

Emerging from the Shadow – Legislative Drafting in Gibraltar

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Abstract:

The topic “the role and efficacy of legislation” is considered in the light of the drafting experience in Gibraltar (up to 2006) and in particular in the light of three key factors namely, drafting under a colonial constitution, membership of the European Union and the existence of a sovereignty claim.

Introduction

During the CALC conference in Hong Kong a number of delegates expressed an interest in legislative drafting in Gibraltar. This paper sets out the context in which drafting has been undertaken in Gibraltar, particularly in terms of the conference topic on the role and efficacy of legislation. It considers this from the perspective of drafting under a colonial framework up until the advent of our non-colonial 2006 Constitution.

The drafting complement presently comprises 5 full-time legislative counsel. These are supplemented by external legislative counsel whom the Government engages for specific assignments. These may bolster the complement by some 3 or 4 persons

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at any given time. The community which legislative counsel serve consists of roughly 30,000 residents, about 7,000 frontier workers and several millions of tourists. Whilst compared to other jurisdictions this may seem to be a generous complement, as this paper develops the reasons for have such numbers will become clear.

Prior to launching into an examination of the drafting issues I feel obliged to set out at least some of Gibraltar's history, since it is crucial to understanding the development of drafting in this jurisdiction.

Geographical legacy.

For those that are not familiar with the territory, Gibraltar (or 'the Rock') is a limestone outcrop that lies at the southern tip of the Iberian Peninsula. Its dimensions are miniscule: 2½ x ¾ miles (1.875 square miles or roughly 6km²).

Gibraltar is itself a peninsula, which at its northernmost end presents a defiant and imposing 1,300 foot cliff that tapers to a southern point projecting into the Strait of Gibraltar. Across the Strait, in Morocco, lies the mountain Jebel Musa, or the other Pillar of Hercules.

Early settlers

The earliest inhabitants were prehistoric, as evidenced by the Neanderthal remains that have been unearthed over the years. Interestingly, there is evidence to suggest that it may have been their last stand in Europe.² In 711, the Rock served as the landing point for the conquest, and ensuing 800 year Moorish occupation, of Spain. The Moors were the first modern humans to settle the Rock. Their legacy consists of various fortifications and associated infrastructure some of which remains to this day.

The Moorish occupation of Gibraltar was followed by a Spanish period of occupation. However, harsh conditions on the Rock meant that, whilst it was important as a fortress, it never really prospered as a Spanish city. Paradoxically, with Spanish controlled ports on either side of the Strait of Gibraltar, the Rock's strategic value declined and this was mirrored in the population that succumbed to the pressures, including disease and attacks by the Barbary pirates.

² C Finalyson, *The Humans Who Went Extinct* (Oxford University Press, New York: 2009).

Establishment of British Rule

By comparison to the 8 centuries of Moorish occupation, the Spanish occupation of Gibraltar was comparatively short-lived (1462-1704). In 1704 an Anglo-Dutch fleet captured Gibraltar in the War of the Spanish Succession. British title to Gibraltar was recognised by the Treaty of Utrecht of 1713, which formally ceded Gibraltar to the English crown in perpetuity. For the next 306 years a British flag has crowned the summit of “The Rock”.

Perhaps one of the most distinguishing features between Gibraltar’s history and that shared by other colonised territories is that there was no native population to colonise. The Spanish inhabitants, in expectation that the invading forces would be repulsed, migrated to a settlement in the Spanish hinterland and effectively gave the Anglo-Dutch forces vacant possession.

Although there was no subjugated population in the more traditional sense, the establishment of British rule on the Rock was for the majority of the ensuing years dominated by a British military presence. In common with other small possessions, society was organised according to the strict hierarchy of the period. In Gibraltar military figures dominated and civilians were subservient to their needs.

The early days of British rule must have been harsh. Arable land was virtually non-existent and fresh water in limited supply. Sanitation was poor and several epidemics afflicted the population. That said, a fair number of civilians settled in Gibraltar. These consisted of a number of expatriates from the Motherland and other Mediterranean cultures (principally Genoese, Maltese and Sephardic Jews) who saw opportunities for commerce. In time the Gibraltarian identity would be forged from these peoples.

