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Political and constitutional issues for the contemporary Falkland Islands

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ABSTRACT

Understandably much of the academic literature on the Falkland Islands relates to its relationship with Argentina and the allied territorial dispute, but that can ignore broader and equally important aspects of the Falklands' political and constitutional lives, which are the feature of this article. The overarching aim is to consider the multi-layered approach to political and constitutional matters, and how they have evolved since the Falklands War in 1982. In particular, the paper considers the Falklands' constitutional ties with the United Kingdom (UK) as a British Overseas Territory, the overall political relationship between the Falklands and the UK at present, and the internal democratic and political arrangements of the Falklands. The paper argues that although the Falkland Islands' political and constitutional position is strong, there are aspects that need to be reconsidered and reformed.

KEYWORDS

Falkland Islands; constitutional reform; lobbying; elections; British Overseas Territory; self-determination

Introduction

The recorded history of the Falkland Islands began in 1592, when English explorer John Davis sighted the Islands on a voyage, but it was not until 1690 that the first-recorded English landing was made. From that time for the next century or so, the British, French and Spanish all had an interest in the Falklands. Since 1833, apart from two and a half months in 1982, the British flag has flown over the Islands. Of course, the events of 1833 that saw the removal of an Argentine garrison remain at the heart of the territorial dispute between Argentina and the UK. However, the focus of this article lies elsewhere, primarily, on the constitutional and political developments of the Falklands over the last 40 years. Before we consider them, it is helpful to provide a brief historical overview of how the Islands' political identity was formed. The relationship between the Falklands and the British Crown was formalised in 1843, with an Act of Parliament that 'empowered the British Government to make future provisions relating to the administration of justice and civil administration on the Islands. (Cawley, 2015, p. 200). Soon afterwards, a local Falklands Government was established with a Governor, a Legislative Council with no fewer than two members and an Executive Council to assist the Governor, although suffrage was limited, with members of the Legislative Council being largely appointed by the Governor. Then, in 1887 and 1945 the legal basis between the Falklands

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and the Crown was updated via the British Settlement Acts that state the Falklands is a 'British possession', and the British Crown has certain legislative powers (Hendry & Dickson, 2018, pp. 15–16). The Acts remain the key pieces of legislation overseeing relations.

Moving into the 20th Century, very little changed until 1948, when the Falkland Islands (Legislative Council) Order was implemented by the UK, which introduced universal suffrage and four elected members (alongside four appointed members). A new constitution came into force in March 1949. Then, over the next 25 years, the number of appointed members was cut entirely, with the number of elected members increasing to six. However, this did not lead the Falklands into a new era of vibrant democracy and effective local decision-making. Rather, the Governor was the dominant political force, and this remained the case immediately after the Falklands War. Reflecting on his time as Chief Executive, David Taylor said this: 'I wanted to do what Islanders wanted. I was therefore rather taken aback by the extent to which the Island Councils, given their elected majorities, effectively expected me and the other officials to make the running in shaping the Islands' future' (Taylor, 2003, p. 272). He went on to say that apart from the creation of a fisheries zone, 'it is hard to think of any significant initiative which came from elected Councillors during my time in the Islands' (Taylor, 2003, p. 273). This view is shared by Dodds, who called the Falklands in the late 1970s a 'quasi-colony', and with 'its governance largely shaped by the Governor of the Islands and expatriate specialists brought in from the UK to manage affairs' (2012, p. 696). It can be argued that the Falkland Islands was caught in a political (and economic) catch-22 situation. As the economy was in 'grave danger of collapsing', with significant depopulation (Shackleton, 1982, pp. 6–7) the local political class did not feel confident enough to play a more active role. However, the British government was not predisposed to providing the financial support that the Falklands required to boost its prospects. So in the 1970s and early 1980s there was political and economic stagnation. However, after the War and a review by the British government of the Falklands' prospects, the political and constitutional positions changed markedly. As Jan Cheek, a former long-standing member of the Falkland Islands Legislative Assembly argues, 'over the years one could see a slightly paternalistic attitude by some in the Foreign Office, looking after these poor ignorant folks a long way off. But I think the relationship has developed into more of a partnership' (Interview, 07/05/2021). We now turn to the more contemporary situation.

