

DOCUMENTS OF CONSTITUTIONAL IMPORTANCE FOR THE CHANNEL ISLANDS:

Reflections on a *Rencontre*

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The papers presented at a Rencontre in Guernsey in 2009 drew attention to a number of documents of significance in the constitutional history of the Channel Islands. The author examines each of them.

1 It was my privilege to edit ten papers produced for and after the *Rencontre* which took place in 2009, loosely themed around the Treaty of Paris of 1259. The papers covered a wide range of topics historical and legal, but shared a common Anglo-Norman theme. The *Rencontres* are important opportunities for the legal and academic communities of the United Kingdom, France, the Channel Islands and further afield to meet, exchange ideas and stimulate each other's activities. The published proceedings of the *Rencontres* are valuable records in their own right and have stood the test of time in terms of their usefulness. Highlights from previous *travaux* include Robert Génestal's *La Formation et le Développement de la Coutume de Normandie*¹ and Jean Yver's *Les caractères originaux de la Coutume normande dans les îles de la Manche*.² The papers from the 2004 *Rencontre*³ were well received. The wonderfully evocative and illuminating tale underlying John Kelleher's paper has stayed with me in particular.⁴

¹ *Travaux de la Semaine d'Histoire du Droit Normand tenue à Guernesey du 26 au 30 Mai 1927*, Caen 1928, at 37. See also his paper on the *retrait lignager* from the 1923 *Semaine*, this time held in Jersey.

² *Travaux de la Semaine d'Histoire du Droit Normand tenue à Guernesey du 8 au 13 Juin 1938*, Caen 1939, at 481.

³ *Commise 1204: Studies in the History and Law of Continental and Insular Normandy*, Guernsey Bar, St Peter Port, 2005.

⁴ *Ibid.* *The mysterious case of the ship abandoned off Sark in 1608: the customary law of varech and choses gaives*, at 171.

The Treaty of Paris

2 The 2009 *Rencontre* marked the 750th anniversary of the Treaty of Paris made between King Henry III of England⁵ and Louis IX of France,⁶ itself one of those important, if in some ways ambiguous, steps contributing towards the identity of the two Bailiwicks.

3 Warburton⁷ put matters simply as follows—

“*Henri III, en renonçant à ses droits sur la Normandie, s’assura toutefois la possession de ces îles.*”⁸

4 Sir Maurice Powicke refers to the series of truces dating back to the last years of King John’s reign and the truce of Chinon, made in 1214 and says this of the treaty—

“The series of truces meant that hostilities were merely suspended. The issue between the two kings⁹ was not decided until 1259. Henry would not recognize the king of France as duke of Normandy or a French prince as count of Poitou; the French regarded Henry as a usurper in Gascony on the ground that, after the judicial deposition of John,¹⁰ Philip Augustus had recognized Arthur of Brittany and after Arthur’s death the duchy, with John’s other fiefs, had reverted to the French Crown. The treaty of Paris brought this state of affairs to an end. Henry surrendered his claims to Normandy, Poitou and other fiefs and did homage to Louis IX for Gascony. When some of his barons expostulated against the recognition of Henry as duke of Gascony, Louis is said to have pointed out that Henry as a vassal of the king of France and as a peer of France would be in a weaker position than he had been as an irresponsible enemy. The answer was shrewd, although future events showed that it was too optimistic. For more than two generations a complicated feudal instrument,

⁵ Henry was born in 1207 and became King in 1216, reigning until his death in 1272.

⁶ Later known as *St Louis*. Louis was born in 1214, became King in 1226 and reigned until his death in 1270.

⁷ Or Lord Hatton, Governor of Guernsey 1670–1706, see Dr Darryl Ogier’s paper in the 1990 *Transactions of the Société Guernesaise*, at 870.

⁸ *Traité sur l’Histoire, les Loix et Coutumes de l’Ile de Guernesey*, written in 1682 but printed and published in Guernesey in 1831, at 3. “Henry III, in renouncing his rights over Normandy, assured himself however of possession of these islands.”

⁹ *I.e.* Henry and Louis.

¹⁰ *I.e.* the *Commise* of 1204.

involving endless litigation,¹¹ was the basis of relations between two powerful kingdoms. The treaty of Paris marks an epoch in the history of Europe; in its form and content a dynastic arrangement, it was a formative element in the development of the international system and the diplomatic practice of the west.”¹²

5 John Le Patourel said this about the Treaty—

“Before the treaty the position of the Channel Islands was precisely that of the other remnants of the Angevin lands in France still unconquered by the French or recovered from them. It seems that the Islands were taken, with the rest of Normandy, during the French campaigns of 1202–4 but that they were recovered by the king of England very soon after. That he and his advisers saw what their value could be to him, a foothold in Normandy to support a legal claim to the whole or to provide a base for recovery by military means, a secure point on the sea-route from England to Gascony, is strongly suggested by the immediate steps that were taken to fortify them—taken in conjunction with the efforts that were to secure a friendly Brittany. The fact that a clause was inserted into the Treaty of Lambeth of 1217 stipulating that the Channel Islands, which had been seized again for the French, should be returned to King Henry III, shows that already, within a dozen years or so of the loss of continental Normandy, a special effort was being made to hold the Islands for the king of England.

During the long period of war and truce from 1202 until 1259, further attacks were feared though none seems to have materialized. Although they are not mentioned by name in the Treaty of Paris, it clearly provided for them, for it included among the lands in France for which King Henry III was to do liege homage ‘the islands if there are any which he holds and which are of the kingdom of France’. The Channel Islands were certainly held by the king of England at the time that the treaty was made, not indeed by Henry III directly, but by his son and heir Edward under him and, as part of Normandy, they had certainly been ‘of the kingdom of France’ before the war started.”¹³

¹¹ It seems that the Treaty of Paris was unambiguously good for the lawyers.

¹² *The Thirteenth Century 1216–1307*, Sir Maurice Powicke, Oxford, 2nd ed (1962), vol IV at 84 of the 15-volume *Oxford History of England*.

¹³ See John Le Patourel’s paper *Guernsey, Jersey and their Environment in the Middle Ages*, published in the collection of his papers *Feudal Empires*

6 Le Patourel drew particular attention to the role of liege homage in the treaty—

“But far more important than the territorial provisions of the treaty was the re-establishment, in even more explicit form, of the relationship based on liege homage. Both as peer of France and as duke of Aquitaine, the king of England was now a part of the political structure of the kingdom of France, a structure based upon the liege homage of all the great nobles and influenced by the revived study of Roman law. In particular, the system of appeals from the courts of the dukes and counts to the king’s court was being greatly developed, and the king was beginning to enforce his legislation and even to collect taxation within their territories. It meant that while the king of England might be sovereign in his own kingdom, his duchy was being absorbed into the French system, his courts were becoming simply one grade in a judicial hierarchy, he was ever more closely supervised from above and often frustrated in his efforts to provide a competent government for his Aquitainian people. Among other things, he had to maintain a “council” of lawyers in the court at Paris to watch his interests there, as the other great dukes and counts were doing.

