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One or two steps from sovereignty

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The constitutional relationship between Jersey and the United Kingdom has lasted for over 800 years but is not immune to change. Recent developments give rise to concerns that the interests of Channel Islanders are not being adequately protected by the UK. The option of independence should be more closely examined.

1. Background[1]

1 Five years ago an important series of articles examining the state of the constitutional relationship between Jersey and the United Kingdom by different members of the Editorial Board was published in this *Review*. The series was entitled *Jersey and the United Kingdom: a choice of destiny.* The first article was written by Richard Falle,[2] the second by John Kelleher,[3] and the third by Alan Binnington.[4] The time seems ripe to look again at some of these issues in a Channel Islands context in the light of developments since then.

2 Falle examined the threats to our fiscal and domestic autonomy as a result of constitutional and political developments in the United Kingdom. He looked particularly at the Island's treatment by the UK in relation to the EU tax package. He also examined some of the constitutional difficulties flowing from the greater engagement by the UK in Europe, and asked rhetorically whether the UK was any longer in a position to defend the Island's interests when those interests conflicted with those of the UK.

3 Kelleher argued that serious consideration ought now to be given to the advantages and disadvantages of independence compared with the current status of being a Crown Dependency. He submitted that it was "not sensible to assume that the constitutional relationship which has existed for 800 years can necessarily continue into the foreseeable future".[5]

4 Binnington cautioned that there was no crisis, and recalled that in the late 19th century some of the Island's privileges had seemed to be under much greater threat from the UK. He doubted whether the finance industry would welcome a change of constitutional status.

2. Some developments during 2004–2008

[1]The author is conscious that, as a former public servant, he has been privy to information which is not in the public domain. He has used his best endeavours not to use any such information in this article.
[2](2004) 8 JL Rev. 321.
[3]*Ibid* at 337.
[4]*Ibid* at 345.
[5]*Ibid* at 342.

5 Since 2004 the system of government has changed in both Bailiwicks. In Jersey a ministerial system was brought in by the States of Jersey Law 2005. A short description of the new system was given in an article by this author published in October 2005.[6] In Guernsey too, changes have been introduced to the system of government, although the changes have been primarily to nomenclature rather than to the substance. There is a Chief Minister, and a number of Ministers, but little executive authority has been vested in them. The number of members of the States of Deliberation in Guernsey has been reduced, but no such change has yet happened in Jersey. It is clear that the governmental systems are still in a process of evolution.

6 On the international front, the Channel Islands have pursued a policy of seeking recognition for a greater international personality or identity. In May 2007 a framework document was signed by the then Chief Minister of Jersey and the Secretary of State for Constitutional Affairs which included an undertaking that "the UK will not act internationally on behalf of Jersey without prior consultation", and a statement that "Jersey has an international identity which is different from that of the UK".[7] On analysis these statements may not have advanced the constitutional cause very much, but they were nonetheless an expression of positive intent. What is noteworthy is the further statement in the framework document that "International identity is developed effectively through meeting international standards …". The requirement to meet changing international standards has been a recurring theme.

7 Following the enactment of the Taxation (Implementation) (Jersey) Law 2004, and the decision of the States on 22 June 2004 to approve model agreements as the basis for bilateral agreements on the taxation of savings income with member states of the EU, the Taxation (Agreements with European Member States) (Jersey) Regulations 2005 was passed. Those regulations gave legislative effect to agreements with EU member states for a retention tax on bank interest arising in Jersey receivable by nationals of those member states.[8] Whether these agreements create obligations for the government of Jersey, or for the UK government, is a moot point. The agreements declare that they "[contain] obligations on the part of the contracting parties only", and the agreements are of course between the governments of Jersey and the relevant EU member state (including the UK itself). Furthermore the model agreements were negotiated directly with the Council Secretariat and the Commission, and not through the intermediation of the UK. On the other hand the UK was insistent that the agreements could only be signed under the terms of an "entrustment" letter that might suggest that the obligations were those of the UK. Given that there is no doubt that it is open to the government of Jersey to suspend or terminate any agreement, the issue may be only academic.

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[6]See Bailhache, *Ministerial Government—A brave new world?* (2005) 9 JL Rev. 287. The role of scrutiny panels in the adoption of legislation was examined in Marsh-Smith, *Draft legislation: the role of scrutiny panels*, (2006) 10 JL Rev. 159.

[7]http://www.gov.je/News/2007/Pages/JerseyandUKagreeframeworkfordeveloping Jerseysinternationalidentity.aspx .

[8]See generally Powell, *OECD and EU tax initiatives – an update*, (2007) 11 J&G Law Rev. 202.

8 On the OECD front, too, there has been movement. It will be recalled that in February 2002 the Channel Islands made political commitments to support an OECD tax initiative on transparency and information exchange through the negotiation of tax information exchange agreements (TIEAs) with OECD member states. The commitment was expressed to be subject to the achievement of a level playing field embracing all OECD member states. That condition precedent was however almost immediately abandoned. By the end of 2002 both Jersey and Guernsey had signed TIEAs with the USA without waiting for commitments to the process from other financial centres. No doubt the political gains of an agreement with the USA outweighed the desirability of waiting until others had signed up. In Jersey further TIEAs were signed with the Netherlands in 2007 and Germany in 2008. So far a total of 15 TIEAs have been concluded with OECD member states.[9] The signature of the TIEAs turned out to have been an astute and prescient move when the leaders of the G20[10] countries convened in London on 2 April 2009. Threatening noises had been uttered about action to be taken against uncooperative countries and territories. The Channel Islands were included in the "white" list of jurisdictions acknowledged to have implemented substantially the internationally agreed tax standard. Some consternation was caused amongst certain European countries which found themselves designated "grey" or "black" rather than "white" by the OECD Global Forum.[11] The Communiqué from the London Summit included agreement "to take action against non-cooperative jurisdictions, including tax havens.[12] We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over."[13] The effect upon Liechtenstein and other laggards was dramatic. By August the OECD Global Forum was able to report that there were no jurisdictions that had not committed to the internationally-agreed tax standard.[14] It is clear that the pressure from the OECD upon uncooperative jurisdictions will not diminish. A second conference on the fight against international tax fraud and evasion by promoting transparency and exchange of information in tax matters which was attended by ministers and senior officials from 19 OECD countries (not including the Channel Islands) took place in Berlin on 23 June 2009.

