

A CELEBRATION OF AUTONOMY



In 1279 King Edward I granted a seal to the Bailiffs of Jersey and Guernsey. The arms on it are those of the King, three leopards or lions, passant guardant. By 1300, however, it was clear that the two bailiwicks had developed as distinct judicial entities and a separate seal was necessary for each Royal Court. Around the shield of the Jersey seal above are the words 'S. Ballivie Insule de Jerseye', the seal of the Bailiff of the Island of Jersey.



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A Celebration of Autonomy 1204–2004: 800 YEARS OF CHANNEL ISLANDS' LAW

*Being a collection of papers presented at
a conference organised by The Jersey Law Review
at the Reform Club, London on 2nd July 2004,
to mark the eighth centenary of the loss of
Normandy by King John and the granting of
special constitutional rights and privileges to
the people of the Channel Islands.*

EDITED BY
PHILIP BAILHACHE, MA (Oxon)
BAILIFF OF JERSEY
HON. BENCHER OF MIDDLE TEMPLE
HON. FELLOW OF PEMBROKE COLLEGE, OXFORD

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LIST OF CONTRIBUTORS

Sir Philip Bailhache, is Bailiff of Jersey and editor of the Jersey Law Review.

William Bailhache QC, is Attorney General of Jersey.

Alan Binnington is an advocate of the Royal Court of Jersey, a member of the Jersey Law Commission and a member of the Jersey Law Review Editorial Board.

Sir de Vic Carey, was Bailiff of Guernsey, between 1999 and June 2005.

Gordon Dawes, is an advocate of the Royal Court of Guernsey and a member of the Jersey Law Review Editorial Board.

Patrick Hodge QC, was a Judge of the Courts of Appeal of Jersey and Guernsey, between 2002 and 2005.

Professor Sir James Holt FSA FBA, was a Professor of medieval history at Cambridge University (1978–1988) and is author of Jersey 1204.

Lord Hoffmann PC, is a Lord of Appeal in Ordinary and was a Judge of the Courts of Appeal of Jersey and Guernsey (1980–1985).

Professor Jeffrey Jowell QC, is a Professor of public law, and Head of the Law Faculty at University College, London.

John Kelleher, is an advocate of the Royal Court of Jersey and a member of the Jersey Law Review Editorial Board.

Sir John Laws PC, is a Lord Justice of Appeal.

Sir Godfray Le Quesne QC, is a bencher of Inner Temple and was a Judge of the Court of Appeal of Jersey (1964–1997) and Guernsey (1964–1995).

Professor Andrew Le Sueur, is the Barber Professor of Jurisprudence at the University of Birmingham.

List of Contributors

Professor Paul Matthews, is a consultant at Withers plc and a visiting Professor at King's College, London. He is a member of the Jersey Law Review Editorial Board.

John Mowbray QC, is a bencher of Lincoln's Inn and author of *Lewin on Trusts*.

Alison Ozanne, is an advocate of the Royal Court of Guernsey.

Mme Sophie Poirey, is a lecturer on Norman Customary Law at the University of Caen.

Professor Kenneth Reid WS, FRSE, is Professor of property law at Edinburgh University and is a Member of the Scottish Law Commission.

Richard Southwell QC, was a Judge of the Courts of Appeal of Jersey and Guernsey, between 1994 and 2005.

Professor Alistair Sutton, is a barrister and a visiting Professor in European Law at University College, London.

INTRODUCTION

Sir Philip Bailhache

INTRODUCTION

It is, at first blush, extraordinary that the Channel Islands should for 800 years have retained independent systems of law with their own courts, judges and procedures. Jersey has a population of some 90,000; Guernsey, about 65,000. They are two distinct bailiwicks, each with its own Bailiff, Royal Court and Court of Appeal. Their legal systems, while springing from the same source of Norman Customary law, have however flowed down different channels over the centuries. Thus, while many aspects of their jurisprudence bear witness to their common origin, there are today important differences both procedurally and substantively between the law of Jersey and the law of Guernsey.

The 1204–2004: 800 years of Channel Islands' law conference held at the Reform Club in London on 2nd July 2004 was the first collaborative effort by the two jurisdictions in the legal field. The conference was organised by the Jersey Law Review, but the judiciary and bar of both Islands were well represented. It was, I believe, in that sense as well, a significant event. While the traditional rivalry between Jersey and Guernsey still of course subsists, both Islands have begun to recognise that in political, constitutional and legal terms their future strength and stability lie in much greater cooperation. The bailiwicks are distinct and different; but both can learn and benefit from the jurisprudence of the other.

The timing of this conference was therefore apposite in a number of ways. 2004 marked the 800th anniversary of the emergence of the special constitutional position of the Channel Islands and their unique relationship with the Crown. How did this come about?

CONSTITUTIONAL ORIGINS

The story of the emergence of the two bailiwicks as autonomous small jurisdictions under the protection of the Crown begins in June 1204. In that month King John's forces surrendered the castle at Rouen to the French King Philip Augustus and the Duchy of Normandy was lost to the Crown. The Channel Islands had been part of the Duchy since their annexation by Duke

William Longsword in 933. After the Battle of Hastings in 1066 they had formed part of the Norman Empire, owing loyalty to the King of England in his capacity of Duke of Normandy. The loss of Normandy in 1204 created a schism which left the Islands exposed in a hostile sea between two warring kingdoms. Why should the Islanders, who spoke Norman French, who traded with the Normans, and who had many ties of kinship and blood with their Norman neighbours have thrown in their lot with the English King? It is one of those perennial questions, and was the subject of an important study by eminent Cambridge historians commissioned by the States of Jersey to mark the 800th anniversary of 1204.¹ One of the authors of that study, Professor Sir James Holt, was a speaker at the conference.

Of one answer to the question we can however be certain. In order to minimise the trauma of the separation from Normandy, and to retain their loyalty, King John conferred a number of privileges upon the Islanders. One of those privileges was the right to be governed by their own laws, that is by the customary law of Normandy and other local customs then in force. By a seminal constitutional document issued not long after 1204, which we now call the Constitutions of King John, the Islanders were commanded to elect their twelve best men to keep the pleas and to administer justice. These benches of twelve judges, who became known as *Jurés Justiciers* or Jurats, formed, with the Bailiff² of each Island, bodies from which the Royal Courts of Jersey and Guernsey emerged towards the end of the 13th century.³ Through the Jurats the Islands found their judicial autonomy. Subsequent Royal charters confirmed that autonomy.

King John also decided not to incorporate the Islands into the realm of England. At first he appointed a Warden for both Channel Islands. In time however a different official was appointed for each Bailiwick. The Warden, or Captain, eventually became known as the Governor with the responsibility for the defence of the Island and for military affairs. The Bailiff held responsibility for justice and for civil affairs.

And so the relationship of the Islands is not with the Parliament at Westminster, but with the Crown, by which Channel Islanders mean the sovereign. The link with the United Kingdom government which, under the current constitutional arrangements, is responsible for the Islands' defence and international relations, lies through a Privy Councillor, the Lord Chancellor or Secretary of State for Constitutional Affairs.

¹ Everard and Holt, *Jersey 1204, the forging of an island community*, Thames and Hudson 2004

² For a brief account of the office of Bailiff, see Bailhache, *The cry for constitutional reform – a perspective from the office of Bailiff* (1999) 3 JL Review 253

³ For an erudite and fuller description of the constitutional significance of the Jurats see Le Patourel, *The medieval administration of the Channel Islands 1199–1399*, published OUP 1937, and republished by the Guernsey Bar Association 2004

THE FUTURE

What does the future hold for the Channel Islands in terms of their constitutional links with the United Kingdom and indeed the European Union? Parliamentary democracy is now well established. The States of Jersey and the States of Guernsey evolved from the Royal Courts of their respective bailiwicks as legislative assemblies during the course of the 14th and 15th centuries. Following organic development and the constitutional reforms which came after liberation from German occupation in 1945, both bailiwicks have democratic parliamentary institutions and systems of government that are responsive to the needs of the small communities which they serve. Their legal and judicial systems are mature and soundly based. Their economies are strong.

The governments of both Islands are now pursuing policies designed to achieve a greater measure of international personality. It is not acceptable to most Islanders that ministers who are not elected by them should, without their consent, determine their destiny in relation to Europe and the outside world. Yet under the current constitutional arrangements the United Kingdom has the duty of representing the Islanders' interests even when those interests run directly counter to the interests of the UK. Perhaps a *modus operandi* will be found which enables the Islands to maintain their current constitutional relationships. Perhaps not.

In terms of constitutional law and public international law the evolving position of the Channel Islands has never been more interesting. Some of these important issues were explored in a series of addresses at the conference. The collection of papers put together in this volume make essential reading for those with an interest in the relationships of Jersey and Guernsey with the United Kingdom and the developing state of the law in both bailiwicks.

L'ESPRIT DE LA COUTUME DE NORMANDIE

Sophie Poirey

Le droit normand s'est appliqué en Normandie, depuis la naissance du duché, en 911, jusqu'à la Révolution de 1789. Cette dernière voulut abolir les coutumes existantes, mais l'incapacité des révolutionnaires à élaborer un texte applicable sur l'ensemble du territoire français permettra au droit normand de survivre quelque temps encore. C'est finalement l'Empire qui en aura raison car la promulgation du Code Napoléon, en 1804, entraîne effectivement l'abolition des coutumes provinciales. Mais si ce droit n'est plus recevable dans la France actuelle, il survit encore dans les îles anglo-normandes, ces territoires qui n'ont jamais rompu avec leurs racines et ont su rester fidèles à leur histoire.¹

Ce droit normand est un droit coutumier, né de l'affaiblissement du pouvoir central à la fin du IXe siècle. Faute d'agents fidèles et efficaces pour les faire connaître et en imposer le respect, les lois royales ne s'appliquaient en effet presque plus. Ce sont alors les coutumes qui prennent le relais, c'est-à-dire les règles et usages en vigueur dans les seigneuries. Née au Moyen-Age avec la féodalité, la coutume demeurera la source principale de droit jusqu'à la Révolution.²

En Normandie, c'est sous le règne de Guillaume le Conquérant qu'une coutume caractérisée émerge avec netteté, sans doute entre 1049 et 1079, soit avec deux siècles d'avance sur les autres provinces du royaume.³ Cette précocité vient essentiellement du sens tactique des ducs qui ont dû et su stabiliser ce duché obtenu au Xe siècle et s'imposer, vis-à-vis de la population mais aussi des barons normands, comme de véritables souverains.⁴ La suprématie indubitable du duc normand, chef incontesté de la hiérarchie laïque et

¹ Sur cette question, cf. Yver, J., *Les caractères originaux de la Coutume normande dans les îles de la Manche*, Travaux de la Semaine d'histoire du droit normand tenue à Guernesey, Caen, 1938, p. 481-583.

² Gaudemet, J., *Les naissances du droit : le temps, le pouvoir et la science au service du droit*, Paris, Montchrestien, 1997, p. 50-55.

³ Génestal, R., *La formation et le développement de la Coutume de Normandie*, Travaux de la Semaine de Droit Normand tenue à Guernesey en 1927, Caen, 1928, p. 37-55, p. 42 et ss.

⁴ Sur la supériorité du duc, cf. Lemaignier, J.F., *La France médiévale, institutions et société*, Paris, Armand Colin, 1981, p. 121 et ss. Cf. encore, Musset, L., *Origines et nature du pouvoir ducal en Normandie jusqu'au milieu du XIe siècle*, in coll., *Les Principautés au Moyen Age. Actes du congrès de la Société des historiens médiévistes*, Bordeaux, 1978, p. 47-59.

ecclésiastique, permet l'instauration d'un droit quasi uniforme en canalisant la multitude d'usages, d'origines diverses, en vigueur dans le duché.⁵

Il faut toutefois attendre les dernières années du règne de Richard Coeur de Lion, à la fin du XIIe siècle, pour que les usages normands soient consignés par écrit.⁶ Cette rédaction se fait en deux temps. Le plus ancien coutumier normand, dénommé *Très Ancien Coutumier de Normandie*, date en partie d'avant la Commise de 1204. On y trouve logiquement de nombreuses dispositions qui traduisent la puissance ducal : citons par exemple l'interdiction faite aux barons de tenir leur justice en même temps que se tiennent les assises ducal;⁷ l'interdiction faite aux seigneurs de lever des impôts sans le consentement du duc;⁸ ou encore l'interdiction de la guerre privée.⁹

En matière fiscale, militaire et judiciaire, se trouvent donc établies en Normandie, et ce dès la fin du XIIe siècle, les bases d'un ordre public très loin de s'instaurer ailleurs.

Après 1204, la coutume s'adapte au contexte politique et aux aspirations des Normands. Paraît alors un texte en latin, plus élaboré que le *Très Ancien Coutumier*, la *Summa de Legibus Normannie in Curia Laicalii*, rapidement traduite en français sous le nom de *Grand Coutumier de Normandie*.¹⁰

Selon toute vraisemblance, ce *Grand Coutumier* est rédigé aux environs de 1245, sans doute par un ecclésiastique, spécialisé comme tel dans le droit romano-canonique, mais manifestement aussi très au fait des pratiques judiciaires laïques. Au XIVe siècle, les Jersiais, lorsqu'ils répondent aux plaids de *quo warranto* initiés par les rois d'Angleterre, désignent ce texte sous le nom de *Somme Maucael*, évoquant peut-être le nom de l'auteur de l'ouvrage publié anonymement.¹¹ La qualité du *Grand Coutumier* lui vaut l'adhésion complète des élites intellectuelles et judiciaires normandes, certains le tenant

⁵ Généstal, R., *La formation et le développement de la Coutume de Normandie*, op. cit., Caen, 1928, p. 42 et ss.

⁶ Sur les sources normandes et notamment coutumières, cf. Tardif, E.J., *Coutumiers de Normandie*, Rouen, 1882–1903, 2 tomes en 3 volumes, tome 1 : *Le Très Ancien Coutumier* ; tome 2 : *La Summa de legibus in curia laicali*. Cf. également sur ces questions, Besnier, R., *La Coutume de Normandie, histoire externe*, Paris, 1935.

⁷ *Très Ancien Coutumier*, ci-après T.A.C., chap. XLIV, 2.

⁸ T.A.C., chap. XLVIII, 2

⁹ T.A.C., chap. XXXI. Sur ces questions, cf., Yver, J., *Le Très Ancien Coutumier de Normandie, miroir de la législation ducal ? Contribution à l'étude de l'ordre public normand à la fin du XIIe siècle*, Tijdschrift voor rechtsgeschiedenis, 29, 1971, p. 333–374.

¹⁰ Pour la *Summa*, cf. Tardif, E.J., op. cit., T. 2. Le texte du *Grand Coutumier* a été publié par Ch. Bourdot De Richebourg, *Nouveau Coutumier général ou Corps des coutumes générales et particulières de France et des provinces*, Paris, 1724, 4 vol. ; (Pour la Normandie, tome IV, *Coutume du Pays de Normandie anciens ressorts et enclaves d'iceluy*, 1583, p. 3–56). Il existe également une édition plus commode due au jersiais, W.L. de Gruchy, *L'Ancienne Coutume de Normandie*, Jersey, 1881.

¹¹ Le nom de Maucael est porté par une famille de la région de Valognes qui compte effectivement plusieurs clercs (cf. Tardif E.J., *Coutumiers de Normandie*, op. cit., p. 217–235).

même, à tort, pour une très officielle consignation de leurs usages, qui aurait été entreprise sur l'ordre de Philippe-Auguste.¹²

Au regard de l'histoire spécifique du duché, point de rencontre de cultures et d'ethnies diverses, plusieurs influences contribuèrent à former cette coutume.

Plus que toute autre province, la Normandie a en effet connu les invasions scandinaves, dès les IX^e et X^e siècles, et l'apport nordique est incontestable dans de nombreux domaines. Cet apport reste cependant des plus limités au niveau juridique : les vikings, et Rollon le premier, ont en effet compris très tôt tout l'intérêt qu'ils avaient à adopter le droit et les institutions carolingiens pour s'imposer à la population locale. Il existe toutefois des apports juridiques spécifiquement nordiques. Au niveau pénal d'abord, on peut mentionner les lois édictées par Rollon en matière de répression du vol, considéré comme un crime passible de la peine de mort. Robert Wace rapporte ainsi la légende des bracelets d'or du duc, suspendus la nuit aux branches des arbres sans être dérobés, tant ces lois infligent une salutaire terreur.¹³ Citons aussi la "paix de la charrue",¹⁴ qui protège les laboureurs et leur instrument de travail, ou encore la "paix des maisons",¹⁵ le hamfare qui sanctionne l'effraction comme un crime.¹⁶ En Normandie, ce système de paix particulières aboutira à une interdiction générale de la guerre privée, au profit d'une paix publique imposée par le duc, et sanctionnée par sa justice.¹⁷

Au niveau matrimonial ensuite, les Rollonides ont maintenu la tradition du mariage *more danico*. A côté des alliances *more christiano*, ces mariages chrétiens qui sont souvent conclus dans un but essentiellement diplomatique, afin de sceller des alliances, les premiers ducs contractent également des unions "à la danoise". Celles-ci font de la femme élue une concubine légale dont les descendants ont les mêmes droits successoraux que des fils légitimes et notamment celui de devenir duc.¹⁸

¹² Viollet P., *Les coutumiers de Normandie*, Histoire littéraire de la France, t. XXXIII, 1916, p. 65–165 ; Besnier, R., *La coutume de Normandie*, *op. cit.*, p. 103–110.

¹³ Wace, *Roman de Rou*, Ile P v. 1984, t. 1, p. 111. Foyer, J., *Exposé du droit pénal Normand au XIII^e siècle*, Paris, Sirey, 1931, p. 137.

¹⁴ T.A.C., chap XVI, *D'assaut de porpris et de charrue*, ed. Tardiff, *op. cit.*, T.1, 2^e partie, p. 15.

¹⁵ T.A.C., chap. XVI, 1, LVIII, 1, LIII, LXX, ed. Tardif, *op. cit.*, t 1, 2^e partie.

¹⁶ Foyer, J., *Exposé du droit pénal Normand au XIII^e siècle*, *op. cit.*, p. 170–179.

¹⁷ TAC, chap XXXI: Nus homs n'ost fere guerre envers autre ; mes qui leur fera tort, si se plaignent al duc e a sa justice, e se ce est cause citeaine, il fera amander le mesfet par chatel ; se elle est criminnal, il le fera amander par les membres", (édition Tardif, *op. cit.*, t.1, 2^e partie, p. 24). Sur cette question, cf. Yver, J., *L'interdiction de la guerre privée dans le très ancien Droit Normand*, Caen, 1928, 45 pages, plus spécialement, p. 21 et s., également, Yver, J., *La législation et l'ordre public au dernier demi-siècle du duché*, Revue d'histoire du Droit français et étranger, 1967, p. 390 et s.

¹⁸ Ainsi, pour Rollon et Popa, Guillaume Longue-Epée et Sprota, ou encore Richard Ier et Gonnor. Ce n'est qu'à partir de Guillaume, qu'il n'y aura plus d'union *more danico*, (Besnier, R., *Le mariage en Normandie des origines au XIII^e siècle*, Caen, 1934, p. 20–27).

Un apport nordique durable existe enfin en droit maritime, car le droit franc est peu tourné vers la mer. Les coutumiers normands réglementent ainsi le droit de varech, celui sur les “choses gayves” (objets trouvés sur le rivage, choses sans maîtres), le droit de “craspois” (le “gros poisson”, baleine ou esturgeon), ou les droits des baleiniers.¹⁹

L'ensemble de ces influences nordiques demeure limité. Quant à l'influence française, elle est quasi-inexistante, car les ducs ont toujours mené une politique d'indépendance vis-à-vis du Roi de France, leur suzerain souvent bien théorique. De plus, lorsqu'a lieu la commise des fiefs continentaux de Jean-Sans-Terre, en 1204, la coutume normande est déjà tellement cristallisée que seules les régions frontalières seront influencées par la coutume d'Île-de-France.²⁰

Quant à l'influence anglaise, qui serait possible à partir de 1066, ou sous les Plantagenêts, elle est également pratiquement inexistante. Les ducs normands ont en effet toujours clairement distingué les deux pays et les deux Cours, la Curia ducis et la Curia regis. De cette séparation résultent deux systèmes judiciaires distincts et, au-delà, deux systèmes juridiques autonomes.²¹

Enfin, on le voit, le fond de la coutume normande provient essentiellement du droit franc, qui gouvernait la population établie sur le territoire dont les Normands ont pris possession. Il s'agit d'un droit germanique, pour lequel compte avant tout la protection du lignage et de son patrimoine, notamment les biens immobiliers, particulièrement précieux lorsqu'ils viennent des ancêtres. Pour saisir l'esprit de la coutume, il nous faudra d'abord examiner les moyens juridiques mis en oeuvre pour préserver le lignage puis comment la coutume s'applique à protéger le patrimoine face à certaines menaces.

PRESERVER LE LIGNAGE

Cristallisée sous le règne du Conquérant, solidifiée sous ceux des Plantagenêts, la coutume de Normandie est la plus centralisatrice de toutes les coutumes médiévales. Quasi souverain, le duc, placé à la tête de la hiéar-

¹⁹ Musset, L., *Les apports scandinaves dans le plus ancien droit normand*, in coll. *Droit privé et institutions régionales. Etudes historiques offertes à Jean Yver*, Paris, 1976, p. 559–575 et plus spécialement, p. 563–564.

²⁰ Ainsi, par exemple, le bailliage de Gisors accepte-t-il la communauté aux acquêts, alors que la coutume normande refuse toute idée de communauté des époux, ne tolérant que le régime dotal et la séparation de biens. (Cf. Génestal, R., *La formation et le développement de la Coutume de Normandie*, op. cit., p. 50).

²¹ Sur l'absence d'influences françaises et anglaises, cf. Génestal, R., *La formation et le développement de la coutume de Normandie*, art. préc., pp. 50 et ss.

chie laïque et ecclésiastique, est titulaire des plus hautes prérogatives judiciaires, militaires et financières. Mais cette centralisation avant la lettre n'empêche pas qu'à l'échelle locale tout seigneur bénéficie de nombreux droits féodaux, des droits que les Normands maintiendront jusqu'à la Révolution. Au contraire, la puissance des seigneurs permet le contrôle de la société et sert les intérêts immédiats du duc. Les intérêts seigneuriaux doivent toutefois se conjuguer avec les intérêts de la structure qui donne sa cohésion à l'ensemble de la société normande : le lignage.

Une coutume fortement féodale

Les seigneurs normands bénéficient de droits féodaux qui leur permettent de dominer leurs vassaux et de garantir au duc la stabilité du duché.²² Les coutumiers normands mentionnent ainsi les droits classiques de confiscation,²³ de déshérence,²⁴ de bâtardise,²⁵ d'aubaine²⁶ ou de retrait féodal.²⁷ Mais les seigneurs normands disposent également de droits spécifiques : le droit de varech,²⁸ importé par les scandinaves, ou encore la garde seigneuriale. Cette dernière permet à un seigneur de jouir du fief de haubert dévolu à un mineur jusqu'à la majorité de ce dernier, en en tirant tout le profit, et ce au détriment du mineur qui subit une perte irréversible de ses revenus.²⁹ Cette institution, jugée archaïque par les juristes parisiens, survit en Normandie jusqu'à la Révolution, alors qu'elle a disparu ailleurs.³⁰

L'esprit féodal imprègne encore très largement le droit privé, et notamment le droit successoral. Rappelons ici que les seigneurs disposent de leurs propres vassaux, qui tiennent d'eux un ou plusieurs fiefs. Or, les services qu'ils attendent en contrepartie de ces concessions territoriales ne doivent pas pouvoir être remis en cause par la dévolution successorale des terres. Pour

²² Sur la "féodalisation" de la coutume, cf. Yver, J., *Les caractères originaux de la coutume de Normandie*, Mémoires de l'Académie des sciences, arts et Belles-lettres de Caen, 1952, p. 307-356, notamment, p. 314-321. J. Yver rappelle ainsi "qu'aucun pays occidental, l'Angleterre mise à part, où le système féodal a été importé par le Conquérant et imposé par lui comme une organisation destinée à supporter son pouvoir, n'a été plus fortement et il faut le dire, logiquement, plus féodalisé que la Normandie" (pp. 314-315).

²³ *Coutume rédigée*, art. 143.

²⁴ *Coutume rédigée*, art. 146.

²⁵ *Coutume rédigée*, art. 147.

²⁶ *Coutume rédigée*, art. 148.

²⁷ *Coutume rédigée*, art. 177 : "Le seigneur féodal peut retirer le fief tenu et mouvant de lui, s'il est vendu par le vassal en payant le prix et les loyaux coûts...".

²⁸ *Coutume rédigée*, art. 194 : "Tout seigneur féodal a droit de varech à cause de son fief, tant qu'il s'étend sur la rive de la mer : comme semblablement des choses gaives".

²⁹ *Grand Coutumier*, édition Gruchy, art. 33, p. 99 : De Garde d'orphelins; *Coutume rédigée*, art. 218 : "Le seigneur fait les fruits de la garde siens...".

³⁰ Sur cette question, cf. Génestal, R., *La tutelle*, Bibliothèque d'histoire du droit normand, 2e série, t. III, Etudes de droit privé normand, Caen, 1930, t. III, 1.

cette raison, la coutume est *a priori* hostile à toute transmission à une femme, puisque celle-ci ne peut assurer les services féodaux. Le droit normand privilégie donc les fils sur les filles, ce qui fait de la coutume de Normandie une coutume “mâle et même toute mâle”.³¹

Par ailleurs, en cas de succession collatérale, on applique la règle *paterna paternis materna maternis*, qui veut que les immeubles propres restent dans leur lignage d'origine.³² Or, lorsqu'il n'y a aucun parent du côté paternel pour recevoir un bien paternel, c'est le seigneur qui en hérite. La Normandie, contrairement à d'autres provinces, refuse en effet la substitution des lignes entre elles, car les patrimoines doivent demeurer séparés.³³

Enfin, les Normands répugnant au partage, qui rend le contrôle seigneurial plus difficile, les immeubles propres sont normalement indivisibles. La règle vaut d'ailleurs pour les successions nobles comme pour les roturières car, en Normandie, toute terre est qualifiée de fief. Pour éviter la division du fief familial à la mort du père, l'aîné des fils se trouve saisi de la succession et en possède les fruits jusqu'au partage.³⁴ Aux yeux des tiers, et notamment du seigneur, il est ainsi le “miroir du fief”. Cette fiction juridique, qui porte le nom de “parage”, ne se prolonge toutefois que jusqu'à ce qu'un cadet réclame le partage.³⁵ A partir de là, le lignage reprend ses droits sur ceux du seigneur.

Une coutume lignagère

La coutume de Normandie est une coutume parentélaire dont la préoccupation essentielle est que l'héritier reçoive les biens de ses ancêtres.³⁶ Le système parentélaire postule donc la vocation de tous les héritiers, ce qui explique qu'au moment du partage, la coutume s'efforce de privilégier un partage égal entre les fils, assorti d'une interdiction une faite aux parents d'avantager l'un

³¹ Yver, J., *Les caractères originaux de la Coutume de Normandie*. art. préc., p. 319 et s.

³² *Grand Coutumier*, chap. XXV, édition Gruchy, pp. 77–78 ; *Coutume Rédigée*, art. 245 “Les héritages venus du côté paternel retournent toujours par succession aux parents paternels ; et comme aussi font ceux qui sont du côté maternel aux maternels, sans que les biens d'un côté puissent succéder à l'autre, en quelque degré qu'ils soient parents, mais plutôt les Seigneurs desquels lesdits biens sont tenus et mouvants y succèdent”. La solution sera encore confirmée en 1666 par le Parlement de Rouen qui, dans l'article 106 des Placités, rappelle que “à défaut de parens de la ligne...(les biens) retournent au fisc ou seigneur féodal...”.

³³ Sur cette question, cf. Yver, J., *Les caractères originaux de la Coutume de Normandie*, art. préc., p. 337 et 338.

³⁴ *Coutume Rédigée*, art 237 : “Le fils aîné, soit noble ou roturier, est saisi de la succession du père et de la mère après leur décès, pour en faire part à ses puînés et fait les fruits siens jusqu'à ce que partage soit demandé par ses frères (...) parce que par la Coutume, il est tuteur naturel et légitime de ses frères et soeurs”.

³⁵ Sur cette question, cf. l'étude de R. Génestal, *Le parage normand*, Bibliothèque d'histoire du droit Normand, 2e série, t. I, 2.

³⁶ Les biens du défunt vont d'abord à ses enfants et aux enfants de ses enfants ; puis, à défaut, ils vont à ses frères et neveux considérés comme les descendants de son père... Sur ces questions, cf. Yver, J., *Les caractères originaux des Coutumes de l'Ouest*, R.H.D., 1952, p. 18–79.

d'entre eux. Cette règle est posée dès le XIII^e siècle, puisque, selon le *Grand Coutumier*, “quand le père a plusieurs fils, il ne peut faire de son héritage l'un meilleur de l'autre”.³⁷ Elle se maintiendra jusqu'à la Révolution, car la Coutume rédigée en 1583 sur ordre du roi rappelle que “le père et la mère ne peuvent avantager l'un de leurs enfants plus que l'autre soit de meuble ou d'héritage”.³⁸

Pour éviter la division du fief, et donc l'affaiblissement du patrimoine, l'aîné dispose d'une priorité de choix, le droit de préciput, qui lui permet de choisir les fiefs les plus avantageux de la succession. Lorsque la succession comporte plusieurs fiefs, les fils choisissent par rang d'âge, les cadets non pourvus recevant une pension de la part de leurs aînés. Mais lorsque la succession ne comporte qu'un seul fief, l'aîné le prend tout entier, à charge pour lui d'entretenir et d'établir les puînés, généralement grâce à des rentes servies sur les produits du fief.³⁹ Le fils aîné a encore le privilège d'obtenir, le cas échéant, la charge de son père, sans avoir à en récompenser les puînés

Un tel système diffère radicalement de celui adopté par l'Angleterre. *Le Tractatus de legibus* de Glanville, qui nous renseigne sur le droit anglais médiéval, nous montre, au contraire, qu'il y existe un droit d'aînesse absolu, en vertu duquel le père ne peut donner à ses fils cadets une partie de ses biens sans le consentement de son fils aîné. Notons que dans ce système, en cas de partage, le puîné ne tient sa part que de son aîné à qui il prête alors hommage.⁴⁰

Pour éviter que le fief ne tombe “en quenouille”, les filles pourvues de frères sont en Normandie exclues de la succession de leurs parents. L'origine de cette exclusion se trouve dans la loi salique, la loi des francs saliens, qui excluait déjà les femmes de la terre des ancêtres.⁴¹ Il suffit d'un seul frère pour que les filles perdent toute vocation successorale.⁴² Mieux, le fils, même cadet par rapport à ses soeurs, porte le titre d'aîné, car, en Normandie, le “mâle est censé plus ancien que la femelle”.⁴³ Autre spécificité normande, ces règles s'appliquent dans les familles nobles comme dans les roturières, alors que les autres coutumes de France qui pratiquent cette exclusion ne visent que les filles

³⁷ Chap. XXXVI, édition Gruchy, p. 111.

³⁸ *Coutume rédigée*, art.434.

³⁹ *Grand Coutumier*, art. XXVI De parties d'héritage; *Coutume rédigée*, De partage d'héritage, art. 335 à 366.

⁴⁰ Généstal, R., *La formation du droit d'aînesse dans la coutume de Normandie*, Normannia, décembre 1928, p. 157–179, p. 178.

⁴¹ Chenon, E., *Histoire du droit français public et privé, des origines à 1815*, 1926, 2 tomes, t. 1, p. 448 et s.

⁴² *Grand Coutumier*, édition Gruchy, art. XXVI, De partie d'héritage, “Les soeurs ne doivent clamer aucune partie en l'héritage (de) leur père contre leurs frères ne contre leurs hoirs”; *Coutume rédigée*, art. 357 : “Les soeurs ne peuvent demander partage des successions des pere et de la mère”.

⁴³ Le Poitevin, A., *Des droits de la fille ou du mariage avenant dans la coutume de Normandie*, R.H.D., 1889, p. 257 et ss ; 562 et ss., 636 et ss., p. 267–294.

nobles. On s'éloigne donc ici de l'intérêt purement féodal pour rejoindre l'intérêt familial. Puisque toute terre est un fief, d'autant plus précieux qu'il constitue le socle familial, peu importe en effet la position sociale. Il est d'ailleurs révélateur qu'en l'absence de fils, les filles retrouvent une pleine vocation successorale, alors que dans les coutumes où l'intérêt seigneurial prédomine, on leur préfère des collatéraux. Pour les Normands, c'est la famille qui prime, et donc ici la fille, plus proche en degré qu'un collatéral. Nous sommes bien ici au coeur de l'esprit de la coutume normande.

Ces considérations de cohésion familiale se retrouvent lorsqu'il s'agit de marier les filles. La coutume normande interdit en effet la mésalliance, jugée déshonorante pour la famille. Il appartient au lignage, père, mère voire frère lorsque les parents sont décédés, de trouver aux filles un mari "idoine", c'est-à-dire de même rang et de même fortune qu'elles.⁴⁴ Pour se marier selon son rang, la question de la dot est évidemment cruciale, mais cela nous conduit à examiner une seconde approche de l'esprit de la coutume.

En effet, sans son patrimoine, la famille n'est rien et la coutume normande met en oeuvre différents moyens qui lui permettent de protéger les biens, et notamment, ceux considérés comme les plus précieux, les immeubles transmis par les ancêtres, qu'on appelle "propres" ou "héritages".

PROTEGER LE PATRIMOINE

Le patrimoine familial ne doit pas être entamé du fait de certains actes, mais il doit également être protégé contre certaines situations qui menacent directement sa spécificité.

Le maintien de l'intégrité du patrimoine

Plusieurs situations menacent l'intégrité du patrimoine familial : la constitution d'une dot pour la fille ; les actes à titre onéreux, comme la vente ou encore, ceux à titre gratuit, comme la donation ou le testament. Examinons les successivement.

Pour ne pas diminuer le patrimoine des fils, les parents ne sont pas obligatoirement tenus de doter leurs filles. La coutume dit « et si rien ne lui fut promis lors de son mariage, rien n'aura ».⁴⁵ Et aux parents soucieux d'aider

⁴⁴ *Grand Coutumier*, ed. Gruchy, chap. XXVI, p. 84 : "Et se les frères les pevent marier, de meubles sans terre ou avec terre ou de terre sans meuble, à hommes ydoine sans les desparager, ce leur doit suffire" ; *Coutume Rédigée*, art. 228 : "La fille aussi doit être mariée par le consentement de ses parents et amis, selon ce que la noblesse de son lignage et valeur de son fief le requiert..." ; art. 251 : "Les frères peuvent comme leurs père et mère, marier leurs soeurs de meubles sans héritage ou d'héritage sans meuble, pourvu qu'elles ne soient point déparagées et ce leur doit suffire".

⁴⁵ *Coutume rédigée*, art. 250

matériellement leurs descendantes, la coutume impose un maximum : la dot doit rester inférieure au tiers du patrimoine, et ce pour l'ensemble des filles, quelque soit leur nombre.⁴⁶ Lorsque ce maximum est dépassé, les fils disposent d'une action en réduction de dot ouverte dans l'année suivant le décès de leur père.⁴⁷

La famille est également protégée des ventes d'immeubles par l'institution du retrait lignager, qui apparaît dans la France du Nord au XIII^e siècle. Il permet aux parents du vendeur d'un bien familial de se substituer à l'acquéreur, en lui remboursant le prix payé et les frais accessoires à la vente, dans le délai d'un an et un jour. En Normandie, cette "clameur de marché de bourse", ou "clameur lignagère", est très largement ouverte au lignage dans son ensemble.⁴⁸ Enfin, contrairement aux autres coutumes, où le retrait ne protégeait que les immeubles propres, la clameur normande pouvait aussi être exercée pour récupérer un acquêt, c'est-à-dire un immeuble récemment acquis, qui d'ailleurs, après cette action, devenait un propre. C'est en effet du fait de sa qualité de propre virtuel que l'acquêt était protégé puisqu'il suffisait d'une transmission familiale pour qu'il devienne un propre. En cas de fraude enfin, le délai d'un an et d'un jour était prorogé jusqu'à trente ans. On le voit, les considérations familiales priment largement sur les considérations commerciales en Normandie.⁴⁹

Enfin, pour éviter que des donations ou des testaments ne viennent réduire le patrimoine auquel ont droit les héritiers, le droit normand avait imaginé une réserve héréditaire très étendue. La quotité disponible, c'est-à-dire la fraction de patrimoine dont peut disposer librement le détenteur des biens, est en effet extrêmement limitée. La possibilité d'effectuer une donation d'immeubles "propres" n'est par exemple offerte qu'aux célibataires ou aux couples sans descendants, et encore, dans les limites d'un tiers du patrimoine. Quant au testament sur ces mêmes biens propres, limité au Moyen Age, il sera carrément interdit au XVI^e siècle.⁵⁰

Ces multiples moyens de protection conduisent Houard à qualifier le droit Normand de "droit très favorable en cette province où tout tend à la conservation des biens de la famille". Le droit normand entend également marquer

⁴⁶ Bataille, R., *Du droit des filles dans la succession de leurs parents en Normandie*, Paris, 1927, p. 46–48. Pour une étude générale, cf. Besnier, R., *Les filles dans le droit successoral normand*, RHD, t. X, 1930, p. 488–506.

⁴⁷ *Coutume rédigée*, art. 254.

⁴⁸ *Coutume rédigée*, art. 451 à 503

⁴⁹ Génestal, R., *Le retrait lignager*, Travaux de la semaine de droit Normand tenue à Jersey en 1923, Caen, 1925, p. 33–236 ; Poirey, S., *Le droit coutumier à l'épreuve du temps : l'application de la coutume de Normandie dans les îles anglo-normandes à travers l'exemple du retrait lignager*, Revue d'histoire du droit français et étranger, RHD, n° 75, 1997, p. 377–414.

⁵⁰ Bridrey, E., *La réserve héréditaire*, Travaux de la Semaine d'Histoire du Droit Normand tenue à Jersey en 1923, Caen, 1925, p. 33–236.

la spécificité de chaque patrimoine et éviter que certaines situations ne conduisent pas à un mélange de biens qui doivent rester séparés.

Le maintien de la spécificité des patrimoines

Au niveau matrimonial, on retrouve dans le droit normand cette volonté de protéger le lignage contre cet étranger de sang qu'est le conjoint. La coutume de Normandie reste marquée jusqu'au code civil par deux traits caractéristiques : l'absence de toute communauté de biens entre époux et un régime de protection du bien de la femme, le régime dotal qui est finalement un régime de défiance à l'égard du mari.

La Normandie se démarque ainsi nettement des autres provinces françaises, dont les usages allaient donner naissance au régime de la communauté des meubles et acquêts. Elle se singularise également par rapport à l'Angleterre qui, si elle interdit bien également la communauté des biens entre époux, tolère toutefois un usufruit de la veuve sur tous les biens possédés par le mari au cours de l'union, y compris donc sur les conquêts, les immeubles acquis par le mari durant l'union matrimoniale.⁵¹

Ces interdictions aboutiront au rejet de la communauté entre époux. Selon la Coutume de 1583 en effet, "les personnes conjoints par mariage ne sont communs en biens...".⁵² La Normandie sera ainsi la seule province où, jusqu'à la Révolution française, la communauté entre époux est une interdiction d'ordre public, à laquelle on ne peut même pas déroger par un contrat de mariage. Elle se situe alors à contre-courant d'une tendance qui, au XVI^e siècle, évolue vers une plus grande liberté des conventions matrimoniales qui devient de droit commun dans les autres provinces coutumières à la fin de l'Ancien Régime.⁵³

Ce n'est qu'au moment du veuvage, que la femme récupère ses biens propres, c'est-à-dire ceux qu'elle a apporté en dot ou qu'elle a reçu de ses ancêtres par succession ou donation et qui, durant l'union, sont gérés par son mari.⁵⁴ On retrouve, au travers de cette gestion par un homme, l'influence du

⁵¹ Il n'en a toutefois pas toujours été ainsi, et la pratique montre qu'aux XI^e et XII^e siècles, la Normandie, comme l'Angleterre, admettait un douaire sur les acquêts, conformément d'ailleurs aux usages francs. Sur ces questions, cf. Astoul, Ch., *La constitution et l'assiette du douaire en Normandie avant le Grand Coutumier*, Bulletin du Comité des Travaux historiques, Sciences économiques et sociales, 1911, p. 132-137 ; Astoul, Ch., *Meubles et acquêts dans le régime matrimonial normand*, Travaux de la Semaine d'Histoire du droit normand tenue à Guernesey, 1927, Caen, 1928, p. 57-83 ; Musset, J., *Le régime des biens entre époux en droit normand du XVI^e siècle à la Révolution*, Caen, 1997, p. 56 et ss.

⁵² *Coutume rédigée*, art. 389.

⁵³ Sur cette question, cf. Colin A., *Le droit des gens mariés dans la coutume de Normandie*, RHD, 1892, t. XVI, pp. 427-469 ; LeFèvre, Ch., *Le droit des gens mariés aux pays de droit écrit et de Normandie*, Paris, 1912 ; Musset, J., *Le régime des biens entre époux*, *op. cit.*

⁵⁴ Elle en bénéficie également, selon des modalités particulières, en cas de séparation de corps et ou de biens. Sur cette question, cf. Musset, J., *Le régime de biens entre époux*, *op. cit.*, p. 89 s.

droit franc et du mundium, cette main tutélaire et protectrice posée sur une personne fragile.⁵⁵ Si la femme n'a donc aucun moyen de contrôle sur ses biens pendant le mariage, la coutume entend toutefois qu'elle puisse les retrouver à sa dissolution. D'où, d'abord, le principe d'inaliénabilité dotale, qui permet à la femme, lorsqu'un de ses biens a été vendu, de s'approprier un bien de valeur équivalente dans le patrimoine de son mari défunt ou à défaut, d'obliger l'acquéreur à le lui céder.⁵⁶ La coutume normande est donc cette "sage coutume ou bien de femme ne peut se perdre".⁵⁷ Un étranger de sang, fut-il l'époux, ne peut capter un patrimoine, ce qui correspond bien à l'esprit de la coutume.

Le décès de son mari permet à la veuve d'obtenir un douaire, c'est-à-dire un usufruit sur les biens propres de son mari décédé.⁵⁸ Mais l'aménagement du régime de ce douaire est, ici encore, parfaitement conforme à l'esprit d'une coutume qui veille scrupuleusement à protéger les droits du lignage, c'est-à-dire ici des héritiers du mari, dont les intérêts sont souvent contraires à ceux des veuves. La veuve gère en effet son douaire sous le contrôle des héritiers qui veillaient non seulement à sa gestion des biens, mais également à sa moralité, son comportement ne devant pas entacher la mémoire de son époux. Le cas échéant, les héritiers peuvent demander en justice que l'on retire à la femme son douaire, en échange toutefois d'une rente servie en argent.⁵⁹

En Normandie, c'est donc l'ensemble de la société, noble ou roturière, qui est structuré autour de la famille et de son patrimoine. C'est pourquoi, dans cette province, le droit est un élément important dans la définition d'une identité normande, et cela explique pourquoi les Normands se montrent si conservateurs de leur droit. Le Grand coutumier du XIII^e siècle fait véritablement figure de code officiel, et lorsque le Roi ordonnera la rédaction de toutes les coutumes, en 1499, les Normands résisteront jusqu'en 1583, de crainte que l'on s'immisce dans leur droit. Toutefois, l'ouvrage de Terrien, au XVI^e siècle, avait mis en lumière le caractère obsolète de certains aspects du Grand

⁵⁵ Sur cette question, cf. Chénon, E., *Histoire général du droit public et privé*, op. cit., p. 380.

⁵⁶ C'est l'action de "bref de mariage encombré" prévue par l'article C du *Grand Coutumier*, édition Gruchy, p. 240 et s. et par les articles 537 s. de la *Coutume Rédigée*. : "Bref de mariage encombré équipole à une réintégrandre, pour remettre les femmes en possession de leurs biens moins que dûement aliénés durant le mariage, ainsi qu'elles avoient lors de l'aliénation, et doit être intenté par elles ou leurs héritiers, dans l'an de la dissolution mariage...".

⁵⁷ Yver, J., *L'inaliénabilité dotale dans les coutumiers français*, Annales de la Faculté de droit d'Aix-en-Provence, 1950, 27 p. ; Yver, J., *Le droit romain en Normandie (avant 1500)*, Jus romanum medii aevi, Société d'Histoire du droit de l'Antiquité, Paris, V, 4, a, 1976, 27 pages, p. 18-19 ; Musset, J., *Le régime des biens entre époux*, op. cit., p. 62-73.

⁵⁸ *Coutume rédigée*, art. 367 à 411.

⁵⁹ Musset, J., *Sanction du comportement "fautif" de la douairière en droit normand : évolution doctrinale et jurisprudentielle en la matière au cours du XVII^e siècle*, in coll. Mélanges offerts à Pierre Bouet, Cahier des Annales de Normandie, n°32, 2002, p. 183-189.

coutumier, ainsi que certaines évolutions jurisprudentielles. Aussi les Normands vont-ils se lancer dans la rédaction de la coutume avec une grande circonspection, en se référant sans cesse au *Grand Coutumier*.⁶⁰ Cette rédaction ne reproduit pas en tout point le texte du XIII^e siècle, car les rédacteurs ont consenti quelques rares innovations, mais l'esprit même de la coutume n'est pas modifié. Le droit Normand conserve ainsi toute sa spécificité ce qui fait dire au Chancelier Daguesseau, au XVIII^e siècle encore que "Les Normands sont accoutumés à respecter leur coutume comme l'Évangile et un changement de religion serait plus aisé en Normandie qu'un changement de coutume".⁶¹ Et en effet, il ne fallut pas moins qu'une Révolution pour que disparaisse un texte dont l'esprit survit toutefois à quelques milles marins de la côte française.

⁶⁰ Yver, J., *La rédaction officielle de la coutume de Normandie (Rouen, 1583), son esprit*, Annales de Normandie, 1986, p. 3–36.

⁶¹ Cité par Yver, J., *Les caractères originaux de la Coutume de Normandie*, art. préc., p. 348.

L'ESPRIT OF NORMAN CUSTOMARY LAW

Sophie Poirey

Norman law applied in Normandy from the time of the creation of the duchy in 911 until the Revolution of 1789. The revolutionaries intended to abolish existing bodies of customary law, but their inability to devise a text applicable to all of France allowed Norman law to survive a little longer. Ultimately it was the Empire and the promulgation of the *Code Napoléon* in 1804 that effectively brought about the abolition of the provincial customs. But even if Norman customary law is no longer the current law of France, it still survives in the Channel Islands, jurisdictions which have never broken with their roots and which have remained faithful to their history.¹

This Norman law was a customary law, the product of a weakening of centralised power towards the end of the 9th century. Royal laws barely continued to apply for want of loyal or effective agents to publicise or enforce them. It was therefore the various customary laws which filled the void, that is to say those rules and usages in force in the kingdom's *seigneuries* (lordships). Born in the Middle Ages at the same time as feudalism, custom remained the principal source of Norman law until the Revolution.²

It was during the reign of William the Conqueror that a distinct *coutume* ("custom") emerged with clarity in Normandy, most likely between 1049 and 1079; in other words two centuries before the other provinces of the kingdom.³ This precocity derived essentially from the Dukes' strategy of seeking to stabilise a duchy obtained as recently as the 10th century and to impose themselves as true sovereigns not only on the population at large but on the Norman barons.⁴ The indisputable supremacy of the Norman Duke, unchallenged chief of the lay and ecclesiastical hierarchy, permitted the

¹ On this question, cf. Yver, J., *Les caractères originaux de la Coutume normande dans les îles de la Manche*, *Travaux de la semaine d'histoire du droit normand tenue à Guernesey*, Caen, 1938, pp. 482–583.

² Gaudement, J., *Les naissances du droit : le temps, le pouvoir et la science au service du droit*, Paris, Montchrestien, 1997, pp. 50–55.

³ Génestal, R., *La formation et le développement de la Coutume de Normandie*, *Travaux de la semaine de droit normand tenue à Guernesey en 1927*, Caen, 1928, pp. 37–55, p. 42 *et seq.*

⁴ As to the supremacy of the dukes, cf. Lemarignier, J.F., *La France médiévale, institutions et société*, Paris, Armand Colin, 1981, p. 121 *et seq.* See also, Musset, L., *Origines et nature du pouvoir ducal en Normandie jusqu'au milieu du XIe siècle*, one of the papers in *Les Principautés au Moyen Age; Actes du congrès de la société des historiens médiévistes*, Bordeaux, 1978, pp. 47–59.

creation and bringing into force of a nearly uniform law, channelling a multitude of usages of diverse origin.⁵

Nevertheless, it took until the last years of the reign of Richard the Lionheart at the end of the 12th century for Norman usages to be reduced to writing.⁶ This redaction occurred initially on two separate occasions. The most ancient Norman *coutumier* (i.e. written collation of customs), named the *Très Ancien Coutumier de Normandie*, dates in part from before the *Commise* (i.e. the loss of Normandy) of 1204. One finds there, logically, a number of provisions setting out the ducal power; for example, a prohibition against barons holding their own courts at the same time as ducal assizes,⁷ or the prohibition against seigneurs raising taxes without the duke's consent,⁸ or forbidding private war.⁹

In relation to fiscal, military and judicial matters, one finds established in Normandy from the end of the 12th century a foundation of law and order far beyond anything in force elsewhere.

After 1204 the *coutume* adapted itself to the political context and aspirations of the Norman people. It next appeared in a Latin text, more elaborate than the *Très Ancien Coutumier*, the *Summa de Legibus Normannie in Curia Laicalii*, which was very soon translated into French under the name of the *Grand Coutumier de Normandie*.¹⁰

In all probability this *Grand Coutumier* was written in approximately 1245; it was written without doubt by a cleric, a specialist in Roman Canon law but clearly also very familiar with lay judicial practices. In the 14th century, when the people of Jersey replied to pleas of *quo warranto* initiated by the Kings of England, they relied upon this text under the name of the *Somme Maucael*, evoking perhaps the name of author of the work, which had been published anonymously.¹¹ The quality of the *Grand Coutumier* commanded the

⁵ Généstal, R., *La formation et le développement de la Coutume de Normandie*, op. cit., Caen, 1928, p. 42 et seq.

⁶ As to Norman sources and, in particular, *coutumiers*, (i.e. the collations of Norman customary law) see Tardif, E.J., *Coutumiers de Normandie*, Rouen, 1882–1903, 2 tomes in 3 volumes, tome 1 : *Le Très Ancien Coutumier* ; tome 2 : *La Summa de legibus in curia laïcali*. See also on these questions, Besnier, R., *La Coutume de Normandie, histoire externe*, Paris, 1935.

⁷ *Très Ancien Coutumier*, (hereinafter referred to as T.A.C.,) chap. XLIV, 2.

⁸ T.A.C., chap. XLVIII, 2

⁹ T.A.C., chap. XXXI. On these questions see Yver, J., *Le Très Ancien Coutumier de Normandie, miroir de la législation ducal? Contribution à l'étude de l'ordre public normand à la fin du XIIe siècle*, *Tijdschrift voor rechtsgeschiedenis*, 29, 1971, pp. 333–374.

¹⁰ For the *Summa*, see Tardif, E.J., op. cit., T.2. The text of the *Grand Coutumier* was published by Ch. Bourdot de Richebourg, *Nouveau Coutumier général ou Corps des coutumes générales et particulières de France et des provinces*, Paris, 1724, 4 vol.; (For Normandy, see volume IV, *Coutume du Pays de Normandie anciens ressorts et enclaves d'iceluy*, 1583, pp. 3–56). There exists also an edition which is rather more easy to use, produced by the Jerseyman, W.L. de Gruchy, *L'Ancienne Coutume de Normandie*, Jersey, 1881.

¹¹ Maucael was the name of a family in the Valognes region which included several clerics (see Tardif E.J., *Coutumiers de Normandie*, op. cit., pp. 217–235).

complete respect of the judicial and intellectual Norman élite, a proportion of them taking the *Grand Coutumier* (wrongly) to be an official compilation of their customs undertaken pursuant to the order of Philippe-Auguste.¹²

From the point of view of the history of the duchy, itself a melting pot of diverse cultures and peoples, several influences contributed to form Norman customary law.

More than any other province, Normandy had experienced Scandinavian invasions during the 9th and 10th centuries. As a result, the Nordic influence is beyond doubt in a number of areas. However this contribution is more limited at the juridical level. The Vikings, and first and foremost Rollon, had quickly understood that it was in their interests to adopt Carolingian laws and institutions in order to be accepted by the local populations. There remain, however, some specifically Nordic juridical contributions. At the criminal level one can mention the laws proclaimed by Rollon concerning the suppression of theft, itself treated as a crime punishable by death. Robert Wace tells the legend of the Duke's golden bracelets, hung during the night from branches of trees without being taken, such was the salutary terror inflicted by these laws.¹³ One can cite also the *paix de la charrue* ("peace of the plough"),¹⁴ which protected labourers and their working tools, or again the *paix des maisons* ("house peace"),¹⁵ the *hamfare*, which punished breaking and entering as a crime.¹⁶ In Normandy this system of specific peaces led to a general prohibition of private war, to the profit of a public peace imposed by the Duke and sanctioned by his justice.¹⁷

At the matrimonial level, Rollon and his descendants maintained the tradition of marriage *more danico* (in the Danish custom). Alongside alliances *more christiano* (in the Christian custom) *i.e.* Christian marriages, which were often concluded essentially with a diplomatic end in order to seal alliances, the first Dukes also contracted unions "after the Danish fashion". These made the chosen woman a legal concubine whose descendants had the

¹² Viollet P., *Les coutumiers de Normandie, Histoire littéraire de la France*, t. XXXIII, 1916, pp. 65–165 ; Besnier, R., *La coutume de Normandie, op. cit.*, p. 103–110.

¹³ Wace, *Roman de Rou*, Ile P v 1984, t. 1, p. 111. Foyer, J., *Exposé du droit pénal Normand au XIIIe siècle*, Paris, Sirey, 1931, p. 137.

¹⁴ T.A.C., chap XVI, *D'assaut de porpris et de charrue*, ed. Tardiff, *op. cit.*, T.1, 2nd part, p. 15.

¹⁵ T.A.C., chap. XVI, 1, LVIII, 1, LIII, LXX, ed. Tardif, *op. cit.*, t 1, 2nd part.

¹⁶ Foyer, J., *Exposé du droit pénal Normand au XIIIe siècle, op. cit.*, pp. 170–179.

¹⁷ TAC, chap XXXI: *Nus homs n'ost fere guerre envers autre ; mes qui leur fera tort, si se plaignent al duc e a sa justice, e se ce est cause citeaine, il fera amander le mesfet par chatel ; se elle est criminnal, il le fera amander par les membres*, ("Our men shall not make war against each other; whoever is wronged, if he complains to the Duke's justice and his plaint is civil, the miscreant will be fined in chattels; if it is criminal, he will be punished by his limbs") (*édition Tardif, op. cit.*, t.1, 2nd part, p. 24). On this question see Yver, J., *L'interdiction de la guerre privée dans le très ancien droit normand*, Caen, 1928, 45 pages, particularly, p. 21 *et seq.*, also Yver, J., *La législation et l'ordre public au dernier demi-siècle du duché, Revue d'histoire du droit français et étranger*, 1967, p. 390 *et seq.*

same successorial rights as legitimate sons including, notably, the right to become Duke.¹⁸

A lasting Nordic contribution was to be found in maritime law, given that Frankish law was not very concerned with the sea. The Norman *coutumiers* therefore regulate the law of shipwreck, that of *choses gayves* (objects found on the shore, things without any master), the law of *craspois* (literally large fish, such as whales or sturgeon), and the rights of whalers.¹⁹

However, the combined contribution of Nordic influence remained limited. As for French influence, this remained nearly non-existent given the Dukes' policy of asserting their independence as regards the King of France, their suzerain often only in theory. By the time of the forfeiture of John's continental fiefs in 1204, Norman customary law had already crystallised to such an extent that only frontier regions were to be influenced by the custom of the Île-de-France.²⁰

As for the English influence, which might have been felt after 1066 and under the plantagenets, it was again practically non-existent. The Norman Dukes always distinguished clearly between the two countries and the two courts, the Ducal Court and the Royal Court. From this separation resulted two distinct judicial systems and, moreover, two autonomous juridical systems.²¹

The foundation of Norman customary law was, essentially, the Frankish law which governed the established population in the territory of which the Normans took control. In other words, law of Germanic origin in which the protection of lineage and family property, in particular realty and especially inherited realty, came before everything else. In order to grasp the spirit of Norman customary law it is necessary first to examine the juridical means put in place in order to preserve lineage and then to see how the *coutume* applied itself to protect *patrimoine* when confronted by certain threats.

¹⁸ Unions of this kind included that of Rollon and Poppa, William Long-Sword and Sprota, (Duke) Richard I and Gonnor. It was only after the accession of William as Duke that the practice of marrying *more danico* was extinguished, (Besnier, R., *Le mariage en Normandie des origines au XIIIe siècle*, Caen, 1934, pp. 20–27).

¹⁹ Musset, L., *Les apports scandinaves dans le plus ancien droit normand*, a paper to be found in *Droit privé et institutions régionales. Etudes historiques offertes à Jean Yver*, Paris, 1976, pp. 559–575 and more particularly at pp. 563–564.

²⁰ Thus, for example, the Bailiwick of Gisors accepted the community of *acquêts* (acquired, as opposed to inherited, realty), whilst Norman custom refused to countenance any idea of community of property between spouses, tolerating only the dotal regime and the separation of property. (See Généstal, R., *La formation et le développement de la Coutume de Normandie*, *op. cit.*, p. 50).

²¹ As to the absence of French and English influence see Généstal, R., *La formation et le développement de la coutume de Normandie*, *ibid*, p. 50 *et seq.*

TO PRESERVE LINEAGE

Crystallised during the reign of the Conqueror and solidified under the plantagenets, Norman customary law was the most centralising of all Mediaeval customs. A near sovereign, the Duke, positioned at the head of the lay and ecclesiastical hierarchy, was the office holder with the greatest judicial, military and financial prerogatives. However, this centralisation did not prevent every seigneur at a local level benefiting from numerous feudal rights, rights which the Normans maintained until the Revolution. On the contrary, the power of seigneurs permitted society to be controlled and therefore served the immediate interests of the Duke. It followed that seigneurial interests had to coincide with the interests of that structure which gave cohesion to Norman society taken as a whole, lineage.

A markedly feudal custom

Norman seigneurs benefited from feudal rights that permitted them to dominate their vassals and to guarantee the stability of the duchy for the Duke.²² The Norman *coutumiers* thus contain the classic rights of confiscation,²³ escheat²⁴ bastardy,²⁵ *aubaine* (the right to a deceased foreigner's personality)²⁶ or of feudal *retrait* (the seigneur's right to intervene in a disposition of land).²⁷ Equally, Norman seigneurs enjoyed specific rights: the right of shipwreck,²⁸ imported by the Scandinavians, and seigneurial guardianship. The latter allowed a seigneur to enjoy any *fief de haubert* (knight's fee) which had devolved upon a minor until that minor reached the age of majority, whilst drawing from it all profit, to the detriment of the minor who suffered an irreversible loss of that revenue.²⁹ This institution, judged archaic by the Parisian

²² On the feudalisation of the coutume see Yver, J., "Les caractères originaux de la coutume de Normandie", *Mémoires de l'Académie des sciences, arts et Belles-lettres de Caen*, 1952, pp. 307–356, notably pp. 314–321. Yver notes also "that no Western country, putting England to one side, where the feudal system had been imported by the Conqueror and imposed by him as an organisation intended to support his power, had been more strongly feudalised than Normandy" (pp. 314–315).

²³ *Coutume rédigée*, art. 143.

²⁴ *Coutume rédigée*, art. 146.

²⁵ *Coutume rédigée*, art. 147.

²⁶ *Coutume rédigée*, art. 148.

²⁷ *Coutume rédigée*, art. 177 : "Le seigneur féodal peut retirer le fief tenu et mouvant de lui, s'il est vendu par le vassal en payant le prix et les loyaux coûts..." ("The feudal seigneur can re-claim the fief held and moving from him if it is sold by the vassal, upon paying the price and the associated costs ...").

²⁸ *Coutume rédigée*, art. 194 : "Tout seigneur féodal a droit de varech à cause de son fief, tant qu'il s'étend sur la rive de la mer : comme semblablement des choses gaives" ("Every feudal seigneur has the right of shipwreck by reason of his fief, to the extent that it extends over the sea-shore, likewise to found objects").

²⁹ *Grand Coutumier*, Gruchy's edition, art. 33, p. 99 : *De Garde d'orphelins* ; *Coutume rédigée*, art. 218 : "Le seigneur fait les fruits de la garde siens..." ("The seigneur takes the fruits of the guardianship for himself ...").

jurists, survived in Normandy up to the Revolution, notwithstanding the fact that it had disappeared elsewhere.³⁰

The feudal spirit strongly influenced private law also, and notably successorial law. It will be recalled that seigneurs had at their disposal their own vassals, each holding from them one or more fiefs. It followed that the services expected in return for these territorial concessions could not be put in doubt by the rules of succession. For this reason the *coutume* was hostile to any transmission to a woman, since she could not assure the provision of those feudal services. Norman law therefore preferred sons over daughters, which made Norman customary law a *coutume* “*mâle et même toute mâle*”.³¹

As for collateral succession, one applied the rule *paterna paternis materna maternis*, which expressed the requirement that *propres* (inherited immovables) should stay in their lineage of origin (*i.e.* land which had been inherited by the descendant-less deceased should go only to the line from which it came).³² When there was no relative on, say, the paternal side to receive property from the paternal line, it was the seigneur who would inherit it. Normandy, contrary to other provinces, refused to substitute one line for the other; *patrimoines* had to remain separate.³³

Finally, the Normans were averse to the notion of *partage* (the division of a single landholding), since it led to a weakening of seigneurial control. *Propres* (inherited immovable property) remained, generally speaking, indivisible. The rule applied to both the successions of noblemen and of commoners given that in Normandy, and not in other provinces, every landholding qualified as a fief. In order to avoid the division of a family fief on the death of the father, the eldest son was seized of the entire succession, and retained the fruits of the estate up until division.³⁴ In the eyes of third parties, and notably

³⁰ On this question see Génestal, R., *La tutelle, Bibliothèque d'histoire du droit normand*, 2nd series, t. III, *Etudes de droit privé normand*, Caen, 1930, t. III, I.

³¹ “Male, even completely male”: Yver, J., “*Les caractères originaux de la Coutume de Normandie*”, *ibid.*, p. 319 *et seq.*

³² *Grand Coutumier*, chap. XXV, édition Gruchy, pp. 77–78; *Coutume Rédigée*, art. 245 “*Les héritages venus du côté paternel retournent toujours par succession aux parents paternels ; et comme aussi font ceux qui sont du côté maternel aux maternels, sans que les biens d’un côté puissent succéder à l’autre, en quelque degré qu’ils soient parents, mais plutôt les Seigneurs desquels lesdits biens sont tenus et mouvants y succèdent*”. “Land coming from the paternal line always returns by succession to the paternal relations; likewise those which are from the maternal line to the maternal, without the property from one side being able to pass to the other, regardless of the degree of relationship; rather, the seigneurs from whom the properties are held and move from, succeed to them.” This solution was confirmed in 1666 by the Parlement of Rouen, where article 106 of the *Placités*, recalls that “*à défaut de parens de la ligne (les biens) retournent au fisc ou seigneur féodal*” (“in the absence of relations from the material line, the property returns to the treasury or feudal lord”).

³³ On this question see Yver, J., “*Les caractères originaux de la Coutume de Normandie*”, *ibid.*, pp. 337 et 338.

³⁴ *Coutume Rédigée*, art 237 : “*Le fils aîné, soit noble ou roturier, est saisi de la succession du père et de la mère après leur décès, pour en faire part à ses puînés et fait les fruits siens jusqu’à ce que partage soit demandé par ses frères (...) parce que par la Coutume, il est tuteur naturel et légitime de ses frères et soeurs*” (“The eldest

those of the seigneur, he was the *miroir*, i.e. the “mirror image” of the fief. This juridical fiction, which bore the name “*parage*” lasted only until a younger sibling demanded division.³⁵ From that point on, lineage regained its rights over those of the seigneur.

A lineal custom

Norman customary law was a *coutume parentélaire*, i.e. it revolved around the family and was preoccupied with the belief that an heir should receive the property of his ancestors.³⁶ This family orientated system postulated therefore the calling of all heirs, by which is meant that at the moment of *partage*, the custom enforced an equal division between the sons accompanied by a prohibition on parents preferring any one amongst them. This rule was established from the time of the 13th century since, according to the *Grand Coutumier*, “when the father has several sons, he cannot benefit one more than the other from his lands”.³⁷ This position was maintained until the Revolution, given that the *Coutume Rédigée* (Reformed (literally “Redacted”) Custom) of 1583, produced pursuant to the order of the king, stated that “the father and the mother cannot confer an advantage on one of their children to the prejudice of the other whether from movable or immovable property.”³⁸

In order to avoid the division of fiefs, and therefore the weakening of family wealth, the eldest was given a priority of choice, the right of “*préciput*”, which permitted him to choose the most advantageous fief(s) from the succession. When the succession comprised several fiefs, the sons chose by rank determined by age, with younger sons not provided for receiving a pension from the share of their elders. However, when the succession comprised only a single fief, the eldest took everything in its entirety subject to the obligation to maintain and establish his younger brothers, generally thanks to rents produced by the fief.³⁹ The eldest son additionally had the right to obtain, should the circumstance arise, his father’s office without having to compensate his younger siblings.

son, whether noble or commoner, is seized of the succession of the father and the mother after their deaths, in order to give to his younger siblings their share and to keep the fruits (of the estate) for himself until division was demanded by the brothers ... because by the *coutume*, he was the natural and legitimate guardian of his brothers and sisters”).

³⁵ On this question see the study by R. Génestal, *Le parage normand*, Bibliothèque d'histoire du droit Normand, 2nd series, t. I, 2.

³⁶ The property of a deceased went first to his children and then to the children of his children, and in default to his brothers and nephews in their capacity as descendants of his father. On these questions see Yver, J., “*Les caractères originaux des Coutumes de l'Ouest*”, R.H.D., 1952, pp. 18–79.

³⁷ Chap. XXXVI, Gruchy's edition, p. 111.

³⁸ *Coutume rédigée*, art. 434.

³⁹ *Grand Coutumier*, art. XXVI *De parties d'héritage*; *Coutume rédigée*, *De partage d'héritage*, art. 335 to 366.

Such a system differed radically from that adopted in England. The *Tractatus de legibus* of Glanville, which informs us about mediaeval English law, shows on the contrary that there existed in England an absolute right of primogeniture by virtue of which the father could not give to his younger sons a share of his property without the agreement of the eldest son. We may note that in this system in the case of *partage*, the younger son(s) merely held his share from his elder brother, to whom he then owes homage.⁴⁰

In order to avoid the fief falling “*en quenouille*” (into distaff, *i.e.* female hands), daughters having brothers were excluded in Normandy from their parents’ succession. The origin of this exclusion is to be found in Salic law (*i.e.* the law of the Salic Franks); which had excluded women from succession to ancestral lands.⁴¹ It was sufficient that there be a single brother for the daughters to lose all rights to succeed.⁴² Moreover, a son, even a son younger than his sisters, bore the title of eldest, because, in Normandy, the “male is deemed to be older than the female”.⁴³ A further distinguishing Norman feature was that these rules applied in commoner families as much as in noble families, whilst the other *coutumes* of France which practised this exclusion applied only to the daughters of nobles. We have, therefore, travelled far from the purely feudal interest to reach the familial interest. Since all land was a fief and so precious that it constituted the foundation stone of the family, it little mattered what social position was occupied. It is also revealing that in the absence of sons, the daughters were allowed full rights to succeed even when in those *coutumes* where the seigneurial interest predominated collaterals were preferred. For the Normans it was the family which was important above all, and therefore the daughter took priority, being closer of degree than a collateral. At this point we are truly at the heart of the spirit of Norman customary law.

These considerations of family cohesion are found again when it comes to the question of daughters marrying. Norman custom forbade marriage beneath one’s station, which was deemed to be dishonourable for the family. It was the responsibility of the family, father, mother, even brother (when the parents had died) to find daughters a husband of the same rank and fortune

⁴⁰ Génestal, R. “*La formation du droit d’aînesse dans la coutume de Normandie*”, *Normannia*, December 1928, pp. 157–179, p. 178.

⁴¹ Chenon, E., *Histoire du droit français public et privé, des origines à 1815*, 1926, 2 tomes, t. 1, p. 448 *et seq.*

⁴² *Grand Coutumier*, Gruchy’s edition, art. XXVI, *De partie d’héritage*, “*Les soeurs ne doivent clamer aucune partie en l’héritage (de) leur père contre leurs frères ne contre leurs hoirs*”. (“The sisters may not claim any part in the inheritance of their father against their brothers nor against the heirs of their brothers”); *Coutume rédigée*, art. 357 : “*Les soeurs ne peuvent demander partage des successions des père et de la mere*” (“The sisters may not demand a share in the successions of their father and mother”).

⁴³ Le Poitevin, A., “*Des droits de la fille ou du mariage avenant dans la coutume de Normandie*”, *R.H.D.*, 1889, p. 257 *et seq.*; 562 *et seq.*, 636 *et seq.*, p. 267–294.

as them (*un mari idoine*).⁴⁴ In order to marry according to her rank, the question of *dot* (dowry, but be careful to distinguish this from the *douaire*) was evidently crucial, which leads us to examine a second approach to the spirit of the *coutume*.

In effect, without its *patrimoine*, the family was nothing. Norman customary law put in place various means which permitted the family to protect its assets, and in particular, those assets deemed to be the most precious, immovables transmitted by ancestors, called "*propres*" or "*héritage*".

TO PROTECT THE PATRIMOINE

Although family property could not be unduly encumbered, it had to be protected against situations which threatened its very identity.

Maintaining the integrity of the patrimoine

Several situations threatened the integrity of family property: the constitution of a dowry for the daughter and dispositions of land by way of sale, donation or testament. We consider each separately.

In order to preserve the inheritance of the sons, parents were not obliged to endow their daughters. The *coutume* says this: "*et si rien ne lui fut promis lors de son mariage, rien n'aura*".⁴⁵ As for parents concerned materially to assist their descendants, the custom imposed a maximum, the dowry had to remain less than one third of the familial property, and this for the daughters taken together, whatever their number.⁴⁶ When this maximum was exceeded, the sons were entitled to bring an action in order to reduce the size of a dowry during the year following the death of their father.⁴⁷

⁴⁴ *Grand Coutumier*, Gruchy's edition, chap. XXVI, p. 84 : "*Et se les frères les pevent marier, de meubles sans terre ou avec terre ou de terre sans meuble, à hommes ydoine sans les desparager, ce leur doit suffire*" ("And if the brothers can marry them with movables with or without land or with land without movables to suitable men without dishonouring them, that suffices"); *Coutume Rédigée*, art. 228: "*La fille aussi doit être mariée par le consentement de ses parents et amis, selon ce que la noblesse de son lignage et valeur de son fief le requiert*" ("The daughter to must be married with the agreement of her parents and friends according to the requirements of the nobility of her lineage and the worth of her fief"); art. 251: "*Les frères peuvent comme leurs père et mère, marier leurs soeurs de meubles sans héritage ou d'héritage sans meuble, pourvu qu'elles ne soient point déparagées et ce leur doit suffire*" ("The brothers can, like their father and mother, marry their sisters with movables without land or without movables provided that they are not dishonoured and this must suffice for them").

⁴⁵ "And if nothing is promised to her at the time of her marriage, she will have nothing": *Coutume rédigée*, art. 250

⁴⁶ Bataille, R., *Du droit des filles dans la succession de leurs parents en Normandie*, Paris, 1927, pp. 46–48. For a general study cf. Besnier, R., "*Les filles dans le droit successoral normand*", *RHD*, t. X, 1930, pp. 488–506.

⁴⁷ *Coutume rédigée*, art. 254.

The family was equally protected from sales of immovables by the institution of “*retrait lignager*”, which appeared in Northern France in the 13th century. It permitted relatives of the vendor of family property to substitute themselves for the purchaser whilst reimbursing the price paid and the associated costs of sale within a year and a day of the transaction. In Normandy this “*clameur de marché de bourse*”, or “*clameur lignagère*”, was widely available to the extended lineage.⁴⁸ Finally, and contrary to other customs where the *retrait* only protected *propres* (inherited realty), the Norman *clameur* could also be exercised in order to recover an “*acquêt*” that is to say an immovable recently acquired, which, after such an action, itself became a *propre*. It was by virtue of its quality as a prospective *propre* that the *acquêt* was protected since it was sufficient that there should be a familial transmission of the property in order for it to become a *propre*. In the case of fraud the permitted period in which to bring an action was extended to thirty years. It is therefore evident that family considerations took precedence over commercial considerations in Normandy.⁴⁹

Finally, in order to prevent lifetime gifts or testamentary gifts diminishing the property to which the heirs were entitled, Norman law devised a very extended hereditary *réserve*. The disposable portion, that is to say the proportion of family property which the owner could dispose of freely was extremely limited. The making of a gift of *propres* was only possible for bachelors or spinsters or couples without descendants, and again limited to one-third of their property. As for testamentary disposition of *propres*, so far as the Middle Ages were concerned this was completely forbidden until the 16th century.⁵⁰

These multiple means of protection led Houard to qualify Norman law as “*un droit très favorable en cette province où tout tend à la conservation des biens de la famille*” (“a very favourable law in this province where everything is directed to the conservation of family property”).

Norman law set out also to establish and maintain the specific identity of each *patrimoine* and to avoid situations leading to a confusion of property which was to remain separate.

Maintaining the specific identity of the patrimoine

At the matrimonial level, one again finds in Norman law a desire to protect

⁴⁸ *Coutume rédigée*, art. 451 to 503

⁴⁹ Généstal, R., “*Le retrait lignager*”, *Travaux de la semaine de droit Normand tenue à Jersey en 1923*, Caen, 1925, pp. 33–236 ; Poirey, S., “*Le droit coutumier à l’épreuve du temps : l’application de la coutume de Normandie dans les îles anglo-normandes à travers l’exemple du retrait lignager*”, *Revue d’histoire du droit français et étranger*, RHD, n° 75, 1997, pp. 377–414.

⁵⁰ Bridrey, E., “*La réserve héréditaire*”, *Travaux de la Semaine d’Histoire du Droit Normand* held at Jersey in 1923, Caen, 1925, pp. 33–236.

lineage against alien blood in the form of the spouse. In this respect Norman custom remained distinguished up until the time of the *Code civil* by two characteristic traits; first the absence of all community of property between spouses and second a protective *dotal* regime for the wife's property based upon distrust of the husband.

Normandy was clearly distinguished from other French provinces where there evolved a regime of community of both movables and *acquêts*. Normandy also distinguished itself from England where, although there was the same prohibition of community of property between spouses, there was nevertheless a *usufruit* (usufruct, typically a life interest in property) of the widow over all the property possessed by the husband during the marriage including therefore *conquêts*, i.e. those immovables acquired by the husband during the union.⁵¹

These Norman prohibitions resulted in a rejection of community between spouses. According to the 1583 *Coutume*, "*les personnes conjoints par mariage ne sont communs en biens ...*".⁵² Normandy was the only province where, until the French Revolution, community between spouses was prohibited as a matter of public policy; nor could one derogate from this bar, even by marriage contract. Norman law therefore situated itself at odds with a trend which, in the 16th century, evolved towards a greater freedom of matrimonial contract which became the common law of other customary law provinces until the end of the *Ancien Regime*.⁵³

It was only from the moment of widowhood that the wife recovered her *propres*, i.e. the land she had brought to the union as her *dot* or which she had received from her ancestors by succession or gift and which, during the union, would have been managed by her husband.⁵⁴ Again one finds throughout this notion of the husband as a quasi-guardian the influence of Frankish law and of *mundium* (the Germanic law notion of rights of protection over one's family, household and property); a protecting curator's hand

⁵¹ It had not always been this way, practice demonstrates that in the 11th and 12th centuries, Normandy, like England, permitted a *douaire* (a life interest after the death of the spouse) over *acquêts*, consistent with Frankish usage elsewhere. On these questions see Astoul, Ch., "*La constitution et l'assiette du douaire en Normandie avant le Grand Coutumier*", *Bulletin du Comité des Travaux historiques, Sciences économiques et sociales*, 1911, p. 132–137; Astoul, Ch., "*Meubles et acquêts dans le régime matrimonial normand*", *Travaux de la Semaine d'Histoire du droit normand tenue à Guernesey*, 1927, Caen, 1928, p. 57–83; Musset, J., *Le régime des biens entre époux en droit normand du XVI^e siècle à la Révolution*, Caen, 1997, p. 56 and following.