What seems so astounding is that all this appeared to be quite natural and normal to King Henry III, though he may not have been able to foresee in 1259 quite how it would develop; and it was accepted equally by his successor Edward I, at least until the end of the century. Henry had performed his liege homage; Edward did so twice.”¹⁴

7 Le Patourel described the position of the Channel Islands in the period leading up and including under the treaty in greater detail in another paper—

“Precisely what happened to the Channel Islands during King John’s critical reign, when the fate of Normandy and much else was decided, is something which no one can yet say. It is possible that they changed hands more than once, and that their destiny was not finally settled until after John’s death; but early in the

Norman and Plantagenet, ed. Michael Jones, Hambledon Press (1984), at IV 453.

¹⁴ *Ibid.*, at XVIII 11 from the paper *France and England in the Middle Ages*. And see Mme Poirey’s detailed examination of this very subject to be published with the papers of the *Rencontre* in due course.

reign of King Henry III,¹⁵ and thereafter, the king of England was in possession. This created a very anomalous situation. The islanders were as Norman as the citizens of Rouen; linguistically, economically and socially they belonged to the Cotentin; their bishop was the bishop of Coutances . . . Yet their ruler, who had hitherto been duke of Normandy and king of England, and who had governed the islands as part of his duchy of Normandy, was no longer duke. Neither John nor Henry III, it is true, despaired of recovering the duchy, nor did they give up the title, until 1259; thus for fifty years and more, relations between England and France were in a state of war or, at best, of truce. The situation of the Channel Islands was, therefore, provisional. In those circumstances the policy of the king of England would naturally be to maintain their law and institutions as fully as possible; and several surviving mandates, addressed to the men he put in charge of them, show that this was indeed his policy . . .

During this half-century of war and truce, therefore, when the situation of the Channel Islands, as between England and France, was anomalous, their Norman law was preserved to them. The Treaty of Paris in 1259, which was an attempt at a general settlement, altered this situation, for, although it is not as explicit on the point as we could wish, it seems to provide a legal basis for the position in which the islands found themselves: By this treaty the king of England renounced all rights which he might have in the duchy and the land of Normandy, and in the islands, if any, which were at that time in the possession of the king of France; and he undertook to do liege homage in the future, not only for those lands in Gascony which he had succeeded in defending, but also for those lands in Aquitaine which the king of France undertook to convey to him, 'and for all the land which he holds on this side (*i.e.* the French side) of the sea of England, and for the islands if there are any which the king of England holds which are of the kingdom of France'. The islands off the French coast which the king of England held in 1259 were the Channel Islands and the Ile d'Oléron. In the text of the treaty, therefore, 'the islands . . . which the king of England holds which are of the kingdom of France' must include the Channel Islands. It follows, then, that they were in law a part of the kingdom of France . . . held by the king of England of the king of France by liege homage . . .

¹⁵ Henry was born in 1207 and died in 1272. He reigned for 56 years from 1216. He commenced the building of Westminster Abbey in 1245.

For some time after this treaty, therefore, the position of the islands seems clear; but when the Hundred Years War broke out, following the confiscation of Aquitaine and Ponthieu by the Court of France in 1337, Edward III continued to hold the Channel Islands, together with what he retained or acquired from time to time on the mainland of France, *de facto* only, by force of arms . . . Their final separation from France, *de facto* at first and perhaps never formally recognised by the French, dates therefore, from the early years of the Hundred Years War.”¹⁶

8 And of course from the perspective of the Treaty of Paris in 1259, the Hundred Years’ War¹⁷ would not start for another 78 years or so and the Treaty of Brétigny¹⁸ was 101 years distant. During the War, the English Crown would occupy Normandy between 1346–1360 and again between 1415–1450.

9 The Treaty of Paris cannot therefore be seen as a definitive, once and for all, moment in Channel Island history but as part of a much longer story in which the current has largely flowed in a single, more or less consistent, direction bringing us to the constitutional status of the Islands as it is today.

10 As an aside, it is interesting to note the close personal links between the two Kings. In May 1234, Louis had married Margaret of Provence. In January 1236, Henry married Margaret’s sister, Eleanor. There is more than a suggestion of intense rivalry between the Kings, at least on the part of Henry—who spent fortunes rebuilding Westminster Abbey, which he regarded as his equivalent of Louis’ Sainte-Chapelle. There was competition over holy relics. Henry encouraged scholars to migrate from Paris to teach at Oxford and Cambridge. Quite apart from warfare and the Treaty itself, it is noteworthy that Louis acted as arbitrator in the ongoing dispute between Henry and the barons led by Simon de Montfort. On 23 January 1264, Louis announced what became known as the *Mise of Amiens*, giving judgment against the barons on every issue and annulling the Provisions of Oxford. And of course, ultimately, Louis was canonised, and Edward was not.

¹⁶ John Le Patourel, *The Origins of the Channel Islands Legal System, Feudal Empires, Norman and Plantagenet*, *ibid*.

¹⁷ 1337–1453.

¹⁸ To similar effect to the treaty of 1259 and of equivalent, if not greater, significance to the Islands given the intention that territory should be acquired in full sovereignty—even if the necessary renunciations were never made, again see John Le Patourel’s paper, “The Treaty of Brétigny 1360”, in *Feudal Empires*, *ibid* at XIII 24.

11 Contemplating the significance of the Treaty of Paris made me contemplate all of the other important documents which one would cite in support of the Islands' special status, and there are many of them. A worthwhile project would be to produce a readily accessible compendium with explanatory notes. What follows is a survey of those documents, taken in chronological order.

