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SHORTER ARTICLES AND NOTES
JERSEY AND THE UNITED KINGDOM: A CHOICE OF DESTINY (2)

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The independence option

1 In the first part of this article Philip Bailhache presents a compelling picture of the gradual but constant erosion of Jersey's constitutional privileges and the Islanders' concomitant right to self-determination. Can anything be done to prevent this? The note in this Review of October 2002 entitled *The Sword of Damocles* suggested that "the possibility of independence is worthy of more serious and detailed consideration than it has hitherto been accorded". It is clear that the independence option ought now to be carefully and soberly examined. The time for such examination is not when the Island is faced with some serious and imminent external threat. The proper time to address this issue is during a period of relative constitutional calm. Ideally, the UK would assist in drawing up a balance sheet of advantages and disadvantages. But with or without that assistance the exercise should be done.

2 The view has been expressed that the assumption of independence would not affect the Island's economic vulnerability, nor its exposure to political pressure from its larger neighbours. This is partly true, but independence would of course change fundamentally the relationships between Jersey and the UK and Jersey and the European Union. The economic vulnerability to the threat in the UK budget of April 2002 to impose tax on controlled foreign companies in designated jurisdictions (and indeed other economic weapons in the UK's armoury) would remain, although ironically the reforms of Jersey's fiscal system proposed by the Finance and Economics Committee as a result of the EU tax package, in particular the proposed sales tax, might well reduce that vulnerability. Two other factors are, however, more significant. The first is that experience shows that the international community is reluctant to intervene in relations between a sovereign state and its dependent territories. This reluctance is based upon the immunity enjoyed in international law 'from any form of external interference in the exercise of State rights in such a way as by implication to impair political sovereignty'.¹ An independent Jersey would, however, on the assumption that it became a member of the United Nations and of the Commonwealth, be able to call upon the assistance of the international community if it were threatened with economic reprisals. Economic sanctions upon a friendly, law abiding and competent independent state are not impossible, but much less likely.² The second and more important factor is that the removal of international responsibility for Jersey from the UK would also remove the UK's liability to pressure from its European partners to ensure Jersey's compliance with fiscal and other initiatives. Arguably, this would open the

¹ O'Connell, *International Law*, Stevens and Sons Ltd., 1965, vol. 1, page 322.

² See O'Connell, *op. cit.* vol. I, page 325, where the law relating to economic intervention is examined.

door to a much more relaxed and constructive constitutional relationship than is possible when officials in Whitehall have conflicting duties to advance the UK's interests and to protect Jersey's constitutional position.

The issue of size

3 Is Jersey too small to aspire to independence? The answer is clearly No. Even within Europe there are examples of micro-states which enjoy international recognition as sovereign entities and which are smaller than Jersey. There are several others with populations of less than 500,000. If one casts the net wider and looks at the Caribbean and the Pacific, one can find several independent states which are smaller than Jersey. All are members of the United Nations and those which are former British colonies are members of the Commonwealth. The table of European small states on the following page is illustrative of Jersey's relative position.³

<u>Country</u>	<u>Size (Square Kilometres)</u>	<u>Population</u>	<u>Per Capita GNI</u> \$ (2002)	<u>International Status</u>
San Marino	61	28,119	28,500 (est.)	Independent; member of UN, 1990.
Monaco	1	32,020	27,500 (est.)	Independent; outside EU; within European Customs area; member of UN, 1993
Liechtenstein	160	33,145	35,000 (est.)	Independent; within Swiss customs area; member of UN, 1990.
Guernsey (ex. Alderney and Sark)	63	59,807	31,000 (est.) (2002)	Crown Dependency; outside EU; within European customs area
Andorra	468	65,844	Not available	Independent; member of the UN
Jersey	116	87,186	34,058	Crown Dependency; outside EU; within European customs area
Iceland	103,000	283,000	29,240	Independent; Member of EFTA, then EEA. Member of UN, 1946

³ The statistical information about size and population is taken from government websites. The figures for GNI are taken from the World Bank's World Development indicator database, April 2004, at www.worldbank.org/data/databytopic/GNIPC.pdf, supplemented by information from the States of Jersey's Statistics Unit.

