

MISCELLANY

The Battle of St Helier 2021

1 It ought to be beyond belief that the gunboats of two friendly countries, but a short time ago both member states of the European Union, should find themselves confronting each other in the territorial waters of the Bailiwick of Jersey. But such was the case in the early hours of 6 May 2021 when HMS Tamar and HMS Severn entered St Aubin's Bay to monitor the arrival of a flotilla of protesting French fishing boats. The arrival of the Royal Navy was followed not long after by FS Athos, a French naval vessel, which remained on the edge of French territorial waters in case of need. The involvement of the gunboats followed suggestions that the port of St Helier would be blockaded and also some intemperate remarks from a French Minister who threatened to procure the cutting of Jersey's electricity supply from France if the fishermen did not get their way. National media were quick to characterise the confrontation, which fortunately involved no actual violence, as the Battle of St Helier.

2 The *casus belli* was the issuance of licences by the Jersey government to French fishermen pursuant to the Trade and Cooperation Agreement¹ (TCA) between the EU and the UK or, in short, Brexit. Members of the Law Officers' Departments of both Islands have written a succinct description of TCA, published in this issue.² The detailed causes of French anger remain uncertain as this issue went to print, but it seems that some information given by some French fishermen did not reach the licensing authority in St Helier, and the licences did not accordingly reflect the entitlements of those fishermen. It is also suggested that the licences contained unexpected conditions which were unacceptable to the French.

3 The relevant article of TCA³ provides

“1. By way of derogation from Article 500(1) and (3) to (7), Article 501 and Annex 38, each Party shall grant vessels of the other Party access to fish its waters reflecting *the actual extent*

¹[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)&from=EN) (accessed 7 May 2021).

² Bell, Berry, Burke and Hodgett, “Beyond Protocol 3: a rule-book for EU/Channel Islands trade” (2021) 25 *Jersey & Guernsey Law Review* 267.

³ At p.252.

and nature of fishing activity that it can be demonstrated was carried out during the period beginning on 1 February 2017 and ending on 31 January 2020 by qualifying vessels of the other Party in the waters and under any treaty arrangements that existed on 31 January 2020.” [Emphasis added.]

4 It is obvious that “the actual extent and nature of fishing activity” is a phrase that is open to interpretation. The correct interpretation belongs ultimately to the arbitrators who would ultimately decide any dispute. It is not the purpose here to present arguments. The point for the moment is that, when it comes to disputes that ultimately turn on who is right and wrong in law, differences of opinion should not lead to bitter, moral condemnation of the other side. The rule of law, whether national or international, is about converting potentially bitter disputes into respectful negotiation and adjudication. For a party to resort to self-help because they believe the other side is legally wrong is not to try to uphold legal right, but to deny the very relevance of law in resolving the problem.

5 Perhaps the real, practical difficulty seems to have been the inability of the government of Jersey to talk directly to the authorities in Normandy and to explain what was required in terms of evidence to satisfy the requirement that the fishing activity should be “demonstrated”. In such a dialogue, the Normandy authorities could point out flaws and suggest corrections, if not satisfied. Under the arrangements set out in the Granville Bay Agreement⁴ it was possible (indeed mandated) that representatives of Jersey, Normandy and Brittany should work together in joint committees to discuss fishing arrangements and to resolve any disagreements.⁵ By and large, it worked well. TCA requires, it seems, communications from Normandy and Brittany to go *via* Paris, Brussels and London before they arrive in St Helier. Chinese whispers of this kind almost invariably lead to misunderstandings. In Gibraltar, any communications between the Rock and its neighbours across the border are meant to go *via* the foreign ministries of the UK and Spain. In reality, officials will just pick up the phone, but then they are often family.

6 It is to be hoped that a sensible way of moderating what is essentially a *voisinage* agreement can be devised for Jersey’s relationship with its neighbours.

⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of France concerning Fishing in the Bay of Granville (St Helier, 4 July 2000, Cm 5025)

⁵ See Birt, “A fishy tale” (2000) 4 *Jersey Law Review* 290.

Historic assumptions of a colonial constitutional relationship

1 A random trip through historic Hansard threw up an exchange from Hansard in the 1830s, appended to this contribution.¹

2 The subject matter was a vote on supply. The questions were raised by the radical MP, Joseph Hume, who made it his principal contribution to political life to ensure that public money was well spent.

3 Hume's concern was that the Governor of Jersey had thwarted a political reform in Jersey. The States Assembly had voted in favour of public meetings and, he said, the Governor had rejected it. The barely relevant reply from George Lamb, for the Government, was that the decision had been taken by the Privy Council.

4 Of more interest is to note the understanding of Joseph Hume of the relationship between Jersey and the United Kingdom.

5 First, his concern is that money spent on preparing the defence of Jersey would be lost "if we had not the inhabitants cordially engaged on our side".

6 Secondly, he appears to assume a colonial relationship. If there are disturbances in Jersey, then the United Kingdom will need a greater military presence. Joseph Hume reasons that it is like that "in other colonial dependencies".