Drafting under a Colonial Regime

Given Gibraltar as a fortress and a garrison town and the other realities of 18th century life, it is not unexpected that legislation would have been the preserve of London and the Governor. Invariably its purpose was to promote and serve the interests of the British crown, and military.

Rather unsurprisingly therefore, a copy of Gibraltar’s laws (both primary and subsidiary) dating back to 1898 is a rather slender single volume. Its contents, even less surprisingly, concern themselves with matters such as the conditions regulating the import and export of goods such as coal and oil.

Although inroads were made to increase civilian representation in the decision-making process, the 1940’s and events arising from the Second World War proved to be a defining time for the Gibraltarians as a people. The entire non-combatant population was evacuated in 1941 to make way for the wholesale militarisation of

Gibraltar as part of the wider war effort. The despatch of women, children and those too old to serve in uniform to places like London, Northern Ireland, Madeira and Jamaica for the duration of WW II almost spelt the end of the Gibraltarian.

After the cessation of hostilities, the repatriation of the exiled civilian community was opposed by certain military figures who saw Gibraltar as simply a military fortress and the civilian population as a nuisance. Fortunately this kind of thinking was from very early on being challenged by events on the ground. In 1942 some men who had remained to defend the Rock from a possible Nazi invasion formed the first Gibraltarian political party: the Association for the Advancement of Civil Rights. Under the leadership of the late Joshua Hassan (later Sir) they mounted pressure on the authorities, eventually achieving the repatriation of all families by 1951. As the party grew in strength and popularity, its objectives turned towards securing more rights and equal rights for the Gibraltarians.

Legislation in the 1950's was enacted by the Legislative Council,³ having taken over from the City Council. The Legislative Council comprised the Governor, 3 ex-officio members, 5 elected members and 2 nominated members. For the currency of its life (1950-1969), it represented a further step in the increasing democratic accountability of the executive, but fell short of a fully democratic institution.

The 1960s

The 1960's opened a new chapter of Gibraltar's history and the events from that decade have repercussions that are felt to this day. They saw the question of Gibraltar's future as a British colony come under fire internationally. The Spanish government lobbied successfully in the United Nations for resolutions that effectively called for the denial of the right of self-determination to the inhabitants.⁴ The thrust of the Spanish argument was that that the inalienable right to self-determination was not an absolute right (notwithstanding its guarantee under the Charter). In their view it is in fact alienable in cases where there is a claim for the restoration of the territorial integrity of a state, i.e. Spain.⁵

The mood that had ushered in pro-independence movements across many colonies and newly independent states was also running contrary to the mood prevalent in

³ Under the auspices of the 1950 Constitution.

⁴ "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;" Chapter I Article 1(2), Charter of the United Nations.

⁵ Resolution 1515 (XVth assembly) 14.12.1960, Resolution 2353(XXII assembly) 19.12.1967, Resolution 2429 (XIII) 18.12.1968.

Gibraltar at the time. From the 1940's an increasing number of colonies were clamouring for and gaining their independence, but what Gibraltarians wanted were closer relations with the Motherland, albeit on a more modern and less colonial basis. Because the Gibraltarians in a sense colonised the British, and not vice versa, it is perhaps understandable that the solution sought by colonised peoples around the globe (independence) was not what the majority of the Gibraltarians sought. They strove for recognition as a people entitled to determine their future, but the international community was not prepared to sanction this. The effect of setting itself apart from the mainstream was effective stagnation in terms of advancement at the highest of international levels.

The 1960's also represented a turbulent time in terms of relations with Gibraltar's neighbour and claimant, the Kingdom of Spain. The fascist dictator General Francisco Franco pursued an aggressive foreign policy in an attempt to get the British Crown to give Gibraltar back to Spain. The resistance of the people of Gibraltar to his overtures (which included both harassment and the offer of Spanish citizenship) led to the imposition of an economic blockade which involved the withdrawal of the Spanish labour force, the cutting of telephone communications, closure of the land frontier and the suspension of all air and maritime links.