The constitutional relationship

Soon after the War, in 1982, Lord Shackleton was asked by British Prime Minister, Margaret Thatcher, to revisit a report he had written in 1976 to see what could be done to revitalise the economy of the Falkland Islands. His new report, *Falkland Islands Economic Study 1982*, was vital in the economic and political progress the Falklands has made since then. A range of initiatives was suggested by Shackleton, and enacted, including the creation of the Falkland Islands Development Corporation to lead the economic reforms, involving land reforms and economic diversification, such as the declaration of a fisheries limit around the Islands. Now, the Falklands is independent of the British taxpayer with

the exception of defence. Shackleton also recommended the awarding of greater political autonomy to the Islands by the British, allowing locals to make more decisions themselves. As Taylor argues (2003, p. 270):

Shackleton's two studies were the basis of all that has happened in the Islands, and his vision of what the Falklands might be has been the single most important factor in the direction taken by the Falklands since 1982 ... Shackleton recognised how talented and capable Islanders were and what relatively limited use was made of those talents in the pre-war dependency culture of the Islands.

In response, several important constitutional changes were enacted. Most particularly, a new constitution was agreed in 1985, which included two newly elected members of the Legislative Council, an extra-elected member (from two to three) of the Executive Council, removing the vote from ex-officio members; and formalising the role of the Chief Executive as head of the public service, with responsibility for the enactment of policy. The 1985 constitution saw a shift in decision-making to the elected members of the Legislative Council, which gave them 'the confidence to exercise the power inherent in the electoral majority' (Taylor, 2003, p. 276). This view is shared by Cheek, who argues that giving only elected members a vote was key: 'Prior to that, officials had a vote, and elected members sometimes felt they were just there to rubber stamp the decisions of others' (Interview, 07/05/2021).

Since then, there has been one further major constitutional review that resulted in a new constitution in 2008. The constitution was wide-ranging and included a modernised Chapter on fundamental rights and freedoms of the individual and embedded self-determination in the body of the constitution (rather than in the Preamble). It also created the Legislative Assembly, which replaced the Legislative Council. Further, the new constitution more clearly defined the balance of responsibilities between the Falklands, on the one hand, and the British on the other. The Governor, representing Her Majesty the Queen, has responsibility for several issues, including external affairs, defence and internal security (including police). Meanwhile, the Falklands government has control over issues, such as the economy, education, health care and immigration. In theory, the Governor can overrule the Falklands government on certain matters, but this happens very rarely (Hendry & Dickson, 2018). Indeed, the Governor's role is an interesting one. On paper, he or she has extensive authority, but the approach and character of the incumbent is important. Nigel Haywood, the Governor from 2010 to 2014, suggests:

I saw my job very much as being there to help the Islands develop in the way that they want to develop. I, or the UK can, provide checks and balances. For example, in rule of law issues. But by and large, I think your job when you're sitting there as Governor is to look where I can add value into the relationship between the UK and the Islands (Interview, 13/05/2021).

Therefore, the constitutional relationship between the Falklands and the UK is one of the strongest amongst the British Overseas Territories, where often there are difficulties. Recent examples, include the British Virgin Islands and the Turks and Caicos Islands, which have seen serious fall-outs and consequential breakdowns in good governance. So, what comes next? It has been more than a decade since the last constitutional review process, and there have been discussions over what further

changes could be made. But it seems that any changes would be minor. For example, Teslyn Barkman, a member of the Legislative Assembly says the present constitution generally works well, but some limited changes could be made, which would remove some of the ‘colonial’ leftovers. Barkman suggests removing the condition that the UK Foreign Secretary must approve the Falklands’ code of conduct for civil servants. Other ideas include further removing the Governor from the day-to-day decision-making process and lowering the voting age from 18 to 16 (Interview 06/05/2021). This overall appraisal of the constitutional position is shared by Stacy Bragger, until recently a fellow member of the Assembly. He argues there will not be major changes, but suggests making secondary, as well as primary, education a constitutional right would be positive (Interview, 14/05/2021).

Political relations

The constitutional relationship is, of course, the overarching framework that ties together the Falklands and the UK. However, there are other, more ‘political’, networks that help to further our understanding of the state of relations in particular, within Westminster and Whitehall. Since the end of the Falklands War there has generally been cross-government and cross-party support in the UK that the link between the Falklands and the UK should remain strong and that the principle of the Falklands’ right to self-determination is key. In other words, for as long as the people of the Falklands wish to remain associated with the UK, then that is a position that must be backed. Over the last 4 decades, there have been changes in how the Falklands has been overseen by the UK, for example, prior to 2002 the Falklands was known as a British Dependent Territory; Whitehall oversight of the territories was fragmented across six separate departments, now there is one; and a new political forum was established to bring together British and territory ministers and officials to discuss matters of common interest and concern. The institutional structure of relations today mirrors those elements still quite closely.

