

Articles

Jersey: constitutional status

By the Staff of the Attorney-General's Chambers, Jersey.

Jersey is the largest of the Channel Islands, a small group of Islands situated in the English Channel, some fifteen to twenty miles from the coast of France. The Islands comprise two separate jurisdictions: the Bailiwick of Jersey, and the Bailiwick of Guernsey, which includes, besides Guernsey, the smaller Islands of Alderney, Sark, Herm and Jethou. These Islands are dependencies of the Crown, but not colonies: they have their own legislative assemblies, and yet the implementation of legislation is dependent upon the assent of the Sovereign in Council; and while they have their own Courts of Law, there is an ultimate appeal to the Judicial Committee of the Privy Council, either as of right or with special leave.

The history out of which this unique constitutional position evolved began in the tenth century, when the Channel Islands formed part of the Duchy of Normandy. Following the Norman conquest, England and Normandy were united in the possession of one man, albeit in the different capacities of King and Duke. The situation came to an end in 1204, when the French regained continental Normandy. The Channel Islands, however, remained in the possession of the English sovereign, the only part of the erstwhile Duchy to do so. They are thus dependencies of the Crown whose origin, and therefore constitutional relationship with the United Kingdom, differs radically from that of the colonies and other overseas dependencies acquired centuries later, during the age of colonial expansion.

After the separation from continental Normandy, there followed a period during which the Islanders asserted various claims to certain constitutional rights and privileges, notably the following:— The right to be governed by the law of Normandy, as modified by local customary law; the right to have twelve Jurats, natives of the Islands, with virtually exclusive jurisdiction in all civil or criminal matters arising within the Islands, who should sit with itinerant justices when they visited Jersey, and in their absence with the Bailiff, (the Chief Magistrate); a right to have all action determined within the Island, and not adjourned elsewhere; a freedom from all duties, taxes and levies; and a right to do homage only when the King came to the Island. For their part the Sovereigns, motivated no doubt by a wish to retain the loyalty of territories situated so conveniently close to France, granted a number of Royal Charters confirming the liberties and immunities of the Islanders. The provisions of the earlier Charters are conveniently summarised in a Charter granted by Elizabeth I in 1562, which confirmed and expanded them. The main provisions of this Charter were an exemption from the payment of all duties and taxes (unless the Sovereign should be detained in prison); a confirmation of the jurisdiction of the Royal Court in all causes, whether civil or criminal (with the exception of certain special cases); and a confirmation of the rights of the Islanders not to be cited by writs or processes issuing out of the English Courts. This Charter, however, included a special reservation of the Royal prerogative.

All criminal and civil matters arising within the Island, with the exception of treason and assaults on the King's Officers in the execution of their duties, which were reserved for trial by the sovereign, were thus, by the close of the middle ages, within the exclusive jurisdiction of the Royal Court. This Court, moreover, had, in addition to this function, the power to make ordinances for the good order and internal government of the Island. In the course of time it supplemented its own strength when exercising this latter power on the Parishes for assistance.

The Island had, since the earliest times, been divided into twelve parishes, the secular heads of which were the Constables, who were elected by the members of the Parish Assembly, and the ecclesiastical heads of which were the Rectors. By the early sixteenth century at the latest, the Royal Court had fallen into the practice of summoning the Constables and Rectors to assist it in its law-making. The practice became the rule, rather than the exception, and eventually the Assembly of the States, as the assembly of Jurats, Constables and Rectors came to be known, acquired an independent power to pass local enactments, which it exercised concurrently with the Royal Court until 1771. The Governor, or his Lieutenant in his absence, was also a member of the Assembly, and had a power of veto in respect of any ordinance which he considered might be prejudicial to the interests of the Crown.

In 1771, in response to a petition which the Islanders had presented to the King the year before, a collection of all the written laws then in force and which it was desired should be perpetuated was drawn up and submitted to the King for approval. An Order in Council dated 28 March 1771, confirmed the collection, (subsequently known as the Code of 1771), and directed that any written laws passed before the compilation of the Code but not included in it should cease to have effect. It also contained a number of provisions relating to the passing of laws. The power to make provisional laws and ordinances was to vest exclusively in the Assembly of the States. Such laws as they did pass were only to remain in force for three years, although at the end of that period they might seek the Royal Assent for the continuance of any law which it was considered desirable to perpetuate. A written copy of any law which was to be proposed to the States was to be lodged fourteen days before it was to be determined, to enable the members to consider it, and the Constables to consult their constituents. Finally, if on any occasion neither the Governor nor his Lieutenant was present at the Assembly of the States, no matter which had been passed at that sitting was to come into force until enquiry had been made to determine whether the Governor, Lieutenant Governor or Commander in Chief wished to exercise his power of veto.

