

## Questioning the current status of the British Crown Dependencies

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**ABSTRACT:** The status of the Crown Dependencies' (CDs) is the result of a firmly consolidated historical and political relationship with the United Kingdom. In this sense, certainly, there is no official request for a status change neither by these territories nor by the UK. Moreover, there has never been a questioning of their status by the international community. Hence, there has been no need to discuss the change of these territories' status until the United Kingdom's withdrawal from the European Union (Brexit). In this sense, Brexit has set a precedent for future decisions on the international stage, which could have even more serious consequences for these territories. Likewise, the CDs have expressed their wish to continue developing their self-government, particularly at the international level. A simple updating of their current status could be enough to address some of their requests and needs, but there are other issues that cannot be solved by a simple update and entail a change of status. Now that the UK's post-Brexit strategy is precisely a 'global Britain', it is necessary to address the future and place of these territories in a global UK. This paper proposes a possible alternative to the current status, which better adapts to the UK's new challenges of the 21st century, particularly in the post-Brexit age. At the same time, the proposed status in this paper preserves their legal peculiarities, handles all their requests, and respects their historical ties with the British Crown.

**Keywords:** Brexit, Crown Dependencies, free associate state, independence, self-determination, status, United Kingdom, Global Britain.

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### Introduction

This paper discusses whether it is necessary and convenient to update or even change the Crown Dependencies' (CDs) status to the new challenges of the 21<sup>st</sup> century, particularly in the post-Brexit era. The consequences of Brexit for all British territories are still unpredictable, but we can expect to see some changes. Some of these changes will be beneficial and others will have a negative impact. Much of the debate on the post-Brexit consequences so far has focused on the territories that are an integral part of the UK. The Scottish National Party argues that Scotland has been taken out of the European Union (EU) against its will, so a second vote on independence can be justified (Institute for Government, 2021). The argument is that independence could allow Scotland to re-join the EU in the future. Regarding Northern Ireland, "the withdrawal of the UK from the EU creates a set of conditions for Northern Ireland that will weaken the capacity of the political system to maintain peace and build economic development. The question of the location of the border between the EU and the UK is the most significant question not only for the development of Northern Ireland's economy but also for its future political stability" (Doyle & Connolly, 2017, p. 2).

We are aware that all these internal issues need to be a high priority in UK politics, since they pose a direct threat to the very existence of the UK as it is understood today. However, this does not mean that there are no other territorial concerns for the UK's future. A big issue that should be at the heart of the UK's post-Brexit agenda is the safeguarding and accommodation of the territories that are not part of the UK but are under British sovereignty. Despite these dependent territories not being an integral part of the UK, they are part of the kingdom in a broad sense, under the concept known as "undivided realm" (Hendry and Dickson, 2018). "The UK, Overseas Territories and Crown Dependencies form one undivided realm" (UK Government, 2022). They are the essence of the British global identity. So, now that the UK's post-Brexit strategy is precisely a global Britain, it is necessary to address the future and place of these territories in a global UK. These territories are very heterogeneous and have different statuses, however, in general terms, they are under British sovereignty, but enjoy a great level of self-government. These territories can be classified in two different categories: The British Overseas Territories (BOTs) and the Crown Dependencies (CDs). There are 14 BOTs spread across the globe. Clegg (2016, p. 552) argues that Brexit will have unpredictable consequences for them, but potentially, very significant. Clegg (2018) also explains that the UK-BOTs' generally strong relationship, with political and economic safeguards in place, bolstered by increasing levels of support from the EU, was placed under serious pressure by the UK's decision to leave the EU. Unlike Gibraltar, the CDs were not part of the EU and unlike the rest of the BOTs, they were not associated with the EU. However, they enjoyed a special relationship with the EU, based on the provisions in the EU Treaties and Protocol 3 (of the Channel Islands and the Isle of Man) of the UK's 1972 Treaty of Accession (UK Parliament, 2019).

The CDs did not participate in the 2016 referendum because that was an exclusive matter for the UK electorate. However, as they would be affected by the UK's decision to either stay or leave (States of Jersey, 2019), some islanders campaigned for the CDs to be given a vote in the EU referendum (BBC News, 2016b). Although, officially the CDs' governments remained neutral, a petition to participate in the referendum was submitted in 2016 and was signed by more than 2,000 of their citizens,

Give a vote in an EU referendum to the Isle of Man, Jersey and Guernsey. Daily life in these British Dependencies is affected by EU decision making. A decision to leave or stay in the EU therefore affects all islanders. Natural justice requires that they have a direct say in such a consequential referendum (UK Government and Parliament, 2016).

The Order approved at the Privy Council on May 4, 2016 said the Committee of Council for the Affairs of Jersey and Guernsey had considered the petition, but that they advised the Queen to dismiss it. The Order said: "Her Majesty, having taken the Report into consideration, was pleased, by and with the advice of Her Privy Council, to dismiss the Petition" (Privy Council, 2016, p. 71). Former States of Guernsey member Anthony Webber said: "Obviously, we are very disappointed. We are being denied a chance to vote on our future ... This is a great mistake by the UK Government ..." (BBC News, 2016b).

So, in addition to the discontent with the refusal to approve the petition to give a vote in the EU referendum to the Isle of Man, Jersey and Guernsey, during the Brexit negotiation process, two other claims were not satisfactorily met. First, to retain the benefits of the existing relationship between them and the EU and to enhance their international identity (UK Parliament, 2017). In this sense, "the UK's withdrawal from the EU ended the special relationship Crown Dependencies have with the EU" (Alegre, 2017, p. 13), and neither the UK

nor the EU were interested in looking for a formula that could entitle the CDs to directly negotiate or conclude an agreement with the EU. Undoubtedly, this would have strengthened their international capacity and identity. However, none of the parties were willing to provide this option. The fisheries crisis in 2021 between France and the Channel Islands regarding the new licencing system that came into place after Brexit is an example of the UK's failure to take into account the CDs' interests in the Brexit negotiation process. This failure proves that "the interests of a State as a whole are not necessarily the same as those of its dependent territories", and the lack of sufficient consideration of the CDs' requirements leads to potential tensions in the relationship between the metropolitan power and its dependent territories (Tan, 2021).