[9]USA (2002); Netherlands (2007); Denmark, the Faroes, Finland, Greenland, Iceland, Norway, Sweden, and Germany (2008); Ireland, France, the UK, Australia, and New Zealand (2009). Guernsey has concluded TIEAs with 13 countries: USA (2002); Netherlands, Sweden, Iceland, Greenland, Finland, the Faroes and Denmark (2008); the UK, France, Germany, Ireland, and New Zealand (2009).

[10]In fact 22 countries were invited by Gordon Brown to be represented at the London Summit. The G20 group was joined by Spain and the Netherlands. There was some confusion as to whether it was now the G22.

[11]The author was in conversation with a representative from Luxembourg at a function in Jersey following a conference of the *Association Parlementaire de la Francophonie*. The response to a polite inquiry as to the state of affairs in Luxembourg was "*C'est terrible. Nous sommes grises et vous êtes blanches*".

[12]The distinction between uncooperative jurisdictions and tax havens is interesting. It seems to leave open the door to punitive sanctions for a failure to cooperate even if the jurisdiction concerned does not fall within the definition of a "tax haven".

[13]http://www.londonsummit.gov.uk/en/summit-aims/summit-communique/.

[14]http://www.oecd.org/dataoecd/50/0/42704399.pdf.

The Communiqué expressed a determination to protect their tax bases against countries and territories not implementing the OECD standards.[15]

9 To what extent the Channel Islands (and the Isle of Man) should be grateful to support from the UK for the outcome at the London Summit is unclear. Certainly no visible statement of support for the position of the Islands emerged prior to the meeting. Indeed, immediately after the Summit the Prime Minister, Gordon Brown, took the unusual step of writing to the Chief Ministers of Jersey and Guernsey (and the Isle of Man) welcoming the progress made but adding—

> "I think it is particularly important that the Crown Dependencies continue to set the pace in this process and put clear water between themselves and those jurisdictions which only just meet the international standard. If genuine progress in agreeing, implementing and abiding by these agreements does not continue to be made I will encourage the G20 to look at this issue again until all abide by the highest standards."

10 Why the Crown Dependencies should necessarily lead the field in this respect is unclear,[16] but the gypsy's warning underlines the importance of keeping the issue of international standards in sharp focus. It may be, of course, that the Prime Minister's letter was a "one size fits all" communication and that the message was primarily intended for the Overseas Territories.[17]

3. Report of the Constitutional Review Group

11 The second interim report of the Constitutional Review Group (CRG) appointed by the Chief Minister of Jersey was submitted to the Council of Ministers in December 2007 and presented to the States on 27 June 2008.[18] The first interim report had identified two stages in fulfilling the Group's terms of reference, *viz.* the conduct of "a review and evaluation of the potential advantages and disadvantages for Jersey in seeking independence from the United Kingdom or other incremental change in the constitutional relationship while retaining the Queen as Head of State". The two stages involved (1) an assessment of the Island's readiness for independence if such an option were forced upon the Island, and (2) the wider issues implicit in any desire actively to seek independence. The second interim report investigated only the first stage.

12 The Group identified five areas for inquiry. They were (i) defence and internal security, (ii) international relations, (iii) internal constitutional considerations, (iv) economic considerations, and (v) other internal considerations. The overall conclusion of the report

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[15]http://www.bundesfinanzministerium.de/nn_2368/DE/Wirtschaft_und_Verwaltung/Internationale_Beziehungen/220609_Steuerkonferenz_anl_en,templateId=raw,property=publicationFile.pdf.

[16]They do however head the pack. See, for example, the report of the IMF in September 2009 which recorded that in Jersey "Financial sector regulation and supervision are of a high standard". See http://www.imf.org/external/ pubs/ft/scr/2009/cr09282.pdf.

[17]See *The Guardian, UK-controlled tax havens told to end culture of secrecy*, 10 April 2009.

[18]http://www.statesassembly.gov.je/frame.asp.

was that Jersey was equipped to face the challenges of independence. The Island was already only one or two steps away from sovereignty.[19] Notwithstanding that general conclusion, the report contained 22 recommendations as to further investigations and work to be undertaken so as to ensure that the Island was as prepared as it might be to meet the contingency of having to consider the option of independence. Those recommendations included actions in relation to the Island's relations with Europe, the ratification of international agreements by the States, consideration of a draft constitution, the appropriate qualifications for citizenship, the enactment of primary legislation to establish a central bank or monetary authority, and, most importantly, the question of how Guernsey might best be involved in these discussions.[20] It is surprising that virtually nothing appears to have been done nearly two years after the report was presented to the Council of Ministers. One would have thought that these vitally important issues might have merited a more energetic reaction. The only movement in response to the report appears to have been the strengthening of the International Relations division of the Chief Minister's Department by the making of one or two appointments within that division. Otherwise the report has fallen into a black hole.[21] So far as Guernsey is concerned, it is known that the External Relations Group of the Guernsey Policy Council established a Constitutional Advisory Panel chaired, until his retirement in March 2009, by Nik van Leuven QC, then HM Procureur. The Panel was charged with investigating issues similar to those considered by the CRG. It is thought that the Panel has submitted a report to the Policy Council, but any such report has not been published.