Having endured 14 military sieges in its British history, this 15th siege was dubbed "the economic siege" and marked an unabashed attempt to strangle the Gibraltar economy with a view to capitulation and reversion to Spain. The economic siege survived the death of the dictator and continued until Spain's accession to the European Economic Community forced her to open the land border in 1982, although initially only to pedestrians. Vehicular access was not permitted until 1985. Air links were not restored until 2006 and a ferry service between the two ports in the Bay of Gibraltar in 2009.

It must be noted that to this day, and despite being a member of the European Union and NATO, Spain both overtly and covertly pursues her claim. It is pursued in all manner of fora from the sporting to the cultural and political. Although it has sometimes succeeded, there have been notable exceptions, usually when Gibraltar is given a fair hearing.⁶

⁶ It has succeeded in blocking Gibraltar's membership of FIFA in the face of a ruling in Gibraltar's favour by the Committee of Arbitration for Sport, has blocked the membership of the Gibraltar Socialist Labour Party (political party) to Socialist International, but it has failed to stop the Gibraltar Kennel Club from becoming a full member of the international federation, to name but 3 instances.

The 1969 Constitution

In 1969 Gibraltar was granted a further constitution,⁷ which some have described as the sort that were granted to colonies prior to independence. The Constitution was prefaced by a preamble which contained the following:

Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.

This was regarded as guarantee against any sell-out and recognition of Gibraltar's right to determine their future, albeit subject to what HMG considered to be certain limitations.

The 1969 Constitution provided for a unicameral parliamentary system in the form of the House of Assembly ("the House"). The House consisted of a Speaker, two *ex-officio* members (the Financial and Development Secretary and the Attorney General) and 15 elected members. The Parliament was empowered to promulgate legislation for "the peace, order and good government of Gibraltar". An important limitation in the 1969 Constitution resided in the disallowance power that was exercisable by a Secretary of State in Her Majesty's Government.⁸ I do not have knowledge this power actually being used.

Under section 45 of the 1969 Constitution, the executive authority of the Government of Gibraltar vested "*in the Governor on behalf of Her Majesty*". The executive powers were further defined (curtailed) by the constitution. These limitations found expression in the term "defined domestic matters".⁹ Competence over non-defined matters, defence, law and order and foreign affairs were reserved for the Governor.¹⁰ This meant that Ministers' responsibilities were in practice

⁷ <http://www.gibraltarlaws.gov.gi/articles/1969-00R.pdf>

⁸ Section "37. (1) Any law to which the Governor has given his assent may be disallowed by Her Majesty through a Secretary of State."

⁹ Defined domestic matters

55. (1) For the purposes of this Constitution "defined domestic matters" means such matters as may from time to time be specified, by directions in writing, by the Governor, acting in accordance with instructions given by Her Majesty through a Secretary of State.

(2) Any question whether any matter is a defined domestic matter for the purposes of this Constitution shall be determined by the Governor, acting in his discretion, and the determination of the Governor therein shall not be enquired into in any court of law.

¹⁰ These are more fully set out in the despatch by the Foreign Secretary Michael Stewart to the Governor Sir Varyl Begg, G.C.B., D.S.O., D.S.C. of 23 May 1969:

limited to those assigned to them by the Governor, after consultation with the Chief Minister.¹¹

At this juncture I would recall that legislative counsel are public servants and that whilst it would have been normal for the responsibility for the civil service to be considered to be a purely domestic matter, the despatch by the Foreign Secretary to the Governor provided that “administrative responsibility for the public service generally should remain within the direct responsibility of the Governor.” This created a rather bizarre and, at least in theoretical terms, complicated arrangement, namely:

Civil servants will work to the Deputy Governor in respect of matters which remain within the direct responsibility of the Governor. In respect of defined domestic matters, which are the responsibility of Ministers, the civil servants concerned will work direct to the Ministers responsible. But when and where matters arise which overlap or appear to overlap both fields, there will need to be direct contact between the civil servants concerned and the Deputy Governor.¹²

I shall return to this point later on.