So, there are various ways in which the Falklands can gain access to UK policy-makers, and we consider several here. First, the Falklands is able to liaise with government departments, including the Foreign, Commonwealth, and Development Office (FCDO), the lead government department for the Falklands. However, there has been some discussion recently, about whether the FCDO is the most appropriate department, and whether the Cabinet Office, for example, is better placed to manage relations. As the House of Commons Foreign Affairs Committee noted, some feel that it is ‘inappropriate for a department responsible for foreign relations to also have responsibility for governing British territories’ (2019a, p. 3). This is a view articulated by John Duncan, a former Governor of both the Falklands and British Virgin Islands, and ex-head of the Overseas Territories Directorate in the FCDO:

The challenge for the territories is that they are remnants of the British Empire, and they are dealt with by the Foreign Office as a result of the amalgamation of the Old India, colonial and diplomatic services that worked well in the beginning, but it is now a rather odd situation. The territories are handled by a department, which in its title they are not represented. They are neither foreign nor Commonwealth, nor in most cases in any need of development assistance (Interview, 10/06/2021)

Notwithstanding, those representing the Falklands retain their support for the FCDO as the lead department. In written evidence to the Foreign Affairs Committee, the government of the Falklands said that the people of the territory do not see themselves as foreign but that, 'whilst it may seem strange for our constitutional relationship with the UK to be managed by the Foreign and Commonwealth Office, on reflection it is a logical home given the unique status of the Overseas Territories' (2019a, p. 8). A view supported by Barkman, who suggested 'there is great strategy in having the Foreign Office. It has a base globally . . . that is useful to someone (sic) as logistically and geographically distinct as the Falkland Islands. Certainly we cannot think of where we would fit better' (Foreign Affairs Committee, 2019a, p. 8). However, this does not mean there are no problems in the relationship. For example, there are concerns that with the high turnover of civil servants and ministers with responsibility for the territories some consistency in policy-making is lost. As Duncan argues, 'I feel that the Falklands and the overseas territories are less understood today than they were, say 20 years ago' (Interview, 10/06/2021). This can lead to a lack of nuance in how the territories are treated. As Bragger argues, 'there's a tendency sometimes to lump all the territories into the same box and have the same cookie cutter . . . There are huge differences in terms of the Falklands and Caribbean, for example, and sometimes that is not always appreciated' (Interview, 14/05/2021). Further, the paternalistic attitude in Whitehall is still sometimes seen. Barkman noted, that 'Rather than being seen as partners, we are in some ways more managed by officials' (Foreign Affairs Committee, 2019a, p. 8). She wanted to see more contact with ministers. So, despite continued support for the existing institutional structure, the Falklands believe that Whitehall should be more understanding of their needs and give them more credit as 'a reliable, responsible and valued member of the UK family' (Foreign Affairs Committee, 2019a, p. 8).

Second, there are committed groups of UK parliamentarians that take an interest in, and lobby for, the territories. They do this individually, and also in parliamentary groups, such as the British Overseas Territories All-Party Parliamentary Group and the Falkland Islands All-Party Parliamentary Group. As Harmer has identified, a significant number of parliamentary interventions relates to the sovereignty dispute (2018, p. 7). Also, several MPs, such as Andrew Rosindell and John Penrose, have promoted the idea that the Falklands (and other overseas territories) ought to be given direct representation in the Houses of Parliament (Express Online, 2020; The House Magazine, 2020); however, here the views of British MPs and the Falklands diverge. Supporters believe that as the territories are part of the 'British family' and decisions made in Westminster have an impact on the territories, then they should be given a voice. But the Falklands has been long opposed to the idea. In 2008, the Foreign Affairs Committee in its report on the Overseas Territories noted, the Falklands representative was 'satisfied with the Falkland Islands All Party Parliamentary Group as its link with Parliament' (2019b, p. 50). More recently, Barkman explained: 'Currently we can appeal to 650 Members of Parliament, whereas we would be funnelling and bottlenecking our issues from a vast number of [OTs], or even a singular territory, through one' (Foreign Affairs Committee, 2019a, p. 17). It seems likely that the debate about direct parliamentary representation will continue, as it has done so for the last 25 years, but at least on the part of the Falklands there is little appetite for it. The relationship the Falklands has with UK parliamentarians is preferred, and there are a critical mass of them to effectively represent the interests of

the Falklands at Westminster. Although, there is always more that can be done. As Bragger argues, 'I think there is more to do to better get across the reality of the Falklands and better outline what we're doing' (Interview, 14/05/2021).