So, Brexit will entail consequences for the CDs. In this sense, the Isle of Man's former Chief Minister, Alan Bell, expressed his disappointment with the result of the referendum and his concern for the future of the UK and, more importantly, of the island. In his opinion, the Isle of Man now faced a period of uncertainty as nobody knew what the long-term effects of the 'leave' vote might be (DQ Law Firm, 2016).

The UK's decision to leave the EU has certainly had direct consequences for the UK, such as the conclusion of a new trade agreement with the EU. However, at the same time, it will have indirect effects too. This paper argues that an indirect effect of Brexit will be the questioning of the current UK territorial model in a broad sense, including the territories under British sovereignty. So, it is not Brexit *per se* that entails the questioning of these territories' statuses, but Brexit can act as a catalyst for rethinking the direction and nature of the current model. In this sense, while Brexit began with arguments about British sovereignty, it may end up with a new constitutional map of sovereignty within the UK and its dependent territories (Alegre, 2018).

Finally, although there are a number of territorial issues at both internal and external levels that the UK needs to tackle, which would be interesting to research, this paper focuses on the CDs' territorial needs and requests within the post-Brexit era. It will address the limitations of the CDs' current status and propose free association as the most suitable formula when it comes to realising the aspirations of these territories. This formula would allow them greater self-government, especially at the international level, without relinquishing its special link with the British Crown. In short, the best of both worlds, which would recognise the CDs' unique status and their willingness to play a more active role on the international stage.

### **Current status of the Crown Dependencies**

The CDs are the Isle of Man and the Channel Islands. The Channel Islands fall into two separate self-governing bailiwicks: The Bailiwick of Jersey (including the uninhabited islands of the Minquiers, Ecrehous, Les Dirouilles, and Les Pierres de Lecq) and the Bailiwick of Guernsey (consisting of Guernsey, Alderney, Sark, Herm, Jethou, Brechou, and Lihou). The Channel Islands are located just off the Normandy coast of France, mainly in the Bay of St Malo, within the English Channel. From a geographic perspective, the CDs are neither large in size nor in population. The Isle of Man has a population of 85,632 and the total land area is 570 km<sup>2</sup> (Worldometers, 2020b). The Channel Islands have a total population of 176,012 and the total land area is 190 km<sup>2</sup> (Worldometers, 2020a). The Isle of Man is situated in the Irish Sea, between Great Britain and Ireland.

Historically, the CDs differ from one another. The Channel Islands are considered the remnants of the Duchy of Normandy, while the Isle of Man was connected to Scandinavian rulers in the past. The CDs, unlike the BOTs, have never been colonies of the UK (UK Parliament, 2019). As a consequence, the CDs have an ad hoc status. They are self-governing territories under British sovereignty, but with a unique constitutional link with the UK. “The Crown Dependencies are autonomous and self-governing, with their own, independent legal, administrative and fiscal systems” (House of Commons Justice Committee, 2010, p. 6). They have their own directly elected legislative assemblies, but as these territories are not integral parts of the UK they do not elect representatives to Westminster.

Queen Elizabeth II is the Head of the CDs, but, in Her role as the Lord of Mann and the Duchy of Normandy. In both the Channel Islands and the Isle of Man, the Queen is personally represented by the Lieutenant Governor. In the Channel Islands, there is a Lieutenant Governor in each bailiwick. Among the CDs, there are statutory peculiarities and different institutions and territorial divisions (Mut-Bosque, 2020, p. 154).

Their constitutional relationship with the UK is maintained through the Crown and is not enshrined in a formal constitutional document. The UK Government is responsible for the defence and international relations of the Islands. The Crown, acting through the Privy Council, is ultimately responsible for ensuring their good government (Ministry of Justice, 2020, p. 1).

Unlike the status of the BOTs, the CDs’ status has never been questioned by the Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples also known as the C-24. None of the CDs were included in the UN list of non-self-governing territories, so the CDs’ status would be in accordance with UN international standards.

Continuing with the uniqueness of the CDs’ status, the 1973 report of the Royal Commission on the Constitution referred to the constitutional position of the CDs in the following terms: “In some respects they are like miniature states with wide powers of self-government, while their method of functioning through committees is much more akin to that of United Kingdom local authorities” (House of Commons, 2019).

The 2010 Justice Committee report highlighted “their essential independence from the UK [and] their independence from each other”. The same report emphasised that the CDs’ relationship was with the Crown rather than the UK (House of Commons, 2019).

In contrast with the BOTs, on which the UK Parliament has unlimited power to legislate, UK primary legislation does not ordinarily apply to the CDs. Exceptionally, the 2019 House of Commons Report states that UK primary legislation can be extended to them if UK Government departments consider it necessary or if they have received a request from a Dependency to do so. However, the UK Ministry of Justice points out that UK legislation rarely extends to the CDs and should not be extended without first consulting the Islands’ authorities and obtaining their consent (Ministry of Justice, 2020).

All issues related to their internal affairs fall under the competence of each territory. However, as noted above, the UK is responsible for assuring good governance. In practice, this means that if the UK believes that good governance is not assured by the local government, it could impose direct rule. This became significant in 2009, when the UK imposed direct rule on the Turks and Caicos Islands, following an inquiry into alleged corruption (Auld, 2009). It

suspended parts of the Overseas Territory's constitution and established interim, direct rule from Westminster, through the Governor, until the government of the territory had addressed the corruption issues (Yusuf & Chowdhury, 2019). Direct rule has never been imposed in the CDs. However, the then leader of the Labour Party, Jeremy Corbyn, suggested in 2016 that the "UK government should consider imposing 'direct rule' on the 14 British Overseas Territories and three Crown dependencies if they do not comply with UK tax law" (BBC News, 2016a). In this sense, scholars have discussed if direct rule could be imposed in the CDs, because they have a different link with the UK than the BOTs.