The product of the 15 member House of Assembly resulted in a Government consisting of 8 members and 7 in opposition. The numerical superiority translates into overwhelming power and a Government that could always deliver on its legislative programme.

This small detail had significant implications for the drafting of legislation as it meant that, whilst Parliament had the ability to scrutinise Bills, it was essentially

The Governor will retain direct responsibility for all matters primarily concerned with external affairs, defence and internal security, including the police, and for such matters as, by reason of their close connection with these matters, would most appropriately be placed under the day-to-day control of the Deputy Governor, the Attorney-General or the Financial and Development Secretary. Since everything which is not a defined domestic matter automatically remains within the Governor’s direct responsibility, it is unnecessary and undesirable to attempt an exhaustive definition of all matters retained by the Governor... <http://www.gibraltarlaws.gov.gi/articles/1969-00R.pdf>

¹¹ Assignment of business

48. (1) The Governor, acting after consultation with the Chief Minister, may, by directions in writing, charge any member of the Council of Ministers with responsibility for any business of the Government of Gibraltar (including the administration of any department of government) relating to any defined domestic matter.”

¹² Paragraph 7 of the Despatch, above n.10.

unable to block any legislation that carried the Government's favour. This fact both liberated and constrained legislative counsel.

On the positive side the legislative counsel is not exposed to the danger of having legislation blocked by a dissenting majority. Amongst other things this frees the legislative counsel to pursue drafting directions that may not otherwise be available, so long as the Bill carries the Government's blessing.

There are of course downsides which will occur whenever there is a feeling of infallibility.

European Union

Gibraltar has been a part of the European Union (formerly the European Economic Community) since 1 January 1973, having acceded at the same time as the United Kingdom by virtue of it being a European territory for whose external relations a Member State is responsible: see Article 299(4) of the Treaty.¹³ As explained, Gibraltar did not accede as a sovereign state in its own right and therefore it is not a "Member State" of the now styled European Union. Gibraltar's laws, however, have to comply with the obligations stemming from the EU as though it were a Member State because Gibraltar's legislature has responsibility for giving effect to EU obligations.

The Constitutional effects of the accession to the EU are reflected in the redistribution of responsibilities. The UK's *European Communities Act 1972* provides:

(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial Law (within the meaning of the *Colonial Laws Validity Act 1865*) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament...

This carved a niche out of the position in the 1969 Constitution given that the Foreign Secretary's despatch had clearly stated that "The Governor will retain direct responsibility for all matters primarily concerned with external affairs"

¹³ It is also a part of the European Economic Area (EEA) viz Article 126(1) of the Agreement of the European Economic Area that sets out the territorial application of the Agreement and states that "The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied, and under the conditions laid down in that Treaty."

(unless you subscribe to the view that membership meant that EU obligations were now internal affairs).

At this juncture it may be appropriate to take stock and summarise the legislative landscape. Drafting of legislation was undertaken

- (a) on the basis of the 1969 Constitution-
 - (i) having to have regard to the powers vested in the Governor;
 - (ii) having to have regard to the powers vested in the Government (defined domestic matters);
 - (iii) having to have regard to both (i) and (ii) where there was an overlap in responsibilities;
- (b) for the purposes of complying with EU law; and
- (c) having regard to the Spanish claim for Gibraltar.

Role and Efficacy of Legislation – A Question of Perspective

If I may pause for a moment and revert to the title and context of this paper “The role and efficacy of legislation”, we begin to see the complexity of the proposition.

The role of legislation can be said to be to govern the land in accordance with the provisions in (and limitations of) the 1969 constitution. It could also be said that a concurrent role is that of transposing EU obligations in the manner required by the EU and having regard to the constitutional obligations. It could also be argued that the role of legislation is to promote or in appropriate cases, safeguard, Gibraltar and its citizens from the possibility of any advancement of the Spanish claim.