Third, there are the representative bodies based in London that help promote the profile and interests of the Falklands. The first is the Falkland Islands Government Office. The office was opened in 1983 after the War and has a remit to represent the interests of its Government and people, lobby the UK government and MPs, liaise with media outlets, and inform the general public. The office plays an important role as described by Richard Hyslop, the Falkland Islands Government Representative in the UK:

I head up our office, which includes a team of seven and we represent the views of the Falkland Islands Government, and we meet with politicians from all political parties, engage with various government departments in Whitehall, the devolved institutions, and the media, but also represent the Islands more broadly in terms of tourism, the economy and our people' (Interview, 17/05/2021).

The second body is the United Kingdom Overseas Territories Association (UKOTA). UKOTA was created in 1994 by the Governments of the Overseas Territories, which have a permanent population. The main purpose of the group is to represent the collective view of the territories via the FCDO and other government departments. The Falklands has been a member of UKOTA from the outset, and it has been a useful forum for the Islands to ask for, and gain, collective support. As Hyslop sets out, 'It's a really important organisation. We work together on areas of mutual interest . . . we share best practice . . . and the solidarity we have is helpful' (Interview, 17/05/2021). One example of working fruitfully through UKOTA was persuading the UK government that the Falklands and other territories could lay wreaths at the Cenotaph to remember their own war dead, rather than the UK foreign secretary laying a single wreath on their behalf. So, it is undoubtedly important that the Falklands has this strong and collective presence in Westminster, at the heart of British politics.

Democracy and the political process in the Falklands

The third section considers democracy and politics within the Falklands itself, issues that are often placed to one side when the dispute with Argentina is discussed. But they are important to evaluate, as the Falklands' credibility as an open and pluralistic society depends in large part on its democratic credentials. We will first consider its political structure. As we have touched on previously, the Falklands has a Governor who exercises the duties of the head of state in the absence of Her Majesty the Queen and chairs the Executive Council. Then, there is the Chief Executive, the head of the public service responsible for the management of the Falkland Islands Government. The Chief Executive is appointed by the Governor on the advice of the Executive Council. The Executive Council is the policymaking body of the Government and consists of three members of the Legislative Assembly. The term of office for an Executive Council member is one-year on a renewable basis. The Legislative Assembly is the unicameral legislature and consists of eight elected members, two ex officio members (the Chief Executive and the Director of Finance), and the Speaker. The Commander British Forces and the Attorney General can also attend.

Since the Falklands War, this structure has taken root and become more democratic, with Members of the Legislative Assembly (MLAs) taking on a more central role. This has been helped by the fact that MLAs are now full-time positions, which has led to more time being given to the role and more professionalism too. When it was part-time, it narrowed the pool of those able to take it on. As Haywood argues, you could often only perform the role if you were ‘independently wealthy or retired or had endless time. This wasn’t getting the youngsters into the Assembly’ (Interview, 13/05/2021). Another important change has been the evolution of the relationship between the Legislative Assembly and the Executive Council. Although the Executive Council is the decision-making body, all efforts are made to take a collegiate approach, so the decisions that are made by the Council follow the overall view of the MLAs more generally. The collegiality in the Falklands political system is enhanced by the absence of political parties. When the MLAs stand for election, they do so as independents. Introducing party politics has been discussed, but it is viewed by many as potentially divisive in such a small political unit. As Cheek contends, party politics leads to a ‘disproportionate amount of time spent scoring political points, and perhaps to the detriment of what politicians should be doing’ (Interview, 07/05/2021). There are, of course, frustrations with the political process, as in any other democracy, including the time it takes for decisions to be made and the short-termism that is sometimes evident. However, overall there is satisfaction with the system of governance in the Falklands.

Perhaps what is more significant is whether the electoral system is fit for purpose, with both Stanley (the capital) and Camp (the countryside) having their own constituencies. As noted above there are eight members of the Legislative Assembly, five seats are in the Stanley constituency and three are in the Camp constituency. Universal adult suffrage is through a block voting system, with each Stanley constituent having up to five votes and each camp constituent having up to three votes. Over the years, the population of Stanley has grown, whilst the population of Camp has declined. According to the 2016 census, 87% of the Islands’ population live in Stanley and 13% in Camp, but the five to three splits in seats has remained (the last change was made in 1997; before then the eight seats were evenly divided). There are also fewer candidates standing in Camp. The results from the November 2021 Legislative Assembly elections show the issue starkly. In the Stanley constituency, there were 11 candidates. The top ranked one won 839 notes; the fifth ranked, 486. The total number of votes was 4,743. In the Camp constituency there were only four candidates, with the top ranked candidate winning 184 votes and the third, 122. The total number of votes was 536. So, there are quite significant differences in both votes cast and number of candidates. However, it is important to point out that these issues have not been ignored. There have been referenda in 2001, 2011, and 2020 on adopting a single constituency, but on all occasions, the measure has been defeated. In 2020, Stanley voted in favour; Camp voted against on a much higher turnout (68% to 49%). Overall, although a majority of those who voted supported the change, the required two-thirds majority in both constituencies were not achieved. Perhaps, not surprisingly, Camp voted to retain the status quo.

