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Conference Proceedings

CONFEDERATION OF THE CHANNEL ISLANDS?—NEXT STEPS

Philip Bailhache

1 The third *Jersey and Guernsey Law Review* conference took place in Guernsey on 9 November 2012 with a view to stimulating discussion on the evolving constitutional relationship between the two Bailiwicks of Jersey and Guernsey. Successive political leaders have emphasized the importance of the two Islands working more closely together, but it seems that the two recently elected Chief Ministers are determined to ensure that words are reflected in actions. Much more has happened in the last twelve months than in the preceding twelve years.

2 The conference opened with an explanation of the difference between “confederation” and “federation”. A confederation coordinates the powers of separate states while a federation unifies them into a single state. Neither word denotes a precise term of art, but in general a confederation involves a constitutional structure where power passes upwards from the constituent parts, for example Jersey and Guernsey, while in a federation power is delegated downward from the new federal state. The assumption of the conference organizers was that the Bailiwicks of Jersey and Guernsey would remain separate but might wish to merge their functions or institutional powers in some respects.

3 Why is it that confederation is a concept to be debated? In truth, the Islands have already embarked upon the federal journey, and the only real question is whether Islanders want to know at this stage where they are heading. Channel Island institutions are not a new idea. In 1949, the Home Office assumed that the Channel Islands would have a single Court of Appeal, and an Order-in-Council was actually made constituting such a court. For a number of reasons¹ it never came into

¹ See Sowden, *The origin of the Jersey Court of Appeal*, (2000) 4 JL Rev 61.

effect although the separate Courts of Appeal in each Island have essentially the same judges in both. This journal was one of the first to acknowledge the confederal theme when it was transmogrified from the *Jersey Law Review* into the *Jersey and Guernsey Law Review* in 2007.²

4 The recognition that the world at large views the Channel Islands as a single entity was one reason for the creation, following the recommendation of the Constitution Review Group in 2008, of a Channel Islands Brussels Office (“CIBO”) in 2011 to seek to protect the Islands’ interests in relation to the European Union.³ This office contains a small number of able officials reporting ultimately to the Chief Ministers of both Bailiwicks. That last statement disguises the *de facto* absence of any constitutional structure to ensure that the political imperatives of both Islands are reconciled and put into effect by CIBO. In practice, the officials must create Chinese walls if the interests of the two Islands do not entirely coincide. This is an adequate temporary expedient but not a long-term solution.

5 The Hon Michael Beloff, QC, the senior ordinary judge of the two Courts of Appeal, chaired the first session of the conference. The speakers were Professor Sir Jeffrey Jowell, QC and Iain Steele, both of Blackstone Chambers, and Richard McMahon, Deputy Bailiff of Guernsey. The speakers addressed the broad question of what constitutional structures would be necessary in a confederation of the Channel Islands. Iain Steele spoke of the state union of Serbia and Montenegro—alas short-lived, in that Montenegro declared its independence after three years. Nonetheless, the Charter established a joint legislative assembly with competence over specific areas, and the Court of Serbia and Montenegro which Mr Steele recommended as an interesting model of a confederal court. Professor Jowell spoke of the limited number of examples of confederation. Senegambia was another example of a short-lived association. In relation to the Executive, the existing executives could remain the primary governmental authorities with a confederal executive being limited to high-level strategy. An alternative, perhaps intermediate step, would involve an advisory body, such as the Baltic Assembly, which discusses matters of common concern to Estonia, Latvia and Lithuania. As to the resolution of disputes, where would a confederal court sit in relation to the Royal Courts of Jersey and Guernsey and the Courts of Appeal of the two Bailiwicks? Alternatively, the Royal Courts could

² See Editor’s Foreword (2007) 11 J&G L Rev 1.

³ <http://www.statesassembly.gov.je/AssemblyReports/2008/46527-24954-2762008.pdf>.

be given jurisdiction to determine confederal matters so long as there was a Channel Islands Court of Appeal to resolve any inconsistencies of approach.