Even if these 3 considerations were to be the only ones that needed to be borne in mind, any test of the efficacy or otherwise of legislation might depend on your position on these issues. In the ordinary course this question would not arise given that in a sovereign state the test must be whether the public interest is served (even if defining public interest is then subject to interpretation issues).

If one applies the test from the perspective of the United Kingdom, the legislation ought to provide for the continuance of the exercise of power in the terms of and subject to the limitations of the 1969 Constitution. This would require legislation to give effect to EU law and in all other regards respect the division of the responsibilities.

From the perspective of the Gibraltarian the role of legislation is more than merely prescribing a workable and fair legal order. Under the cloud of a colonial mind-set,

which the 1969 constitution still provided, the expectation of the Gibraltarian was that of constitutional advancement.

This could have left legislative counsel in something of a predicament save for the fact that the lines between defined domestic and non-defined (and therefore Governor's responsibility) were not always clear cut. This was even more so when there was an EU dimension. As stated earlier the legislative counsel had pretty much free reign as to how to approach drafting legislation and therefore had the opportunity to draft legislation that leant towards localising powers.

If one considers the foregoing to be the role, what then is the test for the efficacy or otherwise, of the legislation? As was the case when we considered the role of legislation, your stand point is also crucial when determining whether legislation is effective.

From a UK point of view, legislation could be regarded as effective if it did not give rise to any constitutional difficulties. Perhaps the ultimate test for this being whether a Secretary of State felt obliged to exercise powers of disallowance available under section 37 of the 1969 Constitution. Of course that is answering the question from a "big picture" stance. At a lower level one would presumably have regarded legislation as effective if it meant that Gibraltar was ticking over with everyone knowing their respective positions in the pecking order and toeing the line. From an EU perspective, the efficacy or otherwise was easily measured by virtue of the number of EU measures transposed into domestic law, and the number of infractions at any given time.¹⁴ Given that infractions against Gibraltar are instituted against the Member State (the UK being the Member State with responsibility for Gibraltar), the fewer infractions that related to Gibraltar the more efficacious the legislation may have been considered to be.

The test from the Gibraltarian viewpoint is more complex. The test could be said to include any or all of these ingredients:

- (a) whether the legislation has advanced if not at least preserved the standing of Gibraltarians vis-a-vis the Constitutional relationship with the UK;

¹⁴ Under EU law an infraction is a legal process whereby steps are taken against a Member State for failing to abide by treaty obligations. Infractions mainly arise in the context of a Member State failing to transpose a Directive or for the incorrect transposition of such a measure. The process can lead to the imposition of fines against the Member State.

- (b) whether it left any lacunae that could be exploited against Gibraltar (whether these materialised in the context of our bilateral relationship with the UK or in any other international respect);
- (c) whether the legislation (by act or omission) could give the Spanish any advantage over Gibraltar;
- (d) whether the legislation allowed for “Gibraltar plc” to comply with EU law and to compete with others on a level playing field.

In considering point (a), legislation that was drafted in a manner that could have advanced the colonial relationship would have been considered not to have been a success. Whilst it is clear that any overtly colonial legislation would have not been sponsored by the government of the day, and thus left to the governor to promulgate under his residual powers, the more dangerous legislation that the legislative counsel had to guard against was that which had effects that could have been interpreted or operated in a colonial manner (i.e. colonialism by stealth). This in effect meant that care had to be taken to ensure that powers were not only properly but also effectively allocated to the intended recipient.

Point (b) may sound trite, but in a number of areas there have been instances where Gibraltar’s capacity has been questioned in international fora. Indeed for a number of years Gibraltar was labouring against the description by certain detractors (mainly in the Spanish political classes and media) as a haven for corruption and money laundering. In order to combat such accusations, the role of the legislative counsel was to produce legislation that could stand up to unbiased international scrutiny, such as the International Monetary Fund.