Part XI of Volume 1 of the Report of the Royal Commission on the Constitution published in 1973 and known as the Kilbrandon Report set out an account of the duties of the Crown in relation to its Dependencies, and included 'good government' (House of Commons Justice Committee, 2010). However, leading constitutional lawyer Professor Sir Jeffrey Jowell QC notes that much has changed since Kilbrandon in 1973. In particular, the courts are now willing to apply constitutional principles and recognise constitutional rights to an extent that would have surprised their predecessors 30 years ago (Birt, 2017, p. 157).

Regarding the CDs' international presence, all three are able to attend international meetings, but as part of the UK delegation. They cannot have their own delegations. With the exception of Jersey, which is a member of the *Assemblée Parlementaire de la Francophonie* (Assemblée Parlementaire de la Francophonie, 2015), none of the CDs can be full members of international organisations in their own right due to their lack of complete sovereignty.

Similarly, the CDs cannot negotiate and conclude international agreements due to their lack of international subjectivity and legal personality. In this sense, the UK is responsible for compliance by the CDs with obligations arising under international law, whether deriving from customary international law or from applicable treaties. This is not to say that it is necessary that the UK implements the territories' treaty obligations in practice. However, the UK Government does pay close attention to the way in which the territories implement them because, ultimately, it is the UK which could be held responsible if the territory violates the obligations under a treaty (Hendry & Dickson, 2018, p. 254).

However, the UK has enabled a mechanism which recognises the CDs' limited authority to conduct external relations on their own behalf, including the negotiation and conclusion of international agreements – usually in a specific and limited manner; most commonly double taxation treaties or tax information exchange agreements (Carey Olsen Law Firm, 2021). Such authority in practice is usually granted by letter to the territory government and is usually called an *entrustment*. The entrustment needs to be requested by the CDs and granted by the UK (Ministry of Justice, 2021). Logically, it needs the willingness and conformity of third parties to enter into an agreement with a CD under the above mentioned circumstances.

According to Hendry and Dickson (2018, p. 254), if an overseas territory – the same can be applied by analogy to the CDs – wants to join a regional or international organisation as a member or an associate member and prefers to make the application for membership and negotiate entry into the organisation itself, which will usually involve it becoming party to the treaty establishing the organisation, an entrustment is required. If a BOT or CD Government wishes to invite a Head of State or Government or another member of a foreign government or Royal Family to the territory in an official capacity, the Governor should always be consulted.

The UK Government could require the territory government to seek an entrustment prior to approaching the other country.

### **Questioning of the Crown Dependencies' current status**

The CDs' status is the result of a firmly consolidated historical and political relationship with the UK. In this sense, certainly, there is no official request of a change of status either by these territories or by the UK. Moreover, there has never been a questioning of the CDs' status by the international community. Hence, on first sight there appears to be no need to discuss a change in these territories' model of governance. However, Brexit has shown its limits, both in terms of the CDs' marginal influence in domestic UK affairs and their inability to engage with some degree of autonomy on the international stage.

As discussed previously the CDs have conferred their international relations powers to the UK in order to be represented in the best way possible. Nevertheless, Brexit has shown that is not always possible for the UK to represent its own interests and at the same time honour the views of the CDs. In this sense, Alegre expressed doubts as to whether, in an international negotiation as wide-ranging as Brexit, the CDs would be able to make their voices heard (House of Lords, 2017). She also noted that the way the process has been managed "will set a precedent for future decisions on the international stage that could have even more serious consequences for the Crown Dependencies and their people" (House of Lords, 2017, p. 27). Moreover, their current status did not allow them to conclude any agreement directly with the EU, in order to preserve their previous trading benefits with the bloc.

As a consequence, the CDs have expressed their wish to continue developing their self-government, particularly at the international level. In this sense, they want to further develop their international identity and personality, and they propose three main adjustments (House of Commons Justice Committee, 2013, p. 35):

- The speeding up of the process for extending treaties to the CDs at their request;
- Their own international representation;
- To negotiate and conclude international agreements in fields where they have a specific interest.

The UK has recognised the Islands' desire to develop their own separate international identity. In this sense, the 2010 Report of the House of Commons Justice Committee (2010) states that when the CDs have a distinct view on a matter which is significant to them, the UK Government has a duty to ensure that their position is heard in the negotiations. So, it welcomes the idea of enhancing the consultation mechanisms, particularly at an early stage in order to take into consideration the CDs' interests. Despite the consultation mechanisms being important in order to enhance their role at the international level, these kind of mechanisms are not enough if the CDs want to develop their own international identity. In this sense, Cathryn Hannah, the lead civil servant in the Crown Dependencies, Overseas Territories and Visits Team at the Ministry of Justice, noted that there are occasions where it is possible for the CDs to have separate input into international negotiations, and others where it is not. This is considered on a case-by-case basis (House of Commons Justice Committee, 2013, p. 26). Therefore, the current mechanisms for increased international participation of the CDs are not enough since decisions are made on the particular circumstances of the issue and require the constant engagement of the UK.

One could argue that an updating of the CDs' current status could be enough to address all these issues, but there are some like the negotiation and conclusion of their own international agreements without the UK's prior permission that cannot be solved by a simple updating. This would lead to important legal gaps regarding the regime of international responsibility. Thus, if a CD concludes a treaty or joins an international organisation as a full or associate member, it is unclear who is party to the treaty or a member of the organisation as a few treaties expressly allow non-State entities to become contracting parties. What is beyond doubt is that under international law, the UK is responsible for compliance with the obligations under a treaty in respect to a territory, regardless of whether the UK extends the treaty to the territory or the territory signs the treaty itself under entrustment. The same argument applies to CDs joining international organisations; the UK has at present ultimate responsibility. So, if the territories want to achieve more autonomy at the international level, without the UK's involvement, they must explore the option of changing their current status and decide how much self-government they would like to have.