The nineteenth century witnessed several trials of strength in the area of the constitutional relationship between Jersey and the United Kingdom. The main issues canvassed in some or all of the cases were the exclusive right of the States to initiate legislation, the power (or lack of it) of the Royal Court to refuse registration of Acts of Parliament applying to the Island, or of Royal Warrants, and the power of the Crown to legislate for, and impose taxes on, the Island, of its own prerogative power. The decisions were curiously inconclusive: on more than one occasion important constitutional questions were raised, but not answered.

One matter, however, which was established beyond doubt was the effect of the provision in the Code of 1771 which conferred on the States a power to make provisional laws and ordinances, but further provided that they should not remain in force for longer than three years, and that the Royal Assent should be obtained for the continuance of any which the States wished to perpetuate. The States had

utilised this provision not only to enact provisional laws and ordinances, but to re-enact them unchanged at the expiration of the period of their validity. In 1882 the States were called in by the Privy Council to justify this practice. Eventually, after consideration of the arguments advanced by the States, an Order in Council was issued on 14 April 1884, which confirmed the power which the States had assumed of re-enacting provisional laws and ordinances at three yearly intervals, but qualified this by providing that it should only apply to such provisional laws and ordinances as related exclusively to subjects of a purely municipal and administrative nature, and which did not infringe upon the Royal Prerogative and were not repugnant to the permanent political or fundamental laws of the Island.

The constitution of the States Assembly was, in the meantime, the subject of statutory amendment. In 1856 its number was augmented by the creation of a new class of member, to be known as Deputies, three to be elected for the Parish of St. Helier (the Parish in which the only town of any size was situated), and one for each of the other Parishes. Later, in 1907, the number for St. Helier was increased to six, two for each of the electoral districts into which the Parish was divided.

In 1948, as the result of the recommendations of a Committee of the Privy Council which had visited the Island in the previous year to advise on the reform of the Royal Court and the States, a law was passed which transformed the constitution of the latter body. The Jurats ceased to be members of the States, and to replace them the Law provided for the election of twelve Senators, to be elected by the electorate of the whole Island and to hold office for a term of nine years. The Rectors also ceased to be members, and were replaced by an increase in the number of Deputies from seventeen to twenty-eight.

The constitution of the States, and other related matters, are regulated at the present day by the States of Jersey Law, 1966. The Assembly of the States now consists of fifty-two elected members. The elected members are the twelve Senators, who are still elected on an Island-wide franchise, but who hold the office for the reduced period of six years, six of them retiring every third year; the twelve Constables, who are, as they have always been, elected by their parishioners as heads of their Parishes, and who are ex-officio members of the States during the three years for which they hold office; and the twenty-eight Deputies, elected, as before, on a constituency basis. The non-elected members are the Bailiff (or Deputy Bailiff), the Lieutenant Governor, who does not, however, always attend, the Dean of Jersey, the Attorney-General and the Solicitor-General. The non-elected members have a right to speak, but not to vote, except that the Bailiff or Deputy Bailiff, as president, has a casting vote.

The discharge of certain specific functions, and the responsibility for various areas of law or administration are delegated by the States to Committees, generally consisting of seven members appointed by the States from among their members. Most of the Island's public services are provided and administered by Committees of the States, in much the same way as local government services in the UK are provided and administered by committees of local authorities.

The nature of the legislation which the State may pass varies. A law is a legislative act of the States, which is passed subject to the sanction of the Sovereign in Council. It is then transmitted to the Privy Council, whence it is referred to the Home Secretary, who, after consultation with such other ministers as seem to him appropriate, advises as to whether or not the law should be approved. In cases where the Royal Assent is given, this is done at a meeting of the Privy Council, and an Order in Council is transmitted to Jersey, stating that the Law

has been approved and directing that it, and the Order in Council, shall be registered and published. Registration by the Royal Court then follows.

Triennial Regulations are Acts of the States, made or renewed for a period of three years under the powers conferred by the Order in Council of 1884. Other regulations, sometimes referred to as Permanent Regulations, are made under certain Orders in Council or Laws which have empowered the States to legislate on particular subjects, without the sanction of the Sovereign Council.

The power of the States is subject to two restraints, one exercisable by the Bailiff and one by the Lieutenant Governor. The Bailiff has a power, under Article 22 of the States of Jersey Law, 1966, of entering a dissent to any resolution of the States susceptible of implementation if he is of the opinion that the States are not competent to pass the resolution. In such a case, the resolution is immediately transmitted to Her Majesty, and remains of no effect until Her Majesty's consent is obtained. The Lieutenant Governor has a power of veto, conferred on him by Article 23 of the same Law, in any resolution of the States susceptible of implementation, but only in respect of such matters as may concern the special interest of Her Majesty. Effect must not be given to any resolution of the States passed when the Lieutenant Governor is not present until an application has been made to him to know whether he chooses to exercise his power of veto.

