraltar could remain in the EU and maintain the special tax regime which has contributed so much to attracting business and generating prosperity; and (c) the territory could resolve a number of conflicts with Spain (including the UN decolonisation demand, territorial waters, the isthmus and the airport, border control and illicit traffic). All of this would come in exchange for the apparently modest price of raising

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the Spanish flag alongside of the British flag and allowing for the idea of forming part of two states in those concrete competences not fully decentralized to Gibraltar’s self-governing institutions.

In effect, it is a modest price; but Gibraltar is loath to pay for the double symbolic cost of having to: (1) rectify a decision already taken by the referendum of 2002 to reject this solution in a preventive way; and (2) also accept a new sovereignty which, although it might be shared, Gibraltar does not want (especially if the proposal from Spain comes in the form of a long transition formula with no definitive solution). As such, co-sovereignty could be a dead letter on arrival. However, it is also clear that as long the legitimate aspirations of Spain are unfulfilled, the controversial issue will remain alive. What is more, it will be impossible for Gibraltar to maintain any access to the Internal European Market if Spain views it as even minimally damaging to its interests. Therefore, on the foundation of co-sovereignty, some authors have proposed imaginative variations on the theme that might diffuse such symbolic significance for Gibraltar.

There are certainly many existing examples in the current EU (even specific cases which are linked) demonstrating that flexible solutions are possible when an orthodox conception of state sovereignty over a small territory is not feasible. None of these examples by themselves provide the key to an acceptable agreement for all sides in the Gibraltar case, but an appropriate combination of them could serve as inspiration.

The first interesting case is found in two enclaves in Switzerland (the German, Büsingen, and the Italian, Campione d’Italia, both about the same size as Gibraltar in surface area). These enclaves show that co-sovereignty (either *de facto* or *de jure*) can be peaceful, viable and successful. In fact, Bern does not exercise legal sovereignty over these two portions of the EU, but their geography leads them to belong to the Swiss customs union (at the border, only products and vehicles, but not people, are controlled), which also covers other areas like health care or sports. In any case, most public goods and services (for example, the currency, policy, education, telephone, postal services and public transport) are shared with either Switzerland, Germany or Italy.

A second reference would be three small British islands (the Isle of Man and the Channel Islands of Jersey and Guernsey). These small island territories are quite autonomous, although not independent; they do not formally belong to the UK, but they are linked to it through their status as ‘Crown dependencies’. This circumstance allows these islands to be connected to a Member State (the UK) that is, furthermore, the responsible authority for a specified series of competencies (mainly security and foreign affairs). In this way, these territories have remained linked to European integration since 1973—but all of this would end the moment that Brexit arrives—. Therefore, there is a precedent for a small territory to form part of the EU—even without belonging to, or formally integrating into, a Member State—if it is connected to the monarchical Head of State of a Member State which exercises certain international functions on behalf of the territory.

Andorra and its two (French and Episcopal) co-principalities could also contribute a third and final ingredient to this imaginative solution. To the above examples of islands connected to a Member State not by belonging to it but rather through the shared institutions of a monarchy, the Andorra model adds the additional possibility that the link
to such a monarch might be dual. In Gibraltar’s case, it could belong jointly to the British and the Spanish Crowns. In short, Gibraltar would become a very autonomous special territory linked to two crowns—and one of them held by the King of a Member State that will not be abandoning the EU in 2019. With such a solution, instead of raising the Spanish flag and emphasising the idea of shared sovereignty, the allusion to sovereignty would be diluted, and the British flag would still be flown (as it does still on the Isle of Man and the Channel Islands). Of course, the European flag would remain, together with that of Gibraltar, given that the territory would not leave the EU because of its special relationship with Spain. It would become a Spanish district where the Gibraltar residents vote in the European Parliamentary elections, but it could maintain its own current jurisdiction such that the local legislative, executive and judicial powers would be responsible for the application and enforcement of EU law.

In any event, Spanish ascendancy over the territory should not be limited to merely providing a formal cover for Gibraltar to remain in the Internal Market, or just hanging the picture of King Philip VI next to that of Queen Elizabeth II in the premises of official Gibraltarian government institutions. More than a mere appearance, this agreement should incorporate effective action, undertaken together with the UK, in specific basic competencies with clear international reach and relevance. In this way, Gibraltar would continue to be considered by the EU law as a ‘European territory whose foreign relations are the responsibility of a Member State’.