### **Moving towards a new status for the Crown Dependencies?**

Once the issues that question the current status of the CDs have been explained, there are interesting formulas that these territories should consider in order to update their status or even change it, and cope better with the considerable challenges that are to come. It is important to clarify that any update or change of their status needs the agreement of both the CDs and the UK. Indeed, this is a key issue to consider. There are different models of governance that could help these territories to improve their autonomy, particularly at the international level. Some involve a change of status, so they would be more difficult to achieve, while others would entail an upgrading of the current approach. The models range from integration with the UK; keeping the same status but granting more autonomy to the CDs; and agreeing free association with the UK to achieve almost complete independence.

This section focuses on one of these possible statuses, the Free Associate State (FAS). In our view, and for the reasons noted below, this is the status most in keeping with the CDs' political and legal peculiarities and more respectful of their historical ties with the UK. Further, this status better canalises these territories' requests for further independence. However, let us make some preliminary remarks about other status options, before considering FAS in detail.

The very nature of the CDs and the way they have evolved make integration with the UK an option that is not feasible. Indeed, it would be counterproductive since it would entail a loss of their current powers. Another option could be keeping the same status but granting the CDs more autonomy. Broadly speaking, this is possible, but as explained previously, there are areas such as international affairs, which are limited in terms of CD engagement. If the CDs push beyond a certain point UK sovereignty would be compromised and the entire edifice of their relationship with London would fracture.

Another option is for the CDs to become sovereign states. This should always be a possibility, but today there are few calls for complete independence. Nevertheless, there are examples where sovereign states share competencies, which could be seen as a way forward for the CDs if they were concerned about their ability to act in certain circumstances. There are microstates and small states in Europe that have signed agreements with other states – bigger states or states with which they have historical links – to take responsibility for certain competences, like defence or foreign affairs. For instance, this is the case with Iceland, which in 1951 signed a bilateral defence agreement with the USA. This agreement is one of the main

pillars of Iceland's national security policy (US Department of State, 2020). There is also the case of Monaco and its relationship with France. The ties between the Principality of Monaco and the French Republic is very old. King Louis XII recognised the independence of Monaco in 1512 and signed a treaty of perpetual alliance with the principality. This continues to the present day with the French government taking responsibility for Monaco's defence, although Monaco maintains a small force for the protection of the Sovereign Prince of Monaco.

Although there is no official data that suggests a different relationship with the UK is desired by the CDs, this does not mean that there are no supporters of a new approach. In fact, there are public leaders of the different CDs who advocate for a change of status. One critic of the Channel Islands' current position is the former Jersey First Minister for External Relations (2013-2018), Sir Philip Bailhache. As early as 2009, he said that "we (the Channel Islands) should be ready for independence if we are placed in a position where that course was the only sensible option" (Bailhache, 2009). In 2012, he noted that sometimes the Islands' interests do not coincide with those of the UK. So, he expressed his wish to go further in the development of the Islands' international capacities, far beyond the mere possibility of negotiating their own tax treaties (Bowers, 2012). However, in Bailhache's opinion, the UK was not willing to "allow Jersey to look after its own interests in a broader sense – maybe the view is: 'If you want to do that you should become a sovereign state and there are limits to the amount of rope we can give you'" (Bowers, 2012).

On June 27, 2012, *The Guardian* published a poll in which it asked, "Should Jersey have constitutional independence from the UK?". Although the sample was not representative, since only 1,500 citizens participated, 61% were in favour of independence (*The Guardian*, 2012). In 2017, at the height of the Brexit negotiations between the EU and the UK, Bailhache, told the States Assembly that "the Island might seek to change its current arrangements by looking for greater independence" (Jersey News, 2017). He also agreed that Jersey should create better links with Guernsey,

There is a possibility of resurrecting an idea about a confederation which had been floated some years ago but that is really matter [sic] for further discussion with our friends and colleagues over in Guernsey and indeed with ministers in Jersey. It is an idea but not more than that. At the end of the day, it really depends whether both parties wish to join together in this kind of way and I think we are a long way from that at the present time (Jersey News, 2017).

Regarding the Isle of Man, the Manx political party Mec Vannin has been campaigning for the Isle of Man's independence from the UK since 1962 (Mec Vannin, 2022). The party advocates for a sovereign state based on a republican form of government (Mec Vannin, 1990). The former Manx Minister Philip Gawne, who was a member of Mec Vannin during the 1980s, said in a 2011 speech at the ceremony to mark the contribution made by Illiam Dhone to the political independence of the island that,

The UK has demonstrated clear ambivalence if not outright hostility to our nation, being much more foe than friend in recent times ... The Isle of Man needs politicians with the vision and drive to develop a future for the nation, which may involve constitutional independence for the island (Gawne, 2011, p. 3).

In 2016, Gawne said Brexit would open all options for the Isle of Man including independence:

We will have to start thinking the unthinkable. We need to consider all the options now including breaking link with what's left of the UK! (Kneale, 2016).

Therefore, in the particular case of the CDs, the sovereign state status could be of interest since, if they wished to, they could maintain their special link with the UK, and particularly with the Crown. As independent states, the CDs could become realms of the UK and at the same time, members of the Commonwealth on their own, like Grenada or Tuvalu, both of which are microstates, UK realms, and Commonwealth members. This option would involve the CDs accepting the British Monarch as Head of State in her/his roles of Duke of Normandy, Lord of Mann and head of the Commonwealth. This status would offer some level of international support for the CDs

However, although the sovereign state option is an interesting one, it does not entail the same level of security as the FAS option. If the CDs opted for full independence, the link they would have with the UK would be more symbolic than real. A good example of this is Grenada in 1983. Grenada became a sovereign state and member of the Commonwealth, with Queen Elizabeth as Head of State in 1974, but this status did not prevent the US and its Caribbean allies invading (UK Parliament, 1983). The UK's reaction did not go beyond a mere critique of what happened. It did not deploy its armed forces and it abstained on the vote of the UN Security Council resolution deeply deploring the US-led invasion of Grenada as a "flagrant violation of international law" (Bernstein, 1983).