⁵² "Persons joined by marriage are not joined in property", *Coutume rédigée*, art. 389.

⁵³ On this question see Colin A., "*Le droit des gens mariés dans la coutume de Normandie*", *RHD*, 1892, t. XVI, pp. 427–469; Lefèvre, Ch., *Le droit des gens mariés aux pays de droit écrit et de Normandie*, Paris, 1912; Musset, J., *Le régime des biens entre époux*, *op. cit.*

⁵⁴ Likewise she benefited in this way, subject to certain conditions, in the case of physical and/or property separation (i.e. the Canon law *divortium a mensa et thoro*). On this question, cf. Musset, J., *Le régime des biens entre époux*, *op. cit.*, p. 89 *et seq.*

placed over a vulnerable person.⁵⁵ However, if as was the case the wife had no means of control over her property during the marriage, the *coutume* nevertheless intended that she could regain her property upon its dissolution. From this arose the principal of dotal inalienability, which permitted the wife, when any of her property was sold, to take property of equivalent value from the *patrimoine* of her dead husband, or in default, to oblige the acquirer to make over the property to her.⁵⁶ The Norman *coutume* was therefore capable of being described as this “wise custom where the wife’s property could not be lost”.⁵⁷ No person who was not of the same blood, not even a spouse, could attempt to acquire another’s *patrimoine*, which corresponds closely to the spirit of the Norman *coutume*.

The husband’s death permitted the widow to obtain a *douaire*, i.e. a usufruct over the *propres* (inherited realty) of her deceased husband.⁵⁸ The provisions governing the *douaire* regime were again in perfect conformity with the spirit of a *coutume* scrupulously alert to the need to protect the rights of successors, in this context the heirs of the husband, whose interests were often contrary to those of widows. The widow enjoyed her *douaire* under the control of heirs who watched over not just her management of the relevant property, but also her moral standards. Her conduct was not to sully the memory of her husband. If the opportunity presented itself, the heirs could bring an action to take back the *douaire* from the widow in exchange for a money allowance.⁵⁹

In Normandy therefore it was society as a whole, both noble and commoner, which was structured around the family and its *patrimoine*. As a result law was an important element in the definition of Norman identity, which again goes to explain why the Normans showed themselves so protec-

⁵⁵ On this question, cf. Chénon, E., *Histoire général du droit public et privé*, op. cit., p. 380.

⁵⁶ This was the action known as “*bref de mariage encombré*” (literally brief of encumbered marriage) provided by article C of the *Grand Coutumier*, Gruchy’s edition, p. 240 et seq. and by articles 537 et seq. of the *Coutume Rédigée*. : “*Bref de mariage encombré équipole à une reïntegrande, pour remettre les femmes en possession de leurs biens moins que dûement aliénés durant le mariage, ainsi qu’elles avoient lors de l’aliénation, et doit être intenté par elles ou leurs héritiers, dans l’an de la dissolution mariage...*” (“*Bref de mariage encombré* equates to a possession action with a view to putting wives in possession of their property, unless such property has effectively and lawfully been alienated during the marriage, which right they enjoy from the moment of alienation, but the action must be commenced by them or their heirs within a year of dissolution of the marriage ...”).

⁵⁷ Yver, J., “*L’inaliénabilité dotale dans les coutumiers français*”, *Annales de la Faculté de droit d’Aix-en-Provence*, 1950, 27 pp. ; Yver, J., “*Le droit romain en Normandie (avant 1500)*”, *Jus romanum medii aevi, Société d’Histoire du droit de l’Antiquité*, Paris, V, 4, a, 1976, 27 pages, pp. 18–19 ; Musset, J., *Le régime des biens entre époux*, op. cit., pp. 62–73.

⁵⁸ *Coutume rédigée*, art. 367 to 411.

⁵⁹ Musset, J., “*Sanction du comportement “fautif” de la douairière en droit normand : évolution doctrinale et jurisprudentielle en la matière au cours du XVIIe siècle*”, see the collected papers *Mélanges offerts à Pierre Bouet, Cahier des Annales de Normandie*, n°32, 2002, pp. 183–189.

tive of that law. The *Grand Coutumier* of the 13th century had all the appearance of an official code, and when the king ordered the redaction of all customs in 1499, the Normans resisted until 1583 for fear that their law would be interfered with. However, the work of Terrien in the 16th century had brought to light the obsolete character of certain aspects of the *Grand Coutumier* as well as various jurisprudential developments. The Normans approached the task with great circumspection, referring endlessly to the *Grand Coutumier*.⁶⁰ They did not reproduce the 13th century text entirely, since the authors managed to agree a few rare innovations, but the spirit of the *coutume* was unchanged. Norman law therefore maintained all that distinguished it, permitting Chancellor d'Aguesseau to observe in the 18th century : "*Les Normands sont accoutumés à respecter leur coutume comme l'Evangile et un changement de religion serait plus aisé en Normandie qu'un changement de coutume*".⁶¹ And, of course, it required nothing less than a Revolution to bring down the curtain on a text whose spirit nevertheless survives just a few nautical miles off the French coast.

Translated by Gordon Dawes

⁶⁰ Yver, J., "*La rédaction officielle de la coutume de Normandie (Rouen, 1583), son esprit*", *Annales de Normandie*, 1986, pp. 3–36.

⁶¹ "The Normans are accustomed to respect their *coutume* as if it were Gospel; in Normandy it would be easier to bring about a change of religion than *coutume*" (Cited by Yver, J., "*Les caractères originaux de la Coutume de Normandie*", *ibid.* p. 348).

THE SOURCES OF JERSEY LAW

Richard Southwell

My topic today is the Sources of Jersey Law, a topic on which I have already written three times in the Jersey Law Review. I speak with some trepidation, because the person who ought to be talking about this subject is Miss Stéphanie Nicolle, the Solicitor General. She has written the main text on this topic – entitled *The Origin and Development of Jersey Law: An Outline Guide*, now in its second edition. She has also written, as a co-author, a book on *The Jersey Law of Property*. So I emphasise that you have to make do with no better than the second-best today.

My aim in this brief address is a modest one, to raise some questions as to what should be the sources of Jersey law. Miss Nicolle's book is an excellent guide to what the sources have been. I believe that it may be instructive to spend a short time considering what they should be.

My most recent writing on the sources is in Vol. 8 of the Jersey Law Review. By questioning reliance on Roman Law and the laws of Scotland and South Africa I wanted to try to stimulate debate about what the sources of Jersey law should be. There followed a critical note by Mr Gordon Dawes, a Guernsey advocate and the author of a valuable and comprehensive work on the Laws of Guernsey. Unfortunately, although he was able to comment on my note, I was not enabled to respond to his – so that part of the debate stopped in mid-air. Mr Dawes' note is most interesting. He overstates, I believe, the difficulty he perceives in researching English case-law: the plethora of good English law text books and the availability of well organised websites make research far easier than before. He is right to point to the commonsense in using research in other jurisdictions as a basis for informing and influencing the development of Jersey law. But he may perhaps not be aware of what has sometimes happened in the past, when the Jersey courts have had thrown at them a ragbag of research which advocates believe may support their client's case. There is a danger in plucking different cherries from different trees. If citation of cases from other jurisdictions is to be of any real assistance to the courts of Jersey, it must be to the point, and informed by a sufficient understanding of the jurisdiction in question. That was one reason why I have expressed concern about the citation of Roman law without adequate understanding of the history of its development over many centuries, or the citation of South

African law without adequate understanding of its Roman-Dutch origins and how those origins have influenced its development. I repeat: a ragbag of citations from different jurisdictions does not assist.

Let me now begin with what is reasonable certain about the sources of Jersey Law. I start with the Guernsey case of *Vaudin v Hamon*¹ in which the Privy Council through Lord Wilberforce gently chided counsel for citing Roman law at various periods, the *coutumes* of different parts of France and the Napoleonic Code without proper regard to the differences in principle as well as in detail. Though a Guernsey appeal, it has an obvious relevance to the approach to be adopted in Jersey. I note that *Vaudin* appears not to have been cited to the Privy Council in *Snell v Beadle*;² I will return to that case later.

In criminal law, though there are major differences between English and Jersey law (as for example in the classification of assaults) the citation and extensive use of English authorities and practice preceded the 1847 Report of the Commissioners enquiring into Jersey criminal law, and has developed apace in the one and a half centuries since, as the Privy Council recognised in *Renouf v Att.Gen*³. Continued citation of English law seems to me to be inevitable. But in some aspects of the criminal law the Courts of Jersey have declined to follow English law and practice. Sentencing is a clear example of this. In the special circumstances of the Island of Jersey, sentencing policy has to be developed by reference to those circumstances, distinguishing the very different circumstances prevailing for example in the large cities of England and Wales. English cases can help inform decision-making in Jersey, but no more.

In land law and the law of succession, English law is generally of no relevance. The *coutume* of Normandy as developed in Jersey is far removed in too many respects from English law to allow for the introduction of English principles or practice in Jersey. This was recognised in *De Carteret v Baudains*⁴ and *Godfray v Godfray*⁵. My view is that this should remain the position, and I have said something about this in a judgment of the Guernsey Court of Appeal in *Pirito v Curth*⁶. But English cases may be of use as guidance in *e.g.* the interpretation of wills.

The origins of the law of contract in Jersey lie most strongly in the civil law. But in commercial cases, and especially those involving standard forms of contract current in England or in commerce generally, English cases are of necessity cited and often followed. It is interesting that the Jersey Law Commission has provisionally concluded that the English common law of contract should be adopted in Jersey by statute. In the latest instalment of the Jersey Law Review, on the one hand this is supported by Advocate Alan

¹ [1974] AC 569.

² 2001 JLR 118.

³ [1936] AC 445.

⁴ (1886) 11 AC 214.

⁵ (1865) 3 Moore PC (NS) 316.

⁶ Civil Appeal No. 321.

Binnington, a distinguished Jersey advocate and one of the Commissioners, while on the other hand it is condemned by Mr Dawes, as “doomed from the outset” and unlikely to “give the kind of legal certainty which the Commissioners crave”. I look forward to the Commission’s final report on this topic, with the hope that the Commission will succeed in achieving a sufficient degree of legal certainty in a field in which England and Wales are moving quite speedily in the direction of harmonisation with the main principles of the civil law, primarily by statute, but also by judicial decision. It is sometimes forgotten that in England in the second half of the 19th century Pothier on Obligations was almost as much cited in contract cases as the then English textbooks. That declined in the 20th century with the decline of legal scholarship. But our membership of the European Union (and also the ECHR) has led to greater harmonisation with the civil law countries in the law of contract, a process in which Jersey would be wise to engage.

In the law of tort I have to keep in mind the differences between English tort and French tort. By and large English tort has won the race to influence developments in the law of Jersey, except in its interplay with property rights. A partial definition of the requirements of a Jersey tort was attempted by the Court of Appeal in *Arya Holdings Ltd. v Minorities Finance Ltd.*⁷ as requiring a duty fixed by law otherwise than by contract or trust, breach of that duty, and redress for the breach of duty by unliquidated damages. The Court of Appeal did so in relation to a Jersey tort which is particular to Jersey⁸. This partial definition was followed in *Jersey Financial Services Commission v A.P. Black Ltd & ors*⁹. Though in *T.A. Picot (CI) Ltd v Crills*¹⁰ it was suggested by the majority in the Court of Appeal that in the tort of negligence the Jersey Courts must follow English law including the decisions of the House of Lords, I doubt whether that was right. It is reasonably clear from recent case-law in Jersey that in other fields of law decisions of the House of Lords are treated with due respect, but are by no means always followed. In my view the judgment of Blom-Cooper JA at pp. 62-63 probably stated the position correctly. He stated:

“The courts of Jersey as a general rule decide questions of tortious liability by direct reference to the development of the common law of England: see *Macrae (née Tudhope) v Jersey Golf Hotels Ltd*; *Mitchell (née Bird) v Dido Invs. Ltd*; *Torrell v Pickersgill and Le Cornu*, to which Le Quesne, J.A. makes reference. That would seem to import the decisions within the hierarchy of English courts. I acknowledge, along with Le Quesne, J.A., that this court cannot pick

⁷ 1997 JLR 176.

⁸ See *D’Allain v De Gruchy* (1890) 14 Ex 108 and 196; 1889–93 TD 49 and 50.

⁹ 2002 JLR 443.

¹⁰ 1995 JLR 33 at pp. 46–47.

and choose which bits of English law it incorporates. Yet the final court of appeal for this Island is the Judicial Committee of the Privy Council, which will normally follow a decision of the House of Lords: See *Abbott v R.* So far as I am aware, there has been no decision emanating from the Board to the like effect of *Rondel v Worsley*. And on the question of an application to strike out a claim, this court is effectively the final court of appeal, subject only to the special leave to appeal procedure, grantable only by the Judicial Committee. This court is free to decide whether in 1995 there is any immunity for advocates from suits of negligence.

It goes without saying that this court will invariably accord the highest persuasive force to any decision of their Lordships in the House of Lords, particularly in the field of tortious liability. It is not unknown, however, for an appellate court, quite exceptionally, to anticipate the reversal of an outdated rule of law by the House of Lords.

In *Schorsch Meier G.m.b.H. v Hennin*, the majority of the Court of Appeal anticipated the reversal by the House of Lords of a previous decision of the House in 1961, by departing from a rule that judgments of an English court could be given only in English currency. The contemporary instability of sterling and other overwhelming considerations, however, rendered the rule obsolete (Lawton, L.J., who declined to overlook the binding effect of the 1961 House of Lords decision, described the rule as an “injustice to a foreign trader ... founded on archaic legalistic nonsense”).¹¹

In *Miliangos v George Frank (Textiles) Ltd.*, the House of Lords agreed that judgements could properly be given in a foreign currency. In so holding, it reversed its own previous decision. The anticipation by the majority of the Court of Appeal did not, however, escape strictures from their Lordships on the grounds of the abandonment of the strict application of *stare decisis*. The binding force of precedent seems, however, not universally to command absolute obedience, like some ligature strangling at birth the instant demands of justice.

Where the decision rests on judicially recognizable, mutable considerations of public policy, the compulsion to follow suit is lessened, if not removed. It also seems to me not right for any court to opt out of doing what is right and just, on the ground that the resolution of a problematical legal principle must await the arrival of the day, maybe far distant, when the length of an aspiring litigant’s purse or the resources of the legal aid fund are to hand, sufficient to finance the costs of litigation all the way up to the final court of appeal. *Rondel v Worsley*

¹¹ [1975] Q.B. at 430.

was indubitably binding on English courts in 1967 (and would coincidentally at that time have been followed in Jersey). A court, nearly 30 years later, which finds that, in its attitude to professional negligence, society has moved on, cannot properly be unmindful of, or lacking in respect for, the judgments of 10 Law Lords. They stand impressively, for their day and age. But they cannot indefinitely bind a future generation, or await their Lordships' review of their own previous decision."

In *Solvalub Ltd. v Match Investments Ltd*¹² the Jersey Court of Appeal declined to follow the House of Lords' decision in *The Siskina*¹³ (a decision which in 1996 was reversed in England and Wales by statutory instrument). In the same year in *Public Services Committee v Maynard*¹⁴ the Court of Appeal expressed *obiter* the view that in the law of prescription as applied in cases of negligence the decision of the House of Lords in *Cartledge v E. Jopling & Sons Ltd*¹⁵ might not be followed in Jersey. It seems to me that the right way forward for Jersey in the field of tort is to accept English cases as persuasive, but no more, and where appropriate to have regard also to developments elsewhere in the common law, particularly in Australia or New Zealand (as the Guernsey Court of Appeal did in *Morton v Paint*.¹⁶

In the law of trusts, subject to the Jersey legislation in the Trusts (Jersey) Law 1984 as amended in 1989 and 1991, English cases have been treated as having persuasive force. This can be seen most clearly in the excellent and powerful judgements of Mr Michael Birt, the Deputy Bailiff, in *In re Esteem Settlement*.¹⁷ I have given the full page references to indicate the length and complexity of the judgements, in which much reliance was placed on English law, though in some respects the Royal Court went beyond the limitations of English law, for example, in the restitutionary claim which it recognised.¹⁸ No doubt this use of English case-law should and will continue.

As I have only twenty minutes, I would like now to move from the extra-neous sources of Jersey law, to the indigenous sources, the courts which decided cases in Jersey. The Royal Court is the primary source of decisions on Jersey law for obvious reasons. The Royal Court with the present and previous Bailiffs has a good and well-deserved reputation for sound judgement, enhanced by the quality of judgements such as those in *Esteem*.

The Court of Appeal came into being in 1964 by virtue of the Court of Appeal (Jersey) Law 1961 in order to provide an appellate court in the Island to which access would be possible at reasonable expense, and to avoid the

¹² 1996 JLR 361. ¹³ [1979] AC 210. ¹⁴ 1996 JLR 343. ¹⁵ [1963] AC 758.

¹⁶ (1996) 21 GLJ 61). ¹⁷ 2002 JLR 53–186 and 2003 JLR 188–389.

¹⁸ 2002 JLR pp. 110–113. In parenthesis, the helpful guidance on the citation of French law at 2002 JLR 00.116–117 needs to be noted.

necessity for a person seeking to appeal to have to go to the Judicial Committee of the Privy Council at much greater expense and after much longer delays. Having served ten years on the Court of Appeal and being still a member, it is not for me to assess the value of the Court of Appeal judgments to which I have contributed. Nor is it for me to speak about the quality of today's judges. I will say only this. If you asked English barristers what they thought of a Jersey Court of Appeal drawn from Judges of Appeal such as Le Quesne, Neill, Calcutt, Hoffman, Clyde and others, they might perhaps reply that England and Wales could not do better. There has been some recent criticism in the Jersey Law Review of judgements of the Court of Appeal, and of the quality of the judges. The Court must always be open to rational and disinterested criticism. I hope that the Jersey Law Review will not give its imprimatur to criticism of judgments by a lawyer who or whose firm has been on the winning or the losing side, and therefore who had a material interest in the result. I am sure that, after my departure next year, the Court of Appeal will continue to provide a good service to the people of Jersey, bearing in mind a point for which the present day Court of Appeal is not always given credit, that almost all judgments are delivered during the week of the sittings.

The final court of appeal is the Judicial Committee of the Privy Council. In the later years of the 19th century that court decided a number of Jersey (and Guernsey) cases, laying down firmly the way in which potential sources of Jersey (or Guernsey) law should be treated: see for example *Att. Gen. for Jersey v Sol. Gen. for Jersey*¹⁹ and earlier *La Cloche v La Cloche*.²⁰ In recent times there has again been a number of Channel Island cases decided in London. In particular in *Vaudin v Hamon*²¹ (a Guernsey case) the Privy Council expressed firm views about the range of sources which it is permissible to tap. But I would respectfully question some of the recent decisions in two respects: first, it is doubtful whether some of the cases justified a second tier of appeal with all the expense and delay involved in a third bite at the cherry; and secondly, for my part I have some doubt whether some of the decisions in London were correct. I will take just two examples. In *Snell v Beadle*²² the majority in the Privy Council held that sale of a right of servitude was henceforth to be excluded from the application of the doctrine of *déception d'outré moitié de juste prix*. It seems to me to be arguable that the view of the minority in the Privy Council, that this was an unjustified move of the Jersey law goalposts under the guise of development of Jersey common law, was right. The second is *Gheewala v Compendium Trust*²³ in the Court of Appeal and in the Privy Council as *Hindocho v Gheewala*.²⁴ As I delivered the judgment of the Court of Appeal I make no comment on the decision of the Privy

¹⁹ [1893] AC 326.

²⁰ (1870) LR 3 PC 125.

²¹ [1974] AC 569.

²² 2001 JLR 118.

²³ 1999 JLR 154.

²⁴ November 20th 2003, unreported.

Council. However, I note that the Court of Appeal gave judgment on July 14th 1999, but that the appeal was not heard by the Privy Council until October 2003, with judgments being delivered on November 20th 2003. Whatever may have been the causes of the delay, it might be thought to be entirely inappropriate for so long a delay of over four years to be permitted in a question of *forum conveniens*, even though the Privy Council itself stressed that such questions as to the appropriate forum ought to be decided as speedily as possible. Reference to the case law of the European Court of Human Rights shows that on many occasions delays by the Italian courts of this kind of length have been held to amount to violations of article 6 of the Convention.

One question which will no doubt have to be considered in years to come is whether two tiers of appeal, (with all the expense and delay which can be occasioned by the second tier), are appropriate for a small island community of 85-90,000 citizens. My time is short, so I will only touch on some of the arguments for and against that proposition which will have in due course to be considered. I make it clear that I express no view either way.

It is right to consider criminal and civil appeals separately, as they are in the Court of Appeal (Jersey) Law 1961. I take criminal appeals first. Criminal appeals require above all things a due measure of speed. Men and women are convicted and sent to prison. If they have been wrongly convicted, that should be decided speedily so that they can be released without spending an excessive period in prison awaiting the hearing of their appeals. If their sentences are inappropriate, again that should be decided as soon as possible, so that either they are released from prison or know precisely what period of imprisonment they will have to serve. Those are statements of the obvious, which are fully supported by the case-law in the European Court of Human Rights. Inevitably appeals to the Privy Council in criminal matters, which require first the stage of special leave, cannot be dealt with speedily by a court which is burdened with appeals from elsewhere in the Commonwealth, from disciplinary decisions of professional bodies, and devolution appeals from Scotland. In 2004 the Privy Council has had to sit with nine judges to resolve the serious differences within the ranks of the Privy Council judges on death-row cases from the Caribbean, which in *Roodal v State of Trinidad & Tobago*²⁵ led to the most outspoken minority judgment in my lifetime at the Bar. It might also be pointed out that there are no second tier appeals in criminal cases in Scotland which has nearly six million inhabitants (except in so far as devolution questions may now have to be considered by the Privy Council), and that the Scottish Courts have dealt with criminal cases, without appeals to the House of Lords, rather more successfully and speedily than the criminal courts in

²⁵ November 20th, 2003.

England and Wales which include the House of Lords as a second tier appellate court.

On the other hand preservationists would be likely to point to the role of the Privy Council in ensuring that errors in the criminal law as decided by the Jersey Court of Appeal are not perpetuated. To this the response might be that the Jersey Court of Appeal is not bound by its own decisions. In my view it is time for the question, whether two tiers of appeal should be retained in criminal cases, to be fully considered.

I turn to civil appeals. Probably the strongest argument for retention of two tiers of appeal is that the Court of Appeal may go wrong, and the law as laid down by that Court may need correction, particularly in an age which the Jersey and Guernsey Courts of Appeal try their hardest to deliver all their judgments during the week of their sittings, a record of which I think the Court of Appeal judges can be proud. No doubt the Court of Appeal may be thought to have gone wrong on occasions. For example there was the recent case of *Hotchkiss v Channel Islands Knitwear Ltd.*²⁶ in which the Court of Appeal had sought to uphold as far as possible a somewhat surprising decision of the Jurats in the Royal Court, and in which the Privy Council, on mature consideration, held that for the most part the Royal Court could not be upheld.

At this point I should mention a major change in the practice of the Privy Council, of which it seems lawyers in the Channel Islands have now become aware. Until recently the Privy Council did not give leave to appeal except in cases involving questions of major principle. This is stated in clear terms in Halsbury's Laws:²⁷

“It is not the practice of the Judicial Committee to grant special leave to appeal unless the case raises either a far-reaching question of law or matters of dominant public importance, and however proper a case may be for serious consideration, it will not be dealt with if the practical issue has been solved otherwise, for example by legislation”.

The first part of that sentence appears no longer to hold true. Recently the Privy Council has been giving leave in cases turning solely on their facts and on the application of undisputed principles of law to those facts. *Gheewala* is one example.

I should also mention one feature of the system of appeals to the Privy Council. This enables litigants to appeal to the Privy Council as of right if the sum in issue exceeds £10,000.²⁸ It is puzzling that the powers that be should think it appropriate to view the right to appeal in cases involving no

²⁶ 2003 JLR 163.

²⁷ Volume 10, 4th edition reissue, at para. 419

²⁸ See the Court of Appeal (Jersey) Law 1961, Article 14 as amended.

questions of principle merely because over £10,000 is at issue, while requiring an application for leave, however important the questions of principle arising, merely because the sum in issue is less than £10,000. I confess that I can see no logic in this. Surely the right answer is that if appeals to the Privy Council are to remain, leave should be necessary in every case.

As I have said, the Court of Appeal may, and indeed does, go wrong sometimes in civil appeals, and this is a point in favour of retention of the Privy Council as a second tier of appeal. The contrary argument would rest in part on the ability of the Court of Appeal to correct its own decisions because it is not bound by them, and, where necessary to resolve a difference of opinion in its own ranks, to sit as a five or seven judge court. This happened recently in the criminal field in the case of *Harrison v Att.Gen.*²⁹ concerning starting points for sentences.

Another point on which the argument for abolition might be based would be the delays and expense inherent in having a second tier of appeal in civil cases. As regards delays I have already mentioned the serious delay in *Gheewala*. As regards expense, every litigant in Jersey not representing him-, her- or it-self is acutely aware of the burden of litigation costs. In saying this I make no criticism whatever of the charges paid to Jersey advocates: on the contrary I wish to pay a well-earned tribute to the large volume of criminal and *pro bono* work done by Jersey advocates for a small or no remuneration. All that I am saying about the second tier of appeals is that inevitably it involves extra time and extra expense.

A further point on which the abolitionists might rely would be the idiosyncratic nature of decision making in the Privy Council. This can most readily be seen in the death row cases culminating in *Rahool*. It can be seen in the change in Jersey law made by the majority in *Snell v Beadle* to justify their decision in favour of Mr Snell. This is nothing new. Anyone who has read Professor Robert Stevens' monograph entitled *The Independence of the Judiciary*,³⁰ will know of the deep concerns caused on occasions by the unpredictable decision-making of the Judicial Committee. In the 20th century probably the more significant examples were the knocking down of the Canadian New Deal measures in the 1930s³¹, and the death row cases which I have already mentioned.

Those are some of the arguments which would be likely to be deployed as and when the retention or abolition of appeals to the Privy Council in civil cases come to be considered. I express no view on them, as I have indicated. The only points on which I can and do express a view are that:

²⁹ 2004 JLR 121.

³⁰ Clarendon Press, Oxford, 1993

³¹ See Stevens especially at pp. 75–76.

- (1) there should be no appeals to the Judicial Committee without leave;
- (2) leave should only be given on the long established basis which I have quoted from Halsbury's Laws; and
- (3) arrangements are needed to ensure that Jersey (and Guernsey) appeals are heard with due expedition by the Judicial Committee.

I finish with these thoughts. During a period of ten years I have had the privilege of sitting in the Court of Appeal of Jersey, of seeking to arrive at just decisions, and of helping to ensure, whenever possible, that appeals are heard and decided without undue delay. My work in Jersey has occupied no little part of my life during these years. This has been an enjoyable occupation. I hope that the Court of Appeal will go on from strength to strength.

THE VALUE OF THE CIVILIAN STRAND

Patrick Hodge

INTRODUCTION

From my first involvement in cases involving property law in the Channel Islands I have been struck by the similarity between the fundamental rules of property law in Jersey and Guernsey on the one hand and those in Scotland on the other. We have both drunk at the fountain of the civil law. Roman law retains a powerful influence in the Channel Islands' jurisdictions through their customary laws.¹ The question which I am asked to address is what if any value there is in the Roman law component of the laws of the Channel Islands.

In this short address I advert to some similarities and also dissimilarities between jurisdictions where Roman law has had a profound influence. I discuss the value of the civilian strand and suggest that there are limits on the extent to which one should rely on sister jurisdictions as a means of developing customary law in the Channel Islands. I suggest that the principal uses to which lawyers can put the civilian strand are first to give structure to the areas of law which are predominantly Roman, and secondly to draw on the rules of analogous jurisdictions where the domestic laws of the Islands do not provide an authoritative answer.

THINGS IN COMMON

There are many similarities between our jurisdictions in the law of things – property law. I list some of these similarities.

- The indivisibility of ownership – *dominium*.
- The emphasis on publicity in land transactions – the requirement that land transfers are recorded in the Public Registry.
- The need for transfer of possession of a moveable thing in order to transfer ownership (subject to legislative alteration).

¹ See *Snell v Beadle* 2001 JLR 118, Lord Hope of Craighead at pp.127–128; Nicolle, *The origin and development of Jersey Law* (1998) section 13 & para 14.7; Dawes, *The Laws of Guernsey* p.7, fn 15.

- The need for transfer of possession to create a security over a corporeal moveable thing – pledge.
- The law of assignation: the requirement of intimation of an assignation of a debt to a debtor in order to transfer the debt to the assignee; and the principle *assignatus utitur iure auctoris*.
- Returning to land transactions, the use of servitude to regulate the interests of neighbours; *propriété en indivis*; *usufruit* are all very familiar to a civilian property lawyer.

Similarities exist in other fields. In bankruptcy, the old procedure of *cession de biens* has similarities to the old Scots *cessio bonorum*. In succession the rights of the spouse of the deceased and the children of the deceased to share in his moveable estate bear some similarity to the Scottish legal rights of *ius relictæ* and the “bairn’s part” although the rules differ in their details. There are also clear similarities between the Scots law of nuisance and the Channel Islands’ concept of *voisinage*.

There are of course significant differences between jurisdictions influenced by Roman law. The laws of succession in the Channel Islands differ markedly from those of Scotland. Your laws relating to securities also are very different. In areas where there are strong similarities there are also material differences in detail. For example, while in Scotland joint property as distinct from common property is in large measure confined to persons acting as trustees; it appears that joint property is more widely used in Guernsey. In the Channel Islands one cannot acquire a servitude right by prescriptive use while in Scotland you can.² The customary rules as to the co-ownership of boundary walls – *mitoyenneté* – differ from those applicable in Scotland where the wall is mutual property and each owner owns the half of the wall on his side with a common interest in the whole wall.³

Because of such differences, it is not appropriate to place reliance on analogous systems of law where an answer can be worked out from authorities which are directly relevant to the laws of the Channel Islands. I am well aware of Lord Wilberforce’s warning in *Vaudin v Hamon*⁴ and recognise the concerns which my colleague, Richard Southwell QC, has articulated in the Jersey Law Review.⁵ Where the law of Jersey or the law of Guernsey gives a clear answer there is of course no need to look further afield,⁶ but it is where

² See *Singleton v Le Noury* (1990) 5 GLJ 48; Matthews and Nicolle, *The Jersey Law of Property* (1991) paragraph 1.41. In Scotland one can acquire positive servitudes by prescriptive possession. See Kenneth Reid *The Law of Property in Scotland* (1996) paragraph 458 f.

³ *Thom v Hetherington* 1988 SLT 724.

⁴ [1974] AC 569, 582–582.

⁵ *Citation from other legal systems* (2004) 8 JL Review 66.

⁶ See *La Cloche v La Cloche* (1870) LR 3 PC 125.

local law and custom do not provide a clear answer that reference to analogous jurisdictions may be fruitful.

My principal aim today is not to join the debate on citation from other legal systems, although I will touch on that matter in the course of my discussion. Rather it is to explore how far practitioners in the Islands can use their own legal sources and in particular what they have inherited of Roman law from Norman customary law to achieve a modern statement of their laws which are based on their customary law and in particular their law of property.

THE VALUE OF THE ROMAN OR CIVILIAN STRAND

Giving a framework

What I seek to argue is that the Channel Islands' jurisdictions face a challenge and that they can derive real assistance in meeting that challenge by recalling and recording their customary laws. If I am right in detecting a gradual decline in the knowledge of the French language in the Islands and, within some circles of the legal profession, a reluctance to devote resources to the study of pre-codification Norman customary law, there is a need to record in English the Islands' customary laws. This recording of customary laws should not be confined to the civilian strand but should embrace all aspects of the Islands' customary laws. Today, however, I am concerned particularly with property law where the civilian strand exercises a strong influence. I see the recording in a modern text of the Islands' property laws as a means of making those laws more accessible to people who wish to do business in the Channel Islands and who might be put off by the apparent lack of an authoritative statement of their basic rules of property law.

Oliver Wendell Holmes described the task of the professional lawyer as "prediction, the prediction of the incidence of public force through the instrumentality of the courts".⁷ In a small jurisdiction the lawyer has to advise clients often without the assistance of a developed case law. The task of prediction is therefore all the more difficult.

If lawyers in a jurisdiction also cease to have access to scholarship on their customary law there is a danger that while detailed rules may be understood in their particularity, their context may not. People may lose sight of the structure which those rules inhabit. This hampers analysis.

In property transactions in particular there a great social good in certainty of outcome. People want to carry out transactions which may involve the

⁷ *The Path of Law*, (1897) 10 Harvard Law Review 457.

largest investments of their lives in a context in which their advisers can state with relative certainty the legal outcome of the choices which they make. Commercial people also value a legal system in which the rules which affect their dealings are clear and well-known. A clear statement of the principles of a jurisdiction's property law which enables a lawyer to place the specific rules of property law within the framework or structure manifested by that statement of principles can be a major contributor to that certainty. The practitioner should be enabled to analyse the problem which he or she is addressing against a framework of principle.

The Islands have many contacts with and have derived many benefits from English law, particularly in the fields of business law and criminal law. English law has a rich and sophisticated legal literature on which the Islands can draw in the areas where English law has had a profound influence on their laws. But I doubt if the Islands can derive much assistance from English law in relation to their property law which has developed in a different tradition from that of English law.⁸ The same point may be valid to some extent in other areas of the law, such as contract law, where English law has developed from different origins⁹ and has relied on statute to discard inconvenient relics from the past. But if the Islands wish to preserve and develop their property and contract laws in the future they need to be put in an accessible form.

Lord Goff, writing the foreword to Professor Birks' *English Private Law* stated that a principal function of the book was "to meet a fair criticism of English law – that it is inaccessible, or at least that it is not so immediately accessible as a codified system in which the structure of the law can quickly be perceived and understood."¹⁰ If that criticism is true of English law, with its sophisticated legal literature, it is surely true of the laws of the Channel Islands.

It may be that English law, which has such an admirable international reach and which is increasingly used as the international law of business in many parts of Europe, has thrived without a text which provides a principled overview of its rules. I am concerned however that the laws of the Channel Islands may not be so favourably placed.

The Islands face several challenges. First, the laws of the Channel Islands are the laws of small jurisdictions and each jurisdiction draws on a variety of sources of law. Secondly, the Islands exist in close proximity to two large but

⁸ In any event, the Privy Council has held that it is not legitimate to import the principles of English law into Jersey property law and the same must surely apply to Guernsey property law. See *Godfray v Godfray* 3 Moo. P.C.C.N.S.316, 16 E.R. 120, at p.131.

⁹ See David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999).

¹⁰ *English Private Law* (OUP 2000), edited by Professor Peter Birks. Lord Goff continued: "In this respect a principled overview can serve the same function as a Code, as is demonstrated by the experience of Scots law".

very different legal systems, those of England and France, with which different parts of the Islands' laws have an affinity. Thirdly, there is only a limited amount of modern writing on Channel Islands' law. I have found Stéphanie Nicolle's book on the origin and development of Jersey law very illuminating. Similarly her collaboration with Paul Matthews on the Jersey law of property is a valuable guide on particular aspects of property law. In Guernsey Gordon Dawes deserves great praise for his substantial study of the Laws of Guernsey which is a significant contribution to the renaissance of law writing on or in relation to the Islands. But more is needed if the Islands are to make the most of the opportunities which they enjoy as places in which financial and other international business is transacted.

I do not want to sound pessimistic. The Islands have valuable legal resources. They can look to each other for persuasive authority particularly in the field of customary law or in relation to their particular offices and institutions.¹¹ Where the Islands have adopted legislation, particularly in the commercial field, which resembles United Kingdom legislation, practitioners and the courts can derive considerable help from English case law which interprets the equivalent English or UK provisions. Much of the Islands' criminal law is drawn from the criminal law of England and reference is daily made to English criminal texts and case law.¹²

But in the field of customary law, and in particular in their property laws, the Islands rely in large measure on old texts. In both Jersey and Guernsey it is charming for someone interested in legal history to be referred to Domat and Pothier and other pre-codification French jurists for the general principles of contract or property law. Life for the amateur legal historian gets even more exciting when reference is made in Jersey to the *Coutume Reformée*, Terrien, Le Geyt or Poingdestre or in Guernsey to *L'Approbation des Lois*, Le Marchant's *Remarques*, Laurent Carey or Peter Jeremie. But where can the busy practitioner get access to a modern and clear statement of the structure and principles of the Islands' property laws and their laws of contract? Where can the in-house lawyer in a large commercial organisation which is interested in transacting business on the Islands obtain an overview of the laws which will affect its business? How will practitioners in future be able to gain access to the older authorities if and when their working knowledge of the French language declines?

It is here, at least in relation to property law, that I believe that the civilian strand offers assistance. The structure and fundamental principles of the Islands' property laws draw heavily on Roman law. In some other jurisdictions

¹¹ See, for example, *Le Cocq v Attorney General* 1991 JLR 169.

¹² Thus the Court of Appeal deprecated reliance on Scottish or South African law in relation to the crime of fraud – *Foster v Attorney General* 1992 JLR 6 (CA).

which have Roman law based property laws but which do not have a codified law there have emerged in recent years systematic academic writing on the principles of property law.¹³ These works which have supplemented standard texts on conveyancing have given practitioners and judges an analytical framework with which to tackle the particular problems which they address. They have the added advantage for the Islands that the texts are in English and they adopt the common law methodology as their legal systems are not codified. I believe that such writing could inform the exercise which the Islands could undertake. I advocate that more attention be paid to the civilian strand not out of any antiquarian interest but as a means of obtaining a modern and systematic statement of the Islands' property laws.

Roman law contrasts real rights and personal rights. These are the fundamental tools of analysis of property law problems. It is relatively easy to categorise the real rights which a particular legal system recognises. In the Channel Islands, ownership, rights in security, servitudes and *usufruit* spring to mind. Ownership is indivisible: as with other mixed legal systems, the laws of the Channel Islands have not adopted equitable ownership. There is no separation of title and equitable ownership, although there is a developed law of trusts that does not depend on equitable ownership. Rather in the civilian tradition, as in Scotland and South Africa, a trust creates in the hands of the beneficiary what has been analysed as a protected personal right which is an unusual personal right which prevails over the trustee's bankruptcy but which remains nevertheless a personal right and not a right of property. More recently, the concept of trust in a mixed legal system has been analysed in terms of the trustee having two patrimonies, his private patrimony which is available to his creditors, and his trust patrimony which is not.¹⁴ Subject to this complication of the law of trusts, the relationship between personal rights and real rights can be analysed in a straightforward manner. These rules or principles apply equally to realty and personalty.

When one has a clear grasp of the principles of property law it should be possible to analyse when property passes from a seller to a buyer whatever the nature of the property. Doubts as to when the conveyance of land is complete can be dispelled. For example, in both jurisdictions the conveyance of land is registered in public registers and consistently with certain other civilian systems the right of ownership will be transferred only on the public recording of the conveyance. Conveyancing of property becomes much more comprehensible to a client when the people transacting have a clear understanding of

¹³ In Scotland I have in mind Professor Kenneth Reid's *The Law of Property in Scotland* (1996) and in South Africa, van der Merwe & de Waal *The Law of Things and Servitudes* (1993) and Silberberg & Schoeman's *The law of property* (4th ed) (2003).

¹⁴ See J M Milo and J M Smits (eds), *Trusts in Mixed Legal Systems* (2001).

the fundamental structure of the relevant property law. That structure also enables practitioners to give principled answers to legal queries and makes the laws more accessible to its informed users by reducing the uncertainties in the customary laws.

I have no doubt that a small jurisdiction like Scotland has gained significantly from the systematic analysis of its property law. Such analytical writing provides a valuable tool for busy practitioners and judges. Among the judges there has been a greater willingness to use academic writing as a tool for legal analysis in recent years. Analytical writing on property law is not infrequently cited by judges in their judgments.¹⁵

I believe that the Islands would benefit greatly from such writing on their property laws using the fundamental rules of Roman property law which have been adopted in the Islands through their customary laws as the analytical template. By these means the laws relating to property transactions would be more accessible to those who transact and each detailed rule of the customary laws could be placed in its correct pigeon-hole in the analytical framework.

I am aware of an initiative between Jersey and Edinburgh University to explore the feasibility of a research programme towards this end. I believe that the project could be of real value to the jurisdictions of the Islands and wish it every success. If it bears fruit I believe the value of the civilian strand will be manifest and manifold.

Giving a source of analogy

My colleague, Richard Southwell, has expressed concern about the burden of research which would fall on the shoulders of practitioners if they were expected to analyse the relevant rules in other jurisdictions which have been influenced by the civil law when presenting cases involving customary law.¹⁶ I am alive to that danger. I do not seek to argue that the Jersey or Guernsey lawyer should familiarise himself or herself with the analogous rules of Roman, Scottish or South African law in every case. To do so would be a great burden particularly if it involved an area of law which had evolved historically through the incremental development of case law. See for example the Guernsey Court of Appeal's careful analysis of the development of the English common law of occupier's liability in *Morton v Paint*.¹⁷ To replicate that research in several jurisdictions would indeed be a burden.

But it would, I suggest, be wrong for the Islands to turn their backs on the

¹⁵ See for example *Clark v Lindale Homes Ltd* 1994 SLT 1053, *Sharp v Thomson* 1995 SLT 837.

¹⁶ See *Citation from other legal systems* (2004) 8 J L Review 66. For Richard Southwell's views on the sources of Jersey law see also *The Sources of Jersey Law* (1997) 1 J L Review 221 and (1999) 3 J L Review 213.

¹⁷ (1996) 21 GLJ 61.

assistance which can be derived from their membership of a family of jurisdictions which have drawn on Roman law at least in providing the framework of important parts of their laws. In *Snell v Beadle*¹⁸ Lord Hope in giving the judgment of the Privy Council derived assistance from Roman law as an explanation of the origin of the customary law relating to *déception d'outré moitié de juste prix*. The Privy Council recognised, consistently with the earlier case of *La Cloche v La Cloche*,¹⁹ that they were to have regard primarily to authorities on the customary laws of Normandy. They used Roman law as a means of understanding the origins of the customary law rule. To my mind this is unexceptionable.

Similarly, in *Haas v Duquemin*²⁰ the Jersey Court of Appeal did not use analogous civilian legal systems in preference to Jersey law but principally to ascertain whether it would be consistent with a civil law based customary law to develop that customary law in a particular direction. The problem in that case was that the proprietors of property owned in common could not agree on an equitable basis for its use. The common property was a courtyard of a rural building which had been converted into houses. The yard could not be divided by *partage* nor was it feasible to sell it as each of the owners had a continuing interest in its use, in particular to park their cars. The Court of Appeal saw the need for some form of judicial regulation if the parties were unable to agree on the use of the yard once the court had spelled out the nature of the parties' rights in land which was held *en indivis*. In the absence of any precedent in Jersey customary law the Court was faced with the task of legislating interstitially, as Justice Holmes described judicial law-making.²¹ In effecting such law-making it is important that any new rule which is grafted onto the customary law is consistent with the fundamental principles of that law as the Court has rightly held that longstanding and fundamental principles of property law should not be overturned by judicial decision.²² While Jersey had no tradition of judicial regulation of *propriété en indivis*, the existence of such regulation in some form in Roman law and in modern Scots law as well as under the French Civil Code provided reassurance to the Court that the judicial regulation would be a legitimate development of Jersey's customary law in this field.

The use of analogous legal systems for these limited purposes should not impose on practitioners an undue burden. Richard Southwell rightly recognises that a heavy burden would fall on them if the Court expected them to

¹⁸ [2001] 2 AC 304; 2001 JLR 118.

¹⁹ (1870) LR 3 PC 125.

²⁰ 2002 JLR 27 CA.

²¹ *Southern Pacific Co v Jensen* 244 US 205, 217 (1917), cited in Richard Posner's *The Essential Holmes* (University of Chicago Press 1992) p.230.

²² *Singleton v Le Noury* (1990) 9 GLJ 48; *Morton v Paint* (1996) 21 GLJ 61, at p.56.

The Value of the Civilian Strand

have an intimate knowledge of the developing case law of analogous jurisdictions in areas of law which develop significantly over time such as the law of tort. I do not call for that. If a practitioner has access to the leading textbooks on the property law of analogous jurisdictions, he or she will be able to ascertain very quickly whether the shared fundamental principles will allow Jersey or Guernsey to adopt from a sister jurisdiction a solution where they have no indigenous authority in point.

CONCLUSIONS

The Channel Islands are small jurisdictions. As remnants of the Duchy of Normandy they have retained unique legal traditions, particularly in their customary laws. But “No man is an island” and the Islands themselves are “a piece of the Continent, a part of the Main”.²³ They remain part of a family of legal systems which have a civilian based property law and which comprise the main stream in European law. In the structure of the civil law there is a clear and comprehensible framework to the Islands’ property laws which needs to be set out in a modern academic work.

Whether or not such a work comes to be written, the Islands, like other small jurisdictions, will look for guidance to the writings of judges and academic lawyers in other analogous jurisdictions. Small jurisdictions do this. They have to do this. As I have said, in much of their commercial law and in criminal law the Islands look to English law and Commonwealth common law jurisdictions. But in their property laws, the analogous jurisdictions are those modern legal systems which have a Roman law based property law.

²³ John Donne, *Devotions upon Emergent Occasions*, No 6.

PANEL DISCUSSION: SESSION 1

Professor Kenneth Reid (Chairman)

PROFESSOR REID: We have had three very different, stimulating contributions this morning. Could I invite – we have about 10 or 15 minutes before we are allowed to have coffee – so could I invite contributions from the floor? Could I say, just before anybody says anything, that it would be very helpful if you could identify yourself before you give your intervention? Who will be first? Otherwise I shall ask questions. (Pause) I am afraid that when a professor stands at a podium, the temptation to give a lecture is almost overwhelming. Yes?

PAUL MATTHEWS: Paul Matthews, but the London Paul Matthews. Could I just make one comment and maybe ask almost a question? A number of points or a number of times the speakers have referred to the Roman law impact in Jersey. Now, at the time of 1204, I don't suppose there were two people in Jersey who knew anything about Roman law. At that time, Jersey and Guernsey would have been rather remote, quiet, agricultural backwaters almost. Had it not been for 1204 and the separation, I don't suppose the situation would have become anything like what it has today. The influence of the Roman law must have come much later and in diverse other ways. The original law in Jersey and Guernsey must have been the sort of feudal law that one found over the whole of Northern Europe and indeed remained in England well into the fifteenth century. Although it is true that there was some influence of civilian ideas in the Roman law sense, that is not indigenous, as it seems to me – others may know better than I do – and, when we talk about the Roman law influence, it seems to me that it is coming much, much later, as perhaps lawyers in the Channel Islands are looking for solutions and are looking round to what other people have done in similar situations. They are not looking back into their own structures because their own structures were different. I put that forward simply as a kind of quasi-historical comment more than anything else.

PROFESSOR REID: Would anybody like to respond to that?

MALE SPEAKER: You are the expert on Roman law.

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RICHARD SOUTHWELL QC: I only spent two years at Cambridge doing mostly Roman law and I remember very little.

PATRICK HODGE QC: I would not doubt that if you asked a thirteenth century Channel Islander what he knew about Roman law you would get an answer which would indicate he knew very little; I wouldn't doubt that for a second. However, the fact now is that the Islands look to Domat, they look to Pothier as authorities and these authorities give a structure to their law which would be very familiar to someone versed in the French Code or someone who was a Germanic pandectist or something. It would be a very familiar structure. I wasn't advocating that one adopt detailed rules of Roman law; I am advocating a conceptual framework, the presenting of what may be in many cases non-Roman rules within the conceptual framework. That rather than anything else is what I am proposing.

PROFESSOR REID: I think one has to be very careful when one is talking about Roman law and civil law because it is a very, very diverse field over hundreds and hundreds of years; and certainly you are right, in 1204, Roman law would not be understood not only in Normandy but also in most other parts of Europe as well.

ALISON OZANNE: I was just going to say, touching on my paper, on which I had monumental help from my husband, Gordon Dawes, in preparing, that the customary laws relate to the specificity of each area where that customary law is practised, but in fact, where there is a lacuna, that is because kingdom-wide in France it was the Roman law that was acknowledged, and I am not sure I agree with Paul Matthews on that point at all.

PROFESSOR REID: That is the absolutely typical European experience, which is customary law with lots of lacunae filled in by the learned law so that Roman law gradually, over hundreds of years, fills in gaps in customary law until the law becomes very Romanised. But it was a very slow process and it happened long after 1204. Scotland is just the same. Our experience is almost identical and so is that of many other European countries.

RICHARD SOUTHWELL QC: My concerns were quite simply, does every Jersey or Guernsey lawyer really want to spend, have to spend, time searching through *Justinian's Digest* and so on actually to work out what the real doctrine was in Roman law rather than a very superficial flitting through some textbooks like *Buckland* to get a very superficial answer. That was my concern, but I should not like it to be taken against me since the last time I appeared in the House of Lords I cited the laws of, I think, 30 countries.

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PROFESSOR REID: I hope you won.

RICHARD SOUTHWELL QC: Amazingly I did, thanks to Lord Hoffman.

PROFESSOR REID: Other contributions? Yes?

JOHN KELLEHER: I am John Kelleher. I am going to be speaking on contract law shortly, but something I have put in my written paper but I won't be speaking to this morning I think might be helpful in the context of Paul's question. There is only one person who studied contract law in the customary contracts to any depth and that is the late Professor Jean Yver, who was a celebrated academic of Norman customary law. He wrote a text entitled *Les Contrats dans le Très Ancien Droit Normand* and he said that – I will translate it for you – roughly translated, he said it is not ... he is talking about the thirteenth century and he said that it's not foolhardy to think that the Roman theory of *obligations* spread quickly in Normandy in the thirteenth century and persuaded those of cultivated minds all the faster because it did so in a vacuum. However, the absence of a theoretical base in the custom created a state of affairs which Roman law, with its finer points and subtleties, its system of protection of the weak and various other things, was suddenly to disrupt. So he says that in the thirteenth century Roman law had already found a place in our customary law in the area of contract. So it is quite early on.

PROFESSOR REID: Other contributions? Would anybody like to take Patrick Hodge up on his suggestion that the law of the Channel Islands needs more organisation?

MICHAEL BIRT: Can I suggest that it is a job for a retired former appeal judge?

RICHARD SOUTHWELL QC: Well, Sir Godfray is here, so ...

SIR GODFRAY LE QUESNE QC: That tempts me to say ... (indistinct) ... organisation ... (indistinct) ... are exactly what a certain Colonel Bentinck was saying in 1771, and he introduced the code which Lord Hailsham described as the worst code he ever saw.

PROFESSOR REID: I think perhaps even Patrick Hodge is not suggesting a code. Any other contributions? Yes, please?

MALE SPEAKER: My name is ... (indistinct) ... and I am not a lawyer, but I am

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still patriotic. I am quite interested in this reference – reference or references – to the Channel Islands in connection with ... (indistinct) ... judgment and I ... (indistinct) ... now, but it would be interesting to know exactly what was said about this because I may be wrong here, but, as I understand it, the Channel Islands were used, particularly in the seventeenth century, as a place where you dumped people like prisoners you did not want because habeas corpus did not lie to the Channel Islands. So I would be very interested to see, to know in due course how the judgment

RICHARD SOUTHWELL QC: I have the text here and you can read it if you like.

MALE SPEAKER: Thank you very much.

PROFESSOR REID: We have time for one more question, if there is one more question. Yes?

SOPHIE POIREY: May I speak in French?

PROFESSOR REID: Yes, of course.

SOPHIE POIREY: On a parlé de l'influence du droit Romain dans le droit des îles – est-ce qu'il y a une unfluence du droit ecclésiastique dans le droit de Jersey ou de Guernesey comme en droit Normand où l'influence ecclésiastique se retrouve justement dans le droit des contrats – avec le respect de la parole donnée – la foi jurée – est-ce qu'on retrouve cette influence dans le droit des îles?

JOHN KELLEHER: Can I just add to that that there is clear evidence of the Channel Islands being in a specific archdeaconry des isles by the eleventh century. There are records in the Jersey Ecclesiastical Court of about 1080 where, I think, by implication Guernsey had the same sort of establishment. So, whilst we may talk of a backwater, certainly the ecclesiastical law was established in the Channel Islands by the late eleventh century, and I know nothing about Roman law, but I don't see why we shouldn't see other influences as well. And, of course, the Islands before 1204 were governed from the Exchequer of Rouen and it is to the influence of Roman law on the Exchequer at Rouen, if any, in that period that we have to look.

PROFESSOR REID: Thank you for that. I think the desire for coffee is even stronger than the desire for questions. Before we depart in two directions

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(if you remember) for coffee, could I ask you to thank the speakers once more for their contributions? [Applause]

THE LAW OF CONTRACT – WHICH WAY?

Alan Binnington

At the time of the separation from Normandy in 1204 Jersey legal practitioners had little or no written law to which to refer. Across the water in Normandy the existing oral legal tradition had been expressed in writing around 1200 in the text known as *Le Très Ancien Coutumier de Normandie* and it was therefore to this text that Jersey practitioners would refer. Some 50 years after the *Très Ancien Coutumier* a second version of the *Coutumier* was produced, known as *Le Grand Coutumier de Normandie*. After 1204 Jersey began to develop its law independently from that of Normandy, although keeping one eye on developments in that jurisdiction. Thus the commentator Poingdestre noted in the 17th century that whilst four hundred years earlier his ancestors could rely on the *Grand Coutumier* its reliability in certain areas was questionable. This comment was echoed by the Court of Appeal in 1996 in the case of *Maynard v Public Services Committee of the States of Jersey*¹ where the Court warned:

“...care has to be taken when referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of the Norman territories in what is now France, Norman Customary law continued to develop in Jersey, Guernsey and Normandy in parallel but not with identical developments. In Normandy development was naturally affected by doctrines prevailing in other parts of France...”

The Royal Commissioners of 1861, appointed “to enquire into the civil, municipal and ecclesiastical laws of the Island of Jersey” concluded that:

“The principal authority as to the ancient customary laws of Normandy is “*Le Grand Coustumier du Pays et Duché de Normandie*”, a work to which different dates have been assigned, but which was compiled probably late in the reign of Henry III.....Other works are cited in Jersey, as evidencing or illustrating the ancient customary law of the Duchy of Normandy, amongst which the commentaries of Terrien (Lieutenant Bailiff of Dieppe in the middle of the sixteenth century) upon the *Vieux Coutumier* hold a conspicuous place. The

¹ 1996 JLR 343

“*Coutume Reformée*”, a French compilation of a much later period (circa 1585) representing the then existing state of the law of continental Normandy, and the commentaries thereon of Basnage, (a celebrated French lawyer of the succeeding century) as well as the works of other French writers, are constantly referred to by the Jersey lawyers. The latter declare, it is true, that such works are not of authority on Jersey law; yet in point of fact they are frequently used as books of reference, and this has naturally, perhaps unavoidably, led to the gradual introduction of much foreign matter, so that what is now practically received as the common law of Jersey, may be described as consisting of the ancient Norman law, with subsequent accretions, some of which are mere developments of the earlier customs, and others interpolations of French law. It may be added, that the circumstance of the Jersey lawyers receiving their legal education chiefly in France, helps to impart a modern French complexion to the jurisprudence of the Island”.²

It can therefore be said that the Islanders took the law as it existed in Normandy in 1204 but developed it separately, no doubt to suit a community which, whilst Norman in origin, was developing its own identity. However, with the coast of Normandy only some 14 miles away it is hardly surprising that the Island continued to have regard to developments in that jurisdiction, particularly given that, as the Royal Commissioners pointed out, the Jersey lawyers continued to receive their legal training in France.

One area where the *Grand Coutumier* was sadly lacking as a source was in relation to the law of contract. This is perhaps not surprising given that it is one of the earliest *coutumiers* in France and represented the custom of a predominantly rural community. One sees in the various sections of the *Coutumier* the very strong influence exerted by feudalism and the importance of rules relating to the rights of the lord in relation to matters such as the confiscation of property, guardianship and illegitimacy. As far as concerns a general theory of contract, there is little to be found save for references to contractual principles relating to the transfer of immovable property.

It was therefore necessary for Jersey to look outside the *Grand Coutumier* and its successor *coutumes* and in common with the law of Normandy as it developed in later years, regard was had to the works of Joseph Pothier, a writer on the *Coutume d'Orleans* in the 18th century. Pothier was much influenced by civil law but such was the quality of his work that when the *Code Civil* was drawn up a few years after his death his work was used as the basis for a number of its provisions. Pothier's work continued, and indeed continues, to be used by the Jersey courts when dealing with matters of

² *Report of The Royal Commissioners on the civil, municipal, and ecclesiastical laws of Jersey 1861*, page (iii)

The Law of Contract – Which Way?

contract although from time to time the court has looked at provisions of the *Code Civil* which are derived from, or not inconsistent with, Pothier's treatise.

Thus far one might be forgiven for thinking that all is well with the Jersey law of contract: the *Grand Coutumier* and its successor *coutumiers* were lacking in contractual content and Jersey law therefore looked at the works of a writer on a neighbouring *coutume* for inspiration in developing its customary law of contract. However, to use the words of the present Bailiff in *Selby v Romeril*,³

“ Pothier was writing two centuries ago and...our law cannot be regarded as set⁴ in the aspic of the 18th century”.

The problem was, therefore, how the Jersey law of contract was going to develop to suit the needs of a changing community.

The essence of a system of customary law is that it tends to reflect what people actually do. Indeed the word “*coutume*” is derived from the Latin “*consuetudo*”, meaning “custom, usage, habit”. During the 19th century French was the dominant language in the Island and local lawyers continued to receive their training in Normandy. However the use of the English language increased rapidly to the extent that by 1900 it was the dominant language in the Island's capital, St.Helier. Until the 1960s there is little evidence of any significant English law influence on the Jersey law of contract. However from the 1960s onwards Jersey courts have increasingly looked at English law in contract matters. Thus, for example, in 1964 we find the Royal Court saying that -

“It has been the practice of the Court for many years, in extension of the principles enunciated by Terrien and Poingdestre, to have regard also to the law of England where no clear precedent is to be drawn from the law of Jersey....and, in arriving at our judgment, we have had regard to both the civil law and to the law of England”.⁵

In that particular case the court justified its reliance on English law on the grounds that the principles expounded by Domat had much in common with the English law of misrepresentation and mistake.

The use of English law has been particularly noticeable in cases relating to contracts of employment. Thus in 1965 the Royal Court referred to English law in relation to the validity of a covenant in restraint of trade, stating that:

³ 1996 JLR 210

⁴ On an interesting culinary note, the word used in the original judgement was “frozen” but by the time that the Jersey Law Report was produced it had been corrected to “set”.

⁵ *Scarfe v Walton* 1964 JJ 387

“by reason of the paucity of precedents in Jersey, we have had regard to precedents in the common law of England.”⁶

In 1970 one finds the Court noting that the matters which justify summary termination of a contract of employment are those set out in Halsbury’s Laws of England.⁷ Despite the fact that Pothier’s treatise on obligations contains much of assistance in relation to the law relating to the sale of goods the Royal Court, in 1982, was able to say that -

“we find assistance in section 35 of the Sale of Goods Act 1893...” (relating to sale by sample) “... That Act does not, of course, apply to Jersey, but we think that its provisions are generally in conformity with the law in Jersey on the sale of goods”.⁸

An examination of contract cases decided by the Royal Court over the last 30 years or so reveals that the Court has adopted a somewhat inconsistent approach to the authorities relied upon, the use of French and English authorities tending to be determined not so much by the area of law in question but the identity of the trial judge and of the advocates appearing before him. Such an analysis might find favour with the American Realist school of jurisprudence, which regarded judicial decisions more as a subjective expression of a judge’s preferences than an objective expression of “reality”, but inevitably this approach, unless corrected, will lead to uncertainty. The question is, does Jersey remain true to its roots and follow Pothier and the French sources, does it allow English law to be absorbed by a legal form of osmosis, or does it do something more radical, perhaps by codifying the law of contract along lines modelled on English law (or, indeed, French law)?

It will be difficult for Jersey law to take the approach of being true to its roots. Firstly, those roots are ill-defined. The purist would say that we should look simply at the law as it existed in 1204 and adapt that, but that would be both to ignore the influences that undoubtedly altered the Jersey law of contract in succeeding centuries and to fail to take account of the fact that the true Norman customary authorities contain little on the subject of the law of contract. Secondly, it is difficult for a small jurisdiction to develop a comprehensive legal system in isolation and endeavouring to follow developments in a jurisdiction with similar roots but which has radically changed the basis of its law may itself be fraught with difficulty, particularly where the alternative jurisdiction is one such as France where the doctrine of precedent has a far lesser role.

⁶ *Wallis v Taylor* 1965 JJ 455

⁷ *Colledge v Little Grove Hotel Ltd* 1970 JJ 1487

⁸ *Jersey Tools v Unipat* (1982) Jersey Unreported 1

Furthermore, France has for over two centuries been following the *Code Civil* which is a comprehensive system of law of which the law of contract is merely a part. Simply choosing to follow the provisions of the *Code Civil* relating to contract risks confusion where a contractual dispute overlaps other areas of the law, such as tort.

An examination of the reported cases decided by the Jersey courts indicates that between 1998 and 2003 15 cases were decided on contract. During the same period there were 94 trust cases. The number of trust cases has enabled Jersey trust law to develop in a consistent manner. The paucity of contract cases has led to anomalies remaining uncorrected, possibly for years. The willingness of the Jersey court to encourage mediation will arguably reduce the number of reported contract cases further. Mediation does not produce legal precedent. Put simply, there are too few contract cases coming before the Jersey courts for the Island to take the Norman customary law and the law as expounded by Pothier and develop a legal framework which both achieves certainty and keeps up to date with modern society. That society is now English speaking and the Island's lawyers receive their training predominantly at English universities and law schools and not in France. The judges of the Island's Court of Appeal are drawn from members of the English Bar and the only Jersey lawyers amongst them are the Island's Bailiff and Deputy Bailiff. Commissioners appointed to hear specific cases tend to be drawn from the English Bar, not even from our sister island. It is therefore hardly surprising that judges and practitioners have been tempted to look to English law, a system with which they are entirely familiar, rather than to the Norman customary law, with which the majority are not.

A similar process has been followed in relation to the law of tort, where, despite the original Norman sources of this area of the law the Jersey law of tort is now almost exclusively determined by reference to English, as opposed to Norman, or French, authorities. The transition appears to have been achieved with relatively little difficulty.

The usual response to the suggestion that the Jersey law of contract should be assimilated to the English common law of contract is that having a different legal system is what makes Jersey different from the United Kingdom and that the erosion of this difference will inevitably lead to the loss of Jersey's relative autonomy. It is said that, as this autonomy is important from the point of view of attracting business to the Island, one should be wary of anything that might erode it. Such an argument has not however prevented the courts from adopting English principles in the areas of criminal law and tort, nor has it prevented the legislature from passing legislation in the areas of company law and financial regulation that are modelled closely on the equivalent English statutes. Trust law, for obvious reasons is already

modelled on English law. It is perhaps not a coincidence that in those areas of human activity which have become more complex, such as crime and civil wrongs, the courts have found it necessary to resort to English law for precedent rather than to remain true to the Island's Norman roots. In contrast, the nature of immovable property and the disputes that arise in connection with it have remained relatively unchanged. It is therefore hardly surprising that Jersey's land law has been able to remain reliant upon Norman customary precedent with little difficulty whilst the law of contract has demonstrated the difficulty of adapting an ancient system to suit modern needs.

The finance industry, upon which, whether one likes it or not, Jersey is now almost totally reliant, sees Jersey as an attractive place to do business not so much because its legal system is different but because the legal system is capable of a degree of consistency and certainty when disputes arise in the increasingly complex transactions that are carried out in the jurisdiction. Jersey needs to create a legal environment which is attractive to global institutions because, in reality, Jersey needs those institutions rather more than those institutions need Jersey. Interestingly, it would appear that it is the anglicisation of some of our laws which appears to be attractive : the Chief Executive of HSBC, which has had a presence in the Island for 150 years, was recently quoted as saying that -

“the bank and its clients favour Jersey because of its tax regime, its legal framework, based on British law, and its long financial history”.⁹

There is a further difficulty in terms of accessibility. If the answer to a problem with a banking transaction is said to depend on examining the text of a Norman commentator of the 16th century to which all practitioners do not necessarily have access Jersey may very well be regarded as “different” but possibly for the wrong reasons. This is a problem which is not confined to the finance industry but is experienced also by members of the general public. It is sometimes said that financial institutions can always choose to have their commercial contracts governed by English law but that tends to ignore the fact that not all commercial contractual arrangements are in written form and thus give the parties the opportunity to select a governing law. Jersey may well have a unique legal system but, given that no other system is reliant upon the works of the Norman commentators, the likelihood of a reprint of those texts seems remote. This means that our legal authorities are becoming relatively inaccessible and remain written in a language which the majority of the population neither speak nor comprehend. The notion of justice must include accessibility of the laws to which a

⁹ Financial Times, Special Report, 25 April 2004

community is subject. One is reminded of the words of Hoffman JA in the Court of Appeal in *Re Barker*:

“I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the Court to do justice according to the notions of our own time. The Court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants”.¹⁰

The question of accessibility was raised as long ago as 1991 when the report of the Jersey Judicial and Legal Services Review Committee, under the chairmanship of Sir Godfray Le Quesne, QC, was presented to the States. The Committee had this to say:

“We conclude our report by drawing attention to a matter upon which, although it lies outside our terms of reference, we have formed a strong view. We have heard much discussion of the special characteristics of Jersey law and the desirability, as many see it, of Jersey retaining its own system of law. It seems to us to be certain that in the long run Jersey law will cease to be an effective system if it remains as inaccessible as it is today. Indeed, we venture to say it is undesirable for a society to live under a system of law, many of the rules of which are undiscoverable by a layman except by reference to a lawyer.

There is no comprehensive statement or discussion of the law of Jersey. Its most authoritative writers lived in the 17th century. The most recent general textbook, that of Le Gros, appeared almost 50 years ago, and that is not a systematic treatise. In order to study the customary law of Normandy, upon which Jersey Law is based, it is necessary to resort to sources even more remote. We may add that all works to which we refer in this paragraph are written in French, and French is now a language which the majority of Jersey’s inhabitants cannot understand.

If Jersey law is to be preserved, and the constantly growing influence of English law is to be restrained, it is necessary, we suggest, for the States to provide resources for the preparation of a fully comprehensive statement or encyclopaedia. This would be a large undertaking. It would need the full-time work of a properly qualified editor; the editor would have to get the assistance of numerous authors; and the publication could not be expected to be profitable. The resources and the effort for which we call would therefore be considerable; but they would be used to ensure the continuance of Jersey’s legal heritage not as a mere memorial but as a living force”.

¹⁰ 1985–86 JLR, 186 at 195

In these days of budgetary restraint one must question the likelihood of funds being made available for this task in the foreseeable future. Given that in the thirteen years since that report was issued we have made no progress in increasing the accessibility of Norman texts the state of affairs envisaged by the Committee is clearly a long way off.

As a result of the separation from Normandy in 1204 the Channel Islands enjoy a privileged constitutional position which has enabled them to develop as finance centres that are world renowned. It is that constitutional position, coupled with a legal system which has shown itself able to keep pace with the needs of an international finance centre which have been the main features in attracting business to the Islands. If Jersey is to continue to thrive then business must continue to be attracted to the Island. The development of a modern law of contract which reflects the "custom, usage or habit" of the Island today rather than that of the 1880s is essential in maintaining confidence in the Island's ability to serve not only the finance industry but the community as a whole.

Customary law is a reflection of the way in which a community conducts itself and it is perhaps time that the Jersey law of contract reflected the community that has evolved during the last century. There are simply too few contract cases coming before the courts for the law to be developed judicially from its present state of uncertainty. Given that the court has apparently found little difficulty in assimilating English law concepts into its contract law when it chose to do so, nor has it experienced difficulty in doing so in relation to the law of tort, there is no reason why a codification, with a leaning towards English common law, should not be used to speed up the process and to produce a framework which is in keeping with the needs of today's society.

We are justifiably proud of the institutions that have developed since the separation in 1204 but our legal system must recognise the changes that have occurred in our society : indeed, that is often said to be one of the great strengths of the customary law. Let us by all means preserve the framework given to us by the Norman customary law in areas where it is appropriate to do so, but in relation to the law of contract perhaps it is time for us to move on.

Given the small number of contractual cases coming before the courts the task must necessarily fall to the legislature. The Jersey Law Commission, in its Final Report on the Jersey Law of Contract has recommended that rather than a wholesale adoption of the English law of contract by statute there should be a statutory codification of the Jersey law of contract. Their preference is to lean towards English law given that the Jersey courts have already adopted a number of English law principles. Favouring an English law framework would also be more suited to the needs of the Island's finance industry

and in accordance with what the layman probably believes to be the state of the law as it is.

Accordingly, rather than devoting resources to the production of an encyclopaedia, which would ultimately remain merely a commentary, appropriate resources should be allocated to the production of a contractual code. Such a code could, of course, take into account any particular features of Jersey contract law which are felt worthy of retention and could, in addition, reflect any progress that has been made towards the standardisation of contractual principles across Europe.

Whichever direction is ultimately chosen, what is now required is certainty so that potential litigants will at least know the legal framework against which their disputes will be resolved by the courts. The present uncertainty arguably benefits only the lawyers; and if that is not a good reason for the States of Jersey to spend some money one wonders what is!

CAUSE FOR CONSIDERATION: WHITHER THE JERSEY LAW OF CONTRACT?

John Kelleher

INTRODUCTION

It would be no exaggeration to assert that the Jersey law of contract is a most troublesome area for Jersey practitioners and for the Island's Courts.¹ Whilst there may be a measure of consensus that the true source of the Jersey law of contract is the French common law pre-*Code Civil*, that is a source which most people (lawyers included) find largely inaccessible. This difficulty in ascertaining the law, together with the not unnatural inclination of English-trained and English-speaking lawyers to head for the more easily attainable English law of contract, has led to a post-1950 scenario of case law in contract which sets out an uneasy and confusing mixture of pre- and post-French *Code Civil* and English common law. The situation in microcosm is a reflection of the peculiar factors which combined to produce the Jersey of today: strong Norman roots, centuries of loyalty to the English Crown and an unusual degree of independence for such a small island. One aspect of that Jersey of today is the commercially ambitious, English speaking, sophisticated offshore finance centre with its main focus on the City of London. But there is another: that of an Island proud of its unique identity, cognisant of its roots and alive to its ability to sift and select from the influences that bear upon it from its larger neighbours. Ultimately however, it is difficult to withstand the tide of anglicisation that moves upon Jersey. So much so, that Victor Hugo's perceptive observation on nineteenth century Jersey may apply with equal force today: "Jerseymen....are certainly not English without wanting to be, but they are French without knowing it".² In the slightly more prosaic realms of Jersey contract law, in the interests of certainty and hence justice, the Island is going to have make up its mind: English law, French law or its own, clearly identifiable brand.

The state of Jersey's contract law was the subject of the Jersey Law Commission's consultation paper issued in October 2002. The Commission

¹ For a more detailed analysis of the origins of Jersey's contract law see John Kelleher, *The Sources of Jersey Contract Law*, 1999 3 JL Review 1.

² Quoted in Philip Stevens, *Victor Hugo in Jersey* (Chichester 1985) page 28.

concluded that clarification of this area of law was a priority and its preferred option for the Island was the adoption by statute of the English law of contract. Attendees at this conference will hear from two Jersey practitioners, Advocate Alan Binnington and me, and from a Guernsey practitioner, Advocate Alison Ozanne, who will give a perspective from the Bailiwick of Guernsey. For my part, I shall speak as to the historical position and develop an argument that in the law of contract Jersey should remain loyal to its French roots.

As a general proposition, the Jersey law of contract can be said to be the same as the pre-*Code Civil* French common law (the *ius commune*³), unless one can identify that the *ius commune* was amended by French statute or that on a given issue Jersey law had developed in a different direction.

This derivation reflects Jersey's own peculiar evolution which in recorded history commenced as part of the territory that was to become the Duchy of Normandy and after 1204 as "peculiar and immediate dependency"⁴ of the Crown of England, albeit with a degree of independence unusual in so small an entity. Political separation from Normandy in 1204, did not mean complete severing of all ties. The bonds between Normandy and Jersey at all levels ran deep. Not least, Jersey law was based on Norman customary law. The position is well stated in the 1861 *Report of the Commissioners appointed to enquire into the Civil Municipal and Ecclesiastical Laws of Jersey in 1861*⁵:

"The common or customary law of Jersey is based upon the common law of the ancient Duchy of Normandy. The Channel Islands, forming originally part of the Duchy, alone remained to the Sovereigns of England, on the loss of the continental part in the time of King John. From a very early period the Islands have formed two Bailiwicks, that of Jersey and that of Guernsey. They have ever since retained their ancient Norman law, except so far as it has in the course of time been modified or corrupted by subsequent enactments or usages. It was indeed contended before us, that the common law of England has been introduced into Jersey. We do not see any proof of this, and it is certain that the contrary was asserted and allowed on the occasion of attempts, in the time of Edward II, to bring the Island under jurisdiction of the Courts at Westminster. It is true that there are numerous instances of identity or close resemblances between the laws of Jersey and the English law in its infancy; but they are much

³ The *ius commune* or *droit commune* has been described as the "complex result of the coming together...of local custom with feudal law, Roman law in modified and elaborated form, Canon law and the Law Merchant" Robinson, Fergus and Gordan, *European Legal History* (London 1994), page 106.

⁴ Attributed to Joshua Le Bailli,, speaking on behalf of the Jersey Chamber of Commerce in 1860, quoted in R. Omner, 'A Peculiar and Immediate Dependence of the Crown': the Basis of the Jersey Merchant Triangle, *Business History* XXV (1983) page 107.

⁵ (London 1861) pages ii to iii.

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more referable to the Norman origin of the English Justiciars, and to the dominant race in England at that period, than to any introduction of English law into Jersey.”

The Commissioners had been appointed following a period of political unrest in Jersey which saw opposed a liberal, reforming lobby of anglophile tendency against a more conservative and primarily rural bloc.⁶ This statement was thus an important assertion of an aspect of Jersey’s identity.

Nearly 30 years earlier, the Privy Council, at that time Jersey’s only court of appeal, had shown itself alive to the issue of the roots of Jersey law. In *Thornton v Robin*⁷ the Court stated -

“If their Lordships were to reverse these decisions without clearly being able to show that they were contrary to the Norman law, we might not only refuse the Respondent a right to which he is by the law of his country entitled, but might raise a suspicion that we were desirous of changing the laws of Jersey, by forming our decisions, not according to those laws, but according to our English notions of justice...”

NORMAN CUSTOMARY LAW

Customary law is a system of legal rules founded on oral tradition and which over time has crystallized into a definite body of law. It has been shown that the customary law in Normandy had crystallized into a body of law in the period between 1048 and 1090.⁸

This oral body of law found its first written expression circa 1200 in a text entitled *Le Très Ancien Coutumier de Normandie* (“TACN”) prepared by a private practitioner. Some fifty years later, there appeared a second written redaction of the *Coutume* in the form of *Le Grand Coutumier de Normandie* (“GCN”) or the *Summa de Legibus* (known in Jersey as the *Summa of Maukel* or *Mansel* and by other names), again the work of an unknown practitioner.⁹

There is no evidence that the TACN was used as a text in Jersey at the time of its publication. It is clear however that the GCN was used. Jean Poingdestre, one of Jersey’s three customary law writers, noted in the preface

⁶ See Kelleher, *The Triumph of the Country: The Rural Community in 19th Century Jersey* (Guernsey 1995).

⁷ (1837) Moo 439 at 450.

⁸ R Génestal, *La formation et le développement de la Coutume de Normandie, Semaine de Droit Normand tenue à Guernsey en 1927*, page 42.