The Constitutions of King John

12 From a Guernsey perspective one would look to early documents such as the Constitutions of King John¹⁹ and the *Précepte d'Assize*.²⁰

13 The Constitutions evidence the earliest steps taken in the creation of these unique legal jurisdictions and their near autonomous status. Of the eight constitutions, our concern is with the first two. The first recited that King John had appointed 12 sworn coroners (“*coronatores juratores*”) who were to keep the Pleas of the Crown. Everard and Holt identify the duties of the coronatores, as first instituted, with the office of coroner in England.²¹ Pleas of the Crown comprised anything that affected the King's Peace. The second constitution authorised the Warden (“*ballivus*”), under the supervision of the “*coronatores*”, to deal with pleas of *novel disseisin*, *mort d'ancestor* and dower along with various other defined pleas, without requiring the issue of a writ

¹⁹ Discussed by the late Sir James Holt and Dr Judith Everard in *Jersey 1204: The Forging of an Island Community*, Thames & Hudson (2004), at 156–163 and which they credit as having its origins in the first part of the thirteenth century, albeit via a description of the original in the response to an inquest ordered by writ in 1248 rather than the document itself. See also Sir James Holt, “Jersey 1204: The Origins of Unity: a Note on the Constitutions of King John”, in *A Celebration of Autonomy 1204–2004 800 Years of Channel Islands' Law*, ed. Bailhache (Jersey Law Review Ltd, St Helier, 2004, at 121). The Constitutions are not specific to Guernsey but apply equally to Jersey. See also Julien Havet's *Les Cours Royales des îles Normandes* (1878), at 3 *et seq.*

²⁰ See the pamphlet written by the former Bailiff (1922–1929), Sir Havilland de Sausmarez, who transcribed and translated a copy dated 1441, although in his notes Sir Havilland relates how “a very old tradition . . . attributes it to the year 1331” before going on to say that it cannot have been compiled in that year. Le Patourel calls the *Précepte* “that curious Guernsey document”, *The Medieval Administration of the Channel Islands 1199–1399* (Oxford, 1937, reprinted by the Guernsey Bar 2004), at 116. See also Havet, *ibid.*, at 14 *et seq.*

²¹ *Ibid.*, at 158. See also the further discussion of the evolution of the office of Jurat at 166–173.

in the king's name; *i.e.* an original jurisdiction in the Islands without reference to London or (given the loss of continental Normandy in 1204) to Rouen. This "generous privilege"²² was extended greatly by mandate of Henry III's regency council in 1219.²³

The *Précepte d'Assize*

14 The *Précepte d'Assize* is a statement of findings of the Royal Court of Guernsey as to the "liberties, usages and ancient customs" of the Island of Guernsey, with particular attention to the constitution of the Royal Court, comprising the Bailiff and 12 Jurats, stating that "they have cognisance, jurisdiction, power of sentence and judgment, in company with the said Bailiff, of all matters in causes both civil and criminal, whensoever arising in the Island", before excepting cases of treason, false coining and unlawfully laying hands on the Bailiff or the Jurats—but nevertheless "cognisance is to be taken there, but the punishment reserved to the Crown". Crucially this was combined with the assertion²⁴ that—

"they should use and enjoy fully and peaceably the liberties, usages and ancient customs which they and their predecessors had used formerly and of old time . . . without going out of the said Island on appeals or otherwise for any reason whatever . . . because of old time appeals and pledges of appearance in the said Duchy of Normandy were and were used to be determined solely at the Exchequer at Rouen, so our Lord the King, Duke of Normandy, as is said above, our Sovereign and Liege Lord, would not suffer that his said men, his subjects and lieges, should or ought to be constrained and compelled by any King's writ or otherwise to leave or go out of the said Island . . ."²⁵

²² *Ibid*, at 161.

²³ *Ibid*, at 162.

²⁴ By reference to the will and grant of "our said Lord the King, the Duke of Normandy, of which Duchy the said Island is a part and a dependency as stated . . ." The *Précepte* acknowledges also the role of the itinerant Royal Justices in the Islands, an institution which did not survive.

²⁵ *Ibid*, at 20.

Rolls of the Assizes, 1309

15 Le Patourel helpfully lists many references in early manuscripts evidencing the formation of a distinct body of Channel Island customary law,²⁶ including this statement from Guernsey in the Rolls of the Assizes, 1309—

“The commonalty of this island being asked what law they use and by what law they claim to be governed, i.e. whether by the law of England or of Normandy, or by special customs granted to them by the Kings etc., they say neither by the law of England nor of Normandy but by certain customs used in this island from time immemorial. And they say that they have of the natives of this island 12 men Jurats of the King who together with the Bailiff of the island in the absence of the justices and together with the justices when they shall come hither ought to judge of all cases in this island in what way so-ever arising.”²⁷

16 And of course for Le Patourel—

“All the Islanders’ liberties may be resolved into the general principle that they should be judged by their own law.”²⁸

Royal Charters

17 The next documents one can pick out would be the various Royal charters granted to the Islands by successive English monarchs over the centuries, from Edward III’s charter of 1341 and ending, in the case of Guernsey, with Charles II’s charter of 1668 and in the case of Jersey with James II’s charter of 1687.²⁹ Tim Thornton summarises the story of the charters in this way—

²⁶ *Medieval Administration*, at 106, footnote 2.

²⁷ *Rolls of the Assizes, AD 1309*, Jersey, 1903, at 29.

²⁸ *Medieval Administration*, at 110.

²⁹ And one could identify also the confirmation of charters included in the Bill of Rights of 1689—

“no charter or grant or pardon granted before the three and twentieth day of October in the year of our Lord one thousand six hundred eighty-nine shall be any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law and no other than as if this Act had never been made.”

See generally Tim Thornton, *The Charters of Guernsey*, Woodfield (2004) and a later companion piece completing the picture from a Jersey perspective, *Jersey’s Royal Charters of Liberties*, (2009) 13 J&G Law Rev, at 186–197. See also Sir Havilland de Sausmarez’s paper *The Earlier Charters of Guernsey*, published in 1928.

“The century following John’s loss of Normandy saw the customs of the island tested by forces which were increasingly and dominantly English, but it saw them successfully defended. The story of the island’s charters is the story of the way this defence of the island’s customs and privileges played out, and of the way that further privileges were granted and won. This reflects on the power and influence of the island community, but also on the power and interests of the crown. The context for this was provided chiefly by the wider relationships and tensions between the English and the French.”

18 Each charter took its predecessor charters as their foundation both to confirm existing rights and privileges and, on occasion, to add to them. A good example is Elizabeth’s charter to Guernsey of 1560.³⁰

L’Approbation des Lois

19 During this period there is for Guernsey a singularly important document, *L’Approbation des Lois* of 1582, as ratified and given force of law by an Order in Council of 27 October 1583. *L’Approbation* was a belated response to earlier Orders in Council requiring the Royal Court to follow the *Grand Coutumier* in Normandy, save in those respects where local practice and law differed, as to which they were to produce a written report, the future *Approbation*. The Bailiff and Jurats wrote their rather brief report by reference to what was then the last (and convenient) published word on Norman customary law, the 1574 commentary of Terrien. Strangely though, the authors must have been aware that in Normandy itself the *coutume* was in the process of being reformed and rewritten; perhaps this was a cultural bridge too far after almost 380 years of political separation. *L’Approbation* remains the starting point for any examination of modern Guernsey law, even if it has had fierce critics, starting with Thomas Le Marchant’s withering *Remarques et Animadversions sur L’Approbation des Lois*, published in 1826 but written in the mid-seventeenth century.