Although the States is the sole legislative body within the Island, Acts of Parliament of the United Kingdom may be applied to Jersey, either in express terms or by including in them a provision for their extension to Jersey by Order in Council. Although it has been held that Acts of Parliament which apply in express terms do not need to be registered in Jersey to have their full effect, it is the practice for these, as well as Acts which have been extended by Order in Council, to be transmitted to Jersey for registration by the Royal Court. By convention Parliament does not legislate for Jersey in matters of taxation or other matters of purely domestic concern.

In international law, the United Kingdom is responsible for the external relations of the Channel Islands and the Isle of Man. At one time the Islands were, for the purpose of international agreements, regarded as part of the metropolitan territory of the United Kingdom. In 1950, however, all foreign governments and international organisations were informed that in future any treaty or international agreement to which the United Kingdom Government became a party would not be considered as applying to the Islands by reason only of the fact that it applied to the United Kingdom, and that any signature, ratification, acceptance or accession on behalf of the United Kingdom would not extend to the Islands unless it was expressly included. The Islands would, unless the contrary was stated in each case, be included among the territories for whose international relations the United Kingdom Government was responsible. The Home Office stated that the purpose of this declaration was to ensure that the Islands would not be bound by treaties on which they had not been consulted or which, when they had been consulted, they did not wish to have applied to the Islands; that adequate time for consultation would be available; and that the inability or reluctance of any of the Islands to adhere to a particular agreement would not prevent the participation of the United Kingdom Government.

The effect of this was not, however, as far-reaching as might at first have appeared. In a later letter of clarification, issued by the Home Office in 1966, the 1950 declaration was explained not to have changed the rule of international law under which the signature, ratification or accession of any state to an international agreement was presumed to be in respect not only of the state itself, but of all

the territories for whose international relations it was responsible, unless this presumption was displaced by the wording of the agreement itself or by necessary presumption. The position is thus that the United Kingdom's acceptance of agreements containing no indication of limited territorial application binds all its dependant territories, including Jersey.

One occasion upon which the effect upon Jersey of the accession by the United Kingdom to an international treaty roused wide concern, came in the late 1960s when the United Kingdom was seeking admission to the European Economic Community. Article 227 (4) of the Treaty of Rome specifically applied the Treaty to all European territories for whose external relations member states are responsible. Thus when the United Kingdom joined the European Economic Community Jersey would automatically enter on the same terms unless either the Article were amended or some modification of the Treaty's applicaiton were negotiated. This created considerable concern, as it might have led to the situation where the United Kingdom, in order to give effect to the Treaty of Rome in the laws of Jersey, would find itself required to legislate for the Island on taxation and other domestic matters, without consultation or consent. In the event, special terms were negotiated for the Channel Islands and the Isle of Man which were accepted by them and included in the Treaty of Accession providing for the United Kingdom's entry into the European Economic Community. Under these terms the Islands are not required to implement the provisons relating to the free movement of persons, capital movement, and the harmonisation of taxation and social policies; they are, correspondingly, deprived of some of the benefits.

The matter of national status is regulated by United Kingdom legislation. While the British Nationality Act, 1948, was in force the Islanders came within the same class as citizens of the United Kingdom, the colonies and dependancies, and were described as citizens of the United Kingdom, Islands and Colonies. Under the British Nationality Act, 1981, however, they are now known simply as British citizens.

Note: As will be apparent to anyone familiar with either work, this note has drawn extensively on *A Constitutional History of Jersey* by F d L Bois (States Greffe, Jersey, 1970) and Part XI of Volume I of the *Report of the Royal Commission on the Constitution, 1969-1973* (HMSO, 1973). Both of these provide useful further reading, as do the *Report of the Law Officers to the Common Market Committee* (States Greffe, Jersey, 1967) and *The Development of the Government of Jersey, 1771-1972*, by R G Le Hérisier (States Greffe, Jersey). I have not attempted a resumé of the complex field of Community Law and its application to Jersey; those who care to pursue this aspect of Jersey's Law should read *The Isle of Man and the Channel Islands: A Study of the Constitutional, International and European Legal Aspects* by S A Horner (European University Institute, 1983).

Drafting laws in plain English: can the drafter win?

The following commentary is circulating among members of the Commonwealth Association of Legislative Counsel.

It is reported that when Moses came down from Mount Sinai to tell the children of Israel of the commandments given by Yahveh he said that he brought both good news and bad news. The good news was that he had persuaded God to