

**The Jersey Law Review - October 2004**  
**SHORTER ARTICLES AND NOTES**  
**JERSEY AND THE UNITED KINGDOM: A CHOICE OF DESTINY (3)**

**Alan Binnington**

**Crisis? What crisis?**

1 Those who suggest that Jersey should become independent seem implicitly, if not explicitly, to be suggesting that the Island has reached some form of crisis point in its constitutional relationship with the United Kingdom. However had one asked an Islander in the second half of the 19<sup>th</sup> century<sup>1</sup> what he thought of the Island's constitutional position he would probably provided a similar answer; yet the Island's relationship with the United Kingdom has changed little since then. As has been mentioned above there were a number of clashes between the Island authorities and the Crown during this period in relation to the legislative power of the United Kingdom Parliament in respect of Jersey but, to use the words of Lisle Bois, quoted in Philip Bailhache's related article "whenever a dispute on the subject arose, it was never allowed to come to a head". To some extent we now find ourselves in a similar position, not so much because the United Kingdom Parliament has endeavoured to legislate for the Island but because it is not seen to be protecting the Island's interests internationally, particularly where the interests of the Island and the United Kingdom conflict. The UK government has, for example, used the threat of legislation to ensure the Island's compliance with the EU Code of Conduct, not by means of direct legislation but by means of indirect legislation such as that relating to controlled foreign companies the effect of which would be to make Jersey far less attractive for entities such as United Kingdom clearing banks.

2 Although there have in recent years been a number of threats to the Island's fiscal autonomy the reality is that it is only since the present Labour government took office that the United Kingdom government has been less willing to stand up for Jersey's interests when those interests conflict with its own. Depending on its political complexion a change of government in the United Kingdom can have a considerable impact on the Island's relationship both with that government and with foreign states. In recent years the area in which tensions have most frequently arisen is that of taxation, as states which have to fund mounting social spending through increased taxation seek ways to prevent the flow of capital to low tax jurisdictions. Although taxation was historically regarded as a matter of domestic concern jurisdictions now co-operate far more in tax matters than was formerly the case. This approach has been mirrored by English courts : until relatively recently English private international law recognised that an English court would not assist a foreign state to collect its taxes<sup>2</sup> but, whilst not directly collecting a foreign state's taxes,

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<sup>1</sup> A series of cases in the latter part of the 19<sup>th</sup> century tested the right of the States to repudiate legislation forwarded to the Island by the Crown in Council: see further Le Herissier, *The Development of the Government of Jersey* at pages 40-48.

<sup>2</sup> See *Government of India v Taylor* [1955] AC 491

English courts will now provide a far greater degree of assistance through the collection of information.<sup>3</sup> This spirit of co-operation both at a domestic and an international level is the background against which the UK Government's attitude towards the offshore dependencies has to be considered. Whilst Jersey may not like it, the pressure to harmonise taxation is increasing, which is perhaps not surprising given the massive social budgets that most European countries have to fund. It is important that the Island does not over-react to the perceived threat of interference in domestic matters: it has overcome such a threat within the existing constitutional framework before and there is no reason why it should not do so again. Nevertheless there is little harm in examining the Island's constitutional relationship with the United Kingdom and possible options for its reform.

### **Independence as a relative concept**

3 Small states such as Jersey can never be truly independent. John Donne's famous comment that "No man is an island entire of itself"<sup>4</sup> is perhaps equally true of islands and small states, if not also large states. If one examines the table of European small states in the related article in this issue by John Kelleher one finds that virtually all of those states have found the need to bring themselves under the umbrella of a larger state. Thus, for example, Monaco is under the French umbrella, Andorra under that of Spain and San Marino under that of Italy.

### **Practical implications of independence**

4 Whether or not one regards the economic reliance on the financial services industry as "unhealthy" the reality is that it is now the Island's principal means of support and therefore the consequences of independence necessarily fall to be judged by its practical effect on that industry. It would be foolish to ignore the impact of the independence option on the finance industry and to hope that if it moves elsewhere some other industry will take its place.

### **Currency**

5 If Jersey were to choose to become independent a number of matters would have to be addressed, perhaps the most significant of which would be the choice of local currency. There is of course no reason why Jersey could not join the Eurozone in much the same way as Monaco and San Marino have done, notwithstanding the fact that they are not in the European Union. Interestingly the Euro coins that Monaco mints are deducted from the French quota by the European Central Bank but, because of their rarity, tend to command a premium as collectors' items!