The Code of 1771

20 Jersey likewise has a particular document with no parallel in the other Bailiwick, namely, the Code of 1771.³¹ The excellent Jersey Institute of Law’s study guide for the Jersey Legal System and Constitutional Law 2013–2014 module describes the Code as follows—

³⁰ *Ibid*, at 74.

³¹ More formally the “1771 Code of Laws for the Island of Jersey”.

“Although entitled a ‘code’, a more accurate description would be a collection: the volume published in 1771 contains a variety of different forms of legislation, some in English, some in French. *Balleine’s History of Jersey* explains: ‘... for the first time in island history, the laws of Jersey were collected in a printed code ‘that everyone may know how to regulate his conduct and be no more obliged to live in dread of becoming liable to punishments for disobeying laws it was impossible to have knowledge of.’

This was approved by the Privy Council and published in 1771. Known as ‘the Code’ it was frequently quoted in subsequent years, and when, in 1950, amid strong opposition, the Social Security Scheme was introduced, it was repeatedly invoked’. The constitutional importance of the Code is that it brought to an end the legislative power of the Royal Court; hence forth the legislature was the States Assembly.”³²

21 The Code also included (and still includes) this key passage—

“Les Loix et Priviléges de l’Isle sont confirmés comme d’ancienneté, et aucune Ordres, Warrants, ou Lettres de quelque nature qu’ils soient, ne seront point exécutés dans l’Isle, qu’après avoir été présentées à la Cour Royale, afin d’y être enregîtrés et publiés: et dans les cas que tels Ordres, Warrants ou Lettres soient trouvés contraires aux Chartres et Priviléges, et onéreux à ladite Isle, l’enregîtrement, l’exécution, et la publication en peuvent être suspendus par la Cour, jusqu’à ce que le cas ait été représenté à Sa Majesté, et que son bon plaisir soit signifié là-dessus: et quant aux actes de Parlement où l’Isle est rapportée, et dans lesquels elle est intéressée, ils doivent être exemplifiés en forme, sous le Grand Sceau d’Angleterre, et envoyés en ladite Isle, et là être enregîtrés, et publiés, afin que les Habitans en aient la connoissance pour s’y conformer, et éviter les peines des transgressions.”

Which translates as—

“The Laws and Privileges of the Island are confirmed as of ancient times, and no Orders, Warrants, or Letters of whatsoever kind shall be executed in the Island before being presented to the Royal Court, in order that they may be there registered and published: and in the case that such Orders, Warrants or Letters are found contrary to the Charters and Privileges, and onerous to

³² See para 1.37. The guide is credited to Dr Phillip Johnson and William Bailhache, soon to be Bailiff of Jersey.

the said Island, the registration, execution and publication may be suspended by the Court, until the case has been put to His Majesty, and his good pleasure signified thereto: and as for Acts of Parliament where the Island is mentioned, and in which it is interested, they must be exemplified in form, under the Great Seal of England, and sent to the said Island and there registered, and published, in order that the Inhabitants are aware of them in order to conform with them, and to avoid penalties and transgressions.”

Articles 31, States of Jersey Law 2005

22 The Code is a much more explicit statement of rights than the mere conventions which exist in Guernsey, let alone the reinforcement of this provision by art 31 of the States of Jersey Law 2005 which reads as follows—

31 Duty to refer certain matters to the States

- (1) Where it is proposed—
 - (a) that any provision of a draft Act of the Parliament of the United Kingdom should apply directly to Jersey; or
 - (b) that an Order in Council should be made extending to Jersey—
 - (i) any provision of an Act of the Parliament of the United Kingdom, or
 - (ii) any Measure, pursuant to the Channel Islands (Church Legislation) Measures 1931 and 1957,

the Chief Minister shall lodge the proposal in order that the States may signify their views on it.

- (2) Where, upon transmission of an Act of the Parliament of the United Kingdom containing a provision described in paragraph (1)(a) or of an Order in Council described in paragraph (1)(b) to the Royal Court for registration, it appears to the Royal Court that the States have not signified their agreement to the substance of the provision or Order in Council—
 - (a) the Royal Court shall refer the provision or Order in Council to the Chief Minister; and
 - (b) the Chief Minister shall, in accordance with paragraph (1), refer it to the States.”

23 Again there is no equivalent express provision in Guernsey law, although it is a favourite exam question as to whether registration of a United Kingdom Act of Parliament is strictly necessary before it can have legal effect. The question arises under Jersey law also and indeed

was considered in *In re Terrorist Asset-Freezing (Temporary Provisions) Act 2010*.³³ The accompanying Order in Council instructing that the Act be registered in Jersey stated, in apparently standard terms, that registration was not necessary for legal effect, but was just a means of giving publicity to the measure. The Court registered the Act, it having been approved by the States. The question whether registration was strictly necessary was left open. But the Bailiff hinted strongly that registration would be necessary.³⁴ A particularly interesting argument was that it would be contrary to the right to free and fair elections, under art 3 of Protocol 1, for an Act of the UK Parliament, in which the population of Jersey had no representation, to have direct effect in Jersey without the approval of the States. Reliance was also placed on the fact of approval by Her Majesty in Council of the 2005 Law, which included in its Preamble the assertion that Jersey had autonomous capacity in domestic affairs, which also signaled an assumption that an Act of the Westminster Parliament could not, of itself, have legal effect in Jersey prior to registration.³⁵

24 It is noteworthy that, by contrast with Jersey, it would not be until 1948 that the Guernsey Royal Court's legislative powers (essentially the power to make ordinances) were finally brought to an end.³⁶

Reports on the State of the Criminal Law in the Channel Islands, 1847 and 1848

25 In the nineteenth century one would turn to the modern equivalent of the medieval prerogative writ, by which the addressee was required to show by what authority he claimed whatever right the writ had questioned;³⁷ the Royal Commission. The earliest reports of note include the *First Report of the Commissioners Appointed to Inquire into the State of the Criminal Law in the Channel Islands—Jersey* of 1847, with the Second Report relating to Guernsey appearing in 1848. The authors were Thomas Flower Ellis and Thomas Bros. Ellis lived

³³ 2011 JLR 117.

³⁴ See, more generally, Phillip Johnson's article *Orders in Council and the extension of Acts of Parliament to the Channel Islands*, (2012) 16 J&G Law Rev 280.

³⁵ My thanks to Andrew Bridgeford for his assistance with art 31.