⁹ The texts of the TACN, the GCN and the *Summa* have been published: the TACN in Tardif, *Coutumiers de Normandie* (Geneva 1977); the Latin version of the GCN in Tardif and the French and Latin in De Gruchy, *L’Ancienne Coutume de Normandie* (Jersey 1881).

to his *Commentaires sur l'ancienne Coutume de Normandie*, how the Jersey people had unanimously and unreservedly informed the Royal Commission of 1333 appointed *inter alia* to enquire into the Island's laws that their law and customs:¹⁰

“estoient celles de Normandie, comprises dans le coutumier qui en avait été compilé, il n’y avait pas fort longtemps, appelé la Somme de Mansel, sans qu’il s’y trouvast aucune différence sinon pour le case de Douaire avec quelques autres exceptions”

[were those of Normandy, as contained in the *coutumier*, compiled not such a long time ago and called the Summa of Mansel, with no difference other than dower and a few other exceptions.]

Following the GCN, the law in Normandy continued to evolve and this is reflected in further texts. These include a number of procedural works (known as *Styles de Procéder*) and the *Glose*, which provided a commentary on the GCN.¹¹ They also include works of analysis by a number of commentators, the two most favoured in Jersey being Guillaume Le Rouillé with his *Le Grand Coustumier du Pays et Duché de Normandie* (1st edition 1534) and Guillaume Terrien with his *Commentaires du Droit Civil tant Public que Privé Observé au Pays et Duché de Normandie* (1st edition 1574).

In 1583 the customary law of Normandy received its first and only officially sanctioned text, the *Coutumes du Pays de Normandie, Anciens Ressorts et Enclaves D’Iceluy*, known as *La Coutume Réformée* (“CR”). The CR itself was also the subject of commentaries up and until the abolition of Norman customary law during the French Revolution in 1789. These included works by authors well known in Jersey, such as D’Aviron, Godefroy, Berault, Basnage, Flaust and Houard. It was also examined in detail by Poingdestre’s *Remarques et Animadversions sur la Coutume Réformée de Normandie*.¹²

THE EVOLUTION OF JERSEY LAW

There can be no doubt that Jersey law did begin to evolve independently after 1204, though it did so both within the framework established by Norman Customary law and heavily dependant on its Norman roots.¹³

¹⁰ Though written in the seventeenth century, the work was not published until the twentieth century (Jersey 1907), page 1. A similar response had been given by the people of Jersey in 1309: see the Rolls of the Assizes held in the Channel Islands in the second year of the reign of King Edward II 1309 (Jersey 1903).

¹¹ The most accessible introduction to the *Styles* and the *Glose* and indeed to the sources of Jersey law generally is Nicolle, *The Origin and Development of Jersey Law - an Outline Guide* (Jersey 1998). See also Southwell, *The Sources of Jersey Law*, (1997) 1 JL Review 221.

¹² Unpublished manuscript.

¹³ The only detailed examinations of this process is in the area of succession: see I. Mautalent-Reboul,

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From time to time, the argument is put that in searching for a Norman customary law reference for Jersey law one can only look to the law as it existed before the political separation of 1204 and thus the only text available would be the TACN.¹⁴ Poingdestre did not see much merit in this argument, but he recognised that determining which parts of the evolving Norman custom Jersey should follow was not always easy. He observed how 400 years earlier practitioners had been fortunate in having the certainty of the GCN following the TACN. Subsequently, he argued, the Normans had moved away from the ancient *Coutume* towards more mainstream French or Civil law, modelled on the law which prevailed in Paris. Thus, claimed Poingdestre, the Jersey practitioners of his time -

“sont demeurés en suspens entre la vieille et la nouvelle, sans scavoit laquelle suivre, d’un costé ils voyaient que l’usage universel avait déjà rejeté plusieurs choses contenues au vieil coustumier comme barbares et déraisonables ou comme superflues.... Le langage antique du coustumier devenu estrange à notre Barreau ne leur en donnait pas peu d’aversion, d’autre part ils ne voyoient pas d’apparence d’assujettir les sujets du Roy d’Angleterre à des loix nouvelles fabriquées par la seule autorité du Roy de France, lesquelles en apparence portent le nom de coutumes de Normandie, mais avec tant de changements que l’ancienne n’en fait que la moindre partie.”

[have remained undecided between the old and the new, not knowing which to follow. On one hand, they could see that the universal usage had already rejected several things contained in the *vieil coustumier* as being barbaric and unreasonable or as superfluous.... The antiquated language of the *coustumier* having become strange to our Bar, it has an aversion for it. On the other hand they did not see any reason to subjugate the King’s subjects to new laws made by the sole authority of the King of France, which in appearance bear the name of customs of Normandy, but with so many changes that the old custom is only a small part of it.]

But Poingdestre, like his contemporary Le Geyt, took steps to assist and thus at length in his works detailed the law of Jersey and pointed out where it differed from Normandy.¹⁵

Le Droit Privé Jersiais: Transformation et adaption de son contenu original au monde contemporain (Unpublished thesis at University of Caen 1995). See also the quote above from Poingdestre referring to 1333 and the differences between Norman and Jersey dower.

¹⁴ This argument is made in the *Report of the Commissioners appointed to inquire into the state of the Criminal Law in the Channel Islands* (London 1847) page vii: “whatever was law at the time of the separation is law still, unless it has been abrogated or modified by Charter, Order in Privy Council, Ordinance of the local Legislature or Statute. And, similarly, it is supposed that no law can in theory exist which was then not existing, unless it has been established by any of those four.”

¹⁵ The main works of Poingdestre are *Commentaires sur L’Ancienne Coutume* (Jersey 1907); *Remarques*

The issue of sources remained a live issue, as illustrated by the following exchange between the Jersey advocates Godfray and Marett, and Sir John Awdry, one of the 1861 Royal Commissioners:¹⁶

“(Mr. F. Godfray.) The Jersey law resembles the Scotch law more than the English law.

(Mr. Marett.) Because that has a Norman origin. . . . It is much more natural that [Jersey law] should be derived from the old country, Normandy; and since that time it is very clear that all the expansions of that law have been in the direction of the Norman law. Whenever anything has been borrowed it has been borrowed from the *Coutume Réformée*:

(Sir J. Awdry.) Might it have happened to some extent, that what had not been mere expansions and developments, but when new doctrines are introduced, they may have been copied from Normandy?

(Mr. Marett.) Undoubtedly; it is very easy to trace a continual assimilation of the law of the Island to the law of Normandy under the *Coutume Réformée*. Modifications have been gradually introduced in consequence of that reform.”

The Privy Council recognised the reality of the situation in *La Cloche v La Cloche*.¹⁷

“...it was also contended, that we could not look at what was called the Reformed Customs of the Duchy of Normandy. There seems upon that latter point to be a fallacy. These collections of Customs are not written laws at all; they are not legislative Acts within the letter of which persons are to be brought. They are written illustrations, written evidences, authoritative declarations of what the unwritten Common Law or customs of the Country was, and unless it can be shown that in that to which their Lordships have been referred - the Reformed Custom - some new principle had been introduced by legislative or other sufficient authority in the Duchy of Normandy, subsequent to the separation, the Reformed Custom of the Duchy of Normandy can be looked at as evidence of what the old law was, just as Coke upon Littleton would be looked at as evidence in Maryland or Virginia of what the Common Law of England was, as just in the same way as the decisions of our Courts of Common Law and Equity to this day are admitted as evidence in every Country which has derived its law from England of what the old law was. Probably it is not very material for

et Animadversions sur la Coutume Réformée (unpublished manuscript); *Loix & Coutumes de L'Isle de Jersey* (Jersey 1927). The main works of Le Geyt are *Privilèges, Loix & Coustumes de L'Isle de Jersey* (also known as the *Code Le Geyt* published Jersey 1953) and *Constitution, Lois et Usages* (Jersey 1847).

¹⁶ Paragraphs 6926 to 6927.

¹⁷ (1872) IX Moo N.S. 87.

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the decision in this case to refer to it, but the Reformed Custom is evidence of what the law was understood to be.”

CONTRACT LAW IN THE NORMAN COUTUME

Neither the TACN nor the GCN can be viewed as all-encompassing texts of Norman customary law. They were the works of private practitioners intent on recording aspects of customary law. Indeed, parts of their work reflected the area of Normandy in which they practised (there were often significant variations in the law between parts of Normandy) and this has assisted historians in identifying where the writers were based.¹⁸ Norman customary law itself was not comprehensive. Its main basis was Frankish law with a small amount of Scandinavian law, the latter particularly in relation to maritime and succession laws.¹⁹

The customary texts were not without some contract law, but they lacked an overall scheme of *obligations*. Professor Jean Yver²⁰ in his *Les Contrats dans le Très Ancien Droit Normand* explores the early customary concept of contract which consists mainly of the *Contrat Réel* (including *Le Prêt*, *La Vente* and *Donation*) and the *Contrat Formel* (*La Foi* and *Le Serment*).²¹ By the 13th century, Yver argues, these primitive concepts in the TACN and GCN were abandoned in favour of the consensual contract found in Roman law:²²

“Il n’est donc pas téméraire de penser que la théorie romaine des obligations s’est... rapidement répandue en Normandie et s’est emparée d’autant plus rapidement des esprits cultivés qu’elle y trouvait table rase. Cependant, cette absence même de théorie [en la Coutume] avait créé un état de fait que le droit romain avec ses finesses et subtilités, son régime de protection des faibles, d’exceptions, de restitutions in integrum, allait brusquement bouleverser”.

[It is not foolhardy to think that the Roman theory of *obligations*...spread quickly in Normandy and persuaded those of cultivated minds all the more quickly because it did so in a vacuum. However, the absence of a theoretical base [in the custom] created a state of affairs which Roman law, with its finer points and subtleties, its system of protection of the weak, *exceptions*, and restitutions *in integrum*, was suddenly to disrupt.]

¹⁸ See Génestal, *op. cit.*

¹⁹ Musset, *Les Apports Scandinaves dans le plus ancien droit normand* in *Droit Privé et Institutions Régionales* (Rouen 1976)

²⁰ (Domfront) 1926

²¹ (Caen 1936)

²² This absence is supported by Poingdestre in his *Commentaires sur l’Ancienne Coutume de Normandie* (Jersey 1907) pages 4 and 261.

Normandy was not alone in this. Roman law provided a unified theory of obligations already planted in the laws of southern France, the *pays de droit écrit* (as opposed to the *pays de droit coutumier* of the north of France). Thus the main basis of French contract law was to be Roman law, as interpreted and developed by the French *ius commune*.²³

According to Routier, the 18th century writer on Norman customary law, it was perfectly proper practice for the Normans to look beyond their own law when it was lacking and borrow from nearby or further afield. Routier provided a set of rules for the interpretation of the *Coutume* which included:

“Quand une Coutume ne contient point toutes les dispositions nécessaires pour décider les questions qui se présentent, il faut dans ce cas avoir recours à l’usage de la Province; & si l’usage manque, il faut avoir recours aux Coutumes voisines, ou à l’Esprit général des Coutumes de France, ou enfin à la raison du Droit Romain”.

[When a *coutume* does not provide the material necessary for one to determine a question which arises, one must have recourse to the custom of the Province; and if this is lacking, it is necessary to resort to neighbouring *Coutumes*, or to the general spirit of the *Coutumes* of France, or finally to the reasoning of Roman Law.]

But what about Jersey law?

THE JERSEY LAW OF CONTRACT

With the exception of the Reports of the Royal Commissioners of 1847 and 1861, and even then they make no specific comment on contract, following the 17th century works of Poingdestre and Le Geyt, there is little evidence currently available to chart how the law of contract evolved in Jersey until the advent of fully reported decisions of the Royal Court from 1915 onwards.

Poingdestre indicated the position in 17th century Jersey. In his *Commentaires sur l’Ancienne Coutume* he stated:²⁴

“Il y a bien au Chapitre de Querelle de Dette et au Chapitre de convenant quelque traits à la légère touchant les contrats et promesses, mais qui voudrait approfondir en ces matières là ou s’esclaircir des difficultés qui arrivent aux venditions, obligations... n’y trouveroit pas son compte; car pour ces choses là les anciens Normans, aussy bien que les autres nations n’avoient point de loix particulières, mais se réglaient par le droit civil qui en cela suit la raison et l’équité naturelles.”

²³ Robinson, *op. cit.*

²⁴ Page 4.

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[There are indeed in the Chapter on debt disputes and in the Chapter on covenants some general statements regarding contracts and agreements, but a person wishing to go deeper into those matters or to clarify issues which arise in sales, *obligations*... would not be well served; for, in this connection, the ancient Normans, as well as other nations, did not have any specific laws, but regulated themselves according to civil law which in this respect follows natural reason and equity.]

He expanded on the point in his *Loix et Coutumes*:²⁵

“*Car il est certain que quand le Droict particulier & municipal se taist, il faut toujours auoir recours au Droit Commun, qui est la Règle générale*”

[For it is certain that where private and municipal law is silent, it is always necessary to resort to the *droit commun*]

An analysis of the reported cases since 1915 shows an inconsistent approach to the law of contract by both the Court and counsel. On some occasions and in some areas of contract law, the *ius commune* (mainly as reflected in the works of Robert Joseph Pothier (1699-1772) on *obligations*) have been favoured, on other occasions, it has been English law. From time to time, the Royal Court has shown its concern at the apparent penchant of counsel for English law over French law, though the message has not always been as clear as one might hope. For example, in *La Motte Garages Limited v Morgan*, the Royal Court, considering an alleged mistake in a contract of purchase of a car, stated “it is perhaps somewhat disappointing that neither party chose to mine the rich lodes of our ancient French law but to rely on English law. It may well be that their conclusions would have been the same if they had.”²⁶

In two cases the Royal Court took the reference to French law a (some would say, large) step further. At first instance in *Kwanza Hotels v Sogeo Co. Ltd*, the Royal Court in a case concerning the contract of purchase of immovable property stated:

“Although the ‘*Code Civil*’ represents the law of modern France and not the ‘*Ancienne Coutume*’ of Normandy from which the law of Jersey is drawn, I feel that, on a question such as the one I now have to decide, he [sic] and the other authorities quoted are a surer guide to the discovery of the Law of Jersey than is the Law of England, where, as here, the Laws relating to real property have diverged to a real extent”.²⁷

²⁵ Page 261.

²⁶ 1989 JLR 312 at page 316. See also *Donnelly v Randalls Vautier Ltd*. 1991 JLR 49 at page 57. There are several other examples.

²⁷ 1981 JJ 59 at 76

In *Selby v Romeril* the Royal Court went further. A crucial issue in the case was the existence of an agreement. In previous cases, the three requirements for a valid contract prescribed by Pothier had been referred to. The Bailiff (Sir Philip Bailhache) turned to article 108 of the French *Code Civil* which provides for an additional requirement:

“It is true that Pothier has often been treated by this Court as the surest guide to the Jersey law of contract. It is also, however, true that Pothier was writing two centuries ago and that our law can not be regarded as set in the aspic of the 18th century. Pothier was one of those authors upon whom the draftsmen of the French *Code Civil* relied and it is therefore helpful to look at the relevant article of that code...in our judgment it may now be asserted that by the law of Jersey, there are four requirements for the creation of a valid contract, namely, consent, capacity, object and cause”.²⁸

Selby v Romeril provoked comment amongst Jersey practitioners. Advocate Alan Binnington’s article in the 1997 Jersey Law Review reflected at least one school of thought when he stated:²⁹

“It is sometimes suggested by the Island’s competitor jurisdictions that a legal system which relies heavily on medieval Norman concepts is unable to meet the demands of a thriving finance sector. Critics of the Island’s legal systems suggest that it has failed to keep pace of the significant changes in the Island’s business and the origins of its residents. This is said to be particularly the case in relation to the law of contract: it would no doubt come as a surprise to the average purchaser of goods in a supermarket in Jersey to be told that their contractual relationship with the supermarket is to be ascertained by reference to 17th century works written in a language totally alien to them. It is also said that in its enthusiasm for rediscovering its Norman links the Royal Court has lost sight of the real origins of the Island’s legal system and has cited with approval certain legal authorities simply because they are written in French. Whilst in a number of decisions in the last few years the Royal Court has shown itself able to adapt ancient principles to modern circumstances and to produce decisions of relevance to the Island’s business community which make sound commercial sense, there are certain dangers in the course presently being adopted by the Court.”³⁰

An echo of this sentiment may be observed in the Court of Appeal’s general exhortation for care to be taken in referring to modern French authorities in *Public Services Committee v Maynard*.³¹

²⁸ 1996 JLR 210 at 218. The author appeared as counsel in this case.

²⁹ ‘Frozen in aspic? The approach of the Jersey Courts to the roots of the Island’s Common Law (1997) 1 JL Review 21.

³⁰ See also Southwell *The Sources of Jersey Law* (1997) 1 JL Review 221.

³¹ 1996 JLR 350–351.

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An important watershed was reached with the case of *Hotel De France (Jersey) Ltd. v The Chartered Institute of Bankers*³² which, following the *Code Civil*, appeared to suggest that, save in exceptional circumstances, it was necessary for a party to a contract to apply to the Court if he wished to determine the contract for breach by the other party. The case provoked some academic discussion.³³ It also drew judicial comment. Firstly, in an *obiter* statement, the Deputy Bailiff (Birt) in *Rosborough (Insurance Brokers) Ltd v Boon*³⁴ commented:

“To insist that, however serious the breach by the other party, the party to a contract cannot treat the contract as being at an end so that he is relieved of his obligation to continue to perform his side of the bargain, but has to go to court to seek a discretionary decision as to whether the contract should in fact be ended, would seem to be very undesirable. It would mean that the innocent party would not know where he stood until a decision by the court some months or even years later. We must emphasise that we have not heard any argument on this matter but our initial reaction is that we would be reluctant to find that the law of Jersey was to such effect unless there were binding precedent to say so. The court should develop the law of contract in accordance with the requirements of a modern society insofar as it is open for it to do so. The French approach would appear to leave all the parties in a state of complete uncertainty...”

The Deputy Bailiff followed this up in *Hamon v Webster*.³⁵ He noted the distinction between English and French law on the termination of contract. Under English law, an innocent party may terminate a contract without recourse to the court where the other party has committed a breach of sufficient gravity. It is also possible for parties to a contract specifically to agree that a lesser breach will enable termination by the innocent party. In French law, as indicated in *Hotel de France*, generally only the Court may terminate a contract for breach and it has a discretion in determining if the breach is sufficiently serious. A French court will also interpret narrowly a provision which allows the parties to terminate for a minor breach. The Deputy Bailiff considered the French approach to be unnecessarily restrictive and contrary to the freedom of the parties to contract (expressed in the Jersey maxim *la convention fait la loi des parties*). He concluded:

³² 21 December 1995. Rather curiously, this case has not found its way into the reported decisions other than as a somewhat belated note: (2002) JLR N[5].

³³ See Le Cocq *Resolving Contracts: The Hotel De France case*, (2000) 4 JL Review 151; Kelleher *Résolution and the Jersey Law of Contract*, (2000) 4 JL Review 266.

³⁴ 2001 JLR 416 at 430.

³⁵ Jersey Unreported 19 July 2002. Like the Hotel de France case, this, too, has been reported only as a note: 2002 JLR N[30].

“Far from being referred to any binding precedent requiring us to adopt the principles of French law in this respect, the cases of *New Guarantee Trust and Hanby*,... suggest that Jersey law is the same as English law in this area. We should only depart from those authorities if satisfied that they are plainly wrong. Far from that being the case, we are in no doubt that they are right and that they reflect the requirements of a modern commercial community. We hold therefore that, save in respect of leases (where an application to the court is necessary), an innocent party may terminate a contract where the breach is one which goes to the root of the contract or where the contract itself specifically provides that he will have a right to terminate the contract in respect of the breach in question. The innocent party need not have recourse to the court.

We would emphasise that such an approach does not mean that the innocent party is completely free of judicial control. The party in breach may always challenge the right of the innocent party to have terminated the contract on the grounds that the breach was not sufficiently serious or did not fall within the category specified in the contract. If the Court agrees, it will hold that the innocent party was not in fact entitled to terminate the contract as he thought he was. It will then go on to make such consequential order as to damages *etc.* as may be appropriate. But this will be the exception. In most cases it will be clear whether the breach is sufficiently serious or whether it falls within the specific terms of the agreement and the law as we have held it to be will allow the parties to take decisions (if necessary with the benefit of legal advice) and plan their lives accordingly. Recourse to the Court should not be the exception and will arise only where the party in breach contends that the right to terminate does not exist.”³⁶

On one level, it is hard to criticise this approach if viewed from the perspective of the end result. In today’s world, no-one would seriously argue that the parties to a contract should not be allowed to agree when and how their obligations come to an end or that the parties should have to apply to the Court to annul a contract for breach. Yet on another level it is clearly unsatisfactory. Prior to the trial, the lawyers advising the parties would have conducted themselves properly to have advised their clients that Jersey contract law is based on the French *ius commune*, not English law, and that the applicable law was as stated in *Hotel de France*, not *New Guarantee Trust* or *Hanby v Moss* which, for no decipherable reason had preferred to adopt the English contract law position, although neither case refers to English law or indeed any law.

By way of concluding overview, the current state of Jersey contract law is

³⁶ Paragraphs 70–71. *New Guarantee Trust* is reported at 1977 JJ 71. *Hanby* is reported at 1966 JJ 225.

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well stated by Stéphanie Nicolle QC in her *Origin and Development of Jersey Law: an Outline Guide*.³⁷

“The 1960s and 1970s saw a sporadic reliance upon English principles of contract law. It is at times difficult to escape the feeling that this owed as much to the inability or disinclination of counsel to cite proper authority to the Court as to any considered conviction that English law was the appropriate authority to cite, as in *College v Little Grove Hotels Limited*³⁸ (master and servant) and *Denney v Hodge*³⁹ (breach of contract), where the judgments record that the parties agreed that the principles of English law applied but not why. In other cases English law was simply cited without comment...

Occasionally, the Courts hedge their bets and refer to English, French and Jersey authorities in the same judgment as in *M.A.B. Investments Ltd. v Vibert*⁴⁰... English law, never, however, achieved the same status as authority in the law of contract as it did in, for example, criminal law or the law of tort, perhaps because the authority of the (civil law influence) French writers was too well established to be displaced.

There are few areas of contract law where it can be said with confidence that English law will be indiscriminately followed, save perhaps those of a specialised nature, for example, actions arising out of building disputes where the RIBA contract has been used, as in *Jersey Steel Co. Limited v Holdyne Limited*.⁴¹

THE JERSEY LAW COMMISSION

It was little surprise then that the Jersey Law Commission chose the Jersey law of contract as its fifth subject to investigate.⁴² The Jersey Law Commission's consultation paper was issued in October 2002. It concluded that there were five particular difficulties in ascertaining the law in this area. Firstly, there is the difficulty caused by the inaccessibility of the sources. There are few collections of Norman law texts. The works of Pothier are more readily available. Overall however the availability of texts contrasts unfavourably with the readily available text books on modern English contract law. Secondly, there

³⁷ (Jersey 1998), paragraphs 15.15–15.22.

³⁸ 1970 JJ 1487

³⁹ 1971 JJ 1915

⁴⁰ 1972 JJ 2127

⁴¹ 1972 JJ 2009

⁴² The Jersey Law Commission was set up by the States of Jersey on 30 July 1996. It has previously considered the right of beneficiaries to information regarding a trust, *dégrèvement* (a bankruptcy procedure which affects immovable property), *tutelles* (a device to protect the property of minors) and the best evidence rule in civil procedure. See Binnington, *Gathering Dust? The creation and operation of the Jersey Law Commission*, (2004) 8 JL Review 78.

is another form of inaccessibility: the fact that the available texts are written in the French language, a language which is alien to many people in Jersey. Thirdly, the Commission sees difficulty in applying ancient concepts of law to modern commercial transactions and suggests that this may undermine Jersey's reputation as a sophisticated finance centre. Fourthly, there is the question of uncertainty. The Commission concludes that a review of Jersey case law would suggest that "in relation to the law of contract the legal system to which the Court will look depends to a large extent on the identity of the judges sitting on a particular case and of the counsel appearing before them. Those who have an affinity with Norman concepts while likely to reject any reliance on English contractual principles while those who feel less comfortable with Norman concepts seem willing to reject them in favour of the application of English law." Fifthly, it suggests that a legal system which reverts to ancient law for its contract is inappropriate in a modern world of commerce, a point which rather overlaps with the third point made.

The Commission purports to proffer two alternative solutions to the problems it has identified. Firstly, Jersey could codify its law of contract. Not surprisingly, there are precedents for this, such as the Indian Contract Act of 1872 which was based on English law; and the Quebec Civil Code of 1866 which was based on the French Civil Code. As the Commission correctly points out, although the intention here would be to codify Jersey's existing law, the current state of the law is such that the process would necessarily involve the important choice of whether the Jersey law of contract is to be based on that of England or France. This leads the Commission on to its second and more favoured option, the incorporation of English law by statute. Rather than a second option, this is in fact a slight variation on the first. Such a process, it concludes, "need not be particularly problematic: the Jersey courts have not experienced much difficulty in adopting the English law of tort to the extent that it has not been modified by statute." The Commission concludes, on balance, this the better option on the basis of "the relative speed by which it could be carried out, the lack of a negative effect in terms of the Island's suitability for doing business and the fact that it probably reflects the impression, albeit mistaken, that the majority of Islanders have the basis of the Jersey law of contract."

WHITHER THE JERSEY LAW OF CONTRACT?

Whither the Jersey law of contract? Is it to be *cause*⁴³ for consideration? In my view, codification of the Jersey law of contract in a manner which reflects its French roots, but also takes account of Jersey case law and the needs of the Island's community, is the only viable way forward. One has to accept that there are a number of competing factors to be taken into account when making the choice between English and French law. However, on balance, for the reasons which I shall explain, the choice of English law as the basis of Jersey contract law, be it by codification or wholesale incorporation by statute, is unacceptable and unworkable.

The fact that the way forward is expressed as a choice between English and French law is a telling remark on the evolution of Jersey. Over the centuries the Island has been something of a crucible for these two elements and it has to be recognised that for the last century and half, if not more, the strongest ingredient in the pot has been the English one. In terms of contract law, there is much similarity between the laws of England and France, but there are some significant differences. As the Jersey Law Commission noted, the English common law of tort has, in the main, been adopted by the Jersey courts. However this may be explained by the fact that the *ius commune* had a relatively undeveloped law of tort (or *delict*) and even under the *Code Civil* the law is stated in the briefest of terms. It has been far easier to turn to the wealth of reasoning to be found in English case law. Contract is different because thanks to writers like Pothier there is an available and sophisticated framework. Without it, it is quite probable that Jersey contract law would have followed the example of its tort law.

If Jersey were to adopt English contract law, what would that law comprise? The English common law or the English common law as altered by statute? For example, would it include the range of English statutes which protect consumers? Would we include a statute which over the years has received major criticism and is ripe for reform? It would seem odd to select the common law without subsequent statutory amendments which can be assumed to have been promulgated with the intention (if not the effect) of

⁴³ Article 1108 of the Code Civil sets out four requirements for the validity of a contract: consent, capacity, an *objet* and a *cause*. The latter bears some resemblance to consideration in the English common law, though is somewhat wider in application, and has been defined as "the motivating reason or purpose" for a promise. See Nicholas, *The French Law of Contract* (Oxford 1992) pages 118–137. Per *Selby v Romeril op. cit.* and other Jersey cases, *cause* is one of the requirements for a valid Jersey contract, though no attempt has been made to define it. Consideration, as a concept, and at a simple level, is not significantly different from *cause* in its purpose, though it is noteworthy that *Chitty on Contracts* emphasizes its role in limiting the enforceability of agreements (London 1999): page 168.

improvement on that which went before. Either way, a significant future difficulty would inevitably arise for Jersey each time England made a significant statutory amendment to its contract law. No self-respecting legislature can automatically and without due consideration promulgate the statutes of another jurisdiction. Yet Jersey is too small a jurisdiction to be able regularly to review and amend its contract law in the light of statutory amendments in England. Inevitably therefore Jersey would fall well behind developments in English contract law and find that that most useful of resources, English case law, has moved on to concern itself with the law as amended.⁴⁴

This is no idle fancy because this process has already occurred in other spheres of Jersey law. The most recent example is in civil procedure. From at least the 1970s, Jersey's civil procedure has modelled itself largely on the Rules of the Supreme Court and availed itself of the large body of case law arising from consideration of its provisions, as well as the ubiquitous White Book. The arrival of the Civil Procedure Rules in 1999 made fundamental changes. Jersey has not followed the CPR and thus in many respects is caught in something of a time warp. Another and more glaring example is Jersey's intellectual property law. In the case of copyright, Jersey law consists of English statutes either registered in or extended to the Island. *Via* the *Loi (1908) au sujet des droits de compositeur*, Jersey's law is in effect the Musical Copyright (Summary Proceedings) Act 1902 and the Musical Copyright Act 1906. However having accepted that English law would become Jersey law, the Island has neglected to keep apace of developments in technology, let alone the law. England has enacted the Copyright Act 1956 and the CDPA 1988. As has been pointed out, Jersey's law long predates computers and issues arise which were not even contemplated in 1911, for example the question of copyrighting of computer software.⁴⁵

The result of the failure closely to follow the evolution of the law one has chosen to adopt can be observed in the Guernsey case of *Morton v Paint*.⁴⁶ The case concerned a visitor to premises in St. Peter Port who was severely injured when she fell through a window on the common staircase into the yard below. At first instance, the Royal Court of Guernsey concluded the relevant law to be the same as that which prevailed in England before the Occupier's Liability Act 1957. The result was that the duty owed by the landlord to the claimant was confined to a duty not to expose her to a danger not obvious or to be expected in the circumstances. The Court concluded that the common law of Guernsey had not evolved since 1956 and could not be developed further by the Guernsey Court, notwithstanding the statutory changes

⁴⁴ See Hanson, *Justice in our time: the problem of legislative inaction*, (2002) 6 JL Review 64.

⁴⁵ Matthews and Nicolle, *Jersey Property Law* (London 1991) paragraphs 4.3 to 4.31.

⁴⁶ (1996) GLJ 61. Morgan, *Judicial law-making in the Channel Islands*, (1997) 1 JL Review 42.

in England or the common law developments elsewhere. The Court of Appeal disagreed. It took the view that the pre-1957 English common law on occupier's liability did not meet the needs of modern society, noting how it had been severely criticised at the time and the resulting 1957 Act. The Court of Appeal then embarked on a process of judicial law making and brought Guernsey law up to date. One can only marvel at the erudition of the judgment and accept the fairness of the decision given the personal circumstances of the plaintiff. However it can hardly be said that such a process allows for certainty.⁴⁷

Another difficulty that would be faced if English contract were adopted is its interface with other areas of Jersey law which derive from French roots. Property law is the obvious example here. Interestingly, one area of the law of Jersey which has not adopted the English common law approach in tort is nuisance. Instead Jersey has chosen to remain with *voisinage* which is a part of land law.⁴⁸ One wonders how English contract law would interact with the concepts of *nullité relative* and *nullité absolue* in the context of *contrats héréditaires* as developed *via* Jersey's own customary commentators and case law from the nineteenth century onwards.⁴⁹

When nurturing and guarding something precious, it is often difficult to be objective. This is the same for those safeguarding and promoting Jersey's finance industry. One often hears comments to the effect that Jersey should do nothing which highlights its differences from England because this will detrimentally affect the relationship with the City of London. Indeed the politics of caution have dominated the Island's legislature in its dealings with the finance industry. This view needs to be tested. It has to be doubtful that the City of London, or indeed anywhere else for that matter, deals with Jersey on the basis that it is an extension of England. Business is attracted to Jersey because of favourable tax regime, its political and economic stability and the quality of its financial service providers. The supportive role to be played by Jersey law should be to ensure that it is certain and identifiable, and backed up by a strong and independent judiciary and able lawyers. Such a role does not necessitate the wholesale adoption of English law.

Perhaps the view that English law is the law of commerce can help explain

⁴⁷ See Hanson, *No legal system is an Island*, (2004) 8 JL Review 209.

⁴⁸ *Searley v Dawson* 1971 JJ 1687. There are other areas too where Jersey has ploughed its own furrow in the law of tort: see *Ayra Holdings Ltd v Minorities Finance Ltd* (1997) 1 JLR 176 (an action against a party who wrongfully pursued bankruptcy proceedings against another) *Jersey Financial Services Commission v Black (Jersey) Ltd and others* 2002 JLR 443 CA (in a regulatory context)

⁴⁹ For a general introduction to this area see Matthews and Nicolle *op. cit.*, paragraphs 1.26 to 1.37. In fact this area of law is in a confused state, with some cases utilising the terms void and voidable, others using *nullité absolue* and *nullité relative* and different rules for contracts passed *devant justice* and other contracts.

the aversion of some Jersey judges and lawyers to any attempt to draw on modern French law as an indication of how Jersey law might evolve on a given subject. There certainly is an illogical distinction drawn between modern English law and French law in this respect. In a recent stimulating paper,⁵⁰ Gordon Dawes has argued that the bias towards modern English law is in part based on a misunderstanding of the *Code Civil* which is wrongly viewed as a radical departure from the law of the *Ancien Régime* brought about by the upheaval of the French Revolution.

In fact it is an easy and cheap shot to cast the law of contract as established in the writings of Pothier as ill-suited to a modern times. However the criticism is not borne out. Yes, and not surprisingly, some of his examples are somewhat out of date. However the law is concisely set out in an understandable and unified framework.⁵¹ Indeed, as has been noted elsewhere, in the 19th century English court Pothier received what the advertising industry would probably now describe as “rave reviews”: Best J stated that Pothier’s *Treatise on the Law of Obligations* was, as an authority, “the highest that can be had, next to a decision of a court of justice in this country”.⁵² One must draw from the principles so clearly set out by Pothier and apply them to the modern context. The process is made easier by the fact that the *Code Civil* drew heavily from Pothier for its section on *obligations* and thus there is plenty of modern material (both French case law and *doctrine* or academic writing) for the keen researcher.⁵³

There is yet one further consideration to be taken into account, one that is perhaps too easily overlooked by lawyers. There has to be a serious concern that the wholesale adoption of English contract law by the jurisdiction of Jersey would have profound implications for Jersey’s identity as an entity separate and distinct from England. Historically, as the need arose, usually when the people felt under threat, the local population has asserted its separate identity as against the English Crown and an important component of that identity has been its distinctive laws. In the medieval period, as we have seen, the Channel Islanders were quick to assert that their law was not that of England.⁵⁴ The relevance of the laws to this identity was acknowledged by

⁵⁰ Dawes, *From custom to code – the usefulness of the Code Civil in contemporary Guernsey jurisprudence* (2004) 8 JL Review 255.

⁵¹ As an example one may cite *Dempster v City Garage Ltd* Jersey Unreported 24 March 1992, which concerned a defective Porsche 911. The law drawn from Pothier used the example of a blind horse. Sadly the horse is missing from the judgment.

⁵² Alan Binnington, *Frozen in Aspic*, *op. cit.* page 24, citing Best J. in *Cox v Troy* (1822) 5B. & Ald 474 at 480.

⁵³ See for example Dupin’s preface to the 1827 edition of the *Oeuvres de Pothier*, cited in Dawes *op. cit.* page 12.

⁵⁴ Le Patourel, *The Medieval Administration of the Channel Islands, 1199–1399* (London 1937) pages 45–61.

Cause for Consideration: Whither the Jersey Law of Contract?

observers in the 17th century and, unlike other parts of the King of England's realm, there was no concerted move to subvert the Islands to English law.⁵⁵ Similarly, the 19th century. The reports of the Royal Commissioners of 1847 and 1861, although provoked by a clamour for a reform, particularly by those wishing to see the anglicisation of Jersey's laws and institutions, stand as testimony to the separateness of the Jersey identity. By the end of the 19th century, after a long period of challenges to the Jersey way of life, particularly from immigration which brought a large number of native English people to the Island, there was an identifiable movement amongst the intelligentsia, *via* historical writing, archaeology, local poetry and songs, to assert a Jersey identity. This movement turned for this identity to that which an already defined society, geographically and historically at least, shared, namely, its historic rights and privileges, which included its distinct law.⁵⁶ Are we in the 21st century so easily to remove an important aspect of the Jersey identity?

There can be no doubt that the Jersey law of contract requires clarification. There can equally be no doubt that if Jersey is to codify its contract law, it will be an onerous task. However the Trusts (Jersey) Law 1984 shows just what can be achieved by worthwhile effort. Jersey can learn from its historical experience as an island living on the periphery of larger states and drawing on and filtering the various influences that came to bear on it over the centuries. It can produce a distinct and distinguished brand of contract law, if the will is there.

⁵⁵ Thornton, *British/English attitude to the Norman law of the Channel Islands in the early modern period*, a paper presented to the *Rencontre du Droit Normand Guernsey* 2004.

⁵⁶ Kelleher, *The Triumph of the Country: the Rural Community in 19th Century Jersey*, (Guernsey 1994) pages 260–263

GUERNSEY CONTRACT LAW: WHICH WAY?

Alison Ozanne and Gordon Dawes

INTRODUCTION

Which way, Guernsey contract law? There are at least two premises to this question; (1) that there is such a thing as Guernsey contract law and (2) that there is a choice as to the direction it may take (and perhaps a third premise - that anyone actually cares). Before considering the first issue, *i.e.* what is Guernsey contract law; it is necessary to consider, however briefly, the history of Guernsey law. Although there are many points of contact with Jersey law, the stories are by no means identical.

A BRIEF HISTORY OF GUERNSEY LAW

To start at the beginning (before ending at the end): between 58 and 50 BC Julius Caesar conquered the north-west of Gaul. The Roman province of *Lugdunensis Secundum* coincided reasonably closely with what was eventually to become Normandy. It follows that the law of the land was Roman law for many centuries; this simple fact is often overlooked. With the decline of the Roman empire, barbarian invasions began c. AD 406. By AD 476 the Western Roman Empire was no more. The Franks ruled Northern Gaul. At first the Merovingian dynasty dominated, with outstanding figures such as Clovis. The Carolingians replaced the Merovingians in the mid-eighth century, the apogee of course being the reign of Charlemagne himself. It was soon after Charlemagne's death in 814 that Viking raiders first appeared on the shores of Northern Gaul, principally from Denmark. Their raids became more frequent and daring, taking and re-taking Rouen and actually pillaging Paris in 845. They began to establish permanent settlements c. 850. The Vikings besieged Paris in 885. The French crown had been weakened by dynastic struggles and the kingdom divided into near autonomous and hereditary principalities or *seigneuries*. Eventually in 911 Charles III of France "the Simple" felt obliged to reach an accommodation with the latest Viking invaders led by one Rollon. By the *Traité de St Claire sûr Epte* Charles granted the first tranche of what would become the duchy of Normandy to Rollon, who was, in effect (if not initially in name) the first Duke of Normandy. Two

further grants of land in 924 and 933 all but completed the territorial integrity of Normandy. The Channel Islands are believed to have been annexed to the emergent duchy in 933. The duchy was a near sovereign state, certainly during those periods when the Duke was powerful by comparison with the French Crown.

Rollon was the great-great-great-grandfather of William the Conqueror, himself the great-great-grandfather of King John. It was John who eventually lost mainland Normandy to King Philippe Auguste of France in 1204, the King purporting to be confiscating the lands of a contumacious vassal. However, the French King was not in possession of all Normandy; the Channel Islands remained loyal to the English Crown, assisted initially by the taking of hostages and thereafter the grant of privileges by a succession of Royal charters over the centuries.

However, merely because the Channel Islands remained loyal to the English Crown did not mean that they now were, or ever had been, a part of England.¹ They remained associated with Normandy geographically, socially and culturally. In particular they continued to employ Norman law. Although English judges were sent out from time to time to hold assizes in the Islands this practice came to an end early on. The Islands were jurisdictions in their own right, the Islanders judging themselves by their own laws *via* the Bailiff and Jurats of the two Bailiwicks.² Indeed Guernsey's greatest historian, John Le Patourel said this:

“All the Islanders’ liberties may be resolved into the general principle that they should be judged by their own law.”³

The Islanders continued to look to mainland Normandy for their laws; albeit with local variations. The province of Normandy had its own distinct customs which had been gathered together unofficially and anonymously in the *Grand Coutumier*;⁴ a document dating back to the mid 13th century, written originally in Latin and subsequently translated into French.⁵

¹ Any more than Hanover became part of Great Britain on the accession of George I; see Laurent Carey's comments in his *Essai sur les Institutions, Lois et Coutumes de l'Île de Guernesey*, written at some time before 1769.

² This is not to overlook the Court of Alderney with its own court and Jurats, nor the Court of the Sénéchal in Sark.

³ *The Medieval Administration of the Channel Islands 1199 - 1399*, OUP 1937, re-published by the Guernsey Bar in 2004, at p110.

⁴ See the *Nouveau Coutumier General ou Corps des Coutumes Generales et Particulieres de France* 1724. Volume 4 begins at p1 with *Le Grand Coustumier du Pays et Duchie de Normendie* (sic) and continues at p59 with the *Coutumes du Pays de Normandie Anciens Ressorts et Enclaves d'Icelui, ie the Coutume Reformée* of 1583. De Gruchy of Jersey also produced an edition in 1881.

⁵ There was a slightly earlier compilation also, the *Très Ancien Coutumier*, but this appears soon to have been eclipsed by the *Grand Coutumier*.

In the 16th century, complaints reached Queen Elizabeth I about the rather arbitrary nature of justice in the Bailiwick of Guernsey. The order went out on 9th October 1580 that they were to follow the *Grand Coutumier* save only in those respects where local practice and law differed, as to which they were to produce for the Privy Council a written report. The positive obligation to follow Norman customary law is particularly noteworthy. Meanwhile they were only to observe variations from the *Grand Coutume* such “... as they can shew have ben used there time out of minde ...”. Nevertheless, the order appears not to have been respected because a further Order in Council followed dated 30th July 1581 again requiring the making of “... a booke of the sayd Lawes and Customs ...”.

This was eventually done. It took the form of a brief, and none too accurate, commentary on the much larger work of the mainland Norman customary law commentator, Guillaume Terrien, whose *Commentaires du Droict Civil tant public que privé, observé au pays & Duché de Normandie* was first published (posthumously) in 1574. The Guernsey work was called *L'Approbation des Lois* and itself became law by an Order in Council dated 27th October 1583; alas, a matter of weeks after mainland Normandy had enacted a thoroughgoing revision of the *Grand Coutumier* known as the *Coutume reformée* (or *redigée*). The timing was unfortunate, to say the least.

The defective *Approbation* was corrected and expanded upon by the Guernseyman, Thomas Le Marchant in his late 17th century *Remarques et Animadversions sur L'Approbation des Lois et Coustumier de Normandie*. In the mid-18th century another Guernseyman, Laurent Carey, produced his *Essai sur les Institutions, Lois et Coûtumes de L'Île de Guernesey*, the last general text on Guernsey law until 2003. Laurent Carey wrote in French, as did all his predecessors.

Guernsey law continued to look to Norman law, notwithstanding the mainland's adoption of the *Coutume reformée* and the passing into Guernsey law of *L'Approbation*. Seventeenth and eighteenth century commentators on the *Coutume reformée* were, and remain, influential.⁶ In particular figures such as Bérault, Basnage and Flaust; albeit the starting point remained Terrien.

Normandy was not alone in having its own customary law. In the North of France there were 65 general customs and more than 300 local variations; whereas in the south of the kingdom, Roman law, as adopted and adapted over the centuries, prevailed.⁷

⁶ Note also, for example, how the *Coutume reformée* was itself the subject of 152 further articles, the so-called *Articles Placités* of 6th April 1666 set out in an *arrêt de réglemant* given by the Parlement of Rouen.

⁷ See *Le Code civil* by Jean-Louis Halpérin, Dalloz, 2nd Edtn. 2003 for a general introduction to the creation of the code.

With the French revolution of 1789 feudalism came to an end. Mainland Norman customary law limped on until 1804 when all French law was superseded by the *Code civil*,⁸ the bicentenary of which we also celebrate this year. In the same way that Guernsey continued to labour under the *Grand Coutumier* in the 16th century, so the Channel Islands continued to be wedded to Norman customary law. Although there has been an increasing anglicisation of Channel Island law during the twentieth century in particular, Channel Island law continues to be rooted in Norman customary law rather than English common law.

WHERE IS GUERNSEY'S LAW OF CONTRACT TO BE FOUND?

The *Grand Coutumier* contains only 125 chapters, in reality articles. It is not an especially lengthy document, by contrast to the commentaries upon it. As noted already, it dates back to the mid 13th century in this form, but reflects decades and even centuries of previous custom. The form we have it in post-dates the events of 1204 and the *belle époque* of the duchy of Normandy. It is nevertheless essentially concerned with the duchy *qua* duchy. It repeatedly refers to the Duke as if that were a continuing institution.⁹ It has a strongly feudal and institutional flavour. It is concerned with offices, ducal privileges, feudal rights and obligations, the law of succession, even crime and the preservation of public peace; but it has next to nothing to say on the subject of contract, just a few not very helpful words on the subject of *querelles*¹⁰ which do not amount even to the beginnings of a cogent system of contract law. Indeed the chapters merely describe different forms of action or complaint rather than any deeper analysis of law *en tant que tel*.

None of the various accretions to the *Grand Coutumier* assist very greatly either; e.g. *La Glose*, a late 15th century paraphrase of the *Grand Coutumier* as expanded by jurisprudence. Of no more assistance are the various *styles de procédure*; which, as their name suggests, were concerned with procedure rather than substantive law.¹¹

Le Rouillé's 1534 commentary on the *Grand Coutumier* has little to say on

⁸ But only in the sense of consolidating and unifying the previously fragmented; the *Code* was a reactionary not a revolutionary work.

⁹ The office had not been abolished, but there was in fact no Duke of Normandy. Very occasionally there would be an appointment for some unrelated political purpose; but these seldom endured and were of no true, lasting significance for the duchy.

¹⁰ Articles 67, 85 - 90.

¹¹ These comprised: *L'Ancien Style*, written between 1386 et 1390, followed by *Instructions et Enseignemens* (1386-1391), a manual written for the instruction of judges, the *Nouveau Style*. There was additionally the *Nouveau Style* of 1457, and the *Style de 1515*, the product of an *arrêt de règlement* of the Parlement du Rouen.

the subject of contract law, save only a brief section *de convenant*¹² which is of little assistance, save perhaps on the subject of *cause* (as opposed to consideration). Le Rouillé is, in any event, difficult to read given its black letter type.¹³

We move forward to Terrien. Surely he has something to say on the subject of contract law, and yes he does; but since he is purporting to write *Commentaires du Droit Civil tant public que privé, observé au pays & Duché de Normandie* he has little to say which is drawn from the *Grand Coutumier*. It is clear from the preface written by Jacques du Puys that it was Terrien's intention to gather together all the various sources of Norman law. Accordingly, Terrien devotes a book¹⁴ to the topic "*D'obligations & contracts*";¹⁵ but it is not of very much practical use, at least not today. Again there is an institutional flavour. He commences with a lengthy discussion of the office of *Tabellion*¹⁶ and its salary entitlement.¹⁷ Chapter 3 concerns debts and debtors, broadly defined to include loan, promise, bailment, guarantee (*plevine*) and pledge. The following chapter is again concerned with the form of contracts. Chapter 5 is of some interest, concerning covenants and *promesses inutiles*. Here we find an emphasis on the need for *cause* (as opposed to consideration) and an effective, lawful *cause* at that. This chapter is fully 7 lines long. Chapter 6 concerns *cession & transport de dettes, droicts & actions*, *i.e.* the assignment of obligations; again the concern is procedural rather than legal. Chapter 7 concerns property rights between spouses.¹⁸ Terrien is principally concerned with gifts between spouses and the right of *douaire* (a widow's interest in her husband's land). Chapter 8 concerns the sale of land, and is again procedural in nature. Chapter 9 contains fairly primitive provision governing the relations between landlord and tenant. Its interest lies principally in the influence the chapter has had on the very limited current Guernsey law in this area. Chapter 10 concerns taking security over land. Chapter 11 concerns community of property. Chapter 12 concerns feudal tenures, or sub-infeudation. Chapter 13 concerns *rentes hypothèques*; a form of credit sale of land. Chapter 14 nullifies gifts to those who occupy certain defined offices or positions of power and influence over a donor; *e.g.* guardians and testamentary administrators. Chapter 15 concerns the publication and registration of gifts, with the purpose of avoiding all

¹² Fo. cix - cxi.

¹³ Le Rouillé is, in practice, the earliest Norman commentator referred to.

¹⁴ Livre 7; pps 221 - 256, *i.e.* a total 35 pages out of a text 728 pages long, excluding the index and preliminaries, *i.e.* not quite 5% of the whole. Terrien's *livres* equate to modern day *chapitres* and his *chapitres* to *articles*.

¹⁵ Note the old French use of the second c, still present in English but missing in modern French.

¹⁶ A predecessor of the *notaire*.

¹⁷ 2 of the 15 "chapters".

¹⁸ The margin note sums the chapter up neatly: "*Le mari seigneur des biens de sa femme*".

manner of mischief, particularly in a society with forced heirship. Apart from a few mentions of contract in the following livre, “*D’actions, querelles ou clameurs*” there is no other significant mention of contract in Terrien.

Thomas Le Marchant devotes 66 pages to Livre VII of Terrien in his commentary on *L’Approbation*.¹⁹ He corrects and amplifies the brief paragraphs of *L’Approbation* but stays close to the subjects of each chapter. There is nothing resembling a general law of contract in these pages.

Laurent Carey has, wait for it, fully six pages on the topics of *obligations et contrats* and *de la rescision des contrats*. They are helpful so far as they go, but they don’t go very far.²⁰

It was the same in mainland Normandy; you will look in vain for any form of comprehensive statement of contract law in a work such as Bertrand Hubin’s *L’Esprit de la Coutume de Normandie avec un Recueil d’Arrêts Notables du même Parlement*.²¹ The word “contract” or “obligation” does not appear in the list of 24 chapter headings by contrast with topics such as fiefs and feudal rights, *gardes*, succession, *partage*, *douaire*, testaments, donations, *retraits*, prescription, shipwreck and servitudes. Very few of the arrêts touch on questions of contract.

WHAT’S GOING ON; WHERE IS GUERNSEY CONTRACT LAW?

So where is it? What’s going on? Where is Guernsey contract law? Have we missed something? Well yes; it all comes down to a question of definition. We have to clarify what we mean by the expression “*Norman customary law*”. There are two definitions; one narrow and another broad. The narrow definition comprises purely and *exclusively* Norman customary law; *i.e.* those laws and customs specific to the province of Normandy. Those laws and customs are identified by the *Grand Coutumier* and the *Coutume reformée*. What becomes immediately apparent is that contract law forms no part of Norman customary law *as narrowly defined*. The *Grand Coutumier* and the *Coutume reformée* have little or nothing to say on the subject. If one then expands the definition slightly to include commentators on Norman customary law *you still have no contract law*. What you do find though is the beginnings of an answer; because the commentaries are not concerned with Norman

¹⁹ See pps 229 - 295 of his *Remarques et Animadversions sur L’Approbation des Loix de Coustumier de Normandie* published in 1826, but in fact written no later than 1714.

²⁰ At just 2.6% of the text, Laurent Carey has less to say about contract proportionately than even Terrien did.

²¹ 3rd edtn, 1720. The work was published posthumously. The Royal Court of Guernsey holds James Gallienne’s personal copy.

customary law alone. They rely heavily also on other sources of law, notably Royal ordonnances common to the whole of the kingdom of France, canon law and Roman law.

The hugely influential French jurist, Jean Domat, in his *Les loix civiles dans leur ordre naturel*²² wrote as follows :

“In France there are four different kinds of laws, - the ordinances, and the customs, which are the laws peculiar to that kingdom; and such parts of the Roman law, and of the canon law, as are there observed.

These four sorts of laws regulate in France all matters, of what nature soever; but their authority is very different.

The ordinances have a universal authority over all the kingdom, and are all of them observed in all parts of the kingdom, except some of them whose dispositions respect only some of the provinces.

The customs have their particular authority; and each custom is confined to the limits of the province or place where it is observed.

The Roman law hath in the kingdom of France two different uses; and have for each of them its proper authority.

One of these uses is, that it is observed as a custom in many provinces, and is there in the place of laws in several matters. These are the provinces of which it is said, that they are governed by the written law; and for the usage of those provinces the Roman law has the same authority as in the other provinces their peculiar customs have.

The other use of the Roman law in France extends to all the provinces, and comprehends all matters; and it consists in this, that those rules of justice and equity which are termed the written law, because they are written in the Roman law, are observed over all the kingdom. Thus, for the second use, it has the same authority as justice and equity have over our reason.”²³

For customary law provinces such as Normandy, contract law was to be found in Roman law; not any peculiarly local construct. Only in the broadest sense of the expression “Norman customary law” can we find contract law, because in Normandy, as throughout the kingdom of France, contract law was drawn from Roman law.

²² Domat lived between 1625 and 1696. *Les loix civiles* appeared in 1689.

²³ Emphasis added. See p94 of *The Civil Law in its Natural Order* by Jean Domat, translated from the French by William Strahan, re-printed in 1980 and available from Lawbook Exchange. See also the important work of Stephanie Nicolle QC in *The Origin and Development of Jersey Law, an Outline Guide*, revised edition 2003.

It is therefore not entirely accidental that there should have been several translations into French of Justinian's Institutes; for example those of Ducauroy (3rd edition 1829), Hulot (1806) and, most importantly of all, Claude-Joseph de Ferrière's 1719 translation spanning six slender volumes, with a companion volume concerning the history of Roman law. It is equally not accidental that a copy of this work should be found in the Royal Court library in Guernsey, with the volume most likely to concern contract law missing.

This truth is again confirmed by the life and work of Robert-Joseph Pothier²⁴ who has as good a claim as any to be called France's greatest jurist. His influence not just on continental European law but also Anglo-American law is hard to understate. Blackstone is celebrated as a figure of cardinal importance in the history of Anglo-American law. His marble relief portrait appears over the doors of the House Chamber in the Capitol, Washington DC as one of 23 lawgivers whose work helped to establish the principles underlying American law; and *Pothier* is amongst them. No equivalent claim could be made for Blackstone in the history of civil law.²⁵ Pothier straddles both common law and civil law.

Blackstone was a near contemporary of Pothier, yet when it comes to the fundamental question of describing contract law, Blackstone's contribution is dismissed by the following sentences taken from the Chicago University Press edition of his Commentaries:

"The received concept of a "thing in action" as a form of property fathered what seems to modern readers to be the most peculiar feature of Book II. Lurking unexpectedly in chapter 30, which is devoted to modes of acquisition of personal property, is Blackstone's account of the law of contract ... Contracts are here conceived of as a sort of conveyance; either they pass property in tangible things such as a horse or book (as in the case of chattel sales), or they pass intangible property recoverable in action, such as a debt. Contracts to perform services or other acts, such as marriage, do not fit the analysis, since the right to the services is not technically a "thing in action", and such contracts are consequently hardly mentioned. Blackstone's treatment of contract is unsatis-

²⁴ Born 9th January 1699, died 2nd March 1772.

²⁵ Sir William Blackstone was born in 1723 and died in 1780. In his introduction to the University of Chicago Press facsimile edition of Blackstone's Commentaries on the Laws of England, Stanley Katz says this: "Sir William Blackstone's Commentaries on the Laws of England (1765 - 69) is the most important legal treatise ever written in the English language. It was the dominant law book in England and America in the century after its publication and played a unique rôle in the development of the fledgling American legal system. The book went through eight editions during Blackstone's lifetime; innumerable editions, revisions, abridgements, and translations appeared thereafter. Astonishingly it can still be read with pleasure in the late twentieth century." He also says this: "Though the list of his honors and activities is long, Sir William Blackstone was undoubtedly a dull man"; which seems a little harsh.

factory because again he falls victim to the deficiency of his basic scheme which, in its failure to reflect the sophistication of contemporary law, has misled many into supposing that the law of contract was in his time little developed. Blackstone's scheme does, however, reflect the fact that in eighteenth-century legal thought contract had not achieved the status it was to gain in the nineteenth century, when it came to be viewed as the principal civilizing force in social development, and consequently as the branch of the law of the profoundest social significance. Freedom of contract was to overtake freedom of property; Blackstone never of course mentions freedom of contract."²⁶

Even this assessment is missing the point somewhat because it was only when the work of Pothier reached England's shores that contract law began to flourish. David Ibbetson in his *Historical Introduction to the Law of Obligations*²⁷ says this:

"Around 1800, the rather half-hearted tentative sallies in the direction of a theorized law of contract were superseded by more full-blooded attempts to fit the common law into an apparently rational framework. ... in the last decade of the eighteenth century there started to appear a steady stream of treatises on the law of contract - Powell (1790), Newland (1806), Comyn (1807), Colebrooke (1818), Chitty (1826), followed by Addison (1847), Leake (1867), Pollock (1876), Anson (1879) - in which the fundamental questions of the nature of contractual liability had to be assessed.

The model from which judges and writers derived their inspiration was the *Traité des Obligations* of the French jurist Robert-Joseph Pothier, first published in 1761 and translated into English in 1806."

In Pothier, Roman and customary law meet. He had already re-edited Justinian's Digest, a huge undertaking,²⁸ and had written a substantial work on the *Coutume d'Orléans*²⁹ before producing the *Traité des obligations*³⁰ and its sub-treatises. It is noteworthy that an author sufficiently motivated to

²⁶ See the introductory essay of A W Brian Simpson to Book II of the Chicago University Press edition of the Commentaries, reprinted in 2002.

²⁷ OUP 1999.

²⁸ *Pandectae Justinianae, in novum ordinem Digestae*. He laboured on this immense work for twenty years.

²⁹ *Coutumes des Duché, Baillage et Prévoté d'Orléans et Ressort d'Iceux*, 1760. He spent the greater part of his life in Orléans.

³⁰ 1761. For the life of Pothier, see generally the éloge of M Le Trosne, King's Advocate in the Presidial of Orléans, which appears in volume 1 of William Evans' 1806 translation of the *Traité*, itself re-published by Lawbook Exchange in 2000; note the wonderful range of reprints and other services they offer at www.lawbookexchange.com. See also *Robert-Joseph Pothier, d'Hier à Aujourd'hui*, published by Economica in 2001, a collection of papers delivered on the occasion of the 3rd centenary of Pothier's birth. They include Jean-Louis Sourieux's *Aperçu de la vie de Robert-Joseph Pothier* at p15.

write a customary law commentary himself should nevertheless also feel it appropriate or even necessary to undertake a massive re-working of Roman law before producing his own text on contract law, itself heavily indebted to Roman law principles.

The *Traité* and sub-treatises were enormously influential. Professor Bernard Rudden identified the heavy reliance placed by English jurisprudence on Pothier in the 19th century. Between 1800 and 1865 alone, Pothier was cited 400 times by or before English tribunals.³¹

His influence on modern French law was even more profound. The *Code civil* owed a considerable debt to the works of Pothier. It is entirely appropriate to remind ourselves that it was Pothier's works which largely underpinned and informed the authors of the *Code civil*. Whole sections of Pothier's writing were literally copied into the Code.³²

GUERNSEY CONTRACT LAW

A number of points follow from the above analysis.

- i) Norman customary law narrowly defined has little or nothing to say on the subject of contract law;
- ii) The law utilised in Normandy on the subject of contract was founded upon Roman law, as distilled over the centuries *via* Domat, reaching its peak in the work of Pothier;
- iii) Pothier was deeply influential in the development of both modern English and French contract law;
- iv) Modern French law is closer to Pothier than modern English contract law.

MODERN SOURCES FOR GUERNSEY CONTRACT LAW

This rather begs the question of the modern sources for Guernsey contract law. The principal source, so far as it exists, remains indigenous Guernsey law; *i.e.* any Guernsey statutes or case-law bearing upon contract law. The difficulty is that there is very little Guernsey generated law of either kind upon the subject; no unfair contract terms legislation, no Misrepresentation

³¹ See Professor Rudden's paper in *Robert-Joseph Pothier, d'Hier à Aujourd'hui* *ibid.* at page 97. The statistics were taken from the English Reports 1220 - 1865 at www.jutastat.com.

³² See *From Custom to Code, the Usefulness of the Code Civil in Contemporary Guernsey Jurisprudence* by Gordon Dawes, a paper for the Rencontre du Droit Normand held in Guernsey in June 2004, for an account of the history of the Code.

Act, not even any sale of goods legislation, let alone more esoteric laws concerning frustrated contracts and the like. Without a proper series of law reports it is also difficult to locate relevant Guernsey case-law, certainly of any great age.³³

The obvious and principled source for Guernsey contract law remains Pothier and the legitimate successor of Pothier, the *Code civil*. Large sections of the *Code* are concerned with contract law,³⁴ providing a clear set of principles by which contractual issues may be determined. Equally, much of what is said would be surprisingly familiar to the English contract lawyer.

THE TROUBLE WITH ENGLISH LAW

The notion that Guernsey law could or should simply import English common law of contract is, with the greatest of respect, misconceived for two very good reasons.

The first is that, as we have already seen, English contract common law relies to a considerable extent on statute law which has no equivalent in Guernsey law. The second is that English contract common law would supply none of the certainty or ease of use which its Channel Island protagonists seek.³⁵ The sheer volume of English case law is all but overwhelming. If it was once possible to blame the photocopier as playing a substantial part in the increase of legal costs through the ease with which a mass of paper could be placed before a court, then likewise modern information technology has led to the instant accessibility of a mass of case law on any given subject from any common law jurisdiction at the push of a few buttons. That case law is itself confused and difficult to interpret. It is perhaps something which can be seen more clearly from the outside looking in. We are looking to English case law ideally for clear and concise guidance on whatever issue we are considering. It is seldom that this can be found. One only has to consider the increasing size of the average English legal text, the fact that they only get larger (witness in particular the expansion of loose-leaf services) and the inability to resolve fundamental issues after decades, even centuries of case-law. Perhaps the most recent outstanding example of this confusion was the case of the *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*.³⁶ In a 42 page judgment the Court of Appeal cited 44 cases whilst concluding that there was in

³³ But see St John Robilliard *The Guernsey Law of Contract - an Explanation* (1998) 1 JL Review where reference to both Pothier and Chitty in two cases from 1842 case is noted.

³⁴ Arts. 1101 - 1369, 1582 - 1701, 1708 - 1831. The whole of the Code is only 2,305 articles long, including a recent 4th livre concerning dispositions applicable to Mayotte.

³⁵ I.e. principally the Jersey Law Commission.

³⁶ [2002] 4 All ER 689

fact no equitable jurisdiction to grant rescission of a contract on the ground of common mistake, disapproving Lord Denning's judgment in the case of *Solle v Butcher*³⁷ after more than 50 years; whilst actually suggesting that, as with the Law Reform (Frustrated Contracts) Act 1943, there was scope for legislation to give greater flexibility to English common law. This rather takes the biscuit.

Another more recent example in the context of tort is the House of Lords decision of *Transco Plc v Stockport Metropolitan Borough Council*.³⁸ Yet again the Lords were considering the so-called rule in the case of *Rylands v Fletcher*, nearly 150 years old, but still causing controversy, remarkable enough in itself. It was, furthermore, the third time the issue of the relationship between nuisance and negligence had been before the House in the last ten years. In an English legal world where Latin tags are not supposed to be used and where all legal language and procedural rules must change to assist humble folk, their Lordships cited 52 cases, 7 articles, one Law Commission report, 4 textbooks, 5 Acts and the law of 5 other jurisdictions before concluding that the rule did indeed remain a part of English law, although confining the rule in such a way as itself to constitute a non-natural user.

In the context of damages, the 2003 House of Lords case of *Lagden v O'Connor*³⁹ finally sank the much distinguished and discredited rule in *The Liesbosch*, but only after 70 years of very expensive argument. Even then their Lordships could not agree between themselves; Lord Scott went so far as to say that what the majority proposed would be "... a disservice to the development of the law".

The lack of clear, concise and persuasive judgments is a true disservice to the development of (English) law. A simple reform whereby the Court of Appeal and the House of Lords would be required to give a single judgment upon which each member of the respective tribunals were agreed would be a considerable step forward and lead to a very substantial saving in future costs.

Examples from this year of the difficulty of following case-law generated in England include *Super Chem Products Ltd v American Life & General Insurance Co. Ltd*⁴⁰ a Privy Council decision in which *dicta* of Viscount Haldane dating back to 1915 were declared either to be wrong or to require such radical qualification as to be left with virtually no useful content. Likewise the case of *The Commissioner of Police of the Metropolis v Lennon*,⁴¹ an English Court of Appeal case concerning, yet again, the question of

³⁷ [1949] 2 All ER 1107.

³⁸ [2003] UKHL 61, Lords Bingham, Hobhouse, Scott, Walker and Hoffmann sat.

³⁹ [2003] UKHL 64.

⁴⁰ [2004] UKPC 2.

⁴¹ [2004] EWCA Civ 130.

liability in tort for pure economic loss, another impossibly old and confused chestnut. Finally there is the case of *First National Tricity Finance Ltd v OT Computers (in administration)*⁴² an English Court of Appeal decision and a further sorry instalment in the complex arguments surrounding the Third Parties (Rights against Insurers) Act 1930.⁴³ A judgment from 2001 was declared to be distinguishable and, in any event, wrongly decided while a further judgment from 2003 was not to be followed!

Reading the daily update from a service provider such as Lawtel soon reveals the depth of the problem. For example, case law on the question of reflective loss; *i.e.* the problem as to whether a claim is that of the company or its shareholders. The latest instalment is a case from 23rd June 2004, *Gardner v Parker*,⁴⁴ the latest⁴⁵ in a trail of fine distinctions going back *via* a number of others to *Giles v Rhind*⁴⁶ and *Johnson v Gore Wood & Co (a firm)*,⁴⁷ not to mention *Henderson v Henderson*⁴⁸ itself and the broader issues thrown up by that case, still unresolved.

The problem is amplified when you are looking from the outside in. It is not as if we are even bound by your jurisprudence. We are not required to follow each ghastly twist and turn; why should we? Within the jurisdiction you can shrug your shoulders and say, that's how it is; these judgments are binding. In the Channel Islands we at least have the opportunity to improve on that, if at all possible.

But how? There is little case law. In reality the jurisdictions are not large enough to generate a meaningful common law, certainly not a comprehensive one, let alone an independent jurisprudence. We have to look to other jurisdictions, if not for authority, then inspiration.

It is certainly not a solution simply to bind ourselves to the law of a much larger nation state with its own history and needs, not necessarily shared by these islands; particularly when that jurisprudence currently has, in the main, no particularly outstanding attraction or even merit.

Another matter which is commonly overlooked is the escalating influence of European law on English law. English jurisprudence is becoming increasingly less useful to the common law world because of the extent of the influence of European Union law and regulation. It simply makes no sense for these Islands to ally themselves to what they perceive to be English common law in such circumstances. The advantage the Islands have is that their

⁴² [2004] EWCA Civ 653.

⁴³ Imported into Guernsey law in 1936.

⁴⁴ [2004] EWCA Civ 781

⁴⁵ And undoubtedly not the last.

⁴⁶ [2002] 4 All ER 977

⁴⁷ [2002] 2 AC 1

⁴⁸ (1843) 3 Hare 100.

jurisprudence is already a synthesis of the common and civil law. Jurisprudentially we are at home both in French and English law.

CODIFICATION

Perhaps, as we contemplate the bicentenary of the *Code civil*, it is an appropriate time to reflect on whether the Channel Islands should produce their own civil and penal codes. And why not? Yes it would require an investment of time and resources but, done well, the project could lead to considerable and lasting public benefit and savings. The project would require imagination and ambition, but is surely achievable.

WHITHER GUERNSEY CONTRACT LAW?

The question took as its premise the notion that Guernsey law has a choice; however, if Guernsey contract law is to remain principled then there is no choice. Guernsey contract law is clearly founded upon Roman contract law as evolved by Domat, Pothier and the *Code civil*. It follows the continental model. It is of course permissible to look to English case law also for assistance, but more often than not this merely complicates the issues and increases the cost of legal argument. Again, perhaps the solution for the Channel Islands is to produce their own civil code.

A LAST THOUGHT

In practice the problem is not so acute. English contract law is not so distant from French contract law. One of the papers submitted on the occasion of the celebration of the 150th anniversary of the *Code civil* in 1954 at New York was written by Thibaudeau Rinfret, Chief Justice of Canada.⁴⁹ The paper was entitled *The Relations between Civil Law and Common Law*, in it he said this:

“The Supreme Court of Canada is perhaps a unique example to be mentioned for the purpose of the present paper. In that court judges trained in the common law sit together with those trained in the civil law. These judges deliver judgment now in common-law appeals from nine of the provinces, and now in

⁴⁹ Thibaudeau Rinfret was born in Montreal, Quebec in 1879. He was called to the bar of Quebec in 1901 and practised in the province for 21 years. He was appointed to the Superior Court of Quebec in 1922 and elevated to the Supreme Court of Canada in 1924. In 1944 he became Chief Justice of Canada, serving on the Supreme Court for 29 years. He retired in 1954 and died in 1962, aged 83.

Guernsey Contract Law: Which Way?

civil-law appeals from the Province of Quebec. And Sir Lyman Duff, who sat in that court longer than any other Canadian judge, after having made that remark adds this: 'Lawyers of this country (Canada) are coming to think, and, as time goes on, more and more will come to think, in terms not of the civil law only, but in terms as well of the broader principles upon which both structures are reared'.

The experience gathered from this writer's association with that court has been that whether a case is decided under the rules of the civil law or under those of the common law, the result is almost invariably the same. And after all, if one thinks of it, it must necessarily be so. Justice is founded on truth, and truth cannot but be one and the same everywhere."⁵⁰

This admittedly utopian vision of universal truth based doubtless upon a natural law outlook, is nevertheless helpful when considering the similar position of Guernsey law when it weighs up both English and continental jurisprudence. Guernsey contract law is rooted in Pothier; as was English contract law. The *Code civil* was deeply influenced by Pothier and is a valid source of inspiration for Guernsey law in all manner of ways. Ironically it is modern English law which requires a perhaps rather more careful use; particularly given the influence of statutes which have no equivalent in this jurisdiction, together with the lack of clarity in modern English case-law and the fact that English common law will itself come under increasing pressure to become more civil. Contract law is likely to be the first general area of law which is codified by the European Union.

Accordingly the question "which way Guernsey contract law?" is answered by saying, carry on as before; but remember where Guernsey contract law came from and look to Pothier and the *Code civil* first. Remember also where European contract law is likely to be heading; and again look at your *Code civil*.

⁵⁰ See p384 - 385, *The Code Napoléon and the Common-Law World*, edtd. by Bernard Schwartz 1956, reprinted by Lawbook Exchange 1998.

TRUST LAW

Paul Matthews and John Mowbray

[Professor Matthews]

John Mowbray and I are going to do this slightly differently; we are going to “Cox and Box”, rather than have one of us for 15 or 20 minutes and then the other for a similar period.

I want just to set the scene with about five minutes’ worth of history. We have heard a number of things this morning about customary law and Roman law. It is a feature of almost all legal systems that they have somewhere within them a need for property to be dealt with and perhaps applied in a more flexible way than the bare bones of the property system would suggest. For example, in 9th century Japan, there are examples of temples, for whose benefit and support there are paddy fields given but not given directly to the temple.¹ Rather they are given to trustworthy persons in the locality for the benefit of the temple. Effectively, therefore, in a fiduciary capacity. Nobody of course suggests that modern trusts come from 9th century Japan. In the same way, the Muslim Waqf is a very similar institution,² as is the Hindu Benami³ and the German Salman.⁴ Then there are also lots of cases from the Italian Rota, in the 15th and 16th centuries, giving judgment in what looks suspiciously like trust cases.⁵ But all these show is that in Roman law, as elsewhere, there were indeed fiduciary institutions. There was the *fiducia*⁶ which came in two flavours, *fiducia cum amico* and *fiducia cum creditore*, and the *fideicommissum*,⁷ which was a device which enabled you to avoid the limitations on the institution of heirs. So, old systems of law may have fiduciary institutions, and it should not therefore be a great surprise or shock, as some civilian lawyers are wont to affect, if English law develops a fiduciary device which becomes very popular and very useful.

One of the most important features of devices of this kind is that they are often relied on by lawyers advising dynastic megalomaniac landowners who

¹ See Arai, *Japan*, in (ed) Glasson, *International Trust Laws*, para A21.1

² See Pearl, *Muslim Family Law*, 3rd ed 1998, 493–503.

³ See Keeton & Sheridan, *The Comparative Law of Trusts*, 1976, 202, 227–9.

⁴ Holdsworth, *History of English Law*, vol 3, 563–565.

⁵ See Lupoi, *Il trust nel diritto civile*, in *Trattato di Diritto Civile*, vol II, I Diritti Reali, 2004.

⁶ Buckland, *A Textbook of Roman Law*, 3rd ed 1963, 431–33.

⁷ *Ibid*, 353–64.

have bought their way into the local aristocracy, and want to stop their idiot son from gambling it all away or spending it on dissolute behaviour or whatever. And so, tying up the family land became very important. Terrien, for example, had some very good things to say about it.⁸ In his view it was part of the customary law of Normandy that you were allowed to do this. It is true that, as with Justinian, who limited to four the number of generations that you could tie up land,⁹ there may have to be some limits. And indeed, the French kings produced *Ordonnances*¹⁰ in the Renaissance period and after, right up to the time of the Revolution, in which they set greater or lesser limits on how far land could be tied up using devices which were the successors to the *fideicommissum* of the Roman law. The principal such device was the *substitution fidéicommissaire*. Le Geyt, himself no mean Jersey lawyer, actually indulged in this in his own family,¹¹ and although the creation of what amounted in English terms to an unbarrable entail of land was criticised, nobody ever tried to set it aside or, at any rate, nobody has found any records which indicate that that happened.

In the 17th century there are plenty of examples of grants being given by the Crown to tenants in chief in Jersey and then licences being obtained by those tenants in chief to assign, as tenants in chief had to do in the feudal system, and in those licences you find licence not only to transfer the land but also to transfer it to trustees, to hold on trust.¹² Quite what the local lawyers thought that meant is of course anybody's guess. Clearly, the idea was that the English institution of the trust was at least in principle known in the Jersey legal environment. How much use was made of it we do not know. One occasionally sees records of cases which show that there were disputes about trusts and settlements of land,¹³ but there is not really any resolution of this because there is not enough detail available.

In the 19th century, we see that the prevalence of chapels and other local institutions, particularly amongst Methodists and Catholics, led to what we in England would know as charitable trusts and so, because very often there were immigrants involved you see trusts of that kind being created. Whether or not they were effective is a matter rather debated by the Royal Commissioners in the 1861 report.¹⁴ But the fact is that that is what people

⁸ *Commentaires du Droit Civil*, 2nd ed 1578, 193–5.

⁹ Buckland, *op. cit.*, 364.

¹⁰ *Ordonnance d'Orleans*, 1560; *Ordonnance des Moulins*, 1566; *Ordonnance des Substitutions*, 1747.

¹¹ *Lois et Usages de Jersey*, Tome I, 516.

¹² See e.g. *Patentes*, vol 1, 149 (1754)

¹³ See e.g. *Bandinel v Dumaresq* (1783) 119 Ex 87, 128, 131, 3 CR 39.

¹⁴ *Report of the Commissioners appointed to inquire into the civil, municipal and ecclesiastical laws of Jersey*, 1861, at page xxxv.

were doing. It is what they wanted to do. So in a sense the system was responding to the needs of the people.

In the 20th century, there were lots of immigrants coming in again, of course of the rather well heeled variety, and they would expect to be able to do what they could do at home. Just therefore as when the immigrants went from England to South Africa they took trusts with them, when they went to North America they took trusts with them, when they went to India they took trusts with them, so too the English immigrants going to the Channel Islands expected to be able to take trusts, and were prepared to pay no doubt handsomely for those trusts to be created of their Jersey wealth.

So that perhaps sets the scene in which the trust is not an indigenous institution, but explains how it creeps into the Jersey legal environment.

[John Mowbray QC]

The post-war growth of the trust practice in Jersey was based to a substantial extent on the avoidance of United Kingdom taxes and I am going to tell you about the way the taxes were then, and shortly afterwards.

The top rate of income tax and surtax together was 98%. The top rate of estate duty was 85%, with a merciful limitation of 80% of the total estate. The marginal rate on a £125,000 estate was 50%. So you can understand that taxes like that would drive people abroad if they could lawfully and honestly avoid the taxes. Well, that it is something they did.