So, what are the arguments for and against moving to a single constituency? Those in favour of a change believe that the growing disconnect between population size and number of seats is damaging to the credibility of the electoral system. Also, with so few candidates in Camp, elections are barely competitive. In a by-election held in 2011, one

candidate stood unopposed. So, the Camp electorate has limited, and on occasion no, choice. Further, several recent candidates in Camp principally live in Stanley. The counter argument is that with only one constituency, the voice and interests of Camp would be represented less effectively. In other words, the direct electoral connection with Camp would be lost, and the focus on development and social cohesion that derives from that may well be compromised. For the moment, though, the issue is settled, and it is an interesting question that many democratic countries have to consider, how the electoral system can best represent the changing nature of their societies.

Away from the general election, I would like to briefly discuss the vote that took place on 10 and 11 March 2013 when Falkland Islands voters were asked whether they wished to remain an overseas territory of the UK. The referendum was organised within the shadow of the 30th anniversary of the Falklands War and growing tensions with Argentina. It also came at a time of greater public diplomacy by the Falklands. But a key consideration was proving to the international community that the islanders wished to retain their existing status. As Nigel Haywood, the then Governor, states: 'When a very senior foreign politician said, how do you know the Falkland Islanders want to remain a British Overseas Territory, something that was taken for granted, a vote seemed to be a good idea' (Interview, 13/05/2021). A key part of the preparations was to bring in independent observers to give legitimacy to the referendum (Dodds & Pinkerton, 2013). The observers concluded that the referendum 'was free and fair, reflecting the democratic will of eligible voters' (Referendum International Observation Mission, 2013, p. 1). The result saw an overwhelming 'yes', with 99.8% wanting the Falklands to remain as a British Overseas Territory. The result boosted the Falklands' credibility in some parts of South America, raised the Islands' profile in the UK and beyond, and most importantly sent a strong message about the right of islanders to determine their own future. As Hyslop argues, the referendum illustrated that 'self-determination is at the core of the relationship with the UK' (Interview, 17/05/2021). The referendum remains an important symbol of the right of the Falkland Islanders to determine their own future. But of course, the Falklands remain on the United Nations' list of 17 non-self-governing territories. There are two main reasons for this. First, the particular status of the Falklands is not recognised by the UN as truly self-governing. Second, is the fact that the UN believes that the resolution of the territorial dispute between Britain and Argentina is required before the issue of self-determination for the islanders is considered. In other words, the view of the islanders comes after the need to deal with the territorial dispute. Nonetheless, the 2013 referendum is a potent statement of the preference of the islanders, and the democratic norms that are embedded within the Falklands are important in underpinning the constitutional and political structures that we have discussed throughout the article.

Conclusion

Of course, the sovereignty dispute, which encompasses the Falklands War of 40 years ago, is a key element in defining the Falklands' contemporary identity. However, it is essential not to ignore the political structures and democratic principles that are so important in validating not just its relationship with the UK but also its internal political culture and how it is perceived by the international community. The article has shown

that the Falklands has a complex and inter-linking political structure, often working in collaboration with others, to further its interests. Relations with the UK are strong and generally effective, but some concerns remain about how UK policy-makers treat the Falklands and recognise the differences between it and other British Overseas Territories. Yet, it is important to note that suggestions for reform, such as a different UK government department overseeing the Falklands or direct representation in the Houses of Parliament, are not supported. Similarly, although it has been over a decade since the last review of the constitution, there is little appetite for major change. Finally, politics and democracy in the Falklands itself is somewhat idiosyncratic, but generally works well based on consensus, although the disparity in electoral representation between Stanley and Camp will need tackling, and the limited competition between candidates on Camp casts a shadow across the electoral process more generally. However, considering the political and constitutional issues in the round, they are largely effective and robust, and offer important credibility for the Falklands when it comes to defending and defining its place in the world.

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