³⁶ See Part VI of the Reform (Guernsey) Law 1948. The pre-1948 powers are described in the *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands*, March 1947, at 29, about which more below.

³⁷ The writ *quo warranto*, literally, by what warrant.

until 1861, was a member of the English Bar and part-author of three sets of law reports. He was a considerable scholar.

26 The Reports give a vivid account of the Islands' legal establishments and legal systems in the mid-nineteenth century, even if the focus is, inevitably, upon criminal law. They provide enormously valuable snapshots of the law of the Islands at that time, including how advocates of the mid-nineteenth century viewed their own legal heritage and customary law in particular. In the case of Jersey this includes a critique of the 1771 Code itself.³⁸ The Jersey Report also evidences the bitter divisions which existed in society at that time—

“the inhabitants of the Island are divided into two parties, which contend with the utmost vehemence, and, we are compelled to add, the utmost virulence, for the possession of power in the States and in the Parochial Assemblies.”³⁹

By contrast, the Commissioners reported that: “We found a very different state of things in Guernsey”.⁴⁰

Report on the State of the Civil, Municipal and Ecclesiastical Laws of Jersey, 1861

27 A little more than ten years later Commissioners were again appointed, but this time, regrettably, in respect of Jersey only. The result was the *Report of the Commissioners Appointed to Inquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey, 1861*. The Commissioners were Sir John Wither Awdry, William Reginald, Earl of Devon, and Richard Jebb. The report gives a comprehensive account of Jersey civil law and legal institutions. There is a small consolation for Guernsey in that a leading Guernsey advocate of the day, Peter Jeremie, gave lengthy testimony to the Commissioners. Jeremie had been in practice for 30 years at the time.⁴¹

28 The Commissioners were not very complimentary about certain aspects of what they found, they were particularly down on the Jurats.

³⁸ At xi of the 1847 report. “The Code of 1771, on inspection, will be found to fall far short of that which, from the language of the Order in Council, it might be expected to be.”

³⁹ Jersey report, at xxxix.

⁴⁰ Guernsey report, at v. Although there was some suggestion that some lived in dread of the power and influence possessed by the Jurats, *ibid*, at v.

⁴¹ He was author of *On Real Property and Taxation in Guernsey*, 1866. Peter Jeremie was HM Comptroller at the time. The text is written in English. The text of his contemporary, James Gallienne, *Traité de la Renonciation par Loi Outrée et de la Garantie* was, as its name suggests, written in French.

Having commented on the combined role of the Bailiff as both President of the States and of the Royal Court and accepting it as a necessary evil (without using those precise words) they went on to state—

“As regards the Jurats, however, all the objections to the union of judicial and legislative functions exist in the greatest force, though we are happy to believe that at the present day the Jersey bench is not subject to that corruption from party spirit which must inevitably result from the popular election of a judicature if party runs high . . . But even supposing the election always to be pure and enlightened, the continuance of this union tends to exclude from the dignified position of life-members of the States all those, however well qualified for legislation, who are not qualified or have not time for the regular performance of judicial duties, or should such persons be elected, leads to a result which at present prevails to a lamentable extent, namely, that they do not give that regular attendance in the Royal Court which is indispensable to the public well-being . . . Independently however of any question as to the mode of appointment of the Judges, the constitution of the Court is anomalous and incompatible with its competency to decide questions of law.”⁴²

29 There are interesting observations about language also—

“in Jersey, with scarcely any exception, all legal proceedings are conducted in the French language. Much complaint on this head generally, and in particular with regard to the speeches of counsel, was made to us, by or on behalf of the exclusively English-speaking part of the population.

It is admitted on all hands that of late years the English language has been gaining ground over the French; so much so that in St Helier’s [*sic*], particularly among the rising generation, it clearly predominates.”⁴³

30 The Commissioners had harsh words concerning the conduct of trials—

“After the evidence on both sides is gone through, and not before, the arguments of counsel on the case are heard. As might be expected in a Court so weakly constituted as that of Jersey is, considerable latitude is given to counsel throughout the

⁴² *Ibid*, at xxxiv.

⁴³ *Ibid*, at xlviii.

proceedings, and we believe that in this respect, great irregularities are of constant occurrence.

We cannot, however, abstain from stating that besides irregularities in the form and order of legitimate discussion, the Court is much lowered in public estimation by a very prevalent opinion that it does not feel itself strong enough to restrain very indecent conflicts of language, and sometimes even personal violence committed in the face of the Court.”⁴⁴

31 There were also reports of unseemly contests between the *Vicomte* (appointed by the Crown) and *Sergens de Justice* (appointed by the Bailiff) relating to execution of judgments.⁴⁵

The Chuter Ede Report, 1947

32 It is interesting that World War I seems to have had comparatively little impact upon the Channel Islands from a constitutional and legal perspective. Obviously the human impact was enormous, given, for example, the fate of the Royal Guernsey Light Infantry. The Sark war memorial alone bears the names of 17 men who fell in World War I, an astonishing proportion of those eligible for military service in such a small community. Unlike in World War II, there had been no enemy occupation and perhaps it is fair to say that the reforms which seemed so obviously necessary after World War II were themselves only really taking hold in Great Britain during the period. Likewise much attention was devoted to the issue of the so-called Imperial Contribution to the cost of World War I in its aftermath which became a significant political dispute.⁴⁶

33 By the end of World War II reform was long overdue. The Islands had been through enormous upheaval during the occupation. The winds of change had started blowing long before McMillan’s Cape Town speech of 1960. Both Guernsey and Jersey had considered reform of their assemblies and judicial institutions in earnest from May 1945 onwards, with elections to the States in December of that year. An Order in Council of 4 June 1946 appointed a Committee of the Privy Council to enquire into reforms in the “constitution and procedure of the States of Jersey and Guernsey, and into judicial reform in both Islands, and advise His Majesty thereon”. The resulting

⁴⁴ *Ibid*, at lii.

⁴⁵ *Ibid*, at lv.

⁴⁶ See the then former Bailiff Sir Havilland de Saumarez’s account of the issue in a lengthy pamphlet entitled *Guernsey and the Imperial Contribution*, 1930.

document was the *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands*, of March 1947, otherwise known as the Chuter Ede report, after its chairman, James Chuter Ede, the then Home Secretary.

