

ADVOCATE-GENERAL

GIBRALTAR OPINION 2004



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Advocate-General



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✠ A CASE IN HISTORY

Once upon a time, Spain transferred sovereignty over Gibraltar to England as part of a comprehensive peace settlement. The Spaniards swapped land for peace, surrendering sovereignty not only over Gibraltar but also over various other Overseas Territories. In return, it was saved further humiliation and losses. On balance, the transfer may not have been such a bad deal, as Spain was unable to hold control over those territories, anyway.

While Spain eventually got over losing its various other possessions, Gibraltar has remained an anomaly, a thorn in the eye, a bump on its chin. The Rock is attached to Spain proper by the disputed isthmus, and having a piece of Britain right on its doorstep is apparently a bit more than Spain has been able to stomach. Quite understandably so! Apparently, it has come to regret its decision to surrender sovereignty over Gibraltar. Stopping short of renegeing on its commitment, it has taken into use a number of measures – some legal, others political, yet others outright controversial and unofficial – to pressure Britain and the international community into reconsidering the issue with a view to transferring sovereignty back to Spain.

In all fairness, I should like to note at this juncture that the 1713 Utrecht Treaty does clearly stipulate that sovereignty would revert to Spain were Britain ever to relinquish its sovereignty over Gibraltar. Diplomatic pursuit of such objectives would thus seem perfectly legitimate within the framework of international law accented upon the Treaty. Furthermore, I should like to point out that international law does grant Spain some leeway in deciding how to handle its state-to-state relations vis-à-vis British Gibraltar as far as controlling border crossings, international communications and

various other issues directly affecting the Gibraltarians.

However, it remains highly questionable whether Spain's alleged "petty harassment" of the people of Gibraltar can be deemed legally or morally defensible. While the British government and the Gibraltarians are in agreement that petty harassment has remained a widespread phenomenon to this day, the official position of the Spanish government remains that no deliberate harassment is occurring and that the various outstanding issues require some give-and-take. In my view, it clearly would be helpful if someone of sufficiently high stature and whose impartiality is beyond dispute were to conduct an independent and comprehensive investigation of any alleged incidents of petty harassment.

For the purposes of writing this Legal Opinion, it suffices that Britain, Spain, the government of Gibraltar, the European Union, and many others are in agreement that the two countries do not enjoy fully normalized state-to-state relations vis-à-vis Gibraltar and its residents. A number of important issues remain unresolved and require urgent attention, as they cause practical inconvenience, are financially burdensome, and hamper Gibraltar's economical development. Not only the Gibraltarians themselves but also their trading partners, tourists, and others suffer the consequences of this administrative and political quagmire. In any event, it seems peculiar that two powerful nations, Britain and Spain, who are perfectly capable of managing their complex relationship, have not seen fit for the past 300 years to fully normalize their state-to-state relationship vis-à-vis Gibraltar and its residents.

❖ ROCK SOLID AND EXPOSED

A number of potent forces were in play in 1969, when General Franco sealed off Spain's international border with Gibraltar while seeking UN recognition of the Spanish claim to sovereignty over Gibraltar. The Gibraltarians found themselves between a rock and a hard place: Physically isolated from the world and unable to predict the final outcome of this political stalemate. Certainly, the situation was not only awkward but unsustainable. To avoid becoming politically isolated as well, the Gibraltarians systematically accumulated evidence of Spanish wrongdoing, mobilized, and made every effort to secure the continuous full backing of the British government.

While the Gibraltarians were feeling exposed as a consequence of this territorial dispute, their plight and their vulnerability had suddenly become clearly visible to the world. As a result, Britain found itself under simultaneous pressure from Spain, the Gibraltarians, and world opinion. On the other hand, any British governor to Gibraltar would have to invest an immeasurable amount of faith in his government's commitment towards the Gibraltarians while also taking care not to sow seeds of disloyalty towards Britain among the local population. The incumbent governor thus

played a pivotal role in steering Britain and its colony through the hidden reefs during rough times. The governor would just have to ask the locals to remain patient, explaining why they had to wait for weeks or months for reinforcements from Britain. This policy would actually imperil the locals, who depended entirely upon the British government for their security, even though Britain was incapable of fulfilling all of their material needs.