4. More recent developments in the constitutional relationship

13 What then has been happening during the last two years in the context of relations between the Channel Islands and the UK? The author's experience is confined to Jersey and the following section accordingly concentrates on that Bailiwick. Does the current constitutional relationship best serve the interests of Jersey? There is little doubt that subtle changes have been taking place since the institution of ministerial government. This article examines in some detail four aspects of relations between the UK and Jersey with a view to shedding light on the shifting sands of the constitutional relationship.

4.1 Citizenship

14 In October 2007 the Prime Minister, Gordon Brown, asked Lord Goldsmith QC, a former Attorney General of England and Wales, to conduct a review on citizenship. The report, entitled *Citizenship: our common bond* was published in March 2008.[22] It is a stimulating and thorough report: among the terms of reference was a mandate "to

[19]Para 90.
[20]Section 8 of the Report.
[21]The author should declare an interest as the chairman of the CRG prior to his retirement from public office. The other members were the Attorney General, the Chief Executive of the States, the Director of International Finance, the Chairman of the JFSC (wearing his hat as Adviser on International Affairs), and the International Relations Officer. Whether the CRG has been reconstituted to complete its work is unknown.
[22]http://www.justice.gov.uk/reviews/docs/citizenship-report-full.pdf.

examine the relationship between residence, citizenship and British national status". It is noteworthy, if a little sad from the perspective of a Channel Islander, that there is not a single reference to Jersey or Guernsey. The only material references to the Channel Islands note that they form part of the Common Travel Area (CTA).[23] Channel Islanders, although they are British citizens, are not even a blip on the radar screen.

15 What does it now mean to be "British"? The Scots (and probably the Northern Irish and the Welsh), know that they are Scottish (or Northern Irish or Welsh) as well as British. Jersey and Guernsey people feel the same. The unifying factor in "Britishness", so far as Channel Islanders are concerned, is a loyalty to the Crown (or, more properly, the Sovereign). Yet in Westminster (and in Whitehall) the trend, as we shall see below, seems to be towards regarding "British" as meaning a citizen of the United Kingdom (in its geographical rather than its technical legal sense under the British Nationality Act 1981). Channel Islanders are not included. They are being marginalized. The Crown's protection is being applied only to those living within the geographical perimeter of the UK. Whether it is in terms of tertiary education, public health, prevention of terrorism, or borders, the psychological line is being drawn around mainland Britain.[24] Channel Islanders have, in the author's view, no real grounds for complaint about this trend in that they have, perhaps, been enjoying the best of both worlds for too long. They have asserted their judicial independence, and their fiscal and domestic autonomy to the great benefit of the inhabitants of the Islands. Taken in the round, Channel Islanders are much more prosperous than British citizens in mainland Britain. It may be unsurprising that the attitude from the other side of the water is increasingly that Channel Islanders are not quite British and can look after themselves.

4.2 The reciprocal health agreement

16 The demise of the longstanding reciprocal health agreement between the Channel Islands and the UK caused some consternation in the Islands. In February 2009 the Minister for Health and Social Services in Jersey announced that his representations to the Minister of State in the UK Department of Health had fallen on deaf ears, and that the agreement entered in 1976 would be terminated at the behest of the UK on 31 March 2009.

17 The demise of the agreement was not really the surprise. The agreement had been reached at a time when the number of UK tourists visiting Jersey greatly exceeded the number of Jersey people travelling to the UK. The annual balancing payment from the UK exchequer to Jersey for health costs incurred had long been out of kilter with the reality on

[23]The CTA comprises the UK, Channel Islands, Isle of Man, and the Republic of Ireland collectively. A person who has been checked at immigration passport control at the point of entry into the CTA does not normally need leave to enter any other part of it. There is therefore no requirement for separate entry clearances to be issued where the applicant is going to transit through or remain for a while in one part of the CTA before travelling to another part. See http://www.ukvisas.gov.uk/en/ecg/commontravelarea.

[24]In the context of borders, that includes Northern Ireland, but only just.

the ground. Jersey (and no doubt Guernsey) had been deriving an unwarranted financial benefit for many years. Furthermore, although one might have thought that the agreement had been terminated with undue speed, generous notice seems to have been given by the UK. The agreement provided for three months' notice; it is understood that the UK notified Jersey's Health Department in mid-2008 of its wish to withdraw from the agreement, and the then Minister for Health and Social Services failed to deal with the matter with a proper sense of urgency.

18 The sadness is that the UK's policy view appears to have been that Channel Island residents should henceforth be treated as foreigners, and required to obtain health insurance before visiting the UK. Equally, it was apparently thought appropriate that any UK visitors to the Channel Islands should regard their journey as equivalent to a journey to Morocco or the USA. Surely a reappraisal of the agreement on the basis of the current visitor figures would have been possible? But that was not, it seems, on offer. The matter was regarded as a purely contractual arrangement that was no longer in the interests of UK taxpayers.