34 The report itself is brief, barely 40 pages long, but enormously informative as to the state of both Islands at the time, if viewed more from an internal than external constitutional perspective. The essential autonomy of the Islands is implicit rather than stated. Themes from previous reports carry through and evolve further, notably the increasing Anglicisation of States and judicial business to the point where English has all but ousted the French language. Basic democratic principle marches forward also, removing remaining obstacles wherever they are found as between sexes, religions, occupations (*e.g.* butchers and bakers, barred from certain offices on the basis that their trades were regulated by the States/the Royal Court). Another theme is the fundamental importance attached to the separation of legislative and judicial functions, removing Jurats from the States and legislative functions from the Royal Court. In short, the 1947 report describes the Islands in the form in which they had existed for the better part of a century up to that point and provide what amounted to a near blue print for the future, including a recommendation for a single Court of Appeal for both Islands, which ultimately did not quite come to fruition, at least not yet. The report is also a fascinating parallel study of the two Bailiwicks, highlighting their similarities and differences in any given area and their very similar but not identical responses to their identical geopolitical circumstances, like (near) identical twins (nearly) separated at birth many hundreds of years before.

The Kilbrandon Report, 1973

35 In 1973, there was published Part XI of Volume 1 of the Report of the Royal Commission on the Constitution, 1969–1973, entitled *Relationships between the United Kingdom and the Channel Islands and the Isle of Man*. This 59 page long document is known more pithily as the *Kilbrandon Report* after its Chairman (succeeding Lord Crowther, who had died in 1972).

36 The Kilbrandon Report is an essential, if rather contentious, point of reference for any examination of the constitutional position of the Channel Islands (and, of course, the Isle of Man). It is thoughtful and well written, whilst reaching conclusions which have attracted increasing criticism and challenge over the years, at least from the

Islands.⁴⁷ The Report continues, however, to be cited with uncritical approval by the Courts of the United Kingdom. The contrast is well illustrated by considering on the one hand Sir Jeffrey Jowell's criticism in his article *The Scope of Guernsey's Autonomy—A Brief Rejoinder*⁴⁸ and on the other, the Supreme Court's judgment in the case of *R (Barclay) v Secy of State for Justice and Lord Chancellor*⁴⁹ (in which Sir Jeffrey appeared on behalf of the intervening States of Jersey and Guernsey).

37 The backdrop to the report was the negotiation leading up to the accession of the United Kingdom to the European Economic Community and its feared consequences for the Crown Dependencies. As it happened, the successful negotiation of the terms of Protocol 3 (itself a wonderful success when viewed with the added benefit of hindsight) rendered the concerns expressed in the evidence to the Commission purely academic. However, the issue had thrown into sharp relief the constitutional relationship of the Islands to the United Kingdom and the powers of the latter to enter into international obligations extending (whether they liked it or not) to the former, and powers, ultimately, to legislate for the Islands (again with or without their consent). The Kilbrandon report is, essentially, an examination of where power ultimately lies in the relationship between the Dependencies and the United Kingdom and, unsurprisingly, the Royal Commission appointed by Her Majesty in London, concluded that, absent independence (which nobody really wanted), power ultimately resided in London (see the final sentence of para 1513: "we are firmly of the opinion that the United Kingdom Government has, and should retain, the right to decide, and that Parliament has, and should retain, the right in the last resort to legislate for the Islands").

38 That said, the report is at pains to state and re-state the constitutional convention that Westminster will not legislate for the Islands without their consent (see *e.g.* para 1498) and that, likewise, the United Kingdom would do what it could to accommodate the Islands' wishes in the context of newly proposed international obligations (see *e.g.* paras 1363 and 1401).

39 The report is noteworthy for the energetic positions taken by the Isle of Man (who were particularly exercised by their desire to accommodate commercial radio stations broadcasting throughout the UK, blocked by London) and Jersey, each producing fully worked out

⁴⁷ Indeed it still has the power to make certain leading individuals' blood all but boil.

⁴⁸ (2001) 5 *Jersey Law Review* 271

⁴⁹ [2014] UKSC 54. "*Barclay No 2*". See below for discussion.

proposals for legislation expressly dividing up areas of responsibility between London, Douglas and St Helier. Not so Guernsey, which was content to accommodate London and the status quo. Less charitable readers might describe the position adopted by Guernsey as supine.⁵⁰

40 The report concludes with interesting proposals for a standing committee to supplement “normal channels” when dealing with any contentious issue and, above that, a Council of the Islands to “introduce an independent element into consideration of a disputed matter before the final decision is taken by the Privy Council”.

41 No such Council was in fact established and judicial review has since evolved and, subject to the recent decision in *Barclay No 2*, is available to resolve disputes other than European Convention on Human Rights-compliance; albeit judicial review does not permit fine enough judgments to be made. The later creation of the British-Irish Council must, of course, be distinguished from the Kilbrandon proposal.

Protocol 3 to the Treaty of Accession of the United Kingdom to the EEC, 1972

42 There is, of course, Protocol 3 itself.⁵¹ Protocol 3 defines the Channel Islands’ relationship to what is now the European Union. It is a remarkably short document, comprising just six articles, whose net effect is that the Islands are neither members nor associate members of the Union. They are within the common customs territory of the Union and therefore must apply the common external tariff. Consistent with this, the Islands are within the EU for the purposes of free movement of goods, but outside of the Union for non-customs related fiscal matters and free movement of persons and services. The Islands are not eligible for Union funds. There is a positive obligation by art 4 “to apply the same treatment to all natural and legal persons of the Community”. However, by art 2, Channel Islanders are not to benefit from Community provisions relating to the free movement of persons and services. All but a minority are spared by art 6, which excludes those with a parent or grandparent born, adopted, naturalised or registered in the United Kingdom or any who have, at any time, been ordinarily resident in the UK for five years.

⁵⁰ Contrast para 1414 for the views of Guernsey with para 1399 for the Isle of Man and para 1405 for Jersey.

⁵¹ Protocol 3 to the Treaty of Accession of the United Kingdom to the European Economic Community, signed on 22 January 1972.

43 EU regulations apply directly to the Islands, if binding on the Islands by virtue of Protocol 3. Directives within the scope of Protocol 3 are implemented by legislation. The Islands can also elect to implement any aspect of EU law on a purely voluntary basis either by way of ordinance under the European Communities (Bailiwick of Guernsey) Law 1973 or by way of regulation under the European Communities Legislation (Implementation) (Jersey) Law 1996.

44 The court which ultimately determines the meaning and effect of Protocol 3 is the European Court of Justice, and Channel Island cases have been heard before it, including *Jersey Produce Marketing Organisation Ltd v States of Jersey & Jersey Potato Export Marketing Board*, C293/02 concerning the scope of the application of art 29 of the Treaty Establishing the European Community.