While the border eventually reopened in 1985, the position in which the Gibraltarians find themselves remains particularly vulnerable due to Gibraltar's immediate proximity to the Spanish coast. It would hardly make any sense to closely monitor Spanish fleet movements, nor is there time to spot any deployments closely by the borderline. Gibraltar's status as a British colony is in some respects less tenable compared with other British overseas possessions, and Spain's negative attitude has left little doubt that the present arrangement would collapse within hours were Britain to formally withdraw its security guarantees or fail to make good on its promise to ensure continuous British sovereignty over the peninsula of Gibraltar. Continuous British presence in Gibraltar thus requires: (i) a firm political commitment; (ii) clear and unambiguous diplomatic signals; (iii) adequate institutions for local governance, (iv) sufficient physical assets such as garrisons, soldiers, and military equipment; (v) potentially, deployment of the British fleet, army, and airforce.

Permanent military infrastructures are in place, and regular high-profile visits by British fleet vessels serve as reminders that Britain remains fully committed towards Gibraltar, which it would defend as if it were Britain proper. However, a considerable amount of tension is omnipresent amongst the local population despite the repeated reassurances by various British governments and the optimism expressed by various incumbent British governors. The anxiety level will shift ever so slightly with shifting political trends, rising high at the slightest sign of conflict, then climbing even higher during discussion or negotiation between the two governments involved.

✠ POLITICAL BACKDROP

Gibraltar's strained relations with Spain neither began nor ended with General Franco. As far as the Gibraltarians are concerned, various Spanish governments have consistently – albeit to varying degrees – been taking a number of measures skillfully designed to cause discomfort and inconvenience. Supposedly, such obstacles – commonly referred to as “petty harassment” – shall serve as a constant reminder that: (A) Spain does not want a British colony as its neighbor, (B) Life in the British colony is never going to be perfectly easy or smooth as far as the relationship with Spain is concerned; (C) Remaining a British colony is hardly a viable option for Gibraltar; (D) Various obstacles could be removed temporarily or permanently were Britain to open substantive negotiations with Spain about the Gibraltar sovereignty

issue.

Their perception, rightly or wrongly, of having been systematically bullied and harassed by shifting Spanish governments in a cynical attempt to persuade Britain to relinquish its sovereignty has made the Gibraltarians view Spain with some resentment and deep distrust. These sentiments constitute an important historical fact, insofar as they have made it exceedingly difficult to make the Gibraltarian people view Spanish sovereignty as being in its best interest.

While acknowledging petty harassment as a real problem, the consistent position of various British governments has been to urge Spain to remove any obstacles and to contribute to a full normalization of the relationship. At the same time, Britain has upped the ante by taking various political countermeasures such as the referendum it once held (1967) in which the Gibraltarians overwhelmingly expressed their desire to remain British, cementing the impression that Gibraltarians are vehemently opposed to any changes of Gibraltar's sovereignty status. Furthermore, Britain has been reacting domestically by enacting legislation to the effect that Britain will never relinquish its sovereignty over Gibraltar against the wishes of the local population, essentially giving the Gibraltarians a veto over the matter.

Ironically but unsurprisingly, the various Spanish political measures and British countermeasures have produced local sentiments – i.e. antagonism against Spain and a strong feeling of patriotism towards Britain – that would become a stumbling block at a time when Spain and the U.K. were, at long last, ready to make an effort in earnest to overcome all their differences while sharing sovereignty as a semi-permanent solution to the Gibraltar sovereignty dispute.

✠ SHARED SOVEREIGNTY

Recent Spanish attempts to regain control over Gibraltar are in some ways strikingly similar to those made by many of its previous governments. Spain's interests are obviously of a long-term and sustained kind, its positions have been developing over a long period of time, which have offered numerous challenges and therefore required a flexible approach by shifting British governments.

Had Britain been less sincere, it would perhaps have relinquished its sovereignty over Gibraltar at some point, but it has remained simply because it has considered its continuous presence to be in its long-term interest. In view of the Utrecht Treaty and Britain's firm commitment, it would be tempting to conclude that so it goes, the maps were drawn ages ago. Viewed through the prism of history, various Spanish challenges and obstacles to continuous British sovereignty could be brushed off as essentially amounting to nothing but short-term adventurism. History has a way of dealing with such phenomena, insofar as it tends to reward those who stay in for

the long haul. Notions of sovereignty run somewhat deeper than expediency.