For the reasons given above, the preferred option would be to become two different FASs – the Channel Islands and the Isle of Man – of the UK. A FAS is a status by which the dependent territory freely and voluntarily agrees to pool part of its sovereignty and associate with a sovereign state, normally through a constitutive treaty. In return, the associated state receives political, commercial, fiscal or social advantages, such as dual citizenship, free market access, the same currency, certain tax exemptions, tax rebates or certain social benefits. The degree and types of advantage, as well as the degree of power conferred, depends on what the parties agree. Normally, the associated state transfers powers in the areas of defence and international relations. However, FAS status does not designate a uniform reality, but a heterogeneous one, particularly regarding the special connection between each FAS and the state with which it is associated and the type of free association agreement that each FAS concludes. Generally, these agreements are embodied in an international treaty, which establishes the terms of the association, the way powers are shared between the two parties and the possibility of withdrawal, according to various requirements. In the case of the Cook Islands and Niue, however, the details of their free association arrangement are contained in several documents, such as their respective constitutions, the 1983 Exchange of Letters between the governments of New Zealand and the Cook Islands and the 2001 Joint Centenary Declaration. There are different examples of FAS in the international community. For instance, the Cook Islands and Niue or Micronesia, the first and second associated with New Zealand, and the third with the US.

According to Keitner (2003, p. 19), the features of associate statehood include: internal control, international status, and delegation of certain state functions to a principal (in the CDs' case the UK), with the power of unilateral revocation residing in the associate. Throughout this

section, we are going to examine if the CDs' status fulfils all these features or if this status falls short in order to achieve the desired outcome in terms of more independence of action.

At the internal level, one could argue that the CDs' status is very similar to the FAS one. This argument is based on the fact that the CDs have broad internal powers and institutional structures of self-government, which have an autonomous functioning from the UK. In Keitner's (2003, p. 20) opinion, in general, one can expect associated states to have control over such things as education, taxation, and infrastructure. They will generally have their own judicial systems with final authority over matters arising within the territory, but some may retain recourse to the highest judicial instance of the principal. Associated states generally have control over immigration and issue their own travel documents, although some will continue to share citizenship with the principal. Some will have their own currencies; others will share the principal's currency. Keitner (2003, p. 20) suggests that free association encompasses a range of relationships between independence and integration. The more competencies delegated to the principal, the farther away the associated state will be from the independence end of the spectrum, and vice versa.

The CDs fulfil all these internal requirements; they have control over education, taxation, and infrastructure. They have their own courts of law, but the Judicial Committee of the Privy Council is the court of final appeal for them (House of Commons, 2019). All the CDs use sterling, which is not considered a separate currency, but is issued locally. Each CD has its own immigration processes and procedures, but their foundations lie in the British Immigration Act 1971 (Home Office, 2021). The UK and the CDs are part of a Common Travel Area with the Republic of Ireland. This means that each territory has its own immigration policies, but each policy is based on an overarching common approach that supports alignment. The UK government is responsible for the defence of the CDs. Defence is something with which most of the FASs who have opted to delegate to the state are associated (Home Office, 2021).

However, there are also significant differences at the internal level between the CDs and the FASs that would make switching to the FAS status desirable. Unlike the FASs, where the principal state can only legislate for the smaller or associated state in those areas that it has competences, the UK Parliament has a paramount power to legislate for the CDs. Apart from legislating in the areas where the UK has competence: defence, nationality, citizenship, succession to the Throne, extradition and broadcasting, UK legislation can be extended to the CDs if UK Government departments consider it necessary or if they have received a request from a Dependency to do so (House of Commons, 2019). On this issue, the Royal Commission on the Constitution concluded that "in the eyes of the courts (the UK) Parliament has a paramount power to legislate for the Islands in any circumstances". Nevertheless, it also stated that this should be restricted to the considerations of "good government" (House of Commons, 2019). In other words, the UK Parliament should only legislate following a fundamental breakdown in public order or endemic corruption in the government, legislature, or judiciary of one of the Dependencies (House of Commons, 2019). Although this is a subsidiary power, it is very restrictive in terms of these territories' autonomy; since, in practice, it means direct rule from Westminster and the temporary suspension of the CDs' self-government if the UK regards this as necessary. Thus, suspension is subjected to the UK's unilateral interpretation of what good government means and when this is breached. Since there is no legal precision of the circumstances that entail a break of good government, this is a vague and discretionary power that the UK retains.

Another important difference with the CDs is that the FAS can be represented in the parliament of the state with which it is associated. It is true that not all of the FASs have a representative; it depends on the nature of their association agreement but becoming a FAS would enable this option. The CDs have never been represented in the UK Parliament. Certainly, there is not a huge clamour for it and some CDs political leaders consider this option as constitutionally inappropriate (Crown Dependency & British Overseas Territories Political News, 2020). However, there are advocates, like UK Conservative MP Andrew Rosindell, who claim that they should have their own political representatives in London. He argues that:

In the UK Parliament, its members take decisions on a whole range of things – defence, foreign policy, international treaties, environmental issues, currency – that directly affect the Channel Islands and the Crown Dependencies. When it comes to those issues, there should be a voice for them in Parliament. We should be a parliament of all British peoples, not just the UK (Madden, 2019).

It is possible that Westminster representation could be organised without the CDs being in free association with the UK, but it would be riskier for their self-government, since granting them this kind of representation would most likely adversely affect their constitutional relationship with the UK. It could entail a limitation of their current constitutional powers. So, if they wish to be represented at Westminster, FAS status would allow the CDs to do this without the risk of losing autonomy.

At the international level, Keitner (2003) explains that multicultural societies can and do flourish; but when territorially distinct people with their own culture, history, and sense of distinct identity are faced with the choice of enshrining that identity in a separate international status or merging that identity into an existing state, the human desire for recognition strongly suggests that the former option will appear preferable. While many forms of federation preserve a large degree of internal autonomy particularly over cultural affairs, they rarely allow an international role for the component units of the federation.