4.3 Taser guns

19 A further example of the trend is to be found in the attempt, so far unsuccessful, to obtain taser guns for the States of Jersey Police and the Guernsey Police.[25] A taser gun is not so much a gun, according to police sources, as an electronic device which can deliver up to 50,000 volts of electricity into a violent offender causing temporary paralysis and incapacity.[26] It can be a useful tool, as an alternative to the traditional baton, to suppress violent behaviour by offenders. HM Inspector of Constabulary recommended that these devices should be available to the Jersey police, but the Foreign Office Minister has vetoed their export to Jersey. The policy underlying the refusal is set out in a written answer by the then Foreign Secretary, Robin Cook MP, announced to the House of Commons on 28 July 1997, explaining the government's new ethical foreign policy. In essence the UK government is concerned to avoid the use of arms and weapons such as taser guns "for internal repression and international aggression". The UK will also "take in to account respect for human rights and fundamental freedoms in the recipient country". The criteria announced in 1997 "will not be applied mechanistically and judgment will always be required".[27] The notion that the States of Jersey police might use taser guns for international aggression is clearly fanciful. As to "internal repression", it is difficult see how such weapons in the hands of the Jersey police are repressive, but in the hands of the Avon and Somerset Constabulary, for example, are not. Is there a concern about taser

[25]See States Assembly Hansard for 11 September 2007.
[26]Taser guns were drawn in response to violent protests at the G20 summit in London in March 2009. They are not without their critics who claim that some devices deliver more than the appropriate charge of electricity. In Quebec the government has recently withdrawn all tasers issued to the provincial police in order that an audit on their electrical output can take place. http://www.nationalpost.com/news/story.html?id=1435091.
[27]http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo970728/text/70728w07.htm #70728w07.html_dpthd1 .

guns being re-exported from Jersey? Jersey has in place very stringent controls under the Customs and Excise (Jersey) Law 1999[28] that mean, in effect, that no export of a taser gun could take place except under licence from the Minister for Home Affairs. As to human rights, not only are the Human Rights (Jersey) Law 2000 and the Human Rights (Bailiwick of Guernsey) Law 2000 in force, but there is also a raft of related international conventions and agreements applying to the Islands of which the most relevant are the European Convention against Torture and other cruel, inhuman or degrading Treatment or Punishment[29] and the UN Convention against Torture and other cruel, inhuman and degrading Treatment or Punishment.[30] Both these conventions include obligations to take effective measures to prevent the use of torture or ill-treatment of any persons in third countries. Bearing in mind that the Minister is very unlikely to authorize the *importation* of taser guns other than for the use of the police, the likelihood of their re-exportation for improper purposes seems remote in the extreme.

20 Why then is the UK government being so difficult about authorizing their export for the use of police forces in the Channel Islands when they are used throughout the United Kingdom? The FCO is asserting that they are simply applying government policy, and that exporting tasers to the Channel Islands would undermine their position with the EU where they are trying to persuade others to adopt a more robust stance on end-use controls for this kind of equipment. But the Channel Islands are not Libya, or Sudan. It seems a baffling exercise of judgment. Moreover, it does suggest that the psychological barrier is being drawn around the UK and that other parts of the British Isles are being excluded.

4.4 Border controls

21 The most serious recent development in UK/Channel Islands relations concerns, however, not health funding or taser guns but one of the Islanders' fundamental constitutional privileges, namely the legal right to travel freely to and from the United Kingdom which is, as this issue goes to press, still under threat. Clause 48 of the Borders, Citizenship and Immigration Bill would, until its defeat in the House of Lords, have removed the exemption in s 1(3) of the Immigration Act 1971 for British citizens in the Crown Dependencies from the operation of (in particular) ss 3–4 of the Act. Channel Islanders and Manxmen could in future be treated as if they were foreign nationals. The detailed implications are examined below. It is ironic that the British passport carried by all Channel Islanders, and issued by the Lieutenant Governor of the Bailiwick in question, "requests and requires in the Name of Her Majesty all those whom it may concern to allow the bearer to pass freely and without let or hindrance, and to afford the bearer such protection and assistance as may be necessary". These imperious words are of course

[28]Although not in force as this issue went to press, the Export Control (Jersey) Law 2009 was registered in the Royal Court on 29th May 2009. This Law will expand the powers available to the Minister of Home Affairs to regulate exports for the purpose of giving effect to any Community provision or a joint action or common position adopted by the Council of the EU.
[29]This was extended to Jersey on 24 June 1988; the first and second protocols were extended on 11 April 1996.
[30]This was extended to Jersey on 9 December 1992.

directed at foreigners, and it remains to be seen whether customs officers in the UK would accord Her Majesty the same respect if policy changed and Channel Islanders were required to show their passports to gain entry to the United Kingdom.[31]

22 Some legal principles are so obvious that that it is sometimes difficult to find authority for them. There appears to be no explicit authority for the proposition that Channel Islanders have a constitutional right freely to enter the United Kingdom, but everyone knows it to be so. It is an inherent part of the constitutional relationship between the Channel Islands and the United Kingdom. It goes back to the agreement struck between our ancestors and King John in 1204. One of the less well known elements of the Constitutions of King John is that the King decreed that the ports of the Islands were to be well guarded and custodians appointed to protect the royal interests. What this meant was that the customs system which John had developed for the English ports in 1203–1204 had been extended to the Channel Islands.[32] Later, specific privileges confirming the right to export goods free of duty to England were granted by Royal Charters. Of course no legal inhibitions restricted individual travel in those days, other than for those subject to a specific royal order such as outlawry, banishment, or abjuration of the realm. The system was, however, plainly designed to place the King's subjects in the Channel Islands within the general protection of the realm. The constitutional right freely to enter the United Kingdom goes to the very heart of the constitutional relationship.