6 The Deputy Bailiff of Guernsey spoke of numerous different examples of federal structures, and of the importance of mechanisms for resolving disputes between the constituent governments. Managing conflict between the insular structures and the confederal authority would also be key to the effectiveness of any confederation. Retaining an appeal to the Privy Council would deserve careful consideration. As AP Herbert wrote in one of his “misleading cases”,⁴ the institution of one court of appeal may be considered a reasonable precaution, but two might be suggestive of panic.

7 Advocate Richard Falle, Deputy Editor of the *Law Review*, chaired the second session entitled “Existing co-operation between the Bailiwicks”. Two leading members of the legislatures of the two Islands were first to speak. Deputy Jonathan Le Tocq, Minister for Home Affairs in Guernsey, spoke of the ecclesiastical, social and political links between the Bailiwicks throughout history, and the experience of his department in monitoring criminal justice issues in the three different Islands making up the Bailiwick of Guernsey. What was needed now was greater purposeful planning and design based upon positive strategic vision. Senator Paul Routier, MBE, Assistant Chief Minister in Jersey, spoke of the joint attendances at UK party political conferences which had encouraged an enthusiasm for co-operation to emerge from personal chemistry; there were many opportunities, he said, to save money by joint working. CIBO was but one major example.

8 The Attorneys General of the two Islands addressed the potential impact of confederation upon the departments that they headed. Would there be Law Officers of the Channel Islands? That seemed unlikely, but there would nonetheless need to be agreement as to how federal offences were prosecuted. Furthermore, if federal legislation were to be enacted, there would need to be some consideration as to how such draft Laws were presented to the Privy Council for royal sanction. Even if legislative draftsmen continued to be employed in both Islands, there would clearly be opportunities for the sharing of resources. HM Procureur drew attention to the difficulties that would need to be resolved in connection with all the different Islands making up the Bailiwick of Guernsey, although, in his capacity of HM Receiver General there was no doubt that he had responsibility throughout the

⁴ Herbert, *Uncommon Law: being sixty-nine uncommon cases* (1969) Methuen Publishing Ltd.

Bailiwick of Guernsey. Her Majesty's property, at least, was safe from inter-island strife.

9 The third session was chaired by Sir de Vic Carey, formerly Bailiff of Guernsey, and entitled "Financial services—moving closer together". Colin Powell, CBE, formerly chairman of the Jersey Financial Services Commission, suggested that there were two areas where there was a persuasive case for the two Bailiwicks to work more closely together. The first was the need to respond to the recommendations of the IMF to develop an enhanced framework for macro-prudential analysis and decision-making. The second was the need for contingency planning in relation to the possibility that the Islands might wish to manage their own currencies in the future. A Channel Islands Stability Board, and a Channel Islands Monetary Authority were institutions that were worthy of consideration.

10 Nik van Leuven, QC, Director General of the Guernsey Financial Services Commission, expressed some reservations about the feasibility of a joint Financial Services Commission while the Islands were to a great extent still in competition with each other. Andreas Tautscher, Chief Executive of Deutsche Bank in the Channel Islands, gave a personal view, but one nevertheless informed by a close knowledge of the financial services industry in the Channel Islands. He presented the business case for and against confederation, and said that competitive pressures were forcing businesses in both Islands to consolidate. There were many factors to be taken into account, but most clients and other groups already saw Jersey and Guernsey as the Channel Islands and not as individual Bailiwicks. He concluded by quoting Sallust, a celebrated Roman historian⁵—"By union the smallest states thrive. By discord the greatest are destroyed."