Publications by the Home Office and successor departments

45 Various guides and fact sheets have been produced by the Home Office, followed by the Lord Chancellor's Department, the Department for Constitutional Affairs and the Ministry of Justice. They seem to have been produced for the benefit of other government departments rather than the public at large but are nevertheless available online.⁵² The chief interest of these documents is that they are succinct and valuable statements of the constitutional position of the Islands and, given their source, carry considerable weight. While containing some contentious statements, the documents are largely accurate from a Channel Island perspective. For example, the most recent guide, that of the Ministry of Justice, makes this statement—

“The Crown Dependencies are not part of the UK but are self-governing dependencies of the Crown. This means they have their own directly elected legislative assemblies, administrative,

⁵² See, *A Guide to Business Involving the Channel Islands and the Isle of Man*, Home Office, 9 July 1999 at: <http://www.nationalarchives.gov.uk/ERORrecords/HO/421/2/ccpd/cnu/chanman.htm> (although this link was not working at the time of writing); see also *A Guide to Government Business involving the Channel Islands and the Isle of Man*, Department for Constitutional Affairs, August 2002 at: <http://webarchive.nationalarchives.gov.uk/> and <http://www.dca.gov.uk/constitution/crown/govguide.htm> and *Fact Sheet on the UK's Relationship with the Crown Dependencies*, Ministry of Justice, undated at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361537/crown-dependencies.pdf. The MoJ document refers to “How to” notes on extension of international instruments to the Dependencies.

fiscal and legal systems and their own courts of law. The Crown Dependencies are not represented in the UK Parliament.”

46 The earliest of the statements (Home Office, 1999) puts matters this way—

“The Islands are not part of the United Kingdom and have no representation in Parliament in Westminster. They are in some respects like miniature states with wide powers of self-government.”

47 The value of the documents is obvious as up-to-date statements or even admissions on the part of the United Kingdom as to the status of the Islands.

Reports of the House of Commons Justice Committee

48 The Justice Committee has produced two valuable reports on the relationship between the United Kingdom and the Crown Dependencies and the role of the Ministry of Justice in administering that relationship which should be read together with the Government’s responses to the reports.⁵³

49 The following is taken from the summary to the 2010 report. Again the value of the statement is obvious in terms of establishing and, if need be, defending the constitutional rights of the Islands. The 2010 report went further though in making specific recommendations to the Ministry of Justice as to how the constitutional relationship should be managed, many of which recommendations were adopted by the Government, with the effect of increasing Channel Island autonomy—

“We found that the Crown Dependencies team at the Ministry of Justice carried a considerable workload, the burden of which sometimes appeared to prevent the efficient and timely administration of legislative and other business from the Crown Dependencies. We recommend that the Ministry of Justice reappraise the priorities for the Crown Dependencies work; focus

⁵³ See *House of Commons Justice Committee: Crown Dependencies, Eighth Report of Session 2009–10*, dated 30 March 2010, and *Government Response to the Justice Select Committee’s Report: Crown Dependencies*, dated November 2010, and *House of Commons Justice Committee: Crown Dependencies: Developments Since 2010, Tenth Report of Session 2013–14* dated 10 December 2013 and *Government Response to the Justice Select Committee’s Report ‘Crown Dependencies: Developments since 2010*, dated March 2014. All four documents are available online.

more on its constitutional duties; and spend less time on issues for which it is not formally responsible.

The Ministry of Justice should give clearer guidance to other Whitehall departments who conduct business affecting the Crown Dependencies. Such departments should be made aware of the constitutional position of the Islands, their essential independence from the UK, their independence from each other, and the fact that their interests need to be considered routinely in any area of UK policy-making and legislation likely to affect them . . .

The UK Government is responsible for ensuring the good government of the Crown Dependencies. Some witnesses to this inquiry indicated a desire for the Ministry of Justice to step in to address certain grievances they have in relation to the governance of the Islands. However, we consider that the Crown Dependencies are democratic, self-governing communities with free media and open debate. The independence and powers of self-determination of the Crown Dependencies are, in the view of both the UK Government and the Island authorities, only to be set aside in the most serious circumstances, such as a fundamental breakdown in public order or of the rule of law, endemic corruption in the government or the judiciary or other extreme circumstance . . .”

50 A good example of how the 2010 report moved on the relationship is to be found in the following statement—

“We found that there was duplication of effort in the processes relating to the scrutiny of insular legislation prior to Royal Assent, with several sets of lawyers sometimes reviewing legislation for the same purposes. In addition, we found that Ministry of Justice and other UK Government lawyers were not necessarily confining themselves to the constitutional grounds for review and were questioning the form and policy content of insular legislation on other grounds. This is inappropriate, both in terms of a non-essential use of scarce resources and in terms of the constitutional autonomy of the insular legislatures in relation to domestic matters.”

51 The summary goes on to recommend that the judgment of the insular Law Officers normally be relied upon (alone) for laws of domestic application only.⁵⁴ Other recommendations included⁵⁵ the

⁵⁴ This led to the use of a revised form of Explanatory Memorandum produced by the Law Officers, concentrating on areas relating to international

giving of clear guidelines to government departments on the need for UK Government consultation with the Crown Dependencies as early as possible in the event that they would be affected by UK, EU or other international measures. They highlighted also the duty of the UK Government to represent Crown Dependency interests on the international stage and suggested the increased use of Letters of Entrustment in specified areas.

52 The UK Government responses to the Justice Committee reports have been broadly to accept their contents and to act upon them, whilst also laying down markers as to the Government's expectation of the Dependencies. Thus in the Ministerial Foreword to the first response we find this—

“The United Kingdom Government has a responsibility to ensure that the Crown Dependencies have the advice and assistance necessary to function as socially and economically sound democracies. In turn the Government expects each Crown Dependency to accept the responsibility of being a ‘good neighbour’ to the UK and to ensure its own policies do not have a significant adverse impact on the UK’s interests . . . The United Kingdom respects each Crown Dependency’s laws and policies as the expression of the will of a democratic government with the power of self-determination. The UK Government is responsible for the Crown Dependencies’ international relations and ultimate good governance and has the commensurate power to ensure these obligations are met.”⁵⁶

53 Likewise it is clear from the response to the first report that the UK Government continues to assert the right to refuse to recommend Crown Dependency legislation for Royal Assent not just on “strict questions of lawfulness” but also—

“in limited occasions we may consider it appropriate to intervene in policy matters where there may be the potential for a direct and adverse impact on UK interests (for example in relation to changes to drug or immigration law in the Islands). Equally if an Island Law sought to do something fundamentally contrary to current UK principle . . .”

obligations and, in particular the risk of successful challenge under the ECHR.

⁵⁵ *I.e.*, expressly authorising a Crown Dependency to make international agreements in any given area.

⁵⁶ *Government Response to the Justice Select Committee’s Report: Crown Dependencies*, November 2010, at 3.

It is implicit also that the UK Government would claim the right to refuse to recommend for Royal Assent if good governance were threatened.