23 The Royal Charters are strongly indicative of support for the proposition contained in para 22 above. In 1341 Edward III, in "recalling with grateful memory with what constancy and high spirit our beloved and faithful men of our islands of Jersey, Guernsey, Sark and Alderney have always hitherto continued in their faithfulness to us" confirmed—

> "that they themselves, their heirs and successors may have and hold *all privileges*, *liberties*, immunities, exemptions *and customs in respect of their persons*, goods, moneys, and other matters by virtue of the grant of our progenitors kings of England … *without impediment or molestation* from us, our heirs or our officers whomsoever."[33] [my emphasis]

It seems clearly to imply, *inter alia*, a freedom of movement for Channel Islanders to England. In the important charter of Elizabeth I of 1560 the Queen affirmed the privileges granted by her predecessors and stated (in translation from the Latin) that the inhabitants of the Bailiwick of Guernsey—

> "shall, for the time to come, be for ever free, exempted, and acquitted in all our cities, boroughs, markets, and trading towns, fairs, market-towns, and other places and

[31]Of course some airlines already require passengers to show their passports, or some other form of photographic identification, before travelling to or from the Channel Islands, but that is a different matter.
[32]See Holt, *Jersey 1204: the origins of unity* published in *A Celebration of Autonomy*, St Helier 2005 at 122–123.
[33]Thornton, *The Charters of Guernsey*, published by the States of Guernsey, 2004.

ports, within our kingdom of England … from and of all tributes, tolls, customs … etc."[34]

Similar rights were conferred upon the inhabitants of Jersey by a separate charter of Elizabeth I.[35] Again, it is difficult to see how such rights could be enjoyed "within our kingdom of England" if Channel Islanders could be prohibited from travelling to that realm.

24 How did it all start? On 24 July 2008, the Home Office published a consultation paper entitled *Strengthening the Common Travel Area*.[36] The entire focus of the consultation paper concerned movement between the UK and Ireland. Apart from cursory references in an annex dealing with the evolution of the CTA, the Channel Islands were not specifically mentioned at all. In retrospect, there may have been a clue in para 2.3 of the Proposals which stated "We propose to bring forward new legal provisions to allow us to … examine CTA nationals and require satisfactory evidence of their identity and nationality through documents to be determined following this consultation." Despite discussions between officials from the Channel Islands and the UK over the summer and autumn of 2008 over the strengthening of immigration controls around the CTA, no consultation with the governments of the Channel Islands as to power to control traffic between the Crown Dependencies and the UK took place until 18 December 2008. The governments were informed by letter that the UK government proposed to introduce a Bill to amend s 1(3) of the Immigration Act 1971 so as to "clarify"[37] powers to undertake immigration controls on air and sea traffic between the UK and Ireland and the Crown Dependencies. The policy intention was stated to be that, although regular controls were to be applied to routes between Ireland and the UK, checks on passengers arriving from the Crown Dependencies would be *ad hoc* and intelligence led. Notwithstanding objections that the proposal would discriminate between British citizens moving about the British Isles, the Bill was duly introduced into Parliament on 14 January 2009, and passed through the House of Commons.

25 It was only in the House of Lords that the relevant provision of the Bill began to receive serious scrutiny. The Chairman of the Select Committee on the Constitution, Lord Goodlad, wrote to the Chief Ministers of the Crown Dependencies seeking their views on the proposed changes to the operation of the CTA. In a letter to the Home Office minister, Lord Goodlad noted the mismatch between the stated policy intention of the UK government not to introduce routine checks on passengers travelling between the Crown Dependencies and the UK, and the breadth of the statutory powers sought. In response to

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[34]Thornton, *op. cit.* at 90.

[35]Public Record Office: Patent Roll. 4 Eliz. Part 3. mem.11 (37).

[36]http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/strentheningthecommontravelarea/travelareaconsultation?view=Binary. The Common Travel Area (CTA) was introduced in 1925 and encompasses the United Kingdom, Ireland, the Channel Islands and the Isle of Man. Citizens of CTA countries and territories are entitled to move between their borders without immigration checks.

[37]The Bill, when published, made it clear that what was in question was a substantive change to the operation of the CTA and the rights of Channel Islanders.

a question as to why it was not possible to differentiate in the statute between the Crown Dependencies and Ireland, the Minister replied that the government's approach was thought to be the most straightforward way of achieving their policy aims. He conceded that there had been no separate consultation with the Islands on these issues. He thought that the UK government's policy intent ought to be sufficient to allay fears. He did not think that any change to the constitutional relationship was in question.

26 The report of the House of Lords Select Committee on the Constitution[38] pulled no punches. In relation to consultation it stated that—

> "there does not appear to have been open, effective and meaningful inter-governmental consultations by the United Kingdom Government with the insular authorities in advance of the introduction of the Bill. Such consultation as did take place gives the impression of being muddled and tardy; it demonstrated little appreciation of the constitutional relationship between the United Kingdom and the Crown dependencies".[39]

On the breadth of the proposed amendment, the report stated—

> "It is in our view difficult to reconcile the modest policy aims stated by the Government … with the far-reaching legal powers claimed by the proposed amendment to section 1 of the Immigration Act 1971 … This mismatch is in and of itself constitutionally inappropriate: Parliament should not grant to Government wide legal authority in excess of the powers properly needed to implement a proposed policy".[40]