11 The fourth and final session was chaired by Advocate (and Deputy) Roger Perrot, and entitled "Federalism in practice". Mr Alexis Lautenberg, formerly Ambassador of Switzerland to the Court of St James, spoke of the emergence of confederation in his native country, and explained that although called a "confederation" Switzerland was actually a "federation". Each constitutional entity had its own history, and the terms federation/confederation were not terms of art. Direct democracy was very important in Switzerland at every level of government—federal, cantonal and municipal. Although there were federal courts, there was no constitutional court because the people always had the last word. Seeking the correct balance between the

⁵ Gaius Sallustius Crispus (*circa* 87 BC—35 BC), usually anglicized as Sallust, was a Roman politician and historian, and later a supporter of Julius Caesar.

federal government, the cantons and the federal institutions was a constant challenge. He spoke of the agreement negotiated by the federal authorities with the countries of EFTA to create the European Economic Area—an agreement that was rejected by the Swiss people in a referendum.

12 The Ambassador of St Kitts and Nevis, His Excellency Dr Kevin Isaac, told delegates that the Federation that he represented had been centuries in the making. St Kitts and Nevis had been federated with Antigua and Montserrat as early as 1671, and successive federal arrangements with other Caribbean islands had come to a conclusion only in 1983 when St Kitts and Nevis gained independence from the UK. St Kitts (population 42,000) was larger than Nevis (population 12,000); although Nevis was permitted by the constitution to form (and has formed) its own government and legislature, that was not so for St Kitts. There were tensions between the two islands which led to a referendum in Nevis on secession in 1998. The speaker thought that that crisis, resolved when Nevisians rejected the notion of going it alone, had strengthened the federation. He detailed the provisions of the constitutional relationship between St Kitts and Nevis which might have parallels for the Channel Islands.

13 The last speaker was Dr Derek O'Brien, an academic specialist in federal entities in the Caribbean. Dr O'Brien spoke of regional organisations in the Caribbean falling short of federation, *viz.* the Caribbean Community (CARICOM) and the Organisation of Eastern Caribbean States (OECS). CARICOM, the Caribbean equivalent in some respects of the European Communities, had not developed the regional machinery required to assure regional economic integration. They had established a court to interpret the founding Treaty of Chaguaramas,⁶ but the heads of government had consistently resisted any other move towards supranationalism. The OECS⁷ (comprising Antigua, Dominica, Grenada, St Lucia, St Kitts and Nevis, St Vincent and three British Overseas Territories) had a higher degree of functional and legal cooperation. He drew the conclusion that the success of any confederation relied critically upon the strength of its governance and institutional structures.

14 The editor of the Jersey and Guernsey Law Review (and author of this note) summed up the conference by suggesting that it was

⁶ http://www.caricom.org/jsp/community/original_treaty-text.pdf.

⁷ The OECS was created by the Treaty of Basseterre, named after the capital city of St Kitts and Nevis, on 18 June 1981. The treaty was substantially revised in 2011. http://www.gov.vc/foreign/images/stories/Foreign_Affairs/Article_pdf/revised%20treaty%20of%20basseterre%20.pdf.

unarguably in the economic interests of Channel Islanders to find areas where services could more efficiently be delivered to the people collectively and on a Channel Island basis. More controversially, he contended that there was a serious debate to be had as to whether inter-island competition and regulatory arbitrage outweighed the benefits of confederation. There were arguments on both sides but the editor believed that the political strengths of a confederation *vis à vis* the outside world, and especially the United Kingdom, were much more significant than the transient benefits of competitive advantage that one Bailiwick might seek to obtain over the other. He suggested that the issues would demand political courage in both Islands, but would be worth the effort. What was needed was a strategic vision for an ultimate confederation so that the people of the Channel Islands could debate whether their future lay in that direction.

15 The proceedings of the conference are expected to be published by the *Jersey and Guernsey Law Review* in the spring of 2013.

Sir Philip Bailhache held the office of Bailiff of Jersey between 1995 and 2009. He retired from the judiciary in June 2011 and was elected as a senator to the States of Jersey in October 2011. He is the founding editor of the Jersey and Guernsey Law Review.