Therefore, if the CDs opt for an FAS formula, they would enjoy a higher level of self-government at both the internal and international levels, without relinquishing its link with the UK. They would have a relationship with the UK – of their choice – and simultaneously, they would be able to conduct their foreign affairs and thus increase their international sovereignty. Moreover, in the particular case of the CDs, not only could they be a FAS, but also part of the realm of the UK allowing them to maintain their important and historical bond with the British Monarchy. The one draw-back would be not being a member of the Commonwealth, as the organisation only accepts sovereign states; however, as they do now, the CDs would be able to engage in a range of associated bodies, such as the Commonwealth Parliamentary Association and participate in the Commonwealth Games.

Finally, for Keitner (2003) the most important feature of FAS status is not what competencies an associated state delegates or maintains, but the process by which the division of competencies is agreed upon, and the common understandings that underpin that division. In other words, an associated state retains the right to modify its status through an act of popular will. As a matter of international law, a principal cannot dictate the future political status of its associate: an associate always has the unilateral right to withdraw from the association. This right of unilateral withdrawal distinguishes free association from other forms of power-sharing, such as federation.

Unlike the BOTs, the CDs do not have written constitutions, or better said, codified constitutions, since their constitutions can be found in a variety of sources. In their legislation, judgments, treaties, reports or merely evidenced by documents. They are also found in convention and custom (Dawes, 2015). There are arguments as to whether an uncodified constitution is the best type of constitution or not. This is the eternal debate between those who argue that these types of constitutions are dynamic, flexible, and more amenable to constitutional reform and those who think that an uncodified constitution can lead to ambiguity, uncertainty, and possible legal conflict between the three pillars of government. The flexible nature of uncodified constitutions means that constitutional issues could be subject to multiple interpretations. This can be understood negatively, since it could entail a lack of legal certainty, but this can be also given a positive reading. An uncodified constitution evolves and adapts to reflect changing circumstances. Sometimes, these types of constitutions are described as “living constitutions” (Wade, 2019).

The fact that the CDs have uncodified constitutions means that these territories’ statuses can grow and evolve more easily. They can adapt to the new challenges and requests in a more flexible way. However, at the same time, it is unclear how far these territories can go in their demands for greater self-government. Since the UK also does not have a “written entrenched constitution which provides a backdrop to the development of self-government, autonomy or decolonisation” (Angelo, 2004, p. 330), this leads to an uncertain future for the UK dependent territories in terms of an eventual right to self-determination. Further, up to now the UK has been reluctant to countenance free association for either the CDs or the BOTs because of concerns relating to ‘contingent liabilities’. As was stated by the National Audit Office in relation to the BOTs back in 2007: “While Territory governments remain responsible for their actions, the UK bears the ultimate risk from potential liabilities. The UK must therefore understand, monitor and mitigate risks in the Territories in order to minimise costs falling to the UK” (National Audit Office, 2007, p. 12). Free association would remove that automatic oversight and this is something which concerns the UK.

Moreover, there are no complementary CD and British laws that embody in a clear way the recognition of these territories’ right to self-determination, and there is no international law that recognises this right to them; since the right to self-determination in international law is reserved to colonial territories, and the CDs have never been considered as such. Alegre argues that the UK has a responsibility to support the CDs in the development of their right to self-determination (Alegre, 2018, p. 312). However, beyond such academic contemplation unlike the FASSs, CDs have no legal assurance of this right, or indeed no clear route to achieving it. Therefore, this is a key issue that the CDs need to consider when it comes to choosing between keeping the current status or moving towards free association.

## **Conclusion**

The UK’s decision to leave the EU has had direct implications for the UK, but at the same time will have indirect effects as well. An indirect effect of Brexit may be the questioning of the current UK territorial model in a broad sense, including the territories under British sovereignty. So, it is not Brexit per se that entails the questioning of these territories’ statuses, but Brexit can act as a catalyst for rethinking the direction and the very nature of the current territorial model.

The CDs' status is the result of a firmly consolidated historical and political relationship with the UK. In this sense, certainly, there is no official request for a change of status either by these territories or by the UK. Moreover, there has never been a questioning of the CDs' status by the international community. Hence, there appears to be no need for discussing the change of these territories' status. But, Brexit has shown the limitation of their status, for example that they had no say in the UK's decision to withdraw from the EU, and they have been unable to negotiate a new bespoke trading relationship with the bloc. These issues have certainly caused frustrations in the CDs and they are starting to consider more seriously the issues of greater self-government and their international role.

The UK recognises the Islands' desire to develop their own separate international identity. However, the current mechanisms for increased international participation of the CDs are not enough since decisions are made on the particular circumstances of the issue and require the constant engagement of the UK. In this sense, if the CDs want to negotiate and conclude their own international agreements, or if they want to join an international organisation on their own, they need a letter of entrustment from the UK. Moreover, if the CDs want to participate in an international meeting they have to be included in the UK Delegation and finally, although the UK is tasked to represent the interests of the CDs their interests often diverge and naturally UK interests trump those of the CDs.

Moreover, there are other issues that question the current status of the CDs, such as the lack of representation in Westminster. The UK Parliament can take decisions on a whole range of areas, such as defence, foreign policy, international treaties, environmental issues and the currency, which directly affect the CDs, but when it comes to those issues, the CDs have no voice in Parliament. Likewise, the UK Parliament can legislate for the CDs when there is a fundamental breakdown in public order or endemic corruption in the government, legislature or judiciary. Although this is a subsidiary power, it is restrictive in terms of the territories' autonomy; since, it could mean direct rule from Westminster and the temporary suspension of the CDs' self-government. Thus, suspension is subjected to the UK's unilateral interpretation of what good government means and when this is breached. Since there is no legal precision of the circumstances that entail a break of good government, this is a vague and discretionary power that the UK retains.

The fact that the CDs have uncodified constitutions means that these territories' statuses can grow and evolve more easily. They can adapt to the new challenges and requests in a more flexible way. However, at the same time, it is unclear how far these territories can go in their demands for greater self-government. Since the UK also does not have a written entrenched constitution which provides a backdrop to the development of self-government this leads to an uncertain future for the UK dependent territories in terms of possible next steps. Also, the UK is reluctant to consider free association because of its responsibilities if anything goes wrong. Further, there is no CD, British or international legal framework that offers a clear and managed path to free association, so the CDs need to keep this mind when evaluating options.