Accordingly, it was considered unlikely that Britain would go to the point of surrendering sovereignty over Gibraltar to Spain. At least, that had been the prevailing view until the British Foreign Secretary, Mr. Jack Straw, gave a speech to parliament in which he basically said that the two nations had agreed in principle on shared sovereignty as a suitable, workable and sustainable model for handling the Gibraltar issue. The statement, which has not subsequently been retracted although it was naturally met with considerable opposition, obviously constitutes a milestone insofar as it marks a breach with the traditional British position of claiming full sovereignty into perpetuity by referring to the provision set forth in the Utrecht treaty as confirmed in subsequent treaties.

Previous British governments had been strong backers of the local population, whereas the Blair government would come to view the Gibraltarians' patriotism with mixed emotions, something incompatible with the negotiation procedures established jointly by Britain and Spain. The current situation is distinctly different from anything seen previously during the prolonged sovereignty dispute, insofar as the Gibraltarians find themselves at odds with the British government and its revised policy concerning Gibraltar's future status. This makes the present situation such a compelling case for conducting further analysis of the entire Gibraltar sovereignty issue.

- Gibraltar is a British colony (also referred to as a "territory," "dependent territory" or "British Overseas Territory"), thus subject to EU law with some exemptions and modifications.
- The Brussels Process (initiated in 1984 by a joint communiqué) is a roadmap for how to normalize relations between Spain and UK with respect to Gibraltar by finding a mutually acceptable solution to the lingering dispute over Gibraltar's future legal status as well as various other outstanding issues (such as border delays, telecommunications infrastructure, implementation of an agreement on restoration of sea ferry links, use of airfields and airspace for military/commercial purposes, military movements and communications).
- Talks have been on and off, re-launched in July 2001 with a joint communiqué being issued. From the onset, a comprehensive discussion on all outstanding issues including sovereignty was envisaged.
- The British Foreign Secretary made a statement to the House of Commons on July 12, 2002, which included references to various principles including shared sovereignty. A joint declaration – a statement of intent by both governments – was issued, to be succeeded by further detailed negotiations including a representative from Gibraltar's government about a comprehensive package, including a new draft treaty, based on the principles set out in the joint

declaration.

- This approach was overwhelmingly rejected by the people of Gibraltar in a referendum held on November 7, 2002. As a result, the negotiations are stalled, and the Spanish government remains unwilling or unable to establish normal, peaceful and harmonious bilateral relations with Gibraltar. Military issues, border controls issues, telecommunication issues etc. remain unresolved.

Gibraltar has enjoyed extensive self-rule since 1964 and has its own constitution, its own Supreme court, a governor (principally a representative of the British government), and its own parliament headed by a Chief Minister. Although Gibraltar has no formal representation in the British political system, the Foreign Affairs Committee of the House of Commons has taken a close interest, issuing five reports in four years.

A House of Commons resolution exists to the effect that “any constitutional change can only be done with the consent of the people of Gibraltar” (the 1969 Constitutional Commitment). As for talks under the Brussels Process, a “formula” was expressed by the British Foreign Minister in 1997 to the effect that no agreement would be made during talks without the express consent of Gibraltar’s Chief Minister. As Gibraltarians see it, this principle was abandoned, as the joint declaration was issued without the participation or consent of the Gibraltar government (the so-called “done deal” approach).

However, before one jumps to the conclusion that Mr. Straw’s speech is symptomatic of inconsistent policy making by Mr. Blair’s cabinet, one ought to take into account the several political and legal documents which are in existence and which envisage a dialogue between Britain and Spain towards a resolution of the Gibraltar issue.

If one wishes to get the full picture, one should also keep in mind that states are themselves subject to gradual transition, transformation, perhaps even complete redefinition of who they are. Spain and Britain constitute no exception in this regard, as they have gone from being sovereign states within the traditional definition to being members of the European Union, which develops common policies and positions and expects certain levels of coordination amongst its member states.

The current predicament over Gibraltar may thus be viewed as a confrontation between two conflicting approaches to sovereignty: A traditionalist, conservative approach and a contemporary, pragmatic approach. As Britain and Spain – two former colonial powers – are struggling to redefine themselves within the current context of the European Union and the NATO alliance, their previous conflicts no longer fit to how they want to profile themselves, thus their attitude towards one another and their behavior towards the local population at Gibraltar is undergoing a rather rapid transformation. This may well lead to a complete redefinition of their

internal relationship and, ultimately, a fundamental change of Gibraltar's international status.