The first thing I ever heard, I think, about Jersey as a tax haven, concerned Jersey mortgages. In the 1950s, the proper territorial limits of fiscal legislation were better regarded than they are today. Foreign property that passed under a foreign law did not bear United Kingdom estate duty, even on the death of someone domiciled in part of the United Kingdom. The youngsters present (I mean anyone under 60) may believe it or not, but that was the tax law in England until 1962. The law governing dispositions and devolutions of immovables was, of course, the *lex situs* where the land, or whatever it was, was situated. So there was an obvious advantage in anyone investing in foreign land. The trouble was the Exchange Control Act 1947 and the regulations under it. They prevented UK residents from buying foreign land, or rather from buying land outside the scheduled territories. And the scheduled territories included the Channel Islands, the Isle of Man, the Republic of Ireland and Gibraltar. Well, that was Jersey's great opportunity. You did not have to buy land. A Jersey mortgage was immovable according to Jersey law, and that is what counted. So, you didn't even have to buy land in Jersey. You could invest in a Jersey mortgage. It was immovable, by its nature it devolved according to Jersey law, and so it wasn't subject to UK estate duty. We use to be told that you could have a kind of a trust – I think the Jersey lawyers

present will recognise what we were really being told – you could have a kind of a trust, but only a kind of life tenancy and remainder sort of thing. That was what people did. And that, as I said, was Jersey's great opportunity.

Subsequently, people used discretionary trusts to avoid estate duty. If you had a number of children and grandchildren, you settled property on discretionary trusts for them, and the rule was that when one of a number of discretionary beneficiaries died, there wasn't any estate duty. Of course you had to live five years so that there wasn't any estate duty on your own death. You could do that – avoid estate duty using discretionary trusts – in England, but people had got into the habit of going to Jersey and so they did it there as well.

Another opportunity arose with capital gains tax, introduced into the United Kingdom in its present form in 1965. Another opportunity for Jersey, because there has never been any capital gains tax there. By putting the trust in Jersey it was possible to defer the payment of capital gains tax even if the beneficiaries were resident in part of the United Kingdom and UK domiciled. UK tax on the gain was only payable when the gain was distributed to the beneficiaries in the United Kingdom. Though the tax was only deferred, deferring its payment was quite beneficial because what would have gone in tax was still there earning income in the settlement and maybe even further capital gains. Since 1991, that has become less and less desirable, because gains are attributed to the settlor. In a similar kind of way, though, a children's and grandchildren's discretionary settlement can be beneficial even where the settlor is domiciled in part of the United Kingdom. It can shelter foreign income with a similar kind of advantage, but the settlor and his wife have to be excluded.

There are other advantages which I will pass by, especially for people who are resident but not domiciled in the United Kingdom. Jersey is still a very convenient place to keep their assets and their income, which is only taxable if it is remitted to the UK. So that is the tax background.

[Professor Matthews]

So we see that there are obviously advantages in having trusts in Jersey and Guernsey. But the original business was carried on as a sort of cottage industry. Partners in law firms and accountancy firms would do it as a sideline to their main practices. Indeed, one or two people, a bit like the 'Sark Lark', would do it from their kitchens. It was very much a cottage industry. But, by the 1970s it was giving way to a kind of industrial revolution, and instead of its being done through individuals, the work of trustees was being done through the medium of companies which were owned not only by the law firms and accountancy firms, but also by the big financial institutions.

The banks were seeing that indeed here was big business coming over the horizon, and they ought to get a slice of the action.

But there was a problem. As we have seen in this potted history, there were good reasons why you might want to put trusts in Jersey. But there was not really that kind of firm base of experience and principle on which to build the very large edifices of trusts, companies and other properties which people wanted to install. Indeed, Lord Hoffmann once wrote, in one of his happily memorable phrases, that:

“Some lawyers on the island, like young Victorian clergymen, went so far as to have Doubts as to whether trusts existed at all, and when I was a member of the Jersey Court of Appeal there were occasionally rumours of impending litigation in which a root and branch attack would be made on the entire concept.”

So, as he put it in another of his phrases:

“The States of Jersey therefore decided that, if there was any possibility that trusts did not exist, they would have to be invented.”

Therefore, they legislated the Trusts (Jersey) Law 1984. Now that law was a revelation. Trust laws up until that point in the common law world had largely been based on what I would call the English model (I leave the United States out of account for this purpose). They tended to be all of a piece. You could see the same statutory provisions recurring, with the same drafting, in every commonwealth jurisdiction, that you found in the English trust legislation going back into the 19th century. But this was not that. There were some points at which it had plainly borrowed from UK statute, but for the most part it was a novel conception, and a brilliant one at that. So much so, of course, that it has been mercilessly ripped off by other offshore jurisdictions ever since, beginning with a certain other Channel Island which I will forebear to mention.

Now, the point about this was that it actually made a sea change, because it enabled the Jersey (and then the Guernsey) trust lawyers see the trust as a firmly founded *product* rather than simply a *legal service*. It was something that you could go out and sell. And you could tell those doubting American lawyers “Here we are, here is the basis for our law, it is clearly enforceable and what is more we will be nice and enforce foreign trusts too”.

So we have this sea change, this watershed in 1984. The Jersey law has been amended a few times since. There was nothing root and branch, nothing spectacular, in the first and second reforms.¹⁵ The third reform in 1996¹⁶ was rather different, because it introduced the non-charitable purpose trust,

¹⁵ Trusts (Amendment) (Jersey) Law 1989; Trusts (Amendment No 2) (Jersey) Law 1991.

¹⁶ Trusts (Amendment No 3) (Jersey) Law; see Matthews (1997) 1 JL Review 6.

which up until then had not been permitted under Jersey law. Indeed, Jersey law on that point was even stricter than English law, which at least allowed those anomalous cases in which, as Lord Justice Harman once put it, ‘Homer had nodded’.¹⁷ But what began to be seen as a result of the 1984 Law was that the trust could be used in a number of commercial situations. It could be sold as a product to help others to avoid unwelcome rules in their own legal systems, like forced heirship rules. In some cases it could be used to sell commercial trusts. Now that meant that the clientele for the trusts ceased to be wholly drawn from the United Kingdom. The Channel Island lawyers were no longer looking mainly to that country. Indeed, they had no choice, because, as John has pointed out, the tax rules were becoming tighter and tighter, and the advantages for a UK resident going to the Channel Islands were becoming more and more slender. So the clientele had to become more and more international. The Channel Island lawyers had to go round the world to sell the Channel Islands trust to them. They got a lot of clients in from many places, it has to be said, because of the uncertainties locally as to what might happen in their own systems in the future. These included such places as South Africa, the Middle East and the Far East, Hong Kong and so on where there was some doubt as to what might eventuate in the future. If you like, the original idea of the UK residents sending their money for tax reasons to the Channel Islands was a kind of money tourism. The situation now, with the more international clientele worried about how stable were their own societies, was a bit more like money evacuation, making sure that the money was well out of harm’s way, so to speak.

The last point I want to mention, before I sit down again, is the licensing of trustees. This is a much more recent phenomenon, and one which is in response very much to outside pressures. Partly they were political pressures from the United Kingdom government,¹⁸ saying you have got to get your house in order, everything has got to be squeaky clean in order to prevent it being said that you are being used to hide drug money. It is noticeable in this area that the Channel Islands are of course way ahead of England and Wales, where you can be a professional trustee of a private trust without any licence whatever. There we are. Also, of course, there were pressures from the market, because it meant that Jersey and Guernsey, which always set out their stalls at the top end of the market, could say that they were still leading the pack by saying that they looked after their trustees. The danger with that, of course, is that, when things go wrong, they blame the licensing authority. It is a bit like suing the garage that did your MOT trust after you have an accident.

¹⁷ See *Re Endacott* [1960] Ch 32.

¹⁸ See e.g. the *Review of Financial Regulation in the Crown Dependencies*, Cm 4109 (the “Edwards Report”).

[John Mowbray QC]

For a generation the courts of the Channel Islands have been at the cutting edge of the development of the law of trusts, pre-eminent before even the English courts with cases about pension funds, though English decisions on constructive trusts arising out of commercial fraud are an exception. The courts of Jersey are leaders in the field of private trusts. It is very important to settlors, and to people advising settlors, to know that if something goes wrong with a settlement put into an off-shore jurisdiction there will be a good court to deal with it. There are good courts in Jersey. The Court of Appeal has been and still is peopled by very distinguished judges. The existence of good courts is something important for anyone advising a settlor where to put his trust. It is important there is a court of appeal like that, and of course what you really need is a very good first instance court, which again there is.

Let me just give one example of the doings of the Royal Court. I suppose the most famous and infamous creation of the Royal Court was the notion of a sham trust in the *Rahman* case. There had been sham HP agreements, and there had been sham leases before that, but there had not been any sham trusts until the *Rahman* case.¹⁹ The Jersey trust was attacked by the settlor's son who claimed his share of the settlor's property as his father's heir under Sharia law. He said the trust property still really belonged to the settlor, was still in the settlor's estate because the trust had been a total sham. The courts decided the case primarily on the Jersey doctrine of *donner et retenir ne vaut*, since abolished. You cannot give and retain at the same time, or as a Canadian judge told me once, 'You can't suck and blow at the same time'. It was decided also on the ground that the trust was a total sham. The evidence that the trustee had acted merely as a custodian on the instructions of the settlor was very strong. In an English case, *Midland Bank v Wyatt*,²⁰ the reasoning in the case was applied. It was not cited to the English court, I think that was from the fear of putting the English judge off. In *R v Allen*²¹ a similar finding by a jury was approved by the Court of Appeal. But then, in a development in the Bahamas, the Court of Appeal of the Bahamas went too far. It was in *Private Trustee Corporation v Grupo Torras SA*.²² Sheikh Fahad, the defendant, did not deny that he had defrauded a Spanish company that belonged to the Kuwaiti Investment Office, the plaintiff, of millions of dollars. He opposed a Mareva injunction freezing the assets of a Bahamian trust of which he was the settlor, but only a discretionary beneficiary. The Mareva injunction was

¹⁹ 1991 JLR 103.

²⁰ [1995] 1 FLR 696.

²¹ [2000] QB 744, [2002] 1 AC 509.

²² 1 OFLR 443.

made; Private Trustee Company was the trustee. It appealed, and that is why it is shown as the appellant in the report. The Spanish company did not claim any proprietary interest in the trust fund. Sheikh Fahad was only a discretionary beneficiary. The court did not say that the trust was a sham, but the President of the Court of Appeal said this:

“If it be established that the Bluebird Trust was a vehicle over which Sheikh Fahad exercised substantial or effective control the court would pierce the corporate structure of the trustee and regard Sheikh Fahad as beneficial owner of the assets of the trust applying principles recognised in English authorities of piercing the corporate veil of companies.”

Taking the lead again, thank Heaven, the Royal Court has brought those inflated ideas back to earth. That was in a decision that has already been praised this morning from inside the Jersey judicial system, *Re Esteem Trust*.²³ That was another case about Sheikh Fahad, and a Jersey trust this time. The court explained away the Bahamian decision as merely about a precautionary Mareva injunction. It distinguished the cases where the veil of companies used for fraudulent purposes had been pierced, and said that either a trust is a sham or it is valid. If it is valid, and is used for fraudulent purposes, in ways that are a breach of trust, well that is a breach of trust. You cannot pierce the veil of a trust in the same way as you can pierce the veil of a company, which is the owner of the property. As I say, with the greatest of respect and admiration, that is the true doctrine and there is great sense in that decision and especially perhaps in the concluding remarks of the court, which everyone interested in trusts ought to read.

Finally, a few concluding remarks of my own, about regulatory concerns and the EU, the FAFT, the OECD and the rest of the alphabet. The situation is in flux, with the exception of the EU. Jersey is not a member, but has agreed to deal with something that the EU objected to. Ordinary companies in Jersey pay income tax on their profits, but if the shareholders are all foreigners the company is “exempt”. You can see why that was considered unfair to EU countries where the company might have been formed. Jersey will be dealing with this. The discrimination in favour of foreigners will be abolished by reducing the tax on all corporate profits to nil – a happy solution in itself, through no doubt other taxes may need to be increased.

Subject to everyone else doing the same, Jersey is also prepared to require paying agents to deduct withholding tax from interest paid to individuals in the EU unless they agree to their home governments being told about the payments. The rate of withholding tax will be 15% to start with, increasing to

²³ 2003 JLR 188.

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35%. This will not apply to dividends, or to payments to corporations. It is not yet clear whether the 'level playing field' has been established that will allow this regime to be brought into force. Likewise, there may be beneficial agreements with countries outside the EU but only if everyone falls into line.

PANEL DISCUSSION: SESSION 2

Lord Hoffmann PC (Chairman)

LORD HOFFMANN: Thank you very much for an extremely interesting and practical account of the matter, and I am sure people will have something to say. Who wants to be the first?

RICHARD SOUTHWELL QC: Going back to the position in relation to contract law, I would suggest that the notion of pursuit of certainty is like a cloud pursuing a shadow. The reality is that commercial people from abroad come to England because of the quality of the lawyers but even more of the courts. That is why they come, and anybody who thinks that English commercial law is certain should go and study the shipping cases that every year pass their way up to the House of Lords and see the extent of the uncertainties that arise. If you want certainty, you are very often much better going to a country which has a code. But, in the end, people will come to you because of the quality of the lawyers and the judges; and I just want to add to that that I think the quality of the lawyers in Jersey and in Guernsey is very high. Thank you.

LORD HOFFMANN: Well, some bits of the law have to be more certain than others and the point, for example, which Alison Ozanne was complaining about was of such immense practical importance that it took half a century for it to come back to the Court of Appeal for decision again. Next?

GORDON DAWES: That is not entirely fair. I picked up my *Times* today and saw the case of *Fytche v Wincanton Logistics plc* — one of yours, I think, my Lord — and I see that there is a question about a hole in a boot and five judgments, two of them dissenting, about the effect of a hole in a boot in the context of health and safety at work law. Now, if you have that lack of certainty as to the consequence of a hole in a boot, what sort of guidance can one obtain from such common law?

LORD HOFFMANN: Yes, yes. Who else? Yes?

MICHAEL BIRT: Can I add, in relation to the debate between Alan Binnington

and John Kelleher about the direction of Jersey contract law and without going too far into this in case one ever has to decide it, but is there not an argument that our law has, to the extent that it is uncertain, been uncertain for the last 30 years and yet this does not appear to have put off people investing in Jersey and setting up banks and generally doing all the financial transactions that they wish to; in other words, to take up Alan Binnington's point, is the lack of certainty, such as there is, in fact a problem?

LORD HOFFMANN: Can I just add to that, because I wanted to ask a sort of practical question of the members of the audience and indeed the panel, and that is, as a matter of practice, if people have a serious international contract in Jersey, do they put in an English choice of law clause and, in that case, does one not have in fact a two tier system under which, if it is a contract in the finance industry, then it is governed by English law anyway, but if it is a contract with your plumber, well then you have got to make the best of Jersey law? Is that right? People are nodding.

JOHN KELLEHER: From my own experience dealing with our corporate lawyers, we don't very often have contracts which have Jersey law as their proper law in terms of what they are doing.

LORD HOFFMANN: Yes.

JOHN KELLEHER: So it is the smaller cases that tend to come up, you know, landlord and tenant disputes, or car hire.

LORD HOFFMANN: That is a very important point, is it not, because that may be the answer to the question you have just asked as to why in practice it does not cause any trouble to the finance industry. They just use choice of law clauses. Yes?

HOWARD PAGE QC: Having sat occasionally in the Royal Court in Jersey on some of these relatively rare contract cases, I have been quite conscious of the need not to impose English law on the practitioners or on the clients and have made a point on a number of occasions of asking what the relevant principles of Jersey customary law are only to be told, almost invariably, that either I don't need to bother with those or it is much more conveniently and easily dealt with by the English authorities which are already before the court in voluminous form. In those circumstances, it is quite difficult for a court itself to decline to look at that and to insist on

being instructed in the principles of the Jersey customary law, which nobody is particularly keen, it would seem, to give you. That seems to me to be just one piece in the jigsaw which may be significant.

It really comes to this. It does seem to be that the way in which the law will develop in Jersey will in practice be very strongly driven by the practitioners and, if it is not only in the courts that the courts adhere to English court cases, but also I suspect the advice which is being given to the clients as to their prospects of success, then that in itself is quite a forceful mountain really which I suspect is not going to be displaced too easily, at least in the absence of some fairly swift codification of what the alternative principles are to be.

LORD HOFFMANN: Yes. This has been hinted at several times already this morning, that cases depend very much upon the advocates who argue them. My own experience was that there were two kinds of advocates in the courts: there were those who handed you a folio volume of *Terrien* from which bits of leather came off on to your suit and said "That is the law" and there were the other lot, who said "My friend and I are agreed that on this point Jersey law is the same as English law" and you carried on from there.

JOHN KELLEHER: Mr Chairman, can I just say something on that, on which I think I can be less polite than Mr Page? I think what you are saying is that, certainly from the 1970s, there was a measure of intellectual laziness by Jersey counsel, and you see that reflected in some of the decisions of the judges. But I think there has been a sea change in the nineties if you look at the case law, and that can only improve, because in the last few years candidates who wish to take the Jersey advocate's exams now have to do a paper which includes Jersey contract law. So they are required to look at our case law now and they are required to know some of the basic principles of the French *ius commune*. I think the problem is not so much that our law is uncertain. I think that the actual issue is whether our law is ascertainable if you can be bothered to look in the right place.

LORD HOFFMANN: Yes?

TIMOTHY HANSON: My name is Timothy Hanson. Can I just pick up on the point the Deputy Bailiff made, which was that he seemed to accept that there was uncertainty in contract law in the Channel Islands and that seems to be acknowledged by all the speakers. But it is not just big business that has to be considered, because contract law, after all, applies to every individual when they go and buy their pint of milk, for instance. One has

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to consider how the lack of certainty affects the average person and how difficult it can be for the average person to find out what the law is on any given subject. One has to have regard not only to business but to the general life experiences of people in the Islands. For that reason, if for no other, I would have respectfully suggested that we urgently do need some kind of certainty in the law. Personally it doesn't bother me which particular direction we go for, so long as we have certainty so that the law is effective in practice.

LORD HOFFMANN: Thank you. Yes?

DAVID LE QUESNE: The proposition that the importation of English law into Jersey contract law would provide twin benefits of certainty and availability is very convincing. I have not ever heard a convincing argument the other way and, with great respect to John Kelleher, I don't think I heard a convincing argument today. There seemed to be threats that if in fact one goes for English law rather than Jersey law one is going to be throwing babies out with bath water and terrible things will happen, but I have never actually heard a description of what is the baby that would be thrown out if we go down the English law route. I have never heard a precise description of what will be the damage or the risk to Jersey or to Jersey law if in fact we go down the English law route. I think that we should have a fairly precise description of the argument the other way rather than these vague warnings of doom and gloom in order to make a rational decision.

LORD HOFFMANN: Does anyone want to comment?

ALISON OZANNE: Sorry. I would just like to respond.

LORD HOFFMANN: Yes, I thought you might.

ALISON OZANNE: If in Guernsey we just become English lawyers dealing with English law to English judges, we become Hampshire; we lose our identity; we lose our specialness; we lose our reason to be different. We make ourselves a target for politicians at Westminster to say "Well, what the heck is all this about? Why have you got a different system? Your laws are exactly the same. Your judges are exactly the same. Why have you got a different status constitutionally? Why don't you just have an MP, send him to Westminster and let's forget all this nonsense about your differentness." So that is very, very worrying for me.

Also, we had our own *rencontre* a few weeks ago in Guernsey when we

had a very interesting talk about the fact that, as an Island, we actually identify ourselves by our laws. We don't have our particularly strong artists or writers. Culturally we don't have a very strong identity. You ask the Guernseyman on the street what is it to be a Guernseyman and he will say "Well, we have got Norman customary laws and our advocates go to Caen". It is that part of our own identity, of the way that we identify ourselves that makes ourselves who we are as a community. As a lawyer, I regard myself as a custodian of the law for the future, not as something that is here for my convenience because it happens to be easier to read *Chitty* than the *Code Civil*. So that is my answer.

LORD HOFFMANN: Well spoken.

JOHN KELLEHER: Can I also say something on that, Mr Chairman, because I think David raises a very good point, but I think it is asked the wrong way. Why should we assume at all that we should go towards English law? I see that as a sort of cultural imperialism, which starts in Jersey in the nineteenth century and is moved onwards, that it is assumed that it is superior to what our own is or to what French law is. Why should we have English law? We are only saying that because most of us have been trained in England as lawyers and we all speak English. I think you have got to start with different base points. We are Jersey. What is our starting point? Our starting point is that we draw our law from the customary law of Normandy and our contract law comes *via* there. So why are we considering English law at all?

MALCOLM SINEL: One of the reasons that we do that is that, save for one exception, today we all speak English and the most significant minority language in Jersey is Portuguese. If you ask the man in the street in Jersey what makes us different from Hampshire, well, for 10% of them you will get the answer in Portuguese.

LORD HOFFMANN: Yes.

SENATOR PHILIP OZOUF: I am afraid I am not a lawyer, but I have to disagree respectfully with the view from Advocate Ozanne. I think there is a lot more to being Jersey than just identifying a root in French customary law. I personally think, as a member of the legislature, that it is absolutely important for there to be certainty in commercial transactions, both at a high level and a low level and I am very interested in developing the concept or I would perhaps like to venture the suggestion that maybe we should be

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adopting a Channel Island approach that there should be some sort of codification, there should be certainty.

LORD HOFFMANN: Thank you.

PATRICK HODGE QC: I do not wish to take a stance on the issue of blood and belonging as an outsider from one of these islands, but I would say this. If you are looking for commercial certainty you cannot treat contract as a unique, self-contained subject, because transactions and contracts give rise to property results and the issue of the law of property is not just about Morgan Stanley's cottage, it is about security over movables. It is about security over all sorts of financial instruments. The Channel Islands do not have the English system of equity. Property does not pass equitably on a contract. If you are to adopt one system or another, someone will have to consider the impact of a particular contract code on your property law and how a contract moves into a transfer of property. What the answer is I do not know, but I do think you have to consider at some stage what the relationship between your contract code and your property law is going to be. Thank you.

LORD HOFFMANN: Yes.

SIR DE VIC CAREY: Following on from what Patrick has said, when I came to advise the Advisory and Finance Committee on the introduction of the Trusts Law, one of the things I identified was that it was quite dangerous to bring in a statutory control over real property in Guernsey and as this law was being brought in purely to facilitate offshore discretionary trusts and the like, no one demurred at the idea that we excluded Guernsey real property from the provisions of that law and there has been no problem on that ever since. If you want to put a property into a Guernsey trust, you put it into a Guernsey company first of all. It is then personalty and can be held by the trust, but real property cannot be directly held. We have always had these chapels, as was identified earlier on, as one of the early forms of *fidéi-commis* in Guernsey in the nineteenth century.

MALE SPEAKER: Can I just add to that, what I think is the normal donation in alms which you will find in the modern *Coutume*. We see charitable donation also created in the biens de la court [sic] in 1588. We have to distinguish between traditional charitable trusts and ... (indistinct) ...

SIR DE VIC CAREY: Yes. The *biens de la court* [sic] could be altered under the

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provisions of the Trusts Law. Any poor advocate is always reminded that in Guernsey they can always come and make a claim on the *biens de la court* administered by the Royal Court.

ALISON OZANNE: I am sorry, Sir, and I hate to disagree with you, but, taking my life in my hands, there was actually a huge debate amongst the Guernsey Bar as to whether real property can go into trust or not and clients are always asking for advice and we find it very difficult to give an answer. You have a clear idea, Sir. I do not think it has been litigated and I think it will be.

SIR DE VIC CAREY: No further comment.

LORD HOFFMANN: Perhaps on that note we ought to go to lunch. Thank you very much to the speakers. [Applause]

JERSEY 1204: THE ORIGINS OF UNITY: A NOTE ON THE CONSTITUTIONS OF KING JOHN

J C Holt

Our schedule is a tight one, and so without more ado I intend to plunge into the Constitutions of King John. They survive in a succinct form in a return to a royal writ of September 11th 1248 addressed to Drew de Barentin, Warden of the Islands of Jersey and Guernsey, enquiring about the customs of the Islands and laws laid down by King John. The return is C145/22 in the National Archives at Kew; it is in a poor state much blackened by applications of gall. I have dealt with the palaeography and diplomatic genesis of the document elsewhere, in the Joan Stevens Memorial lecture 2004, where they are accompanied by photographs, and I shall not trouble you further with these matters. Sufficient to say that we are dealing with an official document, the product of the Bailiff's office, providing us with the first known surviving example of a Channel Islands' official hand.

Our document begins with the customs of Guernsey, which make up most of the whole. Then a space, and then the title – *Constitutiones et provisiones constitute per dominum Johannem regem postquam Normannia alienate fuit*. It is usually assumed that the title applies to the whole of the rest of the document, but that is not so. At the end of the fifth line it changes gear – *Insuper constitutum fuit* – ‘later it was laid down’ and goes on to deal with a levy on foreign ships. This too belongs to John's reign for it ends by stating that after the King's death the levy was reduced at the request of Philip d'Aubigny who was warden from 1217 to 1221. Nevertheless the addition is distinct from the constitutions proper. The rest of the document concerns levies of various kinds, and regulations of the Islands' most important export, fish, especially eels. It is these last sections which were subject to amendment on into the fourteenth century and later. So for the original constitutions of King John we must confine our attention to the first five lines, approximately a quarter of the whole document as it survived in the middle of the thirteenth century.

Before turning to the content, two preliminary questions: What were Constitutions? The term is rare in the Anglo-French world; it is more appropriate to Imperial decrees or papal mandates. In fact there is only one obvious precedent – the Constitutions of Clarendon of 1164 in which Henry II

attempted to regulate his relationship with the church in England. We have all been brought up on the Constitutions of Clarendon. But in fact the label is false; they were originally a 'record' or 'recognition' made in the presence of King Henry of the 'customs, liberties and dignities' enjoyed by his ancestors. 'Constitutions' stems from a marginal entry in the earliest manuscript version written in 1176, made by a clerk seeking to tar them with the brush of authoritarian novelty. The comparison is fitting; our 'Constitutions' were made without formal consultation; they were imposed; and 'constitutions' constituted something. They provide us with an early, if not the first example of the special relationship between Crown and Channel Islands.

The second question concerns King John. Was he up to it? My answer is a firm 'yes'. Under King Richard the Lionheart (1189-99) John had been Lord of the Islands as well as count of Mortain. How much experience he gained on the spot is open to speculation. What is not a matter of speculation is his training as a boy. He spent the first five years of his life at the great Angevin monastery of Fontevrault; then, as was customary, responsibility passed from mother to father, a move accelerated by Eleanor of Aquitaine's decision to support the rebellion of her sons. King Henry decided to place young John in the hands of Ranulf Glanvill. So at a critical stage in his life John and Ranulf travelled the length and breadth of the country together, John riding his first pony, then advancing rapidly to a palfrey. What an education! Henry had chosen well. And in 1203 – this mattered. In the spring of 1204 Normandy was overrun by King Philip of France. The old Norman Exchequer at Caen ceased to function; a devoted clerk took the last of the Exchequer records across to Portsmouth. Now the Exchequer had been not only the centre of account but also the issuing office of all the writs originating civil litigation. I don't imagine that the people of the Channel Islands suffered much from the cessation of account, but the failure of the issuing office was a different matter. The tap of Justice had been turned off, and if it was not turned on again, litigants would turn elsewhere, to the feudal courts of lay and ecclesiastical lords (and the bishop of Coutances showed himself ready enough to respond), to the royal court of France, or perhaps merely to self-help. It was this crisis which the Constitutions of King John were designed to meet.

They contained three main provisions. First, there were to be twelve coroners (*coronatores*) sworn to keep the pleas and rights of the Crown. Second, the Bailiff, in view of the coroners, was empowered to deal with the petty assizes (to use our modern term) 'without writ'. Finally the ports of the islands were to be well guarded and *custodes* appointed to prevent damage to the royal interest.

The third may be discarded as irrelevant to our present purpose. It is sufficient to note that it amounted to a transfer to the Islands of the customs

system which John developed for the English ports in the course of 1203-4, which was announced in a writ of June 4th, 1204 and for which accounts were presented in the Pipe Roll of that year. The additions to Constitutions show that in the Islands it was amended and adjusted to circumstances in the years following 1204. These constitute the malleable element in the tradition of the Constitutions. The first two are a different matter, for they left a permanent mark on the development of the Islands.

Coroners were introduced almost casually into the government of England in the judicial eyre of 1195 – three knights and a clerk in every county to keep the pleas of the Crown. With somewhat restricted duties they survive to the present day, concerning themselves chiefly with unexplained deaths and treasure trove; in such cases they remain formidable. In Jersey the office developed along different lines. From the start they were associated with the Bailiff in judging the petty assizes. They were not themselves judges, but what the Bailiff decided had to be done in their sight. The nearest analogy I can think of is provided by courts martial as they were at the end of the Second World War: the court was made up of two serving officers and a representative of the Judge Advocate General. What the JAG said determined a case, but he acted in the view of the two serving officers. So it was, or must have been, with the *coronatores jurati* of the Constitutions. They were at once a support and control of the Bailiff. He might act without them, but, if he did, he might well find that he would have to justify his actions before the King's justices of assize. In the main, we may suppose that they worked together. It is a great mistake to recreate history from the record of iniquity.

The *coronatores* present some minor problems. The Constitutions state the number as twelve, which coincides with the number of the Jersey parishes. I doubt whether this means anything other than the use of a Jersey version as a source of the return. The office of Jurat, as it became, was not restricted to a particular parish; he was a choice of the whole Island, or rather he was nominated for the whole Island. And in using the term Jurat I have advanced by more than a century. The *coronatores* of our document did not yet enjoy that status; in reinforcing the Bailiff they nevertheless played an important, indeed an essential, role.

That role was to support the Bailiff in his new extended jurisdiction. We cannot estimate the number of actions of novel *disseisin* and *mort d'ancestor* which came his way. Cases of dower were probably more plentiful, cases of pledged fees more plentiful still, and widows' pleas for the restitution of alienations from their property by their husbands perhaps most frequent of all. A wide variety of civil actions had been placed in the Bailiff's hands, indeed probably a high proportion of all actions involving property and family. His powers were further extended in 1219 with the inclusion of land of less than

half a knight's fee in the procedure without writ. The effect was to create an independent court, a royal court still, but one peculiar to the Islands.

There can be little doubt that in instituting these arrangements King John was simply moved by common sense. For islanders to seek a writ in Caen was perhaps a little inconvenient. To be required to seek one in Westminster would have been an awesome burden, one so heavy and impractical as to undermine all sensible procedure. So his answer was to abandon the writ altogether.

Administratively it was a sensible move. Politically it was a very clever one for the new system provided a service to the men of Jersey which the French were unlikely to match. It attached them to the old Angevin regime. But only in certain respects. Once the Angevin writ was abandoned, the law which went with it was weakened. Lawyers and litigants looked around for the roots of their laws and customs, and quickly settled for the customs of Normandy and soon for the great text of those laws and customs, the *Grand Coutumier*. So Jersey ended with a Royal Court, the Bailiff's court, administering customary law, Norman law, and so, in many ways, it has remained.

POSTSCRIPT

I have consistently referred to the senior officer of the Crown in Jersey as the Bailiff. In fact 'warden' would be more appropriate for the early thirteenth century. But the terms were interchangeable; in 1247–8 Drew de Barentin himself was addressed as bailiff then as warden. I chose bailiff, unless warden was specified, because he became the resident officer of the Crown, as against the warden who usually had interests elsewhere. The matter is fully discussed in *Jersey 1204*.

I have concentrated on Jersey with little mention of Guernsey. This is what I was invited to do; and in any case, what I have said about the one applies with little change of detail to the other. But Guernsey may look neglected and in this circumstance it is a special pleasure to put on record my thanks for the gift by the Guernsey Bar, made after my lecture, of their new edition of John Le Patourel's *The Medieval Administration of the Channel Islands 1199–1399*.

In informal discussion following my lecture it was suggested that an earlier version of the constitutions was linked to the return of the customs of Guernsey printed by Sir Havilland de Sausmarez, *Extentes of Guernsey of 1248 and 1331 and other documents relating ancient usages and customs in that Island* (1934). This derives in turn from the submission of Colonel Thomas de Havilland, Jurat of the Royal Court of Guernsey, to Commissioners enquiring into the state of the Criminal Law in the Channel Islands in 1846. But he too relied on our present document. There was no other.

THE DEVELOPMENT OF CONSTITUTIONAL AUTONOMY DURING THE NINETEENTH CENTURY

J G Le Quesne

In the middle of the 19th century there was a constitutional crisis in Jersey. It arose from three causes. First, there were conspicuous, even scandalous, defects of the Jersey legal system. Secondly, there were people who were determined to remedy those defects. They included the Home Office and certain politicians in England, and in Jersey, and a body of reformers, many of them, but by no means all, English residents, led and incited at every stage by Abraham Jones Le Cras. Thirdly, there were the Royal Court and the States, determined not to submit to any dictation from England but, I am afraid, equally determined to make no change themselves unless it was forced on them.

I have described elsewhere¹ the course of the struggle between 1846 and 1866, so I will only summarise that here. The principal objects of the reformers were these:

- (a) the replacement of the Jurats in the Royal Court by permanent professional judges;
- (b) the establishment of a Police Court;
- (c) the establishment of a Petty Debts Court;
- (d) the establishment of a paid police force in St. Helier;
- (e) the reform of the archaic procedure of the Royal Court for criminal trials.

The first report of the Royal Commissioners, delivered in July, 1847², recommended action on all these points except (c). (Those Commissioners were charged only with enquiring into the criminal law and tribunals executing it.) After four and a half years of argument and procrastination the States had taken no action on any of these points. In February, 1852 three Orders in Council were made, establishing respectively a Police Court, a Petty

¹ *Jersey and Whitehall in the mid-nineteenth century*, Jersey, Société Jersiaise, 1992.

² *First Report of the Commissioners appointed to inquire into the State of the Criminal Law in the Channel Islands*. 1847.

Debts Court and a police force for the town. The Royal Court refused to register these Orders, and the States presented a petition to Her Majesty in Council claiming that they were an infringement of their rights and privileges, and that the Crown had no right of legislation in Jersey without the assent of the States. This petition was referred to the Committee for the affairs of Guernsey and Jersey. After hearing argument for and against the validity of the Orders in Council, the Committee reported on the 3rd December, 1853 that:

“although [the Orders in Council] appear to their Lordships in their main provisions well calculated to improve the administration of justice in Jersey, yet, as serious doubts exist whether the establishment of such provisions by your Majesty’s prerogative without the assent of the States of Jersey is consistent with the constitutional rights of the Island,…”

the Orders should be revoked.³

While awaiting the hearing of their petition against the Orders in Council, the States had evidently resolved that discretion was the better part of valour. In August, 1852 they passed six Acts which, among other objects, established a Police Court, a Petty Debts Court and a town police force, but omitted some of the features most obnoxious to the States of the provisions on those points of the Orders in Council. These Acts were considered at the same hearing as the Orders. The Committee reported that the Acts, although leaving something to be desired, might be given the Royal assent.⁴

Three of the principal objects of the reforms were thus achieved to a substantial extent (and the differences on these points between the Acts and the Orders were greatly reduced by subsequent legislation of the States). Criminal procedure was at last reformed, after years of argument and delay, by the *Loi réglant la procédure criminelle* in 1864. There remained the question of the constitution of the Royal Court.

The Home Secretary was pressed by Members of Parliament to do something about this. In 1859 a second Royal Commission was appointed, this time to inquire into the civil, municipal and ecclesiastical laws of Jersey. It reported the next year.⁵ Among its recommendations was a repetition of that of the former Commissioners, that in the Royal Court the Jurats should be replaced by three permanent professional judges. The States were adamant in refusing to adopt this. In 1861, a private Member introduced a bill into Parliament to change the composition of the Royal Court. This bill came up

³ 1 Moo. PC 185, 262; 8 St. Tr. (N.S.) 285, 313.

⁴ *Ibid*

⁵ *Report of the Commissioners appointed to inquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey*, 1860.

for second reading on the 26th June.⁶ The Home Secretary asserted the power of Parliament to legislate for the Channel Islands (which was challenged only by one speaker in the debate), but suggested that there had not at that point been delay in implementing the Commission's report long enough to justify action by Parliament. The bill was withdrawn. An identical bill was introduced in 1864, and received a second reading, to which the Home Secretary said he did not object.⁷ Discussion went on between the Government and the States, and when the bill came up for third reading, the Home Secretary again urged delay; but he added that, if the reforms were not put into effect before the next Session of Parliament, the Government would not then offer any opposition to a similar bill.⁸ Upon this the bill was ultimately withdrawn.⁹ Faced with this threat, the States resolved to hold a plebiscite. Every ratepayer was asked whether he was in favour of substituting 'paid judges' for the Jurats in the Royal Court. The plebiscite was held on the 2nd January, 1865. 180 voted in favour of paid judges, 2298 against. No more was heard of reform of the Court by Parliament.

So ended 20 years of agitation. A number of local issues had been settled, and a number of steps forward taken in the development of the Jersey legal system. On the other hand, the great question of constitutional principle had not been settled. This was the question of the legislative authority of the Crown over Jersey. It was claimed in the United Kingdom that the Crown had power to legislate for Jersey by Order in Council, not only with the concurrence of the States (which was common practice and unobjectionable), but also, if necessary, without their concurrence and against their will. The decision of the Privy Council in 1853 had expressed 'serious doubts' about this. I shall try this afternoon to follow the story of this claim after 1853 up to the end of the century.

Those in Whitehall had not accepted the judgement of 1853 as putting an end to the claim to legislate for Jersey by Order in Council. As events were to show, they remained ready, if occasion demanded, to assert the claim again and act on it and to try to persuade the Privy Council that the doubts expressed in 1853 were unfounded. An unsigned minute written in 1892 on a Home Office file concerning the Prison Board case reads:

"It might be a good thing for the Crown to abandon any claim to legislate for the Island without the assent of the representative Assembly, but a very bad thing to do so as long as the constitution of the States remain as it is. It might

⁶ Hansard, 26th June, 1861, col. 1624.

⁷ Hansard, 6th April, 1864, col. 126.

⁸ Hansard, 22nd June, 1864, col. 126.

⁹ Hansard, 13th July, 1864, col. 1434.

lead to the concentration of authority in the hands of an oligarchy of a somewhat mediaeval type.”¹⁰

The leaders of the States were well aware of the attitude in Whitehall to the decision of 1853. Consequently they regarded with constant suspicion actions of the British authorities towards them, and were always ready to discern in those actions a preparation or an attempt to assert again the alleged right to legislate by Order in Council without the consent of the States.

In these circumstances renewal of the constitutional dispute was very likely. It was made yet more likely by a personal conflict. On the death of Sir Robert Marett in 1884, George Clement Bertram, then Attorney General, became Bailiff. (He became Sir George in 1885). His place as Attorney General was taken by the Solicitor General, William Henry Venables Vernon. Lord Coutanche said that Bertram and Vernon ‘seldom agreed’.¹¹ This was a considerable understatement. On the 1st January, 1895, the Permanent Under-Secretary of the Home Office, Sir Godfrey Lushington, wrote this minute:

“The truth is that the Bailiff and the Attorney General are and have for a long time been at war with each other. The Bailiff pushes the claims of Island against the Mother Country and his own authority as that of the Principal Magistrate of the Island. The Attorney General upholds the rights of the Crown and Crown Officers. These opposite views or tendencies would alone have produced personal antagonism, but there are causes of personal feud besides e.g. the Bailiff sentenced the Attorney General’s father-in-law to penal servitude and the trial was open to grave criticism. Both are able men. It seems to me that the Bailiff is arbitrary and vindictive, the Attorney General is thoroughly embittered and ready to make mischief. It might promote peace if the Attorney General could be removed by being offered some appointment in England – but on the other hand such removal would leave the Bailiff in sole possession, and what is objectionable in the insular mode of administering justice would become more confirmed than ever.”¹²

This may appear to be a balanced judgment, but in earlier years Lushington had made his own contribution to the bitterness of the conflict by strong partisanship of Vernon. He suggested at one point that Bertram had ‘richly deserved to be superseded’.¹³

The Home Office files are full of evidence that the personal rancour between Bertram and Vernon dominated their official relations. Differences

¹⁰ N.A. HO/45/9712/A51279, no. 59.

¹¹ *The Memoirs of Lord Coutanche*, compiled by HRS Pocock, London, 1975, at page 208

¹² N.A. HO/45/9892/D17586.

¹³ N.A. HO/45/9712/A51279, NO.36.

which with tact and delicacy could reasonably have been compromised were pushed into open conflict, and conflict was conducted with no restraint or sense of proportion.

The latent antagonism between Jersey and Whitehall burst into the open over the case of Marie Françoise Daniel at the end of 1889.¹⁴ She was a French woman known to the Jersey police. In 1888 she had been 'committed to prison ... for vagrancy and prostitution', had given birth to a child in prison and on conviction had been banished from Jersey for five years. In spite of this she managed to return, and on the 1st November, 1889 was convicted at the Criminal Assizes of having attempted to have carnal and unnatural knowledge of a dog; and the jury added that when making this attempt '*elle ne jouissait pas de ses facultés intellectuelles*'. The Court ordered, perfectly regularly, that she be kept in custody until there was an opportunity to send her wherever it might please Her Majesty to order, and the Greffier informed the Privy Council office of the order and asked what Her Majesty's pleasure would be. On the 1st December the Governor recommended to the Home Office, with the agreement of the Attorney General, that Daniel should be sent back to France and there discharged and handed over to the French authorities. The French consul, he added, thought this could be done. The view of the Home Office was that the discharge must be by Royal Warrant, so a Warrant was prepared, dated the 18th December, 1889 ordering the release of Daniel. It was despatched to the Governor on the 21st December, 'to be acted on as soon as the arrangements for the disposal of the convict lunatic can be carried out'.

At this point the actions of the Crown's representatives in Jersey, whether or not actually illegal, seem to me to have given the States just cause of complaint. We do not know when the Royal Warrant reached the Governor, but on the 27th December the gaoler of the prison told the Bailiff that the Viscount had told him the previous day that a Pardon for Daniel had been received and she was to be sent to France at 3am on the 30th. (In fact she was not sent then, because arrangements with France had not been completed.) No notice was given to the Bailiff.

On the 31st December there was a meeting of the Prison Board. The Governor, by his own account, at this meeting 'mentioned generally what was intended to be done' with Daniel, and said he held a 'dormant Commission' to act as soon as necessary arrangements with the French had been made. According to the States' representatives present, the Governor said he had been in correspondence with the Secretary of State and the French consul about the discharge of Daniel. The Constable of St. Helier (one of the States'

¹⁴ For the *Daniel* case, see N.A. HO 144/229/A50974.

representatives) then asked the Governor twice whether he held a pardon or other document, but received no answer. All agreed that the Bailiff then said that, if the Governor had any document ordering the discharge of Daniel, it would have to be registered in the Royal Court before execution. The Governor replied, by his own account, that he was advised that was not so, or, according to the States' representatives, that he would consult his usual advisers.

There followed an interval of ten days, during which, as we now know, arrangements were being completed with the French authorities. On Saturday, 11th January, 1890, some time after 8pm, a messenger from the Governor arrived at Sir George Bertram's house at Gorey. He bore a letter from the Governor telling the Bailiff that he had received a Royal Warrant for Daniel's discharge and intended to send her to St. Brieuc by ship sailing at 1am on Monday, 13th. The Bailiff wrote a reply, dating it precisely '11th January, 9pm, which he sent back by the Governor's messenger. In it he warned the Governor that if he discharged Daniel before the Warrant had been registered in the Royal Court he would be acting unconstitutionally.

The Governor postponed his action after receiving this letter, and asked the Bailiff for his authority for maintaining that the Warrant must be registered in Court before execution. The Bailiff replied on the 17th January, relying on the Code of 1771. On the 25th January, the Viscount, acting on the Governor's orders, went to the prison, showed the gaoler a copy of the Royal Warrant and demanded the immediate release of Daniel. The Gaoler showed the copy of the Warrant to the Bailiff, who then saw it for the first time. He ordered the Gaoler not to release Daniel unless the Warrant had first been presented to the Court for registration. The Gaoler accordingly refused the Viscount's demand. On the 31st January the Governor went himself to the prison, accompanied by the Attorney General, the Viscount and other officials. The turnkey was in charge, the Gaoler being absent. The Governor demanded the key. Daniel was released, and put in charge of a centenier. The next day she was put on a ship and taken to Granville.

I have described these proceedings at some length because of the light they cast on the attitudes of the Crown and the States and the atmosphere in which their dealings were carried on. The States complained to the Privy Council that the omission to present the Warrant for registration in the Royal Court prior to its execution was a violation of the laws, privileges and customs of Jersey. They asked that the matter be referred to the Judicial Committee and the States be permitted to be heard by counsel. It was referred, but to the Committee of the Council for the Affairs of Jersey and Guernsey, not to the Judicial Committee.

The States did not complain of the exercise of the Royal Prerogative by the

issue of the Warrant for Daniel's release. Their complaint was solely that the Warrant had been executed and Daniel released without presentation of the Warrant to the Court for registration. In support of this they relied on the Code of 1771. The shortcomings of this Code are well known to Jersey lawyers, and during the argument of the Daniel case Lord Esher described it as "the worst Code I ever saw".¹⁵ It is necessary, none the less, to say something of its provisions debated in this case.

After the corn riots in Jersey in 1769, a regiment was sent from England to restore order, under the command of Col. Bentinck. He won the confidence of the States, and did not confine himself to military action. Finding the law of Jersey hard to discover, he persuaded the States that it would be useful to draw up a code of the laws in force. A collection was accordingly made of rules of law on a large number of subjects, arranged alphabetically from *Ancrage* to *Vraics*. Many of these rules were derived from custom, many from *Règlements*, some from Acts of Parliament, some from Orders in Council. This collection was embodied in an Act of the States, and confirmed by an Order in Council of the 28th March, 1771.

Among the laws in the Code is the following based on an Order in Council of the 21st May, 1679:

(Translation)

".....no Orders, Warrants or Letters of any kind are to be executed in the Island without first having been presented to the Royal Court to be there registered and made public: and in case such Orders, Warrants or Letters are found to be contrary to the Charters and Privileges, and burdensome to the said Island, their registration, execution and publication may be suspended by the Court, until the case shall have been laid before His Majesty, and his pleasure thereon signified."¹⁶

It was on this that Sir George Bertram and the States relied.

However, the States had obtained the making of that Order at the time of an earlier conflict between them and the Governor. The Order prejudiced the Governor's interests on a point not relevant to this story. He complained that it had been made without his knowledge, and obtained the making of another Order in Council of the 17th December, 1679.¹⁷ This Order recalled the Order of the 21st May, and for the passage quoted above substituted the following:

¹⁵ *Notes of the Argument in the matter of the Petition of the States of Jersey dated the 5th April 1890*, Jersey, 1890, at page 108.

¹⁶ *A Code of Laws*, 2nd ed., Jersey, 1860, at pages 159 - 160.

¹⁷ *Prison Board case*, Crown Memo. App., No. 174. (For documents reproduced in the *Prison Board case*, references are given to the papers in that case, as for many readers they are more easily accessible than the National Archives.)

“That all Orders, Warrants or Letters relating to the public Justice of the said Island, either coming from Your Majesty or this Board, which are to be a Standing Rule for their proceedings, be registered in the Royal Court of the Island before they be put in Execution; And that there be a clause in every such Order, Warrant, or Letter, requiring the Registry thereof accordingly. Nevertheless, as to such other Warrants, fit to be executed without Registry, no registry shall be thereon Without Special Direction in that Behalf.”

This Order was not included in the Code of 1771.

The Crown submitted that the consequence of all this was that the Order of the 21st May, 1679 had been repealed and was included in the Code *per incuriam*, while the Order of the 17th December had never been repealed and remained in force. The States admitted that the December Order had repealed the May Order, but submitted that the Code had re-enacted the May Order and, by implication, repealed the December Order.

So the outcome, it seemed, would be the settlement of this issue, and the vindication as part of the law of Jersey of one or the other of the two Orders in Council of 1679. It will come as no surprise to anyone experienced in the ways of litigation that this was not to be.

The hearing took place in July, 1890. Since the reference had not been to the Judicial Committee, the tribunal consisted of three judges – the Lord Chancellor (Lord Halsbury), Lord Esher and Lord Herschell – and two Privy Councillors who, though both barristers, had had careers in politics – the Lord President (Lord Cranbrook) and Lord Cross. The two English Law Officers sat with them as Assessors.

So far as one can judge from the cold print of the transcript, it seems that in the argument about the Orders in Council of 1679 and the Code of 1771 counsel for the States did fairly well. Had the case turned on this point, they might have prevailed; but it did not. In the course of the hearing, another question gradually emerged. Even if the Order in Council of May, 1679, or so much of it as was included in the Code, was in force, was the Royal Warrant an Order, Warrant or Letter within the meaning of the Order in Council? If it was not, the status of that Order in Council was irrelevant and the foundation of the States’ argument was destroyed. In the argument of this point, counsel for the States soon found himself in great difficulty.

The decision of the Committee appeared in an Order in Council of the 12th January, 1891.¹⁸ They decided that, even if the Order in Council of May, 1679 was in force – which it was unnecessary to decide – it did not apply to the case, because the Royal Warrant was not within its intent and meaning, but ‘was of its own force binding up on the gaoler ... and it was the duty of

¹⁸ *Prison Board case.*, Crown Memo. App., no. 394.

the gaoler to give obedience to it A pardon by the Sovereign is an exercise of the Royal Prerogative which operates immediately and requires no further act to make it effectual'. The Committee did suggest, however, that if any such warrant were issued in the future to be observed in Jersey, it should be communicated to the Bailiff 'for the sole purpose of giving notice of Your Majesty's pleasure'. So intent were those in the Home Office not to yield an inch more than they were compelled that they actually obtained the opinion of the Law Officers on how they were to comply with this final suggestion.

The Crown's advisers were by no means ready to rest content with their success. Indeed, before this case was over they were preparing to offer to the States the provocation which was to lead to the next.

The *Daniel case* had given rise to some discussion of the control of the prison by the Jersey Prison Board. The Board was set up by an Order in Council of the 11th December 1837.¹⁹ At that time the condition of the prison was extremely unsatisfactory. Elizabeth Fry had herself visited Jersey.²⁰ She attended a meeting of the Prison Committee of the States, at which she -

“represented with great weight the urgency of a complete change in the system pursued in the Jersey Jail which instead of improving its inmates is peculiarly calculated to demoralize them”.

A plan was drawn up for the extension of the buildings of the prison, the improvement of its administration and the creation of a Prison Board to manage it. Execution of this plan was delayed by long argument between the States and the Home Secretary about liability for the general expenses of the prison and the composition of the Board. A stage was reached at which the Home Secretary maintained that the general expenses should be met each year by payment of £300 from the Crown revenues, £300 by the States and any excess over £600 by the States; the Board should consist of seven members, of whom the States should nominate three. The States maintained that any excess of the annual expenses over £600 should be borne equally by the Crown revenues and the States, and the States should appoint half the members of the Board. The Home Secretary, maintaining his proposal for payment of the annual expenses, then suggested that the Board should consist of six members, three of them nominated by the States; and to this the States agreed.²¹

The Order in Council of the 11th December, 1837 carried out this agreement. The Board was to consist of six members. Three were to be chosen by

¹⁹ *Prison Board case.*, Crown Further Memo., 2

²⁰ *Prison Board case.*, Crown Memo. App., Nos 456, 458, 465.

²¹ *Ibid.* nos. 490–498.

the States, of whom the Bailiff was to be one. The other three were to be the Governor, the Viscount (or his deputy) and one of the Receivers, chosen by Her Majesty. Three members were to make a quorum. No provision was made for a chairman, nor for any casting vote.

The Bailiff took the chair at the first meeting of the Board, and thereafter successive Bailiffs always took the chair when they were present. Assumption by the Bailiff of the style 'President of the Prison Board' occasionally caused irritation,²² but no objection to the Bailiff's chairmanship seems ever to have been made before the events now to be described.²³

On the 14th February, 1890, when Marie Françoise Daniel had just been removed to France and the Bailiff had informed the Lord President that the States wished to consult counsel in England about fresh steps which it might be necessary to take, the Governor wrote to the Home Office that the case of Daniel had 'shown the necessity for a revision' of the Order in Council of 1837. He enclosed with his letter a draft Order in Council, which would revoke the Order of 1837 and provide that the Crown would select one of the members of the Prison Board to be Chairman, the Chairman to have a second and casting vote if the Board should be equally divided.²⁴

On the 25th February, 1890 a meeting of the Prison Board took place. The Bailiff being absent, the Lieut-Bailiff attended in his place and took the chair. The Governor disputed the right of the Lieut-Bailiff to take the chair and claimed to take it himself, but the Lieut-Bailiff refused to yield. The Governor thereupon left, followed by the Viscount and the Receiver General. After this the Governor and the Receiver General ceased to attend meetings of the Board; the Viscount seems to have attended irregularly.²⁵

For the rest of the 1890 the business of the Board was carried on by the three members representing the States, and from time to time complaints of their proceedings were addressed by the Governor to Home Office. On the 24th February, 1891 a letter was written from the Privy Council office to the Bailiff, asking him whether he claimed to be President of the Board, and, if so, by what authority.²⁶ The Bailiff replied on the 14th March that successive Bailiffs or their deputies had presided a meetings of the Board ever since its formation, and frequently been addressed or described as President by the Home Office and former Governors.²⁷ The Governor expressed his comments on this in a long letter to the Home Office on the 5th April, 1891.²⁸

The Home Office now took strong and provocative action. The Permanent

²² N.A. HO 45/9714/A51279B.

²³ For the *Prison Board case*, see N.A. HO 45/9712/A51279, HO 45/9713/A5127A and HO 45/9714/A51279.

²⁴ *Prison Board case.*, Crown Memo. App., no 512.

²⁵ *Ib.*, No. 513.

²⁶ *Ib.*, No. 521.

²⁷ *Ib.*, No. 530.

²⁸ *Ib.*, No. 539.

Under-Secretary of the Home Office suggested to the Secretary of State on the 15th April, 1891 that a new Order in Council, 'explanatory' of that of 1837, should be made, under which the Governor would be chairman of the Board with a casting vote; and this new Order should not be shown to the States before it was made.²⁹ The Order in Council was made on the 23rd June, 1891.³⁰ It provided that the Governor should preside over any meeting of the Board at which he was present; in his absence, the Bailiff should preside; and in the absence of both, a member elected by those present. At all meetings the chairman for the time being was to have a second or casting vote. The Bailiff received this Order on the 2nd July.³¹

By making this Order, the Crown transformed what up to that point had been an acrimonious, but hardly a momentous, argument about the chairmanship of the Prison Board into a constitutional dispute of first rate importance. Because it was made not only without the assent of the States, but without any prior notice to them of what was intended, the Order flew in the face of the decision of the Committee for the Affairs of Jersey and Guernsey in 1853. The Committee had then decided that three Orders in Council made without the States' assent should be revoked, precisely because of serious doubts whether Orders made without that assent were constitutional. The Crown was trying to legislate in that way again. Unless the States were prepared to abandon what they had gained in 1853, they were bound to resist.

They did resist. On the 19th October, 1891 they addressed a Representation to the Queen in Council, asking that the Order in Council of the 23rd June, 1891 might be recalled and the States might be heard by the Committee for the Affairs of Jersey and Guernsey.³² In this Representation they submitted that the Order in Council of 1837 had been made with their assent and under it they became liable to contribute to the maintenance of the prison, so any modification of the Order equally required their assent. They also relied on the 'serious doubts' expressed in the decision of 1853. In due course the States lodged their Case in support of their Representation. The concluding Reasons for the Case included the following:

" ...

2. Because it never has been according to the rights and privileges of the Island, and is not now by virtue of the Code, competent to the Crown to legislate for the Island of Jersey without the assent of the States.

...

5. Because the said Order [of the 23rd June, 1891] is a departure from and

²⁹ N.A. HO 45/9712/A51279, no.22.

³⁰ *Prison Board case*, Crown Memo. App., No. 5.

³¹ *Ibid.*, No. 8.

³² *Prison Board case*, States Case App., no. 132.

violation of the terms upon which the States assented to the Prison Board [Order] of the 11th December, 1837.

...”

These two reasons set out what may be called respectively the wider and narrower grounds of the States' claim to the recall of the Order of the 23rd June, 1891.

Both sides proceeded to make preparations for the hearing on a scale unprecedented in Jersey. The Crown produced a Memorandum of 129 pages supported by an Appendix of 571 documents covering over 1200 pages. The Appendix to the States' case contained 132 documents. The documents ranged in date from 1130 to 1892. Most of these documents were not in the event useful to the Committee for whom they were prepared, but they have been, and still are, an invaluable resource for the historian of Jersey. It is unlikely that such a collection of local records would ever had been published but for the Jersey Prison Board dispute.

The case came on for hearing in May, 1894, before the Lord Chancellor (Lord Herschell), four other judges (Lords Selborne, Watson, Macnaghten and Morris), the Lord President³³ and two other non-judicial Privy Councillors (Lord Cross and Mr James Bryce). Half way through the first day, the Lord Chancellor said the Committee desired:

“that the question should first be completely argued whether the provisions of the Order of 1891 constitute a substantial departure from the arrangement embodied in the Order of 1837, and ought on that ground not to be sustained.”

This was an indication that the Committee thought the States might succeed on the narrower of their two grounds, so that it would be unnecessary to consider the wider ground. The argument of both sides on the narrower ground was accordingly completed, after which the Lord Chancellor said further argument was not required.

The Order in Council containing the Committee's decision was made on the 27th June, 1894. The Committee referred to the argument between the States and the Home Secretary in 1837, and the proposal of the Home Secretary that there should be seven members of the Prison Board, three to be chosen by the States. They went on:

“The proposition insisted on by the States was that one half of the members should be appointed by them and from their body, leaving it to the Secretary of

³³ So it is recorded at the head of the transcript; but at the time of the hearing on 23rd and 24th May, 1894) the Prime Minister, Lord Rosebery, also held the office of Lord President, and it seems unlikely that he should have devoted two days to sitting on this case. If he did, he contributed nothing to the discussion; for the transcript does not record a word spoken by him.

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State to determine the number of members that should form the Board. Ultimately the Secretary of State proposed that the States should nominate three members, one of the three to be the Bailiff, the remaining three being members *ex officio*, namely the Lieutenant-Governor, the *Vicomte* and one of the King's Receivers. The settlement of the controversy was accepted by the States, who afterwards passed the necessary Acts for providing the revenue which it was agreed the States should contribute for Prison purposes.

The Order in Council of December 11th, 1837 did not constitute any Chairman of the Prison Board, or give to the Chairman of the Board a casting vote. [The Order of June 23rd, 1891 provided] that whenever the Lieutenant-Governor of Jersey was present at any meeting of the Prison Board he should preside over such meeting, and further that as all meetings of the Prison Board the Chairman for the time being should have a second or casting vote.

In their Lordships' opinion this Order in Council materially altered the arrangement embodied in the Order in Council of December, 1837, on the basis of which the States agreed to pass, and passed the necessary Acts for making the financial contribution prescribed by that Order.

Their Lordships therefore think that the Order in Council of the 23rd June, 1891 ought not to be sustained....”

The decision of the Privy Council in 1853 had not dismissed the claim of the Crown to legislate for Jersey, in the exercise of the Royal prerogative, without the assent of the States, but had pronounced this claim to be subject to ‘serious doubts’. How far had the argument about this claim been advanced by the decisions in the cases of *Daniel* and the *Prison Board*?

The *Daniel* decision was ultimately irrelevant to this claim. The act of the Crown there in issue was not a legislative act but an exercise of the prerogative of mercy by Royal Warrant granting a pardon. The States did not challenge the power of the Crown to grant this pardon. Their objection was confined to the procedure adopted by the Crown by executing the warrant without prior presentation to the Royal Court for registration. For the necessity of registration the States relied on the Order in Council of May, 1679 as reproduced in the Code of 1771, providing that ‘*aucuns Ordres, Warrants, ou Lettres de quelque nature qu’ils soient*’ should be executed before such registration. The Crown argued that this Order was no longer in force, because it had been recalled by the Order of the 17th December, 1679. The decision of the Privy Council was merely an exercise in statutory interpretation; it was held that, even if the Order of May, 1679 remained in force, the Royal Warrant was not within its intent and meaning.

In the *Prison Board* case, the contentions of the parties did raise directly the

question of the right of the Crown to legislate for Jersey by the exercise of the Royal prerogative. The act of the Crown in issue was a legislative Order in Council, and the wider of the two grounds of the States' challenge was that the Crown had no right so to legislate for Jersey without their assent. However, the outcome resembled the outcome of the *Daniel* case. The Privy Council did not consider this wider ground, because they thought the States' narrower ground was decisive of the case, *viz* that the Order in Council of the 23rd June, 1891 'materially altered the arrangement embodied in the Order in Council of December, 1837', on the basis of which the States had been making ever since their agreed contribution to the expenses of the prison. The Privy Council's conclusion was that for this reason the Order in Council of the 23rd June, 1891 'ought not be sustained'.

So nothing was said about the right claimed by the Crown to legislate for Jersey by Order in Council without the assent of the States. The Privy Council's conclusion was that for this reason the Order in Council of the 23rd June, 1891 'ought not to be sustained'.

The Privy Council obviously thought that, if the States were right on their narrower ground, they must succeed whatever the position might be on the wider ground, *i.e.* even if the Crown did possess the right of legislation which it claimed. This prompts the question – if the Crown had the right to legislate by Order in Council without the assent of the States, why did that right not extend to the Order of the 23rd June, 1891? What was the ground upon which that Order, even if it was a departure from the arrangement of 1837, could be invalidated?

This question was not unnoticed at the hearing. It was discussed more than once between counsel, both for the States and for the Crown, and the Board. The following are extracts from the transcript:³⁴

MR HALDANE: ... I do propose to answer two questions which I will define presently, the one the question of legality and the other the question of constitutionality, which may be another thing. They are not quite the same. A court of law will take cognisance of the one and not of the other.

LORD WATSON: A court of law must give effect to the constitutional rights of the States, whatever they may be.

MR HALDANE: Your Lordships might, but a court would not take any notice of them.

THE EARL OF SELBORNE: The question might be whether it was so manifestly wrong that this tribunal ought to interfere.

MR HALDANE: Yes, that is what I meant by constitutionalities.

³⁴ The transcript of the hearing is often found bound with the papers prepared for the hearing.

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MR BRYCE: You said there was something which might be strictly within their power, but which was so opposed to the whole tenor and usage and spirit in which the relation of this country with the Island had been conducted, that in this Board sitting, not strictly as a law court, it would be held to be unconstitutional.

MR HALDANE: That is exactly it".³⁵
(p.17)

.....
"THE LORD CHANCELLOR: You pray that the Order may be recalled. Is the only ground on which it can be recalled that it is *ultra vires*, or may Her Majesty be advised to recall it, because having regard to the arrangement of 1837 and the money voted in pursuance of that arrangement ... having regard to that arrangement it ought not to have been done, would that be a ground on which Her Majesty could be advised by this Board to recall it?

MR HALDANE: I think so.

THE LORD CHANCELLOR: It is not a mere question of *ultra vires*.

MR HALDANE: No.

....

LORD WATSON: There may be something falling short of an absolute defect of legislative power. There may be reasons under which it would be an unconstitutional proceeding on the part of the British Sovereign to strain to a certain extent Her undoubted power.

MR HALDANE: Mr Lord, I shall call attention to certain precedents for that ...³⁶

.....

"THE EARL OF SELBORNE: The question you are arguing now is whether it is consistent with those Acts [*sc.* of the Crown and the States in 1837] and with the good faith which they imply that this Order should remain?

THE SOLICITOR GENERAL Let me assume for the sake of argument ... that it is within the law and within the usage of the constitution of Jersey for the Crown in Council to make an Order in Council *in adverso* as against the inhabitants of Jersey ... If that is so, my Lords, I can understand it being said that in a particular instance, notwithstanding the general power in law if a general power exists, that it becomes unconstitutional because it may be in violation of a compact that has been made before, or because it may be in other ways an abuse of the power, because I take it that an unconstitutional, as opposed to an illegal, Act means that it is an abuse of the legal power which is conferred."³⁷

³⁵ *Ibid* at page 17

³⁶ *Ibid* at pages 27–28

³⁷ *Ibid* at page 59

In the absence of a fully reasoned judgment, it may be perilous to infer from things said in the course of argument what the final view of the judges was. Nevertheless, in view of these extracts it seems clear in this case that both sides and the Board shared the view that if there was a general power in the Crown to legislate for Jersey without the assent of the States, an exercise of that power in circumstances amounting to bad faith or otherwise amounting to an abuse of the power might, although not illegal, be unconstitutional. In such a case a tribunal with power to do more than administer strictly the rules of law – and the Committee for the Affairs of Jersey and Guernsey was such a tribunal – might advise the Crown to cancel the exercise of the power.

After the case was over, Haldane, who had been leading counsel for the States, sent to the Bailiff a lengthy note of the argument he would have delivered on the wider of the States' two grounds of challenge to the Order. The States published this as a pamphlet, and it has now been reprinted. In it, Haldane wrote that the decision of the Privy Council in 1853 and the decision in this case made it very improbable that the Crown would ever again attempt to legislate for Jersey without the consent of the States.³⁸ Subsequent history to date has justified this prediction.

The legal power of Parliament to legislate for Jersey was never challenged in this period. On the contrary, it was expressly affirmed on behalf of the States both in the *Daniel* case³⁹ and in the *Prison Board* case.⁴⁰ Haldane repeated this view of the legal position, subject to considerations of constitutionality, in his note just mentioned.⁴¹

³⁸ R.B. Haldane, *Jersey Prison Board Case – Notes of Proposed Arguments* in (2001) 5 JL Review 254, at 269.

³⁹ *Notes of the Arguments*, see note 15 above, 10.

⁴⁰ P.B. transcript, 9.

⁴¹ (2001) 5 JL Rev. 254 at 256–7.

JUDICIAL AUTONOMY, HUMAN RIGHTS AND THE FUTURE OF THE BAILIFF

Andrew Le Sueur

THE MEANING OF JUDICIAL AUTONOMY

The development of judicial autonomy in Jersey can be understood in two distinct and different senses. First, it means the capacity of the Island's courts to develop rules of law and legal principles unimpeded by precedents set by judges sitting in courts in other legal systems. Smaller jurisdictions connected to larger ones are always anxious to avoid inappropriate influence through the importation of alien legal concepts and rules from a dominant neighbour. This can be seen, for example in the concerns about the relationship between Scots and English law which resulted in amendments to the Constitutional Reform Bill to ensure that if and when the new Supreme Court is established, its case law will not result in English (or "British") law diluting Scots law.

Judicial autonomy also has a second meaning: the basic constitutional principle that judges must be, and must demonstrably be seen to be, free of improper pressures from other public authorities, powerful groups in civil society, and individuals. Jersey, like the UK, has a proud tradition of judicial incorruptibility and a complete absence of party political influence in the courtroom. The European Court of Human Rights insists upon far more than that, however, when it requires there to be judicial independence and impartiality under the terms of article 6 of the European Convention on Human Rights.

A court must be independent. One aspect of this requirement is the constitutional arrangements which surround the judges of the court. As the European Court of Human Rights puts it: "regard must be had ... to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence".¹

A court must be impartial. Of course, this means that the judges must be free of subjective bias or personal prejudice. Moreover, the court "must be impartial

¹ *Findlay v UK* (1997) 24 EHRR 221.

from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect”.²

THE OFFICE OF BAILIFF

This short article is about judicial autonomy in this second sense, and considers the future of the office of Bailiff in the context of the Human Rights (Jersey) Law 2000 (“the 2000 Law”). The argument advanced is that the 2000 Law establishes a new constitutional relationship between the Royal Court and the States, and that judicial autonomy would be better promoted and protected if the office of Bailiff were reformed.

In proposing reform, there need be no implication that the current arrangements have served the island badly up to now. On the contrary, successive Bailiffs have exercised wise leadership in sometimes difficult times. The emotional attachment that many people in Jersey feel towards this ancient office also needs to be recognised. Jersey differentiates itself from the UK not so much through its culture or language, but by its distinct legal and political system at the centre of which lies the office of Bailiff. The context in which the office of Bailiff exists is however changing. The States Assembly is undergoing radical reforms, with a shift from government by committee to ministerial government. The coming into force of the 2000 Law will also have an important impact on the way people think about law and politics in Jersey.

By any measure, the current scope of the Bailiff’s office is broad.³ His judicial roles are as the chief judge of the Island, presiding over the Royal Court,⁴ and as *ex officio* president of the Jersey Court of Appeal.⁵ In relation to the States Assembly, the Bailiff:

- is the President – the presiding officer – keeping good order during debates and deciding questions of procedure;⁶
- has a casting vote in the exceptional situation where the vote of the elected members is tied;⁷
- has a right of dissent, the exercise of which has a suspensory power on the resolution in question;⁸

² Findlay.

³ See generally Departments of the Judiciary and the Legislature (Jersey) Law 1965; and Bailhache, *The cry for constitutional reform: a perspective from the office of Bailiff* (1999) 3 JL Review 1.

⁴ Royal Court (Jersey) Law 1948, as amended.

⁵ Court of Appeal (Jersey) Law 1961, Art 2.

⁶ States of Jersey Law 1966, Art 1; Standing Orders of the States of Jersey. For an unsuccessful challenge to the lawfulness of a decision by the Bailiff to suspend an elected member for misconduct, see *Syvret v Bailhache and Hamon* 1998 JLR 128.

⁷ States of Jersey Law 1966, Art 21.

⁸ States of Jersey Law 1966, Art 22 (“The Bailiff has power to enter his dissent to any resolution of the

- may issue a warrant compelling a person to produce papers and attend before a States committee of inquiry — a power that is apparently not subject to the challenge in the courts;⁹ and
- regulates access of the public and the news media to States' meetings.¹⁰

Importantly, the Bailiff is also the channel of communication between the Island Authorities and Her Majesty's Government, a function that is likely to look increasingly anachronistic with the coming of ministerial government to Jersey and the creation of the post of Chief Minister. The Bailiff also has power of control over public entertainment in Jersey, though in practice many such powers are now exercised by others.¹¹

In December 2000, the Clothier committee on reform of the machinery of government recommended that the Bailiff should cease to act as President of the States and as the principal link between the Island Authorities and (what is now) the Department for Constitutional Affairs. They reached the conclusion that the Bailiff

“... should be liberated to do what all Bailiffs of recent times have been especially qualified and trained to do, namely be the Island's Chief Justice. There was never a time when the volume, scope and complexity of litigation in the Royal Court of Jersey were more demanding than they are today.”¹²

Since the Clothier report, we can have a clearer view of the implications of the 2000 Law for the Island's machinery of government. The UK's Human Rights Act 1998, on which the Jersey Law is closely modelled, has been in force since October 2000, and we are able to appreciate more fully the constitutional implications of incorporating Convention rights into a domestic legal system.

SEPARATION OF POWERS?

Before proceeding further, it is necessary to consider two linked factors that might at first sight be thought to support the case for reform of the office of

States susceptible of implementation if he is of the opinion that the States are not competent to pass the resolution and, where the Bailiff exercises the power aforesaid, the resolution shall immediately be transmitted to Her Majesty and, in the meantime and unless the consent of Her Majesty is obtained thereto, the resolution shall be of no effect”).

⁹ States of Jersey Law 1966, Art 43, Art 55.

¹⁰ States of Jersey Law 1966, Art 39.

¹¹ See *e.g.* Entertainment on Public Roads (Jersey) Law 1985 (which nevertheless preserves the rights and powers of the Bailiff: Art 5).

¹² *Report of the Review Panel on the Machinery of Government in Jersey*, States of Jersey (2000), para 8.13.

Bailiff. These are (a) the idea that there is a constitutional principle of “separation of powers” applicable to Jersey and (b) that the European Court of Human Rights’ judgment in *McGonnell v UK* (relating to the office of Bailiff in Guernsey) in itself compels change.¹³

Reference in an abstract way to a constitutional doctrine of separation of powers is not helpful or relevant. The UK is not governed according to any notion of strict separation of powers and nor is Jersey. The historical position was explained somewhat colourfully in a report issued by the Council of Europe’s Parliamentary Assembly in a report in 2004 (urging reform of the office of Lord Chancellor):

“The unusual aspect of the Lord Chancellor’s position is widely recognised, both by opponents and partisans of the current system. Its existence is due to the specific conditions of the United Kingdom constitutional system, which has evolved over centuries without the beneficial modernisation introduced by the French Revolution, the effects of which were disseminated in the rest of Europe by Enlightenment thinking and the conquests of Napoleon.”¹⁴

Nor is it correct to suggest that article 6 of the European Convention on Human Rights dictates to Jersey (or any signatory state) that it must adopt any particular form of constitutional arrangements. As the Strasbourg court said in *McGonnell*, the Convention does not require a national system:

“to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case [*McGonnell*] does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey ...”¹⁵

In his concurring opinion, Sir John Laws (sitting as an *ad hoc* judge of the Court), made it clear that the violation of article 6 arose only because of the “coincidence of the Bailiff’s presidency over the States in 1990 [when the legislation governing Mr McGonnell’s planning appeal was adopted], and over the Royal Court in 1995” [when that legislation was applied in Mr McGonnell’s case]. Sir John said that “where there is no question of actual bias, our task under article 6(1) must be to determine whether the reasonable bystander – a fully informed layman who has no axe to grind – would on objective grounds fear that the Royal Court lacks independence and impartiality”.

¹³ (2000) 30 EHRR 289.

¹⁴ The Committee on Legal Affairs and Human Rights, *Office of the Lord Chancellor in the constitutional system of the United Kingdom*, Doc. 9798, 28 April 2003, Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group, para.12

¹⁵ (2000) 30 EHRR 289, para 51.

HUMAN RIGHTS (JERSEY) LAW 2000

My argument for change is that the 2000 Law places the Royal Court and the States in a new constitutional relationship.

Article 4 of the Law (like section 3 of the UK Human Rights Act 1998) places on the Jersey courts a new obligation when interpreting all other legislation, whether enacted before or after 2000. The new duty is: "So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights".

If the court cannot construe legislation in that way, then article 5 (like section 4 of the UK legislation) permits the court to make a "declaration of incompatibility". Such a declaration will not affect the validity, continuing operation or enforcement of the provision in question. The expectation is surely that the States will consider amending the offending provision though, unlike the UK Human Rights Act, the Jersey Law does not contain any specific procedural arrangements for doing this.

It is possible to identify three scenarios in which constraints are placed upon the Bailiff because of his dual position as chief judge and presiding officer of the States Assembly. The first pre-dates the 2000 Law but is central to the problem of achieving the objective appearance of judicial independence and impartiality.

THE MCGONNELL SCENARIO

In *McGonnell*, the European Court of Human Rights unanimously held there to be a breach of article 6 of the Convention. It stated that "the mere fact" that the Deputy Bailiff presided over the States when legislation was adopted is "capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of law in the case" the applicant's appeal which turned on that same legislation. "The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption" of the law.

Following the *McGonnell* case, the Bailiff (or Deputy Bailiff, as the case may be) must recuse himself from any court proceedings in which the principal legislation being interpreted and applied was adopted by the States Assembly at a time when he presided over it. The pragmatic response in both Guernsey and Jersey to comply with the requirements of this ruling has been for the Deputy Bailiff to sit as a judge in any case where the Bailiff was involved in the legislative process (and *vice versa*). The 2000 Law does not, of

course, alter the *McGonnell* principle. In two additional ways, however, the 2000 Law not only places constraints on the Bailiff – which may require him to recuse himself from presiding in one or other of the Royal Court and States in particular instances – but also, I argue, alters the constitution.

THE ROYAL COURT'S NEW INTERPRETATION DUTY

The second scenario relates to the new interpretation duty imposed on the Royal Court by article 4 of the 2000 Law. What in years gone past might have been an obvious, literal application of a clear legislative provision will in some cases now be a complex exercise, requiring some stretching of words, or a departure from previous interpretations (even of the Court of Appeal and Privy Council). Where Human Rights Law interpretation is called for, the Royal Court's role can no longer be portrayed as that of a servant of the States, ensuring that its legislative will is applied and implemented. The Royal Court will no longer simply be giving effect to the wishes of the States Assembly (as expressed in its most recent legislation), but will in a real sense be scrutinising legislation for its compliance with human rights norms. For the office of Bailiff to continue to straddle the Royal Court and the legislature in this new constitutional landscape requires justification, which I believe is difficult to find.