54 The cause of Channel Island autonomy has certainly benefited from Government cutbacks in the wake of the crash of 2008 in that government cutbacks in the MoJ has necessarily reduced the amount of governing it can do.⁵⁷

Reports produced by Jersey and Guernsey

55 Jersey and Guernsey have produced their own reports from time to time. Recent examples include, in the case of Jersey, the *Second Interim Report of the Constitution Review Group* under the chairmanship of Sir Philip Bailhache, then Bailiff of Jersey, dated December 2007⁵⁸ and in the case of Guernsey the *First Report of the Constitutional Advisory Panel* dated 16 February 2009⁵⁹ and a report prepared by Guernsey's Policy Council entitled *Greater Autonomy in the Legislative Process and International Affairs*.⁶⁰

⁵⁷ See para 6, at 7, of the 2013 report quoting Lord McNally—

“Since 2010 the Ministry of Justice has had to cut back, initially, in the first spending review by 23%, and in a subsequent review by 10%. That has meant we have had to employ a leaner team.”

The report goes on to state that—

“The Crown Dependencies team now consists of four policy officials, supplemented by three lawyers who work on the Crown Dependencies and other areas.”

⁵⁸ www.statesassembly.gov.je/AssemblyReports/2008/46525-24954-276 2008. pdf. The focus of the report is to consider the practicalities of Jersey becoming an independent state, albeit retaining the Queen as head of state. The report concluded that “Jersey is equipped to face the challenges of independence”, see para 99, and that sovereignty was “available to Jersey should the people decide that it was desirable”.

⁵⁹ <http://www.gov.gg/CHttpHandler.ashx?id=84009&p=0>. The report came out very firmly against the suggestion that Guernsey should become an independent state. There is an interesting historical pattern of Guernsey adopting a much more conservative and cautious position on constitutional issues than Jersey. The Guernsey report also contains a rejoinder to Kilbrandon.

⁶⁰ *Billet d'État XVIII* of 2013, at 1398 online at <http://www.gov.gg/CHttpHandler.ashx?id=84016&p=0>. The report contains a helpful review of how matters stood in terms of the constitutional relationship and practical matters such as the legislative process and led to the creation of a Constitutional Panel whose primary remit is to report on relationships with the various

56 The reports are valuable sources for the Channel Island perspective of their constitutions and constitutional relationships with the UK, albeit, and necessarily, not having quite the same impact as statements made by either the Ministry of Justice or the Justice Committee, if only for the simple reason that the latter amount to admissions against interest as opposed to what are, ultimately, self-serving and sometimes aspirational statements.

Framework for developing the international identity of Guernsey and Jersey

57 In May 2007, the Department for Constitutional Affairs entered into agreements with Jersey and the Isle of Man for the development of the international identity of the two Crown Dependencies. A similar agreement was later made with Guernsey. The Guernsey agreement would not be signed by the UK government because of the failure of Sark to adopt reform legislation providing for a fully elected assembly, itself a telling use of power in the constitutional relationship (along with more obvious exercises of power, such as refusal to allow Islands legislation to go for Royal Sanction).⁶¹ The key provisions were that the UK would not act internationally on behalf of the Islands without prior consultation; the UK would seek to represent any differing interests the Islands might have (particularly in relation to the EU); it was recognised that the Islands had an international identity separate to that of the UK; the UK recognised the Islands as long-standing, small democracies and supported the principle that they should be free to develop further their international identities.

organs of UK government and, in particular, the Royal Sanction process, the extension of UK legislation to Guernsey, the extension of treaties to Guernsey and the treaty-making powers of Guernsey. There was to be a particular focus on greater legislative autonomy. However, independence was expressly not contemplated.

⁶¹ As to this see another paper produced by Guernsey's Policy Council entitled *Legislation—Projets de Loi ("Laws") Awaiting Royal Sanction* of 19 January 2009, *Billet d'État* VII of 2009, at 279. Guernsey had begun inserting very extensive "Henry VIII" clauses (although not true Henry VIII clause in the Westminster sense) into primary legislation with the effect that subsequent legislation in any given area could be made locally by ordinance and never have to go to London. The Department of Constitutional Affairs smelt a rat and refused to put Guernsey legislation with such clauses forward for Royal Sanction. Guernsey was forced to back down and an undisclosed *modus vivendi* concerning ordinance making powers was agreed and the offending draft laws withdrawn and amended.

Judgments

58 There are various Privy Council, House of Lords and Supreme Court judgments which are of constitutional significance to the Islands. The most recent example is that of *R (Barclay) v Secy of State for Justice*.⁶² The issue for the court was whether the High Court in London had jurisdiction to entertain an application for judicial review of a decision of the Privy Council Committee for the Affairs of Jersey and Guernsey to put forward Channel Island legislation for Royal Sanction and the scope of the judicial review jurisdiction more generally of Orders in Council made in relation to the Channel Islands. Somewhat surprisingly the Government of Jersey and the States of Guernsey (intervening) supported the UK Government position that there was no such jurisdiction, at least not to entertain a challenge to a decision to put forward for Royal Sanction, while keeping their powder dry as to the right of the Channel Islands governments (alone) to challenge a refusal. Ultimately, the Supreme Court held (in a judgment which is unsatisfactory in many ways, not least for the weakness of its analysis and general wooliness) that—

“As a general proposition, to which there may well be exceptions,⁶³ I would hold that the courts of the United Kingdom do have jurisdiction judicially to review an Order in Council which is made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom. Hence the Administrative Court did have jurisdiction to entertain this claim.”

However, where the challenge was based upon ECHR non-compliance it was held (quite arbitrarily, it is suggested) that the challenge should be made in the Channel Island courts pursuant to the relevant local human rights legislation and not by way of judicial review.

Conclusion

59 Channel Island constitutions are no more written than that of the United Kingdom. They are found in a variety of sources, whether legislation, judgments, treaties, reports or merely evidenced by

⁶² *Ibid*, [2014] UKSC 54, [2014] 3 WLR 1142. Another example concerning the legislative powers of the States of Deliberation in Guernsey is *Jersey Fishermen’s Association Ltd. v States of Guernsey* [2007] UKPC 30. Earlier Orders in Council are also valuable sources for Channels Island constitutions. By way of good example see the Miscellany article in the present issue, entitled, “The King is dead: long live the King!”

⁶³ *QED*.

documents. They are also found in convention and indeed in custom. The Treaty of Paris was one of the earliest documents of constitutional significance for the Islands in circumstances where constitutions and constitutional relationships continue to evolve and refine themselves constantly, although the central core of the Bailiwicks' constitutions has been remarkably consistent for many centuries.

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