In relation to the impact on the constitutional relationship, the report stated—

> "It is clear to us that the policy-making process that has led to clause 46 (now clause 48) has not been informed by any real appreciation of the constitutional status of the Crown dependencies or the rights of free movement of the Islanders".[41]

27 On 1 April 2009, Lord Glentoran moved the deletion of clause 48[42] in the debate on the Bill in the House of Lords. The debate makes for interesting reading.[43] Many of their Lordships were obviously more concerned with the position of British citizens in Northern Ireland than with those in the Crown dependencies.[44] Nonetheless a significant number

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[38]Published on 12 March 2009 by The Stationery Office Ltd, London, HL Paper 54. Available on the Internet at http://www.parliament.uk/ hlconstitution.
[39]*Ibid* at para 16.
[40]*Ibid* at para 20.
[41]*Ibid* at para 25.
[42]Clause 48 would have removed all references in s 1 of the 1971 Act excluding all CTA journeys from immigration control.
[43]http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90401-0005.htm#09040160000475.
[44]*E.g*. Lord Smith of Clifton. But even he stated—

were unimpressed by the government's explanations for the treatment of the Crown dependencies. Lord Goodlad quoted extensively from letters sent by the Chief Minister of Jersey, Senator Le Sueur, both to him and to Lord West, the Minister of State at the Home Office. Senator Le Sueur had stated that "the government of Jersey cannot accede to a position in which British citizens resident in one part of the British Isles could be treated as if they were nationals of a foreign state such as the Republic of Ireland". The amendment was carried by 193 votes to 107.

28 It is worth noting in passing that, in an attempt to secure support for its position in advance of the debate in the House of Lords, the UK government had offered the governments of the Crown dependencies a Memorandum of Understanding to the effect that, as a matter of policy, it would have no intention of exercising its power to require British citizens in the Islands to show their passports in order to gain entry to the UK. The governments of the Isle of Man and Guernsey appeared to accept that offer. The Chief Minister of Jersey had held his ground and stated—

> "While we are naturally comforted by the policy intention upon which the proposal for an MoU is based, the essential problem with an MoU is that such a document in itself confirms by necessary implication that the existing Charters and constitutional relationship will have been overridden as the MoU only comes into existence at all because the Bill contains a clause which is inconsistent with them. It is also not clear how much comfort could be derived from a Memorandum of Understanding, which may be withdrawn unilaterally at any future date."

During the debate in the House of Lords Lord Goodlad concurred with the observation "*Ipsissima verba*".[45]

29 When the Bill returned to the Commons in July, the UK government reinserted the clause and gave every indication of pursuing the matter to the bitter end. In the event, an amendment by the opposition parties to delete what was then cl 50 of the Bill was accepted. The government's climb down was not very gracious. The spokesman announced that they did so "with regret" and in order "to prevent any delay to the passage of the BCI Bill through Parliament before the summer break". The Immigration Minister Phil Wollas MP stated—

> "The proposed changes to the Common Travel Area are being put temporarily on hold … The CTA proposals are crucial if we are to make the border between the UK and the Republic of Ireland stronger than ever … I still intend to pursue these changes, necessary to enhance the security of our borders, and we will be looking to bring these proposals back to Parliament at the first possible opportunity."

"A number of impositions have been put on the Crown dependencies by this Government in recent years so much so that they are seriously taking legal advice on how they can cease to be Crown dependencies."

[45] At Column 1103 of the Hansard report.

In the debate on 14 July he stated "there can be no compromise on the Common Travel Area…. We are committed to the policy and we will examine the options going forward".[46]

30 How this story will end is unclear, but at least three conclusions may be drawn from the opening chapters.

(a) The frank admission that no adequate consultation with the governments of the Crown dependencies took place before the Home Office introduced a Bill with major constitutional implications for the Channel Islands is troubling. It may be the case that no-one initially appreciated that there were such implications. Nonetheless, even assuming ignorance of the constitutional relationship within the Home Office, it must have been clear that Channel Islanders were interested parties in the plan to differentiate between them and other British citizens. In the days when the Department for Constitutional Affairs was responsible for relations with the Channel Islands there was a *Guide to Government Business involving the Channel Islands and the Isle of Man.*[47] Paragraph b provided—

> "Departments and agencies are asked to consult the Department for Constitutional Affairs during the drafting process where a proposed Bill appears relevant to the Islands, and before including in any published Bill any provision relating to the Islands."

(b) It is noteworthy that, despite knowing of the opposition of the governments of the Channel Islands to cl 48 of the Bill, the Parliamentary Under-Secretary of State in the Ministry of Justice contributed nothing to the debate in the House of Lords. Lord Bach wears the mantle of the Secretary of State for Justice in the House of Lords. He represents the Privy Councillor with responsibility to The Queen for the interests of the Channel Islands. The Crown's subjects in the Channel Islands should be able to look to him for support of their interests. Yet he was silent during the debate, voted against the amendment, and did nothing to support the position of the Channel Islands. Lord Bach would no doubt say, and indeed did say in a different context when he appeared before the Justice Committee of the House of Commons on 10 December 2008, that "We represent the interests of the [Crown Dependencies] where it is appropriate to do so but we are part of Her Majesty's Government, and of course that is our prime responsibility."[48] That is the nub of the problem. Where the interests of the UK and the Channel Islands do not coincide, the interests of the Islands will always take second place.