As a last resort, Gibraltarians claim that their right to self-determination would preclude Britain from relinquishing sovereignty against their will, and that they would be willing to seek an advisory opinion from the International Court of Justice on the issue of whether the people of Gibraltar enjoys the right to self-determination and whether this right may be curtailed by the Utrecht Treaty, if still valid. This right should extend not only to substance but also to procedure, thus giving the locals a veto over negotiations. The Gibraltarian people's right to self-determination is purportedly derived from its colonial status under the UN charter.

✠ THE NATIONAL INTEREST

Some observers note that the concept of shared sovereignty is here to stay, and the arguments speaking in its favor are by now commonplace: The Spanish government will finally be satisfied (for the time being), the British government will remain as dedicated and engaged as ever, and the Gibraltarians will be entitled to retain their British citizenship while continuing to enjoy their traditional lifestyles. As Spain, Britain and the people of Gibraltar become a holy trinity, all outstanding issues can finally be resolved. As a consequence, Gibraltar will be able to fulfill its potential as a center for trade and finance, and its people will prosper and enjoy better lifestyles. Shared sovereignty is the best solution, which is in everybody's interest.

The feasibility of shared sovereignty remains an issue, however. As the negotiations were never finalized, the actual consequences of shared sovereignty are hard to predict and details sketchy. Several concerns need to be factored in, such as: The weight of history, principles and traditions; due process considerations including the need for transparency, legitimacy, and continuity.

Whereas the people of Gibraltar has already made up its mind by overwhelmingly rejecting the concept of shared sovereignty in a referendum, shared sovereignty remains the official British policy. What ultimately is likely to determine Gibraltar's fate is the British perception, rightly or wrongly, of its own national interest. To be effective, any advocate aspiring to contribute to the outcome should therefore focus upon whether shared sovereignty is in the British national interest, a complex analysis allowing many different concerns to be factored in, including:

- Britain's credibility vis-à-vis the local population, its domestic public opinion, and public opinion abroad;
- Britain's relationship with various states and international institutions;
- Wider ramifications for Britain's other offshore facilities;

- Britain's relationship vis-à-vis Spain and the European Union;
- Britain's Strategic interest relating to military and commercial matters;
- Handling of citizenship for future generations of Gibraltarians;
- Gibraltar's future economical significance and its role within the British economical system;
- Respect for legal and moral values (showing disdain for recognized principles of international law and ethics would hardly be in the British national interest);
- Respect for Gibraltar's cultural heritage and its history.

In order to prevent political considerations of expediency, convenience and short-term manageability from playing a disproportionate role in the future, the debate about what constitutes the long-term British national interest ought to weigh in the above factors. While improved relations with Spain is clearly in the British national interest, it remains to be seen whether shared sovereignty would actually work, and the risks associated with possible failure ought to be factored in as part of the equation. Advocates opposed to shared sovereignty could also warn the British government that taking any further steps in that direction might inflict irreparable damage upon its credibility and thus compromise its ability to conduct effective foreign policy over Gibraltar and its other offshore territories and possessions.

❏ THE END OF PERPETUITY?

For those perpetually inclined, the situation is obviously deteriorating. The shared sovereignty concept as expressed in the joint declaration keeps hanging over their heads in spite of the concept having been rejected in a referendum. As has previously been pointed out, the joint communiqué issued by Spain and Britain marks a novel approach and fundamental change of policy to the Gibraltar sovereignty issue by the British government. Although the approach was subsequently rejected in a referendum, the British government repeating its prior commitment not to alter Gibraltar's status without the express consent of the people of Gibraltar, the official British position – its declared policy – now remains one of shared sovereignty. This stands in stark contrast to its previous position that no policy changes would occur under the Brussels process without the prior express consent of the Government of Gibraltar.

Accordingly, perpetual doesn't mean quite what it used to mean. For those perpetually inclined, it hasn't quite escaped one's attention that once things taken for granted enter into the fray of public debate, they are likely about to change for better or for worse. Simply put, issues once raised in public debate usually don't go away.

Something must be done to satisfy an insatiable appetite among those progressively inclined.