The task of making Jersey legislation compatible with Convention rights through article 4 interpretation is also likely to bring the Royal Court and the Bailiff into politically controversial waters. Cases may for example arise in the context of criminal procedure, housing law, the differential treatment of gay people, and the status in Jersey of children whose parents are not married to each other. It does not require much political foresight to imagine that on occasion elected members of the States and their constituents will not take kindly to some of the outcomes of the judicial innovation that article 4 requires of the Royal Court. Controversy is inevitable and may involve relatively recently adopted legislation.¹⁶ In the new constitutional landscape, it will be important for the Island's senior judges to be able to explain with clarity to the public what their role is under the 2000 Law. I do not believe that a continuing role for the Bailiff in the Island's legislature will assist with that task.

¹⁶ For analysis of some of the tensions that have arisen in the UK between ministers and judges, see A W Bradley, *The independence of the judiciary under threat?* [2003] Public Law 397.

DECLARATIONS OF INCOMPATIBILITY

The third scenario that presents difficulties for the office of Bailiff relates to declarations of incompatibility. If the experience in Jersey is similar to that of England, such declarations by the Royal Court will be relatively rare events.¹⁷ Many of the knotty problems will be dealt with instead by interpretation under article 4. When a declaration is made, the States ought to consider adopting legislation to amend the offending legislative provision, or to remove it from the statute book. Again, the issues at stake may be controversial.

INSTITUTIONAL DIALOGUE

The Human Rights (Jersey) Law – like the UK Human Rights Act 1998, the Canadian Charter of Rights and Freedoms and the Australian Capital Territory Human Rights Act 2004 – gives the final say on policy choices to the legislature, not to the courts. The notion of “democratic dialogue” has been developed to help explain the role of the courts and their interaction with the legislatures.¹⁸ In practical terms in Jersey, this captures the situation where a Royal Court judgment holds that a legislative provision is incompatible with a Convention right, and this is followed by a process of debate in the States, and the enactment of a new law that better respects the Convention right in question. This will be a new form of constitutionalism for the Island. If the Island’s lawyers and judges use Convention right arguments (as they should) as part and parcel of their analytical tool kit in advising clients and deciding cases, the Royal Court will have a far greater influence on law and important social choices – about matters such as respect for privacy and freedom of expression – than has been the case until now.

It is far from clear that the dual role of the Bailiff in the Royal Court and the States will assist in the institutional interactions envisaged by the Human Rights Law. Where a declaration of incompatibility has been made, legal questions may well be asked in States debates as to what the Royal Court meant in a judgment. The Attorney General, as the States’ legal adviser, is likely to have to offer guidance to members. For a member of the Royal Court – whether the Bailiff or the Deputy Bailiff – to preside over the States Assembly during such debates presents difficulties. Traditionally, courts explain their views of the law

¹⁷ For a list of cases in which declarations of incompatibility have been granted, see the appendix to Lord Steyn’s speech in *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

¹⁸ For an overview, see R Clayton QC, *Judicial deference and the ‘democratic dialogue’: the legitimacy of judicial intervention under the Human Rights Act 1998* [2004] Public Law 33.

only through judgments and not by statements outside the courtroom. From his position as the presiding officer, it will be inappropriate for the Bailiff (or Deputy Bailiff) to influence debate by restating or amplifying views expressed in the Royal Court.

The 2000 Law will have an impact far beyond the courtroom. Elected back-bench members of the States, ministers (in the new governmental machinery), and the legal advisers to the Crown are all going to need to engage in discussion about the impact of proposed legislation on Convention rights. In the UK Parliament, the Joint Committee on Human Rights plays an important role in drawing such matters to members' attention,¹⁹ and scrutiny is helped by the fact that the Commons and the Lords contain lawyers and human rights experts of distinction. The position is different in Jersey. At the time of writing, the States is without a single elected member from the legal professions, let alone with expertise in human rights law. The Attorney General's advice to members on questions relating to the compliance of proposed legislation with Convention rights assumes very significant importance in this context. Whatever scrutiny mechanisms are put in place by the States to identify whether proposed legislation or action infringes a Convention right (and whether that infringement might be justified in law by some pressing social need), the Bailiff will have to be a mere bystander during debates in the States' chamber. Under the *McGonnell* principle, his presence in the presiding officer's seat is, however, inevitably going to lead to his disqualification from deciding – as a judge – the issues being discussed should they materialise. In a small legal system where judicial expertise is in short supply – by reason of the small number of judges – this will strike many as a puzzling waste of resources.

CONCLUSION

The view expressed in this article is that office of Bailiff should be now be reformed to reflect the new constitutional relationship between the Royal Court and the States which was created by the Human Rights (Jersey) Law. The alternative of muddling through, with the Bailiff and Deputy Bailiff acting as presiding officer or judge in particular circumstances where the other is precluded from sitting by the requirements of *McGonnell*, may go some way to meeting Article 6 ECHR requirements, but does not reflect the changed constitutional role of the Island's judges that is implicit in the 2000 Law.

¹⁹ The importance and scale of the Joint Committee's work can be judged from its website at <http://www.parliament.uk>.

PANEL DISCUSSION: SESSION 3

Sir de Vic Carey, (Chairman)

SIR DE VIC CAREY: We have got about 10 minutes before tea. I am going to, as I always do over debates, be impartial in view of some of the matters that have been raised. I just add one comment, and this is not really relating to the speakers, but I was saying something in a speech I was giving on Tuesday to a body of people, distinguished people, on 1204 on the position of the Islands. One of the things I finished up by saying was that we have adopted the human rights legislation without giving any consideration as to how the Strasbourg jurisprudence is to be applied in a very, very small jurisdiction which Guernsey is. I think this is a problem. I am not offering any solutions, but I do think that if we do not have some recognition of our size and the way that we adapt our institutions to become compliant, we could just make ourselves ungovernable and the result would be that we would have to join a large country. But, anyway, that is not on any points of the speakers, so can we have some comments on any? We have got three very different contributions, and I am grateful to all three because I think they were all fascinating, all three points that came up. The first comment? Sir, Mr Stevens?

MR STEVENS: Could you not argue that, if the Bailiff made a declaration of incompatibility, he is the very person you do want in the States when it is considering amending legislation to explain why he came to this decision, provided of course that he does not vote or whatever? Why does presiding affect the democratic will of the people, which would be expressed presumably in the amending legislation?

PROFESSOR LE SUEUR: I think the answer to that is partly what you require your presiding officer to do. The presiding officer, to use a neutral term, is often called upon to make rulings on order and to decide matters of procedure. I think it is that which creates difficulties as much as the presence of the Bailiff in the presiding chair. You touch on, I think, one of the important difficulties that the UK has not faced yet in its discussions about abolishing the office of Lord Chancellor and removing the Law Lords from the House of Lords. We are very keen at the moment in dismantling or disag-

gregating rôles, feeling that someone should not be both a judge and a legislator or shouldn't be both a judge and a minister and so on, but we have not fully addressed the question of what channels of communication there needs to be between the courts and the politicians, and I think that is really a key challenge that exists in this country and also in Jersey.

SIR DE VIC CAREY: Any other contributions? Yes, Mr Southwell?

RICHARD SOUTHWELL QC: I would really like to make two comments. The first is that I think that the arguments that Professor Le Sueur has put forward are, with the greatest respect, somewhat overstated and I think the contrary can perfectly readily be argued, but, more important, for my part I have real concerns as to whether the *McGonell* case was correctly decided; and that leads one to a consideration of how far the European case law of the ECHR itself, the court, is to be followed rather than the very different approach which has been adopted both in Scottish and English cases by the House of Lords and the Privy Council. It is very different in many respects from the way in which the rather more Continental European court has proceeded, and I suspect that in both Jersey and Guernsey there will be as much reference to the English cases, where they are relevant, as there will be to the case law of the Strasbourg court.

SIR DE VIC CAREY: Thank you. Any other contribution? Yes, St John Robilliard, advocate?

ST JOHN ROBILLIARD: Thank you. St John Robilliard from Guernsey and this, again, is for Professor Le Sueur. We had an example in Guernsey this week of the *Jersey Fishermen's* case. We have one of the advocates present and we also have one of the judges present. The reason I mention that is that certainly in Guernsey over the years, where there has been a possible problem — and, of course, *McGonell* is a Guernsey case — we have the provision that the Bailiff who is sitting up there can appoint a Lieutenant Bailiff from outside the Island. Is it not a very radical move to remove the Jersey Bailiff when there could be an alternative procedure like that when the cases arise?

PROFESSOR LE SUEUR: Well, it is really a question of who you want to be your number one influential judge. If, in all the key cases relating to human rights matters, if my argument is accepted, the Bailiff will be in difficulties in sitting in a case and some Lieutenant Bailiff is brought in, I think that would be a shame.

Panel Discussion: Session 3

ST JOHN ROBILLIARD: It might be that these cases will go to the Courts of Appeal anyway. They are the sort of cases which tend to. Again, to take another Guernsey example, the issue of judicial review, which was the title of your talk, we tended to think we didn't have judicial review in Guernsey until a Court of Appeal decision overruled some Royal Court decisions back in the 1990s. Is it not likely that in Jersey as well, any major case like this will end up with our friends in the Court of Appeal?

PROFESSOR LE SUEUR: That may well be so. Jersey is in some senses in a similar position to the Scottish legal system and Scottish law, inasmuch as the further up the appellate chain you go, the fewer people there are who have the training in Jersey law and also a knowledge of the Islands, but I take the point you make.

GORDON DAWES: There is perhaps another point, which is the usefulness of having the senior judge in each of the Islands being the presiding officer of the Assembly. Who would play that rôle apart from that and have such training and ability to organise and supervise such a body?

PROFESSOR LE SUEUR: I would simply point out that most Parliamentary chambers around the world manage to find someone who is not also the senior judge to be their presiding officer.

MALE SPEAKER: ... (indistinct) ...

SIR DE VIC CAREY: Any other contribution? Yes?

DAVID VAUGHAN: Can I ask Sir James Holt a question? The Bailiff was to decide the petty assizes, as it were, the little assizes. Who decided the big assizes or the appeals or what-have-you?

SIR JAMES HOLT: The grand assize?

DAVID VAUGHAN: The grand assize.

SIR JAMES HOLT: That would still go to London.

DAVID VAUGHAN: That was?

SIR JAMES HOLT: The grand assize would still go to London, but there were very few actions of that kind.

Panel Discussion: Session 3

DAVID VAUGHAN: So that went to London?

SIR JAMES HOLT: Yes.

DAVID VAUGHAN: Yes, and he just did the small assize, the petty assize?

SIR JAMES HOLT: Yes, but he is dealing with most legal actions which arise. The number of cases of grand assize that go to London could be counted on the fingers of one hand in the thirteenth century.

DAVID VAUGHAN: And was there an appeal system at all or not then?

SIR JAMES HOLT: Well, it was a very, very political form of appeal. You had to wait upon the visits of the judges of assize, which occurred at infrequent intervals, and then they might refer it to the Council in London. Does that help?

DAVID VAUGHAN: Yes.

SIR JAMES HOLT: That deals with your point.

SIR DE VIC CAREY: And Senator Ozouf?

SENATOR PHILIP OZOUF: I offer no fixed view on the rôle of the conflict of Bailiff, but I wonder whether Professor Le Sueur could comment on whether or not he believes there is a potential set of arguments about the conflict in the position of the Attorney General?

PROFESSOR LE SUEUR: In the published version of my paper I may well offer some comments on that. I decided I needed to do some further research and reflect on it before saying anything about it, so that is why I didn't raise it this afternoon.

SIR DE VIC CAREY: Wait and see. Any other contribution? I think that looks like tea time now, unless anyone else wants to come in. Thank you very much. We will gather again at four o'clock for the last session, so if you could be back promptly, please? [Applause]

JERSEY'S CHANGING CONSTITUTIONAL RELATIONSHIP WITH EUROPE

Alastair Sutton

INTRODUCTION

Jersey, with Guernsey, is the closest part of the British Isles to Continental Europe. The celebration of 800 years of independent legal tradition underlines the close and continuing links between Jersey law and both the common and civil law traditions, respectively of England and Europe. Jersey law thrives, perhaps more than any other legal system in Europe, on a comparative approach, drawing *inter alia* on the Roman, Norman, French, English, Scots, South African and Commonwealth legal systems.¹ Although the English common law and lawyers (as well as their Scottish counterparts) have made a remarkable contribution to the law of European integration over the last 31 years since UK membership of the European Community, it is interesting to speculate on the effect which Channel Islands law and lawyers might have had on European law – and vice versa – if Jersey (and Guernsey) had joined the EC with the UK in 1973.²

In practice, the strong desire for political autonomy combined with a measure of antipathy towards the integrationist tendencies in continental Europe have tended to isolate Jersey from the emerging EU legal order. In this respect, the “constitutional” link with the EU provided by Protocol 3 to the UK Act of Accession, has acted (as indeed was intended) as a barrier to the extensive incorporation of European law into Insular law. The main purpose of this paper is to take stock of Jersey’s current legal relationship with the European Union against the background of developments on both sides over the last three decades. Protocol 3 is naturally the key element in this analysis.

At this crucial point, not only in Jersey’s history, but also in the process of integration in Europe and constitutional change in the UK, I have however taken the opportunity to describe in some detail:

¹ See Southwell *Citation from other legal systems*, (2004) 8 JL Review 66 and Nicolle *The Origin and Development of Channel Islands law*.

² The widely-acknowledged influence of UK judges and advocates-general (as well as members of the English and Scottish Bars) in the European Courts is in sharp contrast to the perceived political contribution of the UK to European integration more generally.

- (a) The scope of Jersey's current legal relationship with the EU under Protocol 3 and the technical adaptations made in the recent inter-governmental conference (IGC);
- (b) The way in which Jersey's relationship with Europe has evolved in practice over the last 31 years since UK accession to the European Communities;
- (c) The impact on this relationship of the legal and political changes now taking place in Europe, in the UK and in Jersey itself;
- (d) The main areas of European law and policy (the *acquis communautaire*) which – it seems to me – are of critical concern to Jersey both now and in the future, whether directly under the Protocol or (more probably) indirectly outside the formal legal relationship;
- (e) The way other comparable and sometimes competing jurisdictions are addressing their own relationship with the EU;
- (f) Possible lessons to be learned, in particular as a result of the recent negotiations on the EU's "tax package", for Jersey's external relations, including the constitutional relationship with the UK.

This paper is based not only on my sixteen years experience as a European civil servant in the Commission (1973-1989), but also on fifteen years service as Jersey's Brussels adviser on European law and policy (1989-2004).

A number of general observations may be appropriate at the outset. It is particularly apt, in my view, to conduct a review of Jersey's legal relations with Europe since 1973 in the context of a conference which deals with 800 years of Channel Islands law. The longer and wider perspective highlights both continuity and change, not only in Jersey itself but also in Europe and in the UK where Jersey retains a proud connection to the Crown. However, the increasingly rapid pace of change (particularly economic and technological but also political) makes it vital constantly to review old assumptions in order to check their relevance in today's world. Such "reality checks" are, it is submitted, vital not only in small and vulnerable jurisdictions such as Jersey, but also in the UK and in the EU itself.³

It is of course significant that constitutional review, with the possibility (even probability) of change, is currently underway not only in Jersey, but also in the UK itself and in the EU, with a Treaty establishing a Constitution for Europe subject to referenda and ultimate ratification in the 25 Member States. The starting point for this paper must therefore be to note briefly the

³ As is discussed in detail below, most other comparable jurisdictions are also reviewing their own relations with the EU against the background of the extraordinary developments of the last 10 years, in particular the increasing tendency of the EU to seek the extraterritorial application of its laws and policies (the *acquis communautaire*). The recent experience of the EU's European neighbours, including Jersey, with the "tax package" was fundamental in this respect.

changes which are currently in train in all these jurisdictions. It will then be possible, against this evolving background, to take stock of Jersey's relationship today with the European Community under Protocol 3 and then to examine how this might evolve in the future.

THE CONTINUOUS PROCESS OF EUROPEAN
INTEGRATION – WIDENING AND DEEPENING TOWARDS A
CONSTITUTIONAL EUROPE

The modern Europe, epitomised by political, economic and legal integration through the European Union, has its origins in centuries of increasingly devastating international conflicts from which the Channel Islands were not immune. The last 60 years of European integration flow directly from the ashes of the Second World War, in which the Channel Islands – uniquely in the UK – suffered German occupation for five years. Future historians may wonder that the Channel Islands – which still today carry the memories and even the physical manifestations of military occupation – voluntarily chose to distance themselves from a political process designed to banish such “internecine” conflict from Europe. It may be that the choice was made (and is still made today) against the background of a profound misconception of the political, economic, cultural and legal realities of European integration – a misconception which is still to a certain extent encouraged and exacerbated by public opinion on “Europe” (including the mass media) in the United Kingdom.

In this respect it is vital that Jersey's constitutional and international future be decided on the basis of an objective factual analysis including a comparative study of other jurisdictions in a comparable situation. Above all, due account must be taken of trends (in the UK and Europe) towards devolution and decentralisation, as well as integration.⁴

After the Second World War, European politicians agreed that peace and prosperity should be approached through economic cooperation. Opinion differed as to the legal and political form for such cooperation: six countries opted for the closer form of integration in a customs union comprising the ECSC, EEC and Euratom, whilst seven elected to form the European Free Trade Association (EFTA). Experience has demonstrated the attraction of the

⁴ The reinforcement of the subsidiarity concept and the delimitation of competences in the European Constitution provide concrete evidence of a desire at the highest political level in all Member States to ensure a proper balance between action taken at the European, regional, national and local levels. This is *not* (as is sometimes portrayed in the UK media) uniquely a British matter; the need for local control over issues best decided locally is equally strong, if not more so, in countries which are strongly committed to European integration such as Belgium, Germany and Spain.

former model, which now claims 25 Member States, with over 100 more worldwide in some form of preferential relationship with the EU based in large measure on the *acquis communautaire*. Five enlargement negotiations and five inter-governmental conferences have seen the customs union transformed into the European Union, with a Constitution awaiting ratification by the Member States. A significant number of States wait in the wings for Union membership, some of which (e.g. Turkey) could transform the current “personality” of the Union both internally and in the world.⁵

Meanwhile, the looser form of integration represented by the free-trade model (in which members preserve their external autonomy) has almost disappeared in Europe, except as a transitional measure towards EU membership. Thus, Switzerland is the only State left as a member of EFTA;⁶ only Norway, Iceland and Liechtenstein remain as parties to the European Economic Area (EEA) Agreement. The Europe Agreements, concluded by the EU with all former Warsaw Pact countries as a preparation for EU membership contained free trade obligations set in a comprehensive framework for the adoption of the *acquis communautaire* in its totality.

The unique supranational character of the Union is reflected by law which is directly applicable in national legal orders, superior to conflicting rules of national law and which provides a basis for state liability in favour of European citizens. Crucially, the Union is endowed with legal personality, both internally and externally, and with common institutions which are independent of the Member States. This is the hallmark of supra-nationality. Perhaps the most important of these institutions is the European Court of Justice (ECJ) which has not only developed the fundamental principles of “constitutional” law which uniquely distinguish the EU from other international organisations, but which has – despite the formal limitations on its jurisdiction in Article 220 EC – developed a teleological approach in the interpretation of the founding Treaties, in sharp contrast to other international courts, such as the International Court of Justice (ICJ), in pursuit of economic integration.⁷

⁵ States which may reasonably expect to become EU Members within the next 10–15 years include Romania, Bulgaria, Turkey, Croatia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro, Kosovo and, possibly, Iceland and Norway. The possibility that the Swiss people (as well as their government) might one day vote to join the Union also cannot be excluded.

⁶ The EFTA Agreement of course continues to bind Switzerland to its former EFTA partners, although in the case of former EFTA States now members of the EU, account must be taken of the more than 100 bilateral agreements concluded by Switzerland with the EU.

⁷ Article 220 EC provides that the ECJ “shall ensure that in the interpretation and application of this Treaty the law is observed.” It has frequently been argued that, in interpreting and applying the law the ECJ has also significantly developed European law. There are no better examples of this tendency than the three fundamental principles mentioned above (direct effect, supremacy and state liability) which were established by the ECJ in *Van Gend en Loos*, Case 26/62, 1963; *Costa v ENEL*, Case C-6/64 and *Factortame*, Case C-213/89 [1990] ECR I-2433 and Case C-221/89 [1991] ECR I-3905.

In stark contrast, EFTA has, to all intents and purposes, ceased to exist.⁸ Today, all other European States and non-State jurisdictions define their international relations increasingly by reference to the European Union and its laws and policies. Despite Protocol 3, Jersey is probably no exception. For better or for worse, the EU has become both a legal model as well as an economic magnet for the European continent as a whole. The magnetism of the European economy (the biggest single market in the world) and the legal model afforded by the *acquis communautaire* impacts also on countries as diverse as Russia, South Africa, Mexico, Mercosur and the members of the Cotonou ACP Agreement through their Treaty relations with the EU. It is no surprise therefore that a jurisdiction such as Jersey, on the immediate periphery of the EU, finds itself caught up in this process.

A common theme in the debate on European integration (including in Jersey) is the extent to which power is centralised in federal or supranational institutions at the expense of the Member States. Whilst it is true that any Treaty obligations limit sovereignty (especially where supranational institutions are created by such Treaties), the assertion of an inexorable trend towards centralisation in the EU is exaggerated. It ignores an equally strong tendency – seen across Europe including the United Kingdom – towards regionalism, decentralisation and a fierce defence of local culture, language and political responsibility.⁹ Thus, the post-War history of integration in Europe is certainly dominated by economic and political integration under the EC and EU Treaties.¹⁰ On the other hand, particularly since the explicit recognition in the Maastricht Treaty (1992) of the concept of subsidiarity – the origin of which lay in the political criticisms of excessive centralisation within the EC – this trend has at least partially been reversed.

The conference for which this paper was prepared looked back on 800 years of Channel Islands law. Now, just after the installation of a new Commission on 1 November 2004, is an appropriate moment to “take the temperature” of European integration immediately after the fifth EU enlarge-

⁸ Only Switzerland of the original EFTA Member States remains bound, in its relations with the EU, to Norway and Iceland, by the EFTA Agreement.

⁹ This is reflected, both legally and politically, in the principle of subsidiarity enshrined in article 5 EC. It is nonetheless important to recall that, in contrast to the situation under public international law where treaties are interpreted so as to impose least restriction on national sovereignty, the EC/EU Treaties are founded on the integrationist premise of creating an “ever-closer union among the peoples of Europe”. (Preamble, EU Treaty).

¹⁰ In this paper, an attempt has been made to use the terms Community and Union in their legally correct sense. Thus, the EC is one of these “pillars” established at the Maastricht inter-governmental conference (IGC), whilst the EU is the over-arching institution embracing all these pillars. Under Protocol 3, Jersey is legally linked only to the EC (not the EU) and the Crown Dependencies are only legally affected by measures taken within the EC. Politically and practically however, Jersey is also affected by measures taken by the Union under the second and (especially) the third “pillars” of the EU Treaty.

ment. As this paper was being prepared for publication, the presentation of the new Commission to the Parliament for its approval was withdrawn by President Barroso. This reflects continuing political instability in the EU (particularly on fundamental moral or even religious issues), including at the inter-institutional level, with the Parliament continuing to assert increased power and control over the Commission.

It is tempting to look back on the decade from 1985 until 1995 which saw the creation of the Single Market and the laying of the legal foundations for the single currency as the “golden years” of European integration. It is popular, particularly but not exclusively in the UK, to play down the achievements of the last Commission under its President Romano Prodi. A closer examination reveals however that the last 5 years have been (in a sense, against all the odds) extraordinarily productive. It is submitted that the European legal developments in the last five years (particularly in areas such as financial services) are of crucial importance for Jersey and merit serious consideration in the context of the debate on Jersey’s constitutional future.

The changeover to the single currency was achieved, at least for twelve Member States, smoothly and on time. Despite widespread scepticism, an unprecedented expansion of the EU was achieved on time and in good order.¹¹ A Constitutional Treaty has been negotiated and concluded. Internally, the Commission (and to a lesser extent the other institutions) has carried out radical reforms of its administrative structure and practices.

Against this backdrop, the Prodi Commission set for itself in February 2002 major strategic objectives: to promote new forms of European governance; to bring political stability to the re-united European Continent and boost Europe’s voice in the world; to develop a new economic and social agenda; and to ensure a better quality of life for all. Despite the high-flown language setting out these objectives, a credible case can be made for their substantial achievement against the background of a particularly difficult global political and economic environment.

Above all, when taking stock of Jersey’s relationship with Europe over the last 30 years, it is important to note that the “European agenda” (and the pace at which it is being implemented) has completely changed compared with 1972. This alone appears to justify a fundamental re-evaluation of Jersey’s relationship with this process.

These cross currents in the tides of European integration make any analysis of the power-structure of today’s European Union a complex matter. As indicated above, much has changed in the last 30 years even if Protocol 3 has – at

¹¹ My own view is that the political success of enlargement and the pace at which it was achieved has masked many potential legal problems, particularly related to the accurate and complete implementation in the new Member States of EU secondary law.

least in the popular view – remained “frozen in aspic”. The role and influence of large Member States amongst each other and with smaller Member States, the influence on and interaction with the institutions (the Commission, the European Council, the Council of Ministers, European Parliament and European Courts) of the Member States, the inter-relationship of the institutions¹², the influence of external factors both on the EU institutions and on the Member States, and, finally, the influence of sub-State institutions, such as the regions, are all elements which require constant re-assessment.

Against this complex background, there is only one certainty: in the modern world, “pure” independence is a myth even for large sovereign States. There are merely different structures for sharing power (or “sovereignty”) with differing degrees in the extent to which power is shared between States themselves and between States and international institutions. In my view, Jersey’s international future must be decided against this kaleidoscopic background of change, rather than a stereotype of an irreversible trend towards ever closer integration leading to the creation of some mythical super-State along the lines of the United States of America.

CONSTITUTIONAL CHANGE AND DEVOLUTION IN THE UK

The evolution and shifting patterns of European integration have been matched by those in the United Kingdom. Although never a unitary State (since the Union with Scotland in 1706), the UK has – virtually since EU membership in 1973 – been preoccupied with a “constitutional” identity crisis. Elements of this phenomenon include the debate on the need for a written constitution, the separation of powers, the need for a Supreme Court, friction between the executive and judiciary (epitomised by the growth of judicial review) the extent of influence of “foreign” law such as the European Convention on Human Rights, EU law and public international law (especially as a result of the Iraq war), relations with the Commonwealth and the constitutional “structure” of the country following devolution, including the external dimension.

The Crown Dependencies and other UK overseas territories (notably in the Caribbean) have not been unaffected by this tide of constitutional change. Despite the formal constitutional responsibility of the UK for the defence and international relations of the Crown Dependencies, recent events (perhaps in particular the *de facto* elimination of national frontiers

¹² The continuing friction between the Commission and the Parliament is particularly important in this respect as is shown by the withdrawal of the first Barroso Commission from submission to the European Parliament, causing a politically and legally delicate hiatus in the EU’s activities.

and the “relativisation” of statehood and sovereignty) have demonstrated the need for the self-governing Crown Dependencies to acquire a measure of external autonomy comparable to that which they possess internally. It is not at all clear that the UK has the political will actively to defend the interests of the Crown Dependencies internationally even when these interests do not conflict with those of the UK. It is not obvious that the difficulties faced by the Crown Dependencies, particularly in their external relations, are fully understood in London.¹³ It should therefore allow these jurisdictions the necessary international personality to represent and defend their own interests, both bilaterally and with organisations such as the EU, OECD and even the UN.¹⁴ Such external autonomy is perfectly compatible with a continuing link with the Crown, as well as with the defence of the Islands through the UK armed forces and NATO. Today however, the separation between internal and external economic affairs has virtually disappeared, driven by technological developments such as e-commerce. Legal and political responsibilities and structures should reflect this reality not only for the Crown Dependencies but probably also other jurisdictions with substantial internal autonomy.

THE WINDS OF CHANGE IN THE CROWN DEPENDENCIES

In 1967, when discussions began in the Channel Islands on possible UK membership of the EC, two considerations were uppermost in the minds of Jersey and Guernsey politicians. First, there was the need to preserve the Islands’ traditional independence and, secondly, the need to ensure continued free access to European markets for Insular products, notably in the agricultural field. The economic and social changes in the Island over the last 35 years have transformed the situation, at least so far as the economic interests of the Islands are concerned.¹⁵ Today, both Jersey’s and Guernsey’s GDP rely predominantly on financial services supported by tourism and (only to a limited extent) exports of agricultural and horticultural products. The consequent growth in the Islands’ economies and level of prosperity has been accompanied by the internationalisation of their economies and of their economic interests. In recent years, this has been given added impetus by the

¹³ See, in this respect, the speech by the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer of Thoroton to the States of Jersey on 10 May 2004. The speech is available at the DCA website <http://www.dca.gov.UK/speeches/2004/lc100504.htm>.

¹⁴ These are clear precedents for the UK allowing its territories a considerable measure of freedom to defend their (sometimes conflicting) interests in international bodies. The case of Hong Kong in the GATT (later the WTO) is a case in point.

¹⁵ These developments and the current status and importance of Jersey’s finance industry are well described in the Edwards Report (November, 1998).

arrival of electronic commerce and the “information society”, which diminishes the importance of international frontiers and increases the role of trade in services as opposed to goods.¹⁶ Thus, the information society offers opportunities for economic growth to small jurisdictions, provided that the international legal structures exist (and that the small jurisdictions participate in them) to guarantee market access for the goods and services produced and marketed electronically.

The growth of trade in invisibles, in particular financial and related services, has offered opportunities for growth which are not dependent on the size of the jurisdiction in question. At the same time, particularly since the Thatcher/Reagan era, international economic relations have – in general terms – been dominated by deregulation, the removal of frontiers, a reduction of protectionism and increased competition not only between enterprises but between States and other “non-State” jurisdictions such as Jersey. This process has been accompanied by a rise in international crime and new demands being made on legislators, judges, law enforcement agencies such as police, tax authorities, customs, as well as sectoral regulators and supervisors, especially in the fiscal and financial services fields. The consequences of this process of “global deregulation” for the United States’ economy (including the role of “off shore” jurisdictions such as Jersey) were a central theme of the recent US Presidential election campaign.

More broadly, despite the increasing importance of international organisations such as the United Nations and its specialised agencies (including for the purposes of this paper the WTO), the EU and the United States have emerged as two competing “poles” from a regulatory standpoint: The economic and political power of the European Union have made it both a model (in regulatory terms) and a magnet in an economic sense, in part accounting for the increase in membership from 6 to 25 Member States over the past 30 years.¹⁷

European developments in the last five years on issues such as tax and international crime have highlighted, as never before, the fragility of Jersey’s status under UK constitutional law and, in terms of EU law, under Protocol 3. This paper and those presented by William Bailhache and Jeffrey Jowell at this conference underline the topicality of this issue. Jersey’s system of

¹⁶ The EU’s Lisbon strategy aims to create a competitive job-creating knowledge-based economy characterised by growth, social cohesion and respect for the environment.

¹⁷ Neutral States such as Sweden, Finland and Austria (not to mention Ireland) would not have joined the Union were it not for the “pulling power” of the Union’s institutions and their power in economic decision-making. These States, far from subscribing to a centralised view of European integration, could not accept a role of “second-class citizens” outside the Union, particularly as regards Single Market legislation. They preferred to have “a seat at the table” rather than being relegated to a form of dependency as a “second class European citizen”.

government has been subject to searching review and modifications as a result of the Clothier and Edwards reports,¹⁸ as well as by the International Monetary Fund (IMF).¹⁹ Although Jersey's system of government and governance (especially in the economic field) has generally been commended by these investigations, they have highlighted the fact that, almost irrespective of its formal legal status, Jersey – as a leading international financial centre – is unavoidably and inextricably affected by international disciplines irrespective of Jersey's own will on the matter and, to a certain extent, irrespective of the material scope of Protocol 3 or the constitutional relationship with the UK.

JERSEY'S RELATIONS WITH THE UK AND THE OTHER CROWN DEPENDENCIES

Formally (and at the risk of over-simplification) the constitutional relationship between Jersey and the UK is not based on any formal constitutional document and has developed mainly by convention over 800 years. Jersey enjoys virtually complete autonomy in its internal governance, whilst the UK is responsible for Jersey's international relations and defence. As Professor Jowell has made clear in his presentation at the Conference, any overriding powers possessed by the UK over Jersey's affairs fall within the residual Royal prerogative, including defence, foreign affairs and the maintenance of "good government." This latter concept now has an extremely restricted meaning and certainly does not permit intervention in Jersey's affairs merely to protect the policy interests of the UK.

Under public international law, the UK has responsibility for Jersey's international relations. However, it is settled constitutional practice that the UK will consult Jersey before binding Jersey to obligations in international law and will normally respect Jersey's wishes (implying obligatory prior consultation) and specify the territorial application of its international agreements. Neither the UK Crown nor Parliament require Jersey to conform to international "soft" law, such as the EU Code of Conduct on business taxation or the OECD measures in this area, especially when the matters in question (taxation) fall within Jersey's settled area of autonomy. The same is true, in my

¹⁸ The Clothier Report was commissioned in March 1999 to review all aspects of the machinery of government in Jersey, excluding however the constitutional relationships between the Bailiwick and the UK and the EC. The Report was published in December 2000. The Edwards report (published on 19 November 1998) reviewed financial regulation in the Crown Dependencies, including cooperation with overseas regulators, as well as financial crime and registered companies. It is discussed in some detail later in this paper.

¹⁹ www.imf.org <www.imf.org>

view, in areas of EU law (such as direct or indirect taxation) which clearly fall outside the Protocol. It is an interesting and unresolved question to what extent the UK possesses the power (notwithstanding Jersey's autonomy in virtually all areas of domestic policy) to take steps to ensure that Jersey respects its EU obligations under the Protocol,²⁰ for example in areas such as agricultural state aids or the free movement of goods.

One of the conclusions of this paper is that, in the interests of Jersey's continued political independence and stability – as well as its economic prosperity – it would now be appropriate for the UK to grant increased responsibility for international relations to Jersey, in those (mainly economic) areas where Jersey exercises internal autonomy. The present system whereby the UK issues “letters of entrustment” on a case-by-case basis appears to be inadequate. It lacks the continuity and legal certainty which are needed to provide Jersey's international partners (whether States or international organisation) with the guarantees that they need in dealing with Jersey's authorities. Thus, in my opinion, the lack of clarity regarding Jersey's legal status under the UK Constitution (though not under Protocol 3) was – at least initially – a cause of misunderstanding in the Council of Ministers, which the UK appears to have done little to correct during negotiations on the implementation of the tax on savings Directive (TOSD).

It may be that practice over recent years has led to a constitutional convention²¹ to the effect that Jersey now enjoys sufficient international personality at least to engage in direct relations with the EU institutions and Member States for example on tax and related matters such as financial services (*e.g.* for market access purposes) and international cooperation in matters involving economic crime (*e.g.* money-laundering). Whether such responsibility as has been ceded to Jersey, embraces formal treaty-making power (as opposed to less formal agreements, arrangements or commitments within the scope of its internal autonomous powers) is more doubtful. Necessarily, in the absence of a written constitution and a Supreme or Constitutional Court, all these matters are subjective and somewhat speculative. This is why it is essential that Jersey be clearly endowed by the UK with the essential degree of external authority in order properly to defend and enhance its current level of economic prosperity and that this be done in a way which is capable of being clearly recognised by Jersey's international partners around the world.

²⁰ As argued elsewhere in this paper, like other comparable parts of the EC Treaties, the Protocol is in effect part of UK constitutional law.

²¹ There appear to be no precise criteria under the UK Constitution to determine when practice has crystallised into a convention. It should however be noted that, in his speech to the States on 10 May 2004, Lord Falconer expressly recognised that “the TOSD bilateral agreement signed by Jersey would enable Jersey to deal bilaterally with other Member States...”

In contrast with Gibraltar and other overseas territories for which the Foreign and Commonwealth Office (FCO) is responsible, UK ministerial responsibility for the Crown Dependencies was transferred in 2001 from the Home Office to the Department of Constitutional Affairs (DCA),²² under the ministerial authority of the Secretary of State for Constitutional Affairs and Lord Chancellor. Despite the laudable efforts of DCA officials to strengthen working relations with all the Crown Dependencies, Jersey's international relations in recent years (for example on the sensitive issues at stake with the EU and the OECD) have not been helped by the complex chain of responsibility which currently exists on major policy issues within the UK Administration.

In his speech to the States on 10 May 2004, Lord Falconer accurately summarised the current situation, but – in my view – under-stated the difficulties arising in practice, not only when Jersey's interests diverge from those of the UK, but also as far as the external representation of Jersey's interests are concerned more generally. He said in that speech:

“The key issue to be addressed to get the balance right between my Department facilitating, supporting and encouraging bilateral links between Jersey and Whitehall Departments whilst ensuring we, that is the Department of Constitutional Affairs, are properly involved and participating in those matters where we can add value. The role for me and my team is to promote and support the interests of Jersey whilst not compromising the position of the UK Government²³... There will undoubtedly be times when Jersey's interests do not fit neatly with UK policies. On these occasions, we must ensure that we have viable speedy channels of communications in place – and mechanisms to manage those situations in a mature, constructive and sensible way.”²⁴

Formal communications between Jersey and London must pass – in Jersey – through the Lieutenant Governor and the Bailiff on their way to the relevant administrative department. In London, the DCA acts as a conduit for channelling issues affecting Jersey or the other Crown Dependencies to the relevant Ministries and for coordinating the position of the UK authorities. Where international relations are concerned, the FCO is involved and, in the case of formal communications with the EU institutions, the UK Permanent Representative to the EU in Brussels (UKRep) plays an important role.²⁵

²² Statutory Instrument 2001 No. 3500.

²³ This is of course precisely the extent of the problem which confronts Jersey and the other Crown Dependencies in their external relations and which is a central theme of this paper.

²⁴ See fn. 13

²⁵ These are of course the formal channels of communications. Although these are still respected, the advent of electronic communications has of course transformed (and made more rapid and informal) communications between and within public administrations all over the world. This is certainly true in the case of Jersey and even more so in the case of the UK administration.

Two main criticisms may be made of this system. First, it tends to diminish the importance given in London to Insular matters. There are no votes for a British government in its policies towards the Crown Dependencies! Secondly, the procedures are lengthy and slow, in both directions. Even when issues arise requiring international action which are not (or which ought not to be) controversial as between Jersey and the UK, these will not usually command priority attention in London, compared with the UK's "domestic" priorities. Recent cases have occurred where, in discussions in Brussels with the Commission on specific issues involving the vital economic interests of the Island, considerable concerted efforts were required by Jersey representatives in order that the EU institutions first understood and then acted on the Insular concerns. Direct action, as of right, by Jersey with the Commission would at least have ensured that earlier and more direct attention was brought to bear on the subject, even if positive results cannot always be guaranteed. Of course, when UK and Insular interests clash (as in the case of the TOSD and the Code of Conduct), it is crystal clear that equity (and common-sense) requires that Jersey be allowed to conduct its own international relations.²⁶ It is illogical (and arguably unconstitutional) for the UK to accept, on the one hand, Insular autonomy in domestic policy and then to seek to impair or reduce this independence by imposing restrictions on Jersey's ability to protect or enhance this autonomy internationally. With respect, it is not sufficient for UK Ministers to say, as Lord Falconer recently did to the States of Jersey, that "when Jersey's interests do not fit neatly with UK policy" there must be "mechanisms in place to manage those situations in a mature, constructive and sensible way".

The tensions inherent in the constitutional relationship between Jersey and the UK have surfaced comparatively recently. They have little if anything directly to do with Protocol 3. They relate rather to Jersey's success as a global player in the field of financial services and to the Island's increased visibility and involvement in international commerce and finance. The Island's designation as a "tax haven" or "offshore financial centre" may also be relevant in this context. The difficulties which are posed for Jersey and the other Crown Dependencies in international relations as a result of the formal division of responsibility for internal and external affairs, are not unique either to the Crown Dependencies or to the UK. The devolution of sovereignty (or at least legal responsibility) to Scotland, Wales and Northern Ireland in a number of areas of domestic policy may well pose similar problems, particularly in the

²⁶ The notion that dependent jurisdictions with fully devolved internal responsibilities may adopt policies which do not coincide (or even clash) with those of the sovereign power is not unusual. The case of Hong Kong, when it was a UK colony is instructive. Hong Kong and UK interests in the international trade in textiles were completely opposed. This did not affect the fact that, under public international law, the UK was formally responsible for actions of the Hong Kong authorities.

EU context.²⁷ Amongst EU Member States, Germany (especially, as regards the broad constitutional autonomy of its Länder), Spain and Belgium have comparable problems of representing “sub-State” entities’ interests at international or EU level. Pragmatic means have been found at EU level by these (and other) Member States to ensure adequate and fair representation for constituent regions, notwithstanding the fact that – in formal terms – international responsibility for the actions of the constituent States resides ultimately with the sovereign power.

The case of Jersey and other Crown Dependencies is of course different from that of Länder or provinces such as Bavaria, Flanders or Catalonia, which are fully integrated – together with their Member State – in the EU. However, the minimal substantive context of Protocol 3, which for nearly 30 years ensured that the representation of Jersey’s interests in the EU was largely a theoretical issue, now means that if it were accorded external autonomy by the UK, Jersey would act essentially as a “third country” similar to Andorra or Liechtenstein rather than as a full participant in the EU.

In one respect at least, such a situation would facilitate matters for the UK. A comparison with the case of Gibraltar is instructive. The application of most internal market law to Gibraltar has sometimes created difficulties for the UK, as well as Gibraltar, when the Commission has launched state aids or infringement proceedings against the UK as the Member State responsible for Gibraltar’s interests in the EU. Like the Crown Dependencies, Gibraltar is constitutionally autonomous in most areas of internal economic policy. The UK therefore has limited means under UK constitutional law to compel Gibraltar to take legislative or administrative action to comply with EU law. The fact that – in contrast to Gibraltar – Jersey’s obligations under EU law are confined essentially to trade in goods means that conferring greater external authority on Jersey to conduct its own relations with the EU, the OECD and third countries (such as the United States) would not bring with it the complications involved as a result of the special status – essentially inside the EU’s Single Market – of Gibraltar. Or course, formally, one concern of the UK must be that, under public international rules on State liability, the UK is ultimately responsible for any breaches of international law (including failure to respect engagements entered into) by its Dependencies. This is clearly an issue which must be discussed between Jersey and the UK, as one aspect of the Island gaining greater responsibility in its international relations.

One other issue which needs to be addressed in the context of Jersey’s rela-

²⁷ The fact that devolution in the case of Scotland, Wales and Northern Ireland has been regulated by Statute (specifying, *inter alia*, matters which are “reserved” to the UK authorities) should at least provide greater legal certainty for these regions than for the Crown Dependencies. These are however comparatively early days and it remains to be seen how the external dimension of devolution will work in practice. See further, Michael Keating, *Devolution and Public Policy in the UK: Divergence or Convergence (2001)*.

tions with the EU, is Jersey's relations with Guernsey and the Isle of Man. Although all three jurisdictions have the status of Crown Dependencies under UK constitutional law and the terms of Protocol 3 are identical for all three jurisdictions, the constituent elements of each "bilateral" relationship with the UK is different. The Isle of Man for example has a "common purse" arrangement with the UK, requiring the application of VAT by the Manx authorities and based on a customs arrangement with the UK.²⁸ All three Islands are, however, within the "common travel area" with the UK.

The terms of Protocol 3 are of course identical for all three Crown Dependencies and, at least until recently, they conducted their relations on EC affairs quite independently.²⁹ The recent discussions with the EU authorities on the TOSD (and with the UK authorities on the adaptation of Protocol 3) have however required extensive coordination between the three jurisdictions as well as joint discussions in Brussels and London. Thus, although each Island will sign separate agreements with each Member State, from a policy standpoint all three Islands were clearly in a similar position, thereby making it possible to negotiate jointly the same arrangement for all three Islands with all 25 Member States.³⁰

The question arises whether any lessons can be drawn from these recent experiences for the future. In my view, a distinction has to be drawn between the conduct of everyday relations with the European Union and its Member States on the one hand, and possible situations which might arise in the future where the Union requests certain action to be taken under or outside the Protocol by all three jurisdictions. It is also open to question whether politically the Protocol could be terminated or radically revised on behalf of one or two of the three Crown Dependencies or whether all three territories would, in practice, have to be involved. Legally, there is no reason why the UK could not seek to terminate or indeed to amend the Protocol for Jersey alone. Article 48 TEU currently requires any amendment of the Treaties to be done by inter-governmental conference (IGC). However there is no reason – legally at least – why this could not be done in an appropriately "light" manner if the political will existed on all sides, with effects limited to Jersey.³¹ On the other

²⁸ In my view, the fact that the Manx authorities apply a system of VAT under the terms of an agreement with the UK does not mean that the Isle of Man is bound by EU rules on VAT. Such tax provisions are clearly outside the scope of Protocol 3. Manx autonomy over indirect tax matters remains untouched by Protocol 3 and is limited only by its bilateral arrangement with the UK.

²⁹ The economic interests of the three Islands are however quite different and, even in their relations with the UK authorities, each Island operates independently of the others.

³⁰ See Council document 7408/04 (FISC 58) of 16.3.2004 which contains the texts of the agreements for the UK and Dutch dependent and associated territories.

³¹ The status of Greenland was, for example, changed in 1984, when Greenland became an overseas territory subject to Part IV of the EC Treaty. The Treaty of withdrawal (of March 13, 1984), or "*Greenland Treaty*" (OJ L 29 of 1.2.1985), came into force on February 1, 1985.

hand, the amendment would require ratification by all Member States in accordance with their constitutional requirements. Even this would not be an insuperable barrier provided the other Member States perceived the matter to be of minor importance. However, for the United Kingdom authorities to undertake such a move could clearly only occur after the most careful consideration at the highest level and as a result of the clearest possible expression of will by the Island or Islands requesting the move. Such a development would obviously involve the closest possible consultation between all three Islands, the UK authorities and the EU institutions and Member States.

At a more mundane level, in the course of recent months, an increasing number of issues have arisen as a result of EU legislative initiatives which, although falling outside the scope of the Protocol, affect the Islands' common interests. In certain cases, it may be that the three jurisdictions wish to adopt a common position on such measures and make representations together to the EU authorities, either directly or through the United Kingdom. In other cases, the economic interests of the Islands may differ (or they may not share the same legal approach) and separate approaches may be adopted. In any event, as the EU's regulation of its Single Market progresses (for example in areas such as financial services and economic crime) it may well be that all three Islands will feel the need for more consistent coordination on their policies toward the EU, both amongst themselves and (as is already happening) with the UK authorities in London, through the DCA. Given their constitutional and economic differences however, it is difficult to envisage a situation where the three jurisdictions negotiate jointly with the EU (with or without the presence of the UK), for example on issues of market access for their services providers or other industries based on mutual recognition.

THE SYMBOLIC IMPORTANCE OF PROTOCOL 3

The terms of Protocol 3 reflect the political preoccupations in the Channel Islands and the Isle of Man in the early 1970s. Despite the far-reaching changes in Jersey's economy and demography over the last 30 years, it is clear that the fundamental political preoccupations remain broadly unchanged today. These are, firstly, a deep-rooted desire to preserve the Island's traditions, based on the 800 years autonomy which this Conference rightly celebrates and, secondly, a need to develop market access for Insular goods and services on a global basis³² in order to preserve Jersey's economic prosperity and independence into the future.

³² It is important to keep in mind, in the debate on Jersey's relationship with the UK and the EU, that the Island's economic aspirations are global, especially in the field of financial services.

In 1973, Protocol 3 achieved these goals to a remarkable extent. Whether this is so in 2004 is less clear. Certainly, the Protocol has ensured that the Crown Dependencies have remained – almost completely – untouched by the broad swathe of laws and policies developed within the European Communities and Union. The political and practical implications of this are considered below. In any event, the Protocol itself is worth examining in some detail and this is done in the next section of this paper.³³ First however, it is important to recall the legal context in which the Protocol is set.

Protocol 3, which established the status of the Channel Islands and the Isle of Man in Community law, is a unique legal text. It has no parallels in over 50 years of European integration. The circumstances under which it was drafted 32 years ago are difficult to establish. However, the records of debate at the time in the States (both in Jersey and Guernsey) make it clear that when the Islands were consulted as to the nature of the links (if any) which they wished to establish with the European Communities, they took the view that it would be sufficient to preserve free trade in their manufacturing and (mainly) agricultural goods. For this reason, the Protocol establishes a minimal “umbilical cord” linking the Crown Dependencies to the European Community. Jersey, Guernsey and the Isle of Man are, by virtue of Protocol 3, part of the customs territory of the Community and part of the Single Market for the purposes – broadly speaking – of the free movement of goods.³⁴

For the sake of clarity it is worth underlining that Protocol 3 (which in any event must be interpreted restrictively as a result of Article 299(6)(c)) only provides a link for the Crown Dependencies to the European Community (EC) and not to the European Union (EU). The latter concept was introduced in the Treaty on European Union at the Maastricht inter-governmental conference (IGC) in 1992 and created the “three-pillar structure” for the Union covering the European Community, provisions for a common foreign and security policy (CFSP) and provisions for police and judicial cooperation in criminal matters. The legal link provided by Protocol 3 is with the first “pillar” only. As is discussed below, the Treaty establishing a Constitution for Europe will in future formally link the Crown Dependencies with the Union, although the substantive commitments will remain unchanged. Thus, Jersey’s legal obligations under European Union law will remain those formally covered by European Community law, despite the disappearance of the “Community” under the Constitution.

³³ As Commission Vice President Lord Cockfield remarked on more than one occasion to Member States’ Ministers in the Council, it is rare that people (especially politicians) actually read the original texts of treaties, directives, regulations etc. To do so can be both revealing and rewarding for politicians and citizens as well as lawyers!

³⁴ A short and legally authoritative description of the material scope of the Protocol is set out in Advocate General La Pergola’s Opinion in *Rui Roque* [1998] ECR I-4607 at paras. 8–11.

The Courts in the Isle of Man have recently noted that Regulation 706/73 suffers from “poor drafting and a resultant lack of clarity”.³⁵ Likewise, the Protocol gives the appearance of having been drafted in haste and without excessive concern for conceptual and linguistic consistency with the Treaties as a whole. As is discussed below, this is in marked contrast to the Treaty relationships established more recently between jurisdictions such as Andorra and San Marino with the EU. In addition, in the last 31 years, only three cases have been referred from Insular courts to the European Court under Article 234 EC for the interpretation of the Protocol. Two concerned Article 4 and the “non-discrimination” provision (see below). One pending case – a reference from the Royal Court in Jersey – deals with the application of EC competition law in the agricultural sector. This case appears to be the first dealing with the substantive provisions of Article 1 of the Protocol.

The Protocol settling the status of the Channel Islands and the Isle of Man under Community law is one of 30 Protocols attached to the Act of Accession to the European Communities of Denmark, Ireland, Norway and the United Kingdom.³⁶ The legal basis of the Protocol is Article 299 EC (formerly Article 227 EC). This Article defines the territorial scope of the Treaty and measures adopted under the Treaty. Article 299(1) provides that the Treaty is to apply to the Member States. The succeeding paragraphs make special provision for the application (or non-application) of the Treaties to particular countries and territories which are related to the Member States. In broad terms, paragraphs 2 to 5 define the conditions under which the Treaty is to apply to various territories and countries. Paragraph 6, which applies to the Crown Dependencies, is based on the opposite premise, namely that the Treaty is not to apply at all (in the case of the Faroe Islands or the Sovereign Base Areas of the UK in Cyprus) or is only to apply to the Channel Islands and the Isle of Man to the extent necessary to secure the implementation of the arrangements set out in Protocol 3. This fundamental provision (which is sometimes overlooked) is of great importance in ensuring that the Crown Dependencies are covered by EC/EU law only to the narrowest extent possible. No teleological or extensive interpretation of the Protocol should be possible – either by the Commission or the ECJ – taking into account the restrictive language of Article 299(6)(c). This is in contrast, for example, to the French overseas departments, the Azores, Madeira, the Canary Islands and the Åland Islands. It is also in contrast to the arrangements for Gibraltar and for the overseas countries and territories listed in Annex 2 to the EC Treaty (the OCTs).

³⁵ *Manx Ices Limited v. Department of Local Government and others* [2001] 3 MLR 64 at para. 65.

³⁶ OJ Special Edition (C 73) of 27 March 1972. Following a rejection of the terms of membership in a referendum in 1972, Norway did not join the EC and is now a party to the European Economic Area (EEA) Agreement. Other Protocols attached to the Act of Accession deal with issues such as the status of the Faroe Islands and Greenland and various sectoral issues.

In order to fully appreciate the extent to which Protocol 3 has kept Jersey outside the mainstream of European law and policy, the case of Gibraltar is particularly interesting, given the relative similarity between the geographical size and economic interests of that territory compared with the Crown Dependencies. Article 299(4) EC provides that “the provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible.” As the Court of First Instance (CFI) made clear in the action brought by the Government of Gibraltar against the Commission in 2001,³⁷ by virtue of Article 28 of the UK Act of Accession acts of the EC institutions relating to agriculture, as well as acts on the harmonisation of laws concerning turnover taxes (i.e. VAT) shall not apply to Gibraltar unless the Council provides otherwise. In essence, this means that Gibraltar is covered by EU/EC single market legislation, including financial services and direct taxation.

The difference in treatment which Gibraltar has received as a result of this status is striking and is in contrast to the situation of the Crown Dependencies as a result of the application of Protocol 3. Thus Gibraltar has been subject to state aids investigations by the Commission in respect of its direct tax legislation, in addition to having its tax legislation subject to scrutiny by the Primarolo Committee (as has Jersey) under the Code of Conduct on Business Taxation.³⁸ Furthermore, the United Kingdom, which represents Gibraltar's interests in the EU³⁹, has been subject to infringement procedures brought by the Commission under Article 226 EC for the alleged failure by Gibraltar to implement various Single Market measures, for example in the field of financial services and telecommunications. On the positive side, Gibraltar is a full participant in the Single Market at least in legal terms. It is not yet evident that Gibraltar has been able, in practical terms, to capitalise on these advantages, for example by marketing its financial or other services in Spain and other Member States. Nonetheless, the legal status of Gibraltar presents an interesting comparison with that of the Crown Dependencies.

Particularly in recent years – and in parallel with the increased profile of the Crown Dependencies in EU affairs – “Protocol 3” has acquired almost iconic status, at least in the Islands themselves. It is perhaps time to question whether this is deserved. The Protocol has not protected Jersey from the imposition of foreign (EU) tax laws. It has not guaranteed access to EU finan-

³⁷ Joined cases T-195/01 and T-207/01, *Government of Gibraltar v Commission*.

³⁸ The Committee established to implement the code of Conduct was chaired initially by the UK Paymaster General, Dawn Primarolo and was called the Primarolo Committee.

³⁹ Note however that, in its state aids litigation before the CFI, Gibraltar's *locus standi* to represent its own interests was supported by the UK (which did not however intervene in the case) was approved by the CFI.

cial or other services markets.⁴⁰ It has not had any measurable effect on Jersey's constitutional relations with the UK.⁴¹ However, with the exception of the EU "tax dossier", the minimal material scope of the Protocol has kept Jersey out of the mainstream of European law and policy as it has been developed in the Community and Union institutions. This is of course certainly in accordance with Jersey's political wishes – both in 1972 and today – although a more detailed "cost-benefit" analysis is essential before deciding whether the longer-term economic interests of Jersey are best-served by such legal, political and economic isolation.

THE AMBIGUOUS PROVISIONS OF PROTOCOL 3

It is often said that the Crown Dependencies are covered by EU law on the customs union and on the free movement of goods.⁴² As two rulings of the ECJ make clear however, the Islands' freedom to discriminate between EU nationals (although not between Jersey men and EU nationals) is limited by article 4 of the Protocol.⁴³ Certain disciplines also exist in the field of competition and state aids for agricultural products. Notwithstanding the enactment of a Council Regulation in 1973 to define the scope of the Protocol's application to trade in primary and processed agricultural products, this area remains unclear both as regards the extent to which EU competition law and procedural state aids rules apply to Jersey. It does at least seem clear that the substantive rules for agricultural and fisheries state aids do not apply to the Crown Dependencies. And in the field of competition policy, it is possible that a case currently pending before the ECJ on reference from the Royal Court of Jersey (dealing with the competition law aspects of producers' organisations for potatoes) may clarify the application of competition law under the Protocol in the field of agriculture.

⁴⁰ At the time of writing, Jersey has not been made a party to the WTO Agreements of 1994 as a result of UK ratification on behalf of Jersey. Thus, Jersey has no legal basis upon which to seek access to third-country markets for its financial services products outside (or conceivably inside) the EU.

⁴¹ Like other comparable Treaty provisions, Protocol 3 is an integral part of UK constitutional law. To the extent that this is possible under Community law on the direct effect of Treaty provisions, the Protocol could be invoked in the courts, for example in cases involving the extent to which EC law is (or could be made) applicable in Jersey. It would have been interesting if such a situation had arisen as a result of the recent attempts by the UK to impose tax reforms in Jersey under the TOSD and the Code of Conduct on business taxation. At the very least, as a result of the Protocol, it could be argued that Jersey had a legitimate expectation under EC law not to have EC tax rules extended to it without its consent.

⁴² In the *Rui Roque* case, the Court itself, summarizing the legal status of Jersey under the Protocol, said in terms that Jersey was bound by the rules of the free movement of goods, without being more specific on the issue.

⁴³ For a detailed discussion on the ECJ's interpretation of the article in two cases, see below.

The precise language of the Protocol does not reflect (even approximately) the terms of corresponding provisions in the Treaty such as articles 23-24 on the free movement of goods, articles 25-27 on the customs union and articles 28-31 on the prohibition of quantitative restrictions. Until or unless the provisions of article 1 of the Protocol are subjected to judicial scrutiny, it is impossible to define their precise scope. Nonetheless, in my view, it is unwarranted to assume that all Community law on customs and the free movement of goods (especially the secondary *acquis*) apply to Jersey and the other Crown Dependencies by virtue of article 1(1) of the Protocol. Likewise, as far as article 1(2) is concerned – as is discussed in detail below – there is no doubt that Community law on competition and state aids in the agricultural sector are only partially applicable to the Islands.

Article 1 provides that Community rules on customs matters and quantitative restrictions shall apply to the Crown Dependencies under the same conditions as they apply to the United Kingdom. In particular as far as manufactured goods are concerned, customs duties and charges having equivalent effect between these territories and the Community were to be progressively reduced according to the timetable set out in articles 32 and 36 of the UK Act of Accession. At the same time, the common external tariff was to be progressively applied in accordance with the same timetable.

There is no authoritative judicial interpretation of the scope of article 1 of the Protocol. It is therefore not entirely clear which Treaty provisions (including those with direct effect such as articles 28 and 30 EC) are applicable to Jersey by virtue of the Protocol. It is even less clear how much of the EC *acquis* on the customs union and the free movement of goods is applicable. In the absence of disputes giving rise to litigation either in the Jersey or European Courts (or before the Commission), these issues are theoretical. However, in addition to doubts concerning the material scope of the secondary law and ECJ case law applicable to Jersey, it is also important to note that certain procedural rules may well apply to Jersey and the other Crown Dependencies under article 1 of the Protocol, including rules on customs cooperation and for the notification of new technical regulations under Directive 98/34 as amended.⁴⁴ In the field of state aids for agriculture and fisheries it is likely that at least some of the procedural provisions of Regulation 659/1999 apply to the Crown Dependencies.⁴⁵

⁴⁴ It is important also to note, *en passant*, that the word “goods” in EC law embraces electricity, as well as other energy products. This may well have a certain importance in the future to the extent that the Channel Islands become connected to grids in the EU. On the scope and importance of Directive 98/34 in avoiding the creation of new technical barriers to trade in the Single Market, see Oliver, *Free movement of goods in the European Community* (2003) at pp. 482–501.

⁴⁵ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. *OJ L 083, 27/03/1999 P. 0001 – 0009.*

As far as the free movement of goods is concerned, the material scope of EU secondary law in this area is potentially very wide indeed.⁴⁶ In addition to the voluminous case law of the European Courts based on *Cassis de Dijon*⁴⁷, secondary legislation adopted under the Single Market framework now embraces “vertical sectors” such as food law, pharmaceuticals, telecommunications, as well as “horizontal” issues such as mutual recognition and government procurement (of goods, but not services). A further guide to the potential scope of the concept of the free movement of goods (whether or not this is co-extensive with the scope of article 1 of the Protocol) is given in the original Commission White paper on completing the internal market (1985), in particular the sections dealing with the removal of physical and technical barriers to the free movement of goods.⁴⁸ It is indicative of the generally benign approach of the EU (especially the Commission) to the application and enforcement of the Protocol, that virtually no attention appears to have been paid (in the Commission, in the UK or indeed in the Channel Islands) to the extent to which the secondary and judicial *acquis* has been implemented in the Crown Dependencies in application of Protocol 3.

Particular problems in the field of agriculture, in particular in state aids

Article 1(2) of the Protocol makes more extensive provision for the implementation of EC rules by and in the Islands, than is the case with manufactured goods or services. Article 1(2) provides -

“In respect of agricultural products and products processed therefrom, which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom shall be applied to third countries.

Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition and trade in these products shall also be applicable.”

Article 1(2) then empowers the Council to determine the conditions on which these sub-paragraphs are to be applied. This was done in Council Regulation 706/73, as amended⁴⁹. Considerable difficulties exist in interpreting the scope of these provisions as a result of the massive development in EU agricultural law – as well as in competition law and state aids - since 1973. One key problem is to distinguish the trade and competition rules

⁴⁶ See P. Oliver, *The free movement of goods in the European Community* (2003), for a comprehensive view of the current EU law on the free movement of goods.

⁴⁷ *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78 [1979] ECR 649.

⁴⁸ COM (85) 310 final. See also *The Internal Market – 10 years without frontiers*, available on DG MARKT’s website at http://europa.eu.int/comm/internal_market/10years/workingdoc_en.htm.

⁴⁹ Council Regulation (EEC) 1174/86 of 21.4.1986, OJ L 107 of 24.4.1986.

which apply to these products in the case of the Islands from the rules of the Common Agricultural Policy (CAP), in particular the Common Market Organisation (CMO) Regulations. These Regulations now cover all agricultural and fisheries sectors except potatoes, bananas and agricultural alcohol. It is clear that these Regulations do not apply as such to the Islands and, certainly, the Islands are outside the scope of the CAP, in the sense that they do not benefit from EU financial support measures. Nonetheless, it is an open question (and one which has not been judicially considered) as to the scope of article 1(2) in the field of state aids and competition policy.

Historically, within the EU, state aids for agriculture and fisheries have been subject to different legal disciplines from those applicable to industrial products. Whereas, in the field of industrial goods, the prohibition on state aids (and accompanying derogations) in article 87 have been applied from the outset, the situation in agriculture is entirely different. Under articles 32-38 EC, Community rules on competition (including state aids) were only to apply to production of and trade in agricultural products to the extent determined by the Council "within the framework of article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in article 33".

In essence, the understanding upon which these provisions were based was that Member States should accept Community disciplines on state aids only to the extent that Community financing and other measures of structural support replaced existing national measures. This has now happened, virtually across the board so that – in theory at least – Community state aids disciplines now apply to agriculture, fisheries and industrial goods more or less in equal measure. From 1962 onwards in the Community and since 1 January 1973 in the case of the Crown Dependencies, Member States' obligations on state aids were limited to notifying the Commission of individual measures and schemes. For the Commission, the requirement under article 88(1) to monitor existing aid schemes and, if necessary to propose appropriate measures, also applied. This limited application of EC state aids law was extended to the Crown Dependencies in Regulation 706/73 and remains valid today.

The importance of agriculture and fisheries is not identical for Jersey, Guernsey and the Isle of Man. As a result of its size and geography, these areas are of greater economic and political importance for the Isle of Man. Nonetheless, the Protocol and the relevant *acquis* applying under it should in theory be the same for all three Islands. In practice, agricultural support measures appear to have been used more frequently by the Isle of Man than the other Dependencies. In recent years, to judge from publications in the Official Journal, the Commission, while formally recognising the limited application of the state aids disciplines in agriculture and fisheries to the

Crown Dependencies, has nonetheless conducted rigorous assessments of the notified measures under rules of Community law which do not formally apply to the Crown Dependencies. The Commission has occasionally found that proposed measures would be incompatible with relevant rules of Community law. This appears to have occurred most frequently in the case of the Isle of Man. Since the Commission recognises that the sanctions which are available against Member States are not applicable under the Protocol and Regulation 706/73, the Commission can do no more than to recommend that the measures not be implemented or that they be amended.

Article 2 (second sub-paragraph) of Regulation 706/73 does provide that the Commission may propose to the Council that articles 87-89 are to apply in their entirety to the Crown Dependencies. No such proposal has yet been made. It is a matter of speculation as to the conditions which would provoke such a proposal from the Commission. Even if the Commission appears to find fault increasingly with measures notified, there seems to be no political will – at present at least – to extend the application of state aids disciplines in the absence of serious distortion of trade with Member States and/or complaints from the latter.

From a strictly legal point of view the Commission should not in any event review proposed Insular state aids measures by reference to rules and criteria which, by common accord, are not applicable to the Crown Dependencies. In this context, the use by the Commission of the CMOs and other horizontal or vertical Regulations in order to assess state aids in the Crown Dependencies is inequitable as well as unlawful in at least two respects. First, the rules do not apply to the Islands, but in addition, neither do the Islands benefit from the financial and structural support mechanisms available to Member States and economic operators in the EU. For 31 years since Protocol 3 was concluded, the Islands have – in contrast to EU Member States – been self-sufficient in agriculture and fisheries. It is therefore unjust and arguably illegal that their own self-financed support measures should be measured against criteria tailored to Member States in a totally different economic and legal situation.

This point can be made more generally. So far in its assessments made under article 1(2) of the Protocol and Regulation 706/73, the Commission appears to have made no concession whatsoever to the unique legal and economic situation of the Crown Dependencies. In agriculture and fisheries, exclusion from Community support under the CAP and CFP is of fundamental importance in assessing the permissible scope of state intervention in the Islands' exposed and vulnerable micro-economies. In law, even article 87(1) itself - which defines the concept of "aid" – is not applicable under the Protocol. The Commission would undoubtedly argue that aid notifications cannot be reviewed in a vacuum. Nonetheless, given the total self-sufficiency

of the Islands in this area (and the restrictive provisions of article 299(6)(c)), it is submitted that the relevant Community *acquis*, including article 87(1), must be applied with equity and flexibility by and to the Crown Dependencies. In particular, taking into account the fact that Regulation 706/73 clearly provides that only “aid related to trade” is to be caught by the notification requirement, it is clear that structural measures, income support or aids in fields such as environmental protection, rural development, training of young farmers, early retirement schemes or quality improvement measures, are not caught by the notification requirement. To interpret the Protocol and Regulation 706/73 otherwise would subject insular agriculture and fisheries policies to EU disciplines (in particular those under the CAP and CFP) to an extent beyond that envisaged by the Protocol’s authors in 1972.

The agricultural state aids issue also sheds light on the way Protocol 3 operates, as between the Insular authorities, the UK and the Commission. In the first place, as indicated above, there appears to be a strong case for the Islands to apply Regulation 706/73 with prudence. The fact that neither article 87(1) (defining “state aid”) nor the CMOs apply to the Crown Dependencies – and that the Commission lacks any enforcement power – means that careful consideration needs to be given before measures are notified by the Commission. Many modern “aid” measures in the agricultural or rural areas have environmental, social or other purposes. It seems that such measures are not caught by Regulation 706/73 since they are unrelated to trade. Likewise, when the Crown Dependencies take measures analogous to those provided for at EU level in the CMOs (most of which are “structural” and have no direct effect on trade), these also should not require notification. In any event, to the extent that public support measures for agriculture and fisheries taken by the Crown Dependencies do not affect trade or competition with the EU, the scope of article 2 of Regulation 706/73 (and thus of the Protocol) is more theoretical than real.

Finally, the issue of agricultural and fisheries aids may be used to highlight another “grey zone” in the Protocol. Perhaps more than any other area except competition policy, EC state aids law has been developed, from a short Treaty article (article 87(1) EC), by administrative practice of the Commission and judicial review by the European courts.⁵⁰ Even fundamental concepts such as the Commission’s power to order States to recover illegally-granted aids with interest from the date of grant, was created and proposed by the Commission and endorsed by the ECJ. In 1999, the Council adopted Regulation 659/1999 which broadly codifies procedural rules on state aids. Some of these provisions

⁵⁰ The “Yellow Bible” published by the Commission (DG Competition) and which contains all the secondary legislation and “soft law” on state aids, runs to about 1000 pages.

deal with those parts of the Treaty (notably article 88(1) and the first sentence of article 88(3)) which are applicable to the Crown Dependencies. There is therefore no doubt that some of the provisions of Regulation 659/1999 apply to the Crown Dependencies, although in the absence of judicial practice it is not possible to define which provisions with complete precision.

PROTOCOL PROVISIONS OTHER THAN THOSE ON TRADE

Article 2 of the Protocol provides that the rights of Channel Islanders and Manxmen in the United Kingdom are not to be affected by the Act of Accession. Equally however, such persons are not to benefit from Community provisions on the free movement of persons and services. Although this limitation was clearly acceptable to the Islands in 1972 and may well be today, the fact that the Islands' economies are now dominated by service industries (particularly in financial sectors) as compared with the agricultural production which dominated the Islands' economies in 1972 highlights the fact that, in terms of access to EU markets for services, the Crown Dependencies are in the same situation as third countries. Thus, even in fields such as electronic commerce, Jersey and the other Crown Dependencies are in the position of third countries, with no legal rights of access to EU markets.

For reasons which are obscure today, it was also thought appropriate in 1972 to ensure that, to the extent that persons or undertakings within the meaning of article 196 of the EURATOM Treaty should be covered by the provisions of that Treaty when they are established in the Islands. This is provided in article 3 of the Protocol.

Of more practical concern is the non-discrimination provision set out in article 4. This provides that -

“The authorities of these territories shall apply the same treatment to all natural and legal persons of the Community.”

This short but fundamental provision has twice been interpreted by the European Court of Justice (ECJ) on references from the Deputy High Bailiff's Court in the Isle of Man and from the Royal Court of Jersey. Somewhat ironically, the two cases giving rise to the interpretation of article 4 by the ECJ were in areas of Community law falling outside the scope of Protocol 3 as set out in articles 1-3 and 5-6. They concerned, respectively, employment and criminal justice. These cases were seen at the time as being potentially of great importance in deciding to what extent Jersey and the other Crown Dependencies are affected (actually or potentially) by Community law obli-

gations. The cases are discussed in more detail below. However, in essence, the European Court held that, to the extent that the Community enacts legislation in particular fields, then the Islands may not discriminate between Community nationals in their own legislative or administrative actions in these fields. This did not mean (as was once feared) that the Islands would have some kind of indirect obligation to apply Community rules in areas falling outside the Protocol and where, clearly, it had never been intended that such rules should apply. There is nonetheless an obligation, when introducing legislation in areas subject to EU law, not to discriminate between the nationals (including UK citizens).

Naturally, as the material scope of the secondary law has expanded and “occupied the field”, then the scope of article 4 – in imposing a non-discrimination obligation on the Crown Dependencies - has also expanded. It is doubtful whether, in practice, this is of great practical concern however, since the introduction of Insular legislation discriminating between EU nationals must be unusual. Historically of course, the situation may be different. As was discovered in *Rui Roque*, Jersey legislation allowed the deportation of foreigners except British subjects, who could only be “bound over” to leave, but not ultimately denied the right to stay in or return to the Island. It may be that the special status of UK nationals in Jersey law could give rise to similar “discrimination” in other fields, although as was decided in *Rui Roque*, this would not necessarily imply an infringement of article 4 of the Protocol.

Another fundamental provision of the Protocol (although one which has so far escaped judicial interpretation) is article 5. This is sometimes called a “safeguard clause”, although it is not a safeguard clause in the sense in which this term is used in Community or international trade policy. It may well be that the clause has been seen and even applied in this sense and this may be understandable given the fact that the “dominant” article of the Protocol is article 1 which deals with trade.⁵¹ However, the language of article 5 is far more general and provides that:

“If, during the application of the arrangements defined in this Protocol, difficulties appear on either side in relations between the Community and these territories, the Commission shall without delay propose to the Council such safeguard measures as it believes necessary, specifying their terms and conditions of application. The Council shall act by a qualified majority within one month.”

⁵¹ It is instructive however that, in the one decision taken by the Council on the implementation of this provision, trade criteria were specifically not applied. The article therefore is capable of a far more flexible interpretation than either the UK or the EU have contended.

As indicated above, the scope of this article has never been tested either in the Insular or European Courts. There has been one decision of the Council applying the provision in respect of meat products in the Isle of Man.⁵² One isolated decision is of course insufficient to establish with any certainty how such a general provision could or should be applied in the future. It is clear however that the definition of “difficulties” appearing on either side is not confined to trade or even economic difficulties and that the discretion of the Community institutions in deciding on measures, is very wide. The Commission in particular is entitled to propose “.... such safeguard measures as it believes necessary, specifying their terms and conditions of application”. An interesting question is the extent to which the Islands remain free, in their relations with the EU, to take action outside the Protocol to deal with situations (including those in fields covered by the Protocol such as trade) where either the Commission or the Council is unable or unwilling to act.

In my submission, in areas falling clearly outside the Protocol, Jersey remains free (subject to the provisions of article 4) to take such measures as it deems necessary - for example in areas such as immigration, social security, education, health or employment – to protect its own domestic interests. Even in areas which are broadly covered by the Protocol but where the exact scope of the relevant provisions is unclear (such as agricultural production and trade), it ought still to be possible for the Islands to take such measures as are indispensable for example to preserve a minimum viable production of essential commodities or to protect public health, particularly where other parties involved (the UK or the EU institutions) are unable or unwilling to act.

THE SCOPE OF JERSEY’S OBLIGATIONS UNDER EU LAW AND THE IMPACT OF THE CASE LAW OF THE EUROPEAN COURTS

The limited scope of Protocol 3 has, for more than 30 years, virtually excluded the Crown Dependencies from the activities of all the institutions and from the vast bulk of EU law and policy. In total, the Council has enacted measures on two occasions (Regulation 706/73 and the safeguard measure for Manx imports of meat), there have been one or two Parliamentary questions on the scope of the Protocol, the Commission has occasionally been involved in the application of the state aids and safeguards provisions of the Protocol and the Court has been seized on three occasions by references from Insular courts. To judge from this track record, the political aim of the Islands in 1972 to remain outside the mainstream of European law and policy has

⁵² Council Decision of 23.10.2000 extending Decision 82/530/EC, OJ L 278/25 of 31.10.2000.

been achieved. As will be discussed later however, the real issue today is not the extent to which the Protocol applies to the Islands, but rather the fact that the Islands have been affected (and significantly affected) by EU and other international policies, irrespective of the limited scope of the Protocol. At the same time, the Protocol does not now provide the legal guarantee of market access for Jersey's "products", which was the intention in 1972.

Although it has now become commonplace to say that the Crown Dependencies are bound only by the terms of Protocol 3 and thus essentially or even exclusively by EC rules on the free movement of goods as well as those on competition in agricultural products, this is arguably not strictly correct. Just as article 299(1) which provides that "This Treaty shall apply to the [Member States]", does not exclude the application of *acquis* other than the primary rules of EC law, so the provisions of article 299(6)(c) do not exclude the application of the *acquis* which is based on or derived from the provisions of the Protocol to the Crown Dependencies. Thus, the general and fundamental principles of EC law (including the principles of direct effect, supremacy and state liability) apply to the Islands.⁵³ Likewise, the secondary *acquis* (regulations, directives, decisions and other "soft law" instruments such as communications, guidelines, recommendations etc.) also applies to the Islands to the extent that these are based on the provisions of the Protocol. At the same time, the relevant case law of the European Courts in areas covered by the Protocol also applies in and to the Islands.