Although some of the CDs' demands for change could be achieved by the updating of the current status, there are issues, particularly internationally, which cannot be achieved unless a new status is secured. It is clear that the current status prevents the full development of their international personality. This paper has proposed a move to Free Association, since this is the status more in keeping with these territories' political identity and legal peculiarities, and more respectful of the historical ties between the CDs and the UK. At the same time, this is the status that better conveys the territories' requests to further develop their autonomy and international

identity. Therefore, if the CDs opt for a FAS formula, they would enjoy a higher level of self-government both internally and internationally, without relinquishing their link with the UK.

Finally, this paper's discussion is conditioned by two important issues. First, the people and representatives of the CDs need to decide how far they want to go in their quest for greater self-government. This involves a truly reflexive process, without censorship. They need to discuss all possible political alternatives, from a simple updating of their current status to FAS, and even independence. Second, any update or change of their status needs the approval of the UK, and as we have seen the UK will first need some reassuring and persuading that greater autonomy with a commensurate reduction in UK powers will be of benefit to both parties.

## References

- Alegre, S. (2017). Brexit: the Crown Dependencies. 19th Report of Session 2016–17. House of Lords, European Union Committee. Retrieved from <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/136/136.pdf>
- Alegre, S. (2018). Brexit, human rights and self-determination: A perfect storm in the British Crown Dependencies and Overseas Territories? *European Human Rights Law Review*, 4, 311–314. Retrieved from [https://www.islandrights.org/wp-content/uploads/2018/10/Alegre-from-2018\\_EHRLR\\_Issue\\_4\\_Print\\_FINAL.pdf](https://www.islandrights.org/wp-content/uploads/2018/10/Alegre-from-2018_EHRLR_Issue_4_Print_FINAL.pdf)
- Angelo, T. (2004). A few comparative remarks on the concept of free association in the South Pacific. *Revue Juridique Polynésienne*, 4, 329–338.
- Assemblée Parlementaire de la Francophonie (2015). Jersey. Assemblée Parlementaire de la Francophonie. Retrieved from <http://apf.francophonie.org/Jersey.html>
- Auld, R. (2009). Turks and Caicos Islands Commission of Inquiry 2008–2009, Report of the Commissioner The Right Honourable Sir Robin Auld. Retrieved from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/268143/inquiry-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/268143/inquiry-report.pdf)
- Bailhache, P. (2009). One or two steps from sovereignty. *Jersey & Guernsey Law Review*. Retrieved from [https://www.jerseylaw.je/publications/jglr/Pages/JLR0910\\_Bailhache.aspx](https://www.jerseylaw.je/publications/jglr/Pages/JLR0910_Bailhache.aspx)
- BBC News (2016a). Panama papers Q&A: British Overseas Territories and Crown Dependencies. Retrieved from <https://www.bbc.com/news/uk-35969481>
- BBC News (2016b). Queen dismisses EU referendum petition from crown dependency group. Retrieved from <https://www.bbc.com/news/world-europe-jersey-36228860>
- Bernstein, R. (1983). U.S. Vetoes U.N. resolution 'deploring' Grenada invasion. *New York Times*. Retrieved from <https://www.nytimes.com/1983/10/29/world/us-vetoes-un-resolution-deploring-grenada-invasion.html#:~:text=UNITED%20NATIONS%2C%20N.Y.%2C%20Oct.,flagrant%20violation%20of%20international%20law.&text=The%20vote%2C%20cast%20in%20the,veto%20by%20the%20United%20States>
- Birt, M. (2017). The power of the UK to legislate for the Crown Dependencies without consent: fact or fiction? *The Jersey & Guernsey Law Review*. Retrieved from [https://www.jerseylaw.je/publications/jglr/PDF%20Documents/JLR1702\\_Birt.pdf](https://www.jerseylaw.je/publications/jglr/PDF%20Documents/JLR1702_Birt.pdf)
- Bowers, S. (2012). Roots of Channel Islands' uncertain relationship with UK go back to 1066. *The Guardian*. Retrieved from <https://www.theguardian.com/uk/2012/jun/27/channel-islands-uncertain-relationship-uk#:~:text=The%20Channel%20Islands%20of%20Jersey,dependencies%20are%20not%20constitutionally%20independent>