(c) The Ministry of Justice has apparently not given any response to the constitutional points urged by the Chief Ministers of the two Bailiwicks. No justification of

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[46]http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090714/debtext/90714-0017.htm.
[47]http://www.dca.gov.uk/constitution/crown/govguide.htm#part3. The guide still appears on the Internet, but contains a note that "this site is no longer updated and is retained for archive purposes only. The Ministry of Justice is now responsible for this information". But not, it appears, for ensuring that the guide is observed.
[48]HC Justice Committee, *Crown Dependencies: evidence taken: First Report of Session 2008–09*, 19 December 2008, London: HMSO.

the stance taken by the UK government has been published, notwithstanding the breaches of the legal rights confirmed by the Royal Charters. It is as if the Charter rights mean nothing.

5. Conclusions

31 It is often said by ministers in Jersey, and perhaps in Guernsey too, that the constitutional relationship between the Islands and the UK is strong and in good shape. One understands that it is prudent to be restrained, and that ministers cannot always speak their minds as openly as they might wish. But in the author's view, the constitutional relationship currently leaves much to be desired. Apart from a short period when Lord Falconer was Secretary of State with responsibility for the Crown Dependencies, and viewing matters in the round, the Ministry of Justice seems increasingly to be unable to prevent other parts of Whitehall from ignoring the interests of the Channel Islands. Although the report of the Kilbrandon Commission[49] is in many ways dated, there is a passage in the conclusions which remains as apt today as when it was drafted. Under the sub-heading "Rights and obligations" the authors wrote—

> "The first point we would make is that both the United Kingdom and the Islands have not only rights but also obligations towards each other. The Islands have a right to respect for their autonomy in domestic affairs … But coupled with this is an obligation to give all reasonable assistance and cooperation to the United Kingdom authorities in the exercise of their domestic and international responsibilities."[50]

32 Endeavouring to be even-handed, it is difficult to think of an example in the last 12 years of a failure to give reasonable assistance and cooperation to the UK in the exercise of domestic and international responsibilities. The Islands have accepted the extension of conventions relating to drug-trafficking, money-laundering, terrorism, and other serious crime and legislated accordingly. Interjurisdictional assistance is routinely given in a wide range of matters, including fiscal matters. MOUs with the UK and France in relation to customs and law enforcement help to smooth administration in those areas. Yet on the other side of the coin, respect for the Islands' autonomy has frequently been absent. It is not the author's purpose to be unduly critical, but some examples must be given.

33 First, in January 1998 the then Home Secretary announced without any prior consultation that there was to be a review by a former senior Treasury official of the finance industry in the Crown dependencies. After mounting political anger, an extraordinary meeting of the States was convened in Jersey. The Assembly resolved "to protest in strong terms at the Secretary of State's failure to observe long-established constitutional convention by announcing in the House of Commons the undertaking of a review of the financial legislation and regulatory systems of the Crown Dependencies

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[49] *Relations between the United Kingdom and the Channel Islands and Isle of Man*, 1973, HMSO.
[50] Para 1498.

before proper consultation with the Insular Authorities".[51] The States considered that the review touched a core part of the Island's economy, falling squarely within its domestic competence. The Home Secretary did not agree. He considered that the matter was one for "Ministers of Her Majesty's Government taking account of our responsibilities for the Islands."[52]

34 Secondly, although few appreciated it at the time, the passing of a standard Finance Bill by the States in January 1998 was destined to give rise to one of the most bitter tussles between the UK government and Jersey to have arisen for nearly a century. The draft Finance (Jersey) Law authorized the collection of most of Jersey's tax revenues for 1998. It was not given Royal Assent for over three years, and then only after the Attorney General had warned that legal proceedings before the High Court would be instituted if the Home Secretary did not submit the Bill to the Privy Council for approval.[53] The reason for the extraordinary delay was that the UK Treasury had taken exception to the so-called "designer rate" tax devised for international business companies. Both Guernsey and the Isle of Man already had such companies, and the fiscal interests of the UK had already been protected by legislation.[54] The political embarrassment was that by April 1998 the UK had committed strongly to an OECD initiative to counter the spread of tax havens and harmful preferential tax regimes. The Treasury accordingly pressed the Home Office not to forward Jersey's draft Bill to the Privy Council. The political interests of the UK overrode the legal rights of the States of Jersey to have its draft Finance Bill submitted to the Privy Council for ratification. The UK government was clearly, it is submitted, acting unconstitutionally, and illegally, in failing to submit the draft Bill to the Privy Council. No doubt legal advice to that effect ultimately persuaded the Home Secretary to forward the Bill for royal sanction.

35 Thirdly, the relationship of the Channel Islands to the European Union is governed by Protocol 3 to the UK's Treaty of Accession to the European Communities. In principle the Islands are outside the EU other than in relation to customs matters and trade in goods. Notwithstanding this constitutional position, the UK government's policy on engagement with Europe leads it occasionally to ignore the rights of governments in the Bailiwicks to determine whether or not particular initiatives should apply to the Islands. One example was the European Judicial Network, created by resolution of the Council on 29 June 1998. This was a third pillar initiative falling outside the ambit of Protocol 3. Nonetheless, the Channel Islands were committed to the initiative by the UK government without any consultation. The fact that the Islands would, if asked, no doubt have wished to participate and to improve interjurisdictional cooperation in criminal justice matters is not to the

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[51] *Jersey Evening Post*, 27 January 1998. A similar protest was made in Guernsey. See *Guernsey Weekly Press*, 30 January 1998.
[52] *Jersey Evening Post*, 5 February 1998.
[53] See the note in the Editorial Miscellany of the *Jersey Law Review* entitled *A harmful delay*, (2001) 5 JL Rev. 120.
[54] Controlled Foreign Companies (Designer Rate Tax Provision) Regulations 2000, SI No. 3158.