Malta	316	400,420	17,710	Independent; Member of EU
Luxembourg	3,000	444,000	53,290	Independent; Member of EU

4 It is sometimes said that Jersey would be incapable of conducting its own foreign relations. Yet in the context of the EU tax package, while Jersey's interests have been represented by the UK, the governments of Andorra, Monaco and Liechtenstein have been conducting their own negotiations. The advantage of conducting one's own negotiations is that one is able to bargain. Few states will enter an international agreement without seeking to derive some benefit from it. Thus Andorra, Monaco and San Marino are seeking access to EU financial markets as the price for compliance with the savings tax directive. Jersey was offered nothing for its compliance; the only benefit for that compliance will be enjoyed by the UK. The position of Malta is particularly interesting. Malta has recently negotiated its entry to the European Union which took effect on 1st May 2004. Its terms of entry are unique. Alone amongst member states, it will have the right in perpetuity to block non-residents from buying second homes in Malta. No fewer than seventy exemptions from the general rules have been granted, far more than for any other accession country.⁴ Furthermore, Jersey was in fact left by the UK to conduct its own representation in the context of the OECD Harmful Tax Practices initiative; the view was presumably taken that the UK could not reasonably defend the Island's position when its own interests ran counter to those of Jersey. Curiously the same approach was not adopted in the context of the EU tax package. No doubt Jersey's officials will have much to learn, but with the assistance of the UK in appropriate circumstances, there is no doubt that Jersey is competent to represent its own interests abroad.

Some non-issues

5 The Queen would remain the Head of State. There could be no persuasive reason for seeking to change an unbroken association with the Crown that goes back to 1066 or, (in her Ancestor's capacity as Duke of Normandy) to 933. The Queen would remain the fount of justice and of honour.

6 The Island would remain part of the Common Travel Area (CTA). It would not be in the interests of the UK or Jersey that the Island should become isolated in its independence. Like the Republic of Ireland, Jersey would remain within the CTA. It would be necessary to join the organisations of the international community. Jersey would seek membership of the United Nations and the Commonwealth. In the context of defence, Iceland sets an interesting precedent. In 1947 Iceland became a member of NATO. The Icelandic contribution to NATO is through the Icelandic Defence Force which is composed

⁴ It is also alone amongst accession countries in refusing to amend its tax measures according to the principles of the Code of Conduct. It will be interesting to see whether this position is maintained.

(principally) of Americans and some Icelanders. It is true that there is a military base in Iceland, but the country's financial contribution to NATO is not very different from Jersey's contribution to defence through its funding of the TA Unit.

7 There would be a written constitution which would entrench the independence of the judiciary and fundamental human rights. There are plenty of recent good examples of constitutions from which an appropriate document could be drawn up. The Jersey Court of Appeal would remain, as would the right of appeal from the Court of Appeal to the Judicial Committee of the Privy Council. A Judicial Appointments Commission would appoint or recommend the appointment of the members of the judiciary.

8 The Chief Minister would assume responsibility for foreign affairs in addition to his or her domestic portfolio. The Island's currency would remain the Pound Sterling for so long as it was sensible. In short, very little would change on the surface.

Guernsey?

9 Any sensible person viewing the matter from the outside would think that the two Bailiwicks would be stronger and more secure if they were to become, in international terms, a single federal state. In many parts of the world Jersey and Guernsey are already viewed as one entity. The Channel Islands, with a combined population of some 160,000, would still be a micro-state, but would be much better placed to face the challenges of statehood. There would be difficulties in procuring a federation, but none of these difficulties should be insuperable if the people of the two Bailiwicks reached the conclusion that independence was in their collective best interests.