The limited material scope of the Protocol has undoubtedly reduced the opportunities for Insular Courts to consider issues of Community law, thereby minimising opportunities for references to the ECJ under article 234 EC. Equally, the Islands' micro-economies are unlikely to cause or threaten distortion of trade and competition in the Member States, thus reducing the risk of complaints to the Commission and the possible initiation of infringement proceedings under article 226 EC. The situation would be entirely different if the Protocol had covered the freedom of establishment, the freedom to provide services, consumer protection⁵⁴ or the protection of the environment. The fact that all three Crown Dependencies are centres of international business, with frequent litigation arising in areas

⁵³ Other principles developed by the European Courts such as proportionality, legitimate expectations and legal certainty also apply to the Islands, as presumably do general principles of law common to the constitutional traditions of all Member States in the field of human rights. This is an issue of particular interest in the context of the Constitutional Treaty. Part 2 of the Constitution, incorporating the Charter of Fundamental Rights, will not apply to the Crown Dependencies under the (revised) Protocol, although many of the principles in the Charter may apply as general principles of law.

⁵⁴ The fact that consumer protection, at least through the protection of human health, is one of the purposes of article 30 EC could be interpreted to mean that extensive areas of EC secondary law in this field apply to and in the Crown Dependencies insofar as they constitute lawful measures restricting the free movement of goods under article 30 EC.

such as financial services, company law, trusts and economic crime, would have implied frequent recourse to EC law and, probably, frequent reference to the ECJ under article 234 EC. In this context, the contrasting situation of Gibraltar (as indicated above) is instructive. Although there have been no references from the Gibraltar courts to the ECJ, Gibraltar's obligation to implement and enforce virtually all internal market measures has given rise to difficulty and controversy, notably as a result of infringement procedures being opened by the Commission against the United Kingdom authorities (representing Gibraltar) on the basis of article 226 EC. This has not only created problems for the Gibraltar Government, but has also been a source of added friction between the Gibraltar Government and the United Kingdom. The Commission has also refused to deal directly with the Gibraltar administration, despite the latter's constitutional autonomy (under the Gibraltar Act) for most internal market issues, including direct taxation.⁵⁵

In the case of the Crown Dependencies, the precise scope of the applicable *acquis* has never been defined either by the Commission, by the UK authorities, or by the Islands themselves. The fact that the Protocol itself is badly drafted and does not reflect precisely either the concepts or the language of the Treaties is a further source of uncertainty. This situation does not appear to have created serious practical difficulties over the last 30 years. This may well be because the Insular authorities, in enacting new legislation in particular fields (whether or not these are covered by the Protocol) have looked (amongst other sources) to relevant provisions of EU law for guidance and will be required to do so increasingly in future in order to ensure that regulatory and supervisory standards in the Islands are up to the minimum set in the EU as a basis for market access and the free movement of goods, persons, services and capital.

This is of course a different matter from the possible direct effect of directives and regulations, as well as case law, in Jersey law. There are two issues here. First, as indicated at the start of the paper, frequent use is made in the Royal Courts (both in Jersey and in Guernsey) of the comparative law technique. Such an approach appears to exclude reference to EU law however, including the increasing number of directives and other instruments which harmonise rules of European private law. Secondly and perhaps more importantly, it is clear that there is a significant number of EC instruments which are binding on the Crown Dependencies and which, strictly speaking, should be transposed into Insular law and applied in the Courts. Some of these directives, applicable

⁵⁵ Although it is not the purpose of this paper to discuss the situation of Gibraltar, it may be pointed out nonetheless that the formal responsibility of the UK for its territories' international relations ought not to result in a diminution of the dependencies' capacity to defend their own legislation or administrative measures in international *fora*, including the EU. Unfortunately, this is currently often the case, not only for Gibraltar but also for the Crown Dependencies.

to Jersey by virtue of Protocol 3, may also contain provisions which, according to the criteria set by the ECJ, are directly effective in Insular law.⁵⁶ Voluminous EU legislation has for example been enacted on the free movement of goods in areas such as food law, the abolition of technical barriers (especially Directive 98/34), public procurement of goods, and sectoral measures in areas such as pharmaceuticals, automobiles and other products.⁵⁷

As already discussed, it is impossible to know with any precision which EC secondary legislation is applicable under the Protocol. The scope for differing views is wide, especially given the imprecise way in which the Protocol reflects the Treaty itself. Undoubtedly, if asked, the Commission would probably tend to take an expansive (or teleological) view of the matter (especially in the field of mutual recognition directives designed to promote the free movement of goods). The approach which might be taken by the European Courts – especially taking into account the restrictive nature of article 299(6)(c) – is more difficult to predict.

In addition to the imprecise terms of the Protocol itself, the identification of EC or EU measures which apply in the Islands as a matter of law is made more difficult by the fact that many measures, particularly in the internal market field, now embrace a number of policy areas and thus are either based on a number of Treaty provisions or on article 95, a sort of “omnibus” legal basis for Single Market legislation. Practice is not wholly consistent in this area. Political differences arise between the EU institutions, often as a result of the application of qualified majority voting (QMV) or unanimity in the Council, or whether a measure would be subject to the co-decision or consultation procedure with the Parliament. The fact that article 95 was adopted (as article 100a) in the Single European Act in 1986 as a legal basis for most Single Market measures also operates to hide whether a measure is “purely” concerned with the free movement of goods or whether other policy areas are also involved.⁵⁸ Article 95 itself (in paragraphs 3, 4 and 5) refers to proposals

⁵⁶ In this context, relevant ECJ case law on the direct effect of Directives in EU law would be applicable in Jersey. See *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined Cases C-6/90 and 9/90 [1991] ECR I-5357, and related case law: see Angela Ward, *Judicial review and the rights of private parties in EC law*, Oxford University Press, 2000.

⁵⁷ In view of the exponential proliferation of non-tariff barriers to trade (particularly in the field of standards or consumer protection measures), the mandatory prior notification and standstill requirements of Directive 98/34 as amended are of crucial importance to the free movement of goods in the Single Market. This Directive has been called the single most important measure (at least of a procedural kind) in EU law. It is arguable that its mechanisms apply to Jersey and the other Crown Dependencies, although this appears never to have been enforced.

⁵⁸ See Peter Oliver, *The free movement of goods in the European Community* (2003): “... Article 95 has been held to empower the Community institutions to adopt legislation designed to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws provided that the emergence of such obstacles is likely. Prior to the momentous ruling in [*the “tobacco advertising” case*] the Court had consistently upheld article 95 as the appropriate legal basis for legislation....”

“concerning health, safety, environmental protection and consumer protection” for which separate Treaty provisions apply and which are clearly not applicable (at least *per se*) to the Crown Dependencies as a result of the Protocol.

The difficulties involved in this area are perfectly exemplified by the recent litigation concerning the tobacco advertising and tobacco product Directives. Anxious to secure the adoption of the advertising Directive by qualified majority voting (QMV), the Commission proposed and a majority of the Council accepted article 95 as a valid legal basis for this measure. The ECJ annulled the Directive holding that its provisions did not in effect remove obstacles to the free circulation of print media containing tobacco advertising and therefore was not a measure designed primarily to promote the free movement of goods in the Single Market.⁵⁹ Other Treaty articles may not be used to circumvent the express exclusion of harmonisation laid down in article 152(4)(c) in the field of public health. The ECJ’s rulings in the tobacco cases have certainly not made it any easier to determine which EU secondary legislation applies – by virtue of Protocol 3 – to Jersey, even if *prima facie* the measure in question appears to cover the free movement of goods.

As indicated above however, for the moment at least, this problem tends (in contrast to the situation with Gibraltar for example) to be more theoretical than real. Whether or not Jersey or the other Crown Dependencies implement and enforce particular EC measures has not in practice had a significant economic or political impact on Member States or their nationals. There have been few if any complaints made to the Commission on whether or not the Crown Dependencies are acting in accordance with their Community law obligations. Politically, in EU terms, all three Crown Dependencies have maintained a low profile. If this situation has changed in recent years as a result of the growth of financial services industries and the rise – internationally – of issues such as tax and international economic crime including money laundering – this has not brought allegations that the Islands are acting inconsistently with the Protocol, for example by not implementing a specific measures of EU secondary legislation. There has been, at the level of the Member States and the EU institutions, no doubt that the Protocol does not apply to these areas. On the other hand, as is described below, this has not prevented the EU (and indeed the OECD) from seeking to secure the extra-territorial extension of certain measures (notably in the field of direct tax) to the Islands, but not as a matter of legal obligation.

⁵⁹ See *Germany v Parliament and Council* (the “Tobacco Advertising” judgment), Case C-376/98 [2000] ECR I-8419 and *The Queen v Secretary of State for Health ex parte British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd.* (the “Tobacco Products” judgment) Case C-491/01 [2002] ECR I-1453.

ARTICLE 4 OF THE PROTOCOL AND THE CASE LAW OF THE ECJ

A particular difficulty has arisen on at least two occasions with regard to the scope of article 4, resulting in references to the ECJ. This fairly simple provision requires the Insular authorities to apply the same treatment to all natural and legal persons of the Community. The rulings of the ECJ in these matters merit particular attention in this paper if only to underline their limited implications for Insular policy as regards the extent to which EC law must be taken into account in Jersey's legislative, executive and judicial decision-making.

*Barr and Montrose*⁶⁰ was a case referred to the ECJ in 1989 by the Deputy High Bailiff's Court in the Isle of Man. It concerned the right of a British national to take up employment in the Island. The Advocate General and the Court itself agreed that article 4 "manifestly applies in relation to the nationals of all the Member States including the United Kingdom". In this case, the Manx legislation at issue was alleged to affect nationals of other Member States differently from UK nationals. It was conceded that if there was no discrimination between any Member States and their nationals then there would have been no breach of article 4.

Barr and Montrose is somewhat limited in interest as an authority however, because both the Advocate General and the Court found that there was no discrimination against Barr himself (as a UK national) and therefore no need to consider whether the prohibition on discrimination in article 4 was limited to the material scope of the Protocol or whether it extended to EC law as a whole. As a preliminary point in its ruling, the Court made it clear that article 234 did not allow the ECJ to hold that a particular piece of national legislation was contrary to Community law, but only to advise the referring national court on the correct interpretation of Community law. The Court held that the fact that the Isle of Man required all Community nationals wishing to take up employment on the Island to hold a work permit (when Manxmen were not so required) did not constitute a breach of article 4, even though the Manx legislation provided for certain exceptions in the case of certain types of employment leading to differences of treatment between nationals of different Member States. At the same time, article 2 of the Protocol did not require the Isle of Man to treat Community nationals in the same way as Manxmen were treated in the UK.

Crucially however, the Court did confirm that "article 4 of the Protocol cannot be interpreted in such a way as to be used as an indirect means of applying on the territory of the Isle of Man provisions of Community law

⁶⁰ *Department of Health and Social Security v Christopher Stewart Barr and Montrose Holdings Ltd.*, Case C-355/89 [1991] ECR I-3479.

which are not applicable there by virtue of [article 299(6)(c) of the UK Act of Accession and Protocol 3, such as the rules on the free movement of workers". The Court then went on to state that, contrary to the view taken by the UK, the principle of equal treatment in article 4 is not limited exclusively to the matters governed by the Community rules referred to in article 1 of the Protocol. Article 4 is an "independent provision" so far as its scope is concerned and precludes any discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law. In the *Barr and Montrose* case, since the right to take up employment was covered by Community law, article 4 applied to that right "even though Community nationals cannot thereby obtain on the Isle of Man the benefit of the rules on the free movement of workers". One important point to underline here is that, contrary to a common misunderstanding, there is no prohibition under article 4 from the Islands enacting legislation which, whilst not discriminating between nationals of Member States, does in effect discriminate between Islanders (*i.e.* Manxmen or Channel Islanders) and Community nationals.

*Rui Alberto Roque Pereira v His Excellency the Lieutenant Governor of Jersey*⁶¹ was referred to the ECJ in 1996 by the Royal Court of Jersey. Just as *Barr and Montrose* had involved an area of law (employment and social security) falling outside the Protocol, so *Rui Roque* involved an area even more remote from the Protocol, the right to deport persons convicted of a criminal offence. Under Jersey law, British citizens (unlike citizens of other EU countries) could not be deported from Jersey. Article 48(3) EC (now article 39(3)) allowed Member States to adopt with regard to nationals of other Member States, on grounds of public policy, measures which they could not apply to their own nationals, inasmuch as they had no jurisdiction to expel them from the national territory or deny them access thereto. The Court noted that, since Channel Islanders were British nationals, the distinction between them and other citizens of the UK could not be likened to the difference in nationality between the nationals of two Member States.

It was agreed that EC rules on the free movement of workers (including article 48) did not apply by virtue of the Protocol. Thus, article 4 could not be interpreted as limiting the reasons for which a national of a Member State other than the UK could be deported from Jersey on grounds of public policy, public security or public health under article 48(3) and the related Directive. However, the Court went on to hold that article 4 did prohibit the making of a deportation order by Jersey against a national of a Member State other than

⁶¹ Case C-171/96 [1998] ECR I-4607.

the UK, by reason of conduct which –when attributed to UK nationals – did not give rise on the part of the Jersey authorities to “repressive measures or other genuine and effective measures intended to combat such conduct.” Thus, the Court said, “even if difference of treatment between citizens of the UK and nationals of other Member States is allowed, the rule on equal treatment laid down by article 4 prohibits the Jersey authorities from basing the exercise of their powers on factors which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States.”

In the course of its judgment in this case, the ECJ reviewed its ruling in *Barr and Montrose* and confirmed that article 4 was not to be interpreted as an indirect means of applying in the Islands Community rules which were not covered by the Protocol. However, the Court did confirm that article 4 precluded discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law. Thus, insofar as *Rui Roque's* situation fell under the rules on the free movement of workers, the rule in article 4 applied to him, even if Community nationals could not use EC rules on the free movement of workers to gain employment in Jersey. The Court went on however to examine article 48(3) in the particular circumstances of the case (where Channel Islanders being British citizens could not be likened to citizens of other Member States) and held that the deportation from Jersey was not in breach of article 4.

In answer to a further question from the Royal Court as to whether it was restricted, in considering a deportation order, to the grounds set out in article 48(3), the Court confirmed that this was not the case, since neither article 48(3) nor the related Directive were applicable in Jersey by virtue of the Protocol. However, the Court held that “the fact remains that the rule on equal treatment in article 4 prohibits the Jersey authorities, even if difference of treatment between citizens of the UK and other Member States is allowed, from basing the exercise of their powers on factors which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States.”

Even if, in these two rather isolated rulings, the Court has given some substance to article 4 by making Community law the point of reference for applying the non-discrimination principle, the rulings give considerable comfort to the Islands in at least two respects. First, the ECJ has unequivocally confirmed that article 4 is not an indirect or “backdoor” means of extending the material scope of the Protocol. Secondly, there is no suggestion that the Islands may not enact legislation or apply measures which distinguish between Islanders on the one hand and EU nationals (including UK nationals) on the other.

THE REVISION OF THE PROTOCOL IN THE 2004
INTER-GOVERNMENTAL CONFERENCE (IGC)

As an integral part of the Treaties establishing the European Community and Union, the Protocol has been reviewed in the IGC together with all the Accession Treaties and related instruments in the context of eliminating measures which have become obsolete or redundant.

Unlike many instruments attached to or part of earlier Accession Treaties (such as transitional provisions which have since served their purpose and lapsed), Protocol 3 remains – broadly speaking – legally and practically valid today. Assuming that the Constitutional Treaty is ratified, the terms of the Protocol will remain virtually unchanged, although set in the context of a different Protocol to the new Treaty.⁶² In particular, the word “Community” would be replaced by “Union” systematically throughout the text. In addition, words which clearly have become redundant or obsolete would be eliminated. These would include the reference in article 1(1) to the progressive reduction of customs duties between the Islands and the Community as originally constituted, as well as the progressive application of the Common Customs Tariff (CCT). As far as legislative procedures under articles 1(2) and 5 (respectively, implementing legislation for the agricultural trade and safeguards provisions) are concerned, the present provisions would be replaced by a requirement that the Council shall adopt the appropriate European regulations or decisions. There would be no material change here however, as the Council would still act by qualified majority vote.

The Treaty establishing a Constitution for Europe (hereinafter “the Constitution”) repeals all previous accession Treaties, including all the instruments which were attached to – and an integral part of – such Treaties, including “Protocol 3”. These accession Treaties are replaced by two Protocols, which become an integral part of the Constitution. First, there is a Protocol dealing with the first four accessions (United Kingdom, Denmark, Ireland, Greece, Spain, Portugal, Austria, Sweden and Finland), whilst a separate Protocol covers the fifth accession which took place on 1 May 2004 (Hungary, Poland, the Czech and Slovak Republics, Lithuania, Latvia, Estonia, Slovenia, Malta and Cyprus). The present Protocol 3 to the UK Act of Accession will, in all important legal respects, be preserved intact in the eighth Protocol attached to the Constitution.

The provisions concerning the Crown Dependencies in the new Protocol were carefully and consensually negotiated by the UK authorities, in the

⁶² It remains to be seen whether the “iconic” status of Protocol 3 is affected – at least in the eyes of the Crown Dependencies – by its new position in the Constitutional Treaty as “Protocol 8”.

fullest consultation with the representatives of the three Crown Dependencies (acting in close cooperation), with the EU representatives, essentially the Legal Services of the Commission and the Council, acting under the authority of the IGC.⁶³

The language in the Constitution itself, as well as in the new Protocol, is designed to reinforce the continuity without change of the legal rights and obligations in the present Treaty and Protocol 3. The Preamble to the new Protocol notes that "certain provisions [in the earlier Accession Treaties] remain relevant and ... Article IV- 437 of the Constitution provides that such provisions must be set out or referred to in a Protocol, so that they remain in force and that their legal effects are preserved." The Preamble also notes that the provisions in question have undergone "technical adjustments" to bring them into line with the text of the Constitution "without altering their legal effect". The section of the new Protocol dealing specifically with the Channel Islands and the Isle of Man is preceded by "common provisions". None of these provisions carries any special importance for the Crown Dependencies. The provisions on the Channel Islands and the Isle of Man are set out in section 3 of Title 2 of the Protocol. As indicated above, the only changes which have been made to the existing Protocol are that the word "Union" has systematically been substituted for "Community", the transitional provisions relating to the phasing in of the common internal and external trade arrangements in article 1 of the Protocol have been deleted as redundant and decisions for safeguard measures in article 12 (former article 5) are to be made by the Council, on a proposal from the Commission, by "appropriate European regulations."

Article IV-447 of the Constitution provides that it is to enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited. Failing this, the Treaty is to enter into force on the first day of the second month following the deposit of the instrument of ratification of the last signatory to take this step. Many of the 25 Member States have decided that their ratification of the Constitution is to be preceded by a referendum.

The negotiating aims of the Crown Dependencies in the IGC, in essence to preserve intact the material scope of the legal obligations entered into by the United Kingdom on their behalf in 1972, have undoubtedly been met. However, ever since the creation of the European Coal and Steel Community in 1951, the process of European integration has moved forward within the legal framework of the Treaties. This was of course precisely the intention of the "founding fathers", to create an ever-closer union of the peoples of Europe. The instruments for achieving this were not "classic" Treaties

⁶³ In his speech to the States of Jersey on 10 May 2004, Lord Falconer rightly paid tribute to the "excellent example" of Jersey and the UK working together to modernise the language of the Protocol. See fn. 13.

creating obligations for the Member States under public international law, but Treaties creating independent and “supranational” institutions, empowered to make new law and develop existing law. Over the first 50 years of European integration under the EC Treaties, the role of the ECJ has been of crucial importance, especially in pursuing the economic integration which was central to the European project as a whole.

It is significant that three fundamental principles of European law (the direct effect of European law in national legal orders, the supremacy of European over incompatible national law and state liability towards citizens for breach of European law) were elaborated by the European Courts without there being any explicit reference to these principles in the founding Treaties. These fundamental principles, as well as others such as proportionality, legal certainty and legitimate expectations, apply to the Crown Dependencies although there is no mention of these in the Protocol itself. Similarly, (as discussed elsewhere in this paper), the extensive secondary legislation enacted by the institutions (and related judgments of the European courts) in fields covered by the Protocol (notably customs, the free movement of goods and competition (including state aids) in agriculture), also apply to the Islands and must be enforced by the legislative, executive and judicial authorities in the Islands.⁶⁴ EC and EU law is therefore “living law”, in constant evolution. Put simply, the body of European law to which the Islands are subject today, is very different from that which existed on 1 January 1973, even if the terms of the Protocol remain unchanged. It may be expected that this process will continue in future, if or when the new Constitutional Treaty is ratified, implemented and interpreted by the European and national courts.

The fact that this evolution is barely perceptible in the legal systems of the Crown Dependencies reflects the limited material scope of the Protocol itself, the absence of litigation in the Insular courts giving rise to issues of Community law, the policy of non-engagement consistently followed by the Insular authorities for the last 30 years and the absence of any intervention by the United Kingdom, Community or Union authorities to insist on more extensive implementation and application of Community or Union law in the Islands. Nonetheless, it is clear that legal, economic and political changes in the Union do have an impact on the Islands, notwithstanding the formal provisions of the Protocol. Some recent developments in this respect are discussed in detail below. More generally however, at least three landmarks

⁶⁴ As is extensively discussed above, it is difficult to determine precisely which provisions of “horizontal” EU measures (such as Regulation 659/1999 on state aids) apply to the Crown Dependencies by virtue of the ambiguous provisions of the Protocol, *e.g.* on the procedural requirements for agricultural state aids.

can be identified in the evolution of European integration, all of which have had an important impact on Jersey's relations with the European Union. These are the Single Market programme launched in 1985, with the abolition of frontiers achieved on schedule by 1 January 1993, the Maastricht Treaty creating the European Union of 1992 with its three pillar structure and laying the basis for the achievement of economic and monetary union on 1 January 1999 (with the practical introduction of the euro on 1 January 2002) and, finally, the unanimous adoption by the European Council of the Constitution on 18 June 2004.

The Constitution, when it enters into force, is likely to have a similar impact on Jersey's relations with the EU which is difficult to quantify in advance. The fact that the negotiation of the Constitution occurred in parallel with (and partly to deal with) the accession of 10 new Member States only complicates this analysis. In simple terms, the Crown Dependencies will be legally linked to a different political "locomotive" from 1 November 2006 onwards. The Constitution itself, despite being essentially a consolidation and simplification of existing law, contains substantial developments both of substantive and procedural law. It may be that these have been minimised by the institutions and the Member States in order to enhance the prospects of domestic approval of the Constitution. Nonetheless, the creation of a single legal personality for the European Union (thereby removing the confusion – both internally and internationally – of the parallel existence of the Community and the Union) is a major and positive development. Similarly – and arguably of over-riding importance – is the incorporation into the Constitution of the Charter of Fundamental Rights of the Union. In procedural terms, the Constitution continues the process started in the Single European Act (1986) and developed in the Maastricht (1992), Amsterdam (1997) and Nice (1999) Treaties of extending the role of the European Parliament in EU law-making through the co-decision procedure and rationalising the opaque and complex comitology procedures. The number of areas of law or policy-making subject to QMV has also been consistently expanded. New impetus has been given to "third pillar" measures in the field of justice and home affairs. Finally, the creation of the new "institutions" of European Council President (article I-22) and the Union Minister for Foreign Affairs (article I-28) will undoubtedly reinforce continuity of action at the highest political level of the Union, as well as raising the profile and "personality" of the Union externally.

In my view however, as so often in European law, it is the less visible changes which may in time have the greatest practical impact, particularly as a result of interpretation by the European Courts. One example is the elevation of the four "freedoms" which underpin the Single Market (the free

movement of goods, persons, services and capital) – together with the principle of non-discrimination – to fundamental freedoms in article I-4. Equally, article I-6 incorporates the judge-made principle of primacy of the law adopted by the institutions of the Union over the law of the Member States.

Article I-44 provides for enhanced cooperation. Although provisions to this effect in earlier Treaties have rarely if ever been used, it is conceivable that in a Union of 25 Member States, greater pressures could arise from certain Member States to go “further and faster” than others in certain areas. This could lead in time to a Union of “concentric circles”, variable geometry or, possibly more accurately, a multi-speed Europe. It is important in this context to note that, although the underlying conditions for the use of enhanced cooperation have not been changed in the Constitution, the procedures by which enhanced cooperation are to be triggered have been made more flexible. Article I-44 provides that the procedure may be initiated provided as few as one-third of the Member States participate.⁶⁵

Given the difficulty which the Commission has experienced in achieving even minimal progress in direct tax measures (the “tax package” itself took seven years to complete) and the new enthusiasm in certain key Member States in this area, taxation may well be a candidate for the early application of “enhanced cooperation.” It is conceivable that this could occur within the eurozone for example. One observation as far as the external aspects of such a move however would be that, to the extent that within the EU legal developments occur at different speeds, it is less likely that law and policies which are not common to all 25 Member States will be imposed on third countries and territories.

As far as the Crown Dependencies are concerned, the political, economic and legal impacts of these developments are difficult to predict, especially since the ratification of the Constitution is still uncertain and, in any event, two years away. Despite the formal protections obtained through a Protocol which should ensure that European “federal” law will remain marginal in Jersey’s political and legal order, it is unlikely that – in practice – the Crown Dependencies will be unaffected by the historic changes enacted in the Constitution and the European political will which they represent.

⁶⁵ Articles III-416 to 423 further specify how enhanced cooperation is to be operated in fields of Union competence, with the exception of areas of exclusive competence and the common foreign and security policy (CFSP). Note however that authorisation to proceed with enhanced cooperation is to be granted by a European decision of the Council acting unanimously (article III-419(2)).

DEVELOPMENTS IN PRACTICE UNDER THE PROTOCOL
BETWEEN 1973 AND 2004

From 1973 till the end of the 1980s, European integration proceeded in fits and starts until the launch of the Single Market programme in 1985. After an initial success with the completion of the customs union two years ahead of schedule in 1968, the 1970s and early 1980s were dominated internally by the accession of the UK, Denmark and Ireland, a referendum on possible UK withdrawal from the Community in 1975, and the accession of the former dictatorships in Greece, Spain and Portugal. Externally, with the Community's exclusive external competence well-established, the pre-occupation was with securing EC markets in the face of competition in textiles, steel, automobiles and electronics, notably from Japan.⁶⁶ Against this background, the arrangements agreed in 1972 for the Crown Dependencies appear to have functioned broadly as intended.

With the apparent success of the Single Market in the late 1980s, inspired by the first Delors Commission and spearheaded by Delors himself supported principally (ironically in view of persistent Euro-scepticism in the UK) by Lord Cockfield and Competition Commissioner Peter Sutherland, the Jersey authorities – under the Policy and Resources Committee – sought more regular, timely and detailed information on developments in the EC than was available either publicly or through the UK authorities. In particular, Jersey was anxious to obtain an early warning of measures being developed in Brussels which might impact, directly or (more usually) indirectly on Jersey's economy, in order to be able to react appropriately. The reporting system which was set up was complemented by occasional informal visits by politicians and officials to the Commission's services in Brussels. These focused essentially on the departments responsible for the internal market (especially financial services) and, at a later stage, for justice and home affairs (including money laundering) and the investigation of fraud (initially UCLAF and later OLAF).⁶⁷

From 1989 onwards, the Jersey authorities' interest in developments in Europe was surprisingly wide and certainly not constrained by the formal terms of Protocol 3. Even at this comparatively early stage in the process of implementing Single Market legislation, there was an awareness in Jersey that

⁶⁶ For further details of the EU's political and economic priorities at this time, see Alastair Sutton, *Relations between the European Community and Japan in 1982 and 1983*, Oxford Yearbook of European Law, 1983.

⁶⁷ *Organe pour la lutte anti-fraude* (OLAF) – an internal but autonomous Commission service set up to investigate, in cooperation with national authorities, fraud affecting the Community budget.

regulatory developments in Europe could impact, directly or indirectly, on the Island. It is interesting that, even at this stage, most of the European issues identified by Jersey as of interest fall outside the formal scope of Protocol 3. These included money laundering, the impact of GATT Uruguay Round negotiations and international trade in services, EU law and policy on tourism, environmental legislation (including the protection of natural resources and waste disposal), the free movement of persons under the Schengen arrangement, the participation of Jersey financial institutions in EU funding activities, the potential impact of EMU on the UK-Jersey monetary union, the evolution of EU rules on payments systems, travellers' allowances, employment, health and safety legislation, and consumer protection legislation – to mention only a few.

Despite the wide-ranging scope of issues of concern to Jersey at this formative and dynamic period in EU integration, in the years leading up to the adoption of the “tax package” in 1996, Jersey's main interest was in monitoring progress being made in the EC institutions towards the completion of the Single Market. In particular, the Jersey authorities (especially the Policy and Resources Committee and the Law Officers) were concerned to know in advance whether measures were likely to be adopted at EC level which could affect Jersey's access to EU markets for financial markets or, conceivably, have an adverse effect.

It is probably fair to say that the Jersey administration was conscious, even at this stage, that standards being set in the EU were likely to provide international benchmarks (for example in environmental and health policy, as well as financial services) and therefore should be taken into consideration in Jersey's own law and policy. As far as financial services are concerned, it is important to keep in mind that the regulatory framework for financial services was only at an embryonic stage at that time. Many important measures (notably for insurance and investment services) had still to be adopted by the Council.

More broadly, however, in the early 1990s Member States' attention was focused on three major new developments, which cumulatively had a radical effect in changing the legal political and institutional framework for European integration and setting a new economic agenda, notably for the achievement of EMU. Jersey, like all other non-Member jurisdictions, was unavoidably affected by these developments “on its doorstep”. These developments were:

- (a) the collapse of the Berlin Wall and of the Warsaw Pact in 1989, leading to applications from former Warsaw Pact countries for membership of the EU and NATO (a process which was to culminate in the fifth EU enlargement on 1 May 2004);

- (b) the total abolition of internal frontiers, with the removal of technical, physical and fiscal barriers and the complete free movement of goods, persons, services and capital provided for in the Single European Act in 1986 and achieved on time on 31 December 1992; and
- (c) the ratification of the Maastricht Treaty, with its new three pillar structure, which entered into force on 1 January 1993.

The establishment of the European Union through the Maastricht Treaty underlined for Jersey and other States or jurisdictions outside the EU, the growing importance of EU law and policy not only for Members but also for non-Members. In the economic and financial field, this was under-scored by the creation of a Treaty framework – with substantive and institutional provisions as well as a binding timetable – for the achievement of economic and monetary union (EMU) by 1 January 1999. Although (as usual) scepticism was expressed in the United Kingdom as to the eventual success of this project, it was clear that the creation of a single currency accompanied by closer economic convergence could have serious implications not only for jurisdictions on the periphery of the EU, but also at the global level.⁶⁸

Between 1990 and 1997 when the EU's activities in the fiscal field increased sharply, Jersey's "pro-active" interest in developments in European integration were matched by those of Guernsey and the Isle of Man. During this time, the ongoing process of market integration under the Single Market programme was affected by accession negotiations with Austria, Finland, Norway and Sweden. Once again, the Norwegian people voted against EU membership, but the three other former EFTA countries became Members of the EU on 1 January 1996. The virtual demise of EFTA and of the European Economic Area Agreement reinforced the economic and political power of the EU. In particular, the intensification of legislation and administrative decision making for the Single Market was accompanied by the sharp increase in the number of European States which were directly affected by the EU's *acquis communautaire*.

In the mid 1990's, the EU was focused not only on the completion of a genuine Single Market within the broader framework of EMU, but also on enlargement and constitutional reform. Developments under the "third pillar" on police powers and judicial cooperation gained momentum at this time, assisted by modifications in the Amsterdam and Nice Treaties. These Treaties in 1997 and 1999 respectively, made mainly incremental changes to

⁶⁸ The Treaty basis for EMU comprising substantive economic and monetary disciplines, institutions such as the European Central Bank and the three-stage timetable, was established in articles 98–124 of the EC Treaty.

the structural and institutional changes made in 1992 by the Maastricht Treaty. In particular, the Amsterdam and Nice Treaties further extended qualified majority voting (QMV) as well as the scope of the European Parliament's powers under the "co-decision" legislative procedure (Article 251 EC). Notwithstanding the apparently slow progress being made both on economic integration and enlargement, it was nonetheless clear to Jersey and the other Crown Dependencies that the Union's decision-making was a force to be reckoned with, irrespective of the formal provisions of Protocol 3 and in fields going well beyond the Single Market.

Against this background, Jersey officials and politicians maintained contact, through their professional advisors in Brussels, virtually on a daily basis with developments in all fields of interest or concern to the Bailiwick. Informal visits were also made both by officials and politicians to "take the temperature" more directly. Undoubtedly, these visits helped to establish a positive impression in the minds of European officials, notably as regards the regulatory, supervisory and enforcement standards applied in the Islands. These contacts certainly served the Islands well in organisations such as the OECD (and FATF), occasionally assisting in dealing with uninformed criticism from different quarters. A more pro-active approach was only adopted when the threat to Jersey's economy emerged in the shape of the EU's tax package (see below).

THE ACQUIS COMMUNAUTAIRE AS A MODEL FOR NON-MEMBERS' LAW AND POLICY – ITS IMPACT ON JERSEY

One of the themes of this paper is the fact that, despite the limited legal scope of the Protocol, Jersey has been increasingly affected in practice by the growing body of EC and even EU law, notably but not exclusively in the internal market area. Largely as a result of having to prepare for the unprecedented fifth enlargement, the Commission was forced to take stock of the complete corpus of existing rules of Community and Union law. As is explained below, these rules comprise - but are not limited to - the voluminous secondary legislation (Directives, Regulations etc.).⁶⁹ In addition to insisting on the complete adoption of the *acquis* by the new Member States, with minimal derogations or transitional periods, the Commission increasingly makes use of the *acquis* in external relations. This is possible because of

⁶⁹ This is often referred to in the press as comprising some 80,000 pages of legal texts. I do not know whether this is accurate; it is however certainly misleading, since by far the more important *acquis* is that which is unwritten, such as the fundamental principles of EU law, as well as the case law of the European Courts.

the political and economic power of the EU. Frequently, the *acquis* is extended to third countries on a consensual basis. Agreements with more than 100 countries have contributed to this process. The new “neighbourhood policy” intends to take this further (see below). Recently, in the fiscal field, the EU has attempted to impose its internal rules and disciplines on third parties, irrespective of their consent. Jersey has been caught up in this process, much against its will, and for this reason some further explanation of the notion of the *acquis communautaire* may be useful, as well as the way it has been used by the Commission in negotiations with third countries.

The fact that many EC terms of art (such as “*acquis communautaire*”) continue to be expressed in French reflects the historic dominance of France and the French language in the development of the EU. With the accession of 10 new Member States from Central and Southern Europe this is now diminishing, with the English language playing a greater primary role than ever in the everyday life of the EU.⁷⁰ Nonetheless, it is remarkable that there is no easy English translation for terms such as “*acquis communautaire*”. In its broadest sense, this term embraces all formal sources of EU law (the Treaties, secondary legislation and rulings of the European and national courts), but also fundamental and general principles of law, “soft law” (recommendations, opinions, guidelines, communications, action plans etc.) and – perhaps most important of all – the decisions of the more than 1000 regulatory, advisory, consultation and management committees which manage the Union’s business on a daily basis.⁷¹

The *acquis communautaire* notion has been widely used in the recent accession negotiations with the 10 new Member States from Central and Southern Europe. It was of course always the case that new Member States had to accept and apply Community law in force at the time of membership. However, particularly in the case of Greece (1981), Spain and Portugal (1986), the application of the relevant Community law was “diluted” by wide-ranging derogations. In the fifth enlargement, the EU made it clear from the outset that derogations in the form of “transitional measures” would only be allowed in exceptional circumstances. Thus, the new Member

⁷⁰ Note however that all legislation, Court judgments and other official documents will still need to be translated into all 20 official languages. The crisis in the EU’s language services (both translation and interpretation) exacerbated by the latest dramatic enlargement has largely gone unnoticed outside the institutions. There is however a very real issue as to whether certain texts can be produced in all official languages in areas where short legally-binding deadlines now apply (e.g., mergers, state aids, anti-dumping and competition policy).

⁷¹ The new Lamfalussy committee procedure in financial services is an example of how crucial legal and policy decisions are taken by Committees largely removed from the public (and even Parliament’s) eye. It is likely that, in the enlarged Union, with formal decision-making becoming ever-slower, such delegated law – and decision-making will increase. It is of course already important in highly-technical areas such as VAT and customs. The indirect impact of this “new approach” to rule-making in the EU on Jersey is discussed below.

States were required to accept the *acquis* applicable in the EU on 1 May 2004 in its totality.⁷²

Apart from the enlargement context, the EU has used the *acquis* as a benchmark in many of its bilateral agreements. As indicated below, a great deal of *acquis* is automatically applicable to Iceland, Norway and Liechtenstein⁷³ as a result of the EEA Agreement. In essence, the EEA provides for the automatic application of EC law on the “four freedoms”, together with key “flanking policies” such as competition, state aids, social policy, consumer protection, environment, statistics and company law. Separate institutional mechanisms are provided for the enforcement of EEA rules as regards Norway, Iceland and Liechtenstein, through the EFTA Surveillance Authority and the EFTA Court. Disputes between the EC and one or more of the EFTA States are subject to a dispute settlement mechanism through a Joint Committee.

As a non-Member State with economic interests closely tied to the EU, Switzerland has negotiated the extension of large areas of the *acquis* through more than 100 bilateral agreements. Historically, a key agreement as far as the free movement of industrial goods is concerned was the EFTA Agreement itself, although this Agreement has now largely been overtaken by the EU and the EEA Agreements. Following the rejection of Swiss participation in the EEA Agreement by the Swiss people, Switzerland has attempted to minimise the negative consequences of this by negotiating separate agreements in areas such as the free movement of persons, trade in agricultural products, public procurement, conformity assessments, transport and participation in EU research and development programmes. More recently, agreements have either been concluded or are being negotiated in areas such as the liberalisation of services, participation in the Schengen system, “third pillar” issues such as economic crime and police cooperation and environmental protection. Although Switzerland’s primary purposes in this process has been to secure market access in the EU comparable to its principal competitors (as well as a degree of influence in EU decision-making in these areas),⁷⁴

⁷² This included new measures which were adopted between the time of signature of the Accession Treaty and 1 May 2004. Note that considerable doubts existed on the administrative and judicial capacity of most of the new Member States to enforce the *acquis*.

⁷³ As a jurisdiction which is in competition with Jersey in financial services, a comparison between Liechtenstein’s status as an EEA State, largely inside the Single Market but outside for tax and agriculture is especially instructive.

⁷⁴ Note that, even for EEA Member States, their participation in the EU legislative process is less than perfect. Article 99 of the EEA Agreement establishes a cooperation process based on the provision of information and consultation in good faith. This does not of course guarantee that the EFTA countries’ wishes will be taken into account in the final version of the EU legislation. More importantly, article 6 EEA provides that in the interpretation of the EEA Agreement (insofar as the provisions are identical to the EC Treaty), the rulings of the ECJ are binding.

Switzerland has also had to make concessions to EU interests, perhaps most notably in the field of personal taxation.

More generally however, the fact that the EU is – with the United States – the largest market in the world for goods and services, means that third countries have little choice other than to adopt their internal law and regulations to those of the EU. For many countries, this dependence on the EU *acquis* has led to applications for EU membership. Taking the European Continent as a whole, there is now a small and diminishing number of jurisdictions which are not either EU Members, applicant States or States with Treaty links which provide for total or partial application of the EU *acquis*.

The economic power of the Union and the need to be represented in its decision-making, was the main motivation for former EFTA countries to join and for Switzerland to engage in such an extensive programme of bilateral negotiations. Even if a primary consideration for the Central European former Warsaw Pact countries was security (principally from Russia) – as evidenced by their rush to join NATO – the need for economic growth in a large de-regulated market was also of crucial importance. In this context, it is important to underline the fact that – as applicant States – the Central European countries, as well as Cyprus and Malta, were all required to accept a binding obligation to implement the EU *acquis* in its totality. Despite being admitted, with observer status, to Council meetings during the accession process (after the conclusion of negotiations and the signature of the Treaty of Accession), the influence which even large countries such as Poland could bring to bear on the EU decision-making process before membership, is negligible. Of course, for all these countries, the ultimate goal (now successfully achieved) was to gain the right to appoint their own Commissioners, vote in the Council and send MEPs to Brussels and Strasbourg, with a concrete reflection of their sovereignty and an influence on EU law and policy.

The purpose of this analysis is not to suggest that Jersey should immediately seek to join the EU, either independently or under the aegis of the UK. The fact is however (as is shown by the reviews of recent practice of other micro-jurisdictions below) that all European jurisdictions on the periphery of the EU without exception – whether formally sovereign or not – now define their international personality, to a greater or lesser extent, by reference to the EU and its *acquis*. It would be strange if this were not the case for Jersey. The additional complication in the case of Jersey, compared for example with notionally sovereign States such as Andorra, Liechtenstein or San Marino, is the need to address the constitutional relationship with the UK at the same time as reviewing the adequacy of Protocol 3 as a “constitutional” framework for relations with the EU.

THE “TAX PACKAGE” AND THE EFFECT ON JERSEY’S
RELATIONSHIP WITH THE EU

In the mid-1990s, following the agreement for a legal framework for EMU in the Maastricht Treaty (articles 98-124 EC), the Commission took a major initiative in the field of direct taxation. In launching a “package” of measures in the field of direct taxation, comprising a draft Directive on the taxation of interest on savings, a Directive for the avoidance of double taxation in interest and royalties and a “code of conduct” for harmful business taxation. The inclusion of an external dimension for the first two of these measures had profound effects on Jersey and the other Crown Dependencies, which were to constitute a landmark (and perhaps a catalyst for change) unlike anything which had gone before.

Although the Commission had identified direct taxation as an area which needed to be addressed in order to complete the Single Market (and multinational enterprises had long complained about the extent to which double taxation remained a serious obstacle to doing business in Europe), Member State opposition had delayed progress in the Council. The unanimity requirement for Council voting on tax legislation was only one of the factors involved. Member States’ desire to protect their fiscal sovereignty at a time of economic difficulty was an over-riding reason for this. For these reasons, in contrast with the situation in indirect taxation (VAT and excises), no progress has been made towards the harmonisation or even coordination of corporate tax rates and structures.

Although, from Jersey’s perspective, the measures included in the “tax package” were of vital concern, they represented only a “second best” option for the EU, particularly for the Commission. The Commission’s aim in 1996 was (and remains today) to achieve closer coordination (if not harmonisation) of Member States corporate tax rates and structures. Despite the production of a succession of policy papers by the Commission and a series of rulings by the European Courts applying fundamental principles of EC law to national tax systems, further progress in these core areas seems as remote today as ever. In order to present a consensus amongst the Member States, the Commission proposed legally binding measures to deal with the taxation of savings interest and for the avoidance of double taxation on interest and royalties. In contrast – and because of the political sensitivities involved – the Commission proposed a non-binding Code of Conduct to eliminate harmful business taxation.

From the outset it was clear that, to make the proposed TOSD and the Code work in practice (and to make the “package” acceptable to all Member

States in the Council), an external or extra-territorial dimension was imperative. Thus, the Commission – for the first time in the field of taxation – obtained a “mandate” from the Council to negotiate agreements with certain third countries and territories in order to ensure that the principles of the TOSD were respected in these jurisdictions.⁷⁵ Article 17 of the TOSD provided that Member States were to apply the Directive from 1 January 2005 (since extended by the Council to 1 July, 2005) on condition that the United States, Switzerland, Liechtenstein, San Marino, Monaco and Andorra applied, on the same date, equivalent measures to those contained in the Directive. For the Channel Islands, the Isle of Man and the dependent or associated territories in the Caribbean, a stricter obligation was envisaged, namely to apply the same measures as those in force in the Community.

As far as the external dimension of the Code was concerned, this was of more limited scope than the TOSD. Thus, Member States’ commitment was limited to “promoting” the adoption of Code principles in third countries. This limited engagement must be seen of course against the background of the fact that, since 1998, the OECD had launched a similar (and geographically more far-reaching) exercise for the removal of harmful business taxation (see below).

It is not the purpose of this paper to discuss the negotiating history of the tax package in detail. However, the importance of this process and these measures for Jersey and the other Crown Dependencies should not be underestimated. They mark, in my view at least, a turning point in Jersey’s relations with the EU and perhaps also with the UK so far as its representation of Jersey’s interests in international relations are concerned. Some of the key factors in this process therefore need to be noted.

For the Commission, the TOSD was important more as a step towards greater fiscal cooperation between national tax authorities in an enlarged EU, than to secure the return of fiscal revenue to individuals’ countries of residence, important as this was for certain Member States such as Germany, France and Belgium. Given the unavoidable external dimension of this measure (and to a lesser extent of the Code of Conduct), the Commission were pleased to have been entrusted by the Council with responsibility for the relevant negotiations. Negotiations with Switzerland, Liechtenstein, Andorra, Monaco and San Marino were difficult as envisaged. Those with the United States were more of a formality.⁷⁶ As far as other jurisdictions were

⁷⁵ Classically, the Commission is the Community negotiator in matters falling within the common commercial policy under article 133. On issues of “mixed competence” (e.g. financial services), the Commission may also negotiate on behalf of the Member States for example in WTO “Rounds” of trade negotiations. To be “mandated” in the field of direct taxation was unprecedented.

⁷⁶ In its report presented to the Council on 28 November 2002, the Commission took the view that the U.S. is an active proponent of information exchange and the analysis of the current information exchange

concerned, at the outset at least, the Commission anticipated that the United Kingdom (and the Netherlands as far as Aruba and the Dutch Antilles were concerned) would take responsibility, “in accordance with its constitutional arrangements,” for ensuring that “the same measures” as those in the Directive were applied in the Crown Dependencies.

It appears that the precise constitutional relationship between the UK and its Crown Dependencies was not made sufficiently clear by the UK either to the Commission, to the Council Presidency (and Secretariat) or to the Member States. Undoubtedly, many Member States at least assumed that the UK’s responsibility for the Crown Dependencies’ external relations and defence was matched by comparable responsibility for the Islands’ internal affairs, and that, at least as a last resort, the UK could impose tax legislation on Jersey and the other Crown Dependencies. This is of course not the case. Under UK constitutional law, Jersey and other Crown Dependencies enjoy virtually unlimited autonomy in managing their internal affairs. Even in international relations, the Islands have – in recent years – acted independently, for example in bilateral and multilateral discussions on taxation and on related issues such as money laundering. Initially therefore, attempts by the Commission (and by the UK) to persuade the Crown Dependencies to adopt the same measures as those in the Directive, were firmly resisted. There were several reasons for this.

As background, it is important to keep in mind that, in the Council of Ministers, the UK assumed a particular responsibility for the successful conclusion of the TOSD or was at least anxious not to be seen as responsible for its failure. Following the Commission’s initial proposal which would have allowed the “coexistence” of exchange of information with a withholding tax, the UK insisted on automatic exchange of information. The Feira European Council of 19-20 June 2000 essentially endorsed the UK approach and shifted the emphasis towards a directive based on exchange of information. Opposition by Austria, Belgium and Luxembourg resulted in agreement at Feira on a seven-year transitional period before the introduction of automatic exchange of information for these Member States. This, of course,

possibilities between the Member States and the U.S. show that current tax treaty provisions provide a solid basis for the development of the existing wide ranging information exchanges. Moreover, the Commission emphasised that the U.S. is in the process of extending the coverage of its domestic reporting requirements to provide a more complete basis for information exchange with those of its tax treaty partners that are prepared to reciprocate. At the ECOFIN Council of 21 January 2003, the Council stated that it considers that the conditions are “effectively satisfied in the case of the United States of America...”. Austria, Belgium and Luxembourg are expected to move to automatic exchange of information if and when the Council agrees by unanimity that the United States of America are committed to exchange of information upon request as defined in the OECD agreement for the purposes of the Directive and the other five named third countries also move to exchange of information upon request. No indications have been made that this is envisaged for the foreseeable future.

provided a model which was immediately adopted by all the third countries, as well as the majority of the dependent or associated territories, including Jersey.

Having assumed primary responsibility for the success of the Directive, the UK exerted considerable pressure on the Crown Dependencies to cooperate with the EU, to negotiate agreements in effect giving (irrespective of Protocol 3) extraterritorial effect to the TOSD and subsequently to pass internal legislation to this end. Whatever the political correctness of this approach, the line taken by the UK authorities ignored UK constitutional law, including the clear provisions of Protocol 3. The fact that the Crown Dependencies acted “voluntarily” in cooperating with the UK and the EU does not alter the fact that the approach adopted by the UK violated at least the principles of legal certainty and legitimate expectations based, *inter alia*, on the fact that Protocol 3 forms an integral part of UK constitutional law and is, one of the rare examples of written law in the constitutional relationship between Jersey and the UK.⁷⁷ Whether a written constitution would have afforded greater protection to the Islands must be doubtful, although the possibility of judicial review by a Constitutional Court (as for example in Germany) may well have provided a firmer basis upon which Jersey and the other Islands could have resisted pressure from the UK authorities, notably the Treasury.

Following extensive discussions between the three Crown Dependencies themselves and with the UK (notably the Treasury, the Inland Revenue and the Department for Constitutional Affairs), it was decided that – in contrast to the situation with Switzerland and the other third countries – agreements would be made between each Crown Dependency and each of the 25 Member States. The reasons why a different approach was chosen by the EU for the UK's dependent territories and the third countries are not entirely clear, although it may well be that the UK itself did not wish to see precedent-setting agreements negotiated between its dependent territories and the EC as such. In the event, the solution which was reached was broadly analogous to the situation which would have existed if a single agreement had been negotiated between each dependent territory and the EC. Thus, following extensive concertation, mainly amongst themselves but also with the UK, the Crown Dependencies settled on the text of a “model agreement”. This was then “negotiated” by the representatives of all three Islands acting in concert with the Commission and the Irish Government in its role as Council Presidency.

⁷⁷ It is remarkable (to this writer at least) that greater prominence has not been given to the role of EU law (particularly Protocol 3) in the relationship between the Crown Dependencies and the UK. This is probably partially explained by the absence of “constitutional” or EU-related litigation involving the Crown Dependencies either in the Jersey or the UK Courts. Lord Falconer, when acknowledging the leading role played by Jersey in the drafting of the Model Agreement, effectively glosses over the fact that Jersey's “cooperation” was only secured by fairly overt “power politics” on the part of the UK authorities.

In contrast to the protracted and often controversial negotiations with third countries, the EU's negotiations with the Crown Dependencies were marked by a high level of efficiency and professionalism on the latter's part. Thus, although there were difficulties to be ironed out on a number of technical issues, the core provisions on the retention tax, including the modalities for its collection and payment, were negotiated without excessive controversy or difficulty.⁷⁸

More problems were caused by the "procedural" provisions of the Model Agreement, including the conditions for suspension, termination and dispute settlement. Throughout the process, the Crown Dependencies (for whom Jersey assumed the role of lead negotiator) were conscious of the overriding need to ensure a "level playing field" not only as regards other third countries and dependent territories, but also between the Member States themselves. The Crown Dependencies also wished to make it clear that, by virtue of Protocol 3, they were outside the fiscal territory of the EU. There was no question therefore of the Crown Dependencies adopting the Directive as such. Finally, unlike the third countries involved, the Crown Dependencies did not seek "counter-concessions" from the EU in exchange for their cooperation in the extraterritorial application of the principles contained in the TOSD.

It is of course premature to evaluate the long-term effects of this turning point in relations between the Crown Dependencies and the EU. Undoubtedly, those on the Commission and Council Presidency side who participated in this exercise cannot but have been impressed by the professionalism of those representing the Crown Dependencies. Of course, in this instance, the interests of all three Crown Dependencies were identical and enabled the Islands to work together, seamlessly, as a team. As is discussed elsewhere in this paper, this model would be difficult if not impossible to replicate when the interests of the three jurisdictions differ. However, given the success (in adverse circumstances) of this exercise – together with that involving the technical adjustments to Protocol 3 in the negotiation of the Constitutional Treaty discussed above – it is clear that in terms of capacity to conduct international relations, the Crown Dependencies are at least at the level of comparable sovereign States. This is an element which should be taken into account not only in the Crown Dependencies themselves but also in London, in any future discussions on the international "personality" of the Crown Dependencies.⁷⁹

⁷⁸ Lord Falconer, in his speech to the States on 10 May 2004, noted that "the signing of these Agreements will be an historic event for Jersey, enabling you to deal bilaterally with other EU Member States within a framework that generates confidence from both sides". See fn. 13.

⁷⁹ Note that in its Strategic Plan 2005–2010, the Jersey authorities specifically identify the development of Jersey's international personality as a priority.

Although it is not possible in this paper to give a full analysis of the proposed Model Agreements, the following outline may be helpful. Two points need to be made at the outset. First, the texts of the Model Agreements were prepared by the Crown Dependencies and subsequently changed very little on the EU side. Secondly, although the Crown Dependencies were careful to proceed in discussions with the EU authorities taking into account progress in the EU's negotiations with other third countries such as Switzerland, the efficiency with which the negotiating process was handled was recognised by the EU (particularly the Commission and Council Presidency) and undoubtedly enhanced the standing of the Crown Dependencies with the EU Member States.

The preamble to the Agreements contains useful confirmation that Jersey is not within the EU fiscal territory and that Protocol 3 thus excludes fiscal policy. It is noted that Jersey will apply a "retention tax" with effect from the date of entry into force of the Directive (1 July 2005) provided that the Member States and other third parties have implemented the Directive and the other Agreements made in relation to it. Jersey also confirms that it is to apply automatic exchange of information in the same terms as provided for in Chapter II of the Directive from the end of the transitional period as defined in article 10(2) of the Directive. The Agreements usefully provide that Jersey's legislation on collective investments is deemed to be equivalent in its effect to EC legislation referred to in articles 2 and 6 of the Directive. Finally, the Agreement provides that Jersey will transfer 75 percent of the revenue of the retention tax to the competent authority of the Member State concerned, in respect of interest payments made by a paying agent established in a contracting party to an individual resident in the other contracting party.

The Agreements, both with Member States which apply exchange of information and with Member States applying withholding tax, are reciprocal in form. Thus, they provide that Member States are to provide the Jersey authorities either with information concerning beneficial owners resident in Jersey but receiving payments from a paying agent in a Member State or the levying of a retention tax on interest payments made to residents of an EU Member State with an account in Jersey. The definitions provided in the Agreements (of "beneficial owner", "paying agent" and "interest payment") are broadly the same as those provided in the Directive itself. A retention tax revenue sharing arrangement is made such that Jersey is to retain 25 percent of the retention tax deducted under the agreement and 75 percent of the revenue is to be transferred to the other contracting party.

Perhaps the most controversial aspect of these negotiations (leaving aside the principle of the Agreement itself) was the issue of dispute settlement. The

background to this issue was the fact that, being outside the EU for fiscal purposes, Jersey would not have the possibility of recourse to the European Courts for the settlement of disputes arising under the Agreements. Similarly, unlike third countries such as Switzerland and Liechtenstein (or even Andorra or San Marino), Jersey had no other framework for dispute settlement either with the EU or its Member States.

The Agreements contain a “best endeavours” clause to resolve difficulties or doubts regarding the implementation or interpretation of the Agreement by mutual agreement. In addition (and as a further safeguard for the Crown Dependencies), either party may terminate the Agreement by giving notice of termination in writing. In such a case, the Agreement shall cease to have an effect 12 months after the serving of notice. Finally (and crucially in view of the absolute need for a level playing field), it is made clear that the Agreement is only to apply on condition that all other parties (the Member States of the EU, the United States, Switzerland and Andorra, Liechtenstein, Monaco and San Marino and all the relevant dependent and associated territories of the Member States of the EC) adopt and implement measures which conform with or are equivalent to those contained in the Directive or in the Agreements and provide for the same dates of implementation. Six months before the date of entry into force of the Directive (now 1 July 2005) the contracting parties are to decide, by common accord, whether this condition of “simultaneous application” has been met. Equally, subject to the mutual agreement procedure, the application of the Agreement or parts of the Agreements may be suspended by either party if the Directive ceases to be applicable either temporarily or permanently under EC law, or in the event that a Member State suspends the application of its implementing legislation. Similarly, and also subject to the mutual agreement procedure, either contracting party may suspend the application of the agreement if one of the third countries or territories subsequently ceases to apply the measures.

It has already been necessary for the EU to postpone the date of implementation of the Directive until 1 July 2005. Currently, although most of the “old” EU Member States have notified their implementing legislation to the Commission, very few of the “new” Member States have done so. At the beginning of 2004, the Commission sent infringement letters for failure to transpose the Directive to Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg and the UK. Until now, out of the old Member States, only Greece, Italy and Luxembourg have not transposed the provisions of the Directive into national legislation. A majority of the ten new Member States have not adopted national legislation necessary to apply the Directive and a few have not even published draft legislation, even though the deadline for adoption was 1 May 2004.

The implementation process regarding the third countries has been proceeding smoothly since a package of bilateral agreements, including the TOSD agreement with Switzerland, were initialled in June 2004. Even if the situation improved in the course of 2004, it is clear that the extension agreed by the Council for the entry into force of the Directive on 1 July 2005 was indispensable and even this may be optimistic. Full implementation could also be further delayed as a result of the ratification process in Switzerland, and perhaps Andorra, San Marino and Liechtenstein, which provides for the possibility of a referendum. Even though Andorra has given guarantees that it would be ready to implement the agreement as early as April 2005 and potential delays due to the constitutional arrangements in Switzerland have already been taken into account when changing the date of application to 1 July 2005, EU institutions will obviously closely monitor the implementation process in third countries.

Perhaps more fundamentally, there appears to be a measure of scepticism, particularly in third countries such as Switzerland, as to whether the TOSD process will lead to substantial fiscal revenue being “repatriated” to EU Member States. The feeling appears to exist amongst legal and fiscal experts in third countries that the lack of clarity or uncertainty regarding the definition of terms such as “paying agent” and “beneficial owner” means that scope exists for those wishing to do so, to escape from the coverage of the agreements. If this is correct, it may be questioned whether the 7 or 8 years work within the EU and with the selected third countries and territories will have been worthwhile.

By general agreement, the TOSD and its related Agreements are marginal in the sense that top priority in the EU itself still needs to be given to providing a common tax base for corporate tax⁸⁰, even if any coordination of rates is unnecessary. Finally, despite the Commission's insistence on the need to extend the coverage of the TOSD to other financial centres (for example in Asia) and its commitment to do so in the Memorandum of Understanding (MoU), of the Agreements with third countries, it is unclear that countries such as Singapore would have the necessary political will or incentive to enter into negotiations with the EU on this matter. If this is the case, then EU Member States, third countries and other jurisdictions such as Jersey which

⁸⁰ With hindsight and taking into account the seven years which have been spent to obtain the limited results in both the TOSD and the Code, it must be difficult for the Commission to be other than pessimistic regarding future corporate tax initiatives, especially in a Union of 25 Member States, where the unanimity rule applies to Council voting on tax matters. It is for this reason that, in my view, new tax initiatives may well take place within the framework of “enhanced cooperation” and by using “soft law” measures such as the Code. See further the Commission papers *Tax policy in the EU – priorities for the years ahead*, COM(2001) 260 final of 23.5.2001; *An Internal Market without company tax obstacles – achievements, ongoing initiatives and remaining challenges*, COM(2003) 726 final of 24.11.2003.

have so far reached agreement with the EU will have no guarantee that there will not be a “flight of capital” from their jurisdictions to others in the world, where no agreement on information exchange or retention tax with the EU exists. Despite the uncertain and controversial background to the TOSD and its related international agreements, the impact of this exercise on Jersey and the other Crown Dependencies has been profound. More than any other development in the last 30 years, the virtual imposition of these measures on Jersey by the UK, acting as “agent” of the EU, has rightly provoked fundamental reflection on Jersey’s constitutional relationship both with the UK and with the EU.

THE CODE OF CONDUCT ON BUSINESS TAXATION – A MORE SERIOUS CHALLENGE TO JERSEY?

Although the taxation of interest payments to EU residents may have a certain impact on the extent to which such funds would be located in Jersey, the pressure which was brought to bear on Jersey by the UK acting on behalf of the EU, to amend its company tax legislation is arguably of greater concern. Part of the “package” of tax measures agreed by the ECOFIN Council on 1 December 1997 was a Resolution on a Code of Conduct for Business Taxation. Section M of this Code [“geographical extension”] stated clearly that the Code would apply to the dependent and associated territories of Member States and that it should also be “promoted” to third countries. It is important to remember that this initiative by the EU was taken at virtually the same time as a similar initiative in the OECD on harmful tax competition. Both the EU and OECD actions were based on the understanding that, although taxation was a legitimate instrument of national economic policy in order to promote competitiveness, certain tax measures were “harmful” and should be eliminated. The EU Code, which was legally non-binding, established a procedure of “peer review” whereby national tax measures which were potentially harmful would be tabled, reviewed and, to the extent that they were found to be “harmful,” gradually eliminated and replaced by non-harmful measures. As far as the UK was concerned, measures in all three Crown Dependencies were identified.⁸¹

Section M of the Code provided in part that “Member States with dependent or associated territories . . . undertake, within the framework of their constitutional arrangements, to ensure that these principles are applied in those territories.” The Jersey Exempt Company legislation was identified by the Group as potentially harmful and became one of 66 measures on the

⁸¹ Full details of the measures are to be found in the Primarolo Report: *The Code of Conduct on Business Taxation / Primarolo Group*, ECOFIN Council of 29.11.1999.

final list of harmful measures which were subject to the “standstill” and “roll-back” provisions of the Code⁸². After considerable reflection and consultation, Jersey proposed new company tax legislation which was subsequently submitted to the Group by the United Kingdom and approved as being consistent with the Code.

As in the case of the TOSD, Jersey found that its company tax legislation has had to be changed as a result of:

- (a) action initiated by the EU outside the framework of Protocol 3;
- (b) political pressure from the United Kingdom outside the framework of established constitutional arrangements and arguably in contradiction with the phrase in the Code of Conduct which provides that Member States should act “within the framework of the constitutional arrangements”;
- (c) pressure exercised in such a way as to endanger the legal and economic basis for Jersey’s hard-won economic prosperity and political stability.

As Jersey and other territories affected by the EU and OECD measures have made clear, the attempts by the EU and OECD to apply their tax law and policy (even when it is legally non-binding) extra-territorially is not only in doubtful conformity with public international law but also threatens the economic viability of States and territories which often have no other means of economic survival. This is particularly true of developing countries in the Caribbean, but applies to micro-jurisdictions such as Jersey, Guernsey and the Isle of Man, for whom attracting financial services and other corporate business to establish a base in the Islands is crucial to their future prosperity.

A common and disturbing theme which runs through the extra-territorial extension of EU tax policy (and that of the OECD) is the absence of any legal basis for such action. Unlike areas such as trade, health, civil aviation, maritime policy and telecommunications, there is no universal (or even regional) agreement on tax, either as regards rates, structures or even the details and modalities of international cooperation. No legal definition of “tax haven” exists. Economic and non-binding definitions such as those in the OECD’s 1998 Report and in the EU’s Code of Conduct (para. B, 1-5) cannot lawfully be applied to non-Members.⁸³ In the case of Jersey, the situation is even worse. A change in Jersey’s corporate tax law and policy was forced on the Island not only contrary to the provisions of Protocol 3, but also contrary to the spirit if not the letter of UK constitutional law. It is only

⁸² The four Jersey measures identified by the Code were the *Tax Exempt Companies*, the *International Treasury operations*, *International Business Companies* and *Captive Insurance Companies*.

⁸³ Note that the Code defines “harmful” tax practices rather than “tax havens”.

of limited consolation in this context that Jersey and the other dependencies at least did not suffer the “double jeopardy” endured by Gibraltar, and certain Member States (such as Belgium) whose company tax legislation was not only subject to the standstill and rollback provisions of the Code of Conduct, but was also attacked by the Commission under EU state aid law.

For the sake of completeness, some mention should be made of the OECD tax initiative. Unlike the EU Code of Conduct which addressed rates of taxation (or at least differences in rates of taxation), the OECD initiative (based on the OECD’s 1998 Report *Harmful Tax Competition: An Emerging Global Issue*) addressed the issue of effective exchange of information and transparency. Although the OECD initiative, like that in the EU, was an attack on allegedly harmful tax practices, including “tax havens”, the OECD did not use the device of “standstill” and “rollback” to address specific measures.⁸⁴ Nonetheless, the attempt by a limited number of developed countries within the OECD to impose tax policies (including exchange of information and cooperation) on non-members was not only arguably in breach of public international law, but also deeply resented by some of the developing countries and territories on whom OECD policy was imposed. From a more positive standpoint, the OECD initiative provided Jersey with an opportunity to enhance its reputation as a well-regulated financial jurisdiction. In addition, from a constitutional perspective, Jersey conducted its negotiations with the OECD Secretariat independently of the UK authorities. In this way, Jersey cemented its “standing” in the OECD, where the Island already represented its own interests in the Financial Action Task Force (FATF) and in the Offshore Group of Banking Supervisors.

On 22 February 2002, Jersey provided the OECD with a letter of commitment ensuring that the Island was not included on the OECD list of uncooperative tax havens. In its letter of commitment, Jersey undertook to maintain legal mechanisms allowing information to be provided to tax authorities on specific request for the investigation and prosecution of criminal tax matters on a reciprocal basis. Such information is to be provided even if the conduct being investigated would not constitute a crime under Jersey law. Jersey also undertook to provide to tax authorities upon specific request and in accordance with tax information exchange agreements (TIEAs) to be negotiated with individual countries, information that may be relevant to civil tax matters. Jersey undertook to negotiate TIEAs on condition of full reciprocity, including adequate protection against the unauthorized disclosure of information by the receiving jurisdiction and taking into account privacy obligations arising under relevant human rights law.

⁸⁴ The OECD exercise lost considerable momentum (and credibility) following the lack of support from the Bush administration in the US.

Jersey's Changing Constitutional Relationship with Europe

As far as transparency is concerned, Jersey undertook to ensure the availability of information on beneficial ownership of companies and other legal entities established in Jersey and to ensure that the Jersey authorities have access to bank information relevant to tax matters of both resident and non-resident business enterprises, individuals and other entities, including trusts. Jersey would also require accounts to be kept by companies and other entities in Jersey, in accordance with accepted international standards.

As background to Jersey's commitment to the OECD, the Island Authorities underlined a number of points which had also been made with Commission officials in Brussels. These were that Jersey already has existing legislation providing for exchange of information on criminal tax matters and under Jersey's legislation in respect to the investigation of fraud, all crimes, money laundering and international cooperation, Jersey could already provide information to some other jurisdictions which could be regarded as an exchange of information in respect to civil tax matters. More generally, and politically, Jersey took the opportunity of its commitment to the OECD to underline the need for an inclusive process in setting internationally accepted standards, in view of the need to attract global support for these standards. In this respect, the OECD Committee on Fiscal Affairs could only be successful if its work were carried out on a global basis and through a global partnership. The principle of a level playing field was indispensable in the fiscal field. As far as Jersey was concerned, the need for a level playing field also meant that OECD Members which failed to adopt equivalent commitments or to satisfy the standards of the 1998 Report would be subject (like non-members of the OECD) to a "common framework of defensive measures." Finally, the Jersey authorities emphasized that fair tax competition in all areas of business activity was a benefit to the world economy and was not to be discouraged.

THE IMPACT ON JERSEY OF EU ACTIVITIES IN JUSTICE AND HOME AFFAIRS

Over the last seven years, it is understandable that Jersey's attention has increasingly been focused on the potential negative consequences of the "tax package" adopted in 1996 and the opportunities offered by the integrated EU financial services markets. However, during this time, and in a way which is related to developments in EU tax policy, the "third pillar" of the Maastricht Treaty has provided a basis for increased inter-governmental cooperation in the field of justice and home affairs.⁸⁵ Although dissatisfaction has been

⁸⁵ Title VI of the Treaty on European Union (TEU) laid down provisions on "police and judicial cooperation in criminal matters". Substantial amendments were introduced in this area, particularly by the Amsterdam Treaty which came into force on 1 May 1999.

expressed with progress in a number of areas under the third pillar, there is no doubt that there exists today a level of cooperation between national law-enforcement agencies (and judiciaries) which was unimaginable ten years ago. Given its prominence in the world of international finance, it was inconceivable that Jersey would be unaffected by these developments or indeed, given its excellent reputation in the field, that it would avoid appropriate action to relate to these European developments outside the scope of Protocol 3.

As with almost all new areas of EC or EU policy (the Single Market and EMU were two previous examples), the prospects for successful cooperation between Member States in this area were regarded with some scepticism, notably in the United Kingdom. Increased cooperation between police and other law enforcement authorities had become essential as a result of the total abolition of internal frontiers under article 14 EC. In short, the free movement of goods, services, persons and capital was accompanied by greater freedom for criminals and criminal activities. Article 29 TEU provided that an important Union objective should be to "provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia." This Treaty objective was to be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud, through closer cooperation between police forces, customs and judicial authorities in the Member States.

It soon became clear that in this, as in other areas of EU policy, measures could not be confined to EU Member States alone. In particular, a close nexus was perceived between the creation of a single financial services market and the total abolition on free movement of capital (accompanied and enhanced by the increasing use of electronic commerce), the possibilities for fiscal evasion both at the personal and corporate levels (thus necessitating increased cooperation between national fiscal authorities) and international criminal activities such as money laundering. It was therefore not surprising that EU action in all these areas tended to progress simultaneously if not in a coordinated manner. From an early stage therefore, as a jurisdiction conscious of the need to preserve the highest possible standards of regulation and supervision, Jersey took an active interest in developments at EU level in the field of justice and home affairs, in particular in the field of money laundering.

Jersey's monitoring activities in this and other areas were facilitated by the fact that, following the example set in the 1985 White Paper for the completion of the internal market, the Community increasingly adopted legislative

programmes accompanied by politically-binding time tables in other fields of activity. The Financial Services Action Plan (FSAP) is an example which is discussed below. Likewise, in police and judicial cooperation, legislative time tables, action plans and “scoreboards” providing transparency for Member States⁸⁶ progress in implementing legislation adopted by the Council, facilitated monitoring by Jersey and other non-member jurisdictions. At the same time, even if in strictly legal terms the powers of the Commission were limited in this area of inter-governmental law and policy, in practice the role and influence of the Commission has increased steadily over the last decade. Thus, the Commission’s Directorate General for Justice and Home Affairs is now one of the largest services in the Commission and takes responsibility not only for proposing legislative initiatives in this area but also for monitoring and enforcing respect by Member States for measures already adopted.

Jersey and the other Crown Dependencies have been particularly keen not only to monitor the adoption of EU law and policy in this area, but also to ensure that the EU and other international authorities recognize that Jersey’s own legislation in the field of economic crime (as well as the Islands’ track record in international cooperation) was of the highest order. In general, this has been achieved. Jersey has been a participant, in its own right, in the Financial Action Task Force (FATF) established under the OECD. At the same time, Jersey officials and the Law Officers have ensured that the Commission are kept informed of Jersey legislation in this area, through meetings not only with the Director General for Justice and Home Affairs but also with the Commission’s anti-fraud service (OLAF), which takes action in cooperation with national police forces against fraud on the Community budget.⁸⁷ These meetings have been welcomed by the Commission, which has responded favourably not only to the extent to which Jersey’s own legislation (for example, on money laundering) broadly reflects that in force in the EU, but also on the efficiency of the cooperation provided by the Jersey authorities (notably the Law Officers) in their dealings with Member States or Union authorities.⁸⁸

There was of course no way in which Jersey (or indeed the United Kingdom itself) could have known in 1972 that the economic goals of the

⁸⁶ See Commission documents SEC (2004) 401 and 680 which contain an impressive list and summary of the main measures adopted in this field under the Tampere programme, in fields such as asylum and immigration, visa policy, judicial cooperation in civil and criminal matters, mutual recognition of judgments, and the fight against drugs, terrorism and other forms of international crime.

⁸⁷ Given the extensive legislation adopted by the EU in the field of money-laundering, the fact that Jersey has enacted comparable legislation in parallel to that in the EU has been particularly well-received by the EU authorities.

⁸⁸ Lord Falconer has recognised Jersey’s efforts to develop measures to counter the threat posed by money laundering and other financial crime (speech to the States on 10 May 2004). See fn 13.

European Community would, as a result of unforeseen events, need to be complemented in areas such as security, defence and criminal law. Although there is no doubt (at least in my mind) that the total abolition of internal frontiers on 31 December 1992 emphasised the need to strengthen the external borders of the EU, the main impetus which led to the second and third “pillars” of the EU being included in the Maastricht Treaty in 1992 were the collapse of the Berlin Wall and increased instability on the EU’s Eastern frontier, combined with the total abolition of internal frontiers in the EU and the opportunities which this offered to organized crime.

In addition and perhaps more importantly, it was realised that to attempt to limit the competence of the Community to purely “economic” issues and to public rather than private law, was not only realistic but possibly counter-productive. Thus, since 1992, the divisions between the three “pillars” (particularly between the first and third pillars) has become increasingly irrelevant so that, in the Constitutional Treaty now awaiting ratification, the pillar structure has been abolished altogether. In addition, the EC has increasingly addressed the need to harmonise or at least coordinate areas of national private as well as criminal law. The need for increased judicial cooperation, including the mutual recognition and enforcement of judgements as well as cooperation between law enforcement authorities, has also been recognised.

In a way which was unforeseen a mere decade ago, justice and home affairs has become one of the most dynamic policy domains in the EU. Particular impetus was given by the procedural changes enacted in the Treaties of Amsterdam and Nice, which came into force in May 1999 and May 2003 respectively. In the Amsterdam Treaty, policies grouped under the heading of JHA were re-labelled freedom, security and justice, together with judicial cooperation in penal matters. Immediately after the entry into force of the Treaty of Amsterdam on 1 May 1999, the EU adopted an ambitious work program at the Tampere European Council of 15-16 October 1999, at the same time outlining a timetable (the “Tampere scoreboard”) which set objectives as well as deadlines and gave structure to the agenda in this area.⁸⁹

It is beyond the scope of this paper to discuss in detail progress which has been made in various areas of justice and home affairs. Two observations may however safely be made. First, the intensity of regulatory action in the Council was entirely unforeseen 10 years ago. Secondly, almost all the measures taken have an external as well as an internal impact, which Jersey (like other jurisdictions on the periphery of the EU) cannot afford to ignore. EU regulatory activity has been most intense in areas such as immigration, asylum and judicial cooperation in criminal matters. Given the intrinsic

⁸⁹ See further *Progress and obstacles in the area of justice and home affairs in an enlarging Europe*, CEPS working document no. 194 by Joanna Apap and Sergio Carrera (June 2003).

sensitivity, in terms of national politics, in all these areas, it is not surprising that progress has been difficult and characterised by continuing frictions and strains amongst the Member States. Some of the causes of these frictions which have been identified are the weakness of political resolve by the Member States themselves, the diversity amongst national legal systems (particularly after EU enlargement in 2004) and police practices, differences in European policies on immigration and asylum, corruption amongst certain national authorities, a lack of consistency owing to the practice of the rotating EU presidency and the unsatisfactory or unclear character of the EU pillar structure.

Despite the difficulties and setbacks involved in this relatively new area of EU policy, it is clear that, as jurisdictions with high standards of regulation, supervision and law enforcement, Jersey and the other Crown Dependencies cannot stand aside from these developments, whatever the formal provisions of Protocol 3. Jersey has in fact much to gain - with the EU as with the OECD - from being perceived as a "cooperating jurisdiction" and one which applies high standards in matters falling under the criminal law. Thus, not only has Jersey felt it appropriate to monitor carefully developments in this new area of EU activities, but the Islands' authorities have in certain cases developed contacts with certain of the institutions which have been set up to facilitate cooperation at European level.⁹⁰ Given the close relationship between financial services as Jersey's core economic activity and issues such as money laundering and other forms of economic crime together with the need for wide ranging administrative and judicial cooperation at European level in these areas, it may be wondered whether the current scope of Protocol 3 is not more of a handicap than a benefit to Jersey in developing a form of cooperation with other jurisdictions in Europe (including the EU institutions).

In this respect it is important to stress that Jersey's deep-rooted desire to preserve its culture and heritage through independence is not unique in modern Europe. Indeed, there is in my view a close relationship between the trend towards subsidiarity and decentralisation on the one hand and regional autonomy on the other. Sovereign States such as Andorra and Liechtenstein are equally jealous of their unique history and independence. This, it is submitted, is entirely distinct from the extent to which international cooperation is appropriate. For Jersey to underpin its economic prosperity, international cooperation is indispensable. For this, a clearer and more extensive international personality is overdue.