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<sup>3</sup> See *In re State of Norway's Application (No.1)* [1987] QB 433

<sup>4</sup> *Devotions upon Emergent Occasions, Meditation XVII*

6     Whilst adopting the Euro might encourage more people to travel between the continent and the Island the likelihood is that, from the finance industry's point of view, the preference would be to retain sterling given that it is the base currency of a significant part of the Island's business.

### **External relations**

7     At present the UK is largely responsible for Jersey's relations with other countries and Islanders are able to avail themselves of the assistance provided by British embassies and consulates throughout the world. Following independence the Island would clearly not have the resources to maintain representation in all countries overseas but, if it chose to shelter under the "umbrella" of another country one assumes that it would then take advantage of that country's foreign representation. That country could, of course, be the United Kingdom. In terms of concluding agreements with other countries this has, historically, been carried out by the United Kingdom on the Island's behalf, albeit that in the last few years there have been occasions where prior consultation with the Island has been limited, to say the least. However the United Kingdom has recently displayed a willingness, or if that is too strong a description, perhaps an acceptance, that the Island concludes agreements itself: recent negotiations with member states of the European Union on the exchange of information in fiscal matters are a case in point.

### **Sources of business**

8     There are very few financial institutions in the Island that do not at present depend on a flow of business from the City of London. Independence would not necessarily cause that flow to diminish but it would be unlikely to increase it, and the Island's rating in terms of political stability could be affected with a consequent decrease in its standing as a financial centre.

### **Conclusion**

9     The consideration of independence as a reaction to a UK government which has been distinctly lacklustre in fighting the Island's corner from an international point of view is an understandable reaction. However, from the perspective of its financial services industry, the Island is still very much dependent on being part of the sterling area and confidence in the Island's political stability is, rightly or wrongly, based on a perception of the strength of its constitutional relationship with the United Kingdom. Independence would leave a number of significant issues to be addressed, none of which is likely to result in an increase in business for the Island : the best that could be hoped for would be that their resolution would not result in a decrease in business.

10    If what is hoped for is the ability to conclude agreements with other countries directly where the interests of the United Kingdom and the Island conflict there is no reason why that cannot be done within the existing constitutional framework as the Island's recent direct discussions with EU member states have demonstrated. If the real concern is that

the Island has not received concessions in return for its agreement to remove harmful tax measures and to adopt withholding tax and exchange of information measures the answer may lie not in independence but in the Island demanding more in the way of concessions than it has done hitherto. An obvious example of how other jurisdictions have tackled the problem is that of the Cayman Islands who reached agreement with the United Kingdom government on the European Savings Directive in return for the Cayman Island Stock Exchange being designated as a “recognised stock exchange” by the Inland Revenue. Other possibilities include the removal of the Island from some of the black lists employed by countries in their domestic tax codes in return for provision of information.

11 Greater co-operation between Jersey and Guernsey is something that is being, and should be, explored. Similarly there could be greater co-operation between the Channel Islands and the other offshore dependencies. Whilst they may be competitors in terms of their finance industries many of the threats and problems that they face are common to all of them. In terms of negotiations with the EU and OECD it may well be that more could be achieved by working together than trying to achieve short term competitive advantages.

12 There is much that can be done by the Island to strengthen its position internationally without effecting a drastic change in constitutional arrangements that have lasted for some 800 years and which have withstood various perceived crises at various times during that period. The Island’s pre-eminent position as an offshore finance centre depends to a large extent on the perception of its political stability. Whilst arguments with the United Kingdom may themselves affect that perception the somewhat drastic remedy of choosing independence may have far reaching consequences in terms of how the Island is viewed by investors in other countries. Jersey has always shown itself to be adaptable to changing circumstances and there is no reason why it should not be able to adapt to the significant changes that one now finds in international fiscal matters without discarding a constitutional relationship which has served it well for eight centuries.

*Alan Binnington is an advocate of the Royal Court, and is a partner in Mourant du Feu and Jeune, 22, Grenville Street, St. Helier, Jersey, JE4 8PX.*

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