point.[55] Another, and more controversial example was the EU tax package to which the Islands were also committed without their consent. This rather more serious breach of the constitutional privilege of fiscal autonomy, guaranteed by Royal Charters, involved two strands of relevance to the Islands, namely the Savings Directive and the Code of Conduct on Business Taxation. The tax package has been considered in articles in this *Review*[56] but for present purposes it is sufficient to state that the interests of the Channel Islanders were simply not considered when commitments were given in Europe by UK ministers. At first the commitments were said to be "subject to the constitutional arrangements" but even that fig-leaf eventually disappeared at an ECOFIN meeting at Feira when a further commitment, without consultation, was made by the then Chancellor of the Exchequer.[57] The consequences of these commitments were major amendments to the tax systems of the Islands and, in Jersey at least, much political agony over the introduction of a Goods and Services Tax. It may have been in the interests of the Islands to subscribe to the tax package; it may in retrospect be considered that the amendments to our fiscal systems were desirable. But these were decisions for the elected representatives in Jersey and Guernsey and not for the UK government to take.

36 Do these examples demonstrate "a respect for [the Islands'] autonomy in domestic affairs"? In the author's submission, the evidence of the last 12 years suggests that that respect has often been lacking. The view is that the Crown Dependencies should not be permitted to stand in the way of the UK's domestic interests, and compromises seem more difficult to achieve. In the context of the EU tax package there was probably no specific intent in 1998 to cause harm to the Islands. The principal object was to protect the UK against tax harmonisation in Europe which would have damaged the City of London. In the context of the Borders Bill there is no specific intent to damage the interests of Islanders. What has probably happened there is that the Crown Dependencies have been offered as sacrificial pawns in order not to damage relations between the UK and Ireland, just as the commitment of the Crown Dependencies to the tax package was given in order to placate Luxembourg and others in 1998. Is this all part of the evolving constitutional relationship? It is not how the relationship began. For centuries the Channel Islands offered loyalty to their distant Sovereign and in return were offered protection. The loyalty is still there, but the protection of Her Majesty's Government seems less enthusiastically given.

37 Does this mean the end of the current constitutional relationship of dependency? Not necessarily. It may be that we are just going through a bad patch, as has happened in the past. But it may also be that the relationship has had its day; that the UK's closer engagement with its European partners leaves no room for the quirky ambiguities for which the British are renowned; that historical affection is giving way to envy and suspicion of so-called "tax havens" stoked by a hostile press. In oral evidence taken before the

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[55]See WJ Bailhache, *Jersey's changing relationship with the United Kingdom* in *A Celebration of Autonomy*, ed. PM Bailhache, at 276.
[56]*E.g.* Powell, *Harmful tax competition and the challenges for Jersey*, (1999) 3 JL Rev. 22; Powell, *EU and OECD proposals in harmful tax competition*, (2000) 4 JL Rev. 46.
[57]See WJ Bailhache, *ibid*, at 276.

Justice Committee on 10 December 2008, Mrs Siân James MP stated "We are talking about the regulatory arrangements here, where the Crown Dependencies have had great freedom in the past. The Chancellor did make the comment about the 'tax haven in the Irish Sea' [the Isle of Man] and that is how the greater public in Britain see it. What levers do we have as a government to impose reform?"[58] The review of the long-term challenges facing the Crown dependencies and Overseas Territories as financial centres announced by the same Chancellor of the Exchequer in November 2008 will therefore carry its own challenges for the governments of the Channel Islands.[59] Whatever the future may hold, Channel Islanders will not be well served if the policy is to bury one's head in the sand and to hope that all will turn out for the best.

38 It is submitted that, at the very least, we should be ready for independence if we are placed in a position where that course was the only sensible option. Nothing is lost by adopting the recommendations of the CRG for further research and for preparations so that, if the crisis comes, we are not caught like the proverbial rabbit in the headlights. In the author's further submission, it would also be a responsible action to continue with the work begun by the CRG, and to commission an inquiry into the wider issues inherent in independence. What are the advantages and disadvantages? Some are obvious. It is plainly advantageous to our citizens to hold a British passport and to be able to enjoy the protection of embassies and missions overseas. It is plainly disadvantageous to be unable to protect our own interests internationally and to be subservient to politicians and officials in the UK who do not always have the interests of the Islands at heart. But there are other implications which are not so obvious and which require careful appraisal. A balance sheet of advantages and disadvantages should be drawn up. An inquiry does not commit the Island to any particular course of action. Alan Binnington was of course right to urge caution; but caution does not mean that we should be inert. Whether the finance industry would be concerned about independence is open to doubt. All investors cherish stability, and sovereignty may be the best way to ensure that stability in the long term. At all events, it is more sensible to have these discussions at a time of relative tranquility than in the face of a crisis or some uncomfortable ultimatum. John Kelleher was certainly right that it is not sensible to assume that our 800 year old constitutional relationship can last for ever. There are cold winds of change blowing that we would be foolish to ignore.

Sir Philip Bailhache was the Deputy of Grouville from 1972 to 1974, and a Law Officer in Jersey between 1975 and 1994. He held the office of Bailiff of Jersey from 1995 to June 2009

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[58]It is fair to record that, in answer to this question, Lord Bach replied that there were no levers, and that the record of the Crown dependencies in terms of international transparency standards stood out from the rest of the crowd.

[59]See the statement of the Chief Minister of Jersey at http://www.statesassembly.gov.je/documents/statements.