⁹⁰ Eurojust, a European Union body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime, and Europol, which was set up to improve police cooperation between the Member States to combat terrorism, illicit traffic in drugs and other serious forms of international crime.

FINANCIAL SERVICES AND ACCESS TO EU MARKETS FOR
JERSEY COMPANIES

The growth of Jersey as an international financial centre occurred largely in parallel to the creation of a legal framework for a single financial services market in the EC.⁹¹ As in the GATT (later the WTO), the liberalisation of services markets lagged behind the liberalisation of trade in goods. However, in the space of one decade (between 1988 and 1998) the EC had completed the framework providing for the establishment and the cross-border provision of services in the banking, insurance and securities sectors. Throughout this time, Jersey's financial products could be marketed in EC Member States only as a result of bilateral agreements with the financial authorities in those Member States. This is still the case today. By virtue of Protocol 3 Jersey is, as far as financial and other services are concerned, outside the Single Market and, in practice, in the position of a third country. This is of course in contrast to Liechtenstein which benefits from freedom of services under the EEA Agreement and to Switzerland which has negotiated market access, at least in certain financial sectors, on a bilateral, case-by-case basis. Other countries (such as Andorra and San Marino) have used the recent TOSD negotiations at least to provide a springboard for future market access negotiations.

The success of Jersey's financial industry over the last 30 years and the fact that it is likely to provide the basis for the Islands' future economic prosperity raises the question of the adequacy of Jersey's constitutional links both with the UK and with the EU (as well as other international organisations) in perhaps its most acute form. Protocol 3 is largely if not completely irrelevant to the way in which the Jersey authorities regulate and supervise the financial services industry and to the way in which that industry markets its products in the EU. It is an important question whether the absence of an international legal framework for this important industry (not only in Jersey but in the other Crown Dependencies) is positive, negative or neutral from the standpoint of the protection and development of Jersey's financial services industry. In a fast changing world, it is clear that all jurisdictions for which financial services are a key economic sector are being forced to address this question at

⁹¹ Although the basic framework for the financial services market was set by the establishment and services Directives on banks, insurance and investment services in the late 1980s and early 1990s, these fundamental rules have been modernised and complemented by the Financial Services Action Plan (FSAP) agreed in 1998 and due for completion in 2005. The adoption by the Council of the Lamfalussy Committee's recommendations has now fundamentally changed the regulatory (though not the supervisory) approach to financial services in the EU. Attention has now shifted to EU financial regulation and supervision after 2005, as evidenced by the creation of a taskforce under the Centre for European Policy Studies (CEPS) in Brussels on this subject.

the same time as Jersey, without yet having found a perfect solution. Some, such as Cyprus and Malta (together with other small jurisdictions which have aspirations in financial services such as Slovenia and Estonia) have opted for and obtained EU membership. Others – as indicated above – such as, Andorra, Monaco, San Marino, Iceland and jurisdictions beyond Europe such as those in the Caribbean, the Far East and other parts of the world, are still searching for an appropriate solution. Full membership (or at least adherence to) the WTO GATS, would be an important start for Jersey and all comparable jurisdictions. Whilst not automatically guaranteeing full market access for all financial products, the application of the national treatment and most-favoured nation (MFN) standards in the GATS, as well as the forum which the WTO provides for ongoing market opening negotiations, are an essential legal platform for all jurisdictions for which financial services are a key component of their economies. Again, as so often throughout this paper, the conclusion of suitable arrangements or modalities for international negotiations by Jersey itself, with the UK authorities, is both indispensable and increasingly urgent.

The issues involved are complex, both legally and institutionally. Even if, for Jersey, access to international markets is a priority, financial services are now inextricably linked with other issues such as taxation, economic crime and “corporate governance” in the broadest sense. In the latest report by the European Commission on the Financial Services Action Plan (FSAP)⁹², the Commission makes it clear that the emphasis has now shifted from completing the legislative framework for the cross border provision of services (including the consolidation of existing directives in banking and insurance) and turning to addressing lessons learned from market failures such as Parmalat. Thus, the current legislative priorities for the EU cover areas such as audit and accountancy, money laundering, more rigorous capital requirements (the CAD III proposal), follow-up to the action plan on company law and corporate governance and strengthening company law provisions on cross border transfers of corporate seats.

As the Commission states in its 10th Report on the FSAP:

“Although the European Commission tried to keep additional measures in the area of financial services limited in amount, developments and/or incidents required adaptability and flexible political responses. This was true, for instance in the areas of company law and corporate governance, where the accounting scandals in the United States and Europe required a tailored European response. Furthermore, it became clear already at an early stage of the FSAP that an integrated market could not be achieved by

⁹² *Financial Services: Turning the Corner – Preparing the challenge of the next phase of European capital market integration*, Brussels 2 June 2004 (10th Report).

regulation only: parallel work was set in hand to develop more streamlined regulatory and supervisory structure.”

As a jurisdiction which seeks to attract companies to locate or do business in Jersey, it is clearly in the Island’s political and economic interests to keep abreast of – and indeed to cooperate with – these new European initiatives, so that there can be no question that Jersey has equivalent regulatory and supervisory standards in the field of company law (including audit and accountancy).

As far as the modernisation of regulatory and supervisory structures is concerned, in July 2000, the ECOFIN Council established a Group of Wise Men, chaired by Baron Alexandre Lamfalussy, to investigate and propose options. In February 2001, the final Lamfalussy report recommended reform of the European regulatory structure in the securities area, calling for a four-level approach in the lawmaking process. This approach comprises:

- (a) “Level 1” framework legislation adopted by the co-decision procedure under article 251 EC concentrating on the core legal principles;
- (b) Level 2 implementing measures to fill in the details of Level 1 legislation, to be adopted by the Commission in cooperation with a committee of Member States’ experts;
- (c) greater day-to-day cooperation by national supervisors and regulators to ensure consistent implementation and enforcement, again by the Commission in consultation with national experts; and
- (d) more effective enforcement of Community law.

Following the success of the “Lamfalussy approach” in the securities area, the Council has recently decided to extend this approach to banking and insurance. A new institutional framework has therefore been established, covering the whole financial services field, for the regulation of the industry at European level.⁹³

In clear terms, the Lamfalussy approach means a radical change in the regulation of a key area of the Single Market, which in my view at least, has been relatively unnoticed. This approach (which substantially speeds up EU law making) could eventually be adopted in other areas of EU regulation and is noteworthy for this reason alone. Under this approach the “normal EU lawmaking process” (the co-decision procedure involving the Council and the Parliament under Article 251 EC) is restricted to framework or “over-arching” measures, whereas detailed implementing and enforcement measures would revert to the Commission, admittedly acting in cooperation with

⁹³ Note that supervision (as opposed to the regulation) of the financial services industry is still very much a matter of national as opposed to EU competence.

(and on the advice) of national experts in sectoral committees. Thus, “Level 2” committees would comprise the European Securities Committee (ESC), the European Banking Committee (EBC) and the European Insurance and Occupational Pensions Committee (EIOPC). All these committees would be chaired by the Commission and located in Brussels. Three new “Level 3” committees have been created as follows: the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS). The Securities Committee would be located in Paris, the Banking Committee in London and the Insurance and Occupational Pensions Committee in Frankfurt.⁹⁴

In my view, the adoption of the Lamfalussy approach across-the-board in financial services is of considerable significance for jurisdictions such as Jersey. The new approach reflects an intensification and a quickening in the pace of EU financial services regulation. This has been prompted, *inter alia*, by technological changes and the need for the EU to provide a regulatory and supervisory framework for financial services which enhances Europe’s competitiveness compared with the United States and other jurisdictions. Arguably (although this is of course denied by the Commission) the new approach is less transparent than its predecessor. This is a particular problem for the European Parliament which continues to fight for an equal role in EU legislation with the Council. Non-membership of the new committees will be an added disadvantage. Given the scope and ongoing nature of these reforms (see below), it will be vital for “off-shore” financial centres such as Jersey to establish the best possible working relationships with the new EU structure. One key constitutional issue here is whether this is done directly (formally or informally) or through the UK authorities. This question of course goes to the heart of the issues discussed in this paper, namely that Jersey must enjoy comparable international personality to its internal autonomy, particularly in areas crucial to Jersey’s economic future, such as financial services.

As far as the post FSAP era is concerned (*i.e.*, from 1 January 2005 onwards) it is clear that reforms will be ongoing, although perhaps at a more measured pace. The Commission recently received reports from four groups of market practitioners aimed at assessing the strengths and weaknesses of the European legislative framework in the banking, insurance, securities and asset management sectors. The new Commission under President Barroso, which took office on 1 November 2004, will have to evaluate the conclusions to be drawn from these reports and decide what action to take. It is already clear that the Commission will not rush headlong into announcing new

⁹⁴ The function of the Level 3 committees is to issue non-binding guidelines in their respective sectors.

legislative initiatives beyond those already announced. As the Commission itself has said⁹⁵ “the present legislative programme on strengthening solvency requirements for insurance companies, reinsurance, clearing and settlement, the legal framework for payments, corporate governance and the reform of company law is already a demanding and continuing regulatory priority in the post FSAP period. Nevertheless, where necessary, targeted legislative action in response to specific market failures or regulatory gaps may be an appropriate response and should not be ruled out”.

In addition, Member States meeting in the Financial Services Committee (FSC) have also prepared a report on financial integration in the EU, which was sent to the June 2004 ECOFIN Council. Finally, the Commission has been attempting to evaluate whether the current legislative framework, (as well as the regulatory and supervisory provisions under it) has actually improved cross border commercial opportunities from the four financial institutions and investors. The Commission’s first annual Financial Integration Monitoring (FIM) report has been published alongside the four expert group reports mentioned above. According to the Commission, there is evidence of increased integration of financial markets, as well as favourable developments in terms of competition, market structure, efficiency and the intensity of cross border risk transmission channels. It is unclear however to what extent the new regulatory and supervisory framework for financial services have contributed to this, compared with factors such as the introduction of the euro, cyclical factors or technology. More broadly, it is clear that, in the future, the Commission will work increasingly closely with the private sector in order to develop “evidence-based policy-making and prioritization”. Any future regulation at European level must be “effective and proportionate, respecting the subsidiarity principle”. It must avoid distorting legitimate competition between market players and be attentive to European competitiveness in a global market place. According to the Commission, this should not only apply to directives and regulations, but also to implementing measures and supervisory standards agreed upon within the Lamfalussy framework. The Commission is committed to “impact assessments” in order to prevent inappropriate regulation.

For jurisdictions such as Jersey, the broadening, deepening and intensification of regulation within the EU presents a challenge on at least three levels. First, financial operators in Jersey need to take account of a rapidly changing regulatory and supervisory environment in their biggest and closest market. Secondly, the Jersey authorities (including regulators and supervisors) need to keep abreast of this rapidly changing legal environment in order to ensure that Jersey’s own law and practice is equivalent in all respects. Finally, Jersey’s

⁹⁵ Page 13 of the FSAP Report of 2 June 2004.

economic operators and authorities alike must cope with the fact that, for legal and political reasons, they are formally excluded from the decision-making process in the EU, which will nonetheless have an important influence on the Jersey industry in the years to come.

There is a danger that the pace and intensity of regulatory and supervisory change in European financial services may be under-estimated by economic operators and jurisdictions which are not close to the process. As recently as 2000, there was little interest in the United States administration in establishing cooperation with the EU (as opposed to individual Member States) on financial services. This situation has now completely changed with the Treasury, Securities and Exchange Commission (SEC) and the Federal Reserve (as well as the State Department) actively participating in and pressing for regular consultations with their counterparts in the EU. The need for Jersey to do likewise can scarcely be less.

THE IMPACT OF INTERNATIONAL ACTION AGAINST "TAX HAVENS" AND OFF-SHORE FINANCIAL CENTRES

Jersey's unsought status as a "tax haven" or as an "off-shore centre" is as politically unwanted as it is legally unfounded. These unsolicited labels have been applied to sovereign and non-sovereign jurisdictions across the world, including – occasionally – to EU Member States such as Luxembourg, Cyprus and Malta. Even if the terms "tax haven" and "off-shore centre" have no automatic legal definition or consequences, jurisdictions to which these appellations are attached have undoubtedly suffered adverse consequences at the hands of, for example, the OECD, the EU and the United States (both at Federal and State level).

The fact that such labels are attached to jurisdictions such as Jersey without any clear legal basis makes it difficult to identify a strategy to avoid the negative consequences of such appellations.⁹⁶ Recent developments in the United States, both at Federal and State level, have shown that Jersey and other "off-shore" jurisdictions may be cited or "black-listed" in legislation which aims at limiting United States' use of "off-shore" jurisdictions for investment or trade purposes. It appears that the primary "targets" of such legislation are jurisdiction in the same time-zone as the United States (*e.g.*, in the Caribbean).

⁹⁶ In the context of its work on harmful tax practices, the OECD set out in 1998 four criteria to determine whether a jurisdiction is a tax haven. These are: zero or nominal taxation; lack of transparency; laws or practices preventing the effective exchange of information for tax purposes, with other jurisdictions and the absence of a requirement that economic activity be substantial. Considerable and unresolved debate exists on the public international law consequences of action taken (including extraterritoriality) by, for example, OECD countries, against jurisdictions which are "labelled" as "tax havens".

It is therefore important for Jersey to ensure that its status (vis-à-vis the UK and the EU) is better known, especially in the United States, as well as its regulatory and supervisory system and trade-record in international cooperation. Improving international knowledge of Jersey's "personality" is one aspect of the increased challenge (as Liechtenstein and other micro-States have for example found) in dealing with an enhanced international personality.

Given that the label "tax haven" has no precise legal definition in public international law, it is vital that Jersey's partners in the world (including the United States and the EU) are fully and consistently briefed – in a way which can be referred to and relied on – on Jersey's legislation and law enforcement activities, in relevant areas such as tax, financial services and economic crime.

It may well be, even when such steps are taken in a more systematic way to improve international understanding, that difficulties remain, for example as regards the rates of corporate tax applied in Jersey in order to attract foreign business or investment. However, at the very least, a more intensive and direct international dialogue with key partners would address the current level of ignorance and misunderstanding, which clearly exists.

GENERAL RECOGNITION OF THE EXCELLENCE OF JERSEY'S REGULATORY AND SUPERVISORY STRUCTURE

Although Jersey has been grouped together with other jurisdictions and categorised as a "tax haven" (as discussed above), the general excellence of Jersey's regulatory and supervisory systems in the field of financial services is now better recognised. This has come about as a result, *inter alia*, of Jersey's own efforts to give proper publicity to its regulatory and supervisory structures and practices, for example in the OECD (including the FATF and the off-shore group of banking supervisors) and through full cooperation in exercises such as that conducted by Andrew Edwards on the instructions of the UK authorities in 1998 and, more recently, by the IMF.⁹⁷ Jersey's non-sovereign status has not helped in establishing a separate identity from that of the UK. Of course, it may be argued that sovereign small states such as Liechtenstein, Andorra, San Marino or Monaco have not necessarily fared better than Jersey in securing international recognition and approval or in escaping "black-listing", for example in the United States. It may be that in certain quarters, for example, in the United States, Jersey's close (but undefined) constitutional relationship with the UK is an impediment to the Island's being able to secure adequate recognition in its own right as an independent jurisdiction in the

⁹⁷ *Assessment of the Supervision and Regulation of the Financial Sector* Volumes I and II (November, 2003). See fn. 19.

international financial services world. The confusion within the EU in the context of recent discussions and negotiations on the TOSD are a further example of this phenomenon, which is discussed in more detail below.

There could scarcely be any higher recommendation for Jersey (and indeed Guernsey and the Isle of Man) than the Edwards Report of 1998.⁹⁸ Edwards found that Jersey and the other Crown Dependencies are “clearly in the top division of off-shore financial centres, with legal frameworks, judicial and prosecution systems, regulation, policing and cooperation with other jurisdictions which mostly work well.” Edwards estimated that the Islands’ finance centres (taken together), in terms of assets and liabilities of Island institutions and trusts “probably now amount to some 300 to 350 billion pounds”. The Edwards’ Report expressly does not deal with criticisms of the Islands’ tax regimes and the appropriateness or otherwise of labels such as “tax haven”. On the other hand, Edwards expressly rejects any criticisms based on secrecy, poor regulation and poor cooperation as being “quite wide of the mark”. Edwards concludes, as to the Islands’ reputation, that “the Islands are in the top division of off-shore centres”. He adds that “many of the professional people I consulted commended their standard of regulation, the absence of corruption, and their cooperation with other jurisdictions, especially in the pursuit of drug trafficking”.

Criticisms mentioned by Edwards dealt more with company law and practice and with law enforcement, particularly in the area of tax evasion and other forms of financial crime. It is not possible within the confines of this paper to examine Edwards’ conclusions in more depth. However, to the extent that criticisms are made in the Edwards Report of Jersey’s law and practice, these deal with points of detail rather than major issues of principle and probably could be made with respect to any Member State of the European Union. Indeed, on the occasions when Jersey’s law officers have presented Jersey’s regulatory and supervisory system (both as regards financial services and economic crime) to the EU authorities in Brussels, the comment has often been made that Jersey’s situation is equivalent (and even superior) to that of many Member States. This must certainly be the case to an even greater extent following the EU’s enlargement on 1 May 2004, with the accession of Central European countries, still shaking off the administrative legacy of earlier years.⁹⁹

Edwards, understandably, does not discuss whether the “constitutional” relationship between Jersey and the UK and with the EU is advantageous or

⁹⁸ Lord Falconer said on 10 May 2004 that “the role which Jersey has played in Europe and beyond on financial matters shows just how successful Jersey has been learning a positive and well-deserved reputation for financial regulation.” See fn. 13.

⁹⁹ A consistent criticism by the Commission of the candidate states was their administrative and judicial weakness or inadequacies. Whether all these have been corrected is open to doubt.

otherwise to the Island's economic prosperity. Edwards does mention the importance of the financial flows between Jersey and the UK. He might also have mentioned the fact that many of the regulators and supervisors both in Jersey and the other Crown Dependencies have, at one time or another, gained professional experience in the UK. This tends not only to ensure a consistently high quality of regulation and supervision, but also (presumably) continuing good relations between regulators and supervisors in Jersey and their counterparts in London.

Despite the re-assurance which public commendations such as those in the Edwards and IMF reports may bring, it must be remembered that – unfortunately – these do not always have a major impact on policy-makers with a specific agenda in jurisdictions such as the US or the EU. There is therefore, at least in my view, no alternative to consistent constructive engagement with key partners worldwide, including the EU. On the other hand, it is worth considering whether Protocol 3 (rather than being merely “benign” or neutral) may in fact “send the wrong message” about the image or personality which Jersey wishes to create for itself in the 21st century.

JERSEY'S UNCLEAR STATUS UNDER THE WTO AGREEMENTS

Finally, as far as international market access for Jersey services industries are concerned, it is important briefly to note Jersey's status, not only as regards the EU, but also the World Trade Organisation (WTO). Although Jersey was, as a result of specific ratification by the UK, a party to the GATT (1947), the UK has yet to extend ratification of the Uruguay Round Agreements to the Channel Islands. The delay is apparently due to the fact that neither Jersey nor Guernsey has yet upgraded their intellectual property legislation in order to conform to the trade-related intellectual property (TRIPs) Agreement.¹⁰⁰ In any event, it is crucial for the Islands to become a party to the WTO Agreement on services (GATS) if they are to have a solid legal basis from which to negotiate (whether through the UK or in the form of independence agreed with the UK) market access for financial or other services on a global basis.

The view is apparently taken that, as far as free trade in goods is concerned, the Crown Dependencies are bound by relevant GATT disciplines by virtue of Protocol 3 and the EC's membership of the WTO. It is not clear whether the same legal nexus would mean that the Islands were also bound by the TRIPs and TRIMs agreements (although this appears to be assumed by the

¹⁰⁰ The Isle of Man is apparently a party to the Uruguay Round package (by virtue of UK ratification) already.

UK), since these are specifically trade-related. In my view, the better approach is that these WTO Agreements (together with the GATS) would only be binding on the Crown Dependencies, if the UK ratified these Agreements specifically on behalf of each Island. In any event, it is interesting to note that the Crown Dependencies are represented in GATT (as opposed to WTO) matters by the Commission, even if – in more than 31 years – no representative of the Crown Dependencies has ever attended a meeting of the article 133 Committee, either in Brussels or Geneva, when trade in goods is being discussed.

A further difficult question (but crucial in view of the limited nature of Protocol 3) which arises here is whether Jersey's adherence to the GATS would provide a legal basis for negotiating with the EU (either as such or with individual Member States) for market access for financial services products.¹⁰¹ From a strictly legal standpoint, my view is that this would be possible. Of course, the defence of Jersey's interests in the WTO (as well as the EU and OECD) also raises the question of the role of the UK. Taking the case of Hong Kong as one recent precedent in this field, it seems that when the UK ratifies the GATS on behalf of Jersey, it is, in law, acting in a different capacity from that when it ratifies the GATS on its own behalf or on behalf of another of its dependent territories. This issue however is one which would need to be addressed with others when the new external status of Jersey was being considered. The economic (and political) importance of the matter should not however be under-estimated, since in the absence of a legal basis for negotiations with the EU and other international partners, Jersey's financial industry is in a state of legal uncertainty.

THE CHANGING STRATEGIES OF THE EU'S EUROPEAN
NEIGHBOURS – ADOPTING THE ACQUIS IN EXCHANGE
FOR MARKET ACCESS?

It is fair to say that, as the Community has evolved into an economic and monetary entity (but above all a "Union of law") and as its membership has grown, the consequences of exclusion have also grown. Exclusion can have particularly serious consequences for smaller States or non-sovereign jurisdictions which lack the political leverage to negotiate with the EU (usually through the Commission) on a basis of equality. The only European nation

¹⁰¹ Note that in its Opinion of 15 November 1994 in case 1/94, [1994] ECR I-5276 on the extent to which the EC possessed the exclusive competence to conclude the GATS, TRIPS and TRIMS Agreements at the end of the Uruguay Round, the ECJ held that the EC did not possess such competence. The impact of regulatory developments in the EU over the last 10 years on this legal situation is not clear, although clearly the extent to which the regulatory "field has been occupied" by EC legislation has expanded considerably.

capable of negotiating with the EU in this way is Switzerland. Switzerland is in fact the EU's second largest trading partner after the United States. Taking trade in goods and services into account, there is also a rough balance in bilateral trade. Switzerland has of course applied to join the EU and only the opposition of certain sections of the population (principally the German-speaking cantons) has prevented this. And, as indicated above, Switzerland has made every effort to secure access to the EU's market by the conclusion of over 100 bilateral agreements.

This is a two-way street. Since Switzerland is so frequently a *demandeur* for bilateral negotiations with the EU, it is difficult for the Swiss to resist EU requests for "cooperation" in areas such as fiscal, customs or police cooperation. The recent hard-fought negotiations for an agreement implementing the Taxation of Savings Directive is an example of this. Nonetheless, even if – in the end – Switzerland was compelled to accept the TOSD agreement, with a transitional period leading to the full exchange of information, Switzerland was able to use the "leverage" of these negotiations to secure concessions from the EU in its own interests. Given the scepticism as to the likely results (in terms of recovery of fiscal revenue) of the Swiss agreement, it may be that Switzerland has made a clear net gain from the TOSD exercise.

The same cannot be said of all parties involved in this process. Andorra, Monaco, San Marino and Liechtenstein all sought "counter-concessions" from the EU in the TOSD process. Jersey, the other Crown Dependencies and the UK's Caribbean territories did not even seriously contemplate making "counter-concessions" part of their negotiating strategy in the TOSD discussions. Even for the other third countries involved however, the results obtained were not on the whole of great economic significance. However, the manner in which the EU conducted negotiations with the micro-States on its periphery (including the dependent and associated territories) has certainly caused all of them to undertake a fundamental re-appraisal of their relations with the EU. The same must surely be the case for Jersey.

THE CASE OF SAN MARINO

Independently of the TOSD, San Marino, like all the micro-States on the periphery of the EU, has found it appropriate to take steps – principally for economic reasons – to develop closer relations with the EU. San Marino has concluded an agreement with the EU on cooperation and customs union.¹⁰² The aim of this recent agreement is to strengthen cooperation with the EU "in

¹⁰² OJ L 84/43 of 28.3.2002.

respect of all matters of common interest". The conclusion of a customs union agreement is of course far-reaching, particularly as regards external relations. Although it is not often considered in this conceptual way, Jersey is of course in a customs union relationship with the EU, at least as far as trade in goods is concerned.¹⁰³ San Marino's agreement goes further however. Its provisions on the free movement of goods aspects of the customs union (including rules or origin, for example) are far more precise than those applicable in the case of Jersey, at least on paper. Article 8 of the Agreement provides explicitly for example that San Marino authorises the Community to carry out customs clearance formalities for products imported from third countries. A Cooperation Committee is established to administer the customs union and to provide a forum for the discussion of problems (including the resolution of disputes) arising under the Agreement more generally.¹⁰⁴

The scope of the cooperation provisions is particularly interesting. Cooperation is to be as broadly-based as possible, "for the mutual benefit of the parties, taking into account their respective powers." The underlying philosophy of this Agreement is of course diametrically opposed to that of Jersey under Protocol 3. San Marino seeks an ever-closer engagement with the EU, short of membership. More specifically, the EU and San Marino identify "priority areas" for cooperation, including the growth and diversification of industrial and services sectors (especially for the benefit of small and medium enterprises), environmental protection and improvement, tourism, communications, information and cultural matters. The scope of cooperation may be enlarged by mutual consent.

These provisions on cooperation clearly distinguish San Marino's relationship with the EU from that of Jersey. San Marino views "constructive engagement" with the EU to be in its interest and not to pose an unacceptable threat to its sovereignty or independence. In this respect, it is important to point out that the structure and scope of San Marino's agreement with the EU is both more modern and better tailored to this micro-State's interests in the twenty-first century.¹⁰⁵

¹⁰³ Thus, in law and in fact, the EU represents Jersey's interests in the WTO, insofar as trade in goods is concerned (*i.e.* involving the application of the GATT and other related agreements such as those on technical barriers to trade (TBTs), sanitary and phytosanitary products (SPS)). Whether this is the case – as the UK appears to believe – for matters covered by the WTO TRIPS and TRIMS agreements is controversial. I am not convinced that these agreements apply to the Crown Dependencies in the absence of specific or separate ratification by the UK.

¹⁰⁴ The absence of any dispute-settlement mechanism in the model agreements on the TOSD was a sticking point for the Crown Dependencies until a late stage in their negotiations, notably because it was a symbol of equality in the bilateral relationship being created.

¹⁰⁵ Note that, in sharp contrast to the situation with Jersey under Protocol 3, articles 20–22 of the San Marino's customs union Agreement lays down social provisions, applicable to EU and San Marino nationals, respectively, on non-discrimination, insurance and social security.

The fact that San Marino is (at least in terms of public international law) a sovereign State is probably not insignificant, although there is no obvious reason why Jersey could not obtain a similar framework for its relations with the EU if such were to be the Island's political choice.

The Treaty relationship between San Marino and the EU has been complemented by a monetary Agreement of 2001.¹⁰⁶ This Agreement formally entitles San Marino to use the euro as its official currency in accordance with EC Regulations 1103/97 and 974/98. Article 1 provides that San Marino is to grant legal tender status to euro bank notes and coins as from 1 January 2002. San Marino also undertakes to make Community rules on euro bank notes and coins applicable in San Marino and to align itself to the Italian Republic's timetable for the production of euro bank notes and coins. Further articles of the Agreement specify additional conditions applicable to San Marino on the management of the euro, in close cooperation with the Italian authorities. Article 8 provides that San Marino is to cooperate closely with the EC with regard to measures against counterfeiting euro bank notes and coins and to suppress and punish any counterfeiting of such coins and notes that may take place in its territory. Article 9 provides that the financial institutions located in San Marino may have access to payment systems within the euro area under appropriate terms and conditions determined by the Banca di Italia with the agreement of the European Central Bank (ECB).

It is clear from the dates of the agreements concluded by San Marino with the EU that the "restructuring" of the Republic's relationship with the EU is of recent vintage. It is also clear that this is an ongoing process, particularly as a result of recent discussions on direct taxation under the TOSD.

San Marino's arrangements with the EU provide food for thought, it is submitted, at a number of levels. First, the legal drafting of the customs and cooperation Agreement, as well as the currency agreement, is of a different nature and quality from the language of Protocol 3. The Agreements are balanced and reciprocal, in that they contain rights and obligations on both sides. At least at the legal level, formal sovereign equality is respected. Whatever may be the realities imposed by power politics (and San Marino's position under the TOSD was in substance no different from that of Jersey), San Marino's formal or legal sovereignty is fully respected in the recent agreements concluded with the EU.

Finally, in a Memorandum of Understanding attached to the draft TOSD agreement, San Marino has sought the EU's agreement to eliminate or reduce, on a bilateral basis, Member State taxation of San Marino's financial products, a commitment by the EU to consider the progressive improvement

¹⁰⁶ OJ C 209/1 of 27.7.2001.

of market access for financial products of both parties on a reciprocal basis, a commitment by the EU to simplify procedures under the customs union and cooperation agreement and to allow access for San Marino's citizens to research, study and higher education programs organised by the EU.

THE CASE OF ANDORRA

Similar considerations apply to the case of Andorra. Like San Marino, Andorra has a customs union Agreement with the EEC, dating from 1990¹⁰⁷. Agricultural products are excluded from the coverage of this agreement. Nonetheless, in contrast with the provisions in Protocol 3, the legal details of the customs union are set out in terms which are legally clearer and more consistent both with internal EU law, as well as comparable provisions in other bilateral agreements. Separate provisions apply to products (mainly agricultural) not covered by the customs union. As is the case with San Marino, the Agreement is to be administered by a Joint Committee, which is empowered to formulate recommendations or to take decisions in the cases provided for in the Agreement. Article 18 of the Agreement provides for a binding dispute settlement procedure, including the designation of an arbitration panel.

As in the case of San Marino, Andorra's customs union Agreement with the EU has been complemented in 2004 by a Council Decision (not yet a bilateral agreement) regarding an Agreement on monetary relations with Andorra. In essence, the Council decision sets out the main provisions of an Agreement with Andorra for which negotiations will be initiated when the bilateral TOSD Agreement has been initialled by both parties and when Andorra has agreed to conclude the Agreement. Article 8 of the Council Decision provides that if the TOSD Agreement has not been concluded by Andorra before the agreed date, then the negotiations on the monetary Agreement would be suspended until such conclusion has taken place.

The envisaged Agreement (similar to that with San Marino) regarding euro bank notes and coins, the legal status of the euro in Andorra and access to euro area payment systems is based on the close economic relations which exist between Andorra and the Community. It is envisaged that the EU would accept that Andorra uses the euro as its official currency and would grant legal tender status to euro bank notes and coins issued by the European system of central banks and the Member States which have adopted the euro. For its part, Andorra is required to ensure that Community law on euro bank

¹⁰⁷ OJ L 374 page 14 of 31.12.1990.

notes and coins are applicable in Andorra. In addition, it is envisaged that Andorra would implement – as a matter of legal obligation – “all relevant measures forming part of the Community framework for banking and financial regulations, including the prevention of money laundering, the prevention of fraud and counterfeiting of non-cash means of payments and statistical reporting requirements.” The application of such measures is intended to contribute to establishing comparable and equitable conditions between financial institutions in the euro area and those located in Andorra.¹⁰⁸

From a procedural and institutional point of view, it is interesting that the Decision provides that the Commission could be empowered to conduct negotiations with Andorra and that Andorra’s neighbouring countries (Spain and France) should be fully associated with such negotiations. In addition, it is provided that the European Central Bank should be fully associated with such negotiations within its field of competence. Finally, the preamble to the Decision makes it clear that the negotiation and conclusion of a monetary Agreement (as well as other “separate agreements”) is entirely conditional on progress by Andorra in implementing the TOSD Agreement.

Within the context of the TOSD negotiations with the EU, Andorra also sought concessions in other areas. Andorra was particularly insistent that the EU should commit to initiating negotiations for equivalent measures with other third countries. Thus, during the transitional period provided for in the Directive, the EU would enter into discussions with other important financial centres with a view to promoting the adoption by those jurisdictions of measures equivalent to those to be applied by the Community. There is of course, at the very least, some doubt as to whether other third countries, for example in Asia, will accept such negotiations.

Andorra has also linked the signature of the TOSD Agreement to the signature of a cooperation Agreement with the EC, expanding the scope of its relations to include sectors for future cooperation such as environment, communications, information and culture, education, social questions, health, transfer energy, regional policy and trans-European communications. The draft Memorandum of Understanding attached to the TOSD Agreement also contains a commitment from Andorra to introduce the crime of tax fraud in its territory and provides that Andorra and each EU Member State will enter into bilateral negotiations to define the administrative procedure for exchange of information in this area.

Finally, Andorra has asked the EU for a commitment to consult in order to define a broader framework for economic and tax cooperation. In particular,

¹⁰⁸ These provisions – like those with San Marino – are of course of particular interest to Jersey should the UK ever participate in the euro zone.

Andorra seeks measures to promote the integration of the Andorran economy into that of the EU and bilateral cooperation on tax in order to determine the conditions under which withholding tax on income derived from financial services currently levied in the Member States can be eliminated or reduced.

THE CASE OF MONACO

All the micro-States examined in this paper have some form of special relationship with one or more Member State. Monaco is no exception. Despite formal independence from France, the relationship between the two countries is particularly close and the constitutional situation is not always clear. Likewise, as far as relations with the EU are concerned, Monaco does not have the benefit of a "framework" Treaty relationship, even in as embryonic a form as Protocol 3. Also, as recently has been the case between the United Kingdom and the Crown Dependencies, at least as far as the tax package is concerned, the extent to which French political influence plays a part in the external relations of Monaco, seems to be significant.

Despite the absence of an underlying or framework Treaty relationship with the EU, it appears that - unlike the UK Crown Dependencies - Monaco has found it convenient (or perhaps politically unavoidable) to apply broad sections of the EU *acquis*. By virtue of Article 3(2)(b) of the Community Customs Code, Monaco is fully integrated into the EU's customs union. Monaco also applies EU VAT and excise duties. Somewhat strangely and in contrast to the usual legal situation in a customs union, Monaco is excluded from the external trade policy of the EU. Thus, goods produced in Monaco do not acquire EU origin and Monaco is not covered by the various trade agreements concluded by the Union. By virtue of its "special relationship" with France however, Monaco is covered by the EU's Schengen *acquis*.

As has been the case recently with both Andorra and San Marino, Monaco has found it convenient - apparently on a pragmatic basis - to negotiate with the EU for the extension of certain areas of the internal market *acquis* to Monaco. On 19 December 2003, an Agreement was published in the Official Journal¹⁰⁹ on the relation of certain acts to the territory of Monaco. The acts in question cover medicines for human and veterinary use, cosmetic products and medical devices. This is one of the most densely regulated areas of the Single Market and the relevant acts henceforth applicable by and in Monaco are set out in an annex to the Agreement.

¹⁰⁹ Agreement between the European Community and the Principality of Monaco on the application of certain Community acts on the territory of the Principality of Monaco, OJ L 332/42 of 19.12.2003.

It is not clear at this stage whether the conclusion of this agreement is part of a wider policy by Monaco to seek inclusion in the EU's Single Market when it suits Monaco's interests to do so. Nonetheless, Monaco's policy - like that of San Marino and Andorra - is in contrast to that of Jersey and the other Crown Dependencies, which seek to apply a restrictive approach to their current Treaty relationship with the Community and to prevent this being extended, even incidentally, to fields not envisaged in 1973 when the Protocol was concluded.

Monaco's Agreement with the Community is of legal and political interest in a number of respects. The material scope of the Agreement having been defined in Article 1(1), Article 1 (2) provides that "Acts adopted by the Commission ...in application of the acts referred to in paragraph 1 shall apply on the territory of Monaco without the need for a decision of the Joint Committee. When applying the rules governing such matters covered by the Agreement, such rules must be interpreted in accordance with the case-law of the Court of Justice...." In this respect of course, there is no difference between Monaco and Jersey in the sense that the Jersey courts - as well as the legislative and executive branches - are legally required to apply the *acquis* covered by the Protocol in conformity with the case law of the European Courts and the general principles of Community law.

Article 2(2) of the Agreement makes specific reference (as far as the application of the Agreement is concerned) to the fact that, to ensure the uniform application and interpretation of the Agreement, Monaco's authorities "may have recourse to their special administrative relationship with the French Republic". A forum is provided by the Agreement for dispute settlement in the form of a joint committee, to which Monaco is required to report every year on the manner in which its administrative authorities and courts have applied and interpreted the provisions referred to in Article 1. Failure to settle disputes in the joint committee is to lead to the termination of the Agreement after six months.

In its negotiations with the EU on the TOSD, Monaco did not seek the extension of further areas of the *acquis*. Monaco did however request that it be removed from the various "blacklists" maintained by certain Member States. It also requested greater access to EU markets for its financial services industries, including special measures for companies peculiar to Monaco such as family owned companies. Monaco - like Andorra, Liechtenstein and San Marino - requested a formal commitment from the EU to enter into similar TOSD negotiations with other third countries. This may well be the only "counter-concession" likely to be accepted in a Memorandum of Understanding which will be attached to Monaco's TOSD agreement with the EU.

Finally, Monaco – like San Marino – has concluded a monetary agreement with the Community, by an exchange of letters in 2001, published in the Official Journal on 31 May 2002.¹¹⁰ This Agreement is also of some interest for Jersey, as much for its form and the way it was negotiated as for its content. Initially, France appeared to assume that the monetary *acquis* could simply be applied to Monaco by a unilateral act of the French Republic. In a manner which indicates the attention paid in the Legal Services of the Commission and the Council to matters of this sort however, the Council insisted that the Agreement be negotiated within the framework of Community law. France was therefore “mandated” by the Council to negotiate the agreement with Monaco, in close consultation with the Commission, the European Central Bank and the Council Presidency. The title of the Agreement refers to an agreement between the “French Republic on behalf of the European Community” and Monaco. There is no reason why this formula could not be applied in the future should Jersey and the UK ever wish to negotiate similar arrangements with the EU.

Like the agreement on cosmetics, medicines and medical products referred to above, the monetary agreement makes applicable in Monaco a wide range of EU legislation not only on monetary policy in the strict sense, but also on the prudential supervision of credit institutions and the prevention of systemic risk to payment and securities settlement systems. This is of course not the inclusion of Monaco in the EU’s financial services market which the Principality sought in the context of the TOSD negotiations; it is rather something of a halfway stage, as if Monaco has been required (for reasons of monetary policy) to accept the prudential and supervisory obligations without having the benefit of its financial “products” being recognised by the EU as being eligible for free circulation in the single financial services area.

Nonetheless, the scope of Monaco’s “integration” as a result of the monetary agreement is wide. First (and in “constitutional contrast” to Jersey’s relationship with the UK), the exchange of letters refers to Franco-Monegasque agreements of 1945, 1987 and 2001 on banking regulations, as well as the countries’ bilateral “Neighbourhood Agreement” of 1963, as a legal backdrop to the present monetary agreement. The preamble to the agreement refers to the competence of the Community in monetary matters since the advent of the euro, thereby implicitly excluding the possibility for a single Member State such as France to act unilaterally in this area (even with a “neighbourhood” state such as Monaco). Declaration No.6 of the Treaty on European Union was also referred to as a further basis for negotiating the extension of EU monetary law to Monaco. Significantly (considering the current difficulties of

¹¹⁰ OJ L142/59 of 31.5.2002.

the Crown Dependencies in ensuring their continued access to UK payments systems), the association of the ECB to the negotiations and to the implementation of the Agreement itself was to enable it to agree to the “conditions under which financial institutions located in [Monaco] may have access to payment systems in the euro area”.

In return for being allowed to participate in the euro area, Monaco undertakes not to issue any banknotes, coins or “monetary surrogates” unless the conditions for such issuance have been agreed with the Community in advance. Monaco must also ensure the application and enforcement of EU law on the euro in Monaco, including the prevention of counterfeiting. In that context Monaco is to cooperate with the Commission, the ECB and Europol. For its part, the EU agrees that Monaco’s financial institutions may have access to payment systems in the euro area under conditions which have been agreed with the ECB, including respect for the minimum reserve and reporting conditions applicable in the EU. Registered companies in Monaco involved with portfolio management for third parties or for the transmission of instructions are not however to have access either to the payments systems or to be bound by the obligations on reserves and reporting. The freedoms of establishment and to provide financial services for Monegasque financial operators are also expressly excluded by the Agreement. As far as the prevention of systemic risk is concerned, Monaco also undertakes to “ensure that the law applicable in Monaco in the areas covered by this agreement will at all times be identical, or where appropriate, equivalent to the law applicable in France”. Finally, the supervision of the agreement is to be ensured by a joint committee. Crucially, in view of the need to ensure a uniform interpretation of EC law, the parties “have expressed their common wish for the jurisdiction of the ECJ... to be extended to Monaco.” This will apparently happen once the Court itself has considered the consequences of such an extension.

Further detailed analysis of Monaco’s agreements with the EU would be superfluous in the context of this paper. Nonetheless it seems important to remark in a paper dealing with Jersey’s “constitutional” relationship with the EU (and incidentally with the UK) that any change – no matter how apparently insignificant or formal – is addressed by the EU and all its institutions (including most recently the ECB in matters of monetary and financial policy) – with the utmost respect for EU and EC procedures. In particular, the capacity for one single Member State to make *ad hoc* or unilateral arrangements for the extension of EU law to third States or territories is limited if not non-existent. In addition, an “*à la carte*” approach to the acceptance of EU obligations by jurisdictions outside the EU is far from a simple matter. Quite apart from the concomitant need to accept general principles of law and the case law not only of the European courts but also the

institutions (in which non-Member jurisdictions will not participate), it is clear that the acceptance of rights in one area (*e.g.* monetary policy) will almost always involve the acceptance of obligations in others (*e.g.* financial supervision). Thus, any adjustments to the Protocol which may be contemplated in the future – for example to secure Jersey's access to the Single Market for its financial products – will inevitably involve complex and protracted negotiations with the EU and all its institutions (as well of course as with the UK on the UK constitutional dimension of the exercise), and a broader degree of engagement than might at first be expected.

THE CASE OF SWITZERLAND

The major expansion of the Community *acquis*, particularly in the internal market, has resulted in the re-evaluation of their relations with the EU by most, if not all, peripheral European countries. Unlike Jersey and the other Crown Dependencies, the six third countries with which the EU opened negotiations on the TOSD also used this opportunity to strengthen their bilateral relations with the EU, in a manner commensurate with their political “leverage” in relations with the EU. Switzerland in particular sought, as a condition of concluding an Agreement on the taxation of savings income, the conclusion of agreements in areas such as the fight against fraud, the association of Switzerland to the Schengen *acquis*, the participation of Switzerland in the Dublin and Eurodac regulations, trade in processed agricultural products, Swiss participation in the European Environmental Information and Observation Network (EIONET), statistical cooperation, Swiss participation in the Media plus and Media training programmes and the avoidance of double taxation for pensioners of the Community institutions residing in Switzerland.

It is not clear whether the conclusion of this “package” of Agreements is of greater benefit to the Union or to Switzerland. It is however clear that the Agreements will further narrow the “regulatory” gap resulting from Switzerland's non-membership of the EU. One of the Agreements (that on processed agricultural products) opens the way for improved trade flows in products such as spirits, coffee, tea and products with a sugar content. Other Agreements have a heavy procedural content and will in effect allow Switzerland to participate in policy making and law enforcement on a comparable (though not completely equal) basis with EU Member States. This is the case for example in the Agreement on the fight against fraud, the extension of the Schengen Agreement to Switzerland and the extension of the Dublin Convention and the Eurodac system covering asylum applications

and the EU electronic system for the identification of asylum seekers. Finally, it is important to note that Switzerland has committed to contribute one billion Swiss francs over the next five years to economic and social cohesion in the enlarged EU. There could be no clearer indication that the EU views its relationship with Switzerland as a two-way street: “*do ut des*”.

It would of course be wrong to draw too close a parallel between Switzerland and Jersey, even if the economies of both jurisdictions are dependent to a similar extent on the economy of the EU. Switzerland is, after all, the EU’s second largest trading partner after the United States. In addition, Switzerland has formally applied for membership of the EU. There is a fundamental difference of approach between Switzerland and Jersey, in the sense that the former actively seeks a closer economic and even political relationship with the EU, even at substantial cost, both financially and in policy terms.

Perhaps unsurprisingly, smaller and more vulnerable jurisdictions such as San Marino, Andorra and Monaco have traditionally maintained a certain distance from the EU and – like Jersey – have limited their relations to those falling within a customs union, supplemented pragmatically or opportunistically by areas of cooperation of particular interest to the third country concerned. As indicated above, this situation has recently begun to change. In their negotiations on the TOSD, all the micro-States concerned have sought “concessions” from the EU side. Jersey and the other Crown Dependencies made no such “counter demands”. Although, the EU has generally resisted “linkage” of this kind, and has insisted that the “counter-concessions” requested by San Marino, Andorra and Liechtenstein be set out in non-binding “Memoranda of Understanding” attached to the TOSD, nonetheless the fact that such “wish-lists” have been accepted and registered at all by the EU is seen as a political step forward by the jurisdictions in question.

For the moment at least, Liechtenstein, as well as Norway and Iceland (who were excluded from the TOSD package) appear content with their status under the European Economic Area (EEA) Agreement.¹¹¹ This ensures that they are inside the Single Market for virtually all measures covered by the “four freedoms”¹¹², as well as “flanking policies” such as environmental and consumer protection, but outside the Single Market for indirect taxation and agriculture, as well as external affairs. This formula ensures that Norway, Iceland and Liechtenstein are represented in most of the Committees dealing with EU business which applies to these countries under the EEA Agreement.

¹¹¹ There have recently been rumours that Norway is once again considering renewing its membership application. If this happens, it is difficult to see that (fisheries interest notwithstanding) Iceland would not follow.

¹¹² The free movement of goods, services, persons and capital.

Switzerland does not have such representation in EU working groups and is linked to the EU by the original EFTA Agreement (as well as over 100 supplementary bilateral agreements), which also excluded tax and agriculture.¹¹³

The imposition of personal tax measures¹¹⁴ – essentially through power politics – on its neighbouring micro-States has caused the latter to reappraise their relations with the EU. Undoubtedly for some jurisdictions, the issue of whether to request EU membership will have been raised or revisited.¹¹⁵ It is now increasingly clear that for small neighbouring States, relations with the EU are not a “one-way street”, with EU market access being the only item on the agenda. In areas perceived to be of vital interest to the EU itself (such as cooperation in tax, customs and police matters), the EU will increasingly expect neighbouring micro-States to adopt the EU *acquis* in the particular area and to cooperate constructively with the EU, whatever the terms of the Treaty relationship between them.¹¹⁶ It is likely in the near future that pressure will be brought to bear on these jurisdictions to align their law in areas of the *acquis* such as money-laundering. San Marino's monetary Agreement with the EU already makes provision to this effect.

THE EU NEIGHBOURHOOD POLICY – POSSIBLE IMPACT ON JERSEY

A further illustration of the extent to which the EU *acquis* increasingly has a pan-European application is offered by the recently-adopted EU neighbourhood policy. This purports to provide a framework by which the EU *acquis*, especially on the Single Market, can be “exported” to countries across the European continent, as well as the Middle East and North Africa.¹¹⁷ This

¹¹³ Liechtenstein's status within the EEA may partially explain its limited list of counter-demands compared with the other micro-States.

¹¹⁴ It is interesting that only the UK's Crown Dependencies were the subject of the extraterritorial extension of the EU's Code of Conduct on harmful business taxation.

¹¹⁵ It is worth recalling here that article 48 EU provides that any “European State” may apply for membership. For micro-States such as Andorra, San Marino or Monaco, there would presumably be no obstacle to membership, although it is not clear what arrangement would be made on voting rights or institutional representation in an enlarged EU. In this paper it suffices to note that the “big five” Member States have already displayed considerable concern about the voting power of the smaller Member States in the EU. It is unlikely that any new micro-State Members would receive as generous treatment as that of Luxembourg.

¹¹⁶ In this context it is interesting that the United States' authorities have recently become pre-occupied by the loss of fiscal revenue (both at Federal and State level) caused by US corporations moving business activities “off-shore” or by channelling business transactions through off-shore jurisdictions, notably those in the same time-zone as the US.

¹¹⁷ Communication from the Commission to the Council and the European Parliament: *Wider Europe – Neighbourhood – a new framework for relations with our Eastern and Southern Neighbours*, COM (2003) 194 final of 11.3.2003.

would be on a consensual basis, although appropriate legal frameworks could be negotiated taking into account existing agreements.¹¹⁸ There is no doubt that it is in the economic (and political) interests of the EU to promote these arrangements, since a legal level playing-field will facilitate market-access for EU exporters to the partner countries. The reverse is also true, although in this respect, much depends on the ability of those exporting goods or services from the partner countries to meet EU technical and safety standards, as well as to compete on quality.

Through this new framework for the EU's neighbouring countries¹¹⁹, the EU offers "the prospect of a stake in the EU's Internal Market and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms)". The EU maintains that geographical proximity calls for enhanced interdependence and the steps to be taken will include the extension of current mechanisms in a variety of areas through measures such as:

- Extension of the Internal Market and regulatory structures;
- Preferential trading relations and market opening;
- Perspectives for lawful migration and movement of persons;
- Intensified cooperation to prevent and combat common security threats;
- Greater EU political involvement in conflict prevention and crisis management;
- Greater efforts to promote human rights, further cultural cooperation and enhance mutual understanding;
- Integration into transport, energy and telecommunications networks and the European Research Area;
- New instruments for investment promotion and protection;
- Support for integration into the global trading system;
- EU technical and grant assistance tailor-made to needs and combined with assistance from International Financial Instruments.

Such measures will be taken to supplement the already existing arrangements. Free Trade Agreements (FTAs) are currently in place with the Southern Mediterranean countries. As envisaged by the Barcelona process, these FTAs are expected to be extended in order to include the services sector as well as the goods sector more fully. Meanwhile, Association Agreements,

¹¹⁸ Under existing Partnership and Cooperation Agreements with Russia and former CIS countries and Association Agreements with Maghreb countries, agreements already exist for partner countries to adopt the *acquis* on a voluntary basis.

¹¹⁹ The EU's neighbourhood policy currently covers: Russia, Ukraine, Moldova, Belarus and the Southern Mediterranean countries: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria and Tunisia.

encouraging the approximation of legislation to that of the EU's Internal Market, have been negotiated with a number of Mediterranean countries. The Association Agreements with Tunisia, Israel, Morocco, the Palestinian Authority and Jordan have already entered into force, while those with Egypt, Lebanon and Algeria await ratification. An Association Agreement with Syria is currently under negotiation.

On the other hand, the Partnership and Cooperation Agreements in force with Russia, Ukraine and Moldova do not provide for either preferential treatment in trade or regulatory approximation in the area of the Internal Market.

Formalising and strengthening relations with the EU's bordering countries has already been reported by employers to be an important asset to the business world. The EU's "new neighbours" are countries with great potential for growth and development and in need for foreign investments to support their infrastructure, extend their industry and establish a well-functioning financial services sector. Extending the Single Market to include these countries would mean that doing business is eased, as governments apply to companies (telecoms, car manufacturers, the construction industry etc.) EU legislation regarding the setting up of new plants, merging, banking, employment rules and corporate governance standards. The benefits would be similar to the enlargement process, though not as far-reaching, because the Wider Europe initiative does not provide for membership or participation in the EU institutions and the law-making process of the Union.

This evolving scenario – of the gradual spread of EU law and policy, not only across the wider Europe, Middle East and North Africa, but to countries such as South Africa and many other WTO Members – is, in my view, a further factor to be given serious consideration by Jersey and other Crown Dependencies when reviewing the legal basis for their external arrangements in the future. Essentially there appear to be at least three broad options available. First, "business as usual", in other words, with external relations in general falling under the constitutional responsibility of the UK and with relations with the EU covered formally by the Protocol, but with an increasing number of issues involving contacts with the EU and its Member States being dealt with pragmatically, as in the case of the TOSD arrangements.

A second option would be to agree with the UK a broader scope for Jersey to conduct its own external relations, including with the EU and in the OECD, based on the Island's extensive internal autonomy and taking into account the fact that, in a number of areas of economic policy, Jersey's policy is not the same as that of the UK.

Finally – and as a possible extension of the second option – Jersey could seek an even more fundamental change in the structure of its external relations. This could embrace a revision of the Treaty link with the EU and a

review of Jersey's relationship with organisations such as the WTO. This latter option would presumably require close consultation with Guernsey and the Isle of Man. It would also require not only discussions with the UK authorities (which would inevitably involve consideration of changes to the current constitutional situation), but also negotiations between the UK and other member States under Article 48 TEU.¹²⁰

THE FUTURE OF PROTOCOL 3

In very broad terms, the analysis in this paper of developments over the last ten years in relations between Jersey and the EU can be summarised as follows. With rare exceptions, economic relations under the Protocol have been uncontroversial. Outside Protocol 3, on the other hand, developments in areas such as tax and economic crime have dominated the relationship. A number of other issues which have arisen tend to fall into a "grey zone," where either the Protocol clearly does not apply but EU law and policy has an impact on the Jersey economy or where it is unclear to what extent EU law must be taken into account in Jersey, whether by the administration, the courts or by economic operators.

The advent of e-commerce (including e-payments) has reduced the importance of national frontiers dramatically and has added a new dimension to the cross border supply of goods and services, as well as related issues such as the protection of intellectual property and consumer protection. Private law issues such as the conflicts of laws, judicial and administrative cooperation, and the availability of judicial remedies have also acquired a new significance in the electronic age. This new dimension to international trade has been the subject of intensive, but so far inconclusive, discussions in international organisations such as the WTO and the OECD (for example on the taxation of electronic trade in goods or services). Jersey, although a potential beneficiary of free trade in electronic goods and services, is unable to make a direct input into the ongoing discussions either because the formalities for its membership of the organization in question have not been completed (in the case of the WTO) or because appropriate arrangements have not been made by the UK (in the case of the OECD).

In recent years, it appears that Jersey's economic interests are increasingly affected by EU law and policy, almost always in areas outside the material scope of Protocol 3. In addition to electronic commerce (and the taxation of

¹²⁰ If the UK's request was accepted by the other Member States, then the necessary changes to the Protocol would have to be agreed unanimously and would be subject to ratification by all 25 national parliaments.

this trade), international capital transfers, international air and maritime transport (including the security of links with the EU), intellectual property and data protection are all areas of considerable economic importance in Jersey and where the increasingly close “interface” between the Jersey and EU economies means that a growing number of delicate legal and policy issues may well arise in the future. The extra-territorial application of EU competition law (to trade in goods and services) may also become an issue, to the extent that economic activities in Jersey have an economic effect in the EU.

It would be strange after the dramatic developments of the last few years in the fiscal field if Jersey (and indeed the other Crown Dependencies) did not now reflect on lessons to be learned and possible changes to be made. As we have seen throughout this review, the starting point remains the constitutional relationship with the UK. Fortunately, the history of the UK is rich in the diversity and flexibility of constitutional arrangements which can be made between the UK and its dependent territories. As far as Jersey's continuing relationship with the Crown is concerned, the thesis advanced in this paper is that Jersey's virtually complete internal autonomy needs to be matched with a comparable level of external independence. Only in this way can Jersey's economic prosperity and future political stability be preserved and enhanced. Complete sovereignty or independence may not yet be on the agenda; but a new form of partnership with the UK – more fitted to the political and economic realities of the twenty-first century – seems to be an urgent requirement.

The future of Protocol 3 is obviously related to any future constitutional arrangements to be worked out between Jersey and the UK, but is essentially a separate matter. As Jersey has stated in its Letter of Commitment to the OECD in its work on harmful tax competition, it is vital that the principles of equality, consent and the “level playing field” be followed in international economic relations, including in the tax field. The tendency for the EU to seek to extend its own law and policy (the *acquis communautaire*) extraterritorially shows no sign of abating.¹²¹ Such an approach may well be justified when countries (such as the former Warsaw Pact members or Turkey) apply for membership of the EU. On the other hand, for jurisdictions which seek to preserve their independence, the fundamental principle of international law is that their sovereignty (to the extent that this exists under international law) should only be limited by rules of customary international law, general principles of law recognized by civilized nations or international agreements freely entered into by their consent. The recent approach by the OECD and

¹²¹ The recent Commission paper setting out a “neighbourhood” policy for the EU vis-à-vis its European, North African and Middle East partners merely seeks to provide a more coherent framework for this process.

EU in extending rules and disciplines on business taxation to non-members without their consent is in breach of these principles.

As far as Protocol 3 is concerned, it may be that the radical alternatives of abolishing the Protocol or, on the other hand, seeking full EU membership, can be ruled out. On the other hand, Jersey will certainly wish to examine the situation of other comparable jurisdictions (as has been done in outline in this paper), especially as regards their legal relationship with the EU, in order to see whether alternatives to Protocol 3 exist which might better guarantee the Islands' twin aims of political stability and growing economic prosperity. It is clear that other jurisdictions (both sovereign and non-sovereign) affected by the recent negotiations on the "tax package" with the EU will also be reviewing their status and relationship to the EU, with a view to possible change.

CONCLUSION

In the course of the last 15 years (not to mention the 31 years since Protocol 3 entered into force) all the major elements involved in Jersey's relationship with the Union have changed fundamentally. These include change within Europe itself – from customs union to Single Market and economic and monetary union, from Community to Union and from a multiplicity of founding Treaties to a single Constitution. In the United Kingdom, constitutional change – marked by devolution – is still in progress. In Jersey itself, economic and demographic changes have produced a situation in which the Island is no longer a tranquil haven sheltered from the winds of change emanating from international organisations such as the EU, OECD and the UN, or important states such as the United States. The success of the financial services industry has not only generated prosperity for Jersey, it has also made the Island a serious "player" in the international financial community. In one sense, it may be said that, although Jersey has become an important member of the international financial community, it is handicapped compared with many of its competitors, by its international status (or lack of it). Thus, Luxembourg, Cyprus and Malta as full members not only of the EU but also the OECD, have the full power to "opt out" of or even to "veto" tax measures taken in those organisations. Jersey, on the other hand, despite carrying the full weight of responsibility – without external assistance – for its own economic prosperity, lacks the defences available under public international law to enable it to resist unwanted initiatives by more powerful neighbours.

Jersey has been the target of unsought and hostile action by the EU, by the OECD and even by individual States, such as the United States and a number

of its constituent States. Jersey has found it politically impossible to avoid responding to these initiatives. It has in fact responded constructively. Lord Falconer's speech to the States of Jersey on 10 May 2004 bears eloquent testimony to Jersey's constructive cooperation, but fails to address the serious underlying constitutional issues involved.

In these matters, the limited material scope of Protocol 3 has afforded no legal protection for Jersey whatsoever. In one sense, the fact that Protocol 3 is so manifestly "out of kilter" with the modern Jersey economy may be a source of confusion or misunderstanding about Jersey's status and "economic personality". Perhaps even more significantly, the UK has exercised its responsibilities for Jersey's international relations not by defending the Island's laws and practices, but rather by joining with those seeking to compel change, notwithstanding the absence of internationally-binding rules or procedures.

These circumstances have forced Jersey (as well as other UK dependent territories) to come to terms with the relative weakness and vulnerability of its constitutional and international situation. By a mixture of political will and technical excellence and by making the most of its legal autonomy (mainly internal, but also to a limited degree external), Jersey has succeeded in

- (a) preserving its status as a cooperative jurisdiction in the OECD;
- (b) reaching an accommodation with both the UK and the EU as regards the "rollback" of its company tax legislation under the EU Code of Conduct;
- (c) reaching agreement with the EU and its Member States¹²² on the implementation of a retention tax system for the implementation of the TOSD;
- (d) reaching agreement with the EU, through the UK, on the alignment of Protocol 3 with the EU Constitution.

In this process, Jersey has been forced to recognise the vulnerability of its international and constitutional position. Despite a recent strengthening of the action taken, inter-ministerially, in London by the Department of Constitutional Affairs (DCA) in defence of Jersey's interests, it may safely be said that, at least in relations within the EU and the OECD, defending the interests of the Crown Dependencies (especially when these conflict with those of the UK) is not a UK priority. This was certainly true in the recent tax negotiations in the EU and the OECD, but it is also the case (whether for

¹²² Formally, of course, the TOSD Agreements are with the 25 Member States individually. The terms of the Agreements were however settled by direct discussions with the Commission and the Irish Presidency of the Council.

Jersey, Guernsey or the Isle of Man) on issues such as the application of the agricultural state aids or safeguards provisions of the Protocol. Recent experience in ensuring that Jersey does not suffer economic harm as a result of the adoption of the UK or EU Single Market measures (e.g. as regards payments systems for banks) offers some hope for optimism. But, in general terms, Jersey's experience of the last few years tends to emphasize the need for far greater international autonomy or "personality"¹²³ so that it can defend and enhance its hard-won political stability and economic prosperity, without having to go "cap in hand" to London and to rely – in effect – on one of the less-powerful departments of State to wring "concessions" from the Treasury, Inland Revenue, DEFRA or the Foreign Office.

It is no consolation to recognise that many of Jersey's competitors endowed with formal sovereignty (Liechtenstein, Andorra, Monaco and San Marino) have arguably fared not much better in the face of the political pressure brought to bear by the EU and its Member States (including the UK) and the OECD. Competitors such as Cyprus and Malta which have now joined the EU will now of course benefit from all the institutional rights accorded to Member States (e.g. the right to "veto" unwanted tax initiatives).

As far as Jersey is concerned, once it had been recognised that a compromise had to be made with the EU (for example on the TOSD), Jersey's performance in drafting a "Model Agreement" in concertation with Guernsey and the Isle of Man, in negotiating this with the Commission and Council Presidency, in finalising the agreements bilaterally with all 25 Member States and then ensuring domestic implementation, was unsurpassed, including by EU Member States.¹²⁴

The clear lesson to draw from this experience is that Jersey has the political will, technical competence and resources to conduct international relations in areas where its interests are affected. It is not clear that the constitutional relationship with the UK significantly strengthens Jersey's international negotiating position. And in fields such as tax, where the UK has opposing interests, the UK link is entirely unhelpful. Precedents exist for UK dependent territories or colonies to act as international persons in their own right. Hong Kong was, for many years, a case in point, negotiating with the EC (including the UK) in fields such as textiles, where Hong Kong and UK and EU interests were diametrically opposed.

¹²³ In this context, it may be questioned whether the term "letter of entrustment" is appropriate in the modern age. Under public international law, it would suffice for the UK to make it known, both bilaterally and multilaterally that, whilst retaining its links with the Crown, Jersey enjoys international autonomy commensurate with its internal independence, for the sake of clarity and transparency, this transfer of external powers could well be set out in a statute.

¹²⁴ At the time of writing, a large number of the EU's Member States have failed to transpose the TOSD into national law, as required by the Directive, by the end of 2004.

A word of caution is appropriate at this point. It is clear that even formal sovereignty would not be a panacea, a passport to instant international recognition and acceptance or even a means of avoiding challenges to Jersey's internal laws and practices. As indicated above, it is likely that as EU membership continues to grow and the *acquis* continues to expand and consolidate, the extent to which the EU will expect jurisdictions on its periphery and which wish to do business with the Union, to adopt the *acquis* (with or without relevant Treaty relations) will also increase. This will be so particularly in areas deemed by the EU to be politically sensitive and/or economically harmful, such as tax, financial services, economic crime and "internal affairs" (anti-terrorism, visa, asylum, immigration policy, etc.).

Jersey (and indeed the other Crown Dependencies) must prepare itself to meet these challenges. Like all independent and self-sustaining jurisdictions of its size, Jersey will have to make the best use of scarce resources. In my view, to focus exclusively on the existing legal link with the EC (although that has been the central theme of this paper) would be a mistake. The Protocol has, after all, only recently been reconsidered and renewed, virtually unchanged, in the IGC leading to the Constitutional Treaty.¹²⁵ This is not the case for the constitutional relationship with the UK, where the grant of external autonomy in areas falling within Jersey's internal competence, is now a matter of urgency. Priority does however need to be given to improving international knowledge and recognition of Jersey's political and legal status. Jersey's first-class track record of international cooperation also deserves to be better known. This is essential in order to provide greater legal certainty for Jersey's economic relations with its partners around the world, including perhaps first and foremost the EU and the United States.

Jersey's financial industries have been successful in publicising their products and services across the globe. Comparable efforts must be made by Jersey politicians and officials particularly in the EU, but also in the United States and other key jurisdictions.¹²⁶ It is disappointing that, despite a succession of informal but constructive meetings with EU (mainly Commission) officials in areas such as financial services, justice and home affairs and international economic crime, Jersey is too frequently identified as a "tax haven" or a jurisdiction which lacks – to a certain extent at least – full international legitimacy. There is a contradiction here which needs to be addressed perhaps by considering formalising or giving greater publicity to, meetings with the

¹²⁵ There is of course no reason why the longer-term future of the Protocol could not be considered immediately, since it would in any event take some years before the processes leading to its changes could be completed.

¹²⁶ This is the same challenge faced by literally hundreds of sub-State entities which have had to come to terms with the important role played by the EU in their political and economic lives. This explains why over 200 local authorities, regions and other entities have opened offices in Brussels.

EU institutions and the almost uniformly positive results emerging from these meetings. This is normal practice not only in the case of diplomatic contacts by States and international organisations, but even by private sector entities wishing to put on record (to avoid misunderstandings and for future reference) points made, understandings reached or even disagreements.

In my submission, now that negotiations have been successfully resolved both with the EU and the OECD on personal and business taxation, sustained efforts need to be made – at a level previously not attempted – to secure international recognition of Jersey’s status as a self-governing jurisdiction with the highest regulatory and supervisory standards, not only in tax and financial services, but also in law enforcement and international cooperation more generally. Such recognition, once achieved, needs to be formalised in a way which can later be relied upon. Achieving a minimum degree of international legal personality, whilst retaining a clear link with the Crown, is a *sine qua non* in this respect. The problem until now in informal contacts with the EU has precisely been that the contacts were informal and therefore subject to no official records. Such recognition as has been received (for example as regards the excellence of Jersey’s anti-money laundering legislation) is quickly dissipated, since it is not recorded¹²⁷ and quickly overtaken by other events in the minds of busy EU officials.

The label “tax haven” (or, even more vaguely, “off-shore” jurisdiction) and the consequent inclusion on national “black lists” or other forms of unwarranted discrimination, is more intractable. The very use of the term “off-shore” somehow connotes (or is seen increasingly, by the EU and US authorities to connote) a jurisdiction which escapes appropriate or normal regulatory and supervisory control and thereby creates unfair advantages for investors or traders, including non-residents.

The perjorative use of terms such as “tax haven” is particularly difficult to combat, given the technical complexity (and indeed lack) of agreed ground rules in, international tax law and policy. However, to the extent that such terms imply a failure to respect minimum standards in areas such as international economic crime and international cooperation in customs, tax and police matters, then the evidence and the means clearly exist to rebut such assertions.

As far as tax policy is concerned, it is clear that, both inside the EU and internationally, the limits of national fiscal sovereignty and the appropriate scope of international rules and disciplines have yet to be defined. EU and

¹²⁷ At least in the case of sovereign jurisdictions such as Andorra (or even, in the past, with non-sovereign jurisdictions such as Hong Kong and Macau) formal records are kept of regular Ministerial, diplomatic or official-level meetings. *Notes verbales* are exchanged, as well as agreements (even on minor matters) being recorded by exchanges of letters, memoranda or other instruments recognised by international law.

OECD policy documents assert simultaneously that tax (rates and structures) is a legitimate instrument of national economic policy in promoting the competitiveness of economies and enterprises, whilst at the same time stating that “harmful tax competition” is to be condemned.¹²⁸

As the current debate in the US election campaign demonstrates, the perceived loss of fiscal revenue (both at Federal and State level) is a crucial political issue in the United States, particularly in a nation with a massive budget deficit. The debate on tax rates and structures, as well as the extent to which international corporations should be permitted to structure or channel their operations (including invoicing and tax accounting) through multiple jurisdictions, including those classed as “off-shore”, will continue for the foreseeable future. The absence of a truly global and inclusive forum for international tax discussions is a significant handicap to progress in this area.

In these circumstances, Jersey has a choice between continuing with its present level of international engagement, or of increasing it. Even small jurisdictions do not lack intellectual capital. Jersey has the opportunity to develop its international cooperation in international tax policy (and indeed in international economic relations generally), including the building of alliances with other jurisdictions which share Jersey's concerns. The EU institutions and the increasing number of Member States (many of which now may share Jersey's views of the use of tax policy as an instrument of international competitiveness) should not be excluded from a more pro-active approach in this field by Jersey and the other Crown Dependencies. Constructive engagement with the UK will inevitably be a vital element in any strategy which Jersey may adopt for its future international relations. In this respect, the Protocol which currently links Jersey to the EC (and in the future to the EU) is only one element in Jersey's increasingly complex and challenging international relations.

¹²⁸ In the EU, failing sufficient agreement between Member States on the elimination of “harmful” tax measures, the Commission has – since 2000 – adopted a more rigorous and extensive approach to its state aids policy, applying article 87(1) to national fiscal measures previously considered not to constitute “aid”. At the same time, the Commission has failed to distinguish between tax measures affecting the competitive position of enterprises under article 87(1) and fiscal measures of a more general nature affecting competition between national economies, under articles 96–97 EC. EU fiscal state aids policy does not of course apply to the Crown Dependencies.

Alastair Sutton is a member of the English Bar; Visiting Professor of Law, University College London and of Georgetown University Law School, Washington, D.C.; Partner, White & Case. The views expressed in this article are personal to the author.

THE UK'S POWER OVER JERSEY'S DOMESTIC AFFAIRS

Jeffrey Jowell

I shall in this article be challenging the conventional view of the constitutional relationship between the UK and Jersey. A few years ago I was asked by the then Attorney General of Jersey, to evaluate this relationship. It soon became apparent to me that many of the classic authorities on the UK-Jersey relationship were based upon unsubstantiated assumptions which need to be challenged not only in the interest of historical and legal accuracy, but also in the cause of modern constitutional principle. I shall not be dealing with the responsibility of the UK for Jersey's international relations, or with the status of Jersey in European Community Law.

The conventional view of the UK-Jersey constitutional relationship is most firmly set out in the Kilbrandon Report of 1973¹ which assumed that "in the eyes of the court" the UK Parliament has "paramount power" over Jersey, and could therefore legislate for Jersey "in any circumstances". *Kilbrandon* was clearly uneasy with the claims for paramountcy which he had staked, and therefore immediately hedged them with the qualification that those paramount or ultimate powers were in practice modified. He considered the modification not to be achieved by law, but by constitutional convention, under which the UK refrains in fact from exercising its 'legal' powers over Jersey's domestic affairs (including the power to set and levy taxation).

I want first to question whether the legal power of the UK over Jersey is, or was ever, as unbounded as *Kilbrandon* contended. Being a power of "last resort", I submit that it does not permit intervention in Jersey's domestic affairs except in extreme circumstances and on a restricted range of matters, consistent with the exercise of the prerogative powers within the UK.

If I am wrong about that I ask, secondly, whether the constitutional convention (that the UK does not exercise its powers over Jersey's domestic affairs) has now crystallised into a legal rule to that effect.

Thirdly, I consider whether, if there is ambiguity about either of the first two questions, such constitutional ambiguity these days should be resolved not by unsubstantiated albeit repetitious claims, but on the basis of modern constitutional principle, which will be identified below.

¹ *Report of the Royal Commission on the Constitution* (Cmnd 5460) (1973), Vol.1, Pt XI ("Kilbrandon").

JUSTIFICATION FOR THE UK'S PARAMOUNT POWER

Insofar as they develop their reasoning, *Kilbrandon* and other authorities on the constitutional status of Jersey² rest their claims for the paramountcy of the UK's power over Jersey upon two factors: first, upon the constitutional principle of the sovereignty or supremacy of Parliament, and secondly, upon "convenience", arising out of the apparent constitutional dominance of the UK.

In respect of the first justification, Parliamentary sovereignty or supremacy, it should be borne in mind that this principle is a constitutional precept which is directed to a specific issue, namely, the division of power within branches of government inside the United Kingdom. In particular, it justifies the supremacy of the United Kingdom Parliament over the Crown. It was developed since the seventeenth century as a principle furthering democracy, by requiring the will of Parliament (and later an elected Parliament) to prevail over that of the monarch. The development of Parliamentary Sovereignty was particularly animated by a wish to disable the King from raising taxation without the consent of Parliament. It gained legitimacy over the years as Parliament became progressively representative of the populace as a whole. It is a principle based not only upon a notion of where power actually lies but upon where power ought in a democracy to lie – namely, with the elected representatives of the people rather than the monarch.

If democratic principle ultimately justifies the supremacy of the legislature over other branches of government within the United Kingdom, democratic principle does not justify the supremacy of the UK Parliament over Jersey's affairs. On the contrary, democratic principle would suggest that, in the event of conflict, the will of the UK Parliament should not prevail. This is because Jersey residents do not have any representation in the UK Parliament and indeed have full representation in the States of Jersey. This principle was clearly stated in Blackstone's celebrated statement explaining why Parliament legislated for the Town of Berwick upon Tweed but not for Ireland:

"The Town of Berwick on Tweed, though subject to the Crown of England ever since the conquest of it in the reign of Edward IV is not part of the Kingdom of England, nor subject to the common law, though it is subject to all Acts of Parliament, being represented by burgers therein ... But as Ireland was a distinct dominion, and had parliaments of its own ... our statutes do not bind them, because they do not send representatives to our parliament: but their

² E.g. *Halsbury's Laws*, vol. 6 p.381 ff., AW Bradley and K D Ewing, *Constitutional and Administrative Law* (1997), pp.46–47.

persons are the King's subjects, like as the inhabitants of Calais, Gasgoigny and Guienne, while they continued under the King's subjection".³

'No taxation without representation' is not a mere political slogan. It embodies a fundamental constitutional principle which is enshrined in article 21 of the Universal Declaration of Human Rights (the right to take part in the government of one's country) and article 3 of Protocol 1 of the ECHR (the right to the "free expression of the people in the choice of the legislature"), which, in the *Mathews case*,⁴ was expressed as the requirement of an "effective political democracy".

Turning now to the second justification of the UK's supremacy over Jersey, that of appearance or convenience, we find commentators as eminent as Professor Dicey asserting that "whatever doubt may arise in the Channel Islands, every English lawyer knows that any English court will hold that an Act of Parliament clearly intended to apply to the Channel Islands is in force there *proprio vigore* [by virtue of its own force], whether registered in the States or not."⁵ We note here that even an impeccably thorough lawyer such as Dicey could not find any law to support his assertion that Parliamentary legislation would prevail contrary to Jersey's will and had to rely on force rather than principle to support his bare assertion.⁶

It cannot be doubted, however, that superficial constitutional structures give the appearance that Jersey is under the control of the UK. Although Jersey is formally not part of the UK, it is not an independent State nor even an "associated State". Jersey is known as a Crown Dependency and would indeed qualify as a "British possession". The UK is responsible for Jersey's external relations and indeed the UK may pass laws which may be extended to Jersey. On the basis of superficial appearance, the relationship is clearly therefore one of UK dominance, or Jersey subordination, which could at first sight be read as entrusting the UK with the ultimate welfare of Jersey residents. Furthermore, although the States of Jersey may pass laws, these require the assent of Her Majesty on the advice of the Privy Council. Her Majesty has her own representative in Jersey in the form of the Lieutenant Governor who also has a power to veto a resolution of the States of Jersey as may concern the special interests of Her Majesty.⁷ Both the Lieutenant Governor and the Jersey Law Officers are appointed by the Crown on the formal advice of UK Ministers.

³ *Blackstone's Commentaries* (1765), Vol.1 pp.98–100 (emphasis added).

⁴ *Mathews v UK* [1999] EHRR 361

⁵ AV Dicey, *The Law of the Constitution* (1885), p.52.

⁶ *Kilbrandon* (*supra*, para. 1469) similarly rested his justification of the UK's sovereignty over Jersey on mere "convenience".

⁷ [Editor's note] The States of Jersey Law 2005 abolished the Lieutenant Governor's power of veto.