Protocol 3 and relations with Europe

10 It is interesting to recall that the option of independence was considered, if only briefly, in the early 1970s, when Jersey was negotiating its position once the UK had acceded to the European Communities. The report of the Constitution and Common Market Committee, lodged *au Greffe* on 23rd November 1971, contained a section headed 'Independence as an Alternative'. It recorded that the UK government had made it clear that entry into the European Communities would not be imposed upon the Island if the proposed terms of entry were not satisfactory. The only alternative, however, was independence. It is interesting that the factor which appeared to weigh most heavily with the Committee at that time was 'the position which would arise in relation to the Island's export trade'. It was assumed that a tariff wall would have to be overcome. Agricultural exports to the UK amounted then to £8 million and represented 15% of the Island's GDP. Industrial exports were worth a similar amount, and a similar percentage of GDP. 30% of Jersey's GDP was therefore represented by agricultural and other exports.

11 The value of agricultural and other exports as a percentage of GDP has now fallen considerably. More importantly, such exports could now be protected by other means. Freedom to trade in goods with the European Union and associated states could be

achieved by securing membership of the European Economic Area; this is the course which has been adopted by Iceland. Alternatively, or additionally, membership could be sought of the World Trade Organisation so that the Island's producers could benefit from the freedoms conferred by that organisation.

12 Protocol 3 has served the Island very well over the past 30 years. It could not, of course, survive the independence of Jersey. A new relationship with the European Union would ensue. Whether this relationship with the EU should, in Jersey's interests, involve membership or not, is something that again deserves detailed study. Certain economic advantages would accrue from the ability to market financial products within the Union. On the other hand, the disadvantages, as a relatively prosperous small nation, of subscribing to the obligations of membership, may well continue to outweigh the advantages. The balance of political advantage needs also be taken into account.

Conclusion

13 The independence option should now be carefully and objectively examined. It is submitted that it is not sensible to assume that the constitutional relationship which has existed for 800 years can necessarily continue into the foreseeable future. The UK government has shown a willingness over the past six years to act decisively and even peremptorily to sweep away what it regards as anachronistic practices, offices and institutions, even when hallowed by centuries of tradition.⁵ The announcement of the abolition of the office of Lord Chancellor, whatever one's views may have been on the nature of that office, represented an astonishingly audacious employment of executive power. Why should there be an expectation that the constitutional relationship with the Channel Islands should be treated any differently? One may, perhaps, assume that, so long as the Islands do not constitute an obstacle to the achievement of the UK's foreign policy, they will be left alone. But even that assumption should not be taken for granted. If, however, the Islands are perceived as embodying a significant or serious threat to the UK's national interests, it now seems highly unlikely that the UK would accept that situation on the basis that centuries of constitutional usage had to be respected. The UK would act to protect what would be portrayed as the UK's national interest – and that national interest would not include the interests of Jersey.

14 The call for an examination of the merits of the independence option is of course not new. Indeed it is likely that some work has already been done. The then president of the Policy and Resources Committee told the States in June 1999, in answer to a parliamentary question as to whether the Committee had any plan to secure independence, –

'No. The Policy and Resources Committee does not believe independence is appropriate in the present circumstances and does not see the circumstances arising

⁵ See an interesting appraisal in a lecture by Lord Woolf, LCJ, entitled *The Rule of Law and a change in the constitution*, published in the Cambridge Law Journal, 2004

in the foreseeable future when it would be appropriate. However, this is something that should be, and is being, examined, so that should circumstances ever change we will have all the information at our fingertips to allow the Island to discuss fully the important issues involved.’⁶

15 The current president of the Policy and Resources Committee has announced the establishment of a constitutional sub-committee with wide terms of reference which embrace a possible change in the Island’s constitutional status. A change in status would be unlikely to be regarded as significant by the finance industry. Doing business in Jersey is a matter of calculated commercial choice. If the economic factors are favourable, and the judicial system continues to be efficient and independent, the business will flow in. If either of those pre-requisites is absent, the business will go. The status of the Island as a Crown Dependency or an independent state is not really material.

16 The real inhibition, should the balance of advantage be shown to tip in favour of independence, would be one of mindset. Has the Island the self-confidence to let go of the prop and stand on its own two feet? In truth the Island is for most practical purposes independent already. One should not ignore the technical assistance that is available to government departments in Jersey from their counterparts in the UK. But there seems no reason why such assistance should not continue to be rendered. It is in any event not entirely a one-way street. The reality is that a transition to independence would lead to no dramatic transformation of life in the community.

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⁶ States minutes, 8th June 1999

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