- Carey Olsen Law Firm (2021). Brexit: Impact of the end of the transition period on Guernsey and Jersey. *Carey Olsen*. Retrieved from <https://www.careyolsen.com/briefings/brexit-impact-end-transition-period-guernsey-and-jersey>
- Clegg, P. (2016). Brexit and the Overseas Territories: Repercussions for the periphery. *The Round Table: Commonwealth Journal of International Affairs*, 105(5), 543-555.
- Clegg, P. (2018). The United Kingdom and its Overseas Territories: No longer a 'benevolent patron'? University of the West of England, Research Repository. Retrieved from <https://uwe-repository.worktribe.com/output/857375/the-united-kingdom-and-its-overseas-territories-no-longer-a-benevolent-patron>
- Crown Dependency & British Overseas Territories Political News (2020). Westminster MPs for Crown Dependencies and British Overseas Territories. Retrieved from <https://www.facebook.com/crowndependencypoliticalnews/photos/westminster-mps-for-crown-dependencies-and-british-overseas-territories-no-way-s/3036096849744668>
- Dawes, G. (2015). Documents of constitutional importance for the Channel Islands: Reflections on a Rencontre. *The Jersey & Guernsey Law Review*. Retrieved from [https://www.jerseylaw.je/publications/jglr/PDF%20Documents/JLR1502\\_Dawes.pdf](https://www.jerseylaw.je/publications/jglr/PDF%20Documents/JLR1502_Dawes.pdf)
- Doyle, J., & Connolly, E. (2017) *Brexit and the future of Northern Ireland*. Brexit Institute. Working Paper. Dublin City University. Retrieved from <https://dcubrexitinstitute.eu/wp-content/uploads/2017/06/WP-2017-1-Doyle-Connolly-1.pdf>
- Dumieński, Z. (2019). Shared citizenship and sovereignty: The case of the Cook Islands' and Niue's relationship with New Zealand. *Palgrave handbook of ethnicity*. Singapore: Palgrave Macmillan.
- Gawne, P (2011). Laa cooinaghtyn Illiam Dhone Oraid Ghaelgagh. *The Free Manx Paper*. 46, 1-4. Retrieved from <https://www.mecvannin.im/pabyr/yps46.pdf>
- Hendry, I., & Dickson, S. (2018). *British Overseas Territories law*. London: Bloomsbury.
- Home Office (2021). *Common Travel Area*. London: UK Government. Retrieved from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1024144/Common\\_travel\\_area.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1024144/Common_travel_area.pdf)
- House of Commons (2019). *How autonomous are the Crown Dependencies?* House of Commons Library. Retrieved from <https://commonslibrary.parliament.uk/%EF%BB%BFhow-autonomous-are-the-crown-dependencies/>
- House of Commons, Justice Committee (2010). *Crown Dependencies*. 8<sup>th</sup> Report of Session 2009-2010.
- House of Commons Justice Committee (2013). *Crown Dependencies: Developments since 2010*. *House of Commons Justice Committee*. 10<sup>th</sup> Report of Session 2013-14.
- House of Lords, European Union Committee (2017). *Brexit: The Crown Dependencies*. House of Lords, 19<sup>th</sup> Report of Session 2016-17.
- Jersey News (2017). Minister rejects Brexit independence claims. *Jersey News*. Retrieved from <https://www.bailiwickexpress.com/jsy/news/no-plans-jersey-seek-independence/?t=i#.YebTUP7MLIU>
- Keitner, C. (2003). Associate statehood: Principles and prospects. *Faroese Law Review*, 3(1), 13.
- Kneale, A. (2016). Indy Option raised by Manx Council of Ministers member. *Transceltic*. Retrieved from <https://www.transceltic.com/blog/indy-option-raised-manx-council-of-ministers-member>
- Madden, E. (2019). *The interview: Andrew Rosindell*. Global UK. Retrieved from <https://www.blglobal.co.uk/Features.aspx?id=the-interview-andrew-rosindell>

- Mec Vannin (2022). Advocating Republican Independence for the Isle of Man since 1962. Mec Vannin. Retrieved from <https://www.mecvannin.im/policy.php>
- Mec Vannin (1990). Papers of the Isle of Man political party Mec Vannin. Manx National Heritage Library and Archives. Retrieved from <https://archiveshub.jisc.ac.uk/search/archives/f48ee1c1-0356-3246-996e-c0382fbda789>
- Ministry of Justice (2020). *Fact sheet on the UK's relationship with the Crown Dependencies*. Ministry of Justice. Retrieved from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/863381/crown-dependencies-factsheet-february-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863381/crown-dependencies-factsheet-february-2020.pdf)
- Ministry of Justice (2021). *How to note on the extension of international instruments to the crown dependencies*. Ministry of Justice. Retrieved from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/185881/international-instruments-crown-dependencies.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/185881/international-instruments-crown-dependencies.pdf)
- Mut-Bosque, M. (2020). The sovereignty of the Crown Dependencies and the British Overseas Territories in the Brexit era. *Island Studies Journal*, 15(1), 151-168. Retrieved from <https://islandstudies.ca/sites/default/files/ISJMutBosqueSovereigntyBritishOCTSDependencies.pdf>
- National Audit Office (2007). *Foreign and Commonwealth Office: Managing risk in the Overseas Territories*. Report by the Comptroller and Auditor General, HC 4 Session 2007-2008, 16 November, London: The Stationary Office.
- Privy Council (2016). Orders approved by the Privy Council held by the Queen at Buckingham Palace on 4th May 2016. Privy Council. Retrieved from <https://privycouncil.independent.gov.uk/wp-content/uploads/2016/05/Orders-approved-at-Privy-council-4-May-2016.pdf>
- Tan, C. (2021) Brexit and Jersey Fishing Rights: The International Legal Status of the Crown Dependencies. Blog of the *European Journal of International Law*. Retrieved from <https://www.ejiltalk.org/brexit-and-jersey-fishing-rights-the-international-legal-status-of-the-crown-dependencies/>
- The Guardian* (2012). Should Jersey be independent from the UK? *The Guardian*. <https://www.theguardian.com/uk/poll/2012/jun/27/should-jersey-be-independent>
- UK Government and Parliament (2016). Petitions. UK Government and Parliament. Retrieved from <https://petition.parliament.uk/archived/petitions/118467>
- UK Government (2022). Extension of treaties to Overseas Territories. Retrieved from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/308103/Extension\\_to\\_OTs\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/308103/Extension_to_OTs_guidance.pdf)
- UK Parliament (2017). *Brexit: The Crown Dependencies*. UK Parliament. Retrieved from <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/136/13603.htm>
- UK Parliament (2019). *The Crown Dependencies*. House of Commons Library. Retrieved from <https://commonslibrary.parliament.uk/research-briefings/cbp-8611/>
- Wade, L. (2019). *The pros and cons of an 'Unwritten' constitution*. The Lawyer Portal. Retrieved from <https://www.thelawyerportal.com/blog/the-pros-and-cons-of-having-an-unwritten-constitution/>
- Worldometers (2020a). *Channel Islands population*. Worldometers. Retrieved from <https://www.worldometers.info/world-population/channel-islands-population/>
- Worldometers (2020b). *Isle of Man population*. Worldometers. Retrieved from <https://www.worldometers.info/world-population/isle-of-man-population/>
- Yusuf, H. O., & Chowdhury, T. (2019). The persistence of colonial constitutionalism in British Overseas Territories. *Global Constitutionalism*, 8(1), 157-190.