Before accepting appearances, however, we must seek the legal origins of Jersey's constitutional status and here we find that, compared with all other British possessions, past or present, the Channel Islands present a special case.

JERSEY'S STATUS IN LAW

In 933 Jersey, together with the other Channel Islands, was annexed by William Longsword, Duke of Normandy, and formed part of the Duchy of Normandy until 1204. After the Norman conquest in 1066, and up to 1204, England and the Duchy of Normandy were united in the person of the occupant of the English throne. In 1204 King Philip Augustus of France drove the Anglo-Norman forces out of Continental Normandy, but he failed to occupy insular Normandy, and the Channel Islands remained united with England. Since then, the Channel Islands have remained possessions of the English Crown - dependencies of the Crown, outside of the United Kingdom.

During the 14th century it was clearly established that the Island was governed by the customary law of Normandy. Local enactments were passed through either the Royal Court or the legislative assembly known as the States (which are first mentioned in a deed of 1497). Blackstone stated the position in 1785 as follows:

“The Islands of Jersey, Guernsey, Sark, Alderney and their appendages, were parcel of the Duchy of Normandy and were united to the Crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part of the ducal customs of Normandy, being collected in an antient book of very great authority intituled *Le Grand Coustumier*. The King's writ or process from the courts of Westminster is there of no force, but his commission is. They are not bound by common Acts of our Parliament unless particularly named. All causes are originally determined by their own Officers, the Bailiff and Jurats of the Islands but an appeal lies from them to the King in Council, in the last resort.”⁸

It seems clear from the context of Blackstone's text that he did not consider those Islands to be bound by Acts of Parliament without their consent named in the Acts. This is because the Islands were, as he put it, “governed by their own laws”. Blackstone's view received endorsement from the Judicial Committee of the Privy Council in the case of *Renouf v Attorney General for Jersey*⁹ where it was held that there was no appeal of right to the Judicial

⁸ *Blackstone's Commentaries*, Vol. 1, p. 104.

⁹ [1936] 1 All ER 936.

Committee from Jersey's Royal Court in criminal cases. Lord Maugham said that Jersey is:

“...part and parcel of the ancient Duchy of Normandy which came into the possession of William, Duke of Normandy in A.D. 933 and remained attached to the British Crown when Phillip II of France conquered the rest of Normandy from King John (in 1204). It has its own constitution and is governed by its own laws.”¹⁰

ROYAL CHARTERS

Various Royal Charters were granted to the Islanders, establishing “privileges”, “liberties”, “franchises” or “immunities” of a similar and repeated kind. The first, said to be granted by King Henry III in 1248, known as “the Constitutions of King John”, is of doubtful authenticity but its contents were repeated in a number of subsequent Charters; (most of the Royal Charters granted to the Island are reproduced in the *Jersey Prison Board case* 1890-94).¹¹ For example, the Charter of Elizabeth in 1562 and subsequent charters through to the final Charter of James II in 1687 conferred a number of rights upon the Islanders, including the right to be governed by Norman law, not to be cited in English writs, to have a local judicature and to be exempted from “tolls, tallages, contributions, burdens and exactions”, except those imposed by virtue of the Royal Prerogative.

One of the “privileges” (which were more in the nature of rights) granted to Jersey under the various charters was a right to raise and determine its own level of taxation. Bois states that “there is no instance of taxation ever having been levied on the Islanders without their consent”.¹²

An exception to this autonomy in the field of taxation was the right of the Sovereign to raise revenues under the scope of the Royal prerogative. This power, it should be borne in mind, was not equivalent to a general revenue-raising power, but was confined to exceptional circumstances, for example, matters of “necessity” e.g. defence in times of war, or to special Feudal levies or dues paid to the King or Duke. Thus the Charter of Henry VII, promulgated through an Order in Council of 17th June 1495, provided that “neither the Captain [predecessor of the Governor] nor the Jurats of the Island shall place or levy any taxes or imposts on the people thereof without the knowledge or command of the King, for the common good and defence of the said Island”. In 1679, the Bailiff and Jurats and other inhabitants of Jersey

¹⁰ At p. 937-8. Emphasis added.

¹¹ Discussed below at paras. 30-32.

¹² Bois, *A Constitutional History of Jersey* (1969) 1/111-12.

complained that the Governor had imposed certain customs and duties, claiming that “it is a maxim of State that no authority whatsoever under yours can levy or impose any kind of Taxe or Impost ... without your express command signified under your Great Seale and that the levying of any such tax is a prerogative Royal essentially adhering to your Crown...”. The prerogative of the Crown to levy taxation was, of course, declared illegal by the Declaration of Rights in 1689.

The various privileges *etc.* granted by Royal Charters are by no means of historic or academic interest alone. At various times, even into the end of the nineteenth century, they were successfully invoked as a ground of opposing various orders or warrants of the UK government that were said to infringe them. Challenge was made by means of the writ of *quo warranto* or by means of suspension of the registration of the contested instruments on the ground that they were “derogatory to the Island’s privileges liberties and franchises”. (See *e.g.* the Order in Council of 25th December 1709 revoking the previous Order in Council which was opposed on that ground and see the account, below of the specific challenges mounted in the 19th century).

LEGISLATION UNDER THE ROYAL PREROGATIVE BY MEANS OF ORDERS IN COUNCIL

This form of legislation was derived from the supreme legislative power possessed originally by the Dukes of Normandy. In 1679, following the receipt of a petition sent as a result of complaints that the Governor had imposed certain customs and duties upon Jersey residents, an Order in Council dated 21st May 1679 was made providing that in future no “Orders, Warrants or Letters” should be put into execution until they had first been presented to the Royal Court in Jersey and published. This was so that “the petitioners may have cognizance thereof to conform themselves thereto and avoid the transgression thereof”. It was also provided that the Royal Court should have power to suspend registration in any case when it was considered that the Orders, Warrants or letters infringed “Ancient Laws, Charters and Privileges so confirmed unto them”. (An Order in Council dated 17th December 1679 repealed the Order of May, 1679 in respect of the right of the Royal Court to suspend registration, but was reversed by the Order in Council of 28th March 1771).¹³

An Order in Council dated 28th March 1771 forms one of the most fundamental constitutional documents for Jersey. Following civil unrest, and in

¹³ See further, p. XX below.

response to a strong feeling that individuals were living in “continual dread of becoming liable to punishments, for disobeying Laws it was morally impossible for them to have the least knowledge of”¹⁴, a “Code of Political Laws of The Island” was agreed and granted Royal assent. The Order in Council provided as follows:

- (a) that all laws not included in the Code and not having Royal Assent should have no force and validity;
- (b) that in future all local legislative power in Jersey was vested in the States (with the power of the Royal Court to legislate being withdrawn);
- (c) that provisional laws and ordinances could remain in force for three years only. If considered useful and expedient they could then be presented for Royal Assent. If granted, they would become part of the Code;
- (d) that anything proposed by the Assembly of the States should, before it shall be determined, be lodged *au greffe* for 14 days;
- (e) that the Governor, or Lieutenant Governor was given power to exercise his negative voice in response to matters proposed by the States;
- (f) for the registration of Orders in Council, Warrants *etc.* (as per the Order in Council of 21st May 1769 – see para. 19 above) and also for Acts of Parliament purporting to extend to the Island.

Although aspects of the 1771 Order in Council may seem on their face to formalise the power of the Crown to impose its will upon Jersey without any limitation, it is clear that it was intended to operate within the parameters of existing rights and privileges. To be sure, the Royal Assent was now formally required for acts that were not provisional. However, there is nothing to suggest that the Crown was considered to have the power, at that time, actually to refuse assent to a law within Jersey's realm of autonomy, (within its existing “privileges”). Indeed, the Royal Court was given power in 1779 to suspend Orders *etc.* which infringed those privileges. The principal purpose of the Code was to rationalise and publish the myriad of laws of different kinds and to invest in the States (rather than the Royal Court) the power of legislation.

This interpretation is supported by archival research and endorsed by events in 1882 when the question of the content and duration of provisional regulations (now known as “triennial regulations”) was raised. The States were requested by the Privy Council to explain the grounds upon which the

¹⁴ Letter from Col. Bentinck, 20 October, 1770.

“*règlements*” had been in existence longer than three years without the Royal Assent. The States claimed power to renew provisional regulations for a further three years if they were “subjects of a purely municipal or administrative nature”. The States’ claim was accepted and on 14th April 1884 an Order in Council was made which provided that provisional regulations which related to “subjects of a purely municipal or administrative nature” could be reenacted by the whole Assembly of States for a further three year period, provided they did “not infringe upon the Royal Prerogative and are not repugnant to the permanent political or fundamental laws of the Island”.

This concession is significant, and reinforces the notion that the requirement of Royal assent in the 1771 Order in Council was intended not to stifle Jersey’s autonomy in the area of domestic matters but rather to ensure that the States did not trespass upon the Royal Prerogative or matters affecting the fundamental constitutional relationship between the UK and Jersey. This view is supported by a number of Privy Council decisions in the mid-nineteenth century, when successful challenges were made to Orders in Council seeking to impose charges on the Jersey revenue or otherwise interfering with Jersey’s autonomy in domestic matters. In respect of each of them the pleasure of the Crown was taken. Each was considered by the Privy Council and in every case the Privy Council advised in Jersey’s favour. These were not always judicial rulings, and reasons for the advice to Her Majesty were therefore often not supplied. Nevertheless, legal advice was taken, often following argument on both sides, and Her Majesty inevitably followed her Council’s advice to withdraw the provision that offended Jersey’s autonomy.

NINETENTH CENTURY CHALLENGES

The first of these challenges is reported as *Re States of Jersey*.¹⁵ In 1852 three Orders in Council were made for the purpose of setting up a new system of paid police and a court of summary jurisdiction. The States opposed the constitutionality of the Orders in Council. The Royal Court ordered the registration of the Order to be suspended and the States petitioned Her Majesty in Council for the recall of the Orders, so that *Actes* on the subject could be passed by the States.

The petition opposed the Orders on two grounds. First, that there was no right to legislate through Order in Council, and secondly, that the Crown possessed no right to impose taxation on the Islanders. The petition stated:

¹⁵ (1853) Moo PCCC185 at 262.

The UK's Power Over Jersey's Domestic Affairs

“that while one of the most important privileges of this Island is that of not being taxed by the Imperial Parliament in which it is unrepresented, no tax can be imposed upon the people of Jersey, except with the consent of the States by whom they are represented”.

The Privy Council advised that the Orders be revoked, which they duly were. The States then passed 6 *Actes* on the subject which were assented to by an Order in Council dated 29th December 1853.

A similar constitutional dispute took place between 1853 and 1860 in respect of an Order in Council issued on 4th January 1853 establishing regulations for the administration of Victoria College. The regulations required funds to be provided in Jersey for the purposes of the College. On 24th January 1853 the States passed an *Acte* suspending the registration of the Order and made representations to the Queen in Council asking for the Order to be rescinded. On 9th March 1854 an Order in Council was made revoking the Order of 4th January 1853, albeit “without prejudice to the ancient rights and prerogatives of the Crown with respect to the government of Jersey”.

In 1861 a comprehensive report of the sources of Jersey's constitutional law was undertaken by the Royal Commission into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey. The Commission concluded that :

“the prerogative of your Majesty to legislate in Council for Jersey may be subject to some limitation, as, for example, where the proposed object of legislation trenches upon any of the chartered privileges or liberties of the Island, in which as we have pointed out, is included the exception of the Islanders from taxation except with their own consent”.¹⁶

A final clash between the Crown and the States in the 19th century concerned the *Jersey Prison Board Case* (1891-94). An Order in Council had been made on 11th December 1837 constituting a Prison Board in the Island and making provision for its financial support (eventually provided for by an *Acte* of the States). The Order failed, however, to specify who was to chair the Board, which contained equal membership of nominees of the States and the Crown. An Order in Council of 23rd June 1891 provided that whenever the Lieutenant-Governor was present at any meeting of the Board he should preside over the meeting and have a casting vote. The States petitioned the Privy Council praying for a recall of the 1891 Order on the following grounds:

¹⁶ *Report of the Commissioners appointed to inquire into the civil, municipal, and ecclesiastical laws of the Island of Jersey* London, HMSO, 1861, page vi.

- that on the basis of the Code of 1771 and the rights and privileges of the Island it was not competent for the Crown to legislate for the Island without the assent of the States;
- that Her Majesty's prerogative power did not extend to altering the constitution of a body such as a Board as set out in the 1837 Order; that no sovereign had ever claimed the right to legislate for, or impose taxes upon the Island without the consent of the Assembly or States of the Island and that a representative assembly of the Island had existed "from time immemorial". (emphasis added).

In reply the Crown's submissions were these:

- that the Sovereign possessed the absolute power of legislating for the Island without the assent of the States;
- that even in submitting "*projets de loi*" for Royal sanction, the States were not legislators but petitioners laying propositions before the Crown in Council;
- that the Imperial Parliament had unquestionable power to legislate for the Island, even in matters of internal government.

A hearing before a Committee of the Privy Council took place in May 1894. Argument was confined to the question of whether the Order of 1891 constituted a substantial departure from the 1837 Order. In their Lordships' opinion it did so, and they therefore advised that the 1891 Order be recalled, which it was on 23rd June 1891.

It is clear, therefore that by the end of the 19th century the power of the Crown to impose taxes on the Island without the consent of the States was of doubtful validity. Indeed, it was doubtful too, as even Dicey recognised, whether the Crown had the power to exercise its legislative function at all without the States' consent.¹⁷

ROYAL ASSENT TO THE LAWS PASSED BY THE STATES OF JERSEY

We have seen that in 1771 the assent of the King in Council was required to all *projets de loi* passed by the States. The power of Royal Assent in respect of Jersey *Actes* may not be in quite the same category as that power in respect of the United Kingdom Parliament. Under the latter, the Royal Assent is a prerogative of the Crown, and there is an established convention that assent is not to be withheld to bills properly passed. In Jersey's case, the requirement of Royal assent now has a source in the Order in Council of 28th March 1771.

¹⁷ *The Law and the Constitution*, p.53,n.3.

Over the years there have been threats to exercise the power to refuse assent to laws passed by the States, but these have never been carried out. For example, on 31st December 1831 the States passed an *Acte* for regulating the system of banking. Following the presentation of a petition to the Privy Council praying that the *Acte* should be disallowed, the Committee of the Council suspended its operation for consideration of a more advantageous scheme for landed security.¹⁸ There have also been significant cases where the threat of a refusal of Royal Assent has been opposed by the States on the ground that the refusal unlawfully trespassed upon the autonomy of the Island. In virtually all of those cases the position of the States was vindicated.

For example, in the *Prison Board case*, we saw that the view of the Crown was that the States were not legislators but “petitioners laying propositions before the Crown in Council.” The contrary view of the States was that, irrespective of the formal necessity of seeking the Royal Assent for *Actes* of the States, the power of the Crown was by no means absolute, and indeed was clearly limited in matters pertaining to the sanctioned privileges and liberties of the Island, including domestic matters and matters of taxation. The view of the States prevailed on petition to the Privy Council, albeit on narrow grounds.

The 1861 Report of the Commissioners (mentioned above), refers to an *Acte* passed by the States in 1857 relating to taxation. The *Acte* was submitted for Royal Assent and returned confirmed, but with certain additions. After “remonstrations” from the States, the Order was recalled.¹⁹

THE POWERS OF PARLIAMENT

In respect of the power of Parliament to legislate for Jersey, the 1861 Report of the Royal Commissioners stated that “Acts of the British Parliament do not apply (in Jersey) unless such an intention distinctly appears” and that registration, through an Order in Council, by extension, was normally required. The Commissioners also stated that:

“The competency of Parliament to legislate for Jersey is unquestionable, but the interference of the British Legislature, except in matters of a fundamental nature *e.g.* for regulating the succession to the Crown, etc., or upon other subjects universally applicable to the whole empire, and perhaps in some other

¹⁸ *Ordres du Conseil* vol.5 p.462.

¹⁹ In the *Victoria College case* (mentioned above) following the withdrawal of the Order in Council, the States passed a *règlement* on 13th July 1857 which the Privy Council sought to amend on the suggestion of the Home Secretary. On 2nd February 1859, the Order in Council was, following protest by the States, withdrawn. Following negotiation a new draft was agreed and assented to in 1860.

special cases, is unusual, and would be viewed by the Islanders generally with dissatisfaction".²⁰

The Commissioners did not, however, feel themselves on secure ground and added in respect of their survey in general:

"We think it right to add that an extraordinary degree of uncertainty prevails as to what is or is not law".²¹ In one respect, however, the Commissioners were convinced namely, that it was an undoubted privilege of the Island not to be subject to taxation without the consent of the States. Furthermore, although the general "competency" of Parliament to legislate for Jersey could not be disputed, its precise reach, outside of "matters of a fundamental nature" was left undefined.

It is interesting to note that, despite a number of assertions during the nineteenth century that Parliament possessed the power to legislate for the Channel Islands on any matter, a number of initial attempts to do so without the Island's consent were withdrawn or amended. Particular mention should be made of three attempts, in 1861, 1864 and 1875 to pass Private Member's Bills seeking to reform the system of justice in Jersey. Each of the Bills was withdrawn and never again reintroduced after a plebiscite in Jersey on the subject firmly defeated the proposition.²²

Evidence of the United Kingdom's actual use of any legal power to interfere in Jersey's domestic matters, including taxation, is almost entirely absent.²³ Charles Le Quesne wrote in 1856: "Parliament has never interfered by any Act in the internal affairs or constitutions of the Islands".²⁴ After an exhaustive survey carried out in the late 1970s, of all the Acts of Parliament listed in *Halsbury's Laws of England*²⁵ Heyting concluded similarly that:

- (1) "Parliament has never imposed a direct tax on the Islanders ... and
- (2) No Act of Parliament dealing with matters exclusively domestic to Jersey can be cited".²⁶

²⁰ *Ibid* at page vii.

²¹ *Ibid* at page viii.

²² Le Quesne, *Jersey and Whitehall in the mid-nineteenth century* (1992). And see the successful opposition of Guernsey to the attempt to bring the Merchant Shipping Act 1859 into operation there. Heyting, *The Constitutional Relationship Between Jersey and the United Kingdom* (1977), p.27.

²³ There may be some quibble about the British Summertime Act 1908 and the Civil Aviation Act 1946, but they can be distinguished on the basis of their particular circumstances.

²⁴ *A Constitutional History of Jersey* (1856), p. 389.

²⁵ 3d. ed. Vol.5 para. 1503.

²⁶ Heyting, *op.cit.* p.81.

CONSTITUTIONAL CONVENTION

Contrary to the view above, let us assume now that the traditional view of the UK-Jersey relationship is correct, and that the UK has “strictly legal” powers over Jersey’s domestic affairs. That view then goes on to assert that those legal powers are tempered in practice by a constitutional convention to the contrary. What is a constitutional convention and what is its force in the case of a clash between law and convention?

Space precludes an extended analysis of the concept of a constitutional convention but we might best adopt Dicey’s view that conventions consist of “understandings, habits or practices” which, though not strictly legal, are “rules for determining the mode in which the discretionary powers of the Crown... ought to be exercised”.²⁷ For de Smith, conventions were “forms of political behaviour regarded as obligatory”. He distinguished these from “non-binding usages”.²⁸

Most conventions limit the exercise of the prerogative power. For example, as a matter of strict law, Acts of Parliament are made by the Queen-in-Parliament. The Queen may therefore, legally, grant or withhold her assent to any Bill passed by both Houses of Parliament. No Sovereign since Queen Anne in 1708, however, has refused his or her assent to legislation. This is because they felt bound to follow the convention rather than strict law and political practice – democratic practice – demanded that the convention be followed.

According to Sir Ivor Jennings a constitutional convention must satisfy three tests: first, “what are the precedents; secondly, did the actors in the precedents believe that they were bound by the rule; and thirdly, is there a reason for the rule?”²⁹ Jennings’ test allows conventions to evolve by practice which contradicts the strictly legal position. It does not however, treat any one precedent as determinative of the convention or lack of convention. Thus in the case of Jersey, a single example of the UK Parliament exercising power over Jersey’s domestic affairs would not necessarily cancel an established convention to the contrary. This is because Jennings’ second test – what de Smith called the belief that the convention was obligatory, and the third test, that there be a reason for the convention, could override a mere single

²⁷ *Law of the Constitution*, 10th ed., 1961, p.417.

²⁸ *Constitutional and Administrative Law* (1978) p.105. See also Hood Phillips, *Constitutional and Administrative Law* (6th ed. by Hood Phillips and Jackson, 1978) p.104: conventions are “rules of practice which are regarded as binding by those to whom they apply”. Sir Kenneth Wheare distinguished “usages” from conventions by the fact that conventions have “an obligatory force”. *The Statute of Westminster and Dominion Status* (5th ed., 1953) p.10.

²⁹ *The Law and the Constitution* (5th ed. 1959) p.136. See also *Cabinet Government* (3d ed. 1959) p.136

instance to the contrary. Jennings' third test (is there a reason for the rule?) imports what Maitland and Dicey called "rules of political morality".³⁰ The standard imposed by such a test permits us to look not only at whether the convention has been established empirically, but also whether it has a purpose, such as that of furthering democracy (as with the convention that the sovereign shall not refuse assent to a Bill duly enacted by a freely elected legislature).

Applying these tests to the UK-Jersey relationship, it seems clear that the convention (of Jersey's autonomy over its domestic affairs and taxation) is clearly established by precedent. This is so irrespective of any particular instances, or "mere usages" to the contrary, which would not in themselves constitute definitive evidence of a lack of convention (any more than they would alone settle the creation of a convention). An array of examples, some discussed above, support that conclusion, and also support the second test of a convention, namely, that the parties consider themselves bound by the convention. Thirdly, there is good reason – based upon Dicey and Maitland's political or constitutional "morality" – for the convention. That reason is based upon the fact that Jersey residents have no representation in the UK Parliament, and indeed are fully represented in the States of Jersey. Legislation without representation does not accord with the tenets of modern political or constitutional "morality".

CAN CONVENTION BE LEGALLY BINDING?

In the case of a showdown – where a dispute is to be settled by litigation – can convention, rather than "strict law" be upheld by a court of law? This is a contentious issue, on which authority differs. Professor Jennings held the view that there was "no distinction of substance or nature" between laws and conventions.³¹ This view has received some judicial endorsement most notably from the Privy Council in 1935 when Lord Sankey LC said *obiter* that the convention that the Imperial Parliament could not legislate for Canada would in effect legally trump the strict law. He said that, even after the Statute of Westminster 1931:

"the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or

³⁰ Maitland, *The Constitutional History of England* (1908), p.398. Dicey likened conventions of the constitution to conventions of "political morality". Dicey, *op.cit.* p.23.

³¹ *The Law and the Constitution*, above, p.117 and 346. See also Mitchell, *Constitutional Law* (2nd ed. 1968), p.34

disregard section 4 of the Statute. But that is theory and has no relation to realities".³²

In subsequent cases, however, dealing with the powers of the Parliament of the then Rhodesia, the courts have made it clear that, in the case of a standoff between legal powers and constitutional conventions, courts are obliged to enforce "the legal powers of Parliament".³³

CAN A CONVENTION CRYSTALLISE INTO LAW?

An intermediate position between that of strict law on the one hand and convention on the other would involve a concession that the principle that the UK cannot intervene in Jersey's domestic affairs arose out of a convention, rather than a strict law, but then to submit that that convention has now been crystallised or transmuted into a legal rule. Jennings³⁴ felt that conventions were able so to evolve. Jennings pointed out that constitutional usages about the supremacy of Parliament in the United Kingdom were incorporated into the common law at the end of the seventeenth century. Other commentators deny that conventions are capable of transmuting themselves into rules of law.³⁵ However, Jennings' proposition is supported by a powerful judgment of the Supreme Court of Canada in 1936, in the case of *In re Weekly Rest in Industrial Undertakings Act etc.*, where the majority of that court would have recognised and enforced a constitutional convention conferring treaty-making powers upon the Dominions. Duff CJ said that the process of crystallization was "a slow process extending over a long period of time",³⁶ but "Constitutional law consists very largely of established constitutional usages recognised by the courts as embodying a rule of law".

If a particular moment is needed to legalise the convention of Jersey's autonomy over its domestic affairs (and if such a process is possible), then surely the year 1948 provides that moment. For it was in that year that the electoral system of Jersey was reformed. Up until 1850 the States consisted of three types of member, *viz* Jurats, Rectors and Constables ("Connétables"). Although the Constables and the Jurats were elected (the Jurats initially for life), Jersey was not a fully representative democracy until 1948. As from 1856 the States had a minority of fourteen directly elected members out of a total

³² *British Coal Corporation v. The King* [1935] AC 500 (emphasis added).

³³ Per Lord Reid in *Madzimbamuto v Lardner Burke* [1969] 1 AC 645. See also Slade LJ in *Manuel v Attorney General* [1983] 3 All ER 822 at 831 and the Canadian case *Reference re Amendment of the Constitution of Canada (nos. 1, 2 and 3)* (1982) 1125 DLR (3d) 385.

³⁴ *The Law and the Constitution*, above, p.126.

³⁵ See e.g. Marshall, *Constitutional conventions* (1986).

³⁶ [1936] SCR 461 at 466–67.

of fifty. A Reform Bill passed on 17th February 1948 and known as the Assembly of the States (Jersey) Law, 1948, provided that Jurats and Rectors should cease to be members of the States and that the Assembly should consist of 12 Senators and 28 Deputies, all to be directly elected by public vote.³⁷ The Franchise (Jersey) Law 1950 then conferred the right to vote on all adult residents. Some support for this argument could be gleaned from the famous judgment of Lord Mansfield in *Campbell v Hall*,³⁸ to the effect that once a representative legislative authority had been established, the exercise (in that case) of the prerogative power was precluded unless specifically reserved.³⁹

KILBRANDON'S APPROACH.

We have seen that the UK-Jersey constitutional relationship is fraught with uncertainty and ambiguity. *Kilbrandon* assumes that the UK holds ultimate legal power over Jersey's affairs but provides little evidence of the source of that power. Viewed from the perspective of the early 21st century, *Kilbrandon* appears steeped in the attitudes of a colonial era and is also loosely reasoned, with scant reference to fundamental principle.

It has never been contested that Jersey has its own common law system, based on the Norman Customary Law. Jersey is economically self sufficient, and does not rely on the United Kingdom government for any revenues. Arising from these origins, so different from those of conquered or ceded territories, could it not be assumed that there is a shared sovereignty between the UK and Jersey, and from the outset the settled arrangement has been to the effect that legislation emanating from the UK should not apply to Jersey's domestic affairs without its consent? And that the UK should not interfere with the will of the States of Jersey in domestic matters? The precedent in favour of that assumption is overwhelming. We have seen that time and again in the nineteenth century Her Majesty's Council advised that any action contrary to that position should be abandoned and the Government of the day accepted that advice. Spokesmen for Her Majesty's Government have

³⁷ The Constables continue to sit in the States *ex officio* but they too are elected by public vote.

³⁸ (1774) 20 St.Tr. 239.

³⁹ See also *Re Lord Bishop of Natal* (1864) 3 Moo PCC (NS) 115. The Law of 1966 provides for limited powers of veto of Laws of the States. Under Article 22 the Bailiff may dissent to any resolution of the States if he is of the opinion that the States is not competent to pass the resolution. Where that power has been exercised, the resolution shall have no effect until the Royal Assent has been obtained. Article 23 provides power to the Lieutenant Governor to veto any resolution of the States, but this power is limited to "matters as may concern the special interest of her Majesty". Both these powers are clearly intended to guard the Royal prerogative rather than to guide Jersey's domestic policy. Both powers were abolished by the States of Jersey Law 2005.

acknowledged often recently that it would be “unprecedented” to interfere in Jersey’s domestic affairs, including taxation.

In addition, it is by no means clear, as *Kilbrandon* assumed, that Jersey’s situation is even remotely analogous to that of countries such as the former Southern Rhodesia where the courts refused to enforce convention over “strict powers of Parliament”.⁴⁰ In the case of the former Rhodesia the powers of Parliament were in little doubt. In Jersey’s case, as we have seen, any powers of Parliament over Jersey’s affairs are affected by a lack of clarity. The source and origin of the UK’s alleged “strictly legal” power over Jersey are not clearly observable. Any legal power has neither in practice been exercised, nor set out in any document which unambiguously stands in the way of a convention to the contrary. This is in stark opposition to other established conventions, which contradict a legal rule which has both been previously exercised and possesses an unimpeachable legal source (such as the convention that the Queen does not refuse her assent to legislation). The assumption of *Kilbrandon* that “in the eyes of the courts Parliament has a paramount power to legislate for the Islands in any circumstances” – an assumption that drove so many of *Kilbrandon’s* other conclusions, rests on foundations that are obscure or non-existent.

Kilbrandon does not sufficiently analyse the force of a convention, nor the question whether a convention may crystallize into a binding rule. Oddly, *Kilbrandon* fought shy of defining the area of Jersey’s conventional autonomous powers, maintaining that it was not practicable to define an area of domestic affairs in which the Island’s autonomy should be “absolute” (thereby implying that such an area does exist). Instead, *Kilbrandon* did attempt to define those matters “in which the United Kingdom should be free to exercise its paramount powers”,⁴¹ suggesting “merely for convenience” five categories of matters in which the United Kingdom should be free to exercise them. These are: (i) defence, (ii) matters of common concern to the British people throughout the world, (iii) the interests of the Islands, (iv) the international responsibilities of the United Kingdom, and (v) the domestic interests of the United Kingdom.

Of those matters, (i) defence and (iv) international responsibilities of the UK, are more appropriately dealt with under the issue of the extent of the power of the UK to bind Jersey in international law. Category (ii), matters common to the British people throughout the world, has little relevance today, except perhaps in respect of rights of citizenship. Category (iii), the interests of the Islands, is of potential relevance. It is concerned particularly with “the ultimate responsibility of the Crown for the good government of the Islands”. It is to be noted that recent UK government statements have

⁴⁰ As Lord Reid called them in *Madzimbamuto* (above).

⁴¹ At para.1499.

been repeating this claim and insisting that the Crown (note, not the UK Parliament) has responsibility for the good government of Jersey. What is meant by this responsibility for “good government”? Could it refer to the need to introduce new forms of taxation? To impose higher tax rates? To impose requirements of financial regulation *e.g.* by requiring disclosure of the identity of bank account holders?

The source of the phrase “good government” is nowhere provided by *Kilbrandon*. The phrase echoes the nature of powers of the Crown to legislate for Crown Colonies. As Lord Mansfield said in *Campbell v Hall*⁴² “. . . the King has a right to a legislative authority over a conquered country; it was never denied in Westminster Hall, it was never questioned in Parliament . . .”. However, after the status of colony was conferred upon the conquered or ceded territory, Orders in Council would normally be made specifically conferring upon the colonial authority, with the advice and consent of Parliament or of the Privy Council as the case may be, the power “to make from time to time all such laws as appear necessary for the peace, order and good government of the Territory”.⁴³ This formula was held in a number of cases in the Privy Council to “connote, in British constitutional language, the widest law-making powers appropriate to a sovereign”.⁴⁴

It is clear that any responsibility of the Crown for the “good government” of Jersey does not allow a power as broad as that contained under the rubric of that formula as applied to a colonial territory. And indeed *Kilbrandon* implicitly recognised that distinction, dealing with the matter as follows -

“There is room for difference of opinion on the circumstances in which it would be proper to exercise that power. Intervention would certainly be justifiable to preserve law and order in the event of grave internal disruption. Whether there are other circumstances in which it would be justified is a question which is so hypothetical as in our view not to be worth pursuing”.⁴⁵

Kilbrandon here, correctly makes the following points:

- (a) that insofar as the UK possesses power to intervene in Jersey’s domestic affairs without its consent, that power resides in the Crown and not in Parliament;
- (b) that the power is a limited one, designed to be exercised primarily where there is a grave breakdown of law and order, which the exercise of the power seeks to restore.

⁴² Cowp. 204, 211

⁴³ See *e.g.* in relation to Ceylon, *Abeyesekara v Jayatilake* [1932] AC 260.

⁴⁴ See *e.g.* *Ibralebbe v The Queen* [1964] AC 900,923; *Winfat Enterprise (HK) Co. Ltd. v Attorney General of Hong Kong* [1985] 1 AC 733,747.

⁴⁵ *Kilbrandon* at para. 1502.

The UK's Power Over Jersey's Domestic Affairs

It seems clear from the above that the nature of the power that may be exercised in the interest of good government is the classic Crown prerogative to maintain the Queen's peace in times of grave emergency or the breakdown of law and order.⁴⁶ *Kilbrandon* appeared to recognise this when they stated:

“We think that the United Kingdom Government and Parliament ought to be very slow to seek to impose their will on the Islands merely on the grounds that they know better than the Islands what is good for them; there is ample evidence in the differences between United Kingdom and Island legislation in social matters to show that this policy has in fact been followed for many years”.⁴⁷

This position is supported in a recent statement by Lord Bach in a written answer in the Lords on 3rd May 2000:

“The Crown is ultimately responsible for the good government of the Crown Dependencies. This means that, in the circumstances of a grave breakdown or failure in the administration of justice or civil order, the residual prerogative power of the Crown could be used to intervene in the internal affairs of the Channel Islands and the Isle of Man. It is unhelpful to the relationship between Her Majesty's Government and the Islands to speculate about the hypothetical and highly unlikely circumstances in which such intervention might take place”.

Kilbrandon's category (v), the protection of the UK's domestic interests, is more doubtful by far. *Kilbrandon* considered that intervention on this ground in the affairs of Jersey “was likely to be rare”, but “may be needed”, particularly in the commercial field, and therefore “has to be envisaged”.⁴⁸ Nevertheless, *Kilbrandon* felt that the “the United Kingdom should be very careful not to confuse its essential interests with its own convenience and preference or the damage to those essential interests with mere irritation or annoyance”.⁴⁹

The category of “protection of UK's domestic interests” is surely based upon an age closer to an era both of colonialism and protectionism than would now be acceptable. *Kilbrandon* barely even attempts to conceal the fact that he regards the category as one located in the realm of politics rather than law or constitutional principle.

⁴⁶ As recognized in *R v Secretary of State for the Home Department, ex p. Northumbria Police Authority* [1989] 1 QB 26 (CA).

⁴⁷ *Kilbrandon* at para. 1502.

⁴⁸ *Ibid.* Para. 1505–6. *Kilbrandon* referred here to two disputes on the subject of broadcasting between the UK government and the Isle of Man. The first involved the UK's international obligations, and the second the extension of the Marine etc. Broadcasting (Offences) Act to the Isle of Man without its consent, an extension not challenged by the Isle of Man.

⁴⁹ At para. 1511.

OVERRIDING CONSTITUTIONAL PRINCIPLE AND
CONSTITUTIONAL RIGHTS

Kilbrandon's approach to the question of the UK-Jersey relationship rests on uncertainty and ambiguity. It is woefully short on legal authority, devoid of analytical rigour, packed with speculation and imbued with colonial assumptions which have always been irrelevant to Jersey's status and are out of tune with the present times.

These days decisions in public law, particularly those concerning constitutional interpretation, are decided not on the basis of narrow legalism but on fundamental principle. The courts seek to uphold standards that are necessary in a "European liberal democracy" (per Lord Steyn in *R v Secretary of State for the Home Department, ex p. Pierson*.⁵⁰) Therefore, unless the clearest rules stand in their way, basic democratic principles will be upheld.

Indeed perhaps the major development in English public law in very recent times has been the application by the courts of what are expressly termed "constitutional principles" and the explicit recognition of "constitutional rights". This began in the case of *R v Secretary of State for the Home Department ex p. Leech (No. 2)*,⁵¹ and has been endorsed in the House of Lords in *R v Secretary of State for the Home Department ex p. Simms*.⁵² The constitutional rights in these cases were in respect of access to justice (*Leech*) and freedom of expression (*Simms*), but there is no reason why they should be confined in that way. According to these cases constitutional principles can of course be overridden by clear legislative instruction to the contrary, but the presumption is that they should prevail, and are capable of giving rise to established rights and duties.

Constitutional principle should act as a tie-break to resolve uncertainty and ambiguity in respect of the UK-Jersey relationship. The principle that there should be no legislation (and no taxation) without representation is not only apposite in the setting of UK-Jersey relations. It has evolved into a fundamental international legal standard, set out for example in article 3 of Protocol 1 of the European Convention on Human Rights, now incorporated into UK law under the Human Rights Act 1998,⁵³ which UK courts are now bound to follow.

⁵⁰ [1988] AC 539 at 575

⁵¹ [1994] QB 198 (CA) and approved in *Ex parte Daly* [2001] 2 AC 532.

⁵² [2000] 2 AC 115.

⁵³ Article 3 of Protocol 1 provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions that will ensure the free expression of the people in the choice of the legislature". See also Art.25 of the International Covenant of Civil and Political Rights and the fact that Jersey has recently been held to be a "self-governing" Crown dependenc. Hansard, 3 May 2000 (Lord Bach).

In *Mathews v United Kingdom*,⁵⁴ the applicant, a British citizen resident in Gibraltar, relied upon article 3 of Protocol 1 of the Convention, complaining that she was unable to vote in the 1994 elections to the European Parliament. The European Court of Human Rights upheld her complaint by 15 votes to 2, reiterating that article 3 of Protocol 1 “enshrines a characteristic of an effective political democracy”.⁵⁵ It was held that the lack of electoral representation of the population of Gibraltar in the European Parliament “would risk undermining one of the fundamental tools by which ‘effective political democracy’ can be maintained” (para 43). By analogy, it seems that for the United Kingdom to thwart the expression of a freely elected Jersey legislature, where no alternative means of political representation of Jersey residents in the United Kingdom Parliament is provided, would, similarly, undermine an essential feature of ‘effective political democracy’.

Ultimately *Kilbrandon*, like Dicey, rests his case upon the raw belief that the UK’s will would, in the event of conflict, prevail in Jersey *proprio vigore* – by reason of its own force. Such reasoning is devoid of reference to constitutional principle which should, these days, guide the relationships of modern democracies. Neither law nor convention clearly stands in the way of the constitutional principle which unequivocally grants Jersey the autonomy to determine its own domestic policies.

⁵⁴ [1999] 28 EHRR 361.

⁵⁵ para. 42.

JERSEY'S CHANGING RELATIONSHIP WITH THE UNITED KINGDOM

William Bailhache

The position of the Attorney General in Jersey is a privileged one, although not for the reasons that some people think. Some take the view that the Attorney General, appointed by the Queen acting through her Ministers in London on the recommendation of the Island Authorities, holds the position unelected, unaccountable and ungovernable. For my part I rather take the opposite view. It seems to me that a person whose professional reputation in an inevitably political position depends upon meeting the obligation to give impartial advice fearlessly notwithstanding that the recipient may find it unwelcome can hardly regard himself as holding a sinecure.

However the Attorney is privileged for a different reason, and one which may not be obvious to all. Official communication between the United Kingdom and the Island Authorities is sent by the Department for Constitutional Affairs to His Excellency the Lieutenant-Governor, and from there to the Bailiff. It is then circulated to the Greffier of the States, the Chief Executive of the Policy and Resources Committee and to the Attorney General. Those three either prepare or at least see all outgoing correspondence. This gives one a particular insight into the way in which the relationship between the United Kingdom and the Island works in practice, with such advantages and disadvantages as it may have.

This Conference represents a celebration of an 800 years' association with the English Crown. Just as in one's personal life the end of a decade often marks a time for a review of the achievements secured and losses sustained during the preceding ten years and the targets for the future, so an 800 year anniversary marks an opportunity for Jersey to take stock of where it stands. In taking that opportunity to review the relationship with the United Kingdom, one must distinguish the purely internal relationship between the two jurisdictions, and the internal relationship as it is affected by the fact that the United Kingdom represents the Island internationally, the Island not being a sovereign state.

INTERNAL RELATIONSHIP

Most of my address today will focus on the effect of external business on the Island and on the consequences of the changing position of the United Kingdom within Europe. However I would like to make one or two comments on what one might see as purely internal arrangements.

In his interesting address to you Professor Jowell has set out at least some of the reasons why the traditional view of the legal relationship between the United Kingdom and Jersey may not be the correct one. At the end of the day only a court would be able to say for sure which view was correct. Until relatively recently, I am sure that no-one considered that a court would ever be called upon to determine that particular matter, but that nearly came about in relation to the Finance Law passed by the States of Jersey in 1998, which was withheld from the Privy Council for Royal Assent until litigation was threatened in 2001. As it turned out, Royal Assent was then forthcoming and the litigation was avoided. That disagreement will, I hope, not be repeated.

On a day to day practical level there is a high degree of co-operation between government departments in the United Kingdom and the departments of the States of Jersey. The benefits of this interjurisdictional communication accrue more to Jersey than to the United Kingdom, although perhaps from time to time we are useful – I have noted that, for example, some of our legislative drafting has found its way into United Kingdom statutes. The connections are probably most apparent in justice and home affairs matters – good co-operation with the customs, police and prison authorities, and with probation and childcare services; but also with health and education.

There are of course occasional frictions in the day to day operation of the domestic relationship, but these frictions have been pretty infrequent. An example would be those rare occasions when Parliament passes legislation which, despite having no legal effect in Jersey, does have an adverse impact upon Jersey; and pressure on parliamentary time means it is difficult to get legislation amended once Parliament has enacted it. These types of problem however are matters of routine difficulty, usually only of administrative inconvenience. When they arise, the opportunity should be taken to find some lubricating oil to make the system work better. They are a long way away from being a fundamental problem which requires one to revisit the close association with the United Kingdom that arises from what in 62 years' time will be 1,000 years of association with the English Crown.

EXTERNAL RELATIONS

I want to say first some things about process. Lawyers are sometimes accused of being too concerned with process; but litigation lawyers are especially aware that process is sometimes as important as substance. The skirmishes *en route* very often provide a basis for ultimate agreement before trial. That is the way it always has been, and probably always will be, and, from my perspective of politics, it is exactly the same in political negotiations. Agreements, especially international agreements, are born out of compromise; and process determines the skirmishes which lead to the positions from which compromise is ultimately drawn. I say that as a preliminary to the comments which I will now make because I am focussing on process and on the substance in constitutional terms of that process, but not on the substance of what the process concerned. This distinction is vital.

So in the context of external relations, let me start with some well known background. Until 1950 the Islands were regarded as part of the metropolitan territory of the United Kingdom for the purposes of international agreements made by the United Kingdom Government. It was recognised at that time that this arrangement was inconsistent with the constitutional position of the Islands. The matter came to a head in the context of the International Labour Organisation conventions, to some of which the Islands had been earlier signed up by the United Kingdom without consultation and in a manner which was inconsistent with the Island's laws. Indeed, article 35 of the Constitution of the International Labour Organisation was later amended so as to include this clause:

“The members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions.” (Emphasis added).

It is interesting to note that in this Constitution, member countries accepted that at least some countries cannot be swept into accepting without qualification the international law principle of the unity of the state. Indeed the Bevin Declaration of 1950 made it clear that treaties made by the United Kingdom would bind only its metropolitan territory unless expressly stated.

In the *Report of the Royal Commission on the Constitution concerning*

relationships between the United Kingdom and the Channel Islands and the Isle of Man (the “Kilbrandon Report”),¹ Lord Kilbrandon reported that in 1966 the Home Office sent a letter to Guernsey in which it was maintained that the effect of the 1950 Declaration did not change the rule of international law under which the signature, ratification or accession of any state to an international agreement was presumed to be in respect not only of the state itself but of all the territories for whose international relations it was responsible unless this presumption was displaced by the wording of the agreement itself or by necessary implication. No doubt a declaration by the Foreign Secretary could not change a rule of international law, but it could and did serve as notice to other States, who accepted it, as to the basis upon which the United Kingdom would be making international agreements in the future.

The approach taken by the Home Office in the letter to Guernsey (but not Jersey) in 1966 was later reflected in article 29 of the Vienna Convention on the Law of Treaties which opened for signature in 1969. By that Article, a Treaty made by a sovereign state was deemed to be applicable to its entire territory unless a contrary intention appeared or could be presumed. This Convention of course was developed at a time when a number of territories were obtaining independence and when colonial power was regarded with disfavour.

Nonetheless, perhaps because the Crown Dependencies have never been colonies, a contrary intention has developed over the years and now indeed has international recognition, including at the United Nations. As a result, unless the treaty applies in terms not only to the United Kingdom but also to Jersey, there is an established presumption that the United Kingdom will ratify the treaty solely for itself, leaving Jersey outside its ambit unless the Island agrees to be bound. Accordingly the United Kingdom routinely consults Jersey on whether the Island wants any particular treaty to be applied to it.

The world has changed since the days of the *Kilbrandon Report*, and the United Kingdom has changed too. Whereas from the Middle Ages until the early part of the 20th century treaties were very largely about war and peace and trade, two world wars and the globalisation of the latter part of the 20th century have meant, increasingly, that world standards are being set in areas which were once of domestic importance only – it is now of interest to the international community if we have a nuclear physicist living in the Island providing consultancy services, or if we allow an Island resident of 80 years to open a bank account without providing a copy of his passport and his last electricity bill, or if we properly conserve our population of bats. It is

¹ *Report of the Royal Commission on the Constitution, 1969 – 1973*, Vol. I, Part XI, London HMSO 1973, para. 1382.

Jersey's Changing Relationship with the United Kingdom

precisely in this international area that the scope for disagreement between the United Kingdom and the Island becomes greater because the objectives or requirements of the United Kingdom may not fit the objectives or requirements of Jersey.

Of course, behind this potential for embarrassment, lurks the view – which I do not share for the reason that Jersey, like the United Kingdom, has a dualist approach to the question of treaties, which are made by the executive and do not have legislative force until the legislature puts relevant legislation in force (see the Court of Appeal decision in *Benest v Le Maistre*²) – that if there is an international obligation, it follows that the United Kingdom must have legal power to take legislative or executive steps to ensure that it is not in breach of that obligation. Those who espouse this view not only adopt a bootstraps argument which relies for self justification on a person acquiring legal authority to do something merely by asserting to a third party that he will do it, but also disregard parallel case law concerning federal relationships in the United States and Canada.

If one could be sure that the United Kingdom would not in fact seek to commit Jersey to international agreements or initiatives without its consent, these concerns would be academic. The reality is however that since 1997 it has not been clear that this has been the United Kingdom's position. This reality arises largely because of the UK's relationship with Europe.

On 2nd May, 1967, Her Majesty's Government announced in the House of Commons its intention to reapply for admission to the European Economic Community. The following day an official communication was sent to Jersey in these terms:

“The Secretary of State is aware that the Insular Authorities have already given anxious consideration to the implications for the Island of entry into the Community alongside the United Kingdom. As they will know, Article 227(4) of the Treaty of Rome provides that the Treaty shall apply to the European territories for whose external relations a Member State is responsible. If, therefore, the United Kingdom were to accede to the Treaty, it would apply to Jersey, unless it were possible to negotiate some modification of the Article in its application to Jersey. The chances of securing such a modification must be considered remote but in any event it must be questionable whether such arrangements would be desirable ...”³

In his memoirs, Ralph Vibert, then a leading Senator, described his reactions to this letter as follows:

² 1998 JLR 213

³ Vibert, *Memoirs of a Jerseyman*, pub. La Haule Books, 1991 page 135.

“... I hover between the words “indignant” and “outraged”. The best that the Home Office, our protector, could do was to view the possibility of our securing any modification as “remote” and of questionable benefit to the Island ...”⁴

This indignation was probably felt in equal measure but for different reasons in other parts of the Commonwealth.

That, as they say, is history. As it turned out, Protocol 3 to the Treaty of Rome was negotiated as a result of which Jersey has a different relationship with the European Union, as Professor Sutton has described, than has the United Kingdom. In particular the Island is outside the European Union for free movement of people (in most respects), free movement of capital, and free movement of services.

When the Labour Government came to power in 1997 it pursued a different policy in relation to Europe than its predecessors. It recognised that Europe had changed. The policy was constructive engagement in Europe, and that was to be reflected across a wide variety of different initiatives of which I will single out two for today’s purposes – a justice initiative and a tax initiative.

As to a justice initiative, Government Ministers agreed in Europe that Jersey would be bound by the Council decision establishing the European Judicial Network (“EJN”), a third pillar resolution for improving interjurisdictional co-operation in criminal matters. Jersey was committed to this despite being outside the European Union for these purposes and without being asked for or giving its consent. In fact, we participate in the EJN and have every intention of acting as good neighbours in the fight against international crime. It was not in this case the substance of the initiative but the process which caused a difficulty; worryingly, the process revealed a commitment to the European Union which ignored totally the scope of our constitutional relationship with the EU.

The EU tax package is another example. Of its three strands, the Savings Directive and the Code of Conduct for Business Taxation are of relevance to Jersey. In 1998 the Council agreed a series of resolutions which were to affect taxation structures in Member States. Without consideration of the Island’s tax autonomy, guaranteed by centuries’ old Royal charters, and disregarding the fact that, by Protocol 3, Jersey was outside the EU’s fiscal territory, ministers made commitments on Jersey’s behalf, without proper consultation and without consent that the strands of the tax package would apply to the Crown Dependencies. This commitment was expressed to be “subject to the constitutional arrangements” but the reality is that that language was a fig leaf. Indeed when, at the ECOFIN meeting a couple of years or so later in Feira,

⁴ *Ibid.* page 137.

the Chancellor of the Exchequer made a further commitment on the Island's behalf again without consultation or consent, this time in relation to exchange of information, the fig leaf was missing.

These commitments on the tax package have been a catalyst in requiring the Island to re-think the entirety of its taxation structures with all the political and economic debate that such an exercise inevitably involves. There was, back in 1998, probably no intention on the part of the United Kingdom to cause harm although consideration of the effects of the commitments on the Islands was quite absent. The commitments were made at least in part because the United Kingdom was seeking to protect itself in Europe – to protect itself against tax harmonisation and to protect the Eurobond market in the City of London. Those were important matters, and still are. It seems to me that even if there were no intention on the part of the United Kingdom to damage the Islands, and even assuming that the United Kingdom had been aware that, by making these commitments, it was in fact likely to damage the Islands, the probability is that, faced with these imperatives, the United Kingdom would take the same decision again. No doubt greater care would be taken to negotiate a way out of the problem but the bottom line is that ministers would – understandably – put the UK interests first because it is to the UK electorate that they are accountable.

This is really at the heart of the current debate on our future relationship. For the very first time it has become apparent that the United Kingdom's different structural relationship with Europe exposes the United Kingdom to pressure in respect of the Islands even where the subject matter is outwith the Island's relationship with Europe. No doubt everyone is very sorry after the event, but the real question is how one can prevent this happening again, or at least ensure that there is a better process in order that the negotiations commence from a point which is more even handed.

The Home Office and Foreign and Commonwealth Office submissions to the Kilbrandon Commission were given in private. Had they been made in public, they could have been critically examined. Apparently they suggested that there were four considerations which had a particular bearing on the relationship between the United Kingdom and the Islands. These were the ultimate responsibility of the Crown for the good government of the Islands, their geographical proximity, the economic relationships and the need to avoid submerging small communities under administrative burdens. In particular it was of interest to Lord Kilbrandon that the Departments made the statement that the fact that the United Kingdom and the Islands were all part of the British Islands, while certainly not making uniformity essential, "made it nevertheless highly desirable that the institutions and the practices of the Islands should not differ beyond recognition from those of the United

Kingdom. The Islands succeeded in maintaining a way of life that was distinct from that of the United Kingdom and, in general, the United Kingdom Government fully endorsed the desirability of their being free to express their individuality. But the British Islands were an entity in the eyes of the world, and the United Kingdom Government would be held responsible internationally if practices in the Islands were to overstep the limits of acceptability.”⁵

Lord Kilbrandon also reports that the Departments made the point that the economies of the Islands were closely inter-related with those of the United Kingdom and that “without some measure of compatibility of legislation it would be easy for practices to develop in the Islands, particularly in the commercial field, that would be detrimental to the economic well being of the British Islands as a whole.”

In their conclusions, the Kilbrandon Commission included these statements:

“We believe that the United Kingdom and Island Governments will always wish for reasons of sentiment as well as on practical grounds to go to very great lengths to avoid a situation in which any Island would feel impelled to seek independence [and I interpose to say “aye, aye” to that]. If the Islands were to sever their connections with the United Kingdom, we have little doubt that they would be presented, in the long term if not immediately, with grave problems. Nor, in spite of words that are sometimes uttered in the heat of debate, do we believe that the vast majority of the inhabitants of any of the Islands would be prepared, except as a last resort, seriously to contemplate cutting themselves off from that community with the people of the United Kingdom which their present status enables them to enjoy.”⁶

Small states such as Liechtenstein, Monaco, Andorra and Iceland seem to do quite well, which undermines the conclusion that there would necessarily be “grave problems”. Of course, each has its own relationship with a major and friendly state or organisation. Most of these relationships are recorded in writing.

Lord Kilbrandon’s view that the United Kingdom possessed paramount powers over the Crown Dependencies was qualified by the proposition that these paramount powers should not be exercised except on very rare occasions, which should be considered under the five headings of defence, matters of common concern to British people throughout the world, the interests of the Islands, the international responsibilities of the United Kingdom and the domestic interests of the United Kingdom. As Kilbrandon himself said, the United Kingdom Government and Parliament ought to be very slow to seek

⁵ *Kilbrandon Report* para. 1466.

⁶ *Kilbrandon Report* para 1431.

to impose their will on the Islands merely on the grounds that they know better than the Islands what is good for them. I was sent recently an extract from the declaration of Arbroath, I am told made as long ago as 1320 and which is now found in Arbroath Abbey:

“For as long as but a hundred of us remain alive, never will we on any condition be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting but for freedom – for that alone which no honest man gives up but with life itself.”

Leaving the reference to the English aside, these sentiments are as important in 2004 as they were in 1320; but they do nonetheless provide only part of the story. Each one of us agrees everyday to a containment of part of our freedom, which we do because it suits us. We agree, for example, that we should have a Planning Law which requires us to obtain consent before we can carry out an extension to our property because the curtailment of our individual freedom is considered to have an overall advantage for the Island in which we live. So my view of the approach to international relations is actually the reverse of that of the Kilbrandon Commission : Jersey agrees to the curtailment of its freedoms because, on the whole, the experience has been that it is in our best interests to do so. Of course, if we were to receive a refusal of a planning permission, which we regard as essential, we might have a second look at the Law itself. Today, because the United Kingdom has made commitments for us internationally in Europe which have, putting it at its lowest, played a major part in requiring us to adopt a wholly new fiscal strategy, we need to take a second look at the way these commitments came about and the UK/Jersey relationship in that context.

In the first three or four years of the new Labour Government from 1997 to 2000, Government Ministers showed themselves unwilling or unable to recognise the democratic deficit in the actions which they took which had an impact both on the Crown Dependencies and the overseas territories. This was reflected in many ways but the third example is apparent in the United Kingdom's approach to the “harmful” tax practices exercise conducted under the auspices of the OECD, commencing with the Council Resolution of April 1998, where the UK was an active participant and indeed in the vanguard of countries anxious to see the initiative go forward.

This participation in the OECD exercise was capable of causing the United Kingdom embarrassment. When the United Kingdom ratified the OECD Convention in 1961, it did not specify what territorial application should be given to the Convention, and uncertainty developed over its scope in relation to the Crown Dependencies. In 1990, the United Kingdom clarified the situation and formally transmitted a declaration to the OECD that future decisions

and recommendations would extend to the territories specified in the Declaration unless the contrary is specifically indicated in any particular case. At the OECD Council on 12th March, 1998, when the OECD approval to the tax competition process was obtained, the United Kingdom advised the OECD that Jersey and the other Crown Dependencies and overseas territories would not be treated as part of the UK for the purposes of this process. As a result, the United Kingdom was spared the possibility of having to abstain from the Report on account of these jurisdictions, a course which Luxembourg and Switzerland were able to follow to their advantage. A further consequence was that Jersey represented itself in the OECD harmful tax practices exercise.

One might add that representing oneself at least has the advantage that there is no misunderstanding about what one says or means. The Island's representation of itself in the OECD harmful tax practices exercise has been principled and effective. It has been principled because the Island has consistently indicated a desire to meet international standards provided that the standards were truly international – using the rather overworked phrase, provided there was a level playing field. As the process did not start that way with Luxemburg and Switzerland apparently immune from the debates, having abstained from the 1998 Report, it took Jersey and Guernsey some three years to persuade the OECD that fairness in the tax standards required of different jurisdictions internationally was important; but from the moment that was accepted, Jersey and Guernsey have participated in the OECD global forum positively and constructively, and I believe, enhanced not only their own reputation but also the integrity of the OECD process.

With the European Union tax package, the position has been rather different. There, despite having a conflict of interest which would have resulted in automatic disbarment if a barrister had behaved in this way, ministers continued to represent the competing UK and Jersey interests in the European Union tax package discussions. There was no legitimate authority for this representation to take place. The Island is outside the European Union for fiscal matters, but having made political commitments as to what the Islands would or would not do, ministers continued at the same time both to represent to member states that those political commitments would be met, and to bring pressure to bear on the Islands to comply. It is of interest to note in passing that the legal basis upon which these commitments might be implemented has caused a considerable amount of difficulty. Quite clearly, European Union directives on fiscal matters would not apply to Jersey as they fall outside Protocol 3. To give effect to the retention tax and the reciprocal obligation from exchange of information countries to exchange information, we came up with the proposal which was

developed in conjunction with Guernsey and the Isle of Man for a series of bilateral agreements between the Islands and Member States. These bilateral agreements are expressed to contain obligations of the contracting parties alone. The performance of these obligations is clearly a matter for the two contracting jurisdictions. There remain some EU Member States who are disturbed at this process; they cannot understand why the United Kingdom does not deliver that which it has promised, and they continue to have difficulties with the apparent need to make agreements with non-sovereign territories. For Jersey however the maintenance of its centuries old tax autonomy and of the red lines of Protocol 3 is critical. The constitutionally thoughtless commitments of UK ministers caused a legal problem which has been solved by the development of these bilateral agreements.

As Professor Sutton was explaining earlier, the European Union itself has changed shape in a number of respects over the last 35 years. Understandably, given the nature of the European Union institutions, and the dynamics of European politics, the Treaty on European Union has developed as a living organism. The proposed EU constitution may provide more firm ground rules than have existed in relation to the Treaties to date. For us, although the proposals are to leave Protocol 3 more or less intact, we had to recognise that changes in the structure of the European Union are bound to have knock-on effects for us as well. The treatment of human rights within the new Constitution is likely to prove just one such example.

We can also look to occasions when the European Union asserts a jurisdiction in relation to its external business which is wholly outside the terms of Protocol 3 but nonetheless has an impact on the United Kingdom's external relations. An example is the EU/US Extradition Treaty which is binding on the UK, and which goes further than the UK's Extradition Treaty with the USA. The latter Treaty binds us, but the EU Treaty, which will require changes to be introduced in the UK/US Treaty, does not.

There are others when the EU makes an international agreement – such as the one with South Africa - which is a mixed competence agreement covering not only trade in goods but also a wide variety of other matters as well, none of which would fall within Protocol 3. There are other problems for the UK and therefore for us, some of them difficult, some less so.

We have to recognise that when there is dispute about whether a directive does or does not apply, the consequences of its applying in one Crown dependency are that it probably applies in other Crown dependencies as well, and the Crown dependencies themselves will not necessarily agree with each other as to whether the directive does or does not apply. Is the United Kingdom to represent all the Crown Dependencies with conflicting claims?

We must also recognise that there may be occasions when Gibraltar, which

has an almost precisely opposite relationship with the EU to that which we have, wishes to assert that a Directive does not apply to them, in which case it probably applies to us. Is the United Kingdom to represent both jurisdictions when they wish to advance contradictory claims?

All these examples illustrate the difficulty, both for the United Kingdom and for us, in adapting a UK/Jersey relationship to a changing UK/EU relationship, and indeed to changes which arise within the EU itself.

The Island's present policy is to develop its limited international personality. In doing so, perhaps we can persuade the international community that the United Kingdom has no authority to commit the Island without the Island's consent, and even if that commitment is given, has no legal power to legislate or take executive action as a result of incurring any international obligation on its behalf. However, that goes only part of the way: it does not necessarily act as a brake on UK Ministers who set out to govern Jersey, albeit without democratic mandate.

Speaking at the end of the Overseas Territories Consultative Council in London recently, the Foreign Secretary, Mr. Jack Straw, MP, is reported as saying:

“Many think our partnership is split into external affairs handled by the UK and internal affairs by the territories. But the world today is so interconnected that the boundary between internal and external issues is more and more difficult to draw. For as long as the territories want, the UK will maintain our firm commitment to our partnership and the obligations that go with it. But equally, we cannot offer an ever increasing autonomy which would prevent us from meeting these obligations and from protecting our liabilities and responsibilities. Delivering on our strong commitment to protecting and helping the territories is only possible if we get the balance right.”⁷

One can understand fully the competing interests which are at stake, and the gloriously British illogic of the position in which we find ourselves. Here on the mainland, the United Kingdom itself sometimes seems to be concerned, perhaps even confused, about its identity. There are many who condemn the use of tax havens of which, in their view, the British should be ashamed, but they choose to overlook the benefits conferred on the City of London by the provision from the Crown Dependencies alone of something not that far off £1 trillion by way of capital; and indeed they also choose to overlook the fact that, on at least one analysis, the City of London is one of the biggest tax havens in the world. There is a pride that we have here a tolerant and multicultural society, but at the same time there is a real concern at the

⁷ wAID = 2003112110078

erosion of the "British" character of the population, whatever that might be; hence the changes in the Immigration Act which requires applicants for British citizenship not only to take an oath of allegiance to Her Majesty, but also to take a pledge to uphold the United Kingdom way of life and indeed possibly to satisfy the authorities that there is a sufficient knowledge of the UK way of life, before the application for citizenship is granted, so as to warrant approval for that citizenship. There are many who appear to be committed to the European ideal but are entirely protective of the pound sterling as the United Kingdom currency or are worried about an EU defence force or an EU Foreign Minister. Tensions of this kind are revealed by continued dissension amongst the ranks of the mainline parties as to the extent to which there should be engagement in the European Union. At the same time, the combination of a more federal approach which seemingly is the result of devolution and regionalisation, and the inevitable closer communication between the devolved and regional governments and Brussels in relation to matters of common interest will, it seems to me, have an increasing impact on questions of national identity in the years to come.

What these developments show, in my view, is the need to reconcile two apparently irreconcilable requirements. The first is that people require that those who govern them are accountable to them. This is partly because they need to retain their sense of identity and partly because people wish to retain, through their identity, some control over their own affairs. The second requirement is that for the maintenance of peace and in the hope of prosperity, people require that intra-European and global initiatives should work.

Historically, the reconciliation in the context of a UK/Jersey relationship lay in an understanding by ministers and officials of the constraints under which they acted for the purposes of committing the Islands. For whatever reason, between 1997 and 2002 the United Kingdom did not operate under these constraints. As a result of those failures, a review of the methods of protection of the Island's interest needs to be made and it is in the interests of both Jersey and the United Kingdom that this should be successfully achieved.

The Policy and Resources Committee of the States of Jersey has set up a Constitutional Sub-Committee which is considering the Island's relationships with the UK and with Europe. Its work is in its relatively early stages and no conclusions have been reached. The decision as to what steps to take next is naturally a political one but as this is a legal conference I will take the opportunity to express a personal and preliminary view for consideration.

It is sometimes said that uncertainty as to the constitutional relationship serves the Island's interests best. That might once have been so, but the experience of the last seven years would suggest otherwise. Furthermore, the fact

is that we are now internationally visible, and there is a need that third countries as well as the United Kingdom should understand our relationship with the UK.

As at present advised, I think the best methodology lies in removing the uncertainty which surrounds the relationship, and in the creation of a document – a Concordat, but call it what you will – which states clearly what the relationship is, how it is to work, and what dispute resolution procedures should be available. Inevitably, in the development of such a creature, issues of principle would have to be tackled and each jurisdiction might need to make concessions from its view of the current position with a view to reaching a political solution with which it was comfortable. It is an exercise which would be demanding and doubtless at times stressful. But it would be an exercise which, once completed, would be an answer to those who exploit misunderstandings and, provided the solution was based on principle as well as pragmatism, would stand the test of time, and be a source of reference for outsiders and the British alike.

PANEL DISCUSSION: SESSION 4

Sir John Laws, P.C., (Chairman)

SIR JOHN LAWS: Well, ladies and gentlemen, we have listened to three penetrating and sophisticated discussions about the tectonic plates of power moving beneath the surfaces of the European Union, the United Kingdom and the Crown Dependencies and I, as a labourer at the edge of the constitutional vineyard, have had much pleasure in listening to them. We have 10 minutes or perhaps a little more for discussion, and I will say no more but invite contributions or, if there are none, I will make one. Yes, at the back?

DARRYL OGIER: Darryl Ogier, perhaps I should say of the Channel Islands, as it would be appropriate this afternoon. I want to make a point as a mere historian, particularly having confused Caen and Rouen earlier, for which I apologise; and it is purely from this position as a historian that I invite Professor Jowell to comment further on some of his premisses. The first concerns his point that Parliament has not legislated for Jersey in domestic affairs without consent. I would like to explore qualifying that with the words “in recent times”. I have got in mind things like the Chantries Act of 1547, which closed down Jersey’s religious guilds, and an Act of 1660 which prohibited the growing of tobacco — not the exporting of tobacco, you will note, but the growing of tobacco — in Jersey and Guernsey and perhaps, most interestingly, the Burial Laws (Amendment) Act 1880, which in fact mentions the Channel Islands in its recitals, although it excludes Scotland and Ireland. That is my first point which I would be pleased to hear more on.

My second point (and I think I am on considerably more shaky ground here) is, if it is acknowledged that Philip Augustus legally repossessed Normandy in 1204 in what we have lately learned to call the *commis de fief* and later occupied the Channel Islands, the reconquests of 1206 and the more permanent one of 1217, might not these be seen to amount to conquests, with the King of England, a different King of England, coming back in a different guise — being thrown out as a vassal and coming back as an independent conquering power?

Related to that, I think, is the question of the Treaty of Lambeth of 1218, where the French King concedes that the English King has got the right to

occupy the Channel Islands. Might that not equally be regarded as being a ceding of the Channel Islands to the English Crown? I make these points, as I say, merely as a historian and perhaps in the spirit of constructive engagement.

SIR JOHN LAWS: Good for you, Jeffrey?

PROFESSOR JOWELL: Well, I am not an historian and I concede that your knowledge in history is greater than mine. However, I am a lawyer and what I would like to do is examine these examples. I am aware of one or two of them. I am not prepared at this point to concede that you are right about them, but I think a further discussion would, from my point of view, be extremely useful. I would just say this, however. There may have been, and perhaps I could have cited and I will cite and I will not ignore other examples, minor examples, cases where the UK has legislated for Jersey almost inadvertently. British Summertime comes to mind in the early part of the twentieth century — one or two small instances such as that.

If we look at the notion whether or not there would have been an objection or whether they were bureaucratic slips, I do not know, there is not sufficient information. I have looked at one or two of them. But, in any event, if we look at the literature on what constitutes a convention, one or two instances the other way do not necessarily cancel out the vast — the vast — weight of evidence in the other direction and certainly all those that write about both law and convention in this way accept that point totally.

SIR JOHN LAWS: Thank you very much. There is a hand over there. Yes?

MALE SPEAKER: Very simple question. Where Jersey negotiates a treaty directly, for example, the Exchange of Tax Information Treaty with the USA, short of armed invasion, what sanction does a sovereign country like the USA have if that treaty is broken, given it is a treaty with a non-sovereign state?

SIR JOHN LAWS: Do you want to say anything about that?

WILLIAM BAILHACHE QC: I think the first point to make is that, even if it is a sovereign state, the sanctions are not always necessarily obvious. But, in the case of the US, I think the sanctions are practical and they are varied. We have qualified intermediary status in the US at the moment for the purposes of part of our financial services industry and that could be

removed. There are all sorts of sanctions that in practice could be applied to UK/Jersey business. You cannot forget the fact that the US is the biggest economy that is going, if one does not treat the European Union as one country, of course, which Alistair might have different views about.

So the answer I think comes in two ways. First of all, there is no easy way in which you reconcile the sanction against a sovereign state unless it is agreed that the matter should go before an international court. I have to say that my preference in negotiating tax agreements is to include an arbitration clause. Some countries, it appears, may be interested and prepared to do that. Other countries are not. Of course, that is a question of choice for the countries, because you cannot make a country make an agreement with you. But the inclusion of an arbitration clause I think would be a good start.

SIR JOHN LAWS: Thank you. Do I have another question? David?

DAVID VAUGHAN QC: I was wondering whether Jeffrey Jowell would get into a problem by conflating sovereignty and the practice and custom. If a case was brought before the English courts asking whether Parliament could legislate for Jersey, then the English courts would have to apply the English law on sovereignty of Parliament, presumably, unless you could get yourself within a sort of *Factortame* exception. The separate question is, I suspect — it may be a different question, I am not sure — whether in fact if you applied in Jersey or Guernsey, does the law apply here? Then the judges in Jersey or Guernsey have an obligation to uphold the principle of the rights and privileges of Jersey and Guernsey. It may be a different question if it went to the courts in Guernsey and Jersey. By conflating sovereignty with convention and effect, it seems to me you create a problem for yourself that you don't really have, because effectively they are two different questions, I would have thought. Anyhow, that is a small contribution.

PROFESSOR JOWELL: That is a very interesting point as to which court. I am not convinced, however, that today a court in the United Kingdom — and Sir John may lead us further along this line — would necessarily say “In this particular relationship sovereignty of Parliament must automatically apply.” For one thing, they would have to apply the European Convention on Human Rights through their Human Rights Act, and there you have article 3 of Protocol I, which provides for the free expression of people in the choice of the legislature, which engages a number of the principles that I was discussing. In any event, they have to simply look at the question does the UK have the power, not automatically if Parliament is sovereign, and

therefore it can do anything it likes? I think it a question of *vires* rather than sovereignty, but I take your point about the different jurisdictions. I think that is very useful.

SIR JOHN LAWS: I think that is very interesting. It calls to my mind what is a comparable but not parallel question as regards the United Kingdom Parliament to legislate in certain areas for Scotland. There is a very powerful view that says that, because of the founding treaties that gave rise to the United Kingdom Parliament, there is no power, for example, to abolish the Kirk or the Court of Session. I am not suggesting that this is by any means an analogy, but one can see general arguments about the limits of sovereignty that are not answered merely by what you might call the English rule of recognition. Do I have another question? Yes?

FRANK WALKER: Frank Walker, President of the Policy and Resources Committee of the States of Jersey. I would like to make a comment actually rather than ask a question and say that I both agree with and slightly disagree with my own Attorney-General, which is of course a very dangerous position for me to put myself in.

I do whole heartedly agree with him that the UK Government and the officials and ministers of the day did commit Jersey to EU treaties and EU policies without consultation with Jersey (and not just Jersey, but Guernsey and the Isle of Man as well) and that was quite wrong. Where I don't agree with the Attorney-General is that it was that commitment alone that caused Jersey and indeed the other Crown Dependencies to restructure our fiscal policies and fiscal structures. There are economic issues that come into play here, and we are absolutely convinced, and that is why we have chosen – I emphasise the word “chosen” – we have chosen to introduce new fiscal structures which comply with the EU practice and the EU wishes. Although not strictly in accordance with, they comply with them. But we have chosen that because we genuinely believe it to be in our best interests. So I do not agree that it is because we were committed without consultation that that is the reason we have gone down that path.

I would also like to make the point and emphasise a point indeed made by the Attorney-General that, since 2002, the level of understanding of the UK Government of Jersey's position and the level of co-operation we have received has changed fundamentally and I do not believe that we would see a recurrence under current circumstances of the commitments without our consent that we saw in earlier times. I think we do also have to recognise that the UK has represented us internationally historically, but we have now made tremendous progress in developing our own international

personality, as we have heard, signing treaties and agreements in our own name, which is unheard of. Who would have thought, even two years ago, that France, for example, would sign an agreement with Jersey in our own name? That was almost unthinkable. So we have made tremendous strides in that respect, and we have got to be careful when we think about our future constitutional position.

The Attorney-General has put forward one view. There are of course others, and I would merely emphasise that the constitutional subcommittee that he referred to is of course a political body and a political decision will ultimately decide the future; and no such decision has been taken yet and nor are we remotely close to taking any such decision. There are many who regard the current position, uncertain and vague as it is, as continuing to act in Jersey's best interests.

SIR JOHN LAWS: Thank you. I do not know whether the Attorney General wants to comment?

WILLIAM BAILHACHE: Yes. Can I comment on that? I told you I would displease all of the people some of the time. Perhaps, just to make it plain that the President of the Policy and Resources Committee and I actually do not depart from each other much, I can read again what I actually said, which was that the United Kingdom made commitments for us internationally which had, putting it at its lowest, played a major part in requiring us to adopt a wholly new fiscal strategy. I entirely accept that there were other considerations.

SIR JOHN LAWS: I will take one more question, if there is one. It is just after a quarter to six. No? Can I just say then, before handing over to Sir Philip Bailhache, that I have heard much this afternoon, in the short time I have been here, about the events of 1204 when, as I understand it, Philip Augustus drove King John of England out of Northern France and indeed occupied the Channel Islands. I have been wondering whether it is a coincidence that in the very same year the greatest act of international vandalism committed in the Middle Ages took place, when the 90 year old blind Doge of Venice led the soldiers of the Fourth Crusade to loot the city of his fellow Christians, Constantinople. When eventually he was killed nothing, even the dogs of St Sofia would sniff his bones. The Bailiff.

(Closing remarks were made by Sir Philip Bailhache, Bailiff of Jersey)

CLOSING REMARKS OF SIR PHILIP BAILHACHE, BAILIFF OF JERSEY

Thank you very much, Sir John. I am going to close the proceedings by referring, first of all, to an extract from the 1727 edition of *Coke's Reports* that I was ruminating through a few weeks ago, where, in the preface, the learned author writes "Nothing is or can be so fixed in mind or fastened in memory but in short time is or may be loosened out of the one and by little and little quite lost out of the other. It is therefore necessary that memorable things should be committed to writing, the witness of times, the light and life of truth, and not wholly be taken to slippery memory, which seldom yieldeth a certain reckoning."

I am sure that I speak for many, if not most people, here in saying that we have listened to many illuminating addresses which it would be a great shame to lose. The good news is that the Jersey Law Review proposes to bind together and to publish a volume of papers given at this conference and a copy will be sent to each of the delegates free of charge. But the bad news, I suppose, for our distinguished speakers is that a request will be renewed to send in the text to which they have spoken duly polished for publication.

One of the recurring themes of this conference has been the need for the law of Jersey to be reduced to written form in English. Distinguished professors have expressed the view that elements of the system are broke. Professor Holt made the suggestion, in relation to the law of contract; Professor Le Sueur was bold enough to make the suggestion in relation to the Bailiffs. All that I will say in relation to the latter suggestion is that Sir de Vic and I would be considerably less broke if we had remained in private practice. [Laughter.]

In closing, I thought that I might mention three areas where we will be looking to promote the development of the written law of Jersey.

First, as Professor Reid has mentioned, or perhaps it was somebody else, we are seeking to enter into a collaborative effort with the University of Edinburgh which would involve post graduate students in producing monographs on the law of property of Jersey and perhaps also of Guernsey too.

Secondly, there is some interest in examining the possibility of establishing a school of law which would bring to the process of the studying of Jersey law an academic discipline which is at present absent. A spin-off, of course, from that would be the production of some academic writing, perhaps by teachers of Jersey law or indeed by the students themselves.

Closing Remarks of Sir Philip Bailhache, Bailiff of Jersey

Thirdly, there is a hope that funding will become available to enable the Jersey Legal Information Board to continue to operate its website and to expand the legal materials published on it. For those of you who have never looked at this website, the URL is jerseylegalinfo.je and it is worth some studying. I hope that we shall be able to publish on that website not only texts on the customary law but also a great many other legal texts too and, I hope, perhaps to take up the idea of Sir Godfray Le Quesne, expressed in 1990 in a slightly different way, to make available information on the law of Jersey which would enable the public of the Island to have easier access to the law and to learn something about fundamental legal principles.

I express my gratitude on behalf of all the members of the editorial board most warmly to all our speakers, to all the chairmen, of the sessions for giving us a most fascinating day, and to all of you who have come to the conference. Thank you all very much for coming. [Applause]