As regards legislation that may allow space for the entertainment of the Spanish claim to Gibraltar, point (c), it should be recorded that Spain has been (and remains) a major player in the EU. That body promulgated legislation via organs in which Gibraltar had no direct representation. There have been instances where the transposition of EU legislation made the legislative counsel look beyond the text before him/her and consider the wider political and economic context in which s/he was drafting in. To this day these issues are very much alive.¹⁵

¹⁵ An example of this a live issue today can be seen in the Government of Gibraltar’s claim against the EU where it is seeking the annulment of a decision that recognises the Spanish designation under (EU law) of a nature conservation site which is partly in Gibraltar’s Territorial waters. For further info see Government of Gibraltar press release: http://www.gibraltar.gov.gi/latest_news/press_releases/2009/91-2009.pdf.

In considering point (d), legislation would be considered to have achieved its purpose if it was drafted in a manner that insulated “Gibraltar plc” from the potentially grave implications (generally of an economic nature) that transposing EU legislation could have brought about. Gibraltar was not able to influence the decision-making process at the European level, and because EU legislation was the product of negotiations by Member States, their compromises and the ensuing legislation did not have regard to the physical and economic limitations that applied in Gibraltar. The effectiveness in such cases was measured by the extent to which a legislative counsel produced legislation that was acceptable to Brussels (i.e. did not result in infraction proceedings) and which did not place impossible burdens on either the Government (in both a political and economic sense) or the business community. For legislation to have succeeded in the light of such goals, the legislative counsel needed not only a good understanding of the law and drafting but also an element of political savvy.

The 2006 Constitution

The 1969 Constitution was repealed following negotiations between the governments of Gibraltar and the United Kingdom, which culminated in the 2006 Constitution. Given that there was no desire for independence, it could be said that the 2006 Constitution represents the maximum level of self-government possible whilst retaining British sovereignty.

The Constitution modernises certain aspects of the constitutional relationship between the British Crown and the Gibraltarians.

The legislature has been redefined so that pursuant to section 24 it consists of “Her Majesty and the Gibraltar Parliament”. The composition has also changed both numerically and in substance. It is configured on the basis of a 10-7 split between government and opposition. Whilst at present the numerical advantage and its attendant benefits and pitfalls is preserved, Parliament now has the ability to change its composition, and it remains to be seen whether the number will increase and whether back-benchers or independents will be participating in future parliamentary debates.

As regards the executive section 44 of the 2006 Constitution states

The executive authority of Gibraltar shall vest in Her Majesty; and, save as otherwise provided in this Constitution, that authority may be exercised by the Government of Gibraltar...

Overall the position has moved on from the Governor being responsible for all matters save for those which were defined to the Governor being responsible only

for those matters which are expressly allocated and defined and the Government having responsibility for everything else.

By way of side-note, one of the more interesting aspects of the 2006 Constitution is that for the first time Gibraltar has a Minister for Justice. Since the present incumbent took office, the Government has embarked on the wholesale reform of a number of important areas where the legislation had remained virtually static since the 1960s. Reforms have meant the wholesale drafting of family law and procedure, the criminal law and the revision of criminal procedure (amongst others).

Conclusions

From legislative counsel's perspective, the 2006 Constitution has removed some of the ambiguities to which the 1969 Constitution, as read with the Foreign Secretary's despatch, gave rise. To the extent that those ambiguities have now been removed, I believe that it is appropriate to regard drafting as truly having come out from under a colonial cloud.

What is also evident is that drafting played a role as an agent for change. It was a role that arguably favoured the Gibraltarians over the colonial power. Although I do not know whether the same was true in the now independent former colonies, the reality is that the legislative process was an avenue for social progress. To the extent that it achieved in making changes, albeit subtle ones, in the relationship between the colonial power and the citizens in Gibraltar, it discharged an important, even if small, role. In my opinion that is a legitimate role of legislation and I consider myself fortunate to have been drafting in that period.

Turning to the future, it remains to be seen what legislative practices arise from the new constitution. The nature of the relationship has changed but since Gibraltar has not gained independence, legislative drafting will always have to be informed by the constitutional relationship it finds itself in.