7 It is difficult to imagine in any recent debates on the United Kingdom Parliament considering imposing legislation on Jersey that anyone would suggest that Jersey might be lost to the UK if its autonomy were not respected. Such a dynamic helps to explain the grant of the Constitutions of King John, which provided the first promise after the loss of mainland Normandy that the Channel Islands would not be incorporated into the English jurisdiction. It can be readily inferred from Edward III granting Charters in 1341 to both Jersey and Guernsey positively promising that autonomy to make sure of the Islands' loyalty at the start of the Hundred Years War, and thus renouncing definitively the challenge to that autonomy started by his grandfather, Edward I, in 1290.

8 Today, objections are raised in Parliament as to the democratic morality of the UK Parliament attempting to impose legislation on the

¹ HC Deb 10 May 1833 vol 17 cc1104–5.

Channel Islands. Many Parliamentarians will stress that such steps would mean a break with long standing practice but we have no modern echoes of this dynamic.

9 In the recent near-miss of the Mitchell-Hodge attempt to impose legislation on public registers of beneficial ownership,² much of the House of Commons appeared very much to adopt Joseph Hume's assumption that the Channel Islands were in a colonial position, but saw no consequences to the United Kingdom in using its "authority" in the style of a colonial overlord.

10 The passage from pre-Victorian Hansard perhaps illustrates the choices open to the Channel Islands to avoid repetition. A constitutional convention is only good, as the great Ivor Jennings pointed out, if there is a reason supporting compliance. A defection to France is no longer a credible threat—and probably was not at the time of Sir Joseph Hume's anxiety on the point. Further, it appears that many in the House of Commons see British interests as trumping any anti-colonial political morality—at least where those potentially subject to UK Parliamentary authority are concerned.

11 It follows that the Channel Islands need to find a clear reason why such Parliamentarians should comply with the longstanding convention.

12 Alternatively, the Channel Islands would need to attack the assumption of colonial authority itself. This may be through the courts with arguments familiar to those with an interest in the constitutional position of the Islands such as those expounded by Professor Sir Jeffrey Jowell.³ Or, if convention will not limit the practicality of UK authority, such authority must be defined and thus limited.

13 There has been talk in the United Kingdom of redefining the relationship of the country's component nations with the United Kingdom as a state. That may provide a convenient opportunity for the Channel Islands to seek a better defined relationship should the long-standing convention continue to wobble.

² See Miscellany "Respecting constitutions" (2019) 23 *Jersey & Guernsey Law Review* 131.

³ See, e.g., Jowell, Steel and Pobjoy, "The Barclay cases: beyond Kilbrandon" (2017) 21 *Jersey & Guernsey Law Review* 29.

“House of Commons Debates, 10 May 1833

SUPPLY—JERSEY.

The House went, on the motion of Lord Althorp, into a Committee of Supply.

Edward Ellice MP, Secretary of State for War

proposed, that there be granted to his Majesty a sum of not less than 110,835l. 15s. 5d. to defray the pay of general staff officers and officers of the hospitals in Great Britain and Ireland, from the 1st of April, 1833, to the 31st of March, 1834, both days inclusive.

Joseph Hume MP

said, that as this vote related to the staff, he would avail himself of the opportunity to put a question with respect to the staff in the Island of Jersey. The governor of that island was a general staff-officer. A dispute, which was likely to lead to some unpleasant disturbance, had lately taken place between that officer and the Parliament of Jersey, in consequence of his interference with its proceedings. It appeared that the local Parliament of that island, as well as the general Parliament of the Empire, had lately undergone a salutary reform. The Members had, in consequence, determined to admit the public in future to witness and to report their proceedings. To this determination the Governor had, as he was informed, opposed, and hence great dissatisfaction in the island. *Now we ought to have the island at peace; for we had been at large expense for its protection, and all that expense would be thrown away if we had not the inhabitants cordially engaged on our side.* He wished to know, whether it was true that a dispute had taken place between the Governor of the island and the local Parliament, and if a dispute had taken place, whether it was likely to be soon stopped? If not, it was likely to lead to further disturbances, and those disturbances would lead, as a matter of necessity, to increased establishments in that island.

George Lamb MP, Under Secretary of State

had not expected such a question as this to be put to him upon the Army Estimates, with which it was not very naturally connected, and he was not prepared to give it a positive answer. The decision of which the hon. member for Middlesex complained, was not the decision of the Governor of Jersey, but the decision of the Privy Council, to which the matter had been referred. The Governor had only been the medium of communicating it to the local authorities. That decision, he understood, was strictly according to the law of the island.

Joseph Hume MP

was sorry to find, that reform here had prevented reform from being established triumphantly in the Island of Jersey. *The disturbances between the local and the imperial government would lead to the increase of our military establishments in Jersey, as similar events had led to the increase of them in other colonial dependencies of the Crown.* He hoped that, on another occasion, the right hon. Secretary would lay before the House the reasons why the Government would not accede to the very salutary Amendment proposed in the meetings of the assembly of Jersey.

The grant was voted.”