Furthermore, Gibraltarians themselves argue that Spain and Britain have failed to take due account of their right to self-determination. The right to self-determination presupposes that the colonial power will listen to the voices of the locals, not forge ahead in the hope of being able to bully it, breaking its will by arguments such as: “These issues will not go away.” It has been argued that a shared sovereignty deal is not just politically inopportune at the moment, but quite frankly unenforceable. While the former is a political problem, the latter is a legal issue.

Legally, the implications of shared sovereignty require an understanding of the concept of sovereignty. This becomes a matter of self-determination versus national integrity. The former principle essentially means that the area’s future should be decided by the people who live there, whereas the latter principle takes into account that any area in proximity to a nation state is bound to have implications for that state and therefore may give the state a legitimate right to seek full integration, despite the self-determination principle. In case the national integrity principle would lead to an outcome that is incompatible with the self-determination principle, this would lead to a perceived need for some kind of opinion changing or even manipulation process, where the involved states and institutions have to deal with people’s emotions and the humanitarian aspects of any change of status, indicating clear subordination of individuals to the interests of the nation state.

It is ironic that Gibraltar, in spite of its small size, is in many ways symptomatic of the ability of many different cultures – both religious and demographic – to coexist peacefully. Yet, this apparently harmonious lot is confronted with exterior tension and pressures. Will the process reveals some cracks underneath the surface of unity, cracks that may make them vulnerable to exploitation, or rather cracks that someone wanting to split them could try to exploit, although previous attempts to do so have been manifestly unsuccessful? – hardly, the referendum speaks for itself!

Even perpetuity may not be exactly what it used to be. Spain and Britain had envisaged a “three chairs, two flags” format, where the government of Gibraltar should participate in negotiations on an equal footing without being bound by anything until a comprehensive package had been agreed upon. While seemingly willing to accept the “two flags” format in principle – i.e. the local government of Gibraltar would be part of the British delegation – the government of Gibraltar refused to participate for various other reasons. Notably, one found it unacceptable that Gibraltar’s future sovereignty status was to be included into the negotiations based upon the concept of shared sovereignty (“done deal approach.”) One may thus say that the people of Gibraltar currently enjoys a lesser level of comfort, tranquility and happiness than what was previously the case. It has been trying to exist between

certain guarantees, now it is exposed to the changing winds.

Perhaps as an afterthought, the government of Gibraltar has taken the position, with reference to the right of self-determination, that any future negotiations should exclude the question of sovereignty. Evidently, the joint position of Spain and Britain is incompatible with the approach to future negotiations which Gibraltar deems acceptable.

We have noted with some concern that the Gibraltarian people is no longer satisfied merely to refer to the perpetuity clause in the Utrecht Treaty, as they want to go one step further and call upon the UN to provide them with the so-called "right to self-determination." One might then ask why Gibraltarians seemingly are no longer content with that security which the Treaty provides for combined with the constitutional guarantees that Britain has issued and which has subsequently been reaffirmed time and time again. It would seem that the Gibraltarian position is a defensive one, a last resort, as Britain and Spain have agreed in principle on shared sovereignty and thereby put Gibraltar's government and its people under considerable pressure. By claiming their right to self-determination under the UN charter, Gibraltarians are essentially saying that they no longer feel comfortable under the UK umbrella and therefore have begun looking increasingly toward the international community for support.

The right to self-determination is a progressive type of principle which goes well beyond that which is contained in the Treaty and which has hitherto provided the legal fundament for Gibraltar continuously belonging with Britain. By including such a principle, whether this ultimately proves justified or not, the Gibraltarians have as a matter of fact taken certain chances insofar as they have introduced into the discussion a new component, the total effect of which yet remains to be seen.

The political and legal risks and opportunities associated with this strategy should be further examined. It should be considered, for instance, whether the Gibraltarians – more or less deliberately – may be headed towards a claim for statehood or other forms of far-reaching independence. It should be considered how the claim for self-determination, as it is increasingly being expressed in public and becomes a part of the agenda, will affect Britain and Spain as they try to cope with this issue. Does it, for instance, seem to amount to a denouncement of the perpetuity clause as this allows for the possibility that Gibraltar would revert back to Spain were Britain to relinquish its sovereignty.

No opinion by the Advocate-General is final, as we may at any time revisit an issue and amend or update our prior findings. ■