The functions to be shared between Madrid and London would include the international policies of the territory, the control of external borders, immigration and asylum, and defence. This would also include the military base that would continue to be reserved for British priority use, although not exclusively so. The agreement could be like the existing arrangement for the joint use of Rota by Spain and the US, although it might rely on a different legal and institutional model. Dual nationality could also exist to allow Gibraltar residents the advantages of European citizenship. In the rest of issue areas in which the Gibraltar authorities would not be self-sufficient, practical solutions—like those used in the case of the two Swiss enclaves mentioned previously—could be applied. There could be a special postal service embedded into both Spanish Correos and Royal Mail, local number plates with the European flag, healthcare provision in Spain, possible Spanish police action in Gibraltar, access for youth to the educational and university systems of both countries, sports clubs that could be fully integrated into the competitive play of the preferred country (with an unrestricted national soccer team) and both the euro and Sterling would be accepted legal tenders. Of course, the airport would be

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5 In fact, both sides have considered some of these flexible and pragmatic solutions. For example, in the 2006 Cordoba agreements on the joint use of the airport, some European models were studied, like the Basil-Mulhouse-Freiberg airport in French territory (some 6km from Basil and 75 from the German city).
shared, there would be no control of persons at the border and the special tax regime could be expanded to incorporate the Campo de Gibraltar.

The agreement would no doubt have temporary transitional elements, but it would be an agreed-upon, indefinite and staged formula, perhaps beneath EU supervision to prevent or resolve disputes between the parties. This would convert the territory, in a permanent and stable way, into something like a ‘City of the Two Crowns’. It would be a city linked to the Kingdom of Spain but not integrated into the provincial or autonomous territories under Spanish jurisdiction. This would require two broad political consensuses (both difficult to achieve), but the subsequent developments of such a solution would be fruitful. The result for Gibraltar and the municipalities of the Bay of Algeciras would be especially beneficial for their prosperity and stability, while the bilateral relationship between Madrid and London in the post-Brexit era could be launched without the problems stemming from this controversial issue. On the contrary, the relationship would be significantly reinforced by this institutional link at the highest level.

Conclusions

Brexit demands a resolution for the future framework of Spanish relations with Gibraltar, but it also requires the introduction of new ingredients that might favour a definitive solution to the contentious issue. In the short run it would be convenient not to contaminate the general Brexit negotiation, avoiding potential distractions produced by the noisy reaction of some British nationalist sectors. The Spanish government has astutely confirmed that it does not intend to take advantage of the Brexit negotiation to try to resolve this sovereignty dispute, or to involve the EU. But given the legitimate objective to modify the conditions established in the 1970s and 1980s – when the UK was a Member State, and which Spain had to accept at the moment of its own entry to the EU – this is nevertheless a propitious moment to explore imaginative ideas for dealing with this long-standing controversy.

The possible solution presented here offers basically the same substantial components of ‘co-sovereignty,’ only the symbolism involved – which is difficult for Gibraltar to fully accept – would be softened and diffused. Of course, the idea we have articulated here develops ideas already forwarded by other specialists, and it does not have to be the Spanish position. Instead, it should be used to focus thinking on a possible negotiation path that might be acceptable all concerned. Not being a formal starting proposal, but rather a hypothesis with respect to a desirable end-point, this proposal obviously depends very much on the special opportunity presented this year. Because this window of opportunity is small and of limited duration, we should not fool ourselves into believing that success is especially likely, or even probable. Perhaps there is simply not enough time to develop for the required mutual confidence, particularly considering the distance currently separating the two sides. The rigidity of Gibraltar’s own position on the issue might also quickly erode motivation in Madrid and London to seriously attempt such a

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6 Interestingly, the current chief of international legal affairs at the Ministry of Foreign Affairs and Cooperation, José Martín y Pérez de Nanclares, indicates his full agreement that such imaginative solutions as these ‘do not have to be very different from the proposal Spain has made. Clearly it can at least serve as an object for negotiation’. See his chapter ‘Brexit y Gibraltar: la soberanía compartida como posible solución de la controversia’ in the previously cited book (p. 157-175).
solution. This being the case, if the local authorities pass up the Brexit moment to resolve with this question, the margin for the possible success of a flexible and pragmatic solution like that proposed here will also soon disappear. In that case, Spain would retain its historical aspiration to regain sovereignty over the Rock –even if temporary, or indefinitely shared– and to fully re-integrate Gibraltar within Spain’s territorial structure. In the meantime, Gibraltar would have to leave the EU and the Internal Market at the same time as its Crown metropolis.